IN THE COURT OF COMMON PLEAS
SUMMIT COUNTY, OHIO

MEMBER WILLIAMS, et al.,	)	Case No. 2016 09 3928
	)	
Plaintiffs,	)	Judge James Brogan
	)	
v.	)	
	)	
KISLING, NESTICO & REDICK, LLC, et al.,	)	**EXHIBITS C-D TO DEFENDANTS' BRIEF IN OPPOSITION TO PLAINTIFFS' MOTION FOR LEAVE TO FILE FOURTH AMENDED COMPLAINT**
	)	
Defendants.	)	
	)	
	)	

Respectfully submitted,

/s/ James M. Popson

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Counsel for Defendants Kisling, Nestico & Redick, LLC, Alberto R. Nestico, and Robert Redick

CERTIFICATE OF SERVICE

Pursuant to Civ.R. 5(B)(2)(f), the undersigned certifies that a copy of the foregoing *EXHIBITS TO DEFENDANTS' BRIEF IN OPPOSITION TO PLAINTIFFS' MOTION FOR LEAVE TO FILE FOURTH AMENDED COMPLAINT* was filed electronically with the Court on this 17th day of September, 2018. The parties, through counsel, may access this document through the Court's electronic docket system.

/s/ James M. Popson
James M. Popson (0072773)

IN THE COURT OF COMMON PLEAS
SUMMIT COUNTY, OHIO

KISLING, NESTICO & REDICK, LLC Plaintiff, vs. ROBERT PAUL HORTON Defendant.	Case No. CV-2017-03-1236 Judge Alison Breaux **Affidavit of Robert Paul Horton, Esq.**

Now comes affiant, Robert Paul Horton, Esq., after first being duly sworn according to law, and states the following to be true:

1. I am over 18 years old, of sound mind, a Defendant in the above-captioned action, and a licensed attorney in good standing with the State of Ohio, registration number 0084321.

2. I have personal knowledge of the statements made in this Affidavit, and all statements are made to the best of my knowledge.

3. Kisling Legal Group, LLC dba Kisling, Nestico & Redick, LLC, hired me as an employee on February 20, 2012. My position was as an "associate attorney" in the pre-litigation group, where I primarily represented claimants in personal injury actions prior to the filing of a lawsuit (hereinafter referred to as "claimants" or "clients").

4. At the time of my hire, I signed a Confidentiality Agreement, a true and accurate copy of which is attached as Exhibit "A".

5. My employment with Kisling Legal Group, LLC dba Kisling, Nestico & Redick, LLC terminated on March 17, 2015.

6. Prior to the termination of my employment, I did not report or threaten to report Kisling Legal Group, LLC, dba Kisling, Nestico & Redick, LLC or any of its owners, stockholders, partners, associates, employees, or other agents or representatives (hereinafter collectively referred to as "KNR") to any governmental, professional, or other authority for any reason, including but not limited to any violations of law, violations of the Ohio Rules of Professional Conduct, ethical violations, fraud, or other legal wrongdoing.

7. During my employment with KNR, I did not violate the Ohio Rules of Professional Conduct.

8. During my employment with KNR, I did not personally observe any violations of the Ohio Rules of Professional Conduct, including in the Member Williams case.

9. During my employment with KNR, I did not report or threaten to report KNR to any governmental, professional, or other authority for any reason, including violations of the Ohio Rules of Professional Conduct, ethical violations, or fraud.

10. The pleadings in the case of Member Williams, et al. v. Kisling, Nestico & Redick, LLC action, Case No. CV-2016-09-3928, refer to me as a "whistleblower." I do not consider myself a "whistleblower" under Ohio law or federal law.

11. On September 13, 2013, Member Williams was involved in a motor vehicle accident (hereinafter referred to as the "Accident").

12. I represented Member Williams through my employment with KNR to obtain compensation for her for the injuries she suffered in the Accident.

13. I contacted Chuck DeRemar, who I understood to work for third-party vendor MRS Investigations. When I contacted this Chuck DeRemar, and I knew that Kisling, Nestico & Redick, LLC would pay MRS Investigations.

RPH

14. On September 17, 2013, Member Williams signed a Contingency Fee Agreement for her representation by me and Kisling, Nestico & Redick, LLC.

15. I represented Member Williams under the terms and conditions of this Williams Contingency Fee Agreement and pursuant to my duties and responsibilities under the Ohio Rules of Professional Conduct.

16. I believe the Williams Contingency Fee Agreement was proper under the Ohio Rules of Professional Conduct.

17. I represented Member Williams until my departure from KNR on March 17, 2015, performing legal services on her behalf.

18. During my representation of Member Williams, and to the best of my knowledge:

a. Neither KNR nor I requested Member Williams treat with any chiropractor as a result of the Accident;

b. Neither KNR nor I requested or obtained a medical report on Member Williams' behalf from any chiropractor as a result of the Accident;

c. I was not aware of KNR fronting any expenses for a chiropractor report for Member Williams;

d. I complied with the Ohio Rules of Professional Conduct in my representation of Member Williams;

e. I was not aware of payments made by any medical providers to KNR as a result of their treatment of Member Williams or as a result of their payment for reports related to Member Williams' case;

f. I was not aware of any payments made by MRS Investigations, Inc. or any person associated with MRS Investigations, Inc. to KNR as a result of Member Williams' case;

g. I did not take, witness, or become aware of any "kickbacks" by any individual or entity to KNR, Robert Nestico, Robert Redick, or any other person or entity as a result of the Accident, KNR's representation of Member Williams, or the settlement of Member Williams' claim;

h. Member Williams was not advised by me to take any loan, including any loan with Liberty Capital or any other loan company in which the loan would be guaranteed by the prospective proceeds of the settlement of her claim;

i. I was not aware of anyone at KNR advising Member Williams to take any such loan;

j. I was not aware of any loan that Member Williams entered into guaranteed by the prospective proceeds of the settlement of her claim.

19. I believe that the intake department at KNR sent me a copy of the accident report / police report from the Stow Police Department in Member Williams' case. I do not know how the intake department obtained the accident report / police report.

20. Following my departure from KNR, I sent a text message to Brandy Gobrogge at KNR recommending that KNR call Member Williams.

21. Before I texted with Brandy Gobrogge, I talked with Member Williams. During my conversation with Member Williams, I did not advise her that any fraud or ethical violations had occurred with her case and I was not aware of any fraud or ethical violations that had occurred with her case.

22. During my employment with KNR, I repesented over 1000 other claimants for which I negotiated settlements for personal injuries.

23. In representing the claimants mentioned in the preceding paragraph, claimants were not always treated by a chiropractor. I did not force a claimant to ever use a specific chiropractor.

24. When discussing the distribution of settlement proceeds with my and KNR's clients, I obtained client approval before deducting those fees or costs from the settlement proceeds.

25. I only asked my and KNR's clients to sign the Settlement Memorandum if I believed the fees, expenses, and payments to the client were fair and reasonable and the client agreed to them.

RPH

26. During my representation of claimants as an attorney with KNR, I was not aware of any payments made by MRS Investigations, Inc. or any other third party vendor or individual to KNR, Robert Nestico, or Robert Redick that could be considered a "kickback." I am not aware of payments of any kind made by MRS Investigations, Inc. or any other third party vendor or individual to KNR, Robert Nestico, or Robert Redick.

27. During my representation of claimants as an attorney with KNR, I was never aware of KNR requesting reimbursement from a client for a case-related expense that was not paid by KNR.

28. Third party vendors, such as MRS Investigations, Inc. and other independent contractors, would at times perform the following functions: obtaining the accident report, periodically taking photographs of the vehicles involved in the accident, periodically taking photographs of injured claimants, or other activities. The amount of work performed by the investigator, investigative firm, or third party vendor depended on the individual case.

29. On the cases that I handled and all cases of which I am aware during my employment with KNR, third party vendors were paid by KNR, and then listed as an expense to the client, but the client was not immediately responsible for repaying the expense.

30. I was never aware of an "upcharge" or "surcharge" on any expenses charged to clients. All expenses were simply pass-through expenses that KNR had incurred, and only the actual cost was charged to the client, to the best of my knowledge.

31. If the client did not recover on the client's personal injury claim, KNR did not seek reimbursement of the investigator expense or any other fees or expenses.

32. I never became aware of any case in which the client did not agree to the fee but KNR charged the investigator fee anyway. I am not aware of a circumstance in which a claimant objected to the investigator fee.

PPH

33. To the best of my memory, KNR voluntarily discounted their fees in the vast majority of cases that I settled while working at KNR.

34. I am not aware of any "quid pro quo" relationship between Liberty Capital Funding, LLC and KNR, its owners, or its employees. I discouraged KNR clients to obtain such loans.

35. I never demanded any clients borrow from Liberty Capital Funding, LLC (hereinafter "Liberty Capital"). While some of my clients borrowed from Liberty Capital, such transaction was only completed after I counseled the client against entering into the loan agreement.

36. I am not aware of any "kickback" or other payments made by Liberty Capital to KNR or any of its owners or employees in return for KNR directing clients to borrow from Liberty Capital. In fact, I am not aware of any payments of any kind being made by Liberty Capital Funding to KNR or any of its owners or employees.

37. I am not aware of the ownership structure of Liberty Capital nor do I have information to suggest that Rob Nestico, Robert Redick, or anyone at KNR had any financial or ownership interest in Liberty Capital Funding, LLC.

38. During my time with KNR, I did not observe KNR ever forcing or requiring a client to take a loan with Liberty Capital or any other lender.

39. The reports prepared by chiropractors or other health care providers served the purpose of documenting the injury. I sometimes used these reports to support the clients' claims during settlement negotiations with insurance companies.

40. I am not aware of any chiropractor, medical doctor, or other health care provider sending any payments to KNR, its employees, or its owners, for referral of any claimant to the chiropractor, medical doctor, or other health care provider.

EPH

41. I am not aware of Akron Square Chiropractics or any other chiropractor, medical doctor, or other health care provider making a payment or "kickback" to KNR, its employees, or its owners.

42. I will return to KNR all documents, electronic mails (emails), electronic information, downloaded information, and all other information obtained from KNR by August 8, 2017.

43. I will provide copies of the items mentioned in the preceding paragraph to the Court and will thereafter destroy all such information in my possession and agree not to disseminate such information in any manner, unless otherwise ordered to do so by a Court of competent jurisdiction.

44. I am not aware of any attorney, owner, or other employee of KNR conspiring with any chiropractors or any other third party vendors to inflate billings.

45. I have reviewed this affidavit with my attorney and voluntarily agree to provide this affidavit, which is truthful to the best of my knowledge.

Further affiant sayeth naught.

Robert Paul Horton

8-8-17
Date

STATE OF OHIO)
)
COUNTY OF SUMMIT)

Sworn to before me and subscribed in my presence this 8th day of August 2017.

Notary Public – Thomas A. Skidmore, Esq. (#0038746)
My Commission Has No Expiration

RPH

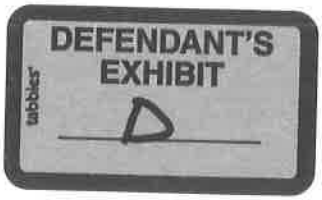
IN THE COURT OF COMMON PLEAS
SUMMIT COUNTY, OHIO

MEMBER WILLIAMS, et al. Plaintiffs, v. KISLING, NESTICO & REDICK, LLC, et al., Defendants.	)	CASE NO. CV-2016-09-3928 JUDGE ALISON BREAUX **DEFENDANTS' MOTION TO STRIKE CLASS ALLEGATIONS IN PLAINTIFFS' CORRECTED THIRD AMENDED COMPLAINT**

Pursuant to Ohio Civ. R. 23(D)(1)(d), Defendants respectfully move this Court to issue an Order striking all class allegations in the corrected Third Amended Complaint. The corrected Third Amended Complaint fails to establish that Plaintiffs can satisfy the elements necessary to proceed with any class action claim. Additional discovery would not affect Plaintiffs' ability to certify any of the four proposed class actions.

Defendants previously filed a Memorandum attached to their Motion to Strike Class Allegations in Plaintiffs' Third Amended Complaint. Thereafter, Plaintiffs filed a corrected Third Amended Complaint. The Memorandum attached hereto addresses the class allegations in the corrected Third Amended Complaint and is identical to the previously filed Memorandum with two (2) exceptions. First, the citations to Plaintiffs' Complaint have been changed to coincide with the paragraph numbering that appears in the corrected Third Amended Complaint as opposed to the Third Amended Complaint. Second, an additional argument (at pp 30-31) has been included to address Plaintiffs' Class C Fraud Claim. This claim was not included in Plaintiffs' Third Amended Complaint, but has been added to Plaintiffs' corrected Third Amended Complaint. The corrected Third Amended Complaint shall be referred to as "Third Amended Complaint" or "Complaint" in the attached Memorandum in Support.

Defendants requests that the Court schedule Oral Argument to address the issues herein.



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Respectfully submitted,

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Counsel for Defendants

CERTIFICATE OF SERVICE

A copy of the foregoing Defendants' Motion to Strike Class Allegations in Plaintiffs' Corrected Third Amended Complaint with attached Memorandum was filed electronically with the Court on this 21st day of November, 2017. The parties may access this document through the Court's electronic docket system.

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IN THE COURT OF COMMON PLEAS
SUMMIT COUNTY, OHIO

MEMBER WILLIAMS, et al. Plaintiffs, v. KISLING, NESTICO & REDICK, LLC, et al., Defendants.	)	CASE NO. CV-2016-09-3928 JUDGE ALISON BREAUX **MEMORANDUM IN SUPPORT OF DEFENDANTS' MOTION TO STRIKE CLASS ALLEGATIONS IN PLAINTIFFS' CORRECTED THIRD AMENDED COMPLAINT**

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OHIO CIVIL RULES

ADDITIONAL AUTHORITIES

I. Introduction

Plaintiffs have failed to properly plead operative facts demonstrating compliance with Ohio Civ. R. 23(A) and (B) when considered in conjunction with the Exhibits attached hereto. Thus, Plaintiffs cannot proceed with any class action against Defendants. Further, additional discovery will not change this conclusion. Specifically, Plaintiffs cannot satisfy Ohio Civ. R. 23(B)(3) that: (1) questions of law or fact common to each of the four classes predominate over any questions affecting only individual members; and (2) a class action is superior to other available methods for fairly and efficiently adjudicating the controversy. Based on the allegations in the corrected Third Amended Complaint and the attached Exhibits, questions regarding only individual members will predominate. In addition, because the claims are based on violation of the Rules of Professional Conduct, there are other methods (e.g., fee dispute resolution and/or bar complaints) that can fairly and efficiently adjudicate the controversy. As a result, the class allegations in the Third Amended Complaint should be struck.

II. Alleged Facts

A. Plaintiffs' Classes And Claims Against KNR.

Plaintiffs have filed a putative class action lawsuit against Kisling, Nestico & Redick, LLC ("KNR"), Rob Nestico, and Robert Redick, which is broken down into four classes.[1] The first class (the "Investigation Fees Class") is defined as: "All current and former KNR clients to whom KNR charged sign-up fees paid to AMC Investigations, Inc., MRS Investigations, Inc., or any other so-called 'investigator' or 'investigation' company ('investigation fees')." (Third Amended Complaint, ¶138(A), hereinafter referred to as "Complaint, ¶_"). Member Williams is the proposed class representative.

The second class (the "Chiropractor Class") is defined as: "All current and former KNR clients who were referred to KNR by Akron Square Chiropractic or referred to ASC by KNR,

[1] By reciting the allegations of the Third Amended Complaint in this Motion to Strike, Defendants do not admit or agree to those allegations or that they can be the basis for certifying a class action.

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terminated KNR's services, and had a lien asserted by KNR on their lawsuit proceeds." (Complaint, ¶ 138(B)). Naomi Wright is the proposed class representative.

The third class (the "Liberty Class") is defined as: "All current and former KNR clients who paid interest or fees on a loan taken through Liberty Capital Funding, LLC." (Complaint, ¶ 138(C)). Matthew Johnson is the proposed class representative.

The Fourth Class (The Narrative Class) is defined as "all current and former KNR clients who had a narrative fee deducted by KNR from their settlement proceeds to be paid to a chiropractor." (Complaint, ¶ 138(D). Thera Reid is the proposed Class Representative.

B. <u>The Factual Allegations Relating To The Investigation Fees Class.</u>

Williams' claims are based on whether KNR's investigation fee charged to Williams and the putative class members was reasonable and appropriate. KNR represented Williams in a personal injury matter arising from an automobile accident. (Complaint, ¶10). Prior to the representation, Williams entered into a binding contingency-fee agreement with KNR in which purportedly the agreement, implicitly or expressly, allowed KNR to "deduct only reasonable expenses from a client's share of" a settlement or judgment. (*Id.*, ¶79). Allegedly, Williams understood that KNR would deduct only reasonable expenses from her share of the proceeds. (*Id.*, ¶79).

KNR obtained a settlement for Williams. (Complaint, ¶99). As part of that settlement and as required by Ohio law, Williams voluntarily signed a Settlement Memorandum that outlined the settlement amount and the fees and expenses that were deducted from that amount to be paid to KNR, with the remainder paid to Williams. (Complaint, ¶¶10, 81). The first expense on the Settlement Memorandum was $50 that was paid to MRS Investigations, Inc. for an investigation fee. (Exh. 1 – Williams Settlement Memorandum (provided in Defs' Resp. to Plf's Sec. Set of Req. for Prod.). Although she agreed to the fee, Williams now asserts that charging clients a flat rate for investigation services violates the Rules of Professional Conduct. (*Id.*, ¶96).

The investigation services provided to individual members of the putative class were significantly different. These services, depending on the case, included taking photographs of injuries, accident scenes or damaged automobiles; obtaining medical records; obtaining witness statements, filing pleadings; locating clients, obtaining contract signatures, picking up police reports, and other miscellaneous tasks.

Plaintiff seeks to recover all investigation fees paid regardless of what services were provided.

C. The Factual Allegations Relating To The Chiropractor Class.

The basis for the Chiropractor Class claims is the alleged *quid pro quo* relationship between KNR and Akron Square Chiropractic ("ASC"). The alleged *quid pro quo* relationship is that KNR will refer its clients to ASC for treatment, and ASC will refer its clients to KNR for legal representation. (Complaint, ¶¶28, 43). It also allegedly involves KNR pressuring its clients to treat with ASC, even though the clients would prefer to treat elsewhere. (*Id.*, ¶¶38-48). The *quid pro quo* relationship continues with KNR allegedly not negotiating lower charges and fees for ASC, or in other words, guaranteeing ASC's fees. (*Id.*, ¶¶53-55.) Finally, it concerns the clients paying ASC narrative fees for purportedly drafting worthless reports. (*Id.*, ¶¶58-59.)

Specifically, Wright contends that KNR unlawfully solicited her through ASC and deceived and coerced her into accepting conflicting legal representation.

The class is limited to clients who terminated KNR prior to settlement and where KNR thereafter asserted an attorney fee lien against any future settlement. The damages sought are the fees collected pursuant to these liens.

D. The Factual Allegations Relating To The Liberty Class.

The Liberty Class is based on KNR allegedly recommending that its clients take out loans with Liberty Capital Funding, LLC ("Liberty") at exorbitant interest rates in order for the clients to obtain a portion of any recovery up front. (Complaint, ¶¶113-132). Johnson allegedly repaid his loan after approximately one year. (*Id.*) Based on no facts whatsoever, Johnson

makes legal conclusions, not inferences, that KNR assisted in forming Liberty, retained an ownership interest in Liberty, and KNR received a "kickback" for each loan. (*Id.*, ¶¶113-132).

The damages sought are interest and loan costs relating to all loans issued by Liberty to any class member.

E. The Factual Allegations Relating To The Narrative Fee Class.

The Narrative Fee Class is brought against KNR and Minas Floros D.C. Dr. Floros is a chiropractor who owns Akron Square Chiropractic ("ASC"). (Complaint, ¶9). When ASC treats a patient of KNR and a narrative report is provided by Dr. Floros, a fee of $150 is paid to Dr. Floros and deducted from client's settlement. As is the case with Reid (Class Representative), narrative reports contain information and opinions not in the medical records. (Exh. 2 – Reid Narrative and Records, provided in Defs' Resp. to Plf's Third Set of Req. for Prod.). Plaintiffs allege that the narrative reports are worthless and part of a kickback scheme between KNR and Dr. Floros. (Complaint, ¶¶57-62).

III. Legal Analysis and Argument

A. Defendants Have A Procedural Right To Move To Strike The Class Allegations.

A defendant may move to strike class allegations prior to the close of discovery and prior to a plaintiff's motion to certify a class. This right was acknowledged by the Court in *Pilgrim v. Universal Health Card*, LLC, 660 F.3d 943, 949, 2011 U.S. App. LEXIS 22715 (6th Cir. 2011)[2]:

> That the motion to strike came before the plaintiffs had filed a motion to certify the class does not by itself make the court's decision reversibly premature. Rule 23(c)(1)(A) says that the district court should decide whether to certify a class "[a]t an early practicable time" in the litigation and nothing in the rules says that the court must wait a motion by the plaintiffs. As a result, "[e]ither plaintiff or defendant may move for a determination of whether the action may be certified under Rule 23(c)(1)." 7AA Charles Allen Wright et al., *Federal Practice and Procedure* §1785; see also, e.g., *Vinole v. Countrywide Home Loans, Inc.*, 571 F.3d 935, 941-

[2] Because Ohio Civ. R. 23 is virtually identical to Fed. R. Civ. P. 23, the Ohio Supreme Court has recognized that "federal authority is an appropriate aid to interpretation of the Ohio rule." M*arks v. C.P. Chem. Co., Inc.*, 31 Ohio St.3d 200, 201, 509 N.E.2d 1249, 1251-1252 (1987).

44 (9th Cir. 2009); *Cook County College Teachers Union Local 1600 v. Byrd*, 456 F.2d 882, 884-85 (7th Cir. 1972).

The Ninth District Court of Appeals has recognized that defendants in Ohio lawsuits containing deficient class allegations need not wait until plaintiffs elect to move for class certification before moving to strike the class allegations from the complaint: "Ohio courts have acknowledged that a Ohio Civ. R. 23(D)(4) [now, Ohio Civ. R. (D)(1)(d)] motion to strike class allegations and claims is appropriate where the plaintiff has failed to properly plead operative facts demonstrating compliance with Ohio Civ. R. 23(A) and (B)." *Sliwinski v. Capital Props. Mgmt.*, 2012 Ohio App. LEXIS 1598, 2012-Ohio-1822 (9th Dist. 2012) ¶14 (9th Dist. 2012) *citing, Cubberley v. Chrysler Corp.*, 70 Ohio App. 2d 263, 267, fn.2 (8th Dist.1981) ("Failure to assert such facts renders a pleading, containing class allegations, subject to a motion to strike made by an opposing party pursuant to Ohio Civ. R. 23(D)(4)."); *Waterman v. Christy*, 1988 Ohio App. LEXIS 893, *2 (10th Dist. 1988) ("It is well-established that a complaint is subject to a motion to strike in accordance with Ohio Civ. R. 23(D)(4) where there is a failure to properly plead operative facts.").

While these courts address only the complaint and whether or not there was a "failure to properly plead operative facts", there is no prohibition against a court's consideration of discovery materials. In *Loreto v. P&G*, 2013 U.S. Dist. LEXIS 162752 (S.D. Oh. 2013), the court considered discovery materials in striking the class allegations. In *Loreto*, the defendant moved to strike the class allegations and attached materials that had been provided in discovery. In striking the class allegations, the court found "that further discovery and briefing on the certification issue would simply postpone the inevitable conclusion that the putative class cannot be certified as explained here." *Id.* at *9-10. *See also Jimenez v. Allstate Indem. Co.*, 2010 U.S. Dist. LEXIS *95993, *10 (E.D. Mich. 2010) (Rev'd in part on other grounds) ("The parties have engaged in some discovery, and Allstate relies on documents outside the pleadings.

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Since *Jimenez* does not dispute the relevance or authenticity of these documents, the court will consider them.")

The issue on a motion to strike is whether further discovery will demonstrate facts supporting certification. "The problem for the plaintiffs is that we cannot see how discovery or for that matter more time would have helped them. To this day, they do not explain what type of discovery or what type of factual development would alter the central defect in this class claim." *Pilgrim*, 660 F.3d at 949. In the present matter, there is no further discovery that will change the facts or law underlying Defendants' Motion to Strike.

B. <u>In Order To Certify A Class, Plaintiffs Must Satisfy The Requirements of Ohio Civil Rule 23.</u>

The Supreme Court of Ohio has defined the prerequisites to class certification contained in Ohio Civ. R. 23(A) and (B) as follows:

> (1) an identifiable class must exist and the definition of the class must be unambiguous;
>
> (2) the named representatives must be members of the class;
>
> (3) the class must be so numerous that joinder of all members is impractical;
>
> (4) there must be questions of law or fact common to the class;
>
> (5) the claims or defenses of the representative parties must be typical of the claims or defenses of the class;
>
> (6) the representative parties must fairly and adequately protect the interests of the class; and
>
> (7) one of the three Ohio Civ. R. 23(B) requirements must be satisfied.

In re Consol. Mortg. Satisfaction Cases, 97 Ohio St. 3d 465, 467, 2002-Ohio-6720, ¶6 (2002).

Ohio Civ. R. 23(B)(3) requires that "the court finds that the questions of law or fact common to class members predominate over any questions affecting only individual members, and that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy." Ohio Civ. R. 23(B)(3). This inquiry requires a court to balance

questions common among class members with any dissimilarities between them, and if the court is satisfied that common questions predominate, it then should "consider whether any alternative methods exist for resolving the controversy and whether the class action method is in fact superior." *Cullen v. State Farm Mut. Auto. Ins. Co.*, 137 Ohio St.3d 373, 382, 2013-Ohio-4733 ¶29 (2013) (Internal citations omitted).

If the Plaintiffs cannot establish any one of the required elements of Ohio Civ. R. 23, a class cannot be certified.

C. <u>The Investigation Fees Class Fails To Satisfy The Predominance Requirement Of Ohio Civ. R. 23(B)(3).</u>

Plaintiff's proposed Investigation Fee Class includes every current and former KNR client who was charged an "investigation fee". ¶138. This class is brought pursuant to four theories of liability: contract, fraud, breach of fiduciary duty and unjust enrichment. Under any of these theories or claims, Plaintiff cannot establish predominance.

1. Contract Claim – Investigation Fee Class.

To satisfy the requirement of Ohio Civ. R. 23 (B)(3), plaintiff must establish that questions of law or fact common to class members predominate over any questions affecting individual members and that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy. Ohio Civ. R. 23 (B)(3). Plaintiff's contractual claim alleges that the investigation fee ($50) charged to each client was unreasonable and improper. (Complaint, ¶¶160-164).[3] In other words, Plaintiff alleges that class members did not receive $50 of properly chargeable, investigation services as required by the contract of representation. Therefore, to establish the presence or absence of liability, the investigation services devoted to each individual client must be proven.

[3] The class representative (Williams) was charged a $50 investigation fee which was standard with respect to the majority of class members.

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What must be proven is central to the determination of predominance. To determine whether common questions predominate, the Court must look to what must be **proven** and whether that **proof** is common to the class as opposed to individualized **proof**. The requirement of common or generalized proof was articulated by the Supreme Court of Ohio in *Cullen:*

> Class action certification does *not* go to the merits of the action. However, deciding whether a claimant meets the burden of class certification, pursuant to Civ. R. 23, requires the Court to consider what will have to be proved at trial and whether those matters can be presented by common proof. *Id.* at 379 (Emphasis in original)(Internal citations omitted)
>
> ***
>
> 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. *Id.* at 382-383 citing *Young v. Nationwide Mut. Ins. Co.*, 693 F.3d 532, 544 (6th Cir. 2012)

Cullen, 137 Ohio St.3d at 379, 382-383. *See also Colley v. P&G*, 2016 U.S. Dist. Lexis 137725, *15 (S.D. Oh. 2016) (issues subject to generalized proof" must predominate); *Kimber Baldwin Designs, LLC v. Silv Comm. Inc., 2016 U.S. Dist. Lexis 173481, *11-12 (S.D. Oh. 2016)(*"To satisfy the predominance requirement, a plaintiff must establish that 'the issues in the class action that are subject to generalized proof, and thus applicable to the class as a whole,...predominate over those issues that are subject only to individualized proof.'")

The proposed Investigation Fee Class involves no "common" or "generalized" proof applicable to the class as a whole that predominates over the necessary individual proof. To determine whether the $50 was reasonable requires proof of the services provided to each class member. The investigation services provided were different for each client. In some cases, the investigator went to the client's home to obtain a signed contract and case-related materials. (Complaint, ¶78). In other cases, the client came to the office or was met at a doctor's office. (*Id.*). The Third Amended Complaint acknowledges that in addition to "signing

up" cases, the investigators (Czetli and Simpson) did "additional tasks." (Complaint, ¶89). Additional tasks were different in each case. In some cases, an investigator took photographs of the client's damaged automobile at a tow yard or their home. (Exh. 3 - Defs. Resp. Sec. Req. for Adm., #15; Exh. 4 - Def. Ans. To Plfs. First Set of Interrog., #2). In certain cases, the investigator photographed visible injuries. (Exh 3; Exh 4). In other cases, they traveled to the offices of health care providers to obtain records or medical bills. (Exh. 4). In some instances, it was one provider; in others, it was two or more. Investigators took photographs of accident scenes and obtained witness statements (Exh. 5 – Wiley Affidavit). At times, investigators traveled to pick up police reports and in other instances, reports were obtained electronically. (Exh. 4-5). When clients did not respond to mail or calls, an investigator traveled to the client's home. (Exhs. 4-5). In some matters, where the case was in suit, investigators filed pleadings. (Exhs. 4-5). The Second Request for Admissions propounded by Plaintiffs and admitted by Defendants states as follows:

> *12. Admit that not all clients, who are charged the same investigative fee receive the same measure of investigative services.*
>
> *RESPONSE: Admitted.*

Plaintiffs' "whistleblower" Robert Horton admitted in his Affidavit that "the amount of work performed by an investigator, investigative firm, or third-party vendor depended on the individual case." (Exh. 6 – Horton Affidavit). These investigation services were all provided as part of the flat fee of $50. There were no additional charges. (Exh. 5). It is difficult to imagine how additional discovery will change the facts established by the discovery already provided, and the information Plaintiff should have received from her "whistleblower."

There is no common or generalized proof that answers the core element of Plaintiff's claim – the investigative fee was unreasonable considering the services rendered. Evidence of the services rendered to each individual class member is necessary. No amount of additional

discovery will change the fact that each member of the putative class received different types and amounts of investigative service.

For common questions of law or fact to predominate "they must be capable of resolution for all members in a single adjudication." *Cullen,* 137 Ohio St.3d at 383 *citing Marks v. C.F. Chemical,* 31 Ohio St.3d 200, 204 (1987); S*ee also Schmidt v. Avko*, 15 Ohio St.3d 310, 313 (1984) ("The common questions must represent a significant aspect of the case and they must be able to be resolved for all members of the class in a single adjudication."); *Linn v. Roto-Rooter, Inc.,* 2004 Ohio App. Lexis 2274 (8th Dist. 2004); *Young v. FirstMerit Bank, N.A.,* 2011 Ohio App. Lexis 582 (8th Dist. 2011). Adjudication of the claims of the proposed class would necessitate thousands of individual adjudications relating to the claim of each class member to determine: 1) what investigation services each received; 2) whether such services were a properly chargeable expense and 3) whether each class member ultimately received $50 worth of services. Such a proceeding is exactly what a class action is not – different evidence for each class member without any single adjudication acting in a representative capacity to resolve any other claim of another class member. There is no set of facts or evidence that is common to all class members. As such, no single adjudication will resolve any significant portion of this litigation.

Predominance cannot be established where some class members have not been damaged. In *Felix v. Ganley Chevrolet, Inc.,* 145 Ohio St.3d 329, 2015 Ohio 3430 (2015), plaintiffs sought to certify a class under the Ohio Consumer Sales Act relating to a loan agreement. In holding that the predominance requirement had not been established, the Court stated:

> If the class plaintiff fails to establish that all of the class members were damaged (notwithstanding questions regarding the individual damages calculations for each class members), there is no showing of predominance under Civ.R. 23(b)(3). *See Behrend*, 569 U.S., 133 S.Ct. at 1432; *see also Cullen v. State Farm Mut.*

> *Auto. Ins. Co.*, 137 Ohio St. 3d 373, 2013-Ohio-4733, 999 N.E.3d 614, ¶48. Indeed, a key purpose of the predominance requirement is to test whether the proposed class is sufficiently cohesive to warrant adjudication by representation.
>
> ***
>
> Here, the class, as certified, fails because there is no showing that all class members suffered an injury in fact. The broadly defined class encompasses consumers who purchased a vehicle at Ganley through a purchase contract that contained the unconscionable arbitration provision. But there is absolutely no showing that all of the consumers who purchased vehicles through a contract with the offensive arbitration provision were injured by it or suffered any damages.

Id. at 337, 338. *See also Hoang v. E* trade Group*, 151 Ohio App.3d 363, 784 N.E.2d 151 (8th Dist. 2003) (denying class certification based on the need for individual proof to establish the existence (not actual amount) of damage for each class member).[4] In the present case, the class is defined as **any** client that paid an investigation fee. Within this broad definition, there are clients who received more than $50 worth of investigation services and thus suffered no damage. There is no predominance.

The historical and judicially affirmed purpose of class actions would not be served by the adjudication of this matter in a class format. Class actions are an exception to the general rules of procedure that are allowed in order to serve concepts of judicial economy. The Supreme Court of the United States in *Gen. Tel. Co. of the Southwest v. Falcon*, 457 U.S. 147, 155, 102 S.Ct. 2364, 2369 (1982) articulated this idea as follows:

> The class-action device was designed as "an exception to the usual rule that litigation is conducted by and on behalf of the individual named parties only. *Califano v. Yamasaki*, 442 U.S. 682, 700-701. Class relief is "particularly appropriate" when the "issues involved" are common to the class as a "whole" and they "turn on questions of law applicable in the same manner to each member of the class." *Id.* at 701. For in such cases, "the class

[4] While the calculation of the amount of damages of each class member does not ordinarily prevent class certification, the existence of damages suffered by all class members must be established with common proof. *Hoang, supra; Felix, supra.*

> action devices saves the resources of both the courts and the parties by permitting an issue potentially affecting every [class member] to be litigated in an economical fashion under Rule 23.

Where common proof does not predominate over the need for individual determinations, class actions do not provide any savings or economic benefit. When thousands of individual adjudications are necessary, as is the case here, the purpose of this procedural exception is not served.

Several cases provide analogous facts to the present case on the question of predominance. In *Linn,* 2004 Ohio App. LEXIS 2274, the Court denied class certification in a case where Defendant instituted the practice of including a pre-printed "miscellaneous supplies charge" on all of its customer's invoices. The charge ranged from $4.95 to $12.95, depending on the geographic location - a fee similar to the $50 "investigative fee" charged to clients in the proposed class. The Plaintiff in *Linn* alleged that "Roto-Rooter required payment of the miscellaneous supplies charge regardless of whether any supplies were used and the charge bore no relation to the cost of such supplies" - a claim similar to that made by Plaintiff against KNR. The Court acknowledged the alleged scheme, but denied class certification based upon the lack of predominance:

> Rather, the issue of whether the alleged 'scheme' is actionable is dependent on the existence of other factors specific to each transaction, i.e., amount and value of supplies used, nature of the work performed and representations made by service technicians. For example, customers who received more in value than the amount of miscellaneous supplies charged would have no claims. Additionally, given the large variance in the jobs performed, i.e., a $75 service call as compared to a $7,500 service call, the amount of miscellaneous supplies used would differ. Moreover, approximately 1500 service technicians responded to customers' questions, resulting in countless different representations. Absent any individual analysis of these factors, there is no way to determine Roto-Rooter's liability under each of the plaintiff's claims. Because these factors require individualized inquiries, the trial court abused its discretion by finding common questions of fact predominate.
>
> *Id.* at *10-11.

The individual inquiry with respect to which supplies were utilized is no different than the individual inquiry into what investigative services were provided to each client. Undoubtedly, in the present case, some clients, if not all, received more than $50 worth of investigative services and have no claim. As in *Linn*, "absent an individual analysis" of the investigation services provided each client, liability cannot be determined. Some class members suffered no damage.

Another case analogous to the present matter is the Supreme Court's decision in *Cullen,* 137 Ohio St.3d, 373. In *Cullen*, the Plaintiff alleged that State Farm had wrongly failed to replace damaged windshields providing the cost of repair instead. In finding that common issues did not predominate, the Court reasoned in part that individual determinations would need to be made as to whether each class member's repair restored the windshield to its pre-damage condition. These class members were not damaged. The individual proof as to the extent of repair is analogous to the extent of investigation service that would be needed as proof for thousands of individual class members in the present case. As in *Cullen*, this proof is central to the liability analysis and "overwhelms" common issues of fact.

The case of *Konarzenski v. Ganley, Inc.*, 2017 Ohio 4297, 2017 Ohio App. LEXIS 2347 (8th Dist. 2017) is another case involving individual determinations as to whether a class member suffered any damage. The alleged class involved automobile purchasers and alleged violations of the Ohio Consumer Sales Practices Act. In denying certification, the Court stated:

> However, the court did not consider whether there was any common proof showing that each class member was in fact damaged by defendants' conduct. The trial court found it unnecessary to the analysis and proceeded to determine that defendants' liability arising from their CSPA violations is common to the class and predominates over the issue of actual damages." The trial court's opinion is in direct contravention of the Ohio Supreme Court's decision in *Felix,* which holds that [p]roof of actual damages is required before a court may properly certify a class action and that plaintiffs must adduce common evidence demonstrating that all class members suffered some injury.

Id. at *10, ¶17. (Internal citations omitted). In the present case, without individual determinations as to the investigation services provided to each class member, the existence of actual damages cannot be resolved on a class-wide basis.

In the Third Amended Complaint at ¶140, Plaintiff cites a list of issues that she claims are common to the Proposed Investigation Fee class. The ability to set forth a laundry list of common questions does not address the question of predominance. Courts have long cautioned against putting any significant weight on such lists. The Supreme Court of the United States, in *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 349, 350 (2011), addressed such lists as follows:

> The crux of this case is commonality – the rule requiring a plaintiff to show that "there are questions of law or fact, to the class." That language is easy to misread, since "any competently crafted class complaint literally raises common questions. Nagareda, Class Certification – The Age of Aggregate Proof, 84 N.Y.U.L. Rev. 97, 131-132, (2009). For example, do all of our plaintiffs indeed work for Wal-Mart? Do our managers have discretion over pay? Is that an unlawful employment practice? What remedy should we get? Reciting these questions is not sufficient to obtain class certification.
>
> ***
>
> What matters to class certification...is not the raising of common questions – even in droves – but, rather, the capacity of a class-wide proceeding to generate common answers apt to drive the resolution of the litigation. Dissimilarities within the proposed class are what have the potential to impede the generation of common answers.

The Ohio Supreme Court is consistent with *Dukes, supra*. In *Schmidt*, 15 Ohio St.3d at 314, the Court stated:

> Thus, while what is meant by "predominate" is not made clear by the rule, it is generally held that in determining whether common questions of law or fact predominate over individual issues, it is not sufficient that common questions merely exist; rather, the common questions must represent a significant aspect of the case and they must be able to be resolved for all members of the class in a single adjudication.

The common questions listed by Plaintiff cannot be answered in a single proceeding or with common, generalized proof. If anything, Plaintiff's common issue list highlights the need for individual class member adjudications.

2. Breach of Fiduciary Duty – Investigation Fee Class.

Plaintiff's third theory of liability is the claim that Defendants breached their fiduciary duty by fraudulently charging each class member $50 for investigation services. (Complaint, ¶¶165-171). Plaintiff's own allegations make clear the lack of predominance under this theory of liability. To support his allegation that the Defendants breached their fiduciary duty, Plaintiff alleges:

> *168. KNR'S conduct in charging its client the investigation fee was intentionally deceptive, undertaken by standardized and routinized procedures and constitutes a breach of fiduciary duty.*

Proof that Defendants were "intentionally deceptive" in charging each client a $50 investigation fee requires individual inquiry. Whether the Defendants were "intentionally deceptive" is dependent on what investigation services were provided – proof that is likely different for each class member. Where a client received $50 or more of investigation services, it cannot be said that KNR was "intentionally deceptive".

Next, to support the fiduciary claim, the Third Amended Complaint states that "Plaintiff Williams and Class A have suffered damages as a direct and proximate result of this breach." (Complaint, ¶169). Whether any individual class member was caused damages is dependent on what investigation services they received in relation to the $50 charge. Proof of proximate cause cannot be made with evidence common to all class members. Pursuant to the Supreme Court's holding in *Felix, supra*, predominance is lacking where the fact of damage cannot be established for all class members with common proof.

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To support the argument of predominance, Plaintiff alleges at ¶140 of the Third Amended Complaint the existence of common legal or factual issues:

1. Determinations as to whether the so-called "investigators" ever performed any investigations; (Complaint, ¶140(A)(i));
2. Determinations as to whether in the "majority of instances" the investigators ever performed any task at all in connection with the client; (Complaint, ¶140 (A)(ii));
3. Determinations as to whether the investigators never performed any services that were properly chargeable to clients; (Complaint, ¶140 (A)(iii));
4. Determinations as to whether Defendants never properly disclosed to their clients what the investigation fee was for; (Complaint, ¶140 (A)(iv));
5. Determinations as to whether Defendants never obtained their clients' consent for the investigation fee; (Complaint, ¶140 (A)(v)).

As stated by the Ohio Supreme Court in *Schmidt*, 15 Ohio St.3d at 314, the mere existence of common issues is not sufficient to establish predominance. Rather, "they must be able to be resolved for all class members in a single adjudication." None of the questions **outlined by Plaintiff** could be resolved for all class members in a single proceeding. Numbers 1 through 3 require individual determinations for each class member as to the investigation services provided. Numbers 4 and 5 necessitate individual proof as to communications between dozens of different KNR employees and thousands of clients over 12 years. There is no need to look beyond Plaintiff's Third Amended Complaint. The plain allegations negate any argument that a single adjudication could resolve Plaintiff's fiduciary duty claim for the entire class.

In an attempt to establish predominance, Plaintiff seeks to negate the need to establish class-wide damages by alleging as follows:

> Where a fiduciary takes a secret profit in a transaction involving his client, as Defendants have here with respect to the investigation fee, such dealing is fraudulent and void as a matter of law, whether or not

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> there is a causal relation between the self-dealing and the plaintiff's loss. *In re Binder: Squire v. Emsley*, 137 Ohio St. 26, 57-58, 27 N.E.2d 939 (1940); *Myer v. Preferred Credit*, 117 Ohio Misc. 2d 8, 9, 2001-Ohio-4190, ¶ 23, 766 N.E.2d 612 (C.P. 2001) citing 3 OHIO JURISPRUDENCE 3D (1998), 136, 134, Agency, §§ 117, 115.

(Complaint, ¶157). Even assuming that this is an accurate statement of the law, it does not change the fact that individual proof is still necessary to establish liability for each class member. By its very statement, there is still a need to prove that the Defendant took a "secret profit" and that its conduct was "fraudulent." At most, the sixth element of a fraud claim (causation and damage) is excused, but the first five must still be established: 1) a representation; 2) materiality; 3) made falsely; 4) with intent of misleading; and 5) reliance. As stated repeatedly, there is no uniform proof that can establish these elements in a single proceeding for all class members. Where a class member received $50 or more of investigative services, there was no "secret profit". There was no "fraud".

There is a second reason why Plaintiff's citation to *In Re Binder* does not further her ability to establish predominance. The equitable remedy outlined in *In Re Binder* requires individual proof. The Court held that where a fiduciary breaches his duty, a plaintiff has the right to "rescind" a transaction:

> Where in a transaction relating to his trust a trustee has been guilty of self-dealing or breach of good faith, such transaction is voidable and the right of the beneficiary of the trust to rescind does not depend on whether the estate has suffered a loss.

In Re Binder, 137 Ohio St. at 57. The well-established law of rescission requires individual proof in this matter. In order to void or rescind a transaction, the party seeking rescission must give back to the wrongdoer the benefits received under the Agreement. In 1846, the Ohio Supreme Court stated that "[n]o principle is better settled than that a party who would rescind an agreement must place his adversary in *statu quo*." *Taft v. Wildman*, 15 Ohio 123, 128 (1849). In 1891, the Court held: "Before a conveyance can be set aside, the purchaser must be restored to his former condition; but it is not essential that there should be a tender of any

specific amount before the commencement of the action." *Saxton v. Seiberling*, 48 Ohio St. 554, 29 N.E. 179 (1891) syllabus at ¶3. In 1931, the Ohio Supreme Court stated the general rule is that one seeking to rescind a contract for any reason must first place the other in "*statu quo*", by returning all benefits received by him under the contract sought to be rescinded or by making a tender thereof to the other party. *Miller v. Bieghler*, 123 Ohio St. 227, 233, 174 N.E. 774 (1931). Therefore, pursuant to the principles of rescission, in each individual case, if the plaintiff is returned their $50 investigation fee, they will be required to return to the Defendants the value of all investigation services rendered. Individual proof of investigation services would be required in thousands of cases.

While *In Re Binder* gives the right of rescission without proof of damage, where a plaintiff, such as in this case, seeks to recover damages for the breach of a fiduciary duty, they must prove a loss. *Strock v. Pressnell*, 38 Ohio St.3d 207, 527 N.E.2d 1235 (1988). In *Crow v. Fred Martin Motor Co.,* 2003 Ohio App. LEXIS 1230, 2003-Ohio-1293 (9th Dist. 2003). The Court of Appeals for Summit County held:

> When alleging a breach of fiduciary duty, a plaintiff must prove the existence of a duty arising out of a fiduciary relationship, failure to observe that duty, and injury resulting proximately therefrom. *Culbertson v. Wigley Title Agency, Inc.*, 9th Dist. No. 20659, 2002 Ohio 714, at P24, citing *Strock v. Pressnell* (1988), 38 Ohio St.3d 207, 216, 527 N.E.2d 1235.

Also, from the Ninth Appellate District: *Holiday Props. Acq. Corp. v. Lowrie,* 2003 Ohio App. LEXIS 1077, 2003-Ohio-1136 (9th Dist. 2003) (A claim of breach of fiduciary duty requires proof of "an injury resulting proximately therefrom"); *Massara v. Henery*, 2000 Ohio App. LEXIS 5425, *13 (9th Dist. 2000) ("As appellant pled a claim for breach of fiduciary duty, he held the duty of demonstrating damages."). In *In re Brown Publ. Co.*, 2015 Bankr. LEXIS 667, *19 (E.D.N.Y. 2015), the Court summarized the law of Ohio with respect to the need to prove damage in a breach of fiduciary duty case:

> Ohio courts explain that the injury or damage that results from the breach is "a vital element" needed to sustain a claim for breach of fiduciary duty. *Massara v. Henery,* No. 19646, 2000 Ohio App. LEXIS 5425, 2000 WL 1729457, at *3 (Ohio Ct. App. Nov. 22, 2000). Any injury or resulting damage "must be shown with certainty and not be left to conjecture and speculation." *Huffman v. Groff*, No. 10-54, 2013-Ohio-222, 2013 WL 312395, at *7 (Ohio Ct. App. January 23, 2013).
>
> ***
>
> Ohio courts have consistently found that if the breach of fiduciary duty was not the proximate cause of damage, then the claims must be dismissed. See *Huffman*, 2013-Ohio-222, 2013 WL 312395 at *7.

Under the well-settled Ohio law, Plaintiff must prove causation and damages in order to recover damages for a breach of fiduciary duty. To do so requires individual proof as to the investigative services provided to every class member. There is no common evidence that would allow a single adjudication of this issue for all class members.

3. Fraud Claim – Investigation Fee Class.

Plaintiff's second theory of liability, under the Investigation Fee Class, is fraud. Whether "questions of law or fact common to all class members predominate begins with the elements of the underlying cause of action." *McNair v. Synapse Group, Inc.* 2009 U.S. Dist. LEXIS 54908, *26 (D.N.J. 2009) ("Although the specific matter to be decided for the present motion here is class certification under the federal rules, determination of that issue involves understanding the proofs necessary for the underlying state causes of action.") "If proof of the essential elements of the cause of action requires individual treatment, then class certification is unsuitable." *In re Hydrogen Peroxide Antitrust Litig.*, 5542 F.3d 305, 311 (3d Cir. 2008) (Internal citation omitted). Under Ohio law, a fraud claim requires Plaintiff to prove:

> (a) a representation; (b) material to the transaction at hand; (c) made falsely; (d) with the intent of misleading another into relying upon it; (e) justifiable reliance upon the representation; and (f) resulting injury proximately caused by the reliance.

Wing v. Anchor Media, Ltd. Of Texas, 59 Ohio St.3d 108, 111, 570 N.E.2d 1095, 1099 (1991). These elements of fraud are alleged in the Third Amended Complaint. (Complaint, ¶¶147-156).

The necessary proof to establish these elements of fraud for each class member is not common and therefore does not predominate. Such proof requires an individual inquiry into which services were provided to each class member. If a class member was provided with more than $50 worth of investigative services, there was no misrepresentation and thus no fraud. Under such circumstances, there could be no knowledge of a misrepresentation on the part of the defendant or detrimental reliance on the part of the client. The proof necessary to establish fraud is different for each class member. As required by the Supreme Court, the alleged fraud claim is not "capable of resolution for all members in a single adjudication." *Cullen*, 137 Ohio St.3d at 383; *Marks,* 31 Ohio St.3d at 204; *Schmidt,* 15 Ohio St.3d at 310.

In several sections of the Third Amended Complaint, plaintiff makes reference to "KNR promotion materials" that speak of "free consultations." (Complaint, ¶¶71, 73, 81 and 84). Plaintiff alleges that these representations amounted to a promise that was breached and were intentionally misleading, given the payment of a $50 investigation fee. As much as the plaintiff argues that these promotional materials support his claims, such arguments undermine his ability to establish predominance. Individual proof as to which class members, if any, saw these promotional materials would be necessary at trial. Of the class members that saw these promotional materials, a determination as to which ones were misled and who considered them to be a promise would be necessary. Interestingly, the plaintiff does not even allege that the class representative-Williams saw, read and was misled by these materials.

Finally, Plaintiff again cites *In Re Binder* for the proposition that there is no need to establish damages in this matter. (Complaint, ¶170). As previously alleged, Plaintiff claims that the Defendants took a "secret profit" that constitutes "fraudulent conduct", making the transaction "void" without a need to establish damages. This allegation does not put Plaintiff

any closer to a finding of predominance. The need to prove a 'secret profit' and fraud are mandatory elements of Plaintiff's own statement of the law. Further, this legal proposition only opens up the opportunity to seek restitution which requires a case-by-case determination of the value of the investigation services provided. As previously outlined, if Plaintiff seeks damages, as she does, it is well settled under Ohio law that she must prove damage. This requirement cannot be established for all class members without proof of the investigative services provided in each individual case.

4. Unjust Enrichment – Investigation Fee Class.

Plaintiff's final theory of liability is unjust enrichment. (Complaint, ¶¶172-176). As alleged and required under the law, in order for Plaintiff to recover under this equitable theory, they must establish that retention of a benefit by Defendants would be "unjust". *Johnson v. Microsoft Corp.*, 106 Ohio St.3d 278, 834 N.E.2d 791 (2005); *Metz v. Am. Elec. Power Co.*, 172 Ohio App.3d 800, 2007-Ohio-3520 (10th Dist. 2007). In this matter, it must be established that the retention by Defendants of the $50 fee would be unjust in relation to each individual class member[5]. If a class member received $50 or more in investigative services, retention of the $50 would not constitute unjust enrichment. The payment was earned. In order to make this determination, proof as to the investigative service as to each class member must be provided. As in each of Plaintiff's three previous theories of liability, predominance cannot be established.

D. <u>The Chiropractor Class Fails to Satisfy Rule 23 (B)(3).</u>

Plaintiff describes her Chiropractor Class as follows:

> *All current and former KNR clients who were referred to KNR by Akron Square Chiropractic or referred to ASC by KNR who terminated KNR's services and had a lien asserted by KNR on their lawsuit proceeds;*

[5] It should be noted that the $50 fee was not retained in any case by the Defendants. The $50 investigation fee was paid to third-party investigators.

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Two theories of liability are alleged: breach of fiduciary duty and unjust enrichment. Under either theory, common questions of fact or law do not predominate over individual questions.

1. Breach of fiduciary duty – Chiropractor Class.

As outlined previously, whether "questions of law or fact common to class members predominate begins with the elements of the underlying cause of action." *Erica P. John Fund, Inc. v Halliburton Co.,* 131 S. Ct. 2179, 2184 (2011). For the Chiropractor Class, Plaintiff alleges the elements of her fiduciary duty claim in the Third Amended Complaint as follows:[6]

> *166. Defendants' conduct in soliciting Ms. Wright and Class B members through representatives of ASC, and in failing to disclose their quid pro quo relationship with ASC, was intentionally deceptive, was undertaken by standardized and routinized procedures, and constitutes a breach of Defendants' fiduciary duty to Plaintiff Wright and Class B.*
>
> *167. No KNR client solicited by ASC would have retained KNR had they been advised of the quid pro quo relationship between KNR and ASC.*

Neither of these allegations can be proven with common or generalized proof. First, to establish predominance, the referral or "solicitation" communication between ASC and class members must be uniform or common. The Court in *Linn* found significant the fact that customers spoke to different technicians who answered questions and made "countless different representations." *Id.* at *18. This, the Court reasoned, was another reason why common questions did not predominate. *Cullen*, 137 Ohio St.3d at 384 ("unscripted" communication between insurance company and policyholder required individual inquiry.) In the present case, to support the existence of a uniform communication, Plaintiff alleges that "standard and routinized procedures" were used by "ASC representatives". There is no

[6] Although Plaintiff's class definition includes clients who were referred by KNR to ASC, Plaintiff alleges no legal theory in behalf of this group of class members. See Claims 5 and 6. (Complaint, ¶163-175). In addition, even if Plaintiff were to attempt to allege a legal theory on behalf of this group, a class representative, other than Wright, would be required as Wright was not referred by KNR to ASC.

allegation that the alleged solicitations were in writing. In the case of Wright, someone from ASC "suggested she speak with 'our attorneys'." (Complaint, ¶19). She thereafter spoke with a KNR representative on the phone before she signed a contract for representation. (Id., ¶19). There is no allegation that a script was used, and Plaintiff's allegations are void of any detail as to the content of the alleged "standardized and routine practices." In any individual case, what was stated by the ASC or KNR representative; what questions the client asked; and what answers were provided are all subject to individual proof. The absence of uniform communication is no different than in *Linn, supra*, where the Court found a lack of predominance stating "Moreover, approximately 1500 service technicians responded to customers' questions, resulting in countless different representations." *Id.* at *11. No amount of discovery will establish uniform communication between KNR and ASC representatives and thousands of clients over a 12-year period.

Second, Plaintiff's allegation that "no KNR client solicited by ASC would have retained KNR had they been advised of the *quid pro quo* relationship…", cannot be proven with common or generalized proof. Adjudication of what each class member would have decided had the alleged *quid pro quo* relationship been disclosed mandates individual inquiry. This is not a circumstance where reliance can be presumed for all class members.

Plaintiff further alleges the element of causation by claiming that the class has been "damaged" by KNR's assertion and collecting on its attorney fee liens. (Complaint, ¶168). Wright and other members of putative Chiropractor Class suffered no damage. The lien in the case of Wright has been asserted but never paid. With respect to other class members, some, if not all, lien payments came from the subsequent attorney's fee – not the client's portion of the settlement. (Exh. 7 – Thompson Affidavit). As such, these putative class members suffered no damage. As the Supreme Court of Ohio held in *Felix, supra*, where not all class members have suffered damages, predominance cannot be established.

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Where some class members have not been damaged, federal courts consider this an issue of standing as opposed to predominance. The Article III standing requirements apply equally to class actions. *Sutton v. St. Jude Med. S.C., Inc.* 419 F.3d 568, 570 (6th Cir. 2005). An individual has Article III standing, only if they suffered an injury-in-fact that is causally connected to a defendant's alleged wrongdoing. See *Lujan v. Defenders of Wildlife*, 504 U.S. 555,560 (1992); *Coyne ex rel. Ohio v. Am. Tobacco Co.*, 183 F.3d 488, 494 (6th Cir. 1999) ("[T]he 'irreducible minimum' constitutional requirements for standing are proof of injury in fact, causation, and redressability.") "To establish injury in fact, a plaintiff must show that he or she suffered 'an invasion of a legally protected interest' that is 'concrete and particularized' and 'actual or imminent, not conjectural or hypothetical'." *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1548 (2016) (Internal citations omitted).

While individual class members do not have to submit evidence of personal standing, a class cannot be certified, if any members in the class would lack Article III standing. *See Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 612-613 (1997) (instructing district courts to be "mindful that Rule 23's requirements must be interpreted in keeping with Article III constraints"); *Denney v. Deutsche Bank AG*, 443 F.3d 253, 264 (2d Cir. 2006) ("[N]o class may be certified that contains members lacking Article III standing.") *Mazza v. Am. Honda Motor Co.,* 666 F.3d 581, 594 (9th Cir. 2012) (same); *Avritt v. Reliastar Life Ins. Co.,* 615 F.3d 1023, 1034 (8th Cir. 2010) ("[A] class cannot be certified if it contains members who lack standing… Or, to put it another way, a named plaintiff cannot represent a class of persons who lack the ability to bring a suit themselves"). Because the proposed class would include individuals with no damage, predominance and standing cannot be established.

Again, Plaintiff seeks to avoid the need to establish causation and damages by its allegation of a "secret profit" that constitutes "fraud", thus making such a transaction void "whether or not there is a causal relation between the self-dealing and Plaintiff's loss."

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(Complaint, ¶169). This allegation of law was fully addressed in Defendants' argument in response to the Fiduciary Duty and Fraud claims relating to the Investigation Fee Class.

2. Unjust Enrichment Claim – Chiropractor Class.

Under Plaintiff's second theory of unjust enrichment, the Chiropractor Class again fails to satisfy the predominance requirement. As with Plaintiff's claim of breach of fiduciary duty, there is no common evidence of the alleged solicitation or what each class member would have done had the alleged *quid pro quo* relationship been disclosed.

In addition, as alleged in the Third Amended Complaint, the claimed remedy of restitution for unjust enrichment only arises where a "benefit [has been] conferred by a plaintiff upon a defendant." *Hambleton v. R.G. Barry Corp.,* 12 Ohio St.3d 179,183 (1984)(Emphasis added); *Johnson v. Microsoft Corp.*, 106 Ohio St. 3d 278, 284 (2005) (A party must demonstrate a benefit conferred by a plaintiff upon a defendant…)(Emphasis added); *Scott Charles Laundromat, Inc. v. City of Akron*, 2012 Ohio App. LEXIS 2523, *9, 2012 Ohio 2886 ¶12 (9th Dist. 2012), ("To recover for unjust enrichment, a plaintiff must demonstrate: (1) that it conferred a benefit upon the defendant…"). As previously stated, some, if not all, of the lien payments were not paid from the client's portion of a settlement. No "benefit was conferred" by a class member and thus predominance is lacking. *Felix,* 145 Ohio St.3d at 337. Any argument by Plaintiff that, in some cases, the lien-fee was paid from a class member's portion of a settlement would require discovery, proof and adjudication of each individual case.

Further, to prevail in an unjust enrichment claim requires proof that retention of the benefit by defendant is unjust. To determine whether any fee paid, pursuant to a lien, is unjust would require individual determination as to the legal work provided and the value added in each individual class member's case.

There is nothing about Plaintiff's unjust enrichment claim that resembles a class action. To suggest that this matter could be resolved in a single adjudication would be to ignore the plain allegations in Plaintiff's Third Amended Complaint.

3. Plaintiff Cannot Establish Numerosity – Chiropractor Class.

In addition to the element of predominance, Civil Rule 23(A) requires as a prerequisite to class certification that the class be so numerous that joinder of all members is impractical. In the seven (7) year period from 2012 to 2017, there were only seven (7) KNR clients who were referred by ASC to KNR; who terminated KNR and where KNR asserted a fee-lien.[7] (Exh. 7). If we ignore the (6) year statute of limitations for an unjust enrichment claim and the four (4) year statute of limitations for a breach of fiduciary duty action, the longest conceivable class period is (12) years (2005 to 2017). A simple extrapolation would result in approximately (15) members of the proposed Chiropractor Class. This, however, is an overstatement of the number because prior to 2012 very few, if any, liens were asserted. (Exh. 8 – Redick Affidavit). The best estimate of class members is probably less than ten (10)[8].

The number of potential class members in this case, under any estimate, does not satisfy numerosity. The Supreme Court of Ohio addressed numerosity as follows:

> In construing Civ. R. 23(A)(1), known as the numerosity requirement, courts have not specified numerical limits for the size of a class action. This determination must be made on a case-by-case basis. Professor Miller, however, has indicated: "[i]f the class has more than forty people in it, numerosity is satisfied; if the class has less than twenty-five people in it, numerosity probably is lacking; if the class has between twenty-five and forty, there is no automatic rule.

Warner v. Waste Mgmt., 36 Ohio St.3d 91, 97 (1988). *See also Miller v. Painters Supply & Equip. Co.*, 2011 Ohio App. LEXIS 3327, 2011 Ohio 3976 (8th Dist. 2011) (finding no numerosity in a proposed class of (37) class members); *Burrell v. Sol Bergman Estate Jewelers, Inc.*, 77

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[7] Prior to 2012 KNR's electronic record system does not allow KNR to readily identify potential class members. To identify clients who were referred by ASC and a fee-lien was asserted prior to 2012 would require a file by file investigation of thousands of files stored off-site.

[8] In reaching this estimate of under ten (10) class members, Defendants did not include clients who KNR referred to ASC, as Plaintiffs' Third Amended Complaint alleged no cause of action for these clients and the class representative-Wright was not referred by KNR to ASC. If clients who KNR referred to ASC are included, that adds four additional class members. (Exh. 7).

Ohio App. 3d. 766, 603 N.E. 2d. 1059 (8th Dist. 1991), (The Court cited *Warner, supra* and the language that less than twenty-five people probably does not satisfy numerosity).

The Ninth District Appellate Court, Summit County, refused to certify a class based on a lack of numerosity in *Adkin-Bagola v. Universal Nursing Services*, 2004 Ohio App. LEXIS 5542, 2004 Ohio 6082 (9th Dist. 2004). The class consisted of approximately ten (10) members. Citing the language in *Warner, supra* that numerosity is probably lacking when the class has less than twenty-five members the court denied class certification. The court stated:

> We do not find that *Bagola* has shown that the members of her proposed class are so numerous that it is impracticable to bring them all before the court. In a class that consists of approximately ten members, we cannot say that joinder is impracticable.
>
> *Adkin-Bagola* at *10.

While the actual number of potential class members goes a long way in determining whether numerosity exists, other factors may be considered on the issue of whether joinder is impracticable. Another factor the courts have considered is the geographic dispersion of class members. *Williams v. Countrywide Home Loans, Inc.*, 2007 Ohio App. LEXIS 4712, *17, 2007 Ohio 5353 (6th Dist. 2007). In *Edwards v. McCormick*, 196 F.R.D. 487, 493, 2000 U.S. Dist. LEXIS 16219 (S.D. Ohio 2000), the court stated "in judging numerosity, the court may consider the diverse geographic distribution of members in the putative class..." In *Glover v. McMurray*, 361 F. Supp.235, 241 (S.D.N.Y. 1973) (Rev'd. on other grounds), the court noted the significance of geographic location as follows:

> A group as small as fifteen or thirty cannot maintain a class action unless special circumstances make the joinder of all members impracticable. Fed. R. Civ.P. 23 (a)(1); *Demarco v. Edens*, 390 F.2d 836, 845 (2d Cir. 1968); *Giordano v. Radio Corporation of America*, 183 F.2d 558 (3d Cir. 1950. The primary factor to be considered in deciding whether joinder is practical is the geographical location of the other potential plaintiffs. *Dale Electronics, Inc. v. R.C.I. Electronics, Inc.* 53 F.R.D. 531 (D.N.H. 1971); *Phillips v. Sherman*, 197 F. Supp. 866 (N.D.N.Y. 1961), Here the other

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day care centers are all located within New York City. I therefore find that the class is not so numerous that joinder of all members is impractical.

In the present case of the seven (7) potential class members identified, six (6) are from Summit County and one (1) is from Cuyahoga County. (Exh. 7). Location of class members is not an impediment to joinder. Plaintiff cannot satisfy her burden that, for a class involving probably less than ten (10) members, joinder is impractical.

Looking to other factors does not allow Plaintiff to establish "special circumstances" in order to prove that joinder is impractical. Courts have considered the efficiency or economy of a class action as opposed to joinder. *Williams, supra* at *9. As already outlined, the individual proof required to adjudicate the case of each putative class member negates any time or cost savings of a class proceeding. Joinder in this matter is not impractical. Numerosity cannot be established as required by Civil Rule 23(A).

E. <u>The Liberty Class Fails to Satisfy The Predominance Requirement of Ohio Civ. R. 23(B)(3).</u>

The proposed Liberty Class includes "all current and former KNR clients who paid interest or fees on a loan taken through Liberty Capital Funding, LLC." This class is brought pursuant to three theories of liability: fraud; breach of fiduciary duty; and unjust enrichment. The proof necessary, under all three theories of liability, negates the existence of predominance.

1. Breach of Fiduciary Duty – Liberty Class.

Plaintiff cannot establish predominance under the theory of fiduciary duty. As outlined previously, variation in the alleged misrepresentation or omission argues against class certification. *Cullen*, 137 Ohio St.3d 373; *Linn,* 2004 Ohio App. LEXIS 2274; *Schmidt,* 15 Ohio St.3d 310; 1966 Advisory Committee Notes to Fed. R. Civ. P. 23(b)(3) cited in *Hamilton v. Ohio Sav. Bank*, 82 Ohio St.3d 67, 694 N.E.2d 442 (1998). Plaintiff seeks to certify a fiduciary duty class, based on individual verbal discussions between different KNR lawyers and various clients concerning a personal loan. (Complaint, ¶¶205-212). This discussion was then followed by at

least one discussion between the client and various representatives of Liberty Capital Funding, LLC. The variation in the potential questions asked is limitless, as are the representations in response. *See Linn, supra* (predominance lacking considering customer questions and different representations).

In addition to the variable statements made by Liberty and KNR representatives, each client signed a written Loan Agreement. The Loan Agreement of Johnson states that the "Company [Liberty] has advised me to consult a lawyer of my own choosing before signing this Agreement." (Exh. 9 – Loan Agreement of Johnson, provided in Defs' Resp. to Plf's Third. Set of Req. for Prod.). How many class members took this advice and what consultation did they receive? The Loan Agreement further states that the "Company has advised me to consult a financial or tax professional." Which class members took this advice? The Loan Agreement requests that the client "acknowledge" that "my attorney has made no recommendations regarding this transaction." Each class member's individual understanding of this language and explanation as to why it contradicts the allegations in the Third Amended Complaint will be subject to individual proof.

Further, Plaintiff's allegations in the Third Amended Complaint highlight the need for individual proof. Plaintiff's alleged issues include:

- Whether Defendants recommended Liberty Capitol. (¶140(c)(i));
- Whether Defendants failed to consider whether the loan was in the client's best interest. (¶140(c)(iv));
- Whether Defendants failed to encourage other possible sources of funds. (¶140(c)(iv));

These issues cannot be resolved on a class-wide basis. Individual evidence for every loan from each KNR lawyer, KNR employee, Liberty employee and client will drive the answers to these issues. The only common omission alleged by Plaintiff is that KNR did not tell clients

that it had a financial interest in Liberty or that it received a "kickback" for each loan. While this allegation is common, it is not the truth, and there is no evidence to support this allegation.

As a necessary element of its fiduciary claim, plaintiff alleges that each class member entered the loan agreement as a result of and in reliance on KNR's misrepresentation and concealment. (Complaint, ¶¶209). In the present case, the decision-making process of each client would differ. The amount of each loan could be a factor. The financial condition of each class member would be a factor. If a client had a great financial need, like the need to pay their mortgage, what was represented by KNR or Liberty might have played little or no roll in their decision to borrow money. In other words, any representation or concealment might not have changed a particular plaintiff's decision to borrow money from Liberty. Every class member would need to be asked what was material in their decision to take a loan and what facts would have changed that decision. This is not a case where a presumption of reliance can be made for all class members as was done in *Hamilton*, 82 Ohio St.3d 67.

Plaintiff again alleges that Defendants took a "secret profit" that constitutes "fraudulent conduct", allowing for a restitution claim without proof of damages. This allegation of law was fully addressed in Defendants' argument in response to the Fiduciary Duty and Fraud claims relating to the Investigation Fee Class.

2. Fraud – Liberty Class.

Plaintiff's second theory of liability for the Liberty Class is fraud. The underlying proof necessary to establish the elements of fraud are not common to all class members. As outlined in Defendants' Fiduciary Duty argument, the representations to class members would be made by different lawyers and paralegals from KNR; different employees of Liberty; and possibly a financial or tax consultant. There is no representation common to all class members.

Further, the element of damage proximately caused by the concealment cannot be established with proof common to all class members. For some class members, Liberty might have been the only company willing to loan them money. These class members had no

alternative and thus suffered no damage. The interest and fees of Liberty might have been lower than other companies depending on the amount and time frame of the loan. Probably most significant would be the practice of loan companies to discount the amount owed at the time of repayment. The amount of any discount for each individual class member would need to be determined and somehow compared to that which might have been offered had they borrowed from another company. A single adjudication would not resolve this issue for all class members.

3. Unjust Enrichment – Liberty Class.

Plaintiff's unjust enrichment claim is based on the allegation that Defendants own a portion of Liberty and receive kickbacks for each loan. This allegation will be addressed in a Motion for Summary Judgment. Even assuming its truth, for the purposes of this Motion, the unjust enrichment claim suffers the same lack of predominance as Plaintiff's fiduciary duty claims.

F. The Narrative Fee Class Fails to Satisfy The Predominance Requirement of Ohio Civ. R. 23(B)(3).

Plaintiff's proposed Narrative Fee Class is defined as "all current and former KNR clients who had a narrative fee deducted by KNR from their settlement proceeds to be paid to a chiropractor." (Complaint, ¶138). This class is brought under the claim that all Defendants breached their fiduciary duty and a separate claim for unjust enrichment brought against Defendant, Minas Floros D.C. only. Under either of these theories, Plaintiff cannot establish predominance.

1. Breach of Fiduciary Duty Claim – Narrative Fee Class.

The plain allegations made by Plaintiff to support the claim that Defendants breached their fiduciary duty require individual proof. The Plaintiff alleges:

1. "These narratives are worthless." (Complaint, ¶58);

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2. "The narratives never contain any information that is not readily apparent and easily accessible from the client's medical records." (*Id.*);
3. "Defendants know the narratives do not make an opposing party any more likely to settle a client's case." (*Id.*);
4. [Narratives] have nothing to do with individual client's needs." (*Id.*, ¶59);

Plaintiff's first allegation that narratives are worthless mandates an evaluation of each narrative and the facts surrounding each case. Where a client has suffered an injury with permanent or future ramifications, a statement of "prognosis" in the narrative that is not in the records is of considerable value. Other clients may require future care. An opinion in the narrative of this need and its estimated cost is of significant value. Whether this statement is also in the medical records would need to be examined for each case. If a client's case is in suit in Cuyahoga County, a narrative outlining opinions is required by local rule, if the chiropractor is to testify. Cuyahoga County Local Rule 21.1. Certainly, where a narrative is required by law, it is not "worthless." Where the medical records are voluminous, not organized well, and handwritten, a typed, organized narrative has a value different than a case where the records are typed and well organized. The thousands of different records for each class member were prepared in different offices, by different chiropractors, over 12 years. Different injuries might require more or less explanation. The value of every narrative is different and the factors that determine its value are limitless. It should be noted that accompanying the provision of a narrative report are the medical records and chiropractic billing with no additional charge. (Exh. 5). A single adjudication on the value of any individual narrative is not going to answer the question for every class member.

Plaintiff's second allegation that narratives never contain any information that is "not readily available" in the medical records requires an examination of every narrative and every set of medical records. Comparing the narrative and the medical records of Reid (Class Representative) reveals that her narrative contains an outline of future risks; a future care

opinion; and estimated costs. These opinions are not "readily available" in the medical records. In fact, they are totally absent from her records. (Exh. 2). Whether some, all, or no other class have a narrative similar to that of Reid can only be known with an investigation into the records and reports of each class member.

Plaintiff's third allegation that narratives "do not make an opposing party more likely to settle a case" cannot be addressed on a class-wide basis with common proof. What effect a particular narrative had on an opposing party would require evidence from thousands of insurance adjustors and hundreds of defense attorneys over the last 12 years.

Finally, Plaintiff alleges that the reports do not serve the needs of the client. Whether this allegation is accurate for any class member necessitates individual proof of the content of each class member's records, their narrative, their injuries and the local rules where cases are in suit. There is no need to go beyond the Plaintiff's Third Amended Complaint to conclude that predominance is absent.

Plaintiff's allegation of causation requires individual inquiry. Plaintiff alleges that "no KNR client would have agreed to have the fee deducted" had they been "advised of the '*quid pro quo*' relationship" and "the nature of the fee." (Complaint, ¶222). Would this be true where the narrative was obtained pursuant to a local rule? The client would have to be asked. Would this be true where the narrative outlined an extremely negative prognosis of permanent injury where there was no such information in the records? What would the client's view be if the narrative simply clarified what was in the records? The facts do not allow a presumption of what every class member would have agreed to had they been provided further information.[9]

Plaintiff again alleges that Defendants took a "secret profit" which amounts to "fraudulent conduct" and that as a result, there is no need to prove causation and damages. (Complaint,

[9] Some courts allow a class-wide presumption of what class members would have decided had undisclosed information been provided. *Hamilton,* 82 Ohio St.3d 67, 694 N.E.2d 442 (1998) and *Schmidt,* 15 Ohio St.3d 310, 15 Ohio B. Rep. 439, 473 N.E.2d 822. Such a presumption is not appropriate under the facts of this case.

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¶224). This allegation of law was fully addressed in Defendants' argument in response to the Fiduciary Duty and Fraud claims relating to the Investigation Fee Class.

2. Unjust Enrichment – Narrative Fee.

Defendants' unjust enrichment claim is only brought against Minas Floros D.C. Therefore, counsel for KNR will not address this issue.

IV. Conclusion

For the reasons stated herein, Defendants respectfully request that this Court issue an Order striking all class allegations in the Third Amended Complaint as permitted by the Ninth District case *Sliwinski,* 2012 Ohio App. LEXIS 1598, 2012-Ohio-1822, ¶14. There is no additional discovery that will change the facts underlying Defendants' Motion.

Respectfully submitted,

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CERTIFICATE OF SERVICE

A copy of the foregoing Defendants' Memorandum in Support of Defendants' Motion to Strike Class Allegations in Plaintiffs' Corrected Third Amended Complaint was filed electronically with the Court on this 21st day of November, 2017. The parties may access this document through the Court's electronic docket system.

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