IN THE COURT OF COMMON PLEAS
SUMMIT COUNTY, OHIO

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| MEMBER WILLIAMS, *et al.*,<br><br>Plaintiff,<br><br>vs.<br><br>KISLING, NESTICO & REDICK, LLC, *et al.*,<br><br>Defendants. | Case No. CV-2016-09-3928<br><br>Judge James A. Brogan<br><br>**Plaintiffs' Opposition to Defendants' Motion for a Protective Order Limiting the Scope of Depositions** |

Late yesterday, the KNR Defendants filed a two-page motion for a protective order asking the Court to "limit the scope of depositions sought by Plaintiffs to class certification issues only." In requesting this relief, Defendants do not identify the "class certification issues" in this case or explain how these issues should be separated from merits-based issues, again disregarding controlling Ohio Supreme Court precedent law holding that class certification issues "frequently ... overlap with the merits of the plaintiff's underlying claim." *Cullen v. State Farm Mut. Auto. Ins. Co.*, 137 Ohio St.3d 373, 2013-Ohio-4733, 999 N.E.2d 614, ¶ 18[1]

In their motion, Defendants argue that the Court's July 24, 2018 order "conveyed the Court's intention that ... discovery on [the class certification] issue only should be completed before

[1] Courts nationwide routinely criticize the false distinction between class and merits discovery that the Defendants are asking the Court to draw. *See, e.g.*, *Chen-Oster v. Goldman Sachs & Co.*, 285 F.R.D. 294, 299 (S.D.N.Y. 2012) ("class-related discovery ... often overlaps substantially with the merits."); *In re Riddell Concussion Reduction Litig.*, 2016 U.S. Dist. LEXIS 89120, 2016 WL 4119807, *2 (D.N.J. 2016) ("More often than not there is no 'bright line' between class certification and merits issues."); *In re Plastics Additives Antitrust Litig.*, No. 03-2038, 2004 U.S. Dist. LEXIS 23989 at *9 (E.D. Pa. Nov. 29, 2009) ("[T]he distinction between merits-based discovery and class-related discovery if often blurry, if not spurious."); *Ahmed v. HSBC Bank*, No. ED CV 15-2057 FMO (SPX), 2018 U.S. Dist. LEXIS 2286 at *8-*9 (C.D. Cal. Jan. 5, 2018) (noting that "the distinction between class certification and merits discovery is murky at best and impossible to determine at worst" and collecting cases in support of same). *Tait v. BSH Home Appliances Corp.*, 289 F.R.D. 466, 487 (C.D.Cal.2012) ("[I]t is often easy for a [class-action] defendant to paint a dismal picture of plaintiffs' prospects [when] plaintiffs do not have the benefit of discovery into the merits of a case.").

the parties are forced to expend resources to seek discovery related to the merits of Plaintiffs' allegations." Here, Defendants seemingly overlook the Court's July 30, 2018 order overruling Defendants' objections to more than 140 of Plaintiffs' written discovery requests, including those pertaining to the following subjects:

- KNR's policies and procedures regarding referrals to chiropractors and other health-care providers (Interrogatory Nos. 2-5, 2-6, 2-7, RFA Nos. 2-20–2-24);
- Whether KNR maintains reciprocal referral arrangements with health-care providers (Interrogatory No. 2-8; RFA No. 2-42);
- KNR's policy of ensuring certain health-care providers that they would be paid a certain percentage of their fee for treating KNR clients (RFA No. 20).
- Changes to KNR's policies and procedures in response to the fraud lawsuits by large insurance companies against the Plambeck-owned chiropractic clinics to which KNR routinely directed its clients under the alleged quid-pro-quo relationship (RFA Nos. 3-1, 3-2);
- KNR's policy of paying fees for narrative reports to certain health-care providers, including policies and procedures regarding the solicitation of narrative reports (Interrogatory No. 2-8, 2-11; RFA Nos. 2-26–2-32, 2-34–2-39);
- KNR's development and maintenance of its business relationships with chiropractors (Interrogatory No. 2-15);
- KNR policies and procedures regarding referrals of loan companies to its clients (Interrogatory Nos. 2-31–2-35);
- Whether KNR maintained an exclusive referral relationship with the Liberty Capital loan company and the reasons for this exclusive relationship (RFA No. 2-76, 3-84);
- KNR's practice of sending investigators to client's homes to sign them to fee agreements and charging their clients an "investigation fee" (RFA Nos. 2-7, 2-8, 2-10, 2-15, 2-52);
- The specific type of work performed by KNR's "investigators" for the firm, including that which did not relate to the investigation fee (RFA Nos. 3-4, 3-6);
- KNR's reasons for terminating key witnesses Gary Petti and Robert Horton (Interrogatory No. 2-26, 2-27).

This list, which is only partial, shows the great extent to which class-certification and merits issues overlap in this case. It is also consistent with the position that Plaintiffs set forth in the

briefing on their motion to compel discovery dated February 28, 2018 regarding Civ.R. 23's predominance element, which requires a plaintiff seeking class-action certification to "establish that issues subject to generalized proof and applicable to the class as a whole predominate over those issues that are subject to only individualized proof." *Cullen*, 137 Ohio St.3d 373, ¶ 30. This inquiry focuses upon whether central points of dispute in the case are "capable of resolution for all members in a single adjudication." *Lycan v. City of Cleveland*, 2014-Ohio-203, 6 N.E.3d 91, ¶40 (8th Dist.). Common issues predominate if all class members will "prevail or fail in unison." *Musial Offices v. Cuyahoga Cty.*, 2014-Ohio-602, 8 N.E.3d 992, ¶32 (8th Dist.) Or, in other words, where the "gravamen" of every class members' claim "is the same." *Baughman v. State Farm Mut. Auto. Ins. Co.*, 88 Ohio St. 3d 480, 489, 727 N.E.2d 1265 (2000); As The Supreme Court of Ohio held in *Cullen* (at ¶ 34), this analysis requires courts to "find that questions common to the class *in fact* predominate over individual ones," proof of which can (and here does) "necessarily overlap[] with proof of the merits."

Plaintiffs do not intend to argue that every issue pertaining to the merits of this case also pertains to class-discovery and do not intend to question witnesses on such subjects prior to class-certification. For example, Plaintiffs acknowledge the propriety of the Court's order that Interrogatories No. 3-2 and 3-3, regarding the bank accounts from which KNR Defendants paid the investigation and narrative fee, shall not be answered "until this case has been certified as a class action." *See* July 30, 2018 order at 1.

Rather, Plaintiffs only seek to question a limited set of witnesses on the above-listed and related subjects to show that "questions common to the class *in fact* predominate over individual ones." *Cullen* at ¶ 30 (emphasis in original). In order to establish that all class members will "prevail or fail in unison," Named Plaintiffs intend to show that the putative class members were subject to the same schemes of fraud and self-dealing as the Named Plaintiffs, which requires them to make at

least a preliminary showing that this course of conduct was both fraudulent and undertaken on a firm-wide basis. *Musial Offices*, 2014-Ohio-602, ¶32. The Defendants have not conceded on any of Rule 23's requirements, and have strenuously contested Named Plaintiffs' ability to establish predominance, in particular (as in their motion to strike), denying key facts necessary to establish that common questions predominate as to all of the pending classes of claims.[2]

It is not Defendants' prerogative to dictate to Plaintiff which third-party witnesses have or might have information pertinent to the alleged fraudulent schemes. Defendants have failed to show that the testimony of any of the requested witnesses would be irrelevant to class-certification, they have failed to identify any legitimate or workable boundaries between class and merits discovery in this case, and they have failed to show that setting any such boundaries is necessary or would be productive regarding the limited set of depositions that Plaintiffs seek to conduct prior to class certification briefing. Thus, their motion for a protective order should be denied, in which case and

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[2] As to the investigation-fee class, Defendants have denied Plaintiffs' essential allegations that the fee was an across the board sham, designed by Defendants to pass off their overhead expenses to their clients (*See* KNR's Answer to TAC at ¶ 95); Defendants have denied that the primary purpose of the so-called "investigators" was to solicit clients and sign them to KNR fee agreements as quickly as possible (*See Id.* at ¶¶ 3, 101); and they have further denied that the investigators were essentially KNR employees, who never performed any actual "investigative" work, and only ever performed tasks that were so basic in nature that they were properly subsumed in the firm's contingency fee and in no event chargeable as a separate case expense (*See Id.* at ¶ 95).

As to the narrative-fee class, Defendants have similarly denied that they maintain quid pro quo referral relationships with the chiropractors, and have maintained that the narrative fee was a legitimate charge as opposed to a kickback. *See* Defs' Response to Pls' Interrogatory No. 2–8, attached as Ex. 3 to Pls' Motion to Compel ("Defendants ... have no agreement, including a 'reciprocal referral agreement' with ASC or any Medical Service Provider.").

And as to the Liberty Capital class, Defendants have maintained that they "had no ownership or financial interest in Liberty Capital" and "never received any financial benefit or alleged kickback when KNR clients use Liberty Capital to secure an advance on potential future recovery." Defs' MSJ, Mar. 13, 2018, at 3; *See also* Defs' Motion to Strike (at 29–30) and Defs' responses to Pls' Request for Admission Nos. 85–86 ("[T]his request incorrectly assumes that Liberty Capital Funding and KNR did not have an arms-length relationship. Defendants deny this assumption ... Defendants deny this request because KNR had an arms-length relationship with Liberty Capital Funding.").

in any event counsel for the Defendants and all non-party witnesses will remain free to object and instruct their witnesses not to answer any questions that they believe are clearly irrelevant to class-certification, with such improper objections subject to sanctions under Local Rule 17.02(b)(5).[3]

Respectfully submitted,

*/s/ Peter Pattakos*
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[3] Local Rule 17.02(b)(5) provides that "Counsel shall not instruct a witness not to answer a question except: (A) to preserve a privilege; or, (B) in response to a question that is: (i) not relevant; and, (ii) is not likely to lead to the discovery of admissible evidence; and, (iii) counsel instructing the witness not to answer has a good faith, reasonable belief that his or her position will be sustained by the judicial officer with jurisdiction over the case and can explain in detail and on the record at the time he or she instructs the witness not to answer the basis or bases for the instruction not to answer. If a Motion to Compel, or other similar motion, is filed by the party whose counsel asked the question of the witness and it is ultimately determined by the court that the question at issue shall be answered by the witness, then counsel who advised the witness not to answer the question shall pay the reasonable fees of the examining counsel incurred in obtaining the court's ruling that the question shall be answered."

**Certificate of Service**

The foregoing document was filed on September 26, 2018 using the Court's e-filing system, which will serve copies on all necessary parties.

*/s/ Peter Pattakos*
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