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.,	)	**DR. SAM GHOUBRIAL'S MOTION TO INTERVENE FOR THE LIMITED PURPOSE OF OPPOSING PLAINTIFFS' MOTION FOR LEAVE TO FILE FOURTH AMENDED COMPLAINT AND OPPOSITION TO PLAINTIFFS' MOTION FOR LEAVE TO FILE FOURTH AMENDED COMPLAINT**
Defendants.	)	
	)	

Now comes Dr. Sam Ghoubrial, M.D., by and through undersigned counsel, and hereby moves the Court to permit Dr. Ghoubrial to intervene in this matter for the purpose of opposing Plaintiffs' Motion for Leave to File Fourth Amended Complaint and submits his opposition to Plaintiffs' Motion for Leave to File Fourth Amended Complaint.

Dr. Ghoubrial meets the requirements of Ohio Civil Rule 24 and, therefore, should be permitted to intervene in this matter for the purpose of opposing Plaintiffs' Motion for Leave to File Fourth Amended Complaint, which proposes to add Dr. Ghoubrial as a party defendant.

Plaintiffs' motion should be denied for the reasons set forth in the Memorandum in Support attached hereto and incorporated herein by this reference.

Respectfully submitted,

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Counsel for Dr. Sam Ghoubrial

MEMORANDUM IN SUPPORT

I. INTRODUCTION

On September 6, 2018, the lawyer in this case filed a motion to bring a frivolous lawsuit against an Ohio doctor, Sam Ghoubrial, MD. The lawyer proposes a class action against Dr. Ghoubrial that has zero chance of being certified.

The lawyer alleges things in a way designed to make Dr. Ghoubrial look terrible without support in Ohio law. Worse, the lawyer did not contain his conduct to the confines of a judicial pleading. He took the allegations outside of the walls of the court system and published them on his website, on Facebook, and on Twitter. People read these false statements and posted hurtful comments about Dr. Ghoubrial[1]. See **Exhibit "A"** attached. Of course, the lawyer's public posts all troll for clients without the required disclaimers for advertisements, but that is for a different forum.

We implore this Court stop the lawyer dead in his tracks and deny his motion to add Dr. Ghoubrial to this litigation.

II. LAW AND ARGUMENT

A. Dr. Ghoubrial Must Be Permitted to Intervene to Oppose Plaintiffs' Motion.

Intervention under Civ.R. 24(A)(2) is permitted if (1) the application is timely (the lawyer's motion was filed Sept 6, 2018); (2) the applicant has an interest relating to the subject of the action (the lawyer is trying to bring Dr. Ghoubrial into existing litigation); (3) disposition of action will impair the applicant's interest (obviously) ; and (4) the interest is inadequately represented by the

[1] A person identified on Facebook as Karas Allese Bordner comments for the public to see, "You are phenomenal!!! Wish you practiced in South Carolina when we had a house fire and found out the fire damage company and State Farm Insurance dabbled in fraud. We lost our life savings plus more."
A person identified on Facebook as Ali Wilson comments for the public to see, "Wow… what a horrible thing to do to people. Appalling."

existing parties to the suit (the claims against Dr. Ghoubrial do not involve the other existing defendants). *See Myers v. Basobas*, 129 Ohio App.3d 692, 696 (Ohio Ct. App. 1998).

Allowing Dr. Ghoubrial to intervene for the purpose of opposing the lawyer's motion is not a final appealable order and would be subject to an abuse of discretion standard at the end of the case should the lawyer appeal at that time. *Myers v. Basobas*, 129 Ohio App.3d 692, 696 (Ohio Ct. App. 1998). On the other hand, denying Dr. Ghoubrial the ability to intervene for the purpose of opposing the lawyer's motion would affect a substantial right and would therefore be a final appealable order. *Id.* Since Dr. Ghoubrial is simply opposing the lawyer's motion and adding no new claims, an intervening complaint is not required. *See Crittenden Court Apt. Assoc. v. Jacobson/Reliance*, 8th Dist. Cuyahoga No. 85395, 2005-Ohio-1993, at *3.

Dr. Ghoubrial satisfies the requirements of Civ.R. 24(A)(2) and must be allowed to intervene for the purpose of opposing the lawyer's motion as a matter of right.

B. Denying the Lawyer's Motion Under Civil Rule 15 is proper.

Denying the lawyer's motion will not be disturbed on appeal without an affirmative showing of an abuse of discretion. *Wilson v. Smith*, 9th Dist. Summit No. 12692, 1987 WL 16519, at *2 (Aug. 19, 1987) Denying the lawyer's motion for the reasons set forth herein have been upheld by other courts, "[w]here a plaintiff fails to make a *prima facie* showing of support for new matters sought to be pleaded, a trial court acts within its discretion to deny a motion to amend the pleading." *McMaster v. City of Akron*, 9th Dist. Summit No. 17133, 1995 WL 623049, at *2 (Oct. 25, 1995). In other words, "a trial court properly refuses to grant leave to amend when amendment would be futile." *Hensley v. Durrani*, 1st Dist. Hamilton No. C-130005, 2013-Ohio-4711, at ¶ 14. Moreover, "the trial court does not abuse its discretion if it denies a motion to amend pleadings if there is a showing of bad faith, undue delay, or undue prejudice to the opposing party."

Wagoner v. Obert, 180 Ohio App.3d 387, 2008-Ohio-4041, ¶ 111, 905 N.E.2d 694 (5th Dist.) (citing *Hoover v. Sumlin*, 12 Ohio St.3d 1 (1984)).

While any one of these reasons is enough to deny the lawyer's motion, they all apply here. Let's start with the futility of the lawyer's motion.

1. The Lawyer's Claims Against Dr. Ghoubrial are "Medical Claims" and fail to Comply with the Requirements of R.C. § 2305.113.

In paragraph 14, the lawyer says Dr. Ghoubrial is a physician. In paragraphs 85, 87, and 89, the lawyer sets forth the factual predicate for the claims of his proposed class. This factual predicate involves a proposed class representative who was allegedly seen by Dr. Ghoubrial for medical care and treatment and received prescriptions and medical supplies for her care and treatment while in Dr. Ghoubrial's office. As such, the class representative and all the proposed class members will have claims that arise from the care and treatment provided between a doctor and their patient.

R.C. § 2305.113(E)(3) defines "medical claim" as "**any claim** that is asserted in any civil action against a physician . . . and that arises out of the medical diagnosis, care, or treatment of any person." (emphasis added).

Any claim means any claim, regardless of how a claim is pled. Here, the lawyer attempts to disguise the medical claims with Fiduciary language, Fraud language, Contract language, and Equity language. The law is clear. If the claim arises from the care and treatment, it is a medical claim. *See Amadasu v. O'Neal*, 176 Ohio App.3d 217, 222 (1st Dist. Ct. App. 2008) ("Malpractice by any other name still constitutes malpractice. It consists of the professional misconduct of members of the medical profession. Thus, the one-year statute of limitations for medical-malpractice actions applied to [plaintiff's] entire complaint.").

The disguise of claims in fraud have been specifically shot down. S*ee Hensley v. Durrani*, 1st Dist. Hamilton No. C-130005, 2013-Ohio-4711 (finding fraud claim subject to one-year medical malpractice statute of limitations). Under the statute, "medical claims" are subject to a one-year statute of limitations and a four-year statute of repose. R.C. § 2305.113(A) and (C). They are also required to be supported by an affidavit of merit. Civ.R. 10(D)(2).

The allegations made by the lawyer here fit squarely within the definition of "medical claim" under R.C. § 2305.113. *See e.g. Siuda v. Howard*, 1st Dist. Hamilton No. C-000656, C-000687, 2002-Ohio-2292 (medical malpractice alleging unnecessary surgery performed on patient); *Smith v. Loeffler*, 20 Ohio App.3d 66 (9th Dist. Ct. App. 1984) (medical malpractice claim alleging unnecessary radiation treatments administered by physician). Here, the lawyer alleges unnecessary medical care, but fails to attach an affidavit of merit. The joinder fails for this reason alone.

2. These Medical Claims Are Not Class Action Claims.

In a class action seeking damages, the court must find that common questions of law or fact predominate over questions that are individual to members of the class. *Hamilton v. Ohio Sav. Bank* (1998), 82 Ohio St.3d 67, 79. "'[A] claim will meet the predominance requirement when there exists *generalized evidence* which proves or disproves an element on a *simultaneous, class-wide basis*, since such proof obviates the need to examine each class member's individual position.'" (Emphasis added.) *Cope v. Metro. Life Ins. Co.* (1998), 82 Ohio St.3d at 429–430, 696 N.E.2d 1001, quoting *Lockwood Motors, Inc. v. Gen. Motors Corp.* (D.Minn.1995), 162 F.R.D. 569, 580.

Common issues do not predominate for purposes of certifying a class action where individualized proof is required for each class member to recover. If any

means any in § 2305.113(E)(3), then common issues cannot predominate in medical claims against doctors as they are plead in the lawyer's motion. For every plaintiff, the medical necessity of each medical supply and prescription is an issue. A review of each individual's medical records is required. A separate affidavit of merit is required for each class member. Simply put, certifying a class of medical claims like the ones put forth by the lawyer here would be unprecedented and impracticable. Individuality is why an affidavit of merit is required in medical claims and individuality defeats commonality.

Accordingly, "where no one set of operative facts establishes liability" and "individual issues outnumber common issues," a court "should properly question the appropriateness of a class action for resolving the controversy." *Sterling v. Velsicol Chem. Corp.* (C.A.6, 1988), 855 F.2d 1188, 1197. The joinder fails for this reason alone.

3. It is a lie to tell this Court that Ohio law prohibits doctors from taking profits from selling medical supplies to their patients while the patients are in the office.

Among other paragraphs, in 247, 248, 249, 255, 256 and 257 the lawyer alleges that Ohio law extends the fiduciary duty of a doctor to inform patients of the amount of profit they will make from the sale of medical supplies provided to their patients in the doctor's office. The lawyer cites no statute. He couches the claims in Fraud, Fiduciary Duty, Contract, and Unjust Enrichment. NO SUCH LAW EXISTS.

As the Court considers allowing this amendment to add Dr. Ghoubrial, think of the implications of what the lawyer is saying. "Mr. Smith, you need brain surgery. Before we do that brain surgery we need you to know we paid 25 cents for this stent and are going to charge you $250. We need you to know that we paid $1 for each bag of saline that will be hooked to you and

we will be charging you $100, etc. etc. Are you ok with that?" The list for one surgery alone would be arm's length.

In the office, "Mr. Smith, your leg is broken, and we are going to place it in this air cast. Before we do, we want you to know that we paid $10 for it and are going to charge you $300. Are you ok with that?" "Mr. Smith, your gums are unhealthy, you need more aggressive cleaning, or we will be removing teeth. We can provide you this power tooth brush to you, but you need to know we paid $15 for it and will charge you $250. Are you ok with that?"

What about the patients who are unconscious? "Yes ma'am, we know your friend is unconscious and needs Narcan to save him, but he needs to know that we paid 50 cents for this drug and are going to charge $50 for the dose. We can't proceed until he wakes up and gives us permission." In a code blue, "can someone get the patient's wife on the phone before we proceed so she knows that our defibrillator is fully paid for and we will make $150 for each time we shock him, and we only paid a small amount for the epinephrine we will administer and charge $100?"

These situations do not happen in the real world. They only happen in the imaginary world of the lawyer who filed this motion.

Part of the reason there is no duty placed on the doctor or the hospital in these circumstances is that costs are not strictly limited to the item itself, but include other considerations such as overhead, storage and ready availability to patients, professional advice, and acceptance of risk associated with the use of the device or medicine. If, hypothetically, a physician treating a patient marks up certain supplies or equipment that is routinely done, appropriate and not inconsistent with Ohio law.

While Dr. Ghoubrial does not concede the accuracy of any of the allegations made by the lawyer, there is nothing illegal about the conduct the lawyer alleges. In fact, attached hereto as

Exhibit "B", the Court will find an invoice from another provider that charges $1500 for the device the lawyer contends Dr. Ghoubrial is charging $500.

The extent of the fiduciary duty of doctors in self-dealing are set forth in the "Stark Laws" 42 USC 1395. The duty of disclosure comes where a doctor makes a referral to an "outside entity" which the doctor has a financial interest. US ex rel. Drakeford v Tuomey Healthcare System Inc 675 F.3d 394 (4th Cir 2012). For instance, if a doctor sends a patient to a physical therapy center in which he has a financial interest, he would have a duty to disclose that interest.

Here, the lawyer does not allege that Dr. Ghoubrial referred the patients to an outside facility in which Dr. Ghoubrial held a financial interest. He does not even allege that Dr. Ghoubrial had a financial interest in the company that sold Dr. Ghoubrial the medical equipment for which the lawyer complains.

The lawyer here wants no part of any statute that defines the fiduciary duty of a physician to disclose their financial interest because these statutes do not apply to the situation the lawyer describes involving Dr. Ghoubrial. There is no Ohio law (statutory or otherwise) that extends Dr. Ghoubrial's fiduciary duty to disclosing profit margins, accepting insurance, or anything else outside of the diagnosis and treatment of medical conditions.

In fact, the fiduciary duty of a doctor in Ohio does not extend beyond the medical relationship with respect to diagnosing and treating diseases and injuries. *N. Ohio Med. Specialists, L.L.C. v. Huston*, 6th Dist. No. Erie E-09-13, 2009-Ohio-5880, at Hn. 1, ¶ 16 (finding no fiduciary duty to obtain insurance benefits for patient).

Here, the lawyer relies solely on two cases that have nothing to do with the extent of the fiduciary duty of a doctor to their patient. The first, *In re Binder's Estate*, is a probate case from 1940. *See In re Binder's Estate*, 137 Ohio St. 26. It involved the extent of a fiduciary duty by a

trustee bank to the beneficiaries of a trust. *Id.* The case simply stands for the proposition that a trustee of a trust has a fiduciary duty to act in good faith regarding the funds that it has been hired to manage. *Id.* It in no way extends a doctor's fiduciary duty beyond the medical diagnosis and treatment the doctor provides to a patient.

The second case, *Myer v. Preferred Credit*, involves the extent of the fiduciary duty a mortgage broker owes in a mortgage refinancing. *See Myer v. Preferred Credit, Inc.*, 117 Ohio Misc.2d 8. The case extends mortgage broker's fiduciary duty to include informing the parties of a fee-splitting agreement between mortgage brokers. *Id.* at 27. This case has nothing to do with the extent of a doctor's fiduciary duty to his patient.

All Fiduciary duties are not created equal. There is no law in Ohio that says a doctor's fiduciary duty extends beyond the diagnosis and treatment of the patient. In fact, there is law that says the Fiduciary duty does not extend beyond the diagnosis and treatment of the patient.

Plaintiffs' claims for fraud and breach of fiduciary duty are ill-conceived and not supported by Ohio law. Ohio law does not require medical providers to accept insurance, disclose profit margins, or share in the inner-workings of their business with patients. This would be a drastic departure from the United States healthcare system and one can only imagine the effect it would have. The joinder fails for this reason alone.

4. Ohio Joinder Laws prohibit the Joinder.

The claims against Dr. Ghoubrial are unrelated to the other claims against KNR. The lawyer does not allege a claim against KNR for what they say happened in Dr. Ghoubrial's office.

The lawyers in this case have been at odds for years, with thousands of pages of discovery and dozens of hours of deposition testimony taken. They are on the precipice of discovery ending. The last thing anyone should want is some unrelated claims against a doctor being added on the

eve of discovery closing. Likewise, we do not want Dr. Ghoubrial dragged into a case with unrelated claims against a law firm that we would have to get up to speed on, charge for, and run the risk of having confusion reign. As should be the case, the Ohio Rules of Civil Procedure are against this joinder.

Ohio Civil Rule 20(A) permits joining defendants in one action "if there is asserted against them jointly, severally, or in the alternative, any right to relief in respect of or arising out of the same transaction, occurrence, or succession or series of transactions or occurrences and if any question of law or fact common to all defendants will arise in the action." The lawyer's claims against Dr. Ghoubrial do not fit, "proper joinder requires more than the common questions of law and fact ... the plaintiff must also seek to hold the defendants jointly, severally or alternatively liable as a result of the same transaction or occurrence." *In re Chochos*, 325 B.R. 780 (U.S.Bkcy. N.D.Ind. 2005).

The lawyer's concocted claim against Dr. Ghoubrial is brought against him alone. There is no relationship between the representation of the class representative by KNR and the claims against Dr. Ghoubrial. KNR could never be jointly, severally, or alternatively liable for the claims the lawyer seeks to bring against Dr. Ghoubrial. The joinder fails for this reason alone.

Now let's move to the bad faith and undue delay underbelly existing in the lawyer's motion.

5. Adding Dr. Ghoubrial to the Existing Case Will Add Confusion and Undue Delay.

As pointed out earlier, the analysis of fiduciary duty with regard to a doctor as opposed to a lawyer will be different. This will add confusion and undue delay.

Additionally, the analysis of the statute of limitations will be different between claims against a doctor and a lawyer. Generally, claims for breach of fiduciary duty are subject to the four-year statute of limitations set forth in R.C. 2305.09. *Cleveland Indus. Square, Inc. v. Dzina*,

8th Dist. Cuyahoga Nos. 85336, 85337, 85422, 85423, 85441, 2006-Ohio-1095, ¶ 45. "A cause of action for breach of fiduciary duty arises when the act or commission constituting the breach of fiduciary duty occurred. The discovery rule does not toll the statute of limitations for a breach of fiduciary duty claim." *Id.* (citing *Helman v. EPL Prolong, Inc*., 139 Ohio App.3d 231, 249, 2000 Ohio 2593, 743 N.E.2d 484 (7th Dist.2000)).

Likewise, the general statute of limitations for fraud is also four years. Although fraud claims are subject to the discovery rule, the claims still accrue when, with the exercise of reasonable diligence, the fraud should have been discovered. *Cundall v. U.S. Bank*, 122 Ohio St.3d 188, 2009-Ohio-2523, ¶ 29, 909 N.E.2d 1244. In "determining whether the exercise of reasonable diligence should have discovered a case of fraud, the relevant inquiry is whether the facts known would lead a fair and prudent man, using ordinary care and thoughtfulness, to make further inquiry." *Id*. The statute of limitations starts to run under the discovery rule when there is constructive knowledge of the facts. *Id*. at ¶ 30. Actual knowledge of the facts and their legal significance is not required. *Id*.

As cited infra, **all claims** that arise out of the treatment of a patient by a doctor are subject to a one-year statute of limitations and a requirement of an affidavit of merit. Additionally, all medical claims under ORC 2305.113(C) are subject to a four-year statute of repose that is not in place for KNR.

Allowing Dr. Ghoubrial to be brought into this case will involve an analysis of statutes of limitation and repose that are different from KNR. This will add undue delay, complexity and confusion to the existing litigation. The joinder fails for this reason alone.

6. Adding Dr. Ghoubrial at this Late Stage in the Existing Litigation is Untimely and Highly Prejudicial.

"[A] trial court does not abuse its discretion if it denies a motion to amend pleadings if there is a showing of bad faith, undue delay, or undue prejudice to the opposing party." *Wagoner v. Obert*, 180 Ohio App.3d 387, 2008-Ohio-4041, ¶ 111, 905 N.E.2d 694 (5th Dist.) (citing *Hoover v. Sumlin*, 12 Ohio St.3d 1 (1984)).

From a review of the docket, this litigation has been going on for years. Plaintiffs provide no explanation or reason why they have waited to assert their allegations against Dr. Ghoubrial. Dispositive motions have been decided, discovery disputes have been ruled upon, and substantial discovery has been completed including depositions.

Reaching to include Dr. Ghoubrial on the eve of the expiration of discovery exposes the bad faith and the real purpose of undue delay behind the lawyer's motion. Should the court grant the motion, Dr. Ghoubrial and his counsel will have to catch-up on almost two years of prior litigation. This will delay the existing litigation; in which it is likely the existing defendants have spent considerable funds. Adding Dr. Ghoubrial will not only prejudice Dr. Ghoubrial, but it will hurt everyone in the existing litigation that has an interest in bringing that case to conclusion. The only person who would gain a benefit is a lawyer who wants to buy more time for additional discovery he failed to pursue. Such a lawyer should not be permitted to benefit from his own delay at the expense of Dr. Ghoubrial and the other existing defendants. The joinder fails for this reason alone.

III. CONCLUSION

For the foregoing reasons, Dr. Ghoubrial's Motion to Intervene should be granted and Plaintiffs' Motion for Leave to File Fourth Amended Complaint should be denied.

Respectfully submitted,

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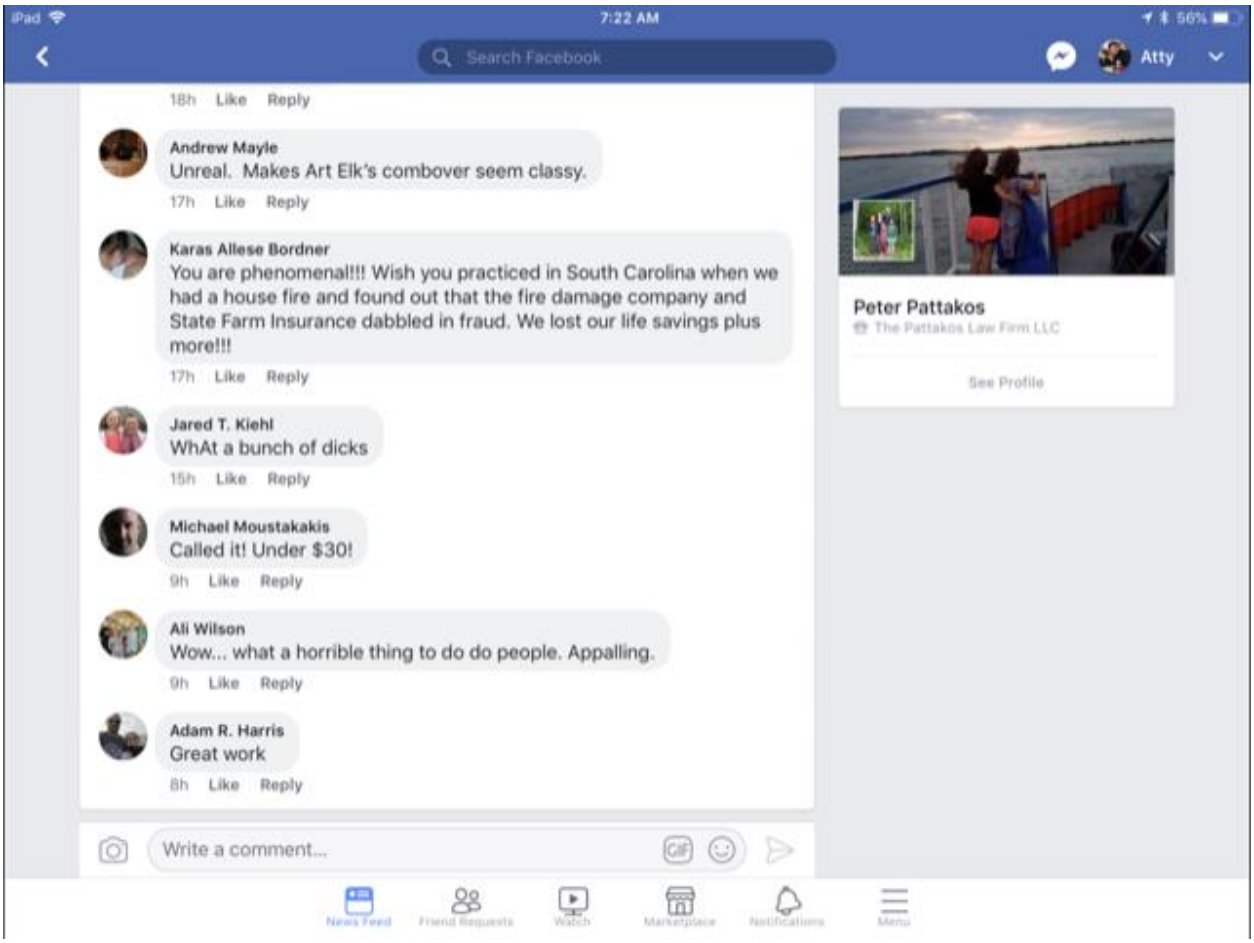
Counsel for Dr. Sam Ghoubrial

CERTIFICATE OF SERVICE

I hereby certify that the foregoing pleading was filed electronically, **this 14th day of September 2018**. Notice of this filing will be sent to all registered parties by operation of the Court's electronic filing system.

/s/James S. Casey
James S. Casey (0062552)



Exhibit

A

exhibitindexes.com #581

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LEDGER

8/6/2018

ACCT# [redacted]

[redacted]

UNIONTOWN, OH 44685

DATE	INVOICE DATE	INVOICE	CARRIER NAME	PRODUCT DESCRIPTION	BILLED AMOUNT	PAYMENT	TRANSFER AMOUNT	BALANCE
3/9/2018	3/13/2018	[redacted]0 1	STATE FARM	INT TENS	$795.00			$795.00
3/9/2018	3/13/2018	[redacted]00 2	STATE FARM	ELECTRODES 2 X 2	$138.00			$138.00
3/13/2018	3/13/2018	[redacted] 1	STATE FARM	ELECTRODES 2 X 2	$552.00			$552.00
3/13/2018	3/13/2018	[redacted] 2	STATE FARM	SKIN COTES	$37.50			$37.50
3/13/2018	3/13/2018	[redacted]00 3	STATE FARM	SHIP/HAND-LRG	$13.85			$13.85
					$1,536.35			$1,536.35

Balance Due $1,536.35