

**IN THE COURT OF COMMON PLEAS  
SUMMIT COUNTY, OHIO**

<p>MEMBER WILLIAMS, <i>et al.</i>,</p> <p style="text-align: center;">Plaintiffs,</p> <p style="text-align: center;">vs.</p> <p>KISLING, NESTICO &amp; REDICK, LLC, <i>et al.</i>,</p> <p style="text-align: center;">Defendants.</p>	<p>Case No. CV-2016-09-3928</p> <p>Judge Patricia A. Cosgrove</p> <p><b>Amended<sup>1</sup> Reply in Support of Plaintiffs’ Motion to Compel Discovery from the KNR Defendants and Brief in Opposition to the KNR Defendants’ Motion for Protective Order</b></p>
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**I. Introduction**

In their opposition brief, the KNR Defendants hardly deny the facts set forth in Plaintiffs’ motion to compel showing the extent to which they have obstructed discovery and misled the Court and Plaintiffs. Nor do Defendants deny that they possess documents that are responsive to the bulk of Plaintiffs’ outstanding requests. Rather, they continue to claim for various inconsistent, shifting, and ultimately baseless reasons that they simply do not have to search for these documents or produce them. Their goal, apparently, is to obtain summary disposition of this case based on an incomplete set of facts of their own choosing, and avoid further discovery of documents—like those quoted in the Third Amended Complaint—establishing the basis for class certification and Defendants’ liability to the putative class-members for the fraud and self-dealing alleged.

Defendants had asked the Court to stay discovery pending resolution of their motion to strike class allegations. Defs’ Opp. at 3. With this argument now moot due to the Court’s April 6,

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<sup>1</sup> This Amended Reply was filed to correct citation and punctuation errors contained in Plaintiffs’ original Reply brief that was filed on April 20, 2018.

2018 order denying the motion to strike, Defendants' opposition to Plaintiffs' motion to compel is based mainly on their contention that this lawsuit isn't important enough for them to be bothered with searching their files for responsive documents because the putative classes have not yet been certified. *See, e.g.*, Defs' Opp. at 2 ("The collective amount in controversy at this time is less than \$1,000."). In making this claim, Defendants deny Plaintiffs' clear entitlement to discovery relevant to Civ.R. 23's requirements, and seek to subvert "the policy at the very core of the class action mechanism, to overcome the problem that small recoveries do not provide the incentive for any individual to bring a solo action prosecuting his or her rights." *Gattozzi v. Sheehan*, 2016-Ohio-5230, 57 N.E.3d 1187, ¶ 18 (8th Dist.) citing *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 613, 117 S.Ct. 2231, 138 L.Ed.2d 689 (1997).

Beyond its open disregard for Rule 23 and its purpose, Defendants' opposition amounts to little more than a claim that their files are too large and disorganized for them to be subject to discovery in this case. But the law allows no such excuse. The Named Plaintiffs have presented detailed and cogent allegations of serial fraud and self-dealing by attorneys against their own clients, supported by extensive quotations from Defendants' own documents that render their accusations that Plaintiffs are on a "fishing expedition" completely absurd. These putative class-action claims have survived Defendants' various motions to dismiss and strike, and Plaintiffs are entitled to discovery on them to show that "questions common to the class *in fact* predominate over individual ones," proof of which "necessarily overlaps with proof of the merits." *Cullen v. State Farm Mut. Auto. Ins. Co.*, 137 Ohio St.3d 373, 2013-Ohio-4733, 999 N.E.2d 614, ¶ 34 (emphasis in original). The size or disorganized state of Defendants' files in no way relieves them of their obligation to comply with discovery here, particularly where the evidence that would show whether the Named Plaintiffs were subject to the fraud and self-dealing alleged is the same evidence that would show whether all KNR clients were subject to the same alleged schemes.

In short, Defendants have failed to present any legitimate basis for their request to be excused from discovery in this case. They cannot justify the false distinction they ask the court to draw between class and merits discovery, they cannot establish the irrelevance of any of the requested information to the class certification analysis, they and they cannot begin to show a basis for their extraordinary request that the Court shift their discovery costs to Plaintiffs.

Defendants' requests for special treatment here are not only unjustified, they are based on wild misrepresentations. Defendants' calculation of what it would cost them to search their files for responsive material is absurd on its face and does not withstand the slightest bit of scrutiny. Further, Defendants open their brief by complaining about the amount of attorneys' fees they have incurred and blame this on the Plaintiffs for having "run amok for almost two years."<sup>2</sup> Defs.' Opp. at 4. But it only takes a brief look at the docket to show that these two years have been spent dealing almost entirely with the Defendants' continued requests for extraordinary relief, including,

- motions to dismiss the claims against individual Defendants on the pleadings (denied upon Plaintiffs' motion for reconsideration),
- frivolous counterclaims against the Named Plaintiffs (pending) and a strike suit against key witness Rob Horton (dismissed),
- a motion for unconstitutional orders to seal the docket and to gag Plaintiffs from communicating with the public about the case (overruled),
- motions for discovery sanctions, and to show cause for alleged failure to comply with the unconstitutional gag order (denied),
- a motion to have requests for admission deemed admitted (denied),
- premature summary-judgment motions based on the allegedly admitted requests (that the Court declined to consider),

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<sup>2</sup> Defendants also boast (Opp. at 1, 29) that they "have produced three thousand eight hundred forty-nine (3,849) pages of documents in this case," as if producing a certain number of pages could excuse a failure to produce the bulk of responsive information in their possession. In advancing this claim, Defendants fail to acknowledge that most of these 3,849 pages have little to no bearing on the case, including 2,158 pages of the Named Plaintiffs' client files which consist largely of irrelevant medical records, and a 992-page manual for KNR's computer system.

- as well as the motion to strike Plaintiffs' class-action claims (denied),
- and yet another premature summary-judgment motion on the Liberty Capital claims (stayed pending the completion of discovery).

It is on top of all this that the KNR Defendants have held this case up for the last nine months and counting by their near-complete refusal to respond to document requests that have been pending since last July.

Thus, Defendants are undoubtedly correct about one thing: The Court should “impose structure and order on these proceedings.” Defs.’ Opp. at 4. It can do so here, simply, by enforcing the Civil Rules, granting Plaintiffs’ motion to compel, and disabusing Defendants of the notion that this case can be resolved in their favor with incomplete discovery on Plaintiffs’ claims.

## **II. Law and Argument**

### **A. The Court had already expressly declined to stay discovery during the pendency of Defendants’ motion to strike class allegations, which has since been denied.**

Even before the Court denied Defendants’ motion to strike the class allegations on April 6, it had already expressly declined to stay discovery at the October 16, 2017 hearing despite its knowledge of the impendency of Defendants’ ultimately meritless motion. Oct. 16, 2017 Hearing Tr. at 44:8–9 (“I will give [Plaintiffs] 30 days to respond to [Defendants’ motion to strike]. And discovery is to continue.”). Thus, not only is Defendants’ request for a discovery stay moot, it was improperly advanced in the first place.

### **B. The discovery Plaintiffs seek is relevant and necessary to class certification.**

Defendants argue that the Plaintiffs should confine their discovery efforts to issues relating to class certification and eschew any inquiry regarding the “merits” of their claims. In doing so, Defendants ask the Court to draw a false distinction that is frequently denounced by courts in Ohio and nationwide. Such a distinction is particularly useless here, where all the

discovery requested by Plaintiffs is relevant and necessary to class certification: mainly, the determination of whether all KNR clients (the putative class members) were subject to the same alleged schemes as the Named Plaintiffs.

**1. Defendants ask the Court to draw a false distinction between class and merits discovery that is contrary to well-established law.**

The distinction between class and merits discovery is largely irrelevant in this case, as in countless others, as courts, including The Supreme Court of Ohio, have repeatedly recognized that class certification issues “frequently ... overlap with the merits of the plaintiff’s underlying claim.” *Cullen v. State Farm Mut. Auto. Ins. Co.*, 137 Ohio St.3d 373, 2013-Ohio-4733, 999 N.E.2d 614, ¶ 18; *Chen-Oster v. Goldman Sachs & Co.*, 285 F.R.D. 294, 299 (S.D.N.Y. 2012) (“class-related discovery ... often overlaps substantially with the merits.”). “More often than not there is no ‘bright line’ between class certification and merits issues.” *In re Riddell Concussion Reduction Litig.*, 2016 U.S. Dist. LEXIS 89120, 2016 WL 4119807, \*2 (D.N.J. 2016). And the difference between the two is “murky at best and impossible to determine at worst.” *Ahmed v. HSBC Bank*, No. ED CV 15-2057 FMO (SPX), 2018 U.S. Dist. LEXIS 2286 at \*8-\*9 (C.D. Cal. Jan. 5, 2018) (collecting cases); *See also In re Plastics Additives Antitrust Litig.*, No. 03-2038, 2004 U.S. Dist. LEXIS 23989 at \*9 (E.D. Pa. Nov. 29, 2009) (difference between class and merits discovery is “often blurry, if not spurious”).

Thus, courts, wary that defendants “frequently” seek to “with[o]ld exactly the information needed to prove plaintiffs’ case” on grounds that this information is unrelated to class certification, decline to bifurcate class and merits discovery for this reason. *Ahmed* at \*9 citing *Tait v. BSH Home Appliances Corp.*, 289 F.R.D. 466, 487 (C.D.Cal.2012) (“[I]t is often easy for a [class-action] defendant to paint a dismal picture of plaintiffs’ prospects [when] plaintiffs do not have the benefit of discovery into the merits of a case.”).

Courts have further recognized that the need to consider merits-based issues when they overlap with class-certification issues “does not ... militate in favor of bifurcating discovery prior to class certification,” but rather, “illustrates the need to develop the record fully before a class motion is considered.” *Chen-Oster*, 285 F.R.D. 294, 298-299; *See also Cullen*, 137 Ohio St.3d 373, ¶ 34 (“[T]he trial court had to find, that questions common to the class in fact predominate over individual ones, and proof of predominance necessarily overlaps with proof of the merits in this case.”).

**2. Merits discovery and class discovery overlap almost completely in this case, particularly as to Civ.R. 23's predominance requirement.**

There is no need for the Court to undertake a bifurcation analysis in this case because issues that go to the merits of Named Plaintiffs' claims overlap almost completely with those that go to class certification; in particular, the predominance inquiry under Civ.R. 23. “To meet the predominance requirement, a plaintiff must establish that issues subject to generalized proof and applicable to the class as a whole predominate over those issues that are subject to only individualized proof.” *Cullen*, 137 Ohio St.3d 373, ¶ 30. This inquiry focuses upon whether central points of dispute in the case are “capable of resolution for all members in a single adjudication.” *Lycan v. City of Cleveland*, 2014-Ohio-203, 6 N.E.3d 91, ¶40 (8th Dist.). Common issues predominate if all class members will “prevail or fail in unison.” *Musial Offices v. Cuyaboga Cty.*, 2014-Ohio-602, 8 N.E.3d 992, ¶32 (8th Dist.) Or, in other words, where the “gravamen” of every class members' claim “is the same.” *Baughman v. State Farm Mut. Auto. Ins. Co.*, 88 Ohio St. 3d 480, 489, 727 N.E.2d 1265 (2000); As The Supreme Court of Ohio has held, this analysis requires courts to “find that questions common to the class *in fact* predominate over individual ones,” proof of which can (and here does) “necessarily overlap[] with proof of the merits.” *Cullen* at ¶ 34 (emphasis in original).

Here, all of Plaintiffs' discovery requests are directly relevant to establishing Rule 23's predominance requirement, because they go directly to showing that "questions common to the class *in fact* predominate over individual ones." *Cullen* at ¶ 30 (emphasis in original). In order to establish that all class members will "prevail or fail in unison," Named Plaintiffs are required to show that all KNR clients were subject to the same schemes of fraud and self-dealing as they were, which requires them to show that this course of conduct was undertaken on a firm-wide basis in the first place. *Musial Offices*, 2014-Ohio-602, ¶32. The Defendants have not conceded on any of Rule 23's requirements, and have strenuously contested Named Plaintiffs' ability to establish predominance, in particular (as in their motion to strike), denying key facts necessary to establish that common questions predominate as to all four classes of claims. For example:

1. As to the investigation fee class, Defendants have denied Plaintiffs' essential allegations that the fee was an across the board sham, designed by Defendants to pass off their overhead expenses to their clients (*See* KNR's Answer to TAC at ¶ 95); Defendants have denied that the primary purpose of the so-called "investigators" was to solicit clients and sign them to KNR fee agreements as quickly as possible (*See Id.* at ¶¶ 3, 101); and they have further denied that the investigators were essentially KNR employees, who never performed any actual "investigative" work, and only ever performed tasks that were so basic in nature that they were properly subsumed in the firm's contingency fee and in no event chargeable as a separate case expense (*See Id.* at ¶ 95);
2. As to the chiropractor classes, Defendants have similarly denied that they maintain quid pro quo referral relationships with the chiropractors, and have maintained that the "narrative fee" was a legitimate charge as opposed to a kickback. *See* Defs' Response to Pls' Interrogatory No. 2–8, attached as Ex. 3 to Pls' Motion to Compel ("Defendants ... have no agreement, including a 'reciprocal referral agreement' with ASC or any Medical Service Provider.").
3. And as to the Liberty Capital class, Defendants have maintained that they "had no ownership or financial interest in Liberty Capital" and "never received any financial benefit or alleged kickback when KNR clients use Liberty Capital to secure an advance on potential future recovery." Defs' MSJ, Mar. 13, 2018, at 3; *See also* Defs' Motion to Strike (at 29–30) and Defs' responses to Pls' Request for Admission Nos. 85–86 ("[T]his request incorrectly assumes that Liberty Capital Funding and KNR did not have an arms-length relationship. Defendants deny this assumption ... Defendants deny this request because KNR had an arms-length relationship with Liberty Capital Funding.").

Having thusly contested these allegations, which are critical to establishing that common

questions are “predominant” under Rule 23, the Defendants cannot now be permitted to deny the very discovery needed to assess them. Their arguments to the contrary are nonsensical where they are not inscrutable:

First, Defendants argue that they don’t need to perform seven requested searches pertaining to the investigation fee issues because they have offered various stipulations, including a description of the investigators’ “typical activities,” and, “that each investigator is paid the flat rate on each case, the fee is paid to the investigators by KNR, the fee is charged to the client as an expense if there is a recovery, and that the investigators’ work on each case varies.” Defs’ Opp. at 19–20. With these stipulations, Defendants claim that, “[no] more information is possibly necessary to assess whether this group of individuals is a class under Rule 23.” *Id.* But Plaintiffs are simply not required to accept Defendants’ description of what their investigators actually do and why they do it. Defendants’ stipulations do nothing to negate Plaintiffs’ need or right to discovery to establish that the investigators’ primary function was to solicit clients and sign them to KNR fee agreements as quickly as possible. Plaintiffs are also entitled to discovery to show that the investigators were functionally KNR employees, who never performed any actual “investigative” work, and only ever performed tasks that were so basic in nature that they were properly subsumed in the firm’s contingency fee and in no event chargeable as a separate case expense. Defendants have not (because they cannot) establish that any of Plaintiffs’ discovery requests pertaining to the investigators are not targeted at resolving these issues, which will show that common questions predominate over individual ones.

Similarly, relating to five requested searches pertaining to the chiropractor classes, the Defendants broadly claim that, “the information sought has no bearing on the issue of class certification,” and that their stipulation “that ASC is paid a flat fee to write a narrative report for almost every case,” somehow resolves the need for the requested discovery. *Id.* at 20–22. They



also claim, without any support in law or logic, that, “even if [the narrative] fee was the result of a ‘quid pro quo relationship ... Plaintiffs cannot satisfy the requirements of Civ.R. 23.” *Id.* at 22. They further claim that their decision to send all “red bag” referrals to a certain chiropractor is unrelated to class certification, and they maintain their refusal to even search for documents relating to Plambeck-owned clinics (*Id.* at 22–23), the need for all of which is amply illustrated in Plaintiffs’ motion to compel (at 24–27). Defendants can defeat class certification by showing that no such quid pro quo or kickback relationships exist, and they have maintained as much throughout this lawsuit. Plaintiffs’ requested discovery as to the chiropractors is targeted at rebutting this contention and Defendants can make no showing to the contrary.

Finally, while Defendants do not contest the relevance of any of Plaintiffs’ specific requests as to the Liberty Capital class, they will similarly attempt to defeat class certification by showing that they “never received any financial benefit or alleged kickback” from their exclusive referral arrangement with Liberty Capital. Defs’ MSJ, Mar. 13, 2018, at 3. Plaintiffs are entitled to the requested information, which is targeted at rebutting this contention.

Thus, here, as in countless cases, the overlap between class and merits discovery “does not ... militate in favor of bifurcating discovery prior to class certification,” but rather, “illustrates the need to develop the record fully before a class motion is considered.” *Chen-Oster*, 285 F.R.D. 294, 298-299.

**C. Defendants cannot establish “undue burden” sufficient to excuse them from complying with Plaintiffs’ requests.**

Defendants continue to maintain that Plaintiffs’ discovery requests subject them to “undue burden” and that they are excused from complying as a result. In making this argument, Defendants dramatically overstate the burden they face in complying with Plaintiffs requests, and in no event do they establish that any such burden is undue. *Undue* burden can only be

established where the information requested is not reasonably calculated to resolve the issues in the case. Here, Defendants' formulaic accusations that Plaintiffs are engaged in a "fishing expedition" ring especially hollow due both to the nature of the documents requested and the likelihood, as shown by the documents quoted in the Complaint, that additional relevant and probative documents exist. The law is clear that discovery requests are not unduly burdensome merely because it would take a party time and effort to comply with them.

Defendants also misrepresent Civ.R. 26(B)(4)'s provisions regarding electronically stored information, claiming that responsive documents in their email files are "inaccessible" under the rule merely because of the size of their files, and that it would take them time and effort to search them. On this basis, Defendants ask for the extraordinary remedy that their discovery costs be shifted to the Plaintiffs. But Rule 26(B)(4)'s "inaccessibility" provision merely recognizes that "technology may increasingly permit litigants to reconstruct lost or inaccessible information," and when electronically stored information "exists in an accessible form," as in this case, "the usual rules of discovery apply." *Zubulake v. UBS Warburg LLC*, 216 F.R.D. 280, 291 (S.D.N.Y.2003).

In short, Defendants cannot be excused from making a complete search for additional documents on the same subjects merely because their files are voluminous or disorganized, no matter whether these files exist in electronic or hard copy form.

**1. Defendants continue to dramatically misrepresent the burden they face in searching their files.**

As a preliminary matter, Defendants' estimate of the cost they would face in complying with discovery is facially ridiculous. Without reason or explanation, they provide the cost of taking every single bit of their company's data—which, they claim, is nearly twice as voluminous as the Library of Congress—and moving it onto a secure cloud server to have it hosted there for an extended period of time, up to a full year. Defs' Opp. at 6, 8. That is not what Plaintiffs are

requesting and is not necessary to accomplish what Plaintiffs are requesting. Rather, as made clear in their motion to compel, Plaintiffs have only suggested that the Defendants do the following, consistent with basic logic and widely used best-practices of which Defendants are undoubtedly aware:

First, before uploading *any* data (let alone 17 terabytes' worth) to a cloud-based review platform for deduplication, Defendants should first use the electronic search capabilities that their own email system already has, using the search terms agreed upon by Plaintiffs, to limit the amount of responsive data to be uploaded. *See* Pls' Mot. to Compel at 12–13. This would narrow the amount of data to be uploaded to a fraction (likely a small fraction) of the 17 terabytes of which Defendants complain.

Then, this narrowed set of data could, within a matter of days, be deduplicated to remove redundant information, which is the main point of uploading the data onto a cloud-based review platform in the first place. As explained in Plaintiffs' motion to compel (at 15) and the supporting Affidavit of Brett Burney (Ex. 21, ¶¶ 7–10), this deduplication process will substantially reduce the amount of data that would need to remain on the platform for attorney review, again, likely to a fraction of that uploaded in the first place. This is particularly so given the fact that Defendants routinely made use of email lists to send the same email to many different users.

Thus, Defendants are not only dramatically overstating the amount of data to be uploaded in the first place, they are also dramatically overstating the length of time that all but a fraction of this data would have to be hosted on the third-party review platform, with these overestimates forming the basis of their inflated claims of burden. Additionally, Defendants' IT manager has admitted that it would only cost one to two thousand dollars and a couple hours of time to set up the storage space necessary to complete the preliminary narrowing task, yet

Defendants ignore this testimony, and continue to claim, without qualification or justification,<sup>3</sup> that they have “insufficient [storage] space to complete the [requested] searches.” Defs’ Opp. at 7. Finally, Defendants cite their IT manager’s offhanded and ultimately irrelevant estimate that it “would take at least two year to review 3.2 million items,” without any explanation of why 3.2 million items would have to be reviewed, or how an IT manager would know how long it should take for attorneys to complete a document review in any event. Defs’ Opp. at 8, 30.

In short, Defendants’ estimate regarding discovery costs is baseless, obviously false on its face, and, as explained below, ultimately irrelevant, because Defendants cannot under any circumstances show that the burden they face in complying with discovery in this case is “undue.”

**2. Any burden faced by Defendants in complying with Plaintiffs’ requests is not undue because the information requested is necessary to resolve the issues in dispute on class certification and the requested searches are likely to lead to responsive information.**

In Ohio, it is well recognized that all discovery is burdensome, and a party cannot establish that his burden is *undue* merely because it “would subject [the party] to significant expense and effort.” *Future Communs., Inc. v. Hightower*, 10th Dist. Franklin No. 01AP-1175, 2002-Ohio-2245, ¶ 1. Rather, the party opposing a discovery request, “ha[s] the burden to establish that the requested information would not reasonably lead to the discovery of admissible evidence.” *State ex rel. Fisher v. Rose Chevrolet, Inc.*, 82 Ohio App. 3d 520, 532 (12th Dist. App. 1992). In other words, “where the effort is great, but the documents serve the purpose of

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<sup>3</sup> As made clear by the testimony of KNR’s IT manager, KNR’s email system never “crashed” in response to Plaintiffs’ searches. Rather, certain searches were merely returning a data set that was too large to fit in the relatively small storage space that Defendants had allocated for it. *See* Pls’ Mot. to Compel at 12–13, Ex. 16 (Whitaker Tr., at 74:15–75:17; 77:16–78:2). Defendants do not address this testimony in their opposition brief, and do not even attempt to excuse their repeated false statements to Plaintiffs and the Court that their email system “crashed” as a result of Plaintiffs’ requested searches, and that these searches were “not possible” to perform. *See* Pls’ Mot. to Compel at 12, Ex. 10 (Jan. 5, 2018 Hearing Tr. at 54:18–55:4, 58:15–20, 60:17–24).

resolution of the issues, there is little basis for a claim of unreasonableness or oppression in having to respond to a [request] for the production of documents.” *First Bank of Marietta v. Mitchell* (4th Dist. Nov. 28, 1983), Nos. 82 x 5; 82 x 14, 1983 Ohio App. LEXIS 13535, \*32-33 (quoting Anderson’s Ohio Civil Practice); accord *Bishop v. Jones Motor Co.*, 9th Dist. Wayne C.A. NO. 2690, 1992 Ohio App. LEXIS 2407, at \*6-7 (May 13, 1992) (burdensome discovery not allowed where the requesting party failed to show that “the requested documents were relevant to his case or that he was prejudiced by not having access to them”). A contrary holding would “allow a defendant whose business generates massive records to frustrate discovery, by creating an inadequate filing system,” thus “defeat[ing] the purposes of the discovery rules.” *Dunn v. Midwestern Indemn.*, 88 F.R.D. 191, 198 (S.D. Ohio 1980).

Here, Defendants fail to meet the threshold showing of undue burden because, as set forth in detail in Section II. B. above, the information requested by Plaintiffs goes directly to resolution of the issues in dispute on class certification.

It is no excuse for the Defendants to keep repeating that Plaintiffs are engaged in a “fishing expedition.” Defs’ Opp. at 3, 4, 9, 11, 23. As shown by the detailed allegations in the Complaint, which quote extensively from Defendants’ internal communications, this is hardly a case where the plaintiffs are grasping at straws. Rather, the documents quoted in the Complaint—which contain key admissions establishing Defendants’ class-wide liability for the fraud and self-dealing alleged—illustrate the great likelihood that additional relevant and probative documents exist.

**3. Defendants cannot establish that the electronically stored information requested is “inaccessible” under Civ.R. 26(B)(4) to justify their lack of compliance, nor as a basis for the extraordinary remedy of cost shifting.**

Defendants also fail to establish undue burden under Rule 26(B)(4)’s “inaccessibility”

provision, and fail to justify their extraordinary request that the Court shift their discovery costs to the Plaintiffs.

- a. **Rule 26(B)(4)'s "inaccessibility" provision merely recognizes that technology may increasingly permit litigants to reconstruct lost or inaccessible information. When electronically stored information exists in an accessible form, as in this case, the usual rules of discovery apply.**

Civ R. 26 was amended to add the current Rule 26(B)(4) nearly 10 years ago to, "temper[] the virtually unlimited discovery traditionally authorized by Rule 26(B)(1) by providing that, as is the case with all discovery, a party is not required to produce electronically stored information if production is too burdensome or expensive compared to the potential value of the discovery."

Staff Comments to Ohio Civ. R. 26. Rule 26(B)(4) provides, in part, that,

A party need not provide discovery of electronically stored information when the production imposes undue burden or expense. On motion to compel discovery or for a protective order, the party from whom electronically stored information is sought must show that the information is not reasonably accessible because of undue burden or expense. If a showing of undue burden or expense is made, the court may nonetheless order production of electronically stored information if the requesting party shows good cause.

Thus, the new provision affirmed that discovery under the Civil Rules is "virtually unlimited" as long as it is reasonably calculated to lead to resolution of the matters at issue, and merely "tempered" that "virtually unlimited" discovery in recognition of the fact that information can be electronically stored in a manner that makes it "inaccessible." In other words, the new provision recognized that, given the availability of new technology, the means of storage itself could contribute to the expense or burden a party faced in accessing certain information, and this burden had to be considered in weighing whether the requested information was important enough to justify compelling its production. While, as Defendants' acknowledge (at 26), there is a "dearth of [Ohio] case law" on Rule 26(B)(4)'s "inaccessibility" provision, its meaning is

apparent, as explained by the court in the leading case on the corresponding Federal Rule 26(b)(2)(B), *Zubulake v. UBS Warburg LLC*, 216 F.R.D. 280, 291 (S.D.N.Y.2003):

Documents stored on backup tapes can be likened to paper records locked inside a sophisticated safe to which no one has the key or combination. The cost of accessing those documents may be onerous, and in some cases the parties should split the cost of breaking into the safe. But once the safe is opened, the production of the documents found inside is the sole responsibility of the responding party. The point is simple: technology may increasingly permit litigants to reconstruct lost or inaccessible information, but once restored to an accessible form, the usual rules of discovery apply.

*See also Zubulake v. UBS Warburg LLC*, 217 F.R.D. 309, 320 (S.D.N.Y.2003) (“Information deemed ‘accessible’ is stored in a readily usable format. Although the time it takes to actually access the data ranges from milliseconds to days, the data does not need to be restored or otherwise manipulated to be usable. ‘Inaccessible’ data, on the other hand, is not readily usable. Backup tapes must be restored using a process similar to that previously described, fragmented data must be de-fragmented, and erased data must be reconstructed, all before the data is usable. That makes such data inaccessible.”); *Kemper Mortgage, Inc. v. Russell*, S.D. Ohio No. 3:06-cv-042, 2006 U.S. Dist. LEXIS 20729, at \*3 (Apr. 18, 2006) (*Zubulake* ... has received wide recognition at the federal bar as authoritative.”); *Townsend v. Ohio DOT*, 10th Dist. Franklin No. 11AP-672, 2012-Ohio-2945 (applying Ohio Rule 26(B)(4) and noting that, “computer data is not safe from disclosure merely because it has been ‘deleted’ from a system or is contained in a damaged disk or hard drive. Using sophisticated computer programs, electronic mail messages or computer files thought to be deleted can be retrieved from the deep recesses of a computer data base long after they have disappeared from the screen.”) (citations and quotations omitted); *Semsroth v. City of Wichita*, 239 F.R.D. 630, 636 (D.Kan.2006) (“[H]ere, as in *Zubulake*, the data sought is on an medium which can be classified as ‘inaccessible,’ i.e., back-up tapes, which must be restored

before they can be searched for relevant data.”); *United States ex rel. Carter v. Bridgepoint Edn., Inc.*, 305 F.R.D. 225, 239 (S.D.Cal.2015) (“[W]hen backup tapes and erased, fragmented, or damaged data is requested, such ESI is generally defined as inaccessible.”).

Thus, contrary to Defendants’ argument, Civ.R. 26(B)(4) does nothing to relieve a party of its burden to search its electronic files for responsive information when those electronic files are accessible. Rather, “[t]he obvious negative corollary of this rule is that accessible data must be produced at the cost of the producing party.” *Peskeoff v. Faber*, 244 F.R.D. 54, 62 (D.D.C. 2007). And data is not rendered “inaccessible” under the Rule merely because it would take time and effort to search for it. *Zubulake v. UBS Warburg LLC*, 217 F.R.D. 309, 318 (S.D.N.Y. 2003). (“[I]t cannot be argued that a party should ever be relieved of its obligation to produce accessible data merely because it may take time and effort to find what is necessary.”).

Here, Defendants have not shown and cannot show that their email files are “inaccessible” under 26(B)(4). Rather, Defendants only claim, broadly, that it would take them significant effort and time to search their accessible data. *See* Defs’ Opp. at 30. This is plainly insufficient to excuse them from discovery under the Rule.

- b. Even if Defendants could establish “inaccessibility” sufficient to show an “undue burden” under Civ.R. 26(B)(4), it would still not excuse them from discovery because good cause exists for requiring them to produce the requested information.**

Even where a producing party can establish “inaccessibility” under Rule 26(B)(4), courts may still order production of the inaccessible information upon a showing of good cause. As set forth in Rule 26(B)(4),

The court shall consider the following factors when determining if good cause exists:

- (a) whether the discovery sought is unreasonably cumulative or duplicative;



(b) whether the information sought can be obtained from some other source that is less burdensome, or less expensive;

(c) whether the party seeking discovery has had ample opportunity by discovery in the action to obtain the information sought; and

(d) whether the burden or expense of the proposed discovery outweighs the likely benefit, taking into account the relative importance in the case of the issues on which electronic discovery is sought, the amount in controversy, the parties' resources, and the importance of the proposed discovery in resolving the issues.

Here, even if Defendants could show that the requested information was “inaccessible” (as explained above, they cannot), the “good cause” analysis would still mandate production. As shown above and in Plaintiffs’ motion to compel, there is simply no way to assess Defendants’ claims that this case is not suitable for class disposition without access to their documents showing the day-to-day operation of their relationships with the investigators, the chiropractors, and the Liberty Capital loan company, including their internal communications about these relationships. The documents quoted in the Complaint directly contradict Defendants’ claims, thus illustrating the importance that Defendants comprehensively search their files for related documents. And, importantly, Defendants do not even try to make a showing that they lack the resources to fund the requested discovery. Where “there is no information before the court regarding Defendant’s resources or financial condition to assess its ability to fund the cost of the document production ... Defendant cannot demonstrate that the document production to Plaintiff is unduly burdensome, unreasonable, or oppressive.” *Ashmore v. Allied Energy, Inc.*, D.S.C. No. 8:14-cv-00227-JMC, 2016 U.S. Dist. LEXIS 8012, at \*8 (Jan. 22, 2016) citing *Convertino v. United States DOJ*, 565 F. Supp. 2d 10, 14 (D.D.C. 2008).

Thus, while it is unnecessary for the Court to undertake the “good cause” analysis due to

Defendants' inability to establish that the requested information is "inaccessible," "[c]onsideration of the factors set forth in Civ.R. 26(B)(4), in light of the facts in the record, overwhelmingly establishes good cause for [Plaintiffs'] request for electronically stored information." *Townsend v. Ohio DOT*, 10th Dist. Franklin No. 11AP-672, 2012-Ohio-2945, ¶ 17.

**c. This case does not present the extraordinary circumstances necessary to justify shifting Defendants' discovery costs to the Plaintiffs.**

Despite their inability to show "inaccessibility" under Rule 26(B)(4) or that they should be excused from discovery at all under the Rule, Defendants nevertheless go a step further and ask the Court to apply it to require the Plaintiffs to pay their costs in complying with the pending requests. This request is dead on arrival, as "cost-shifting is potentially appropriate only when inaccessible data is sought." *Zubulake v. UBS Warburg LLC*, 216 F.R.D. 280, 284 (S.D.N.Y.2003) ("When a discovery request seeks accessible data—for example, active on-line or near-line data—it is typically inappropriate to consider cost-shifting."). *See also Peskoff v. Faber*, 244 F.R.D. 54, 62 (D.D.C. 2007) ("Cost-shifting does not even become a possibility unless there is first a showing of inaccessibility."); *Wagoner v. Lewis Gale Med. Ctr., LLC*, W.D. Vir. No. 7:15-cv-570, 2016 U.S. Dist. LEXIS 91323, \*4-11, 2016 WL 3893135 (Jul. 14, 2016) (collecting cases and holding that courts "should only consider shifting the cost of production ... when the requested information is not reasonably accessible"); *Hawa v. Coatesville Area Sch. Dist.*, E.D. Penn. No. 15-4828, 2017 U.S. Dist. LEXIS 37675 \*3, 2017 WL 1021026 (Mar. 16, 2017) ("[I]t cannot be argued that a party should ever be relieved of its obligation to produce accessible data merely because it may take time and effort to find what is necessary."); *Bailey v. Brookdale Univ. Hosp. Med. Ctr.*, E.D.N.Y No. 16-2195, 2017 U.S. Dist. LEXIS 93093, \*8-10 (Jun. 16, 2017) (relying on *Zubulake* and requiring that accessible data be produced at cost of producing party); *Begay v. United States*, D.N.M. No. 15-0358, 2018 U.S. Dist. LEXIS 10520, \*33, 2018 WL 557853 (Jan. 13, 2018) (same); *See also*

*Zubulake*, 216 F.R.D. 280, 284 (“As a general rule, where cost-shifting is appropriate, only the costs of restoration and searching should be shifted. ... [T]he responding party should *always* bear the cost of reviewing and producing electronic data once it has been converted to an accessible form.”) (emphasis in original).

Defendants’ request that the Court disregard this well-established principle is based almost entirely on an extraordinary decision from the Eastern District of Pennsylvania from six years ago—*Boeynaems v. La Fitness Int’l*, 285 F.R.D. 331 (E.D.Pa. 2012)—that was apparently wrongly decided, has never been cited favorably in the Sixth Circuit or been adopted in its own circuit, and involved facts that are highly distinguishable from those at issue here. Defendants rely on *Boeynaems* for the proposition that where, “(1) class certification is pending, and (2) the plaintiffs have asked for very extensive discovery, compliance with which will be very expensive, that absent compelling equitable circumstances to the contrary, the plaintiffs should pay for the discovery they seek.” Defs’ Opp. at 28-29. This proposition was aptly addressed by the court in *Fleisher v. Electronically Filed Phoenix Life Ins. Co.*, S.D.N.Y. No. 11 Civ. 8405, 2012 U.S. Dist. LEXIS 182698, \*10-11 (Dec. 27, 2012), which stated that,

“[t]he presumption created by *Boeynaems* has never been adopted in this circuit, and, more importantly, runs counter to the relevant principle announced by the Supreme Court: ‘Under [the discovery] rules, the presumption is that the responding party must bear the expense of complying with discovery requests[.]’”

*Id.* quoting *Oppenheimer Fund, Inc. v. Sanders*, 437 U.S. 340, 358, 98 S. Ct. 2380, 57 L. Ed. 2d 253 (1978). *See also Zeller v. South Cent. Emergency Med. Servs.*, M.D.Pa. No. 13-CV-2584, 2014 U.S. Dist. LEXIS 68940, \*21-22 (May 20, 2014) (collecting cases for the proposition that “a responding party bears its own costs of complying with discovery requests.”); *Koehler v. Freightquote.com, Inc.*, 93 F. Supp. 3d 1257, 1268 (D. Kan. 2015) (“defendant asserts that ‘plaintiffs would unjustly benefit from a form of ‘asymmetrical discovery’ wherein defendant is forced to endure the

extensive costs of discovery’ unless the Court shifts some costs to plaintiffs. This argument is insufficient by itself to overcome the presumption that the responding party bears the costs of complying with discovery requests.”).

Moreover, while *Boeynaems* acknowledges that “*Zubulake* is undoubtedly the leading opinion in regard to [electronic discovery and cost-shifting],” the court fails to apply *Zubulake*’s threshold test—are the documents at issue “inaccessible?” See *Zubulake* 216 F.R.D. 280, 284 (“Cost-shifting is potentially appropriate only when inaccessible data is sought.”); *Peskeoff v. Faber*, 244 F.R.D. 54, 62 (D.D.C. 2007) (“Cost-shifting does not even become a possibility unless there is first a showing of inaccessibility.”).

Finally, *Boeynaems* is inapposite even on its facts. As another court in the Eastern District of Pennsylvania noted in declining to follow the decision, “the [*Boeynaems* court] shifted the costs of discovery relating to plaintiffs’ request for class certification after the defendant had borne the expense of producing a great amount of discovery which consisted of voluminous ESI and paper documents.” *Cochran v. Caldera Med., Inc.*, E.D.Pa. No. 12-5109, 2014 U.S. Dist. LEXIS 55447, \*10-11, 2014 WL 1608664 (Apr. 12, 2014). Specifically, in *Boeynaems*, the Defendant had already, at its own expense, “reviewed (1) over 500,000 Member Notes from five states for 30 months looking for certain terms, (2) over 1,000 boxes of cancellation requests, of which Plaintiffs reviewed only 70 boxes, (3) over 19,000 pages of documents, and (4) an electronic search of over 32,000 E-mails, maintained by five custodians.” *Boeynaems* at 340. Those efforts far exceed any made by the Defendants in this case, who have refused to make any comprehensive search of their files for relevant documents, and have only made a minimal production of mostly irrelevant material. Thus, whatever *Boeynaems* could stand for despite its faulty legal reasoning, it is in no event relevant to this case.

Beyond their misplaced reliance on *Boeynaems*, Defendants do not cite any persuasive

authority to support their request for cost shifting,<sup>4</sup> and cannot cite a single example of an Ohio court applying Civ.R. 26(B)(4) to shift costs for electronic discovery because no such case exists.

### III. Conclusion

Defendants' barely colorable misrepresentations of law and wild exaggerations of the burden they face in complying with discovery further confirm an apparent intent to obstruct and conceal as much as the Court will allow them to get away with. The Court is undoubtedly within its discretion to order Defendants to comply with Plaintiffs' discovery requests. As shown above and in Plaintiffs' motion to compel, it should restore order to these proceedings and vindicate the purpose of the Civil Rules by doing so.

Respectfully submitted,

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<sup>4</sup> Apart from *Boeynams*, Defendants only cite two other cases where a court shifted costs as requested here, both of which, like *Boeynams*, are inapplicable. In *Schweinfurth v. Motorola, Inc.*, N.D. Ohio No. 05-cv-0024, 2008 U.S. Dist. LEXIS 82772, \*6-7, 2008 WL 4449081 (Sep. 30, 2008), the defendants had already produced over 200,000 pages of documents when plaintiffs made the requests at issue, which were served, as the court noted, at the very close of discovery in the case. *Id.* at \*6. Additionally, while the court relied on Rule 26(b)(2) in denying the requested discovery, it failed to inquire or find that the requested data was inaccessible under the Rule. *Id.* at \*7. The other cost-shifting case relied upon by Defendants, *Clean Harbors Envtl. Servs. v. ESIS, Inc.*, N.D. Ill. No. 09 c 3789, 2011 U.S. Dist. LEXIS 53212, \*8, 2011 WL 1897213 (May 17, 2011), actually *did* involve inaccessible data, and the court expressly relied on *Zubulake's* analysis, distinguishing between accessible data and data stored on backup tapes, "likening" the latter to "paper records locked inside a sophisticated safe to which no one has the key or combination."

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### CERTIFICATE OF SERVICE

The foregoing document was served on all necessary parties by operation of the Court's e-filing system on April 21, 2018.

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