IN THE COURT OF COMMON PLEAS
SUMMIT COUNTY, OHIO

MEMBER WILLIAMS, *et al.*, Plaintiffs, vs. KISLING, NESTICO & REDICK, LLC, *et al.*, Defendants.	Case No. 2016-CV-09-3928 Judge James A. Brogan **Supplement to Plaintiffs' Motion for Class-Action Certification under Civ.R. 23.**

In response to correspondence received from the KNR Defendants on May 17, 2019, Plaintiffs hereby submit the following to briefly address an issue Defendants have taken with Plaintiffs' pending Motion for Class-Action Certification filed on May 15.

Specifically, Defendants have requested that Plaintiffs "correct the record" regarding their request for certification of a class (Class A, "the price-gouging class") that combines two separate classes proposed in the pending Fifth Amended Complaint pertaining to allegedly fraudulent charges for healthcare delivered by Defendant Ghoubrial (the "Tritec medical supplies" and "injections" classes) into one. *See* 05/17/2019 Mannion email attached as **Exhibit 1**.

Plaintiffs have sought certification of the single combined price-gouging class because extensive evidence has been recently revealed (as detailed in the class-certification motion) showing that the fraudulent charges for both the injections and the medical supplies were administered pursuant to a single overarching scheme involving all of the Defendants. Civ.R. 23 does not require plaintiffs to seek certification of classes that are identical to those pleaded in a complaint, or any particular class at all, and Plaintiffs here have merely sought certification of a class that conforms with the evidence as it has been discovered.

The KNR Defendants' problem with this, apparently, is that while the majority of the Injections-class claims—including for fraud, breach of fiduciary duty, and unjust enrichment—were

pleaded against Ghoubrial and the KNR Defendants, the substantially similar Tritec-class claims were only pleaded against Ghoubrial. *See* **Ex. 1**, Mannion email.

To the extent that it is necessary to resolve this issue prior to class-certification, it can be done so in alternative ways, none of which would result in any prejudice to the Defendants:

First, Plaintiffs have, concurrently with the filing of this Supplement, filed a motion for leave to amend their complaint to conform to the recently discovered evidence under Civ.R. 15(A) and (B). The proposed amended pleading tracks the detailed summary of evidence set forth in the class-certification motion, revising and streamlining Plaintiffs' claims accordingly to account for this evidence and the Defendants' corresponding liability based on it. Rule 15(B) was designed precisely to address such circumstances, explicitly allows for amendment "at any time, even after judgment," and further provides that courts should permit such amendments "freely," even "at the trial," "when the presentation of the merits of the action will be subserved thereby." *See also Peterson v. Teodosio*, 34 Ohio St.2d 161, 175, 297 N.E.2d 113 (1973) (because "[t]he spirit of the Civil Rules is the resolution of cases upon their merits, not upon pleading deficiencies," Civ.R.15 must be liberally construed toward permitting such amendment); *State ex rel. Rothal v. Smith*, 151 Ohio App.3d 289, 2002-Ohio-7328, 783 N.E.2d 1001, ¶ 68 (9th Dist.) ("This rule conveys a liberal policy toward allowing amendments where such allowance is not sought in bad faith and does not cause undue delay or prejudice to the opposing party.").

Thus, the Court may simply permit the requested amendment and certify Class A accordingly. Rule 23 does not prohibit certification of a class immediately upon entry of a pleading, and given the extensive discovery conducted and extensive evidence submitted as to all Defendants' liability on the claims at issue, such treatment would be particularly appropriate here. *See* Civ.R. 23(C)(1)(a) (providing that class certification should be determined "at an early practicable time after a person sues or is sued as a class representative").

If the Court decides not to permit the amendment, or does not decide on the motion to amend until after class certification is decided, Class A may still be certified, as requested, on the understanding that—at least until any further amendments to the Complaint are permitted—the KNR Defendants would only be liable on the Class A claims as they pertain to the allegedly fraudulent charges for the injections.

In any event, the bottom line is that no Defendant in this case could possibly be prejudiced by either the amendment of the Complaint or the certification of Class A as Plaintiffs have requested. None of the Defendants, all of whom have been on notice of their own fraudulent scheme since they undertook it in the first place, can seriously suggest that they are now surprised by the prospect of facing liability for it. It would be particularly absurd for the KNR Defendants, having already been sued for allowing their clients to be overcharged for one form of healthcare from Ghoubrial (the injections), to claim unfairness now that extensive discovery has revealed that all of Ghoubrial's charges, including the medical supplies, were unconscionable and part of the scheme too, and that the whole point was to overcharge the clients so as to inflate the Defendants' profits with a minimum of effort. *See*, generally, Motion for Class Certification at pages 2–44. As noted in their pending motion to amend, Plaintiffs have not been dilatory in pursuing their claims, and, to the contrary, are responding to the newly discovered evidence in this case as promptly and straightforwardly as is practicable under the circumstances.

Thus, Plaintiffs have "correct[ed] the record" as Defendants have requested. **Ex. 1**. Any further issues that Defendants may take with the pending motions to amend and for class-certification can be raised in their opposition briefs, and addressed by Plaintiffs on reply as necessary and/or as otherwise instructed by the Court.

Respectfully submitted,

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Certificate of Service

The foregoing document was filed on May 23, 2019, using the Court's electronic-filing system, which will serve copies on all necessary parties.

/s/ Peter Pattakos
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Williams v KNR

Mannion, Tom <Tom.Mannion@lewisbrisbois.com> Fri, May 17, 2019 at 11:09 AM
To: Peter Pattakos <peter@pattakoslaw.com>
Cc: Joshua Cohen <jcohen@crklaw.com>, "James M. Popson" <jpopson@sutter-law.com>, David Best <dmb@dmbestlaw.com>, "Barmen, Brad" <Brad.Barmen@lewisbrisbois.com>

Mr. Pattakos:

As you know, the operative Complaint in this case (Fifth Amended Complaint), only asserted the Class D (Tritec equipment) claims against Dr. Ghoubrial, not against KNR, Nestico, or Redick.

You confirmed this on the record at the deposition of Monique Norris. And - you even stated that Richard Harbour was the ONLY putative class representative who had overlapping claims against Dr. Ghoubrial and the KNR Defendants.

You further clarified that ONLY Richard Harbour had overlap in claims against Dr. Ghoubrial and the KNR Defendants.

MR. PATTAKOS: If you look at claim 11 in the fifth amended complaint and claim 10 -- which ones are these. Okay.
Yeah, claims 10, 11, and 12 are asserted only against defendant Ghoubrial.
MR. MANNION: Okay. Are there only 10, 11, and 12 under class D?
MR. PATTAKOS: And there's 13, I'm sorry, for the unconscionable contract. That is also just against Ghoubrial.

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MR. MANNION: Okay. Just to clarify, all of the class D claims are against Ghoubrial?
MR. PATTAKOS: All of the class --
THE WITNESS: That's what I

EXHIBIT 1

thought --

MR. PATTAKOS: -- D are Ghoubrial only. So it's only Harbour that has the overlap between Ghoubrial and KNR.

The only class allegation alleged jointly against Dr. Ghoubrial and the KNR Defendants related to trigger point injections. Class C, which involved Tritec Equipment, was only against Dr. Ghoubrial. Thus, any claims involving Tritec-supplied back braces or TENS units should not be asserted against the KNR Defendants (or Floros based on the allegations in the Fifth Amended Complaint and your representation at Ms. Norris's deposition). The Fifth Amended Complaint also had no claim for Dr. Ghoubrial's office visit expenses, at least not against KNR.

Yet, in your Motion for Class-Action Certification, you combined the Class D and Class E claims into a putative Class A and include Tritec equipment (TENS units and back braces), office visits, and the cost of kenalog. Specifically:

> All current and former KNR clients who had deducted from their settlements any fees paid to Defendant Ghoubrial's personal-injury clinic for trigger-point injections, TENS units, back braces, kenalog, or office visits, billed pursuant to the clinic's standard rates from the date of its founding in 2010 through the present.

We would ask you to immediately correct the record and advise the Court the Class A claims are ONLY against Dr. Ghoubrial.

Tom

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