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 **Defendants Kisling, Nestico & Redick, LLC, Alberto Nestico and Robert Redick's Brief in Opposition to Plaintiffs' Motion for Class-Action Certification and Appointment of Class Counsel Under Civ. R. 23**

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I. INTRODUCTION

On November 21, 2017, Defendants filed a Motion to Strike Class Allegations based on Plaintiffs' Third Amended Complaint and four (4) proposed classes. The Motion was denied so that further discovery could be conducted. Since then, Plaintiffs have dismissed one of its proposed classes, chosen not to pursue certification of another and added a new proposed class.

Plaintiffs' current Motion for Class-Action Certification and Appointment of Class Counsel under Civ. R. 23 (hereinafter referred to "Pls. Mot.") seeks to certify three (3) separate classes. The first 57 pages of Plaintiffs' Motion are replete with allegations of conspiracies, frauds, omission and misrepresentations. In the end, Plaintiffs' story is comprised of pieces and parts, taken from a multitude of sources, of disparate testimony and evidence. Plaintiffs represent their narrative as if it is shared by entire populations of Class Members, in some instances dating back 14 years. In reality, the accounts of the four (4) Class Representatives and former KNR attorneys, not only fail to outline evidence common to all Class Members, but make obvious that the proceeding that Plaintiffs propose is exactly what a class action is not – different proof for each Class Member without any single adjudication acting in a representative capacity to resolve an issue for the entire Class.

II. ALLEGED FACTS AND CLARIFICATION

Defendants' fact section is not an attempt to respond to every allegation made by Plaintiffs, but rather to outline the evidence necessary for the Court to address issues of class certification. Plaintiffs have devoted the majority of their Motion, not to class certification but rather, to the integrity, ethics and practices of KNR. There is already significant evidence in the record and more that could be provided to refute these allegations, but Defendants do not intend to turn this Motion into a contest on the merits. The issue before this Court is the propriety of Class Certification.

Of note is that the majority of Plaintiffs' factual allegations come from affidavits and the testimony of four (4) former KNR attorneys: Gary Petti, Robert Horton, Kelly Phillips and Amanda Jo Lantz. All four (4) of these attorneys were terminated by KNR prior to the initiation of this litigation. Mr. Horton is a personal friend of Plaintiffs' counsel, and the other three (3) former attorneys contacted Plaintiffs' counsel in response to their solicitations through social media (Facebook, Twitter, email chains and press releases).

A. Factual Allegations Relating to the Price Gouging Class (A).

Plaintiffs' Price Gouging Class alleges that KNR clients paid exorbitantly inflated prices for medical treatment and equipment provided by Defendant Sam Ghoubrial for the period beginning 2010 to the present. Pls. Mot. p. 44. Plaintiffs' Price Gouging Class is thus centered on an alleged conspiracy resulting in unreasonable charges for medical care and devices prescribed by Dr. Ghoubrial. Plaintiffs are intending to hold KNR responsible for Dr. Ghoubrial's treatment and charges, pursuant to this alleged conspiracy.

Critical to Plaintiffs' claims is an understanding of the relationship between Dr. Ghoubrial and KNR. Dr. Ghoubrial formed his pain management practice taking referrals from chiropractors before he ever met anyone from KNR. **Exh.** N, Nestico Aff. KNR rarely refers clients to Dr. Ghoubrial. **Exh.** N, Nestico Aff. KNR refers clients to over a dozen chiropractors, who in turn refer a small percentage of their patients to Dr. Ghoubrial. **Exh.** N, Nestico Aff. Dr. Ghoubrial is referred patients by over 30 chiropractors throughout Ohio. **Exh.** O, Ghoubrial Aff. He has treated patients represented by more than 50 attorneys. **Exh.** O, Ghoubrial Aff. During the class period, less than 15% of KNR clients were treated by Dr. Ghoubrial. **Exh.** N, Nestico Aff.

Once a KNR client agrees to treat with a chiropractor, the course of treatment is determined by the chiropractor. **Exh.** D, Nestico Tr. p. 401; **Exh.** B, Petti Tr. p. 58; **Exh.** A, Phillips Tr. p. 147; **Exh.** P, Floros Aff. Each chiropractor, based upon the patient's physical condition, history and clinical needs, makes an independent determination as to the patient's treatment plan. **Exh.** P, Floros Aff. A small percentage of Dr. Floros' patients are referred to Dr. Ghoubrial. **Exh.** P, Floros Aff. KNR plays no role in the decision as to whether or not an individual chiropractor refers a patient to Dr. Ghoubrial. **Exh.** N, Nestico Aff.

Dr. Ghoubrial, in addition to himself, has employed as many as five (5) different physicians over the class period. **Exh.** O, Ghoubrial Aff. The patients' course of care, treatment and medical needs, are determined by each physician based upon the patient's history, injuries and clinical examination. **Exh.** L, Ghoubrial Tr. pp. 65-69; 120-121. KNR has no role in determining the specific treatment prescribed to any patient. **Exh.** O, Ghoubrial Aff. KNR plays no role in setting or determining the initial amounts charged by Dr. Ghoubrial for care, treatment, medical devices or therapies. **Exh.** O, Ghoubrial Aff.

KNR's relationship to Dr. Ghoubrial, like that of nearly 50 attorneys throughout Ohio, stems from the fact that they represent a fraction of his patients. In that role, KNR negotiates and discounts the treatment amounts charged by Dr. Ghoubrial to their clients. The vast majority of Dr. Ghoubrial's medical charges are reduced by KNR. **Exh.** N, Nestico Aff. The discounted reimbursement, which is agreed to by Dr. Ghoubrial, ranges from 98% to 0%. **Exh.** N, Nestico Aff. During certain times in the class period, the reimbursement determination and negotiation with Dr. Ghoubrial was conducted by individual KNR lawyers. **Exh.** N, Nestico Aff.; **Exh.** W, Angelotta Aff.; **Exh. X**, Zerrusen Aff. At other times, this function was handled by Defendant, Attorney Alberto Nestico. **Exh.** N, Nestico Aff.

A central allegation in the Price Gouging Class is Plaintiffs' claim of the existence of an unlawful *quid pro quo* referral scheme between KNR and chiropractors. Approximately one-third of KNR's business comes from chiropractors; one-third from marketing and one-third from client referrals. **Exh.** N, Nestico Aff. Over the class period, KNR has referred clients to well over 100 different chiropractors. **Exh.** N, Nestico Aff. Its lawyers also refer clients to various different physicians. **Exh.** N, Nestico Aff. Referrals are made to chiropractors because some patients do not have physicians; others have physicians who will not treat injuries resulting from automobile accidents; and because KNR believes that chiropractic treatment enhances the settlement value of a client's claim. **Exh.** N, Nestico Aff.

There is no issue that KNR kept track of which clients were sent to which chiropractors. KNR keeps records of all sources of business. The purpose was to keep positive relations with chiropractors. However, who an individual lawyer sent a client to was based upon a discussion with the client, the needs of the client and what was in the best interest of each case. **Exh.** E, Gobrogge Tr. pp. 234-239, 246; **Exh.** B, Petti Tr. pp. 241-242. Brandy Gobrogge testified that they sent clients to chiropractors that sent them business and to chiropractors that did not send them business. **Exh.** E, Gobrogge Tr. p. 237. In summing up KNR's approach, she stated:

> So given the choice, if I had chiropractor A on one side of the street and Chiropractor B on the other side of the street, and we'll say that they were both good doctors. I had met with both of them. I knew both of them. Chiropractor A sent us cases, sure. I'd prefer to send over to A – that doesn't mean B wouldn't get any referrals from us.

Exh. E, Gobrogge Tr. p. 237.

B. Factual Allegation Relating To The Narrative Fee Class (B).

The allegations underlying the proposed Narrative Fee Class are that the fees paid by KNR to "preferred chiropractors", for the provision of a patient-specific narrative report, are

nothing more than "kick-backs". Pls. Mot. p. 44. What Plaintiffs' allegation ignores is that KNR pays a fee to all chiropractors and doctors that provide narrative reports – not just those that Plaintiffs have identified as "preferred chiropractors". **Exh.** Q, Major Aff. KNR is no different than attorneys throughout Ohio that have been paying narrative report fees for decades. Plaintiffs' suggestion that KNR attorney, Rob Nestico, "invented" the narrative report ignores 50 years of history. Pls. Mot. p. 49.

KNR believes that narrative reports are of value in settling the cases of their clients. **Exh. D**, Nestico Tr. pp. 279-283; 285-288. As a result, the policy was and remains to request reports on all cases unless the attorney determines that a report is not necessary. **Exh.** D, Nestico Tr. p. 313. Reports are generally not requested in cases of minors or other clients who have had minimal treatment. **Exh.** D, Nestico Tr. pp. 313-319. KNR Managing Partner and a Defendant in this case readily admitted that it is the "default" policy to request narrative reports unless the facts of treatment and extent of injuries dictated otherwise. **Exh.** D, Nestico Tr. pp. 313-319.

Despite Plaintiffs' representations, narrative reports are not requested until after the client has finished treatment and are not paid for until after they are received. **Exh.** D, Nestico Tr. pp. 278-279. Plaintiffs have highlighted three (3) KNR documents indicating that certain chiropractors are paid "automatically" upon receipt of the narrative report. Pls. Mot. pp. 45-46. From these, Plaintiffs claim that these are the only chiropractors that are paid for their narrative reports. Pls. Mot. p. 45. Testimony and internal documentation of payments to chiropractors and doctors refute this claim. KNR pays every chiropractor or physician that provides a narrative report. **Exh.** Q, Major Aff. This is not an issue.

What is most relevant to the issue of class certification is the irrefutable fact that the treatment of each Class Member was different; the content of each narrative report varies and thus, the value of each narrative is different.

C. Factual Allegations Relating To The Investigative Fee Class (C).

Plaintiffs seek to recover the standard $30-$100 fee charged by KNR to clients for investigative services. The fee is fixed regardless of the services provided. It is charged pursuant to the client contract that allows for the deduction of "reasonable expenses" from the client's settlement or judgment.

Investigators who provide services to clients are not employees of KNR. Investigators own the car they use, pay for their own gas and do not receive health insurance or any other type of benefit (vacation time, retirement). **Exh.** Z, Czetli Tr. pp. 41-42. Some investigators do work for other personal injury law firms or perform security services for other clients. **Exh.** S, Monto Aff.; **Exh.** T, Hillenbrand Aff. At various times, between 10-12 investigators provided services. **Exh.** N, Nestico Aff. Some are separately incorporated businesses. **Exh.** Z, Czetli Tr. pp. 8-9; **Exh.** AA, Simpson Tr. pp. 12-13. Four of the investigators are retired police officers. **Exh.** N, Nestico Aff.

KNR investigators do travel to the homes of some clients to obtain signatures on contracts, authorizations and collect basic information. This is not an issue. Additionally, they provide a variety of services including taking accident scene photos; obtaining property damage photos at body shops; taking photographs of client injuries; obtaining medical records and bills; locating witnesses; delivering and obtaining documents from clients; locating clients who were not responding; filing pleadings at various courthouses; timing and documenting traffic light sequences; seeking out available video surveillance and other additional tasks as needed. **Exh.**

D, Nestico Tr. p. 629; **Exh.** AA, Simpson Tr. p. 17; **Exh.** Z, Czetli Tr. p. 30-33; **Exh.** S, Monto Aff.; **Exh.** T, Hillenbrand Aff.; **Exh.** U, Fisher Aff.; **Exh.** V, Webb Aff.

Plaintiffs seek to recover all investigative fees notwithstanding the type or extent of services provided.

III. LEGAL ANALYSIS AND ARGUMENT

A. In Order To Certify A Class, Plaintiffs Must Satisfy The Requirements Of Ohio Civil Rule 23.

The Supreme Court of Ohio has defined the prerequisites to class certification contained in Ohio R. Civ. P. 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, 780 N.E.2d 556, ¶6 (2002).

Ohio R. Civ. P. 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 R. Civ. P. 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, 999 N.E.2d 614, ¶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.

B. The Price Gouging Class Fails To Satisfy The Predominance Requirement Of Ohio Civil Rule 23(B)(3).

Plaintiffs' Proposed Price Gouging Class is identified as follows:

> 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.

Pls. Mot. p. 44.

To evaluate whether the predominance requirement can be satisfied for Plaintiffs' Price Gouging Class, it is critical to understand the allegations underlying this Class. Plaintiffs' allegations are not that of "price gouging" but rather a "price gouging scheme" or "conspiracy". Pls. Mot. pp. 9, 10, 11, 75, 76. It is not against one Defendant, but all Defendants. It is not three individual claims, but rather the combination or concert of actions that Plaintiffs' claim amounts to a "conspiracy". To establish predominance, Plaintiffs must convince this Court that there exists a set of evidentiary facts that would establish the existence of the alleged conspiracy that affected each Class Member. Plaintiffs concede their obligation to establish that in a "single adjudication", all Class Members were victims of the conspiracy which they specifically describe. Pls. Mot. p. 74.

Most important, simply because Plaintiffs can establish the existence of a conspiracy, or even a conspiracy as to some Class Members, does not mean that the conspiracy involved all Class Members. A conspiracy as to some does not make it common to the Class. Plaintiffs must, and in fact, claim that they can establish a body of common evidence whereby "Class Members will prevail or fail in unison." Pls. Mot. p. 75. **Such a claim is undermined by Plaintiffs' own outline of the common issues presented by the Price Gouging Class**. Pls. Mot. pp. 67-68.

Plaintiffs' list of common **issues** does not by itself satisfy the predominance requirement. The necessary analysis is whether there is **evidence or proof**, common to all Class Members, that allows a single adjudication to resolve the issue for all Class Members. The ability to set forth a laundry list of common questions therefore does not answer 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, 131 S.Ct. 2541, 180 L.Ed.2d 374 (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, common 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 us plaintiffs indeed work for Wal-Mart? Do our managers have discretion over pay? Is that an unlawful employment practice? What remedies should we get? Reciting these questions is not sufficient to obtain class certification.
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> 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 v. Avco Corp.*, 15 Ohio St.3d 310, 314, 473 N.E.2d 822 (1984), 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.

Plaintiffs do not disagree with this required analysis that looks for "common proof" and not just "common questions". In fact, Plaintiffs admit that "the legitimacy of all three classes of charges will depend upon '**generalized proof' of their true nature that applies across the board, without variation** from Class Member to Class Member." Pls. Mot. p. 75. (Emphasis added).

In acknowledging that "common proof" is essential to the establishment of predominance, Plaintiffs cite long-standing Ohio law: "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.**" *Cullen v. State Farm Mut. Auto. Ins. Co.*, 137 Ohio St.3d 373, 379, 999 N.E.2d 614 (2013) (Emphasis added). "When there exists **generalized evidence** which proves or disproves an element on a simultaneous, class-wide basis, such proof obviates the need to examine each Class Member's individual position." *Cope v. Metro Life Ins. Co.*, 82 Ohio St.3d 426, 432, 696 N.E.2d 1001 (1998); *Baughman v. State Farm Mut. Auto. Ins. Co*., 88 Ohio St.3d 480, 489, 727 N.E.2d 1265 (2000) (Emphasis added); "Cases that involve a scheme and common misrepresentations or omissions across the Class are particularly subject to **common proof.**" *Cantlin v. Smythe Cramer Co.,* 2018-Ohio-4607, ¶21 (8th Dist. 2018), *citing Cope*, 82 Ohio St.3d 426 and *Baughman*, 88 Ohio St. 3d 480. (Emphasis added). "When considering the predominance requirement, the

Supreme Court has found that it will be satisfied 'when there exists **generalized evidence** which proves or disapproves an element on a simultaneous class-wide basis…'" *Carder v. Buick-Olds Co. v. Reynolds and Reynolds*, 148 Ohio App.3d 635, 642, 775 N.E.2d 531, 537 (2nd Dist. 2002) (Emphasis added) (Citations omitted). Thus, there is no issue before this Court that Plaintiffs must establish "common proof" that would determine liability for all Class Members in a single adjudication. The existence of common issues is not sufficient.

Of particular relevance to the present matter is the requirement that all Class Members were the subject of the wrongful conduct. Predominance is not established when some Class Members were not subjected to the alleged misconduct. In the case of *Petty v. Wal-Mart Stores, Inc.*, 148 Ohio App.3d 348, 2002-Ohio-1211 (2nd Dist. 2011), the Plaintiffs sought to certify a class based on an alleged practice where employers were pressured to work off the clock. In holding that the Plaintiffs could not satisfy the predominance requirement, the Court noted that the Class definition included employees who "were not exposed to the alleged conduct of Wal-Mart". *Id.* at 352. The court stated:

> *Petty* later defined the class as including all 174,000 past and present Ohio Wal-Mart employees. Although this definition was not set forth in the complaint or the motion for certification filed by *Petty*, it was addressed by the trial court, which found that this definition must also fail because it is clear from the evidence that not all the putative class members were required or permitted to work off the clock or miss meal breaks.
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> **As defined, the persons who were exposed to the conduct would be a subset of the class rather than the class**. If this type of class were permitted, plaintiffs would be able to define a class as broadly as possible in the hope of netting a certain percentage of injured members. This practice would render the class action vehicle unduly cumbersome, and ultimately ineffective. Without a definition of the class related to the plaintiff's theory of recovery, the trial court would have to conduct individualized inquiry with respect to each individual's exposure to the alleged conduct of Wal-Mart in order to determine whether that individual

> was the subject of tortious conduct by Wal-Mart, which would obviate the purpose of class actions.

Id. at 354 (Emphasis added).

To support its position, the Court in *Petty* cited two Supreme Court opinions outlining the requirement that there exists "common evidence" across the "entire class" in order to establish predominance: *Baughman, supra* and *Cope, supra*. As required by the holding in *Petty*, it will be shown that Plaintiffs have failed to establish that each Class Member was the subject of the "tortious conduct" alleged in the Price Gouging Class.

Similar to the requirement that all Class Members were subjected to the wrongful conduct is the requirement that all Class Members suffered some damage. A proposed class where some class members have been harmed, while others have not, lacks predominance. In *Felix v. Ganley Chevrolet, Inc.,* 145 Ohio St.3d 329, 2015-Ohio-3430, 49 N.E.3d 1224 (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 member), 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.2d 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.
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> 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, 2003-Ohio-301,784 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)[1]; *Linn v. Roto Rooter, Inc.,* 2004-Ohio-2559, 2004 Ohio App. LEXIS 2274 (8th Dist. 2004), (denying class certification where some class members were not damaged because they "received more in value than the amount of miscellaneous supplies charged").

The case of *Konarzewski 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).

With respect to the Price Gouging Class, the Court need look no further than Plaintiffs' own articulation of the "common issues" to conclude that there is no evidence "common to the entire Class" to adjudicate the issues outlined by Plaintiffs. Each issue highlights the inability of Plaintiffs to establish that each Class Member was subjected to the alleged wrongful conduct.

[1] 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* and *Felix, supra.*

Each issue makes clear that not all Class Members were harmed by the alleged wrongful conduct. The jury in every instance would need to review the evidence of each Class Member. Such a proceeding is exactly what a class action is not.

1. Issue No. 1 Identified by Plaintiffs – Price Gouging Class

The first common issue related to the Price Gouging Class outlined by Plaintiffs is as follows:

> Did KNR unlawfully conspire with chiropractors to solicit clients and direct their treatment pursuant to a routinized course of care calculated to maximize the Defendants' profits?

Pls. Mot. p. 67.

This first issue identified by Plaintiffs involves the allegation of an "unlawful conspiracy". As outlined above, it is not enough to establish that the conspiracy potentially or actually affected some Class Members. Rather, to satisfy the predominance requirement, Plaintiffs must show that all of the Class Members were "unlawfully solicited" by an alleged conspiracy. *Petty, Cope, Cullen, Baughman, and Felix, supra.* As stated in *Musial Offices Ltd. v. County of Cuyahoga,* 8 N.E.3d 992, 2014-Ohio-602 at ¶32 (8th Dist. 2014) and quoted by Plaintiffs, predominance exists "if **all** Class Members will 'prevail or fail in unison'". (Emphasis added).

The evidence of unlawful solicitation as to each Class Member is not common. Some Class Members came to KNR as former clients, without any solicitation by KNR or any chiropractor. These Class Members could not be the victims of an unlawful conspiracy to solicit. Some Class Members were referred to KNR as family members of KNR employees - again, without solicitation, let alone an unlawful conspiracy. Other Class Members were solicited through a KNR advertisement and became KNR clients without involvement of any chiropractor.

Some Class Members were directly solicited by Dr. Floros via a telephone call without any involvement of Dr. Ghoubrial or KNR.

The Court need look no further than the proposed class representatives to understand the different methods of solicitation that brought a Class Member to KNR. Dr. Floros is the only chiropractor identified as part of the solicitation conspiracy. Yet, he had no involvement in five (5) of the seven (7) KNR cases pursued by the four (4) Class Representatives. **Exh.** N, Nestico Aff. Class representative Thera Reid was referred to KNR by Akron Square Chiropractors. **Exh.** F, Reid Tr. p. 101. Richard Harbour was represented by KNR on four (4) different occasions and originally came to KNR because of radio advertisements. **Exh.** G, Harbour Tr. p. 22. Monique Norris was recommended to KNR, either by her aunt, Carolyn Holsey, or by her uncle. **Exh.** H, Norris Tr. p. 16; **Exh.** DD, Holsey Tr. pp. 82-83. Member Williams was related to a KNR secretary by marriage. **Exh.** J, Williams Tr. p. 65. Former Class Representative Mathew Johnson was referred to KNR by his roommate's father. **Exh.** BB, Johnson Tr. p. 151. The methods of solicitation or instances of no solicitation that led a client to KNR are limitless.

Plaintiffs' first issue simply asks "Did KNR unlawfully conspire **with chiropractors** to solicit clients..." Pls. Mot. p. 67. (Emphasis added). To address this issue on a class-wide basis, first it would need to be determined whether each Class Member treated with any chiropractor and then the identity of the chiropractor would have to be established. Some Class Members did not treat with any chiropractor, yet they are within the Class definition. Evidence for each identified chiropractor would have to be presented to determine if they were involved with a KNR conspiracy to solicit. The adjudication of whether a solicitation conspiracy existed between KNR and Chiropractor "A", who treated certain Class Members would not adjudicate the issue for Class Members who treated with Chiropractor "B", "C" or "D". KNR has referred

Class Members to over a dozen chiropractors throughout Ohio over the eight (8) year class period. **Exh.** N, Nestico Aff. Plaintiffs have not even attempted to establish a common scheme among the many unidentified chiropractors and KNR. There is a total lack of evidence that all Class Members were "subjected" or "exposed" to the wrongful conduct as required by the *Petty* court.

The heart of Plaintiffs' allegation of an unlawful conspiracy to solicit Class Members is the claimed existence of a *quid pro quo* relationship between KNR and chiropractors. Pls. Mot. p. 11. Plaintiffs have outlined evidence of various referral relationships between KNR and certain chiropractors that they claim are *quid pro quo* relationships. Pls. Mot. pp. 12-14. Whether these relationships amount to an "unlawful conspiracy" is a question left for a merits determination. What is relevant to class certification is whether these relationships existed with the **unidentified chiropractors** that treated Class Members. As outlined above, Plaintiffs do not even identify all of the chiropractors that were allegedly involved in this unlawful conspiracy, let alone prove that the *quid pro quo* relationships existed on a class-wide basis.

One of the health care providers allegedly involved in a *quid pro quo* relationship is Dr. Ghoubrial. Pls. Mot. p. 11. With respect to Dr. Ghoubrial, former KNR attorneys testified:

- **Robert Horton,** who practiced at KNR for three (3) years, did not remember ever referring a client to Dr. Ghoubrial. **Exh.** C, Horton Tr. pp. 125-126;
- **Kelly Phillips**, who practiced at KNR and handled approximately 500 cases, did not ever refer a client to Dr. Ghoubrial. **Exh.** A, Phillips Tr. pp. 164-165;
- **Gary Petti**, who practiced at KNR from March 2012 to November 2012, never referred a client to Dr. Ghoubrial. **Exh.** B, Petti Tr. pp. 414-415;
- **Amanda Jo Lantz**, who handled over 800 cases while an attorney at KNR, testified that in order to know how a client got to Dr. Goubrial, you would have to review the individual files. **Exh.** K, Lantz Tr. p. 16.

At the very least, Dr. Ghoubrial was not involved in a *quid pro quo* with KNR. This alone negates the existence of a class-wide practice.

Apart from Dr. Ghoubrial, the testimony of KNR attorneys regarding chiropractor referrals evidences the non-existence of a class-wide *quid pro quo* practice. Plaintiffs place considerable weight on the testimony and emails of KNR Office Manager, Brandy Gobrogge, where she directs attorneys to make referrals to specific chiropractors. Pls. Mot. p. 12 citing six (6) Gobrogge emails. Plaintiffs argue that these directives by Gobrogge are KNR's side of the *quid pro quo*. Pls. Mot. p. 12. In practice, however, KNR attorneys did not abide by her orders. KNR Attorney Kelly Phillips testified:

> ***Q.*** *And you didn't let her tell you how to do it, did you?*
> ***A. No, sir. I did not.***
> ***Q.*** *You exercised your own judgment?*
> ***A. Where she was concerned, certainly***
> ***Q.*** *Now, you don't know the reason that she would send these e-mails out about directing to certain chiropractors, do you?*
> ***A. I have no idea why, no.***
> ***Q.*** *Did you know that it was to spread the work out so they weren't working just one or two people?*
> ***A. I have no idea. Like I said, I was only told -- my specific instructions, when I started there were, all cases are to go to Town & Country, unless otherwise advised.***
> ***Q.*** *But that's not how you operated?*
> ***A. Not once I entrenched myself a little bit, no.***
> ***Q.*** *Well, you never sent somebody to Town & Country that you thought did not need chiropractic treatment, did you?*
> ***A. No. If they did not need chiropractic treatment, no.***

Exh. A, Phillips Tr. pp. 185.

Gary Petti testified similarly:

> ***Q.*** *And you talked some about we saw e-mails from Brandy and Megan, but I think what you said was you didn't let them tell you how to practice law, fair?*
> ***A. That is fair. I'm not listening to them.***
> ***Q.*** *Okay. You handled your cases the way you felt a lawyer should handle the case, true?*
> ***A. That is true.***
> ***Q.*** *And you followed your professional duties, true?*
> ***A. Yes.***

Q. And what you did is what you thought was in the client's best interest, true?
A. True.
Q. And, in fact, whether you sent them to a chiro or a medical doctor or whatever it is or just kept them with who they were, that was based on each individual conversation with each individual client, fair?
A. Fair.

Exh. B, Petti Tr. pp. 241-242.

The directives of Brandy Gobrogge, that figure so predominantly in Plaintiffs' claims, cannot establish a class-wide *quid pro quo* practice, where two of KNR's attorneys testified that they did not follow her directions. Whether every other KNR attorney, dating back eight (8) years, followed office directives for every Class Member would necessitate individual investigation.

In a further attempt to make the alleged *quid pro quo* practice appear to be class-wide, Plaintiffs make the unsupported statement "If the clients come to KNR directly, the firm immediately directs them to treat with one of the so-called 'preferred' chiropractors…" Pls. Mot. p. 12. Despite Plaintiffs' assertion, this was not a class-wide practice. KNR attorney Phillips testified as follows:

Q. But, as far as how you handled that individual case, each individual case was a little different, fair?
A. Yeah, other than, you know, where I was required to send people for treatment. That was directed to me.
Q. I thought you said you didn't follow those directions?
A. Yeah, I didn't follow – not towards the end, no, I didn't follow those directions. I would send people, based on my discussion with them, what treatment I felt fit them best.

***

Q. And, you did that, didn't you?
A. If they said they needed treatment, I would tell them what doctors we had available, that we knew and dealt with, and if they were comfortable with that, I would send them there.

Exh. A, Phillips Tr. pp. 161-162.

KNR Attorney Petti testified:

Q. So those decisions on who you would refer the client to as far as medical care or chiropractic care, would depend on the conversation with the client?
A. Yes.
Q. Because that's not necessary, especially in the 513 area code, you're not going to send him to Dr. Floros, correct?
A. No. 513 would have been what, the Cincinnati guys down there, Werkmore.
Q. But even if it was Akron, that's a guy that you probably would have sent to a medical doctor instead?
A. Me personally, yes.
Q. Okay.
A. Like I said, that was always my first preference was let them do their own health insurance, if possible. If they have a relationship with a doctor, that's what I want to do.
Q. And that's how you handled cases even at KNR, true?
A. Yes

KNR Attorney Petti also testified:

Q. And, in fact, whether you sent them to a chiro or a medical doctor or whatever it is or just kept them with who they were, that was based on each individual conversation with each individual client, fair?
A. Fair.

Exh. B, Petti Tr. pp. 241-242.

KNR Attorney Horton testified:

Q. You would have had a discussion with them about the types of potential care, and you and the client together would talk about who they would go see, fair?
A. Yes.
Q. It's the same thing you do today, basically?
A. Yes.

***

Q. So generally speaking, though, it's the same thing you do today?
A. I help my, I help my clients get the care that they need.
Q. And that's what you were doing at KNR?
A. Yes.
Q. You were helping them get the care they needed, true?
A. Yes

Exh. C, Horton Tr. pp. 50-51.

Based on this testimony, there is only one conclusion that can be reached – not all Class Members were subjected to the alleged *quid pro quo* practice. It was not a class-wide occurrence. In addition to the individualized nature of their referrals, Attorneys Horton and Phillips both testified that they knew of no *quid pro quo* agreements with any chiropractors. **Exh.** C, Horton Tr. p. 104; **Exh.** A, Phillips Tr. p. 183. If any unlawful *quid pro quo* relationships did exist, the evidence does not support a class-wide practice.

There is not a common set of facts that could be presented at a single proceeding to adjudicate for all Class Members the issue identified by Plaintiffs of whether "KNR unlawfully conspired with chiropractors to solicit clients…" The methods of solicitation or instances of no solicitation that led a client to KNR are limitless. Even if an unlawful *quid pro quo* relationship existed with some chiropractors there is no evidence it existed with all chiropractors that treated Class Members. The testimony of KNR attorneys documents that at least two (2) attorneys did not always participate in the alleged *quid pro quo* practice. This alone negates the existence of a class-wide practice that is the gravamen of Plaintiffs' unlawful solicitation claim.

The second part of Plaintiffs' first common issue asks whether "KNR unlawfully conspired with chiropractors to direct their [Class Members] treatment pursuant to a routinized course of care…" Underlying this issue is Plaintiffs' claim that Class Members were not just "directed", they were "pressured" to accept the care of Dr. Ghoubrial:

> To exploit and sustain its settlement mill, KNR conspires with its "preferred" medical providers to defraud its clients with a price gouging scheme for healthcare that the clients are **pressured** to accept…

Pls. Mot. p. 10. (Emphasis added). See also Pls. Mot. p. 15. (KNR and certain chiropractors direct clients to Dr. Ghoubrial "whose services the clients are also **pressured** by the Defendants to accept".) (Emphasis added).

Here too, there is no common proof to address this issue for all Class Members. Not all, if any, Class Member was directed or pressured regarding their health care. In many instances, Class Members never treated or saw Dr. Floros, the only chiropractor named as a Defendant. Thus, he could not possibly have conspired to direct any aspect of these Class Members' treatment. This portion of the Class would need its own adjudication. What the unidentified chiropractors did or did not do to direct Class Members' treatment would be subject to evidence specific to that chiropractor and his Class Member patients. Additionally, some Class Members were treated by Dr. Ghoubrial before becoming KNR clients. In those instances, KNR could not have directed the Class Members' treatment with or by Dr. Ghoubrial because the treatment occurred before they became KNR clients.

The testimony of Class Representative Thera Reid contradicts Plaintiffs' representation that clients were "pressured":

> ***Q.*** *And your answer to Interrogatory No. 29, it indicates "pressuring clients into unwanted and unneeded chiropractic care." And, you've already told us they didn't do that to you. Do you know anybody they did do that to?*
> ***A. I'm unsure.***
> ***Q.*** *Why would you sign something saying that they pressured clients into unwanted and unneeded chiropractic care if you didn't know?*
> ***A. I was talking to my attorney.***

Exh. F, Reid Tr. pp. 240-241.

The testimony of the former KNR attorneys further highlights the lack of a conspiracy, let alone a class-wide "conspiracy" to "direct" or "pressure" Class Members regarding their treatment.

Attorney Phillips testified:

> ***Q.*** *The decision is made between the physician and the patient, correct?*
> ***A. In most circumstances, yes.***
> ***Q.*** *You don't tell clients what treatment to get, do you?*
> ***A. I do not.***

Q. You've never done that, have you?
A. I have not, no.
***
Q. And, you never once at KNR forced somebody to go to a chiropractor, did you?
A. No.
Q. You wouldn't do that, would you?
A. No.
***
Q. Right. You didn't tell them to take injections they didn't need, did you?
A. I did not, no.
Q. And, if they weren't helping, tell them, "Well, don't do them?"
A. That is correct.
Q. And, you weren't told by KNR, or anybody, "No, even if it doesn't help, keep getting injections." Nobody told you that.
A. Nobody told me to tell them that, no.
Q. You wouldn't have done that anyway, would you?
A. I would not have done that.

Exh. A, Phillips Tr. pp. 147; 163-164; 252-253.

Attorney Horton testified:

A. I think the affidavit says I didn't refer her to one, *that's accurate. Yeah, it says "Neither KNR nor I requested Member Williams to treat with any chiropractors as a result of the accident." Yeah, I don't --*
Q. You never referred her to any physician, true?
A. I don't think so, no. To the best of my knowledge I would say that's true.
Q. And it wasn't because she was a friend of anyone at the firm, it's because you had to make a decision with Member Williams on what was best for her and her case, true?
A. Yes.
Q. You didn't treat her different than you would have somebody else who came in that you didn't know, true?
A. True
***
Q. And you certainly never forced anybody to use a specific chiropractor, true?
A. Never forced anyone.
Q. You might have recommended somebody or referred somebody, true?
A. Yes.
Q. But you never said "No, this is your only choice, you have to go here or I'm not going to take your case," anything like that, true?
A. True.
Q. Never forced that, true?
A. True.

Exh. C, Horton Tr. pp. 47-48; 96.

Attorney Petti confirmed that he did not direct or pressure clients with respect to their treatment:

> *MR. PATTAKOS: Well, I mean that the KNR attorneys were suppose to instruct the client to follow.*
> ***A. Oh, no. No. The clients -- we didn't tell the client how many treatments to go to or anything like that. Just go, do whatever your doctor tells you to do. Don't miss appointments. Keep going until he says you're done or she says you're done, whatever the case may be.***
> ***
> ***Q.*** *But my question is: You wouldn't do that if they didn't want chiropractic care, would you?*
> ***A. You wouldn't ask. If they said, hey, I don't want to go to a chiropractor, I wouldn't send them to one.***
> ***Q.*** *You never forced a client at KNR to get unwanted health care, did you?*
> ***A. I would never have, no.***
> ***
> ***Q.*** *You never got a call at KNR while somebody was at the chiropractors and said, hey, um, the doctor says this many visits over this many times, what do you think?*
> ***A. Maybe that kind of thing could have happened.***
> ***Q.*** *What would you say?*
> ***A. It's up to you and the doctor --***
> ***Q.*** *Okay.*
> ***A. -- keep me out of it.***
> ***
> ***Q.*** *Did you ever get any calls from Ghoubrial's office saying, hey, the doctor says I should get injections, should I?*
> ***A. No, Ghoubrial would never speak with me.***
> ***Q.*** *Well, I mean, I'm talking about whether or not the client called. Did you ever get that kind of call?*
> ***A. It's possible.***
> ***Q.*** *You don't remember any?*
> ***A. No, I don't.***
> ***Q.*** *You would have told them the same thing, that's between you and the medical doctor?*
> ***A. Yes, I would have.***

Exh. B, Petti Tr. pp. 58; 190-191; 344-345.

As alleged, there may be some Class Member who was "pressured" by a KNR attorney and some chiropractor to undergo an unnecessary "routinized course of care" by Dr. Ghoubrial. The testimony, however, of the three (3) KNR attorneys, brought to this case by Plaintiffs and a Class Representative, makes it clear that this allegation was not a class-wide practice. As

acknowledged by KNR former attorney Lantz, you "would have to pull that file" to see how a client ended up with Dr. Ghoubrial. **Exh.** K, Lantz Tr. p. 28.

On top of the individualized nature of the KNR attorneys' initial referral for chiropractic treatment is the individualized nature of each Class Member's chiropractic care. The care provided by Dr. Floros and the unidentified chiropractors to each Class Member was not the same. **Exh.** P, Floros Aff. The reasons that a Class Member was referred to Dr. Ghoubrial by Dr. Floros; one of his associates; or any one of the unidentified chiropractors would not have been the same. **Exh.** P, Floros Aff.

Once a Class Member was seen by Dr. Ghoubrial, the treatment for each varied. **Exh.** L, Ghoubrial Tr. pp. 65-69. Some had one office visit, while others had multiple. Some Class Members had no trigger-point injections, while others had multiple. **Exh.** L, Ghoubrial Tr. pp. 117-124. There are Class Members who were prescribed a TENS unit and some who were not. **Exh.** L, Ghoubrial Tr. pp. 249-250. Whether any received a "routinized course of care", as alleged in Plaintiffs' Issue No. 1, would require a case-by-case inquiry.

This first "common issue", identified by Plaintiffs (not the Defendants) highlights the absence of common evidence that would resolve Plaintiffs' first issue in a single adjudication. Without a class-wide practice, the Court would be left with individual inquiries to determine whether each Class Member was subjected to the alleged wrongful solicitation. This was exactly the situation in *Petty, supra*, that caused the Court to deny class certification. Plaintiffs' claim and the requirement that there exist common facts that would allow the issue of solicitation to be resolved in a single adjudication is absent. Plaintiffs' claim and the requirement that "Class Members will prevail or fail in unison" is absent.

2. Issue No. 2 Identified by Plaintiffs – Price Gouging Class

The second issue identified by Plaintiffs as common to the Price Gouging Class is as follows:

> Did the Defendants conspire to inflate KNR clients' medical bills by the administration of trigger-point injections and other medical supplies and health care for which the clients were charged exorbitant and unconscionable rates?

Pls. Mot. p. 68.

This issue alleges wrongdoing with respect to all Defendants instead of just KNR and "Chiropractors" as claimed in Issue No. 1. By this fact alone, the evidence to address this issue will differ from that in Issue No. 1, while still attempting to adjudicate the rights of all Class Members in a single proceeding.

This issue focuses on a "conspiracy" to charge "exorbitant or unconscionable rates" by Dr. Ghoubrial. The cost of trigger-point injections is put at issue. The cost of trigger-point injections varied over time and certainly since 2010, the start of Plaintiffs' Class. **Exh.** O, Ghoubrial Aff. Plaintiffs' issue, however, is not limited to just charges for trigger-point injections. It also includes "medical supplies" and "health care". What "medical supplies" and the corresponding cost as it relates to each Class Member would have to be determined. What "health care" and its cost for each Class Member would have to be identified. Once determined, there would need to be an adjudication of whether each of the charges for each Class Member were exorbitant and unconscionable. Not only have Dr. Ghoubrial's charges changed over the eight (8) year class period, but what is considered a reasonable cost for medical supplies and care has changed over the eight (8) year class period. **Exh.** O, Ghoubrial Aff.

What Plaintiffs ignore is that what is relevant is not what Dr. Ghoubrial charged but rather what he accepted as reimbursement from the Class Members' settlements. All physicians

and hospitals charge more than they accept from Medicare, Medicaid and insurance companies. KNR discounted nearly every client's medical reimbursement to Dr. Ghoubrial. Plaintiffs ignore this aspect of the case. For some Class Members, KNR discounted the medical reimbursement to Dr. Ghoubrial by 98%. **Exh.** N, Nestico Aff. While in others, it was 88%, 82% or 50% and in some, there was no discount. **Exh.** N, Nestico Aff. In each of these instances, Dr. Ghoubrial accepted the reduction as satisfaction of his charges. Plaintiffs cannot rationally claim, let alone establish, that every discounted reimbursement to Dr. Ghoubrial was excessive. Such a determination would require a case by case evaluation.

During certain times in the class period, different KNR lawyers handling the individual cases would determine and negotiate the reduction with Dr. Ghoubrial. **Exh.** W, Angelotta Aff.; **Exh.** X, Zerrusen Aff. During other periods, Attorney Nestico would make the final determination as to the reduction after a recommendation by the individual attorney. **Exh.** N, Nestico Aff. Plaintiffs have not even attempted to establish that each of these KNR attorneys was part of a conspiracy to price gouge their Class Members-clients. Without such proof, the empty allegations of a class-wide conspiracy must fail.

There is no common evidence that could adjudicate this issue for all Class Members. A trial court determination of whether the actual, agreed upon payment to Dr. Ghoubrial of $400.00 for a trigger-point injection was exorbitant would not adjudicate the same claim of a Class Member who paid only $100.00. As stated by the Supreme Court in *Felix*, "If a class plaintiff fails to establish that all class members were damaged…there is no showing of predominance under Civ.R. 23(b)(3)." *Felix*, 145 Ohio St.3d at 337. The Plaintiffs' unsupported claim that "Ghoubrial did not charge inappropriate amounts to some Class Members but not others" does

not magically obviate the need to examine the discounted amount paid by each Class Member. Pls. Mot. p. 76.

3. Issue No. 3 Identified by Plaintiffs – Price Gouging Class

The third issue identified by Plaintiffs as common to the Price Gouging Class is as follows:

> Did the Defendants mislead their clients into foregoing coverage from health insurance providers in order to avoid scrutiny of, and obtain higher fees for, fraudulent healthcare services?

Pls. Mot. p. 68.

There is not common proof to adjudicate this third issue. First, a significant percentage of Class Members had no health insurance coverage. **Exh.** N, Nestico Aff. Their fact patterns are distinct from Class Members who did have insurance. In fact, this allegation and issue has no application to these Class Members. As required by the Court in *Petty*, all Class Members must be "the subject of the tortious conduct…" Plaintiffs' attempt to make this a class-wide issue ignores the real world. Plaintiffs suggest that the existence of the Affordable Care Act, 6 U.S.C. 5000(A)(a), "requiring every U.S. citizen to maintain a health insurance policy" translates into all Class Members having insurance. Pls. Mot. p. 29. This is not reality. The health insurance crisis in America has not been solved. Plaintiffs further argue that health insurance companies will not deny claims for fear of bad faith lawsuits. Pls. Mot. p. 29. Insurance companies deny claims every day of the year. Most physicians will not wait for payment during the pendency of a Class Member's lawsuit against his or her insurance company. Even if the unfounded estimates of former KNR attorneys are accurate ("most" or "80%" have insurance coverage), they do not establish a class-wide allegation. Pls. Mot. p. 29.

Equally significant is the fact that Plaintiffs claim that **each** of the Defendants "misled" the Class Members into foregoing health insurance coverage. Some Class Members never treated with Dr. Floros, so he could not have misled them. An adjudication against Dr. Ghoubrial or KNR would not bind Dr. Floros. This group of Class Members would be subject to their own adjudication. Other Class Members began treatment with Dr. Ghoubrial or Dr. Floros before becoming KNR clients. Any alleged misrepresentation concerning health insurance would have occurred before KNR met the Class Member. These Class Members would be subject to yet another adjudication. Class Representative, Richard Harbour, had health insurance but chose not to use it for any of the medical bills related to his auto accident. **Exh.** G, Harbour Tr. p. 20. Mr. Harbour is not the only Class Member who chose not to use his or her own health insurance. Some clients forego their own coverage for fear it will affect their premiums. **Exh.** N, Nestico Aff. This is yet another distinct fact pattern with different liability implications.

As part of this issue, Plaintiffs make the sweeping allegation that Class Members "end up paying more for this care than it would have cost them to simply pay through their health insurance policies". Pls. Mot. p. 77. Like so many of Plaintiffs' class-wide allegations, there is no way to determine their truth without looking to the facts of each case. When a Class Member uses his or her health insurance, most will pay a deductible and a co-pay. What the health insurance pays will be reimbursed to the insurance company from the Class Member's settlement, pursuant to a subrogation clause in the insurance policy. Whether these amounts are greater or less than the charge of Dr. Ghoubrial after the KNR discount requires individual inquiry. Some Class Members would have suffered no damage. "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 member), there is no showing of predominance…" *Felix, supra.*

The claim that Defendants "misled their clients" involves a misrepresentation or omission. If and what discussions any of the dozens of KNR lawyers might have had with different Class Members concerning health insurance would be highly individualized. If Dr. Ghoubrial and/or Dr. Floros, or any of their associates, had discussions, the content of those discussions with each Class Member, would be highly individualized. The discussion with a client possessing no health insurance would be different than the discussion with a client who had health insurance. The discussion with a client whose insurance had a high deductible or co-pay would vary from that with a client whose insurance obligations were lower. The existence of a med-pay provision in a Class Member's automobile policy would also alter the discussion. In some cases, there was probably no discussion. Plaintiffs do not even attempt to allege how, when, or where each and every Class Member was misled. Again, the very issue identified by Plaintiffs as common to all Class Members makes obvious the need for individual inquiry.

4. Issue No. 4 Identified by Plaintiffs – Price Gouging Class

The fourth issue outlined by Plaintiffs is as follows:

> Did the Defendants intentionally and serially fail to disclose that the care they administered was unnecessary and/or readily available from alternative sources at a fraction of the price they charged the clients?

Pls. Mot. p. 68.

This issue alleges that all Defendants acted "intentionally" dating back to 2010. To act intentionally, Defendants must have acted with knowledge. Thus, to address this issue, there would need to be evidence concerning what each Defendant knew, for a period of eight years, about each of the different aspects of care administered and whether or not it was "unnecessary".

Not all Class Members received the same type or amount of care. **Exh.** L, Ghoubrial Tr. pp. 65-69; 117-124; 249-250. Whether a Class Member's TENS unit, injections or care was necessary would be dependent on his/her medical signs, symptoms and course of treatment. **Exh.** L, Ghoubrial Tr. pp. 65-69; 117-124.

In an attempt to make the issue of "necessity" one that can be resolved on a single set of facts, Plaintiffs argue that "Ghoubrial's administration of trigger-point injections deviates extremely from the standard of care" and that the practice is "medically indefensible". Pls. Mot. pp. 20, 22. Plaintiffs' claim that this is supported by "all available medical literature". Specifically, Plaintiffs state:

> According to **all available medical research**, it is well settled that trigger-point injections are contraindicated for the treatment of **acute pain** resulting from car accidents.

Pls. Mot. p. 21. (Emphasis added).

This statement is immediately followed by Plaintiffs' citation of nine (9) medical articles. A reading of those articles reveals:

- Four (4) of the nine (9) articles do not even discuss trigger-point injections[2];
- Two (2) of the articles do not even discuss "acute pain", let alone identify trigger-point injections as "contraindicated" in its treatment[3];
- The one article that addresses "Whiplash-associated" trigger-point symptoms actually includes trigger-point injections as one of "six points of management [that] can often be

[2] **Exh. M**-1 (Noonan TJ, Garrett WE Jr., *Muscle strain injury: diagnosis and treatment*, J. Am. Acad. Orthop. Surg. (1999); **Exh. M**-2 (L. Bagge, et al, *Treatment of Skeletal Muscle Injury: A Review*, ISRN Orthop. (2012); **Exh. M**-3 (*Noninvasive Treatments for Acute, Subacute and Chronic Low Back Pain: A Clinical Practice Guideline from the American College of Physicians*, Annals of Internal Medicine (2017); **Exh. M**-4 (Roger Chou, *Subacute and chronic low back pain: Nonpharmacologic and pharmacologic treatment,* UpToDate (Aug. 2018).

[3] **Exh. M**-5 (Ciara S.M. Wong and Steven H.S. Wong, *A New Look at Trigger-point Injections,* Anesthesiol., Res. Pract. (2012); **Exh. M**-6 (Stephen Kishner, *Trigger-point Injection,* Medscape (2019).

initiated during the first visit..."[4] This article appears in UpToDate, which Plaintiffs tout as a widely used research database. Plaintiffs falsely represent that "...trigger-point injections are not even mentioned in the summary of research for treatment contained in UpToDate..." Pls. Mot. p. 22.

With nothing more than a preliminary search, it is evident that Plaintiffs' statement that "according to **all available** medical research, it is well settled that trigger-point injections are contraindicated for the treatment of **acute** pain..." is blatantly untrue. (Emphasis added). In a 2019 article, researchers studied the effectiveness of trigger-point injections in patients with low back pain with an onset of **less than 48 hours**. The study concluded:

> In this small randomized study with several methodological limitations, TPI was superior to the intravenously administered NSAID in the **acute treatment** of LBP caused by trigger-points. We believe that the trigger-point injection should be a part of the **acute treatment** of LBP in the selected patient group. (Emphasis added).

Exh. M-8 (Abdullah Osman Kocak, *et al*, *Comparison of intravenous NSAIDs and trigger-point injection for low back pain in ED: A prospective randomized study*, American Journal of Emergency Medicine, (2019).

The point is not to defend the treatment of Dr. Ghoubrial, as it relates to all or any Class Members. The point is that Plaintiffs' sweeping allegation that Dr. Ghoubrial's treatment of all Class Members was unnecessary and that such a conclusion can be drawn without looking at the facts of any of the cases is unprecedented. Defendants could not defend Dr. Ghoubrial's treatment of each Class Member without the facts of each case, and Plaintiffs just as certainly cannot condemn the treatment without the facts of each case. To suggest otherwise is illogical, and KNR Attorney Gary Petti agreed when asked about the treatment of Class Members:

[4] **Exh. M-7** (Irving Kushner, *Overview of soft tissue rheumatic disorders*, UpToDate (Jan. 2019).

> ***Q.*** *You'd have to look at every individual patient, their records, the doctor, and look at the whole entire file to determine whether, for that particular patient, it was reasonably and medically necessary, fair?*
> ***A. Yes.***

Exh. B, Petti Tr. pp. 199.

This is another attempt by Plaintiffs to make a class-wide determination out of an issue that in reality requires individual inquiry.

Apart from the need to address the necessity of various forms of treatment, Plaintiffs' allegation that Defendants acted "intentionally" in the failure to disclose would require the determination of what each Defendant knew about the necessity of each Class Member's care going back to 2010 and whether Defendants knew about the "available alternatives at a fraction of the price." Pls. Mot. p. 30. A determination of what each Defendant **should** have known would not suffice. As to KNR, to make this a class-wide practice, all of its lawyers dating back to 2010 must have known and failed to disclose that **all** of Dr. Ghoubrial's treatment was **unnecessary**. There is no evidence that this was the case. In fact, the former KNR attorneys, who were deposed, did not know whether the treatment was or was not necessary. Attorney Horton testified:

> ***Q.*** *Okay. For you to know whether or not something was reasonably medically necessary, you'd have to ask the doctor on each one of those cases?*
> ***A. I would have to -- the doctor would have to tell me that.***

Exh. C, Horton Tr. p. 113.

Attorney Phillips testified similarly:

> ***Q.*** *Now, you said that you relied on the doctors in determining, whether the treatment was reasonable and necessary. It is reasonable for you as a lawyer to rely on a medical doctor to determine whether care is reasonable and necessary, true?*
> ***A. I would certainly like to think so, yeah.***

Exh. A, Phillips Tr. p. 381.

Attorney Petti also acknowledged his lack of knowledge:

> ***Q.*** *Okay. And you're not here to argue that either trigger points or TENS units are not reasonably and medically necessary for some patients, are you?*
> ***A. Again, I'm not qualified for that.***

Exh. B, Petti Tr. p. 199.

These KNR attorneys could not be said to have "intentionally….failed to disclose…that the care was unnecessary." Pls. Mot. p. 30. This testimony alone negates Plaintiffs' claim of a class-wide intentional wrong that was perpetrated on each Class Member.

5. Issue No. 5 Identified by Plaintiffs – Price Gouging Class

The fifth issue outlined by Plaintiffs is as follows:

> Did the Defendants intentionally and serially fail to disclose that their relationships were viewed as fraudulent by auto insurance companies responsible for paying KNR clients, and were thus damaging the KNR clients' cases.

Pls. Mot. p. 68.

Again, this issue alleges that all Defendants acted "intentionally" dating back to 2010. As previously stated, to act intentionally, Defendant must act with knowledge. In other words, for this issue to be resolved in a single adjudication, each Defendant, separately, must have known that "their relationships were viewed as fraudulent" by every insurance company and every insurance adjustor dating back to 2010, that handled a Class Member's claim. This is not possible. All insurance companies and all adjustors at all times did not view the alleged relationships the same, and Plaintiffs have offered no evidence to the contrary. The claims of Class Members were handled by different insurance companies and different adjustors at different times. What any one of the Defendants knew in 2010 with respect to Allstate's view could be different from what that Defendant knew in 2016 in relation to State Farm. The view of an insurance adjustor for the same insurance company could be different from that of a different

adjustor from the same company or even different from their own view five years earlier. Individual evidence would be required.

KNR cannot be accused of "intentionally" failing to disclose something they did not know. Plaintiffs' presentation of evidence that some insurance companies at certain times held specific views does not translate into class-wide knowledge regarding all insurance companies dating back to 2010.

Plaintiffs further allege that each Class Member was damaged by this insurance company "view". To determine whether or not each Class Member was damaged in this fashion would be highly individualized and probably not possible. It would involve recreating each file and attempting to understand the thought process of each insurance company in deciding to settle the claim at the specified amount. Then, a determination would need to be made as to whether the settlement would have been higher, lower or the same had Dr. Ghoubrial's charges been less. *See Hoang, supra,* denying certification based on the need for individual proof to establish the existence of damage for each Class Member.

6. Issue No. 6 Identified by Plaintiffs – Price Gouging Class

The sixth issue identified by Plaintiffs with respect to the Price Gouging Class is as follows:

> Did Dr. Ghoubrial deliberately set out to administer as many of the injections and distribute as many of the overpriced supplies as possible, precisely to enrich himself and his co-conspirators?

Pls. Mot. p. 68.

This issue provides a straight-forward illustration of why the predominance requirement cannot be satisfied. This issue asks whether Dr. Ghoubrial "deliberately" set out to administer as many injections and distribute as many supplies as possible. Answering this question in a void is

of no legal consequence. When this question is answered, in an individual case, as well as a class action, it must be determined whether Dr. Ghoubrial in fact carried out his intention as to each Class Member. Bad intentions, unacted upon, do not constitute a cause of action. The care provided to each Class Member must be examined to determine whether Dr. Ghoubrial in fact deliberately injected and/or distributed as many medical supplies as possible to each Class Member. Plaintiffs' overriding argument that Defendants created a wrongful conspiracy and thereafter, there is no need to establish that each Class Member was subjected to and harmed by the wrongful conduct is contrary to the holdings in *Petty, Felix,* and *Ganley, supra.*

7. Issue No. 7 Identified by Plaintiffs – Price Gouging Class

The seventh issue outlined by Plaintiffs is as follows:

> Did KNR and Dr. Floros refer clients to Dr. Ghoubrial with the knowledge and intention that his exorbitant charges would raise the cost of settling their claims and thereby increase the amount that KNR and Dr. Floros would collect from the clients' settlements?

Pls. Mot. p. 68.

This issue looks to the "knowledge and intention" of KNR and Dr. Floros. As with other issues identified by Plaintiffs, Defendants' knowledge in 2010 was probably different than it was in 2014 or 2018. As outlined earlier, this issue would require discovery of what KNR and Dr. Floros knew about every insurance company and every adjuster during the eight (8) year class period.

While unclear, Plaintiffs seem to indicate that KNR knew that by referring Class Members to Dr. Ghoubrial, KNR would receive a larger attorney fee. ("…increase the amount….KNR would collect…"). The only way KNR's contingent fee would increase is if the client's case settled for a higher amount. This is what Plaintiffs appear to indicate when they state "raise the cost of settling". Under most circumstances, if the settlement amount was

"raise[d]", the Class Members would receive more money. If KNR acted with knowledge and the intention to increase the settlement amount received by each Class Member, how is this actionable? If this increase were true with respect to some Class Members and not others, it is yet another instance where class-wide harm is absent.

8. Issue No. 8 Identified by Plaintiffs – Price Gouging Class

The final issue identified by Plaintiffs as common is as follows:

> Did the Defendants intentionally disregard the negative impact that the Defendants' providers' involvement had on the clients' individual cases because it was more profitable to simply drive a greater number of them through the high-volume, highly routinized business model?

Pls. Mot. p. 68.

This Issue No. 8 seems to allege the opposite of Plaintiffs' Issue No. 7. Issue No. 8 alleges that Defendants knew that the involvement of the Defendant providers would have a "negative impact" on the value of the clients' cases. While Issue No. 7 alleges such involvement would "raise the cost of settling their claims". In either scenario, as outlined with respect to Issue No. 5, individual consideration with respect to the different auto insurance companies and different insurance adjustors over the eight (8) year class period would have to take place to address this issue. If the allegation in Issue No. 7 is true, that the settlement value of some Class Member's claims was **increased** by Dr. Ghoubrial's charges and the allegation in Issue No. 8 is true, that the settlement value of some Class Members was **decreased** by the involvement of Dr. Ghoubrial, then there is clearly no common proof to address these issues in a single adjudication. By virtue of Plaintiffs' own allegations some Class Members have been damaged, while others have not. This is the very reason that prevented class certification in *Felix, Hoang, Linn,* and *Konarzewski, supra*. Common evidence would not predominate over the evidence derived from the necessary individual inquiries.

Defendants' analysis of the predominance requirement has been directed at the eight (8) issues which Plaintiffs have identified as central to the adjudication of their Price Gouging Class. Plaintiffs clearly articulate that each of their four (4) causes of action rests on the adjudication of these issues:

> Are the Defendants liable for fraud, breach of fiduciary duty, breach of contract, or unjust enrichment based primarily on the answers to the questions above?

Pls. Mot. p. 68.

The referenced "questions above" are the eight (8) issues that Defendants have addressed. None of these issues can be answered for all Class Members with common evidence. The myriad of alleged acts of wrongful conduct, whatever the cause of action, were not class-wide. It cannot be said that all Class Members were subjected to or harmed by the alleged wrongful conduct. What Defendants knew or did not know at different periods of the eight (8) year class period varies. To determine which of the thousands of Class Members were subjected to the various allegations of wrongdoing and which suffered damage would require individual inquiry. The required predominance of common proof does not exist for the Price Gouging Class.

9. Plaintiffs' Argument That There Exists Class-Wide Wrongdoing In The Price Gouging Class Is Fundamentally Flawed.

Plaintiffs' argument that common proof predominates in the Price Gouging Class is misguided at the most basic level. First, Plaintiffs argue that Defendants' misrepresentations and omissions were class-wide because Defendants never told any Class Members that Dr. Ghoubrial's charges were exorbitant. ("Defendants uniformly concealed from clients the exorbitant charges…") Pls. Mot. p. 76. It is absolutely true that Defendants never told any Class Members that Dr. Ghoubrial's charges were exorbitant, but where the Class Members' charges were **not** exorbitant, there was no misrepresentation. Where the Class Members' charges were

reasonable, there was no duty to disclose that they were unreasonable. There may have been an omission, but not a wrongful, actionable omission. Common representations that were not **mis**representations do not advance Plaintiffs' argument of commonality. To determine whether a representation is a **mis**representation or a failure to disclose is a wrongful omission requires individual Class Member inquiry.

Plaintiffs repeat their misguided predominance argument by claiming "that Defendants fail to disclose that these injections are not only medically unnecessary, but contraindicated…" Pls. Mot. p. 76. Again, Plaintiffs are correct, this was never disclosed; but unless the care was in fact unnecessary for a particular Class Member, there was no actionable omission common to all Class Members. Defendants had no duty to disclose something that was untrue. An omission, unless wrongful, is of no consequence to the issue of whether there is common proof. The Court in *Petty* looked to whether every Class Member was "subject to the alleged tortious conduct" – not just conduct. The case law cited by both Plaintiffs and Defendants all reference common "misrepresentations", "fraud" and "omissions" where there was a duty to disclose. *Cope,* and *Cullen supra.* **Common, wrongful, class-wide** conduct is what is required to establish predominance.

10. The Disgorgement Remedy Does Not Negate The Need For Individual Inquiry In The Price Gouging Class.

Plaintiffs' attempt to dismiss the need to prove class-wide damages by arguing that in a breach of fiduciary duty case, they are entitled to disgorgement without the need to prove damages. Pls. Mot. p. 79. First, with respect to Dr. Ghoubrial, the Court has ruled that there is no fiduciary cause of action. With respect to KNR, Plaintiffs claim that their fiduciary action arises out of the attorney-client relationship. Pls. Mot. p. 78. If this is true, Plaintiffs' fiduciary claim fails because Ohio does not recognize an "independent claim for breach of fiduciary duty

against an attorney acting in his capacity as attorney and counselor". *Purushealth, L.L.C. v. Day Ketterer, L.L.P.*, 2019-Ohio-2002, ¶38 (8th Dist. 2019). If Plaintiffs' claim against KNR does not arise out of the attorney-client relationship, then there is no basis for a breach of fiduciary duty claim.

Assuming arguendo that Plaintiffs can establish a fiduciary duty with respect to KNR, and a breach of that duty, the law is well established that they must nonetheless establish damages as an element of their cause of action. *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, ¶10 (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, ¶43 (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, Plaintiffs must prove causation and damages in order to recover damages for a breach of fiduciary duty.

In order to avoid the need to prove class-wide damages, Plaintiffs may choose to forego any claim for damages and pursue only disgorgement of KNR fees. However, the disgorgement remedy Plaintiffs seek requires consideration of causation, damages and more. The remedy that Plaintiffs seek for the Price Gouging Class is "disgorgement of **all** fees collected by Dr. Ghoubrial, Dr. Floros, and the KNR Defendants pursuant to the Price Gouging scheme".[5] Pls. Mot. p. 44. (Emphasis added).

The disgorgement remedy sought against KNR requires individual evidence and inquiry with respect to each Class Member. Complete forfeiture of an attorney's entire fee is not automatic as Plaintiffs suggest. The extent of the disgorgement is limited to the amount of the profit or fee generated by the wrongdoing. The Restatement of the Law 3d, Restitution and Unjust Enrichment, §51 Enrichment by Misconduct; Disgorgement; Accounting states that it is not the total gain (attorney fees) that is subject to disgorgement, but rather that amount of the gain resulting from the wrongdoing:

> Disgorgement does not impose a general forfeiture: Defendant's liability in restitution is not the whole of the gain from a tainted transaction, but the

[5] In Section II(B)(5) of Plaintiffs' Motion for Class Certification titled "Class A Members and Claims", Plaintiffs only seek disgorgement as their remedy. Later in their Motion, Plaintiffs claim that Class Members are also "entitled to recover the amounts by which they were overcharged by Defendants' price gouging scheme" (p. 44 and 79). If Plaintiffs are in fact making this claim, as previously discussed, it would require case specific proof of causation and damages.

> amount of the gain that is attributable to the underlying wrong. Restatement 3rd, Comment i.

In the case of KNR, this is not disgorgement of the alleged overpayment to Dr. Ghoubrial, but rather disgorgement of an attorney fee arguably increased by Dr. Ghoubrial's overpayment.

The extent that the attorney fee might have been increased by the price gouging scheme would vary from case to case. If and by what amount the charges of Dr. Ghoubrial increased the value of a class member settlement resulting in a larger contingent fee would need to be determined in each case. The recreation of each case and its settlement would be an extensive undertaking. The determination would not be a uniform mathematical calculation. Plaintiffs' sweeping demand for disgorgement of **all** fees for every Class Member manifests a misunderstanding of the basic tenets of this equitable remedy.

The underlying principles of disgorgement are equally applicable to cases involving attorney fees. In *Burrow v. Arce*, 997 S.W.2d 229 (Tex. 1999), an attorney was sued for a breach of his fiduciary duty. The issue of the extent of attorney fees forfeiture was addressed by the court. After an analysis of the Restatement and case law across the country, the court held that the extent of attorney fee forfeiture, whether full or partial, was subject to the consideration of several factors. The court stated as follows:

> Section 49 sets out considerations similar to those for trustees in applying the remedy of fee forfeiture to attorneys. As we have already noted, they are: 'the gravity and timing of the violation, its willfulness, **its effect on the value of the lawyer's work for the client, any other threatened or actual harm to the client, and the adequacy of other remedies.' These factors are to be considered in determining whether a violation is clear and serious, whether forfeiture of any fee should be required, and if so, what amount**. The list is not exclusive. The several factors embrace broad considerations which must be weighed together and not mechanically applied.

Id. at 243-244. (Emphasis added).

Of note is that the Court not only found that these factors should be considered to determine the amount of forfeiture, but also "whether forfeiture of any fee should be required." The Court also cited Comment C to Section 243 of the Restatement (2nd) of Trusts as follows:

> It is within the discretion of the Court whether the Trustee who has committed a breach of trust shall receive full compensation or whether his compensation shall be reduced or denied. In exercise of the Court's discretion, the following factors are considered: 1) whether the Trustee acted in good faith or not; 2) whether the breach of trust was intentional or negligent or without fault; 3) whether the breach of the trust related to the management of the whole trust were related only to the part of the Trust properly; 4) **whether or not the breach of trust occasioned any loss and whether and if there has been a loss, it has been made good by the Trustee; 5) whether the Trustee's services were of value to the Trust**.

Id. at 243. (Emphasis added).

The Court further stated:

> The Restatement's approach, as a whole, is consistent with Texas law concerning constructive trusts, and we agree with the forfeiture rule stated in Section 49 as explained in the comments we have quoted. This rule, or something similar, also appeared to have been adopted in most other jurisdictions that have considered the issue.

Id. at 242.

The Court went on to cite cases from Missouri, Oregon, Illinois, Minnesota, Tennessee, California, New York, New Hampshire, Maryland, Washington DC, Alaska, Florida and Colorado.

Applying the *Burrow* and Restatement factors to the present case would require the weighing of evidence particular to each individual Class Member. The "actual harm" or "loss" consideration identified in *Burrow* would require individual evidence for each Class Member. The effect, if any, that the fiduciary breach had "on the value of the lawyer's work" would need to be considered for each Class Member. The cases of some Class Members were settled

without filing a lawsuit. Some Class Members had their cases filed and extensive discovery by the KNR attorney took place. Some Class Members had their cases tried to a jury where Dr. Ghoubrial testified live or by deposition. **Exh.** N, Nestico Aff. The value of the lawyer's work would be different in each case. The simple class-wide remedy, claimed by Plaintiffs, to disgorge all fees from all Defendants is not supported by the law.

Similar to the Restatement and *Burrow*, the law of Ohio, also appears to require an evidentiary analysis to determine the extent of attorney fee disgorgement. In *Ivancic v. Enos*, 978 N.E.2d 927, 2012-Ohio-3639 (11th Dist. 2012), an attorney representing an estate failed to disclose a conflict. He was sued by beneficiaries for disgorgement of his attorney fee. The Court found that he breached his fiduciary duty and awarded disgorgement of $1,500.00 out of his attorney fee of $3,200.00. In reaching its decision, the Court determined the actual legal services performed and the reasonable value of those services. Applying the same approach in this case, as was done by the Appellate Court in *Ivancic*, would require inquiry into the "actual service" performed by KNR in the case of each Class Member and a determination of the "value" of those services. As outlined above, legal services provided ranged from those associated with early resolution all the way to those associated with a completed jury trial.

In disgorging a portion of the attorney fees, the Court in *Ivancic* also considered the fact that the Estate had been damaged by the attorney's actions:

> The trial court found that Mr. Davies' conduct did not preserve or augment Mr. Griffith's estate. Rather as discussed previously, Mr. Davies' failure diminished the estate substantially, justifying the trial court's order to return a portion of the **fees** taken.

Id. at ¶81. (Emphasis added).

A similar damages consideration in the proposed class would necessitate case specific evidence for each Class Member.

While the existence of disparate damages alone does not customarily prevent class certification, there are exceptions to this premise. The Court in *Petty,* 148 Ohio App.3d at 356, citing the Supreme Court, recognized the effect of disparate damages on class certification:

> With regard to the issue of differing damages, we note that the "overwhelming weight of authority" indicates that class certification should not be denied solely on the basis of disparate damages. *Hamilton v. Ohio Sav. Bank* (1998) 82 Ohio St.3d 67, 81, 694 N.E.2d 442. However, disparate damages may present an adequate basis for denial in some cases. *Id.*, 82 Ohio St.3d 67. In this case, the damages are not susceptible to class-wide proof because there is no acceptable method of computing the damages on a class-wide basis…Therefore, we find that the disparate damages supports the denial of the class certification.

The fact that Plaintiffs seek disgorgement and not damages does not prevent application of the Court's reasoning in *Petty* to this case. Disgorgement in this case, like damages in *Petty*, will be "highly individualized". Plaintiffs' self-serving claim that "all of the fees collected" are "subject to disgorgement as a matter of law" is unfounded. Pls. Mot. p. 44. In fact, there is no law to support this proposition.

C. The Narrative Fee Class Fails To Satisfy The Predominance Requirement Of Ohio Civil Rule 23(B)(3).

The proposed Narrative Fee Class includes:

> All current and former KNR clients who had deducted from their settlements a narrative fee paid to (1) Dr. Minas Floros of Akron Square Chiropractic, (2) all other chiropractors employed at clinics owned by Michael Kent Plambeck and (3) certain other chiropractors identified in KNR documents as "automatic" recipients of the fee, from KNR's founding in 2005 to the present.

Pls. Mot. p. 50.

The underlying claim in the Narrative Fee Class is that narrative fees paid to certain chiropractors were "kick-backs". Pls. Mot. p. 49. Defendants addressed the near total lack of support for this allegation in the fact section. Regardless of its merit or lack of merit, this

proposed Class cannot satisfy the predominance requirement of Ohio R. Civ. P. 23(B)(3). As already outlined, predominance does not exist where some Class Members have not been harmed. *Felix, Hoang,* and *Linn, supra.*

Recognizing the requirement to establish class-wide damages and realizing their dilemma, Plaintiffs make two (2) unsupportable claims. First, Plaintiffs claim that all of the narrative reports are "worthless". Pls. Mot. p. 80. Plaintiffs' Fifth Amended Complaint alleges "these narratives are worthless". Pls. Fifth Amend. Comp. ¶65. Plaintiffs support this claim with four (4) lines of testimony from Attorney Petti where he states that the narrative reports were of "no independent value." Pls. Mot. p. 47. This ignores the bulk of Mr. Petti's testimony on this topic where he repeatedly agreed that to assess the necessity and value of a Class Member's narrative report would depend on the specific facts of each case:

> **Q.** So you'd have to look at each individual case to see whether a report was necessary?
> **A. Yeah. There's no way to do it on virtually every one of them.**
> **Q.** You just can't blanketly say none of the cases need reports, you can't say that, can you?
> **A. Right, that's fair.**
> **Q.** And again, you'd have to look at the medical records, talk to the attorney who was involved in the case, talk to the claims examiner, there's all sorts of things you'd have to look at, fair?
> **A.** That's, generally speaking, fair.

Exh. B, Petti Tr. pp. 324-325.

After reviewing the narrative report of the Class-Representative Thera Reid, Attorney Petti testified:

> **Q.** And to know whether this particular narrative report was beneficial or not, you'd have to look at this case and all the records and the negotiations, true?
> **A. Yeah, that's true.**
> **Q.** That's true for every case, isn't it?
> **A. It is true.**

Exh. B, Petti Tr. p. 339.

Attorney Petti further outlined the various factors that would need to be applied in each case to determine the value of the narrative ("pre-existing injuries", "future pain", "future care", "causal relation"). **Exh.** B, Petti Tr. pp. 310-311. He also admitted that if a case is in litigation, narrative reports are "mandatory." **Exh.** B, Petti Tr. p. 418. The value of each narrative would vary depending on the application of these factors.

Plaintiffs' first allegation that narratives are "worthless" thus 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. 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. Some insurance companies and adjusters request narrative reports. **Exh.** CC, Vallillo Aff. The thousands of different records for each class member were prepared in different offices, by different chiropractors, over 14 years. The value of every narrative is different and the factors that determine its value are limitless. Individual inquiry would be necessary to determine whether a Class Member was damaged by the payment of a narrative fee.

Plaintiffs further attempt to create class-wide damages by alleging "the narratives **never** contain any information that is not readily apparent and easily accessible from the client's medical records." Pls. Fifth Amend. Comp. ¶65. (Emphasis added). See also Pls. Mot. p. 47.

Looking no further than the Class Representative's narrative report belies the truth of this statement. Attorney Petti reviewed the narrative of Class Representative Thera Reid at his deposition:

> **Q.** Okay. And, in fact, this has, if you look down at two paragraphs from the bottom where it starts, "Thera Reid sustained, joint, disc and ligamentous injury." Do you see that?
> **A. No, I'm not looking there.**
> **Q.** Four lines up from the bottom.
> **A. Four lines, yes, I see it.**
> **Q.** And it says, "The cost to stabilize her condition over the next year is approximately $5,000." Did you see that?
> **A. Yes, I did.**
> **Q.** And that's information you didn't find in the medical records, true?
> **A. That is true.**
> **Q.** And if you look at the next line where it talks about reasonable chiropractic probability and a necessity as a result, that wasn't in the medical records, was it?
> **A. It wasn't, no.**
>
> ***
>
> **Q.** -- these risk factors will serve to significantly lower the threshold for injury and increase the probability for long-term symptoms. That wasn't in the records, was it?
> **A. Not that I saw.**
> **Q.** And the next line wasn't in the records either, was it?
> **A. Not that I saw.**

Exh. B, Petti Tr. pp. 335-337.

Thus, comparing the narrative and the medical records of Thera Reid (Class Representative) reveals that her narrative contains an outline of risk factors; a future care opinion and estimated costs. These opinions were not "readily available" in the medical records. In fact, they were totally absent from her records. Whether some, all, or no other Class Members dating back to 2005 have a narrative similar to that of Reid can only be known with an investigation into the records and reports of each Class Member.

Beyond Plaintiffs' inability to establish class-wide harm, Plaintiffs make a series of baseless allegations in an attempt to establish a class-wide practice regarding narrative fees.

Citing Attorney Petti, Plaintiffs represent that KNR did not obtain narrative reports from any other chiropractors other than the "preferred chiropractors." Pls. Mot. p. 48. ("…Decision to order [narrative report] is based solely on the identity of the chiropractor." *Id.* at 45). KNR has ordered, received and paid for narrative reports from hundreds of different chiropractors and doctors throughout Ohio, dating back to 2005 (beginning of Class period). **Exh.** Q, Major Aff. Most were and are not on Plaintiffs' loosely defined list of "preferred chiropractors." This is not a matter of opinion, but a well-documented fact. This practice was never limited to a select group of chiropractors and there is no credible evidence to support that it was.

Next, Plaintiffs allege that narrative reports are ordered as "soon as the case comes in, before anyone at the firm has an opportunity to review the relevant facts." Pls. Mot. p. 45. This is another attempt to create a class-wide practice. This allegation is based solely on the testimony of Attorney Petti, who admitted he had no first-hand knowledge of when narratives were ordered. **Exh.** B, Petti Tr. p. 318. This allegation is not even an issue as KNR case records document when each case came into the firm and when the narrative was ordered. The practice was to request narrative reports at the completion of the client's treatment. **Exh.** D, Nestico Tr. pp. 278-279.

Plaintiffs ignore the evidentiary record and further claim that the narrative fee was paid to "certain selected chiropractors, immediately upon referral" of the client to those chiropractors. Pls. Mot. p. 44. First, this statement is made without any citation of support because there is no support. Attorney Petti, Plaintiffs' primary source of information, admitted that he does not know of a single instance where Dr. Floros was paid for a narrative report without having prepared one. **Exh.** B, Petti Tr. p. 319. The only witness that addressed this allegation directly was KNR Operations Manager, Brandy Gobrogge. When asked by Plaintiffs' counsel if KNR

paid for narrative fees at the time a client was signed up, her response was "-no never". **Exh.** E, Gobrogge Tr. p. 290. When asked the same question, a second time, her response was again "-no never". **Exh.** E, Gobrogge Tr. p. 291. She further testified that KNR only paid for reports that were actually prepared by the chiropractor or physician. **Exh.** E, Gobrogge Tr. p. 289. Not only was the alleged wrongdoing not a class-wide practice, it did not exist.

Plaintiffs' next attempt to create a class-wide wrongdoing by claiming that "...clients pay a narrative fee on every case involving certain chiropractors." Pls. Mot. p. 45. Again, this is supported solely by the testimony of Gary Petti. **Exh.** B, Petti Tr. p. 284. Mr. Petti worked at KNR for less than nine (9) months in 2012, and he only worked on KNR cases for a fraction of that time. **Exh.** Y, Petti Aff. His testimony and affidavit reference only narratives from Dr. Floros and Plambeck-owned clinics. Plaintiffs' proposed Class covers 14 years and includes a group of all chiropractors described as "certain other chiropractors identified in KNR documents as 'automatic' recipients of the fee, from KNR's founding in 2005 to the present." Pls. Mot. p. 50. The testimony of Attorney Petti, based on less than a nine (9) month window, does not even begin to establish a practice that is common to the described Class.

Plaintiffs have failed to establish a class-wide harm. To do so would require individual inquiry as the value of each Class Member's narrative report is fact specific. Plaintiffs' attempt to establish a class-wide practice of wrongdoing is lacking in evidentiary support. There simply is not common evidence that would adjudicate in a single proceeding that all narrative fees, for all Class Members, paid to all of the described chiropractors dating back 14 years, were unnecessary. The predominance requirement cannot be satisfied. If Plaintiffs do have a fiduciary cause of action and they limit their remedy to disgorgement, as previously discussed, this does not obviate the need for individual inquiry. See pp. 41-45 of this Brief.

D. The Investigative Fee Class Fails To Satisfy The Predominance Requirement Of Ohio Civil Rule 23(B)(3).

The proposed Investigative Fee Class includes:

> 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, from 2008 to the present.

Pls. Mot. p. 57.

There is no factual dispute that KNR charges a flat rate of $30 to $100 in the vast majority of settled cases for "investigative services". There is no issue that investigators traveled to some clients' homes to gather necessary signatures on contracts and authorizations and to collect basic information. What is more significant to class certification is that investigators performed a variety of other services, including taking accident scene photos; taking or obtaining property damage photos at body shops; taking photographs of client injuries; obtaining medical records and bills; locating witnesses; delivering and obtaining documents from clients; locating clients who were not responding; filing pleadings at various courthouses; timing and documenting traffic light sequences; seeking out available video surveillance and other tasks as needed. **Exh.** R, Wiley Aff.; **Exh.** D, Nestico Tr. p. 629; **Exh.** AA, Simpson Tr. p. 17; **Exh.** Z, Czetli Tr. p. 30-33; **Exh.** S, Monto Aff.; **Exh.** T, Hillenbrand Aff.; **Exh.** U, Fisher Aff.; **Exh.** V, Webb Aff. Whether or not a client received $30-$100 worth of services would require the adjudication of each client's case.

Plaintiffs' **original** Complaint alleged that KNR investigators did nothing more than sign up cases and in some instances not even that. Class Action Complaint with Jury Demand ¶¶ 17, 18, 19, 25. Now that the discovery has conclusively established that KNR investigators perform a wide range of services, Plaintiffs have been forced to change their theory in an attempt to certify a class. Plaintiffs now argue that despite the fact that each class member received

different levels and types of investigative services, predominance is nonetheless satisfied because it is "unlawful" for Defendants to charge clients for **any** of the services provided. Plaintiffs specifically claim:

> Thus, as with the fraud claims, the contract claims of all class-members will turn on a single question: Was KNR recapturing overhead expenses in assessing this amount against its clients? The investigation–fee class claims do not depend upon whether the $50 served exclusively as a sign-up fee, or whether KNR ascribed other "investigatory" tasks to it in certain cases. Investigators may have handled tasks in particular cases beyond just signing up the client. Yet, as long as they were acting as KNR functionaries in doing so, as the evidence detailed above exclusively shows, the firm's overhead would still subsume any corresponding expense, no matter what service they performed.

Pls. Mot. pp. 81-82.

Plaintiffs make this desperate argument because they understand that unless **all** investigative services are unlawful, a case-by-case determination of the services provided would be necessary.

Plaintiffs' claim that it is unlawful to charge for any of the investigative services provided by KNR is unfounded and unsupported by their own case citations. Plaintiffs, in both their Fifth Amended Complaint (¶9a) and in this Motion for Class Action Certification cite *Columbus Bar Ass'n v. Brooks*, 87 Ohio St.3d 344, 721 N.E.2d 23 (1999). While quoting from *Brooks,* Plaintiffs left out the following language:

> In addition to outlining the percentage that the attorney will charge for fees, the agreement shall provide that the client is liable for the costs of litigation. Cf. citing *Disciplinary Counsel v. Shane* (1998), 81 Ohio St.3d 494, 497 (692 N.E.2d 571, 573-74). Examples of such costs appear in DR5-103(B) and include 'court costs, **expenses of investigation,** expenses of medical examination **and costs of obtaining and presenting evidence**.' (Emphasis added).

KNR investigators photographed property damage, injuries and accident scenes. They located witnesses, took statements, obtained police reports, obtained surveillance video and timed traffic

light sequences. All such services involve "obtaining evidence" or "investigation" as outlined in *Brooks* and DR5-103(B). While Plaintiffs cite *Brooks* and DR5-103(B), Plaintiffs failed to inform the Court of this language, regarding the costs of "investigation" and "obtaining evidence".

The Plaintiffs' argument seems to rest on its claim that all KNR investigators "were acting as KNR **functionaries**..." Pls. Mot. pp. 81-82. (Emphasis added). Defendants cite not a single case or disciplinary rule that supports the proposition that the services of "functionaries", no matter what their nature, are always part of overhead as a matter of law. In fact, nowhere in any case, statute, ethical rule or treatise is the word "functionary" defined or even used. Plaintiffs are asking this Court to certify a multi-million dollar class action based upon an undefined term and in the complete absence of legal support.

Even if "functionary" means employee or some in-house associate, a law firm may still lawfully charge a client for their service. In their Fifth Amended Complaint ¶134, Plaintiffs cite The ABA Committee on Ethics and Professional Responsibility published Formal Opinion 93-379 (1993), Billings for Professional Fees, Disbursements and Other Expenses. Plaintiffs fail to mention the section relating to the provision of in-house services. In this regard, the ABA stated as follows:

> C. In-House Provision of Service
>
> Perhaps the most difficult issue is the handling of charges to clients for the provision of in-house services. In this connection, the Committee has in view charges for photocopying, computer research, onsite meals, **deliveries and other similar items**. Like professional fees, it seems clear that lawyers may pass on reasonable charges for these services. Thus, in view of the Committee, the lawyer and the client may agree in advance that, for example, photocopying will be charged at $.15 per page, or **messenger services** will be provided at $5.00 per mile. However, the question that arises what may be charged to the client, in the absence of a specific agreement to the contrary, when the client has simply been told

> that costs for these items will be charged to the client? We conclude that under those circumstances the lawyer is obligated to charge the client no more than the direct cost associated with the service (i.e., the actual cost of making a copy on the photocopy machine) plus a reasonable allocation of overhead expenses directly associated with the provision of the service (e.g., the salary of a photocopy machine operator). (Emphasis added)

Even if Plaintiffs were to establish through discovery that KNR investigators were employees, it would not make the $30-$100 charge unlawful.[6] As required by the ABA opinion, the KNR clients were charged "no more than the direct cost" incurred by KNR. The $30-$100 charge is a direct pass through. **Exh.** N, Nestico Aff. The ABA opinion even allows for a "reasonable allocation of overhead expenses", which KNR did not do. Additionally, ABA Formal Opinion 93-379 recognizes charges for delivery services and messenger services. KNR investigators filed pleadings, picked up medical records and police reports and delivered documents to clients.

Despite their criticism of Defendants in this case, Plaintiffs' counsel and their current or former firms have represented to various courts **in their own cases** that similar expenses are appropriately chargeable to clients. In 2017, Chandra Law Firm, LLC (Mr. Pattakos was a partner at this firm during this time) sought reimbursement of a $144.50 expense incurred for an investigator to "travel and view scene with clients". **Exh.** I, Popson Aff. attaching case expense invoice for *J.G. v. Jones, et al.*, United States District Court, Northern District of Ohio, Case No. 1:17-cv-01171. Additionally, Plaintiffs' counsel have classified messenger and delivery services to file pleadings to serve subpoenas, to send correspondence and to make deliveries as litigation expenses. **Exh.** I, Popson Aff. attaching case expense invoices for *John Pope, et al. v. Cliffs Natural Resources, Inc., et al.*, Case No. 1:14-CV-01234; *Northeast Ohio Coalition v. Husted, et al.*, Case No. 2:06-CV-00896; *Arthur Lavin, M.D., et al. v. Jon Husted*, Case No. 1:10-CV-

[6] Defendants have denied that any of its investigators are employees of KNR, however, as outlined above, even if they are employees, a flat rate, pass through charge for their services is appropriate.

01986; *Christina Cruz, et al. v. English Nanny & Governess School, et al.*, Case No. CV-11-768767; and *Sandy Cross v. Georgiou Studio, Inc.*, Case No. 1:07-CV-03790. KNR, unlike the Plaintiffs' counsel, have not charged for copying expenses that are in excess of what copy services charge and appear to be a "profit center" for the firms. See *English Nanny* where Mr. Pattakos sought reimbursement of "in house copies and prints" charges in the amount of $2,927.84. *See also* the *Lavin* case where the Chandra Law Firm sought expense reimbursement of $576.30 for copy expenses at the rate of $.20 per page and reimbursement of Westlaw online research services in the amount of $2,858.40 and $1,302.06 for Lexis online research services. Again, items that KNR does not charge to clients. Defendants are not claiming that the expenses that Plaintiffs' counsel charged to their own clients were unlawful. The point is that through their own submissions to Ohio courts, Plaintiffs' counsel demonstrate that many of the services that KNR investigators provided were properly classified as reimbursable expenses.

Plaintiffs acknowledge that "The Ohio Supreme Court has held that a plaintiff seeking class certification must be able to prove through common evidence that all class members were in fact injured by the Defendant's action." *Felix v. Ganley Chevrolet*, 145 Ohio St.3d 329, 2015-Ohio-3430, 49 N.E.3d 1224. Plaintiffs' Memorandum in Opposition to Defendants' Motion to Strike Class Allegations, p. 15. It is this undisputed legal principle that has caused Plaintiffs to take the extreme position that no matter the service provided, KNR's $30-$100 fee for such service is illegal. This position, however, is unsupported by any case, statute or ethical code. In fact, it contradicts the law cited by Plaintiffs in their Fifth Amended Complaint, their Motion to Certify Class Action and their own conduct.

IV. CONCLUSION

For the reasons stated herein, the KNR Defendants respectfully request that this Court deny Plaintiffs' Motion for Class-Action Certification and Appointment of Class Counsel under Civ. R. 23. Defendants' request for denial of Plaintiffs' Motion is directed to each of the three proposed Classes outlined by Plaintiffs in their Motion.

Respectfully submitted,

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CERTIFICATE OF SERVICE

A copy of the foregoing Defendants' Brief in Opposition to Plaintiffs' Motion for Class-Action Certification was filed electronically with the Court this 17th day of June, 2019. The parties may access this document through the Court's electronic docket system.

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