IN THE COURT OF COMMON PLEAS
SUMMIT COUNTY, OHIO

MEMBER WILLIAMS, et al., Plaintiffs, v. KISLING, NESTICO & REDICK, LLC, et al., Defendants.	Case No. CV-2016-09-3928 Judge James Brogan **Defendant Sam Ghoubrial, M.D.'s Opposition to Plaintiffs' Motion for Class Certification**

I. INTRODUCTION

A. The Proposed Price-Gouging Class is Uncertifiable

The Plaintiffs' proposed price gouging class is simply not certifiable[1]. As succinctly and aptly stated by Justice Scalia in *Am. Express Co. v. Italian Colors Rest.*, 570 U.S. 228, 234 (2013), Rule 23 "**imposes stringent requirements for certification that in practice exclude most claims**." Such is the case here. As with most proposed classes, the class proposed against Dr. Ghoubrial is simply uncertifiable, as thousands of mini trials would be required to determine the viability of each patient's claims.

The Plaintiffs ignore this reality, as demonstrated by their rambling, mostly irrelevant, and at times incomprehensible 85-page motion for class certification. Plaintiffs spend more time name-calling and fact-twisting than analyzing the stringent requirements necessary for certification. In so doing, the Plaintiffs routinely talk out of both sides of their mouth, even espousing claims contrary to their own personal injury settlement:

[1]Defendant Ghoubrial will only address the price gouging class, as he is not named in the other two class definitions.

1. The Plaintiffs simultaneously allege Defendants' conduct increased the value of their claim and decreased the value of their claim;

2. The Plaintiffs simultaneously claim no law firm could profitably represent them and yet then criticize defendant KNR for coming to their aid and providing legal representation when others wouldn't;

3. The Plaintiffs simultaneously vilify Dr. Ghoubrial for providing "unwanted" and "unnecessary" healthcare to all class members and at the same time admit they personally wanted the healthcare and actually went back for more because it was beneficial;

4. The Plaintiffs simultaneously define the class as including only those charged exorbitant or unconscionable fees and then in direct contrast allege their claims apply to ALL fees, regardless of reasonableness;

5. The Plaintiffs simultaneously depict all class members as poor, uneducated, unsophisticated automatons who present at the Defendants' collective whim for treatment with whomever and for whatever the Defendants "direct" and yet admit this didn't occur in their own case;

6. The Plaintiffs simultaneously rely on former disgruntled KNR employees recounting of rumors and innuendo as "evidence" of wrongdoing while they ignore the fact these "witnesses" uniformly admitted they never actually observed or engaged in such conduct and could not identify a single former KNR client who was harmed.

The dichotomy between the factual allegations and the admissible evidence is a chasm Plaintiffs do not even attempt to bridge. Rather, the Plaintiffs pretend it doesn't exist, much like they pretend certain Orders of this Court do not exist, hoping if they look away, so will the Court. This is the only logical explanation for why the Plaintiffs continue to pursue a breach of fiduciary duty claim against Dr. Ghoubrial when the Court has already dismissed that claim.

B. The Overwhelming Evidence Supports the Defendants on Every Issue

The overwhelming evidence in this case has established two things with abundant clarity:

1. The Defendants have provided and continue to provide legal representation and healthcare to a large group of accident-injury victims who otherwise would have nowhere to turn for assistance; and

2. The individually named Plaintiffs all received a significant monetary recovery and excellent healthcare.

The Plaintiffs claim the class members are accident-injury victims who would otherwise have been left high and dry because their cases were not profitable enough for others to help them. Instead, because of KNR, Dr. Floros, and/or Dr. Ghoubrial, the four named Plaintiffs each obtained needed healthcare, money in their pocket, and a significant recovery, like thousands of former clients before and after them. The four named Plaintiffs, whose cases no one else would touch, recovered an average settlement of $16,556.84.[2]

Following their settlements, the Plaintiffs not only expressed satisfaction with their legal care and healthcare, but some also referred friends to KNR and/or returned for additional representation themselves. Now, the Plaintiffs claim the very Defendants who helped them when no one else would were actually co-conspirators in a "price gouging" scheme to hurt them, not help them. Defendant Ghoubrial asks the Court to see this for what it is: a "manufactured" claim based on innuendo and hyperbole, not based on evidence and facts.

C. Plaintiffs' Approach to Certification is not Based on Evidence

The Plaintiffs approach to the Motion to Certify is the same they have taken throughout this case: Make an outrageous allegation, claim you have proof, label the proof "overwhelming", and then perhaps, if you say it long enough, loud enough, and to enough people, maybe someone will believe it. Plaintiffs' counsel has told newspapers, courts, competitor physicians, competitor law firms, former and current clients, the public (through misleading social media advertisements), and anyone and everyone who will listen that he has "overwhelming evidence" to prove his theory

[2]The Defendants obtained over $100,000 in settlement for the named Plaintiffs in 7 different claims (Plaintiff Richard Harbour had 4 claims over 6 years with KNR). Not counting Mr. Harbour's last two claims where he did not treat with Clearwater, the average settlement for was over $20,000.

against the Defendants. Yet, the proof never comes[3]. The claims remain supported primarily by Plaintiffs' counsel's own twisted interpretation of testimony from former disgruntled KNR attorneys[4] and recently submitted affidavit of witnesses they refuse to produce for deposition.[5] One by one, Plaintiffs' witnesses were shown to either support the Defendants or, at a minimum, testified they had no actual knowledge as to the Plaintiffs involved in this case.

D. Plaintiffs Fail to Demonstrate the Claims can be Adjudicated in a Single Trial

The Plaintiffs are attempting a take-down of the entire industry of large personal-injury firms that provide representation to accident victims. The Motion fails, however, to offer a legitimate plan on how a behemoth class action trial relating to the claims of ***thousands*** of current and former patients could be adjudicated in a single class trial. While Plaintiffs claim common questions of fact and law exist, the real issue is not whether questions exist – it's whether **common answers** to those questions exist. They do not. The answers are widely varied, dependent on the individual lawyers, clients, claims examiners, insurance companies, and health care providers involved. Resolution of the price gouging class members' claims cannot fail or succeed in unison but rather would necessitate thousands of mini-trials.

[3]Plaintiffs could not identify any evidence to support their theories. To a person, they simply claimed their "attorney has the evidence."

[4]The Plaintiffs initially touted former KNR attorney Robert Horton as a "whistleblower" and their star witness. When it came time for evidence, the truth came out. He testified under oath three times, and each and every time he refuted the Plaintiffs' claims. *See* Affidavit of Attorney Robert Horton (Attached as Exhibit A); Recorded Statement of Attorney Robert Horton; Recorded Statement of Attorney Robert Horton (Attached as Exhibit B). The deposition of Robert Horton as already been filed with this Court and is incorporated herein by reference. The Plaintiffs next claimed former KNR attorney Gary Petti supported their claims. Again when it came time for evidence, the truth came out: Mr. Petti's admitted his prior affidavit referred to facts that no longer applied and/or, was speculation. Moreover, he was only at KNR for 9 months in 2012. The only case pending during his tenure was Mr. Harbour's first case, of which he had no knowledge. Ultimately, he claimed he did not know how other attorneys handled their cases, but he admitted he met his professional responsibilities and he never coerced a client into unwanted healthcare.

[5]The Plaintiffs attached witness affidavits to the Motion to Certify, including a mixture of irrelevant, misleading, and, as it relates to some of the parties, outright untruthful statements. Not surprisingly, Plaintiffs' counsel refused to allow these witnesses to be deposed so the Defendants could expose this, and thus the Court should not consider these affidavits.

Moreover, the Plaintiffs' factual and legal theories are wildly inconsistent and even contradictory. In some portions of the Motion to Certify, the Plaintiffs' theory of damages is that individual settlements were too low due to the involvement of the Defendant health care providers. At other times, they offer testimony and evidence showing the Defendants' involvement increased the value of the individual settlements. If the latter is true, then none of the Plaintiffs were harmed and the class fails. Most importantly on this issue, though, is that Plaintiffs also fail to explain how a single proceeding could provide a common answer to this question for **ALL** prospective class members.

The Plaintiffs offer zero explanation as to how they would attempt to prove any particular accident victim – let alone the class as a whole – was worse off by hiring KNR and treating with Dr. Floros and/or Dr. Ghoubrial. The Plaintiffs intentionally avoid this evidentiary hurdle because they know the truth: it would involve a mini-trial in each case to determine if the client could have obtained a more favorable outcome with different healthcare treatment or *pro se* representation. Such a showing would be a steep burden in any individual case and is a wholly insurmountable burden on a class-wide basis.

Plaintiffs are so preoccupied with how a law firm's business works and the gripes of a few former employees that **they have not thought about whether or not their clients benefited from hiring KNR, Dr. Floros, and/or Dr. Ghoubrial** or **how the claims could be fairly adjudicated in one proceeding**. Instead, Plaintiffs offer this Court a path of no resistance, urging this Court to adopt an evidence-free theory of liability that presumes the underlying insurance companies or at-fault parties would have so adequately protected the class members' interests that ALL class members would have netted more settlement money without the Defendants than they did with them.

Could this be true for some potential class member of the "thousands" of former clients and patients? Perhaps. But which class member? It would depend on the facts of each individual case, the credibility of the claimant, the accident facts, the nature and extent of the injuries, the alternative treatment chosen by the claimant if they did not treat with Dr. Floros or Dr. Ghoubrial (ALL of the Plaintiffs were injured and wanted healthcare), the individual response to the hypothetical alternative treatment, the cost of the alternative treatment, the nuances between individual claims' examiners and insurance companies, and a myriad of other variables that would need to be examined for each and every case. An individual analysis for each and every class member's case is unavoidable, and even that analysis would be highly subjective if not speculative.

The Plaintiffs' theory does not lend itself to class treatment since it requires an individual analysis of numerous individual factors related to the individual patient, treatment modalities, costs accepted as payment in full, other treatment obtained by the patient, and many other variables. Thousands of mini-trials would be required because no common evidence or method exists to determine whether a particular patient was "damaged" unless all the facts as to each "victim" are considered. The *effects* need to be examined in order to determine liability. This is a classic case where the class-action procedure will not bring efficiency in an aggregate trial. Rather, the case would devolve into different evidentiary proof and results for each class member. As stated above, the class is simply uncertifiable.

E. Plaintiffs Ignore the Different Roles of the Defendants

Furthermore, attempting to pursue the same factual and legal theories against a law firm providing legal advice to clients and the health care providers providing medical treatment to those same individuals ignores the different roles for each party. The law firm provides LEGAL representation, including legal advice about the case, evaluation of liability, evaluation of causation,

evaluation of damages, evaluation of the impact of pre-existing injuries on the value of their case, negotiations with claims examiners, analysis of the law, and many other issues. The healthcare practitioners evaluate and examine the patient, discuss the patient's care with them and offer treatment options, and then treat the patients based on informed consent and medical standards.

The lawyers do not control the medical care and the health care providers do not control the lawyering. The lawyers do not control the medical costs. And the healthcare providers do not control the Contingency Fee Agreement or settlement distribution.

The Plaintiffs only deposed one former KNR attorney who represented any of the named Plaintiffs[6], and he unequivocally testified he did not control or direct healthcare treatment. In fact, he NEVER referred Member Williams to any health care provider and NEVER referred a client to Dr. Ghoubrial. Moreover, the Plaintiffs admitted they were not coerced into unwanted healthcare.[7] Furthermore, each healthcare provider deposed in this case testified the Plaintiffs' treatment was based upon the health care providers professional judgment, uninfluenced by anyone or anything other than the patient's best interests.

The roles of the attorney and the health care providers differ. One truth remains consistent, however: personal injury insurance claims and lawsuits are NOT lotteries. They are necessary mechanisms used to in determining if and how much an injured party is entitled to compensation from an at-fault party for economic and non-economic losses.

Another fact that should not be forgotten. The Plaintiffs are not claiming they lied about their injuries or their need for medical treatment. Each and every named Plaintiffs admitted to being injured and admitted to wanting healthcare to recover from those injuries:

[6]Attorney Robert Horton represented Monique Norris and Member Williams. His affidavit and deposition transcript have been filed with the Court and are incorporated herein. Attorney Horton's testimony is clear on these issues.
[7]*See* Reid Deposition, page 240, lines 1-7 (attached as Exhibit C); Harbour Deposition, page 119, lines 1-11 (attached as Exhibit D); Norris Deposition, page 354, lines 3-10 (attached as Exhibit E).

1. Member Williams did not treat with Dr. Floros or Dr. Ghoubrial. She also was not referred for treatment by KNR. Importantly, though, she admitted she was injured and wanted healthcare and that KNR did not direct her medical care. *See* Medical Audit of Member Williams (attached as Exhibit F).

2. Monique Norris admitted she wanted chiropractic care and wanted a referral to a chiropractor, and that she went to Dr. Floros and Dr. Ghoubrial on her own free will. She admitted Dr. Ghoubrial did not attempt to force any unwanted health care on her. *See* Norris Deposition, page 354, lines 3-10 (attached as Exhibit E). She admitted KNR told her it (was fine to switch chiros.)

3. Richard Harbour was highly appreciative of the referral to Chiropractor Auck and actually treated with him on his own when not represented by KNR. He even relied on Dr. Auck (who was then retired) and not KNR for a referral to Chiropractor Frain, who treated him for injuries in his fourth accident case with KNR. Mr. Harbour also testified in the underling action in 2015 that Dr. Ghoubrial's treatment was effective (and he reluctantly admitted the same when deposed earlier this year). He was so pleased with KNR's representation that he not only had them handle 4 cases for him over a 6-year period, he recommended a friend for representation.

4. Thera Reid admitted she wanted treatment for her injuries before she even met Dr. Floros. She further admitted the chiropractic care by Dr. Floros and medical care by Dr. Ghoubrial was beneficial and helped alleviate her pain.

5. Former Plaintiff Matthew Johnson was so appreciative of the chiropractic care that he testified he wished he could go back for more care. (Former patient Naomi Wright's case is still in litigation with another firm).

Dr. Ghoubrial does not practice law or give legal advice. He treats patients. The manner in which the patients are referred to him does not impact his treatment choices. *See* Affidavit of Dr. Ghoubrial (attached as Exhibit G). Rather, he has a physician-patient relationship with the class members he treated; he discussed their medical conditions and needs with them; he examines and evaluates them; he offers treatment options; and provides treatment options the patient agrees upon after full consent. No arms are twisted. No minds are manipulated. No patient is forced to receive a treatment. The patients are presented various treatment options – which vary depending on the injuries sustained in their particular accident, their predisposition to such injuries; their body's

response to treatment; their individual tolerances and desires; and the individual professional judgment of the Clearwater physician provider treating them.

Dr. Ghoubrial has never allowed a law firm to dictate or direct his medical care. To wit, none of the Plaintiffs, or any other witness for that matter, has testified Dr. Ghoubrial interloped into their legal actions, was directed to provide care by any outside person or entity, or provided any treatment without informed consent. To the contrary, they all admitted they asked for medical care, were provided medical care, and – for all of the named Plaintiffs and for the vast majority of the individuals identified in discovery – admitted Dr. Ghoubrial's treatment was beneficial.

Dr. Ghoubrial's role was to provide competent and wanted healthcare, which he did. If some individual patient believes he failed to meet the standard of care, that patient can choose to sue him for medical malpractice. But to hold Dr. Ghoubrial responsible for how much the client "netted" in settlement is preposterous and without proof. The Plaintiffs provide no evidence that any settlement for any client/patient would have been as high absent Dr. Ghoubrial's treatment. The Plaintiffs provide no evidence any single class member – let alone every member of the class – would have netted more money in their pocket or healed more quickly without Dr. Ghoubrial's involvement. The Plaintiffs simply lack individual evidence let alone class-wide evidence.

F. Plaintiffs' Motion Misrepresents the Claim against Dr. Ghoubrial and Places the Medical Standard of Care Directly at Issue

The Court has already dismissed the breach of fiduciary duty claim against Dr. Ghoubrial and ruled the Plaintiffs do not have any medical-practice-type claims. *See* May 9, 2019, Order on Defendant's Motion for Judgment on the Pleadings. As the Court clarified in its April 10, 2019,

Order, whether Dr. Ghoubrial was "operating within the appropriate standard of care" in recommending trigger point injections and TENS units to relieve patients' pain is irrelevant.[8]

Rather than acknowledging no medical malpractice OR breach of fiduciary duty claim exists against Dr. Ghoubrial, the Plaintiffs instead launch into seven irrelevant and misleading pages on the standard of care for trigger point injections, TENs units, and journal articles.[9] *See* Motion, pages 20-26. In doing so, the Plaintiffs essentially makes a devastating admission: the standard of care is relevant to their claims. *See* Motion, fn. 11. By putting the standard of care at issue, **Plaintiffs have put the standard of care as to every class member patient of Dr. Ghoubrial at issue**. Such a determination would obviously require individual inquiry into every matter, including but not limited to expert evidence and testimony as to every one of Dr. Ghoubrial's class member patients, thereby necessarily precluding certification. The medical issues are discussed in more detail later in this Brief.

G. Plaintiffs' Class Definition Inherently Conflicts with their Legal Theory

Plaintiffs seek to certify one class relevant to Dr. Ghoubrial:

> 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. *See* Motion, page 44 calling this "Class A".

This proposed class does not track a particular cause of action and is in conflict with Plaintiffs' case theory stated earlier in their Motion. Plaintiffs first described the class they seek to certify as including "KNR clients who paid *exorbitantly inflated prices* for medical treatment and

[8]Defendants agree standard of care is irrelevant. However, Dr. Ghoubrial's intent (and the intent of other Clearwater physician providers) is relevant to the claims of conspiracy and claims of intent to inappropriately inflate medical expenses. Defendant could technically have breached the standard of care without intending harm. Intent is not an element of a medical malpractice claim, but Plaintiffs have made intent a necessary element to the present claim.
[9]Plaintiffs' counsel's misrepresentations in this regard are discussed further below.

equipment provided by KNR's 'preferred' healthcare providers pursuant to a price-gouging scheme by which the clients were *pressured into waiving insurance benefits* that would have otherwise protected them." *See* Motion, page 1. These legal conclusions invite individual adjudications—how do you adjudicate whether each patient paid exorbitant prices and was pressured into waiving insurance (assuming they had insurance) in a class action trial when each patient voluntarily and knowingly signed off on the settlement?

The Court has stated the issue is whether Dr. Ghoubrial "grossly overcharge[d] them for these devices…" *See* April 10, 2019, Order, page 5. While the initial pages of Plaintiffs' Motion argues a theory of "exorbitant prices," the Plaintiffs then flip flop at page 44 of their brief and argue the class includes "any fees" paid to the doctor. Based on this, there is an inherent conflict between Plaintiffs' theory of liability (exorbitant prices) and the class they seek to certify (including all patients whether or not the prices were "exorbitant). This alone compels denial of certification of class A.

Whatever Plaintiffs' amorphous theories are, they require an individual analysis of:

1. Each patient's individual medical treatment;

2. The amount Clearwater Billing, LLC accepts as payment in full for the medical treatment;

3. The reasonable charges for the this treatment based on prevailing standards for the precise treatment during a precise period of time (as the Complaint spans 10 years);

4. The quality of their medical treatment (necessary for unjust enrichment analysis);

5. How much of the charges were paid by the "settlement" portion as opposed to "medical payments";

6. A determination of the impact of the care on the ultimate settlement and net to the class member;

7. The reasonable value of Dr.Ghoubrial's medical treatment; and

8. Many additional factors as discussed throughout this Brief in Opposition.

If Plaintiffs' theory is that "all" charges by Dr. Ghoubrial must be paid back to each individual patient, *every patient will then have to prove that they received no value whatsoever for the medical care they received* (this case does not concern fabricated medical charges of treatment never received). No matter how you analyze Plaintiffs' theory, it cannot be certified.

Since this is not a medical-malpractice case, the Plaintiffs cannot introduce evidence the medical care was below the standard and therefore worth nothing (thus they have no way to prove that all patients can disgorge all fees paid to Dr. Ghoubrial). But even if Plaintiffs could introduce standard of care evidence, this would necessitate individual medical testimony and individual client testimony. Either way, Dr. Ghoubrial would be entitled to show, via individual evidence, he did not overbill for medical treatment and the reduced charge appearing on each patients' agreed-to settlement memorandum was reasonable.

In short, Plaintiffs' theories are incomprehensible and could never to be proven on a class-wide basis with common evidence. Plaintiffs seek to litigate *en masse* the medical treatment of *hundreds, if not thousands, of patients* when every individual's treatment is different and every individual eventually settled for different amounts after receiving different reductions. This could only be done via mini trials.

Plaintiffs' do not even attempt to explain how a class trial could manageably be litigated consistent with the Dr. Ghoubrial's due process rights to put on a defense to each patient's claims. *Binder v. Cuyahoga Cty.*, 2019-Ohio-1236, ¶148 ("Deciding whether a claimant meets the burden for class certification … does require the court to *consider what will have to be proved at trial* and whether those matters *can be presented by common proof*."). Plaintiffs make a tactical decision to

keep it vague and throw mud because they know there is no possible way to try this case in a class trial. These and numerous other reasons below demonstrate why a class should never be certified, as "individualized issues necessarily predominate over any questions common to the class." *Cullen*, 137 Ohio St.3d 373, ¶48.

II. RELEVANT FACTS AS TO THE CLAIMS AGAINST DR. GHOUBRIAL

A. Dr. Ghoubrial's Medical Practice Treats Personal Injury Patients with the Goal of Alleviating their Individualized Injuries

Dr. Ghoubrial has been a licensed medical doctor in Ohio for over 20 years. He is in good standing with the Ohio State Medical Board, and he is unaware of any complaints with the Board ever being lodged against him. *See* Ghoubrial Deposition, page 10, lines 1-2; page 13, line 25 (attached as Exhibit H). Dr. Ghoubrial's practice is varied and includes helping run Wadsworth's largest primary care practice. *See Id.* page 11, lines 2-6 (attached as Exhibit H). His practice also includes treating victims of personal injuries such as auto accidents. *See Id.* page 22, lines 1-5 (attached as Exhibit H). These patients are referred to Dr. Ghoubrial by chiropractors such as Defendant Floros and other providers. *See Id.* page 46, lines 19-25; page 47, lines 1-9 (attached as Exhibit H). Chiropractors refer out to Dr. Ghoubrial when the pain cannot be treated by alternative methods like chiropractic manipulation and massage. *See Id.* page 45, lines 4-11 (attached as Exhibit H). While some of his patients are represented by KNR, Ghoubrial has no referral contract with KNR or chiropractors. *See* Ghoubrial Affidavit (attached as Exhibit G). Dr. Ghoubrial has never had any type of referral agreement with KNR. In fact, Dr. Ghoubrial regularly sees injury patients represented by approximately seventy (70) different lawyers and law firms and his charges for the medical services provided are uniform for all patients regardless of who is representing them in their legal matters.

B. Clearwater Billing, LLC's Patient Population

Commendably, Clearwater's personal-injury practice serves an "underserved area" of the Ohio population, individuals who are often without health insurance or even government assistance who would have difficulty receiving care elsewhere without self-pay, which they typically cannot afford. *See* Ghoubrial Deposition, page 44, lines 1-5 (attached as Exhibit H). Dr. Ghoubrial started his personal injury practice, now run under Clearwater Billing, LLC, because "these patients can't get seen, they kept having to go back to the ER… the family doctor won't see them. They don't have health insurance, they don't have anybody that will take care of them and they need to be treated.." *See* Ghoubrial Deposition, page 45, lines 6-11 (attached as Exhibit H). Confirming this, Plaintiff Harbour first treated with Dr. Ghoubrial because his primary care physician refused to see him because he was injured in a motor vehicle accident. *See* Harbour Deposition, pg. 62, 8-13 (attached as Exhibit D). In addition, former KNR attorneys Robert Horton, Gary Petti, and Kelly Phillips confirmed, in their experience, primary care physicians often refused to treat motor vehicle accident victims. *See* Horton Deposition, page 97, lines 9-12 (attached as Exhibit I); Petti Deposition, page 128, lines 7-15 (attached as Exhibit J); Phillips Depo. pg. 380, 14-19 (attached as Exhibit K).

C. Dr. Ghoubrial's General Approach to Treatment of Soft-Tissue Injuries

The typical patient who presents to Dr. Ghoubrial or other Clearwater physician providers in the personal injury practice is suffering from moderate to severe traumatically-induced injuries, including soft-tissue injuries to muscles and ligaments (along with headaches and various other medical complaints). Thus, Clearwater physicians have significant experience treating traumatically-induced soft tissue injuries. *See* Ghoubrial Deposition, page 63, lines 19-22 (attached as Exhibit H). These injuries may require a prolonged time to heal. Dr. Ghoubrial takes a "multidisciplinary

approach" to healing patients with traumatically-induced soft-tissue injuries. *See* Ghoubrial Deposition, page 42, lines 9-12 (attached as Exhibit H). This is consistent with the standard of care throughout the nation, including Ohio.

In addition to physical therapy with a PT specialist or chiropractor, treatment modalities for these injuries generally include a combination of pain medication, muscle relaxers, NSAIDs, and various other medications depending on the circumstances. Treatment may also include the use of back braces, TENS units, the release of trigger points through the use of trigger point injections, referrals to health care providers who provide services Clearwater does not, and other potential treatments.

D. Trigger Point Injections

Trigger points are a specifically identified area on a patient's anatomy that may or may not require treatment. They present as taut bands of muscles, spasms, and in other manners. Identification of trigger points involves palpation, discussion with the patient, and evaluation based upon the health care provider's experience. Trigger points are real anatomical injuries recognized by the entire medical and chiropractic professions. Some trigger points require treatment, others do not. Moreover, when treatment is necessitated, multiple different modalities may be utilized, some of which are appropriate for chiropractors and some of which require a medical doctor.

Trigger point "injections", with or without steroids, are one of several commonly accepted methods of treatment. In fact, it's minimally invasive, highly effective, and often specifically requested by patients who have had the injections in the past. The Plaintiffs' characterization regarding the administration of trigger-point injections is, in a word, **untrue**. This is not a close call. The Plaintiffs COMPLETELY and WHOLLY misrepresent the medicine in this regard, in yet another obvious attempt to improperly bias this Court's view of Dr. Ghoubrial.

The Court does not have to rely on obscure research to understand the inaccuracy of Plaintiffs' representations regarding trigger point administrations. The Court only needs to examine one section of the very research Plaintiffs' counsel cited. Quite frankly, the Plaintiffs' blatant misrepresentations regarding the journal articles are staggering. Four of the nine articles referenced do not even discuss trigger point injections. The two that discuss trigger point injections do not state trigger point injections are contraindicated for treatment of acute pain, because that was not an issue addressed by those articles.

Most shockingly, the Kushner article, Overview of Soft Tissue Rheumatic Disorders, UpToDate (Jan. 2019), expressly approves trigger point injections as one of the proper treatment methods to release "whiplash-associated" trigger points. Moreover, the article expressly states the use of trigger point injections "can often be initiated during the first visit…" This flies on the face of Plaintiffs' patently false representation that "…trigger-point injections are not even mentioned in the summary of research for treatment contained in UpToDate…" *See* Motion, page 22.

The use of trigger point injections as an effective treatment modality is further supported by the testimony of Dr. Gunning, the use of trigger point injections by other physicians with former Plaintiff Matt Johnson, and the affidavit of Adam Carinci, M.D., a board-certified pain management specialist and the Director of the Pain Treatment Center for the University of Rochester Medical Center. *See* Affidavit of Adam Carinci, M.D., (attached as Exhibit L).

Dr. Carinci testified unequivocally that the administration of trigger point injections is medically appropriate and used on a fairly routine basis in the medical profession as it relates to patients suffering from traumatically-induced soft-tissue injuries, including acute pain, such as that suffered by accident-injury victims.. *Id.*, ¶ 6. Dr. Carinci further testified to a reasonable degree of medical certainty:

1. Soft tissue injuries are often treated with multiple modalities, including trigger point injections, chiropractic car, pain medication, the use of anti-inflammatories, electrical stimulation, and muscle relaxers. *See Id. ¶ 7;*

2. The use of steroidal and non-steroidal trigger point injections is a widely accepted and appropriate treatment modality for soft tissue injuries. *See Id.* ¶ 8;

3. Trigger point injections are not contraindicated for use in treating acute trauma. *See Id;* and

4. Numerous peer-reviewed and accredited medical studies support the use of trigger point injections as a treatment modality for acute and sub-acute soft tissue injuries. *See Id.*

In addition to his work as a Professor at the University of Rochester School of Medicine, Dr. Carinci runs an active clinical practice, focused on the treatment of patients suffering from acute back pain and/or traumatically induced muscle pain (caused generally by motor vehicle accidents or other traumatic events). *See Id.* ¶¶ 2-3. As part of his clinical practice, Dr. Carinci treats patients suffering from traumatically-induced acute muscle and back pain with steroidal and/or non-steroidal trigger point injections. In his experience, trigger point injections have generally proven beneficial to his patients in helping to alleviate pain and are a reasonable method of treatment. *See Id.* ¶ 10.

Dr. Carinci and Dr. Ghoubrial are not alone in their support of the healing effects of trigger point injections to alleviate pain in certain patients. *See Id.* Modern medical research also supports and encourages the use of trigger point injections in acute treatment. 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. *See* 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).

Further, contrary to Plaintiffs' misrepresentations, Dr. Ghoubrial truly believes in the use of trigger point injections to effectively reduce pain levels and promote healing because he has personally seen trigger point injections work in "thousands" of his own patients' care. *See* Ghoubrial Deposition, page 90, lines 6-13. In this case alone, Plaintiff Thera Reid admitted trigger point injections were beneficial in relieving her pain and helping her heal. *See* Reid Deposition, pages 373-375, lines 23-17; page 474, lines 1-2 (attached as Exhibit C); *Compare* Ghoubrial Deposition, page 249 (attached as Exhibit H) (Dr. Ghoubrial's records show trigger point injections were beneficial in reducing Thera Reid's pain).

As can be seen from the testimony of Dr. Ghoubrial, Dr. Gunning, Thera Reid, Sharde Perkins, and Richard Harbour, trigger point injections are only offered and administered if clinically warranted and agreed to by the patient after full informed consent.

E. TENS Units

Like the use of trigger point injections, TENS units are widely considered an effective modality in treating and helping to alleviate soft tissue injuries, including neck and back pain and spasm. *See* Affidavit of Adam Carinci, M.D., ¶13 (attached as Exhibit L). In fact, the use of TENS units to treat acute low back pain or soft tissue injuries is widely supported in the medical community and considered an accepted method of treatment. *See Id.* ¶ 13 and ¶15; Johnson, MI, et al, *Transcutaneous Electrical Nerve Stimulation for Acute Pain (Review),* Cochrane Database of Systematic Reviews, 2015. The use of TENS units, along with other modalities, has been found to reduce pain intensity and help patients with traumatically-induced soft tissue injuries heal more quickly. *See Id.* In a 2019 article, the use of TENS units was specifically recommended as an adjunct to other immediate post-injury or post-operative pain treatments as a strategy to reduce pain. *See*

Joseph R. Hsu, et al, *Clinical Practice Guidelines for Pain Management in Acute Musculoskeletal Injury,* Journal of Orthopedic Trauma, (2019).

Over the years, Dr. Ghoubrial has read many articles which have pointed to the benefits of utilizing TENS units as a modality to reduce pain in patients suffering from soft-tissue injuries. *See* Ghoubrial Deposition, page 149, lines 5-8 (attached as Exhibit H). And, in his own practice, Dr. Ghoubrial has seen the positive effects the use of TENS units can have on patients. *See Id.* pages 148-149, lines 18-2 (attached as Exhibit H). Ultimately, Plaintiffs' admissions in this case alone substantiate the use of TENS Units and its effective in reducing pain overall. (Harbour Cite).

Dr. Ghoubrial and the other Clearwater physicians only provide TENS units if clinically indicated and if the patient desires the TENS unit after a full informed consent discussion. The patients are always provided instructions on its use or at least offered to provide instructions on its use. On most occasions, the physicians document that instructions were provided. Often times, the patients also sign a form conforming the instructions were provided AND the unit was shown to be operable in front of them. For example, Chetoiri Beasley, who signed an affidavit attached to the Motion to Certify, signed the following form:[10]

[10]This obviously raises serious questions as to Ms. Beasley's credibility, given her affidavit provides contradictory testimony to the very document she signed on November 8, 2017.

Re: Tens Unit Instruction & Confirmation

I, Chetoiri Beasley, was issued an Ultima 3t Unit on 11-8-17 and instructed how to use this device and given a manual on a **3t Ultima Lot No.** 170323. At the time of instruction, I can confirm that the Tens Unit I was instructed on and received was in great working order. I can affirm that this unit was tested in front of me at my visit and that the unit turned on after the battery was placed in the unit with the setting functions properly working during instruction. In addition, I was directed to use my manual or contact the medical office at (330) 331-7207, if you have any questions related to this Tens Unit.

Patients Signature 11/8/17 Date

Chetoiri Beasley
Please print name

Authorized Representative for Clearwater Billing Services, LLC

(See Affidavit of Dr. Ghoubrial)

F. Soft Tissue Injuries and the Personal Injury Settlement

While soft-tissue injuries are the most common types of injuries sustained in car accidents, they are also one of the most criticized, overlooked, and underestimated. The public's (i.e., a jury's) and insurance company's perception of medical treatment changes over time and often lags behind the acceptance in the medical community. For example, decades ago, insurance companies, defendant's attorneys defending these claims, and even juries, failed to acknowledge the legitimacy of chiropractic treatment. Now, chiropractic treatment is generally accepted as proper. Still, as testified to by EVERY attorney deposed by Plaintiffs' counsel, insurance companies often look for ways to pay as little as possible on claims, often resisting paying full compensation for the treatment of soft-tissue injuries. Unlike a broken bone or laceration, there is often little or no objective proof that an accident victim has suffered a soft-tissue injury.

Victims are faced with a larger burden than usual to prove to the insurance company that their injuries warrant financial compensation. Unfortunately, some (but certainly not all) insurance claims' adjusters are cynical (or express cynicism) when it comes to these types of claims due to lack

of evidence. When victims are not diligent in seeking medical attention after an accident, insurers will do their best to prove that the injury and the accident are unrelated. If there isn't any objective evidence that an injury exists—as documented by doctor reports—then the insurance company may discount the injury and/or deny the claim.

However, Dr. Ghoubrial does not allow insurance claims adjusters to determine how he treats and evaluates patients. The insurance company's opinion on soft tissue injuries does not change the patient's pain level or need for treatment.

G. Treatment is Tailored to the Patient and is only Provided if Necessary

Dr. Ghoubrial rebuffed Plaintiffs' counsel's attempts to accuse him of providing unjustified treatments. Ghoubrial stated "I can't emphasize to you enough that there is no class of patients where I just give everything to everyone. *Each individual is specific*." *See* Ghoubrial deposition, page 135, lines 7-9 (attached as Exhibit H). He stated further, ***I don't use narcotics on every patient***. In fact, that's one of the reasons that *I like to use trigger points, when appropriate is to* ***avoid the use of narcotics***. Muscle relaxers, again, it's *patient specific*." *Id.* p. 135:1-6. Dr. Ghoubrial looks for **"subjective and objective findings to support" his treatment plan.** *Id.* p. 132: 19-20. He has "treated thousands of these patients" over more than a decade and he has personally "seen the benefits of the trigger point injections and I know when to give them, how to give them, where to give them and when not to give them." *Id.* p.128. Contrary to Plaintiffs' baseless and self-serving assertions, trigger-point injections are a recognized and appropriate treatment for the patients and presentations seen by Dr. Ghoubrial in the personal injury clinic. *See* Affidavit of Adam Carinci, M.D., (attached as Exhibit L).

When asked about his "multidisciplinary approach," Dr. Ghoubrial explained it means "depending *on the patient, like I said it's patient specific*, there's no one class of patients here. … …

If you're looking for one answer that covers all patients, it just simply doesn't exist." *Id.* p. 136:10-137:5. "As I told you, each patient is different. You're looking for one answer that fits all patients - … there's no such thing. … The truth is each and every one of the patients that I treat is a unique individual by virtue of their age, by virtue of their problems, by virtue of the medications they're on, by virtue of the contraindications, by virtue of when they present, how they present. So there is no uniform answer …, I can just tell you it's patient specific." *Id.* p. 138:7-24.

Ghoubrial engages less invasive ways to treat pain than minimally invasive trigger point injections and refers out when necessary: "Sometimes I just simply say, look, I think the best course of treatment for you -- I've done this hundreds of times -- is to just simply go to massage therapy and continue with your chiropractor and I see them for one visit and that's it. Sometimes I say, look, your pain is so significant here that I think you need to go to pain management. I refer them to pain management. When they have a multiple disc issue and they need a fusion, I refer them to neurosurgery. Well, there's many, many ways to treat these patients. No one patient is the same as the second. *Id.* p. 145. He recommends "less invasive modalities" to his personal injury patients including chiropractic care and physical therapy, and "*Occasionally* TENS units, those are helpful" and "On occasions braces."[11] *Id.* p.145. Ghoubrial is thus treating every patient individually with the goal of avoiding narcotics.[12]

Dr. Ghoubrial is referred to by numerous chiropractors (not just defendant Floros) and has worked with approximately seventy different lawyers and law firms. *See* Ghoubrial Affidavit. Plaintiffs provided no evidence that they were ever mistreated by Dr. Ghoubrial. Indeed, Plaintiff Harbour admitted the trigger point injections benefited him and he returned for more treatment,

[11]It is undisputed none of the named Plaintiffs herein ever received a back brace from Dr. Ghoubrial or his personal injury practice.

[12]Ohio has the second highest rate of drug overdose deaths involving opioids in the U.S. See https://www.drugabuse.gov/opioid-summaries-by-state/ohio-opioid-summary.

including trigger point injections, on several occasions. *See* Harbour Deposition, page 118, lines 21-25, page 119, lines 1-3 (attached as Exhibit D). Tellingly, Plaintiff Harbour treated with Dr. Ghoubrial multiple times as the result of two separate accidents and two separate lawsuits. *Id.* at page 116, lines 11-15. As such, he cannot credibly claim he was unaware of the treatment or the related charges.

H. Dr. Ghoubrial Never Coerced Patients into Foregoing Insurance Coverage; Patients Agreed to Pay Clearwater from Settlement Proceeds Rather than Out-of-Pocket, and Clearwater Agreed to Reduce its Bill in Nearly Every Case

Plaintiffs' counsel fails to explain how it is a detriment for victims to receive medical care without having to pay out of pocket. Plaintiffs' counsel also does not address the testimony of his own client, Plaintiff Richard Harbour, who explained the entire reason he obtained legal representation was to ensure he paid no medical expense out of pocket or with insurance, but rather wanted the at-fault party's insurance to pay for his medical care. *See* Harbour Deposition, page 20, lines 13-17, (attached as Exhibit D). Mr. Harbour's testimony highlights the disparity between class members. His testimony unilaterally proves not every personal injury victim has health insurance or wants to use the insurance they have. Or, they may not want to pay the copays and sometimes large deductibles.

In addition, certain class members may not have had any other means to pay for the medical treatment they needed to heal from their injuries. These victims are presented with a catch-22: they could pay for the medical care they need *if* their suit settles, *but they cannot prove their case without first getting medical care*. *See* Horton Deposition, pages 48-49 (attached as Exhibit I) (they had to have treatment to have an injury claim.) This is critical. Without a documented medical history of injury and treatment, the claimant would get either no recovery or minimal recovery. As plaintiffs' own purported legal expert admits, the personal injury cases often settle based on "going rates,"

which is typically two to four times the amount of medical bills. Plaintiffs' Mot. Ex. 2, Engstrom, *Run-of-the-Mill Justice*, 22 Geo. J. Legal Ethics 1485, 1532-33 (2009). While Defendant does not adopt the concept that the value of a claim can be determined with a calculator, the point is that the Plaintiffs' own expert agrees medical bills increase settlement values.

Most accident injury victims want to obtain medical care to help them heal quicker and get back to life's activities. Apart from that, many differences exist. Some are not worried about out-of-pocket expenses; some are. Some want chiropractic care; and some don't. Some want care by a medical doctor; some don't. Some don't mind if their individual health insurance pays for treatment; and some are adamantly opposed to even having their own med pay coverage pay for the care. Some, like Plaintiff Richard Harbour, want to avoid having medical bills go to collection and wish ALL of their medical treatment was provided under a Letter of Protection.

A Letter of Protection (LOP) is a *promise to pay for the reasonable value of medical services directly out of a settlement*. It is a contract between the victim receiving care and the medical provider. The lawyer often signs the agreement as well, at the client's direction, which then allows the accident-injury victims to obtain the treatment they need in exchange for a promise to pay the provider directly from the settlement. The LOP protects the doctor from having to collect a bill directly from the patient who typically cannot not afford to pay up front. Letters or protection are standard and were used by "non-conspirators" for the care of KNR clients, just as the healthcare provider Defendants did.[13]

[13]See, for example, the Massage Therapy Lien and Agreement and Assignment forms for care provided by Mary Kanlowsky, L.M.T. and the CNS Center, which are health care providers former Plaintiff Matthew Johnson obtained treatment with separate and apart from a KNR referral.

Akron attorney John Lynette, Esq. of Slater & Zurz (where Attorney Horton now works) provided testimony via affidavit on the Letters of Protection. *See* Affidavit of John Lynette (attached as Exhibit M):

6. To provide the best possible service for my clients, I have recommended to my clients doctors and facilities that will treat them for their injuries, with the understanding that these providers will not try to collect payment for those services from my clients until my clients' claims have been settled or adjudicated.

7. Because these physicians do not have the legal right in Ohio to enforce an Assignment of Benefits on my clients' claims, with my clients' permission I agree to withhold an amount of agreed upon health care services fees from my clients' settlement or judgment and pay those amounts directly to the doctor or healthcare facility. That promise benefits my client because it puts the healthcare provider at ease knowing that if there is a monetary resolution to the claim, the physician will get some portion of their fees paid and allows my client to get the timely medically necessary treatment that is required.

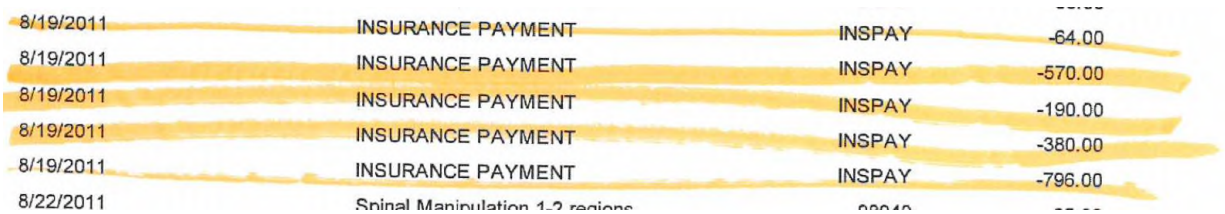
A Just like you say with your primary care doctor, it's to make sure that they get care, I guess is the best way to describe it. A lot of -- this is one of the most frustrating things about what we do, is a lot of medical providers refuse to see you or want you to pay cash up front if you've been in an accident. Not getting care is not a good option and people don't have the money to pay doctors up front. So most of the chiropractors who actually do personal injury work work on letters of protection, so they'll see your patients or clients and get paid when they're done.

Q It's a benefit to the client?

A Yes.

See Horton Deposition, page 98, lines 1-14, (attached as Exhibit I). Moreover, Plaintiffs' claim that none of the Defendant health care providers accept insurance is outright false. Dr. Floros testified he

accepts insurance. And, for Mr. Taijuan Carter, one of the patients whose records Plaintiff requested and partially used in the Motion to Certify, "med pay" insurance and "liability insurance" paid for $2,000 of Akron Square Chiropractic's charges. The policy only provided $2,000 in med pay coverage, as documented in Dr. Floros' billing records. *See* Ghoubrial Affidavit (attached as Exhibit G):



8/19/2011	INSURANCE PAYMENT	INSPAY	-64.00
8/19/2011	INSURANCE PAYMENT	INSPAY	-570.00
8/19/2011	INSURANCE PAYMENT	INSPAY	-190.00
8/19/2011	INSURANCE PAYMENT	INSPAY	-380.00
8/19/2011	INSURANCE PAYMENT	INSPAY	-796.00
8/22/2011	Spinal Manipulation 1-2 regions		

Every attorney who has testified at deposition in this case has agreed as to the appropriateness of Letters of Protection. *See* Horton Deposition, pages 97-98, lines 21-14 (attached as Exhibit I).

Also, as Plaintiffs' counsel fails to mention, the patient's lawyer typically attempts to negotiate a discount of the charges for services rendered under a letter of protection. KNR lawyers universally negotiate such discounts, and Dr. Ghoubrial agrees to discount Clearwater's bills on nearly every case. Doctors who treat patients under an LOP take on significant risks in delayed payment, reduced payment, and nonpayment. In fact, nonpayment and drastically reduced payment occurred in the very patients Plaintiffs examined in discovery, with at least two patients paying Clearwater $0 for treatment (from one client who obtained a recovery but reneged on the LOP and another client who did not obtain a recovery). Clearwater and Dr. Ghoubrial recognized and accepted this risk in treating patients in the personal injury practice. *See* Ghoubrial Affidavit (attached as Exhibit G).

Like most doctors, Dr. Ghoubrial does not work in his personal capacity. He works for Clearwater Billing Services, LLC, the entity that actually billed for and received payment for the

treatment provided.[14] The patients seen in Dr. Ghoubrial's personal injury practice do not pay him out of pocket and instead ***sign*** an LOP called a "medical lien," which states:

> I hereby direct you to pay to Clearwater Billing Services, LLC from the net proceeds of any settlement, claim, judgment, verdict or award, for any and all services rendered as a result of an injury that I received on ___.
>
> Said amount being *fair and reasonable price of medical services* provided by our medical providers for me at the direction of my doctor or doctors. I authorize you to withhold said sums from the net proceeds of any settlement, claim, judgment, verdict, or awards as may be necessary to pay Clearwater Billing Services, LLC
>
> *I fully understand that I am directly and fully responsible to Clearwater Billing Services, LLC for the aforementioned account submitted to me by Clearwater Billing Services, LLC for services rendered me*, and that this agreement is made solely for its additional protection and in consideration of its awaiting payment. I further understand that such payment is not contingent on any settlement, claim, judgment, verdict or award by which I may eventually recover said fee.

See Motion, Exhibit 35 (plaintiffs' signed medical liens with Clearwater). The KNR lawyer or other lawyer would then sign that they agree to pay Clearwater Billing, LLC out of the settlement. *Id.*

Clearwater, through Dr. Ghoubrial's approval, agrees to a reduction "on 99.9 percent of the cases." *See* Ghoubrial Deposition, page 152, lines 2-3(attached as Exhibit H). Plaintiffs' misleadingly state Dr. Ghoubrial has collected "nearly eight-million dollars" from KNR client' settlements since approximately 2011. *See* Motion, page 3. Under the medical lien, this is money the victims agreed to pay the entity Clearwater Billing Services, LLC, ***not Dr. Ghoubrial***. And this figure represent the "paid amount, which represents a reduced figure from what's billed." *See* Ghoubrial Deposition, page 152, lines 11-13. Dr. Ghoubrial regularly sees reductions from 30 to 75 percent. *Id.* Clearwater has written off nearly $6 million during this time, and the personal injury practice has provided over $7 million in free medical care to KNR clients. *See* Ghoubrial Affidavit,

[14] Plaintiffs are aware Clearwater Billing, LLC is the entity that billed and received payment for the medical treatment provided. However, Plaintiffs never named Clearwater Billing, LLC as a defendant in this action, choosing instead to only name Dr. Ghoubrial personally. This is despite the fact Dr. Ghoubrial never treated named Plaintiff Monique Norris who was treated by Dr. Richard Gunning.

(attached as Exhibit G). Clearwater was responsible for all billing and reductions and Clearwater receives all payment, not Dr. Ghoubrial. *Id.*

I. Dr. Ghoubrial did NOT treat Ms. Norris or many other Class Members

Dr. Ghoubrial did not treat Monique Norris or many other of the alleged class members. The Plaintiffs failed to identify Clearwater Billing, LLC or any other corporate entity as a Defendant, despite knowing of the existence and nature of the business relationship. Dr. Ghoubrial did not have a physician-patient relationship or any other relationship with Monique Norris. She had a physician-patient relationship with Dr. Gunning, who has admitted he is the physician who treated her. Dr. Ghoubrial supports the care provided by Dr. Gunning, but he certainly cannot be held personally responsible for care rendered by other physicians, especially when the other physician has testified all recommendations were based on their own professional judgment.

J. The Case of Sharde Perkins

The Plaintiff requested medical records from Dr. Ghoubrial, Akron Square Chiropractic, and KNR relating to several non-Plaintiff patients. *See* Ghoubrial Affidavit, (attached as Exhibit G). One of those patients was Sharde Perkins. An examination of the treatment she was provided disproves many of Plaintiffs' allegations and puts a nail in the coffin in their request for class certification.

First, the Motion to Certify characterizes class members as unsophisticated, uneducated, accident-injury victims who are "unlawfully solicited" or "chased down" by investigators and then "coerced" into receiving unwanted and essentially useless healthcare. Plaintiffs' counsel describes class members as automatons who have no personal responsibility for their individual choices,

failing to understand or even read documents they sign[15], and present in robot-like fashion at the Defendants' collective whim for treatment with whomever and for whatever the Defendants "direct." The characterization is not only insulting and misleading, it is simply not true.

Dr. Ghoubrial's patients – including the named Plaintiffs and the others in which records were requested regarding – report an experience entirely different than that presented by Plaintiffs' counsel:

1 Rather than surreptitiously obtaining "informed consent", the patients confirm Clearwater physician providers discussed the risks and benefits of treatment before proceeding;

2. Rather than brief "two-minute" interactions in which "no words are exchanged", they report detailed discussions, mutual involvement in decisions making, and office visits lasting sometimes more than 45 minutes;

3. Rather than lack of knowledge of the medication used for trigger point injections, they have prior testimony and communications documenting their knowledge of the medication and the desire to receive the medication;

4. Rather than "unwanted" care, they report asking for and wanting the care;

5. Rather than "unnecessary" or "useless" care, they almost universally report beneficial effects from the care;

In other words, neither the actual patients who are or were Plaintiffs in this action, nor the other patients identified in discovery, support the fiction proffered by Plaintiffs' counsel. Getting back to Sharde Perkins, the following is pertinent. *See* Ghoubrial Affidavit, (attached as Exhibit G):

1. Ms. Perkins was employed and educated. Following her high school degree, Ms. Perkins attended higher education classes at ACE Medical Academy in Canton, Ohio to become certified to distribute medications and to obtain her

[15]One is presumed to read and understand contract terms when one signs a contract. *Beckham v. Nationwide Mut. Ins. Co*., C.P. No. 11CVH-09-11447, 2012 Ohio Misc. LEXIS 246, at *1 (July 11, 2012).

STNA certification (a state tested nurse assistant). She was employed at RES Care at the time of her accident. *See* Perkins Deposition, page 9 (attached as Exhibit N).[16]

2. Ms. Perkins was familiar to the legal arena, as she was involved in prior litigation unrelated to this case. She also received prior chiropractic treatment at Perry Chiropractic for traumatically-induced soft-tissue injuries relating to a 2011 motor vehicle accident, from which she obtained a settlement.[17] *Id.*

3. Ms. Perkins was involved in a heavy-impact MVA on April 27, 2016, which caused her to strike the interior of the vehicle with such force she blacked out and resulting in immediate severe pain and injuries to her head, neck, and back. *Id.* at pages 33-35, 42.

4. Ms. Perkins sought immediate care at Aultman Hospital's Emergency Department, where the ED physician's assistant and physician evaluated her, obtained a CT of her cervical spine, and diagnosed her with Cervical Strain; Myofascial lumbar strain; right facial contusion; muscular strain; back sprain/strain; and neck sprain/strain, all related to the MVA. She was treated with Ibuprofen and Flexeril and advised to follow up with "any doctor that I pretty much can find". *Id.* at pages 34, 40-42.

5. Ms. Perkins then voluntarily decided to present for treatment at Canton Injury Center based upon "good recommendations from other people that got treated there." She was not telemarketed, offered free rides, or referred by an attorney. She was not represented by KNR at the time she presented to the Canton Injury Center. *Id.* at pages 43-46.

6. Ms. Perkins contacted KNR for representation on her own initiative. She did not contact KNR due to an advertisement; she was not referred by a chiropractor or Dr. Ghoubrial or Clearwater. That is, she was not "chased down" or "unlawfully solicited." Rather, as Ms. Perkins testified on March 3, 2017:

[16]This is true of many of the potential class members and current Plaintiffs. Mr. Harbour is educated, Ms. Norris is a pharmacy technician, Mr. Carter attended college, and many other class members were educated beyond high school. Plaintiffs' counsel's use of class members' alleged "ignorance" and lack of education is insulting and also wholly irrelevant. None of these potential class members referenced in this case have guardians or an inability to understand the English language. Many of them have multiple lawsuits (at least 5 of the 14 individuals identified in discovery have had multiple representations with KNR and more than that considering representations by other firms).

[17]Ms. Perkins' prior case did not involve KNR. However, nearly 40% of the patients identified in this litigation came back to KNR for representation multiple times. Plaintiff Richard Harbour was represented and obtained recover on 4 separate cases with KNR. Mr. Carter was represented by KNR three times. Ms. Beasley, and other former KNR clients and Clearwater patients were likewise involved in prior litigation.

> Q. When you went to Canton Injury Center did they provide you with some attorneys?
>
> A. No. I provided my own.
>
> Q. So you found your attorney yourself?
>
> A. Yes. (Deposition of Sharde Perkins, at p. 46, ll. 18-23);

7. Ms. Perkins spent an "hour or two" with Dr. Peterson at the first visit, where she received "excellent" and "great" treatment that helped her injuries. *Id*. at pages 47-52.

8. Ms. Perkins decided to treat with a Clearwater physician provider herself. The receptionist at Canton Injury Center told her a medical doctor sometimes was at the office, and Ms. Perkins then told the chiropractor at Canton Injury Center she wanted to be evaluated by the physician. *Id*. at pages 53-54.

9. The initial office visit with Clearwater was hardly a "two-minute" examination without words being exchanged, as described by Plaintiff. The office visit most likely took at least 30-45 minutes, and even Ms. Perkins admitted the visit was at least 15-20 minutes. Ms. Perkins further testified the Clearwater physician provider discussed her family history and background, performed a physical examination, and discussed treatment options with her. *Id*. at page 58, 4-20. *See also* Ghoubrial Affidavit, (attached as Exhibit G).

10. Dr. Jones did not "surreptitiously" obtain informed consent for injections. Rather, he discussed the trigger point injections with Ms. Perkins, including the potential side effects, and obtained informed consent.[18] *See* Perkins Deposition, pages 54-55, 58 (attached as Exhibit N). *See also* Ghoubrial Affidavit, (attached as Exhibit G).

11. Rather than being given "as many injections as possible", Ms. Perkins received ONE injection at her first visit, no injections at her second office visit, and then was discharged from Clearwater's care due to her improvement. *See* Ghoubrial Affidavit (attached as Exhibit G).

12. Ms. Perkins told the receptionist at Canton Injury Center she "needed a TENS unit or some further relief". Ms. Perkins **asked** the Clearwater physician provider for a TENS unit, which she was still using nearly a year later:

[18] *Id*. at pp. 54-55, 58; see also medical records.

Q. It looks like he prescribed you a TENS unit. Do you remember that?

A. Yes. I have still that.

Q. Do you still use it?

A. Yes.

Q. Did you ask him for a TENS unit?

A. Yes. .

See Perkins Deposition, pages 55-56, lines 6-4) (attached as Exhibit N).

Ms. Perkins asked the receptionist at the chiropractor's office for a TENS unit and was advised the Clearwater physician could provide one.

Q. You just testified you asked for it –

A. I asked for it.

Q. - so how did you know he had it?

A. The receptionist.

Q. The receptionist said he has a TENS unit that he can give you?

A. Yes.

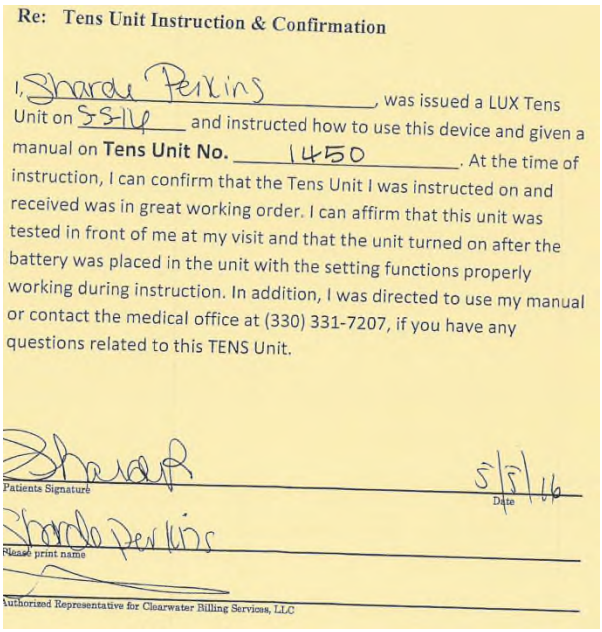
Q. Did you tell the receptionist you needed a TENS unit or some further relief?

A. Yes.

Id. at page 56, lines 2-4.

13. Ms. Perkins was not just handed a TENS unit without instructions. Rather, in addition to asking for the device, she was provided instructions on use of the device, as evidenced by the dictated office note of the Clearwater physician and Ms. Perkins' own admission:

SPECIAL NOTE: I provided the patient with an Ultima 3t TENS unit. I gave instructions on its use and recommended the normal mode setting (30 microseconds pulse width and 2 Hz pulse rate) for 30 minutes, two times daily.



Re: Tens Unit Instruction & Confirmation

I, Sharon Perkins, was issued a LUX Tens Unit on 5-5-16 and instructed how to use this device and given a manual on Tens Unit No. 1450. At the time of instruction, I can confirm that the Tens Unit I was instructed on and received was in great working order. I can affirm that this unit was tested in front of me at my visit and that the unit turned on after the battery was placed in the unit with the setting functions properly working during instruction. In addition, I was directed to use my manual or contact the medical office at (330) 331-7207, if you have any questions related to this TENS Unit.

Patients Signature 5/5/16 Date

Sharon Perkins Please print name

Authorized Representative for Clearwater Billing Services, LLC

14. Ms. Perkins **asked** the Clearwater physician provider for a back brace, which she utilized nearly a year later when doing chores around the house (Id. at pp. 56-57). Ms. Perkins testified:

> Q. Other than the injections and the TENS unit did [the Clearwater physician provider] give you anything else to assist with the pain?
>
> A. It was a back brace.
>
> Q. Did you ask for the back brace as well?
>
> A. Yes, I did.

See Perkins Deposition. pages 56-57, lines 12-18, (attached as Exhibit N).

15. Ms. Perkins was never prescribed narcotic pain medication by any Clearwater physician provider. The Clearwater physician provider prescribed the same medication she was previously on from her treatment at Aultman Hospital's Emergency Department: Flexeril and Motrin. (See Affidavit of Dr. Ghoubrial).

16. Rather than pushing medications, the Clearwater physician provider advised Ms. Perkins to "scale back on the medications" to "see how she does without them." At her second (last) visit, he prescribed Flexeril and Motrin, with no refills and, because of her improvement, released her from Clearwater's care. (See Affidavit of Dr. Ghoubrial).

17. Ms. Perkins case went to litigation, where a Complaint was filed, her deposition taken, discovery conducted, mediation conducted, and the case settled.

18. Ms. Perkins was fully aware of Clearwater's charges before she agreed to a settlement, because she answered Interrogatories attaching the medical bills. The charges were also present on the Settlement Memorandum, and she was advised of the reduction in Clearwater's charges.

IV. THE STANDARD FOR CLASS CERTIFICATION HAS NOT BEEN MET.

The Ohio Supreme Court has adopted the strict class certification standards set by the U.S. Supreme Court, which has held most claims cannot be certified:

> [C]lass-action suits are the ***exception*** to the usual rule that litigation is conducted by and on behalf of only the individually named parties. To fall within that exception, the party bringing the class action must ***affirmatively demonstrate compliance with the procedural rules governing class actions***. …The United States Supreme Court has insisted that courts give careful consideration to the class-certification process, holding that Fed.R.Civ.P. 23 is not "a mere pleading standard." Rather, the party seeking class certification must affirmatively demonstrate compliance with the rules for certification and be prepared to prove "that there are in fact sufficiently numerous parties, common questions of law and fact, etc." After *Dukes*, there can be no dispute that a trial ***court's rigorous analysis*** of the evidence often requires ***looking into enmeshed legal and factual issues that are part of the merits of the plaintiff's underlying claims***. In doing so, however, the ***trial court may probe the underlying merits of the cause of action*** only for the purpose of determining that the plaintiff has satisfied Civ.R. 23.

Felix v. Ganley Chevrolet, Inc., 145 Ohio St.3d 329, ¶35-37 (2015) (cleaned up).

Civ.R. 23 has seven requirements to certify, as outline in Plaintiffs' Motion. In *Cullen*, 137 Ohio St.3d 373, ¶12. Civ. R. 23(B)(3), the Ohio Supreme Court ruled a necessary prerequisite to class certification is that "the court finds that the questions of law or fact common to class members predominate over any questions affecting only individual members…." If plaintiffs cannot establish any one of these requirements, a class cannot be certified.

VI. PLAINTIFFS MAY NOT CERTIFY CLASSES NOT ALLEGED IN THE OPERATIVE FIFTH AMENDED COMPLAINT

After years of litigation, the plaintiffs abandon any effort to certify the classes alleged against Dr. Ghoubrial in their Fifth Amended Complaint. Instead, they now propose to certify new classes *not disclosed until filing their Motion*, based upon a new proposed Sixth Amended Complaint (for which they did not even seek leave to file until after KNR's counsel questioned them on the discrepancy). This proposed new class is significantly *broader* than the putative classes alleged in the operative complaint, alleging facts and legal theories never before advanced. Factually, the Plaintiffs now include allegations relating to the reasonable need for and reasonable of cost of office visits, back braces, and every single service provided by Clearwater, including those not even listed in the Fifth Amended Complaint or proposed Sixth Amended Complaint and not identified in discovery. The Plaintiffs also now allege a conspiracy[19] which they claim not only includes the named Defendants but a nebulous group of other healthcare providers that have not even been mentioned.

Plaintiffs readily admit this with their request for leave to file a proposed *Sixth* Amended Complaint. Plaintiffs' class certification motion is based on the broader class definitions and allegations in the proposed Sixth Amended Complaint, even though that pleading was not operative (and still is not operative). *Plaintiffs have the order wrong*. They should have sought amendment *before* the class certification Motion was due and while discovery was in progress. Because *Plaintiffs admit they are seeking to certify based on class definitions and allegations in a proposed complaint*, the Court should deny the Motion for class certification outright, rule on the motion for leave (which should be denied), and then allow the parties time to brief class certification as it relates to the operative pleading. This is just the latest example of Plaintiffs and their counsel's complete disregard for the Ohio Rules of Civil Procedure.

[19]Not to mention RICO allegations, which will not be addressed in this brief.

At a minimum, due process requires that parties have a right to conduct pre-certification discovery on all claims asserted. *Bar told v. Glendale Fed. Bank*, 81 Cal.App.4th 816, 827 (2000) ("due process requires 'an opportunity to conduct discovery on class action issues before … documents in support of or in opposition to the motion must be filed …' "). Defendants are deprived of that right where, as here, Plaintiffs now propose brand new classes and theories for the first time in their class certification Motion. Dr. Ghoubrial objects to Plaintiffs' "certification-by-surprise" tactics as a violation of his due process rights and further objects on the grounds of relevance as to all evidence offered to establish certification of classes never alleged in the operative complaint. Plaintiffs cannot be permitted to obtain class certification through misrepresentations and ambush. The law expressly prohibits what Plaintiffs are trying to do.

Ohio courts do not permit plaintiffs to add new class definitions, theories, and allegations in an motion for class certification that were not properly pled in the operative complaint. *Glazer v. Chase Home Fin., LLC*, 2017 U.S. Dist. LEXIS 49339, at *7 (N.D. Ohio Mar. 31, 2017) (striking the class allegations in an amended complaint because it was filed without leave, as well striking the class certification motion because it was based on the improperly filed amended complaint). The Court is bound to class definitions provided in the operative complaint and *cannot consider certification beyond the scope of this operative pleading*.[20]

Plaintiffs' motion must be denied or stricken on the basis of *Glazer, supra,* alone. The Court does not even need to address any other issue. Plaintiffs' counsel has admitted with his leave to amend after the Motion to Certify was filed that the class-certification Motion is improper.

[20] See also *Lampe v. Queen of the Valley Med. Ctr.*, 19 Cal. App. 5th 832, 842 (2018) ("The lack of connection between the complaint and the classes appellants seek to certify provides a basis for denial of the certification motion."); *Jones v. Farmers Ins.*, 221 Cal.App.4th 986, 999 (2013) (court can deny class certification or strike certification motion where the plaintiffs seek certification that is "beyond the scope of the pleadings."]); *Costelo v. Chertoff*, 258 F.R.D. 600, 604-05 (C.D. Cal. 2009) (the "Court is bound to class definitions provided in the complaint and, absent an amended complaint, will not consider certification beyond it.").

As the Court is well-aware, Plaintiffs only allege in their operative complaint, which is the Fifth Amended Comp. filed on November 28, 2018, the following classes against Dr. Ghoubrial:

> D. All current and former KNR clients who had fees for medical equipment manufactured or distributed by *Tritec* deducted from their KNR settlement proceeds.
>
> E. All current and former KNR clients who had fees for injections from Dr. Ghoubrial or his employees deducted from their KNR settlement proceeds.

The Motion seeks to certify a class far beyond the allegation of the operative complaint, and seeks to *add* patients that received *any* "trigger-point injections, TENS units, ***back braces, kenalog, office visits,"*** or essentially any and all medical services and equipment provided by Clearwater physician providers. Plaintiffs' attempt to amend the Complaint (which even names Defendants with whom none of the Plaintiffs have even treated) indisputably demonstrates Plaintiffs are now seeking to certify broader and different class definitions than those alleged in the operative complaint.

Even more damaging is that Plaintiffs are seeking to add new representatives in their Motion to represent these broader classes. For example, Plaintiff Richard Harbour was the only named plaintiff in the operative complaint who sought to represent the "Class E" regarding "injections from Dr. Ghoubrial". Fifth Amended Comp. ¶¶ 19 180(E), 289-291 (explaining Harbour is the only plaintiff seeking to represent patients who received injections). But in their Motion, Plaintiffs' counsel is now seeking to certify a brand new definition where all four named plaintiffs (Williams, Reid, Norris, and Harbour) are seeking to represent those who "received trigger-point injections" from Dr. Ghoubrial's. *See* Motion, page 44. This is despite the facts Plaintiffs Harbour and Reid admitted the trigger point injections benefited them, Plaintiff Norris never received a trigger point injection and never treated with Dr. Ghoubrial, and Member Williams never treated with any

physician at Clearwater. *See* Reid Deposition, pages 373-375, lines 23-17 (attached as Exhibit C); Harbour Deposition, pages 41-44, lines 3-22 (attached as Exhibit D); Norris Deposition, page 354, lines 3-10 (attached as Exhibit E). The Plaintiffs attempt to improperly enlarge the class definitions in their Motion by adding new Plaintiffs to represent those who received injections violates due process.

VII. THE MOTION FAILS FOR LACK OF COMMONALITY: CLASS-WIDE PROCEEDINGS WOULD NOT GENERATE COMMON ANSWERS APT TO DRIVE THE RESOLUTION OF THE LITIGATION

Ohio Civil Rule 23(a)(2) requires "questions of law or fact common to the class." However, the mere existence of common questions is not the crux of the commonality requirement. To the contrary, as clarified by the United States Supreme Court in *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 349, 350 (2011), the analysis does not hinge simply on the existence of common questions. Rather, the analysis of whether commonality has been satisfied should focus on the **answers** to the common questions. Specifically, do **common answers** to the common questions exist **and** are those **common answers likely to drive resolution of the action** in one proceeding. *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 349, 350 (2011).

Thus, the mere ability of a lawyer to set forth a laundry list of common questions does not begin to address the entire question of commonality. Courts have long cautioned against putting any significant weight on such lists of "common questions of law or fact" when the lists are devoid of analysis, like the list here. The U.S. Supreme Court in *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 349, 350 (2011), addressed such lists as follows:

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

The Ohio Supreme Court has adopted the *Dukes* test. *Stammco, L.L.C. v. United Tel. Co*, 136 Ohio St.3d 231, ¶30-32 (2013). The existence of common questions is still required. But the

inquiry does not stop once common questions are identified (because, as the United States Supreme Court stated, any competently crafted complaint can create general common questions). *Id.* at ¶32. Rather, the Plaintiffs must demonstrate the potential for the claims to **"generate common answers apt to drive the resolution of the litigation."** *Id.*

In the case *sub judice*, the Plaintiffs claim the price-gouging class is "derived entirely" from a "common nucleus of operative facts" and "common liability issues," which Plaintiffs claim can be determined by answering 9 "common questions" relating to the price-gouging class. While Plaintiffs raise "common issues," they fail to articulate **common answers** to those "common issues", which is necessary for class certification.

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

No "common answer apt to drive resolution" of the price-gouging class exists for the this question. The individual components of this question are analyzed below.

a. Does an unlawful conspiracy exist between KNR and chiropractors?

The Plaintiffs have offered no proof whatsoever of the existence of a conspiracy between Dr. Floros and KNR. Plaintiffs' "common question" is far broader than a conspiracy just between Dr. Floros and the KNR law firm, however. How would the Court or a fact finder answer this question for all class members, which Plaintiffs have defined to include all former KNR clients who had Clearwater Billing charges deducted from settlement proceeds.

When looking at the class members as a whole, the conspiracy would have to include complicity and involvement of dozens if not hundreds of individuals:

- All chiropractors involved in the class members' care;

> Dr. Ghoubrial and other physicians at Clearwater were referred patients by multiple different chiropractors and chiropractic clinics. This would involve multiple different chiropractors at multiple different clinics during a 10-year time period.
>
> - At least 4 different physicians at Clearwater provided treatment to accident-injury victims;
> - Dozens of different attorneys at KNR have been involved in cases involving both a chiropractor and a Clearwater physician.
> - Dr. Ghoubrial has treated patients with more than 70 different lawyers / law firms. Are all these attorneys part of the conspiracy as well?

With whom at KNR did these chiropractors make this alleged agreement? What proof do we have of such agreement? How would a "common answer" reveal itself when multiple former KNR attorneys have already testified they would never refer a patient for treatment that wasn't needed? How would a "common answer" emerge when Dr. Floros has testified he only refers a "small percentage" of his patients to Dr. Ghoubrial or any other medical doctor. Exhibit R, Floros affidavit, at paragraph 7. What about chiropractors who referred patients to Dr. Ghoubrial but had no idea how much he charged? How can the Court or a jury answer whether a conspiracy exists with some unnamed and unknown individuals?

In Richard Harbour's case, he was referred to Dr. Ghoubrial by Chiropractor Auck. The Plaintiffs do not allege Chiropractor Auck was part of the conspiracy. In fact, Richard Harbour liked Dr. Auck so much that he treated with him 3 separate times for accident-related injuries, including treating with Dr. Auck BETWEEN accidents on his own for non-accident-related injuries and sometimes going to Dr. Auck before he was represented. Mr. Harbour testified:

> P63, ll12-15
> Q You liked Dr. Auck quite a bit, didn't you?
> **A I did, yes.**
> Q He was wonderful, wasn't he?
> **A Yes, he was.**

See Harbour Deposition, page 63, lines 12-15 (attached as Exhibit D).

> Auck very good chiropractor; very caring; took my concerns and my medical care seriously

Id. at pages 85-86, lines 20-1(attached as Exhibit D).

> Q Are you glad that KNR referred you to Rolling Acres?
> **A Yes.**

Id. at page 78, lines 1-3 (attached as Exhibit D).

During his first case, Mr. Harbour testified he and Dr. Auck jointly discussed which doctor he should be seen by (since his PCP did not treat accident-injury victims). Mr. Harbour actually called KNR's Robert Redick, a named partner and the KNR attorney handling his case, to ask for Mr. Redick's help to get in with Dr. Ghoubrial or another physician. Mr. Redick actually asked Dr. Auck if there was another physician he could send Mr. Harbour to. *See* Exhibit O, KNR04595:

> Called Dr. Auck - advised of issue to see if there is another doctor that we can refer him to Client has also contacted his PCP but they will not see him due to AA

Mr. Harbour then worked out his scheduling issue and went to see Dr. Ghoubrial, whom he obtained relief. After his first case with KNR, Mr. Harbour put the following on his client satisfaction survey. *See* Exhibit P.

	Always	Sometimes	Never
1. Phone calls were returned timely.	X		
2. I was able to reach my attorney.	X		
3. I was able to reach my legal assistant.	X		
4. The staff was caring & concerned.	X		

5. How would you rate your overall satisfaction with us?
- ☒ Very Satisfied
- ☐ Somewhat Satisfied
- ☐ Neutral
- ☐ Dissatisfied
- ☐ Very Dissatisfied

6. How likely is it that you would recommend us to a friend or family member?
- ☒ Very Likely
- ☐ Somewhat Likely
- ☐ Neutral
- ☐ Unlikely
- ☐ Very Unlikely

7. COMMENTS:

Dr. Auck is wonderful.

For his third motor vehicle accident, Mr. Harbour went to treat with Dr. Auck on his own initiative without first contacting KNR. After his fourth accident, Mr. Harbour called Dr. Auck for a referral (since Dr. Auck had retired). Dr. Auck referred him to Chiropractor Frain.

As mentioned, Plaintiffs requested medical records of several other former clients. Of the 14 total former clients of which records were requested, Clearwater physicians did not treat the patients in approximately 6 of the cases (and it often was not Dr. Ghoubrial who treated the patients in the other cases, but another physician at Clearwater). Of the 21 cases handled by KNR for those 14 clients, 5 different chiropractors were involved: Dr. Floros, Dr. Auck, Dr. Frain, Canton Injury Center, and Akron Injury Center. Former client Jane Doe 2 treated with Dr. Floros but was not referred to Clearwater, but rather to a family practice physician. Member Williams did not treat with

a chiropractor or Clearwater. The identity of the treaters and the reasons for referral depended on the patient's individual circumstances and a determination by the referring provider, along with discussions from the patient. No one has testified they were forced to treat with Dr. Ghoubrial or Dr. Floros.

b. Did the conspirators unlawfully solicit accident-injury victims to be represented by KNR?

Plaintiffs use "solicitation" pejoratively as if solicitation of accident injury victims by chiropractors is "unlawful" on its face. It is not. Ohio law permits chiropractors to solicit accident-injury victims as long as the solicitation complies with Ohio Administrative Code 4734-9-02[21]. Thus, solicitation by a chiropractor is not "unlawful" on its face. Yet, Plaintiffs' counsel urges this Court to find any solicitation by ASC unlawful simply because he states it is unlawful. Where is the proof? Where is Plaintiffs'analysis under OAC 4734-0-02 to show any solicitation by any chiropractor was unlawful? The rule governing solicitation by chiropractors is detailed and would require individual analysis for each interaction between a chiropractor (or the chiropractor's agent) to determine if the solicitation complied with the requirements of OAC 4734-9-02, not to mention the individual inquiry necessary with respect to each solicitation of each class member, including the intent behind the solicitation, whether KNR was involved in the solicitation, the impact on the class member, and many other issues. It's impossible to have a common answer to this question for all potential class members.

Moreover, we know only one of the 4 named Plaintiffs was "solicited" by a chiropractor. Thera Reid testified she received voice mails re: solicitation from chiropractors but only took the phone call from ASC's telemarketer. *See* Reid deposition, page 363, lines 24-25, page 364, lines 1-

[21]See copy of OAC 4734-9-02 attached as Exhibit "T" to this Brief in Opposition.

10, (attached as Exhibit C). Member Williams is not in the price gouging class but chose KNR because of a relative who works there. *See* Williams Deposition, page 66, lines 9-18 (attached as Exhibit P). Monique Norris was referred to KNR by her Aunt Holsey (as was the passenger in her vehicle, former KNR client Brittany Holsey). *See* Norris Deposition, page 16, lines 14-25 (attached as Exhibit E). Richard Harbour heard of KNR through a KNR radio or bus advertisement, not from direct solicitation. Thus, the ANSWER to this alleged common question is not even the same for the current Plaintiffs, let alone ALL class members.

Importantly, the manner in which Thera Reid describes the solicitation raises no issues with the lawfulness of its content. She admitted the solicitation phone call did not mention KNR in any way, shape or form. *See* Reid Deposition, page 34, lines 6-17, page 278 (attached as Exhibit C). She admitted she already wanted to received healthcare for her injuries, and thus no one was forcing or coercing her to seek treatment. And she signed Exhibit 20 to her deposition.

Furthermore, Dr. Floros testified he does not use telemarketers to solicit car-accident victims and Plaintiffs have offered no proof to the contrary. *See* Floros Affidavit, (attached as Exhibit R). Rather, Dr. Floros' employer, Akron Square Chiropractic ("ASC"), retained telemarketers to solicit accident-injury victims. *Id.* Even assuming ASC did something wrongful, the Plaintiffs cite to no evidence in the record sufficient to pierce the corporate veil and hold Dr. Floros individually responsible for his employer's conduct. Dr. Floros is not even a part owner of ASC. *See* Floros Deposition, page 56, (attached as Exhibit Q). He is a salaried-employee, just like other chiropractors employed by ASC. The record is devoid of any evidence establishing Dr. Floros individually solicited a single accident-injury victim let alone did so on a class-wide basis.

Maybe Plaintiffs' counsel does not condone this practice, despite the practice being permitted by the Ohio legislature. And certainly, Plaintiffs' counsel is entitled to his own personal opinions.

However, neither Plaintiffs' counsel nor his clients make the law. Ohio courts and Ohio legislators make the law in Ohio. And the Ohio legislature has spoken: chiropractors are permitted to solicit accident injury victims if they follow the rules set forth in OAC 4734-0-02.

c. No Proof Exists the Conspiracy Directed the Course and Cost of Treatment

Even if Plaintiffs could identify the members of this conspiracy and prove solicitation of some class members was unlawful, which they obviously cannot do even with the 4 named Plaintiffs, no evidence has been established to show that KNR, Dr. Floros, or any lawyer or health care provider directed the care or cost of treatment provide by Dr. Ghoubrial, Dr. Gunning, or any other physician provider at Clearwater. Dr. Ghoubrial testified he treats his patients based on his own professional judgment. *See* Ghoubrial deposition, pages 140-141, (attached as Exhibit H); *see also* Ghoubrial Affidavit. He charges the same rates for all patients regardless of who referred the patient to his practice. This includes working with over 70 attorneys and working with multiple chiropractors. *Id.*

Even a cursory review of any of the medical records or legal files of the named Plaintiffs will reveal Dr. Ghoubrial did not received direction from KNR or Dr. Floros in his care and treatment of Ms. Reid or any other patient. Moreover, Dr. Floros and other purported members of the conspiracy have no role in how much Dr. Ghoubrial accepts on Clearwater's behalf of reductions in the cost of medical care.

d. The Conspiracy Directed a "Routine Course of Care"

This allegation is outlandish. No "routine course of care" existed for the treatment of Dr. Floros, Dr. Auck (Richard Harbour), or Dr. Ghoubrial. For example, during treatment with Dr. Ghoubrial:

- Sometimes patients received one or more trigger point injections and sometimes they did not receive and were not even offered

trigger point injections during their entire course of treatment with Clearwater physicians. *See* Ghoubrial Affidavit, (attached as Exhibit G).

- For those patients that did want trigger point injections, sometimes they received one injection and symptoms began to resolve, and no more TPIs were offered or administered. And, sometimes they received more than one TPI.

- Sometimes a TPI was beneficial to once muscle group but not another muscle group, in the very same patient, so no more TPIs were provided in that muscle group.

- Only approximately half of the patients ever received TPIs.

- Some patients were prescribed a TENS unit, sometimes they were not.

- Only approximately half of the patients were prescribed TENS units.

- On limited occasions, patients were recommended to utilize a back brace, but on most cases they were not.

- Some patients were prescribed narcotics, and some were not. Some even requested narcotics and were denied the prescription.

- Some patients treated with Clearwater only one time (Thera Reid, Brittany Holsey, Matt Johnson) and some treated on multiple occasions (Thera Reid and others).

- Even though Clearwater charged the same for individual services, the total charge for services varied between patients. Even for the named Plaintiffs and other identified in discovery, charges varied from $600 to $3000. It depended on the patient and their presentation. *See* Ghoubrial Affidavit.

- More significantly, the total accepted as full and final payment varied widely. Clearwater accepted reductions for the named Plaintiffs of approximately 10%, 15.6%, 29.4%, and 35.7% (Richard Harbour's two cases were different reduction percentages). Moreover, Brittany Holsey's reduction was 17.6%, less than Ms. Norris' reduction. Former Plaintiff Matthew Johnson paid Clearwater $0 despite receiving a recovery in his case. Mr. Carter paid $0 for one set of treatments because he apparently did not recover any settlement money (case not

> handled by KNR). In the other cases, Mr. Carter's reductions were 47.6% and 49.2%. At least one of the patients identified in discovery had charges reduced by 76.9%. *See* Ghoubrial Affidavit.

Neither Floros nor KNR directed treatment by Clearwater physicians. In fact, Dr. Ghoubrial often did not direct treatment of Clearwater patients, as multiple different physicians provided care and treatment. Not one shred of evidence has been elicited to show anyone other than the treating Clearwater physician and the patient in question directed treatment for that particular patient. The Plaintiffs also have their legal files. Nothing exists in those files – or anywhere else - showing direction of medical care provided by Clearwater. Rather, even a cursory review of these files shows the KNR clients, on occasion, communicated the status of treatment to keep KNR informed of progress and when they might be released, but they did this AFTER treatment had been completed. No one even suggest KNR attorneys actually directed the type or cost of treatment (other than the bare allegations of Plaintiffs' counsel).

Simply put, the treatment regimens varied between patients. Only a small percentage of Dr. Floros' patients who were also KNR clients were referred to Clearwater. *See* Floros Affidavit, (attached as Exhibit R).

As far as increasing profits, Some of the patients were referred to other providers and then released from Clearwater's care, a far cry from increasing profits. Of those referrals, some were to chronic pain management specialist, some were to orthopedic specialists, some to mental health professionals, and some to a combination of physicians who could hopefully help the patient heal.

Moreover, when patients told KNR they wanted to stop seeing Dr. Ghoubrial, they said it was no problem.

e. The Routine Care was Calculated to Maximize Defendants' Profits

Absent the administration of routine care and routine costs, this portion of the question is inapposite. However, even a brief consideration of this issue shows that it is not subject to common answers for all members. How does Clearwater maximize profit with only 1 office visit? Or referral out for treatment to a "non-conspirator"? Or the failure to give TENs units or trigger point injections? Defendant Ghoubrial did not profit at all on some cases, because Clearwater's charges were reduced 75%, 90%, or even resulted in no recovery at all. To determine if the course of care in any one case was legitimate vs routinized vs. designed to increase medical costs would have to be examined separately for each and every class member.

2. 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?

Issue 2 increases the conspiracy from just attorneys and chiropractors to including Dr. Ghoubrial, Dr. Gunning, and any other physician provider at Clearwater, again making a "common answer" to the question nearly impossible.

Plaintiffs alleges a conspiracy dating back to 2010 but they ignore the fact that the cost of trigger point injections, "medical supplies" and "health care" have changed over time during the class period. *See* Ghoubrial Affidavit, (attached as Exhibit G). As Plaintiffs make no effort to identify what "medical supplies" and/or "health care" they are alleging were part of the conspiracy, every individual patient file would need to be examined to determine what, if any "medical supplies" they were provided and what types of "health care" they were provided. Once those individual patient files were examined and compared in order to determine who the proper class members were, all corresponding costs, reductions, and the ultimate payments made for the trigger point injections,

"medical supplies," and "health care" would need to be determine and compared to "reasonable" charges during the same time period as what charges would be considered "reasonable" have certainly changed over time. Considering this, it is not surprising Plaintiffs fail to articulate how this could be done. In reality, it would simply not be possible to do so.

Plaintiffs focus exclusively on the charges for the medical treatment provided by Dr. Ghoubrial and Clearwater while completely ignoring what Clearwater *actually accepted as payment in full* from the class member's settlements. The amounts charged are wholly irrelevant. The real question is what every named Plaintiff and purported class member actually paid. None of the named Plaintiffs, nor the vast majority of the purported class members, actually paid the amounts that were charged. On the contrary, all of the named Plaintiffs, and most of the purported class members, paid reduced amounts out of their settlements to satisfy Clearwater's charges. To determine whether Plaintiffs and the class members actually *paid* "exorbitant" and/or "unconscionable" rates for the medical services provided, it is necessary to examine each individual settlement.

It is common knowledge physicians and hospitals routinely charge more for the services they provide than they ultimately accept from Medicare, Medicaid, and insurance companies. Here, KNR, in agreement with Dr. Ghoubrial and Clearwater, discounted nearly every patient's medical reimbursement. Typically Dr. Ghoubrial and Clearwater took a reduction of between 30% and 70% on every file. *See* Ghoubrial Affidavit, (attached as Exhibit G). While there were some files that were not reduced at all, there were also some that were reduced 100%, resulting in no payment to Clearwater and Dr. Ghoubrial. *See* Ghoubrial Affidavit, (attached as Exhibit G). Not only was every patient interaction different, the reductions on each file was different, often significantly different.

The amounts actually paid by the named Plaintiffs demonstrates the lack of commonality and the inability to adjudicate this matter in a class action. First, named Plaintiff Member Williams never treated with Dr. Ghoubrial or Clearwater. How then could she have been a victim of a conspiracy to overcharge by Dr. Ghoubrial? Among the three named Plaintiffs that did treat with Dr. Ghoubrial or another Clearwater physician, their treatments, charges, and reductions differ significantly.

Plaintiff Thera Reid was treated by Dr. Ghoubrial multiple times and admits the trigger point injections she received in her neck were beneficial and helped to alleviate her pain. Reid Deposition, pp. 477-478, line 14-3. How could trigger point injections she admits helped her be contraindicated or unnecessary? The total Clearwater charges for her treatment equaled $3,460.00 but Clearwater accepted a reduced payment of $3,000.00 to fully settle her account, a 15.6% reduction. Likewise, Plaintiff Richard Harbour, who treated with Dr. Ghoubrial and Clearwater in 2012 and again in 2015 after multiple car accidents resulting in separate law suits, admitted the trigger point injections administered by Dr. Ghoubrial benefited him and helped to alleviate his pain. Harbour Deposition, pg.115, lines 13-14. The Clearwater bill for Plaintiff Harbour's treatment in 2012 totaled $3,110.00; however, Clearwater accepted $2,000.00 as payment in full, a reduction of over 35%. In 2015 the bills for Plaintiff Harbour's treatment totaled $2,110.00 but Clearwater accepted only $1,900 in full satisfaction, a reduction of 10%.

Unlike Plaintiffs Reid and Harbour, Plaintiff Monique Norris only treated at Clearwater on one occasion in October of 2013. And unlike Plaintiffs Reid and Harbour, Plaintiff Norris never saw Dr. Ghoubrial and she never received a trigger point injection. Plaintiff Norris was treated by Dr. Richard Gunning who, among other things, provided her with a TENs Unit after a thorough history

and examination.[22] While the charges for Plaintiffs Norris's single visit with Dr. Gunning at Clearwater amounted to $850.00, Clearwater accepted $600.00 as payment in full, a reduction of nearly 30%.

The case of Jane Doe 1[23] is illustrative of the deep and varying rates of discount. Her charges were reduced by 76.9%. Thus, the actual cost to Jane Doe 1 for services for the initial office visit, which lasted over 30 minutes, was $69.45, for the follow-up visit approximately $35, the TENS unit $115.75, and for the TPIs $60.76 ($57.87 for the injection charge and $2.89 for the corticosteroid medication charge). *See* Ghoubrial Affidavit, (attached as Exhibit G).

Moreover, Clearwater accepted a reduced payment out of the settlement for every purported class member whose medical files were produced in discovery pursuant to an executed release. The amounts of the reductions varied from patient to patient and average a reduction of 40%, ranging from 17% to 100%. How could purported class member Taijuan Carter possibly claim he was the victim of a conspiracy to charge him "exorbitant" and "unconscionable" rates for the medical services provided when Clearwater agreed to accept nothing in satisfaction of medical bills totaling $3,010.00? Similarly, how was purported class member Jane Doe a victim or damaged when Clearwater agreed to reduce her charges by 76.9% and accept payment $500.00 in full satisfaction of medical bills totaling $2,160.00?[24]

Again, it is the amount actually paid to satisfy Clearwater's bills that is relevant to the inquiry, there is no common evidence that could possibly adjudicate this issue for all class members.

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[22] While Plaintiff Norris maintains she was treated by Dr. Ghoubrial and not Dr. Gunning, the medical records and associated evidence demonstrates, at best, Plaintiff Norris's memory regarding who she actually saw in 2013 is foggy.

[23]Name withheld for privacy. Plaintiffs requested and were provided these records in discovery but did not mention the patient in the Motion to Certify.

[24] As indicated below, the Price Gouging Class cannot be certified because Plaintiffs cannot prove all purported class members suffered any damage as a result of the alleged conspiracy.

This is especially true considering there is no common evidence to adjudicate this issue just among the three named Plaintiffs who actually treated with Dr. Ghoubrial or another Clearwater physician. Plaintiffs' baseless assertion Dr. Ghoubrial "did not charge inappropriate amounts to some class members but not others" misses the mark. *See* Motion, page 76. Plaintiffs and the purported class members could only have ever been damaged by what they actually paid. Because none of the named Plaintiffs or the purported class members identified to date actually paid what was charged, the charges themselves are meaningless.

3. 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?

The Court needs to look no further than the putative class representative Richard Harbour, who specifically sought representation to ensure his medical needs and to ensure the at-fault party's insurance paid the bill. Mr. Harbour, who had neither health insurance nor Medicaid during his first case with KNR, testified at page 20:

Q· What did you want to seek legal advice for?

What was the reason?

A. Getting the repairs done on my vehicle properly and to make sure that my medical needs were properly taken care of.

Q· When you say your medical needs were properly taken care of, do you mean to help you get to a doctor or do you mean to be paid for the services?

A. My intention of that was to ensure that the bills that I would incur were not handled by myself or my private insurance but were handled by the at-fault party's insurance and taken care of in that matter.

Mr. Harbour testified other unpaid medical bills not subject to a LOP impacted his credit, caused him not qualify for a home loan, and even was a factor in his bankruptcy. In fact, he testified he wished those providers would have taken LOPs. Mr. Harbour admitted he wanted the LOPs, it was important for his doctor to accept them, he authorized the bills to be paid from the settlement and no one forced him to do that, and it was in his best interest for the bills of Dr. Floros and Clearwater to be held off until the end of his case. *See* Harbour Deposition, pages 65, 86-87, 232, (attached as Exhibit D). Importantly, Mr. Harbour also admitted his primary care physician would not treat him because the injuries stemmed from an automobile accident. *See* Harbour Deposition, page 58, (attached as Exhibit D):

> Q. Did you have any treatment from that accident with your primary care physician?
>
> A. The accident in 2001 is what you're referring to, correct?
>
> Q. Yes, I am. Thank you.
>
> A. Yes. Dr. Heim did, you know, see me. To the best of my kknowledge, I don't believe he did any actual treatment because he did not like to get involved with MVAs.

As with Issue 2, there is no common proof to adjudicate this issue. First, not all purported class members had health insurance and Plaintiffs cannot claim otherwise simply by referencing the Affordable Care Act. Plaintiff Harbour made it clear it was intention not to use his own health insurance to cover his medical costs. *See* Harbour Deposition, page 20, (attached as Exhibit D). Plaintiff Harbour alone illustrates how the relevant facts are substantially disparate between those class members who had health insurance and those that did not, and those that wanted to utilize their own health insurance and those that did not.

Plaintiffs allege they, along with the purported class members, were misled by the Defendants without specifying which Plaintiffs and purported class members were misled by which Defendant(s). Not all Plaintiffs and purported class members interacted with or were treated by all Defendants. Plaintiff Harbour was referred to Dr. Ghoubrial by Dr. Auck of Rolling Acers Chiropractic, a chiropractor not named by Plaintiffs as part of the alleged conspiracy to mislead. *See* Harbour Deposition, page 61, (attached as Exhibit D). Certainly the evidence necessary to adjudicate Plaintiff Harbour's claims relative to any attempt to mislead him regarding health insurance is necessarily different than that required for the other named Plaintiffs, let alone the purported class members. This, coupled with the fact Plaintiff Harbour never intended to use his own health insurance, further complicates the analysis and demonstrates why class adjudication is impossible. *See* Harbour Deposition, page 20, (attached as Exhibit D).

Plaintiffs' assertion that "class members end up paying more for this care that it would have cost them to simply pay through their health insurance policies" is not only wholly unsupported, it highlights the reasons the Price Gouging Class could never be certified. *See* Motion, page 77. Adjudicating this issue requires individual evidence from every class member regarding: 1) whether they actually had health insurance at the relevant times; 2) whether those that did have health insurance wanted to use it to cover their care; 3) what deductible or co-pay they were required to pay; 4) was there a Med Pay provision and did they receive it; and 5) did the carrier have a right of subrogation. Only after those questions were answered would it be possible to even begin to determine if each particular class member actually ended up paying more as Plaintiffs suggest. Of course that inquire could not be completed without then analyzing those costs compaired to the reduced amounts the medical provider Defendants actually accepted in satisfaction of the medical bills.

As the named Plaintiffs cannot prove they were all damaged as a result of the allegedly being misled regarding their health insurance, how could hundreds or thousands of purported class members? It cannot be done without looking at each individual and even then it is virtually impossible.

Physicians are not required to accept health insurance. Dr. Ghoubrial and Clearwater Billing, LLC are permitted under Ohio law to provide medical treatment without accepting health insurance, and the Plaintiffs cite no law to the contrary. All Clearwater patients are clearly advised and agree to have Clearwater's bills paid through their settlement proceeds. *See* Ghoubrial Affidavit (attached as exhibit G). Nothing prevents patients from submitting Clearwater's bills to their health insurance on their own. Maybe some of them have done that.

However, health insurance policies almost invariably contain a provision providing them a right to subrogation, perhaps similar to the below provision (easily found on a google search): .

> The Plan shall be subrogated to all rights of Recovery the Covered Person has against Another Party potentially responsible for making any payment to Covered Person as a result of any injury, damage, loss, or illness Covered Person sustains to the full extent of benefits provided or to be provided by the Plan to Covered Person or on Covered Person's behalf with respect to that illness, injury, damage, or loss immediately upon the Plan's payment or provision of any benefits to Covered Person or on Covered Person's behalf. The Plan's recovery, subrogation, and reimbursement rights provided herein exist even where a party allegedly at-fault or responsible for any loss, injury, damage, or illness Covered Person sustains does not admit responsibility and regardless of the designation or characterization given to the funds Covered Person receives or agrees to be disbursed from that party or that party's representative.

If so, then it would be up to that individual health insurance carrier as to whether they would pursue subrogation against the settlement proceeds.

Plaintiffs have not identified any health insurance policy provisions of any of the named Plaintiffs or offered any proof of how much those health insurance carriers would negotiate off their

lien.

5. 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' claims, and were thus damaging to KNR clients' cases?

This issue alleges all Defendants acted with the intent not to disclose how some undefined and unproven "relationships" were viewed by unidentified third parties dating back to 2010. There are several problems with this issue that are fatal to Plaintiffs efforts to certify this class.

First and foremost, to have acted intentionally, each Defendant, including Dr. Ghoubrial, would had to have knowledge of the auto insurance industry's state of mind starting in 2010. However, what each insurance company, and more significantly what each particular insurance adjuster within those companies who handled the class members' claims, believed relative to KNR cases is impossible to know. Second, if Plaintiffs assertion auto insurance companies viewed the Defendants' "relationships" as fraudulent were true, that is something that had to occur over time. It is not something that could have happened at the time Dr. Ghoubrial started treating personal injury patients through Clearwater meaning any class including members going back to 2010 is too broad by definition. More importantly, Plaintiffs fail to articulate how Dr. Ghoubrial, a physician treating injured patients, would have any knowledge of the auto insurance industry, let alone the mindset of that industry and those working within it.

There is no evidence all auto insurance companies and all adjusters within those companies viewed the "relationships" the same way at all times. Class Members' claims were handled by different insurance companies and different insurance adjusters at different times. What one Defendant knew regarding the view of one insurance company or a particular adjuster in 2010 would necessarily be different than what a different Defendant knew at other any point in time during the class period. Moreover, Plaintiffs are critical of Dr. Ghoubrial for not accepting health insurance in

his personal injury practice yet this issue assumes he somehow knew the views of the auto insurance companies and adjusters he had no reason to interaction with. This defies logic. Plaintiffs cannot on the one hand accuse Dr. Ghoubrial of wrongdoing for not accepting health insurance, something as a physician he has some knowledge of, and then accuse him of having inside knowledge of the mindset of the auto insurance industry that he failed to disclose.

Dr. Ghoubrial could not fail, intentionally or otherwise, to disclose something he did not know. There is no class-wide evidence the auto-insurance industry held similar views regarding the "relationships" of the Defendants going back to 2010. And there is certainly no class-wide evidence that could ever suggest Dr. Ghoubrial possessed knowledge of how the auto insurance industry viewed his "relationships" with the other Defendants going back to 2010. Separate and apart from the fact Plaintiffs cannot prove Dr. Ghoubrial had any such knowledge at any time, Plaintiffs could not prove any class member was ever injured by the alleged views of various auto insurers without highly individualized evidence that could never be accomplished on a class-wide basis.

Insurance companies and third parties involved in the cases at issue include State Farm, Nationwide, Motorists, Guide one, Erie, Progressive, Motorists, Geico, Grange, American Family, Travelers, Merchants Insurance, Hunt Transportation, Metro Regional Transit Authority. This would involve depositions of dozens of claims representative just of the patients at issue and hundreds if not thousands of claims examiners to determine this for all class members in order to prove how a change in representation, policies, or treatment impacted ultimate settlement.

6. **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?**

For example, the Plaintiffs ask whether the Defendants set out to administer as many trigger point injections as possible. Plaintiffs disingenuously raise this questions despite the fact Plaintiff

Norris, companion Holsey, and many other purported class members never received a trigger point injection, some were never even offered trigger point injections, and some specifically requested trigger point injections because they were so beneficial to them previously.[25]

Moreover, answering this question, along with every other question raised by Plaintiffs, would necessarily require an individual examination of *every* patient's medical treatment to determine what treatment was indicated and provided, and whether the treatment was reasonable. Plaintiffs also question Dr. Ghoubrial's "exorbitant charges" but to determine if the charges were exorbitant the factfinder would have to not only examine every person's treatment, but also each individual settlement. As nearly every patient's treatment charges were reduced prior to payment, the amount actually accepted as payment in full for the services provided for each individual patient would need to be analyzed. Because the operative question is actually what each patient paid out of their individual settlements to satisfy the charges from Clearwater, *the "common" questions plaintiffs list are better described as individual questions for each patient because they were all different*.[26]

This case is squarely on point with *Dukes*, where the U.S. Supreme Court found a lack of commonality. In *Dukes*, female employees alleged Wal-Mart discriminated against them by denying promotions and pay equal to men's due to a "strong and uniform 'corporate culture'" that permitted "bias against women to infect … the discretionary decision-making of each one of Wal-Mart's thousands of managers—thereby making every woman at the company the victim of one common discriminatory practice." The plaintiffs submitted statistical evidence about pay and promotion

[25] Plaintiffs' baseless allegation Dr. Ghoubrial sought to give *every* patient as many trigger point injections as possible is demonstrably false simply by looking at Plaintiffs Harbour and Norris. Plaintiff Norris never received a single trigger point injection and Plaintiff Harbour did not receive trigger point injections every time he was treated by Dr. Ghoubrial.

[26] Likewise, the real issue is not whether the charges from Clearwater were reasonable or exorbitant but whether what was actually paid for the services provided was reasonable.

disparities, anecdotal reports of discrimination, and testimony from a sociologist, who analyzed Wal-Mart's "'culture' and personnel practices and concluded that the company was 'vulnerable' to gender discrimination."

The *Dukes* court held the commonality requirement of Rule 23(a)(2) was the crux of the case. *The court further held that raising common questions is not enough*. *Rather, the requirement is to "'generate common answers apt to drive the resolution of the litigation.'"* The court held that the commonality requirement overlapped with plaintiffs' "contention that Wal-Mart engages in a pattern or practice of discrimination." *Dukes* reasoned that because plaintiffs' complaint involved thousands of employment decisions by Wal-Mart, *plaintiffs would have to prove a common theory why Wal-Mart discriminated against them*. The court stated: "'[W]hether 0.5 percent or 95 percent of the employment decisions at Wal-Mart might be determined by stereotyped thinking' is the essential question on which [plaintiffs'] theory of commonality depends." The court found no "convincing proof of a companywide discriminatory pay and promotion policy, [and] concluded that [the plaintiffs] have not established the existence of any common question."

7. 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?

8. 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 great number of them through the high-volume, highly routinized business model?

The seventh and eighth "common questions" are both intertwined yet diametrically opposed. This question appears centered on the Defendants' "knowledge" and "intention" of KNR and Dr. Floros to the exclusion of Dr. Ghoubrial. Plaintiffs identify another issue regarding Defendants'

knowledge and intent spanning the entire class period dating back to 2010 without consideration of the fact that KNR and Dr. Floros' knowledge would necessarily change over time. Again, establishing or disproving this issue would require discovery about every insurance company and every insurance adjuster involved with the class members' files during the entire class period. This is just one of several reason why this issue cannot be adjudicated upon common proof.

First and foremost, KNR rarely referred clients to Dr. Ghoubrial. None of the former KNR lawyers relied upon by Plaintiffs could identify a single instance where they referred clients directly to Dr. Ghoubrial. On the contrary, the evidence and testimony is consistent that the vast majority of referrals to Dr. Ghoubrial came from various chiropractors or other providers, of which Dr. Floros was just one. Dr. Floros himself referred a small percentage of his patients to Dr. Ghoubrial. Floros Affidavit. Plaintiff Member Williams never referred to or treated with either Dr. Floros or Dr. Ghoubrial and Plaintiff Richard Harbour was referred to Dr. Ghoubrial by Dr. Auck of Rolling Acers Chiropractic, a chiropractor not named by Plaintiffs and not alleged to have been a part of any conspiracy or scheme. Again, how could common issues and common evidence apply class-wide when common issues and common evidence do not apply among the four named Plaintiffs?

Not only are commonality and predominance lacking, this issue directly contradicts the crux of Plaintiffs allegations. Plaintiffs seemingly indicate that KNR and Dr. Floros knew that referring class members to Dr. Ghoubrial would result in them obtaining larger fees when the cases settled. However, the only way KNR's contingent fee would increase is if it obtained a higher settlement than it would have absent the referral to and involvement of Dr. Ghoubrial. Higher gross settlements typically equate to higher net recoveries for the client class members. Certainly Plaintiffs cannot be alleging all class members obtained lower net recoveries as a result of their lawyers obtaining higher gross settlements because of the referrals to Dr. Ghoubrial. And if Plaintiffs are making that

allegation it only exemplifies the need for individual proof including, but not limited to, the amount of each settlement, how it was obtained, including the negotiations that occurred with the insurance adjusters, the treatment of Dr. Ghoubrial, the cost of the treatment, and the reduced amount actually paid in satisfaction of that treatment. Each class member would also have to demonstrate they were damaged as a result of the referral to Dr. Ghoubrial, meaning each would have to establish their net recoveries would have been equal to or better than what they received had they never been referred to Dr. Ghoubrial.

The eighth issue flies in the face of Issue #7. Here, Plaintiff allege Defendants knew the involvement of Dr. Floros and Dr. Ghoubrial had a negative impact on the value of the class member's cases while Issue #7 alleges the same involvement would "raise the cost of settling their claims." While Issue #7 and this issue are inapposite, determining either necessarily involves individual investigation and evidence with respect to the auto insurers and adjusters over the entire class period. It also requires individual analysis of each class member's settlement and ultimate recovery to establish how the involvement of Dr. Floros and Dr. Ghoubrial impacted their financial recovery. Again, Plaintiffs cannot be arguing that every class member who treated with Dr. Floros and/or Dr. Ghoubrial recovered less in settlement than they would have absent the treatment. How could Plaintiffs and the class members ever prove they were damaged, as they are required to do, without this detailed individual analysis?

Common evidence could not predominate where, as here, Plaintiffs allege some class members fared better as a result of the involvement of Dr. Floros and/or Dr. Ghoubrial while others fared worse. Who then are the proper class members? How can they be identified? How then is the class identifiable as required in order to be certified? Plaintiffs have presented no blueprint on how these questions could ever be answered because they likely cannot ever be answered. And if they

could be answered, they could only ever been answered by individual analysis and proof because the results are anything but uniform across the class. Quite the opposite is true, because every class member's experiences and results were different common proof does not exist. Common questions alone are not enough for class certification, there must be common answers to those questions attainable through common proof. Where, as here, there are no common answers, the Price Gouging Class cannot be certified.

9. 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?

The need for answers to Issues 1-8 demonstrates precisely why the Price Gouging Class cannot be adjudicated upon common proof. On the most basic level, the Price Gouging Class cannot be adjudicated upon common proof because the claims against the various Defendants are different. Issue Nine asks if all Defendants, including Dr. Ghoubrial, are liable for… breach of fiduciary duty despite the fact the breach of fiduciary duty claim asserted against Dr. Ghoubrial was previously dismissed by this Court. Currently, Plaintiff only have claims for breach of fiduciary duty against Defendants Dr. Floros and KNR. That Plaintiffs continue to ignore this reality does not create a claim for breach of fiduciary duty against Dr. Ghoubrial where it otherwise does not exist.

That there is no breach of fiduciary duty claim pending against Dr. Ghoubrial highlights that the alleged wrongful acts are not class-wide. There is no common proof of any such breach and no Plaintiff or class member could have been harmed by such a breach on the part of Dr. Ghoubrial. Because there are different claims pending against different Defendants, it cannot be said that all class members were subjected to or harmed by the same alleged wrongful conduct. As such, common issues do not predominate meaning they cannot be adjudicated upon common proof.

Separate and apart for the fact common issues to do not predominate based solely on the fact there are different claims pending against different Defendants, the nature of Plaintiffs' claims further demonstrate the disparity of the issues between the named Plaintiffs and among the class. Plaintiffs' claims for fraud, unjust enrichment, and breach of contract against Dr. Ghoubrial all stem from allegations there were misrepresentations and/or omissions regarding Dr. Ghoubrial's "exorbitant" charges. While Dr. Ghoubrial concedes he never told his patients his charges were exorbitant, this would only possibly be actionable if what a particular patient actually paid out of their settlement was in fact exorbitant. Where the payments made were reasonable for the services provide there could be no actionable misrepresentation omission. And to determine this requires individual inquiry and proof.

Likewise, and contrary to Plaintiffs' baseless assertion, Dr. Ghoubrial had no duty to disclose the trigger point injections were "medically unnecessary" and "contraindicated" unless they were in fact medically unnecessary and contraindicated. However, one need only look to named Plaintiffs Harbour and Reid and their admissions the trigger point injections benefited them and helped to alleviate their pain to see the folly of Plaintiffs' arguments. If the only two named Plaintiffs that actually received trigger point injects both benefited from them how could they possibly represent a class of people alleged to have received "medically unnecessary" and "contraindicated" injections? And, how could such a class be identified without individual proof from all class members who received trigger point injections? The experiences of the named Plaintiffs alone demonstrates the lack of common issues and proof on this issue.

VIII. CERTIFICATION FAILS FOR LACK OF TYPICALITY

Dr. Ghoubrial does not address Plaintiff Member Williams, as she is not a proposed class representative for the price-gouging class. The other three Plaintiffs are addressed below, following a recitation of the applicable law.

A. Law Applicable to the Typicality Requirement

In determining if the "the representative parties will fairly and adequately protect the interests of the class" (Civ.R. 23(a)), it is clear the named Plaintiffs herein do not satisfy the requirement that "the *named representatives must be members of the class*." *Cullen.*, 137 Ohio St.3d 373, ¶12. Plaintiffs define the class, in part, as those "KNR clients who had deducted from their settlements any fees paid to Defendant Ghoubrial's personal-injury clinic for …back braces." Mot. p. 44. But not a single one of the named Plaintiffs who saw Dr. Ghoubrial, or any other physician associated with Clearwater, received a back brace (and the Motion does not state otherwise). Likewise, none of the Plaintiffs are current clients while Plaintiffs' Motion seeks to certify those clients as well. Because no named Plaintiff received a back brace or are "current clients," they are not adequate representatives.

B. Plaintiff Richard Harbour is NOT Typical of the other Class Members

As stated above, Plaintiff Harbour was the *only* named plaintiff in the operative complaint who alleged he received a trigger-point injection, and is the only one the complaint stated would seek to represent a class regarding injections. Fifth Amended Comp. ¶¶ 19, 180(E), 289-291. However, *Plaintiff Harbour is not an adequate representative for the simple reason he testified his injections were helpful and went back multiple times to Dr. Ghoubrial to get more injections*. Harbour wanted to be treated by Dr. Ghoubrial because his primary doctor would not treat him or was reluctant to treat him because it was an accident case. A plaintiff who is satisfied with the services they received cannot then file suit claiming the exact opposite of their experience simply to

fit a false narrative. Plaintiff Harbour is the definition of an inadequate representative. At the very least, his testimony demonstrates his experiences undermine the claims of the purported class. He is therefore an inadequate class representative by definition.

Not only did Plaintiff Harbour testify the trigger point injections benefited him and helped to alleviate his pain, he also testified he discussed the risks and benefits of the trigger point injections with Dr. Ghoubrial before they were administered, he knew the precise type and purpose of medication being administered, he discussed the effectiveness of the trigger point injections with Dr. Ghoubrial, and he would not continue to receive additional trigger point injections if they were not effective. *See* Harbour Deposition, pages 62-63, 125, 252-253, (attached as Exhibit D). Plaintiff Harbour also testified that he went to Dr. Ghoubrial because his primary care physician would not see him because he was injured in motor vehicle accident, he did not want to bill his own insurance for his treatment, and he wanted to be treated on a letter of protection (LOP) because he believed it was in his best interest. *See* Harbour Deposition, pages 62-66, (attached as Exhibit D). In short, Plaintiff Harbour single-handedly eviscerates Plaintiffs' entire theory relating to the trigger point injections demonstrating both the theory is based entirely upon a false narrative and that Plaintiff Harbour is not an adequate class representative.

"Rule 23(a)(3) typicality 'determines whether a sufficient relationship exists between the injury to the named plaintiff and the conduct affecting the class, so that the court may properly attribute a collective nature to the challenged conduct.'" *Stout v. J.D. Byrider*, 228 F.3d 709, 717 (6th Cir. 2000). "The premise of the typicality requirement is simply stated: *as goes the claim of the named plaintiff, so go the claims of the class*." *Sprague v. General Motors Corp.*, 133 F.3d 388, 399 (6th Cir. 1998) (holding that typicality is not established where resolution of a named plaintiffs claim would not "necessarily have proved anybody else's claim."). Where class members' claims turn on

individual permutations that "varied from person to person," the claims of the named plaintiffs are not typical. See, e.g., *Romberio v. UNUMProvident Corp.*, 385 F.App'x 423m 431 (6th Cir.2009) (typicality lacking "[w]here a class definition encompasses many individuals who have no claim at all to the relief requested").

Here, just looking at some of the named Plaintiffs' facts demonstrates there are individual permutations that destroy typicality. For example, Plaintiff Harbour ***wanted*** letters of protection (he know about them from a workers compensation case). *See* Harbour Deposition, page 65, (attached as Exhibit D). He did not want to bill his own auto insurer and wanted the other to driver to pay for his medical treatment. *See* Harbour Deposition, page 20, (attached as Exhibit D). Harbour did not get an injection on every visit to Dr. Ghoubrial, but did go back multiple time to get injections because he admits they provided relief and were helpful to his recovery. *See* Harbour Deposition, pages 111-112, (attached as Exhibit D). Contrary to Plaintiffs' allegations and the claims of the purported class, Harbour was referred to Dr. Ghoubrial by a different chiropractor who is not named in this suit (not defendant Floros). *See* Harbour Deposition, page 158, 230, (attached as Exhibit D). And again, Plaintiff Monique Norris never got trigger point injections. Based on these facts alone, there are simply too many individualized issues with each patient's medical treatment and settlements to list. *Modern Holdings, LLC v. Corning, Inc.*, E.D.Ky. 2018 U.S. Dist. LEXIS 52559, at *24 26 (Mar. 29, 2018) (purported medical issues caused by contamination of property "presents too many individualized issues" to support adequacy/ typicality).

These are " unique argument[s]" that will destroy typicality and adequacy because they are "so central to the litigation that it threatens to preoccupy the class representative to the detriment of the putative class members." *Jacobs v. FirstMerit*, 2013-Ohio-4308, ¶65. Plaintiff Harbour's issues alone destroy typicality and adequacy for the reasons stated. And this is true even before analyzing

the substantial contradictions and suspect inconsistencies between Plaintiff Harbour's sworn deposition testimony and the sworn affidavit he submitted in support of class certification.

There is also inherent conflict between Dr. Ghoubrial's current patients that have not settled their cases and the named Plaintiffs who saw Dr. Ghoubrial and settled their cases years ago. It is well-settled that a class representative is not considered adequate if her "interest" is "antagonistic to the interest of other class members." *Carder Buick-Olds Co. v. Reynolds & Reynolds*, 148 Ohio App.3d 635, ¶23. In addition, there are indisputably patients of Dr. Ghoubrial and clients of KNR who did better than they would have if they would have negotiated with the insurance adjuster by themselves. Thus there is an antagonism between these clients/ patients that did better and the named Plaintiffs because Plaintiffs are essentially seeking to *undue settlements that benefited putative class members*. Likewise, this action may prevent current clients/patients from recovering the maximum amount possible in a settlement. As explained below, Dr. Ghoubrial's treatment records and medical bills were necessary show there was "personal injury" in the first place. Horton Depo. pp. 47-48. In essence, Plaintiffs are attempting to prevent current patients from continuing to receive care from a provider that may be able to help them relieve pain (as in the case of Plaintiff Harbour), while also assisting them in justify a higher settlement in their personal injury case. Here, there is "actual antagonism" because this suit (brought by *former* clients) is interfering with the litigation/negotiations of the *current* KNR clients that are also patients of Dr. Ghoubrial. At the very least there is a "potential for antagonism and conflict," which is enough to defeat certification.[27]

B. Monique Norris is NOT Typical of the Price-Gouging Class Members

Ms. Norris does not satisfy the typicality requirement because:

[27] *Davis v. City of Kettering*, 1987 Ohio App. LEXIS 6111, at *12-13 (Mar. 13, 1987) ("Actual antagonism is not necessary, but the potential for antagonism is enough" and finding "the *potential for antagonism and conflict* exists among the purported class members. Therefore the representative parties cannot fairly and adequately protect the interests of the class …").

1. She was treated by Dr. Gunning, not Dr. Ghoubrial.

2. She did not receive trigger point injections.

3. She admitted she was not "chased down", she "wanted" health care, and Defendants did not force her to receiver trigger point injections or any other treatment.

4. Ms. Norris was provided a copy of her Settlement Memorandum, with all bills, prior to coming in to KNR to sign for her settlement. She was fully apprised of all bills on multiple occasions and cannot claim ignorance in this regard.

5. Ms. Norris committed perjury regarding her "loan" with Liberty Capital and other various matters.

6. Ms. Norris admitted the Clearwater physician treating her offered to provide instructions on the use of the TENS unit (despite initially refusing to acknowledge such).

7. Ms. Norris admitted the Clearwater physician did not attempt to coerce her into trigger point injections.

8. Ms. Norris only saw a Clearwater physician one time and had her charge reduced before settlement, with one of the lowest costs of all the former patients in which records were produced in this case.

9. Ms. Norris' refusal to admit she treated with Dr. Gunning, not Dr. Ghoubrial, serious undermines her credibility. *See* Mohammed Affidavit, (attached as Exhibit S).

C. Thera Reid is NOT Typical of the Price-Gouging Class Members

Ms. Reid admits no one else directed her care with Dr. Ghoubrial. She claims she never even discussed Dr. Ghoubrial with KNR before she treated with him. *See* Reid Deposition, page 370, lines 3-10, (attached as Exhibit C). To the contrary, Ms. Reid discussed her treatment needs with her treating chiropractor, Dr. Floros, and together they decided her pain was so great she needed more than just chiropractic care. *See* Reid Deposition, page 368, lines 4-11, (attached as Exhibit C). Based on that discussion, Dr. Floros recommended Ms. Reid to Dr. Ghoubrial. *Id.* Ms. Reid testified:

Q. So even though the chiropractic care might have given you some relief, there was still a lot of pain and you needed more than just the chiropractic
A. Yes.
Q. That's why you and Dr. Floros talked about seeing Dr. Ghoubrial true?

A. Yes..
….

Id. at page 368, lines 4-8.

Q. Your decision to go to Dr. Ghoubrial was based on Dr. Floros' recommendation, true?

A. True.

Q. I mean, KNR didn't tell you to go to Dr. Ghoubrial, did they?

A. No.

See Reid Deposition at page 370, lines 11-16.

Ms. Reid also testified KNR "never" told her to get trigger point injections, thus negating Plaintiffs' claims of conspiracy. *See* Reid Deposition at page 477, lines 7-9.

Ms. Reid's testimony (and the medical records) are in stark contrast to Plaintiffs' claim that "no words were exchanged" between Dr. Ghoubrial and his patients, that he "surreptitiously" obtained informed consent, and that patients knew neither the type of medication being administered or even that an injection was being considered. First, Ms. Reid was told about injections even before she went to see Dr. Ghoubrial, because she and Dr. Floros discussed the possibility of injections due to the unresolved pain. *Id.* at pages 368-369. Second, despite Plaintiff's claim that Dr. Ghoubrial does not "exchange words" with his patients, the Plaintiff discussed her care in depth with Dr. Ghoubrial. Plaintiff Reid testified on deposition:

1. She and Dr. Ghoubrial discussed her symptoms and the fact she was in a lot of pain. *See* Reid Deposition at page 370, lines 17-23.

2. She and Dr. Ghoubrial discussed "different options for treatment." *See* Reid Deposition at page 370, lines 24-25, page 371, lines 1-2.

3. Dr. Ghoubrial did not "sneak up" on her and "just jab [her] with a needle without talking about." *See* Reid Deposition at p. 371, lines 7-9.

4. She and Dr. Ghoubrial and discussed the medications she was already taking, her radiographic results, her current diagnosis and symptoms ("what was already wrong with me"), the accident facts, her prior treatment at Akron City Hospital, that her pain was a "50 out of 10", and that she agreed to trigger point injections to address the pain. *See* Reid Deposition at pages 370-373, 463-465.

5. She only agreed to the trigger point injections after she knew the identity of effect of the medication. *See* Reid Deposition at page 373, lines 9-20.

6. The injections helped and she went back for more injections, which she would not have done if they did not help. *See* Reid Deposition at page 373, lines 21-25, page 374, lines 1-12.

7. In fact, she went back a third time for injections, which she would "not have done if they weren't working." *See* Reid Deposition at p. 375, lines 7-15.

8. She and Dr. Ghoubrial discussed referral to a chronic pain management specialist because he provided short term pain management and he referred her to a chronic pain management. *See* Reid Deposition at p. 375-376.

9. She and Dr. Ghoubrial discussed a TENS unit and decided together it was not appropriate for her injuries. *See* Reid Deposition at p. 380, lines 2-15.

10. Dr. Ghoubrial did not push a TENS unit on her. *See* Reid Deposition at page 381, lines 3-5.

Plaintiff Reid also contradicts Plaintiffs' assertion that Dr. Ghoubrial's evaluation of personal injury patients only took a few minutes. To the contrary, Plaintiff Reid testified her initial evaluation with Dr. Ghoubrial took 30-45 minutes "or longer." *See* Reid Deposition at page 473, lines 4-11. Plaintiff Reid testified the following occurred at her office visit with Dr. Ghoubrial:

1. Dr. Ghoubrial examined her ears, eyes, throat. *See* Reid Deposition at p. 466, lines 14-16.

2. Dr. Ghoubrial palpated her neck to evaluate it. *See* Reid Deposition at page 466, lines 18-22.

3. Dr. Ghoubrial examined her spine and back. *See* Reid Deposition at page 466, lines 23-25.

4. Dr. Ghoubrial identified "reproducible" (meaning on palpation) pain in her back, "guarding" (meaning she flinched as he approached touching a painful area), spasms, and significant tenderness in her lower back. *See* Reid Deposition at p. 467, lines 1-25.

5. Dr. Ghoubrial checked her "grasp and manipulation." *See* Reid Deposition at p. 468, ll. 6-8; p. 470, lines 13-15.

6. She and Dr. Ghoubrial discussed her past medical history with her, including four prior surgeries. *See* Reid Deposition at page 468, lines 9-25; page 469, lines 1.

7. She and Dr. Ghoubrial discussed her prior drug use and tobacco use. *See* Reid Deposition at page 469, lines 2-4.

8. Dr. Ghoubrial examined her upper extremities. *See* Reid Deposition at page 470, lines 16-18.

9. Dr. Ghoubrial observed the 40 x 60 cm bruise on her right biceps and right upper should region. *See* Reid Deposition at pages 470-471.

10. Dr. Ghoubrial examined her range of motion in her right shoulder. *See* Reid Deposition at pages 471, lines 7-13.

11. Dr. Ghoubrial examined her lower extremities, musculoskeletal, and neurological status as well. *See* Reid Deposition at page 471, lines 14-17.

12. She and Dr. Ghoubrial then discussed her diagnoses and potential treatments. (Deposition of Thera Reid at page 471, lines 18-21).

13. They discussed and she agreed to trigger point injections. (*See* Reid Deposition at pages 471-472.

14. Rather than sneak up on her to administer a trigger point injection, Dr. Ghoubrial discussed it with her, lifted her shirt after she was on the examination table, prepped it with alcohol, and then administered the shot. *See* Reid Deposition at pp. 471-472.

15. Ms. Reid testified she was aware she was getting the trigger point injections and "there was no secret" about the fact she was getting trigger point injections. *See* Reid Deposition at p. 472, ll. 21-25.

16. Ms. Reid "had relief" after the initial trigger point injections and continued to have relief from the subsequent trigger point injections. *See* Reid Deposition at page 474, lines 1-2.

Plaintiff Reid testified as following concerning the duration of that first office visit with Dr. Ghoubrial:

Q. How long did that first visit take, to go through all that history the medications, the social history, the physical exam, the trigger point injections?

A. It took a while.

Q. I mean we're talking half hour, 45 minutes?

A. It seemed like. Maybe a little bit longer. I don't know. It took a while. *See* Reid Deposition at page 473, lines 4-11.

Likewise, when she obtained another trigger point injection in her neck, it was only after it was discussed and she agreed to it. *See* Reid Deposition at page 477, lines 1-6. And, she again admitted, those trigger point injections "helped." *See* Reid Deposition at page 477, lines 13-22. Thus, she admitted that when she went to Dr. Ghoubrial's office it was her desire to have the trigger point injections be administered, she felt the trigger point injections helped, and she told Dr. Ghoubrial she was feeling relief form the trigger point injections. *See* Reid Deposition at page 477, line 25; page 478, lines 1-17.

Dr. Ghoubrial's notes and KNR's contemporaneously recorded notes to the file confirm the effectiveness of the trigger point injections for Ms. Reid. On Ms. Reid's follow-up visit on May 4, 2016, Dr. Ghoubrial documented:

The patient is here for a follow-up visit. Her arm is still in a sling. She said she had tremendous relief after the trigger point injections in her lower back.

Moreover, on June 1, 2016, at her follow-up for trigger point injections in Plaintiff Reid's cervical region, Dr. Ghoubrial documented the injections were "very beneficial":

The patient is here for a follow-up visit. She is going to have surgery of her shoulder. The trigger point injections were very beneficial to her neck.

Plaintiff Reid admitted no one at KNR pushed her into obtaining unwanted healthcare:

Q Okay. Now, KNR, and when I say "KNR," I'm including the lawyers there, Matt Walker or any of the others, they never pressured you into unwanted medical care, did they?
A No.
Q They never pressured you into unwanted chiropractic care, did they?
A No.
including the lawyers there, Matt Walker or any of the others, they never pressured you into unwanted medical care, did they?
A No.
Q They never pressured you into unwanted chiropractic care, did they?
A No.

See Reid Deposition at page 239, line 25; page 240, lines 1-14.

Ms. Reid also never complained once regarding the care being provided by Dr. Ghoubrial (or Dr. Floros). (Deposition at p. 365, lines 6-10). To the contrary, she sent an email to KNR indicating the chiropractic treatment was "going okay" and admitted on deposition she would not have kept

seeking chiropractic care if it did not help. *See* Reid Deposition at page 366, lines 6-155. Plaintiff Reid testified:

> Q. In fact, you recall sending an email to Marty or Matt [paralegal and attorney at KNR], one of the two, over at KNR saing that the chiropractic treatment's going okay?
>
> A. I believe so.
>
> Q. In fact, we talked about it at our last deposition, that not only it was helping you, you would not have kept going if it wasn't helpful, true?
>
> A. True.
>
> Q. I mean, from spending time with you at a deposition and reading your emails and that, I mean, you're not afraid to voice your opinion i fyou're upset about something, are you?
>
> A. No.
>
> Q. I mean, you've threatened to get congressmen involved, true?
>
> A. True.
>
> Q. You got, in your words, bitch with KNR and apologized the next day because you were in a tough situation and you were sort of at the end of your nerves, fair?
>
> A. Fair.
>
> Q. They were understanding about that, wreen't they?
>
> A. Yes.
>
> Q. I mean, if you had criticisms of Dr. Ghoubrial or Dr. Floors, you would have been telling KNR that, wouldn't you?
>
> A. I would have told them that.
>
> Q. And you never did, did you?
>
> A. I don't believe so. *See* Reid Deposition at page 366, lines 6-25; page 367, lines 1-12).

II. THERE ARE NUMEROUS INDIVIDUAL ISSUES AND NO COMMON EVIDENCE REGARDING EACH PATIENT'S MEDICAL TREATMENT, SETTLEMENTS, AND DAMAGES, ALONG WITH CLAIM SPECIFIC ISSUES THAT PREDOMINATE AND NECESSITATE MINI TRIALS.

Consideration of all of the aforementioned Rule 23(a) factors demonstrates that class action treatment is inappropriate. Although the facts of this case present unique issues under the elements of Rule 23(a), the unsuitability of class action treatment becomes even clearer when considering the predominance and superiority requirements of Rule 23(b)(3).What must be proven at a class action trial is central to determining predominance. To determine whether common questions predominate, the Court must look to what must be ***proven*** and whether that ***proof*** is common to the class as opposed to individualized proof:

> deciding whether a claimant meets the burden of class certification …requires the Court to consider *what will have to be proved at trial and whether those matters can be presented by common proof.* …To meet the predominance requirement, a plaintiff must establish that issues subject to generalized proof and applicable to the class as a whole predominate over those issues that are subject to only individualized proof. [*Cullen,* 137 Ohio St.3d at 379, 382-383].

The predominance test is a more difficult standard to pass because "For common questions of law or fact to predominate, it is ***not sufficient that such questions merely exist***; rather, the ***common questions must represent a significant aspect of the case and they must be capable of resolution for all members in a single adjudic***ation." *Jacobs v. FirstMerit,* 2013-Ohio-4308, ¶27. This is why class-certification briefing is focused on whether the core issues in the case are amenable to class proof. If review of individual questions requires a mini-trial on thousands of claims, the case could drag on for a lifetime. Such is the case here.

Plaintiffs provide no analysis on how they could try a class action trial and what common evidence exists, and they provide no individual analysis whatsoever as to Dr. Ghoubrial. Mot. pp. 75-80. For this reason alone they have failed to meet their burden. Plaintiffs seek to distract this Court and to sweep aside individual differences by slinging as much mud as possible, making the Motion unnecessarily complicated, and parroting criminal buzzwords. They do this for effect while

failing to address or disclose the *common evidence that would prove their claims.* The reasons for their incomprehensible Motion and chosen tactics is there understanding there is no common evidence. This is because every patient would have to prove they were damaged by the outcome of their medical treatment and case settlement they voluntarily signed off on, and Defendants would have an opportunity to rebut each individual's proof. Depriving defendants of their right to rebut each patient's claims would be a due process violation.

A. Plaintiffs fail to disclose and have no plan to prove damages and liability on a class wide basis and thus individual liability issues predominate.

An essential element of each of Plaintiffs' claims is damages or injury.[28] Plaintiffs' Motion fails to appreciate how personal injury lawsuits actually work. This is an intentional omission on Plaintiffs' part. The cardinal rule in personal-*injury* law is that the plaintiff needs to prove they were injured. To do that, the plaintiff needs to seek treatment for their injuries. *See* Horton Deposition, pages 47-48. Treatment records and medical bills help prove why a particular plaintiff is entitled to a monetary settlement. Obviously, the more medical bills a victim has the stronger chance of showing a higher settlement is warranted (compare a case where back surgery is needed compared to one where only a few sections of chiropractic work is warranted). With the majority of accident cases that are not catastrophic, the most common issue is a soft tissue injury which cannot be proven or justified without medical treatment. The *central error in Plaintiffs' theory then is that the patient's treatment from Dr. Ghoubrial did not benefit them relative to their individual settlements*. Plaintiffs ignore the fact that the medical treatment helped them prove their injuries so they justify a personal

[28] See *Estate of Mikulski v. Centerior Energy Corp.*, 8th Dist. Cuyahoga No. 94536, 2011-Ohio-696, ¶ 14-15 (in Ohio, "one element common to the vesting of actions in tort and contract is the necessity of actual damages."); *Cohen v. Lamko, Inc.*, 10 Ohio St.3d 167, 169 (1984) fraud requires resulting injury proximately caused by the reliance.); *Scott Charles Laundromat, Inc. v. City of Akron*, 2012-Ohio-2886, ¶ 12-13 (unjust enrichment requires a showing that "it would be unjust to allow the defendant to retain the benefit without payment").

injury settlement. If Plaintiffs claim otherwise, that would only show that it would require an individual analysis to determine if their medical treatment helped them obtain more money and necessitate hearing testimony from all parties involved in negotiating each individual settlement.

Plaintiffs' baseless conclusion every patient would have received a higher settlement if they had not received treatment from Dr. Ghoubrial is pure speculation and wholly lacking in commonsense. In the *same sentence* Plaintiffs claim they are entitled to the amounts "overcharged," they later on say they are entitled to complete "disgorgement of the fees." *See* Motion at page 79. Inexplicably, Plaintiffs are attempting to argue they received no medical benefits whatsoever from Dr. Ghoubrial's treatment (or that of the other providers at Clearwater) despite the fact Plaintiffs' breach of fiduciary duty claim against Dr. Ghoubrial has been dismissed and there is no medical malpractice claim. A "no benefits" theory would be impossible to prove on a class basis because Dr. Ghoubrial would be required to put on individual evidence of the treatment provided to and the results obtained by each individual patient in the class.

Plaintiffs' other theory about being "overcharged" also fails. This theory is that Dr. Ghoubrial did medical work within the standard of care on patients but he charged more than Plaintiffs believe he should have. Not surprisingly, Plaintiffs provide no basis on how they would prove, *with "common evidence,"* Dr. Ghoubrial was paid more than he "should have been paid". *Cullen*, 137 Ohio St.3d at 379, 382-383. Plaintiffs provide no standard for how this could be adjudicated on a class basis since there is no law on how much a doctor, lawyer, or anyone else should charge for their professional services. In any event, Dr. Ghoubrial's company Clearwater (not a defendant) took significant reductions in the amount it charged for the doctors and services provided by the practice. This would necessitate analyzing each settlement to determine the amount

of each individual reduction and whether the reduced amounts met some made-up test up for what doctors "should" charge.

Again, the amount *charged* for the medical services provided is irrelevant to the analysis as Clearwater took a reduction on nearly every case. *See* Ghoubrial Affidavit, (attached as Exhibit G). What matters is what each patient actually *paid* out of their individual settlements in satisfaction of Clearwater's bills. As the reductions varied from case to case, typically ranging from 30% to 70%, each individual settlement would need to be analyzed to determine if the amount actually paid out of the patient's settlements to Clearwater for the services provided was in fact reasonable. *Id.*

In short, a patient that received medical care from Dr. Ghoubrial and did better—in terms of out of pocket recovery—than she would have if she tried to navigate insurance companies and medical bills on her own could not be considered "damaged" or "injured" by Dr. Ghoubrial. And a patient that received professional medical care and whose pain was cured by Dr. Ghoubrial also could not be considered damaged if Dr. Ghoubrial's bills that were actually paid were "*fair and reasonable price of medical services*" as the letters of protections all patients signed expressly stated. Since every patient has a different diagnosis and individualized treatment, it would be impossible to make this determination of whether the particular patient was ultimately "overcharged" on a class basis.

What is truly boggling about Plaintiffs' Motion, and voluminous supporting materials and declarations, is that there is no evidence and no plan to show how high-volume personal injury firms like KNR are a net loss to the accident victims they represent. For example, Plaintiffs provided a Declaration from professor Engstrom which is actually helpful Defendants. Professor Engstrom admits that KNR processes "small or borderline claims that *other firms might reject* as unprofitable" and thus KNR serves a legal niche. Engstrom Affidavit ¶22. This professor admits that "settlement

mills" can be helpful to certain claimants. If a victim uses a "settlement mill," and has a small claim that is meritorious, they are a "likely winner," and they are a "likely winner" if they have a large unmeritorious claims. *For small unmeritorious claims, settlement mills are a definitive "winner.*" Plaintiffs' Mot. Ex. 2, Engstrom, *Run-of-the-Mill Justice* at 1535; see also *id.* at 1537 ("*Settlement mill clients with non-meritorious claims fare well* because, even if an insurance adjuster recognizes that a particular claim lacks merit, if he is negotiating with a plaintiff's attorney (or non-attorney) with whom he frequently bargains, he nevertheless has an incentive to tender an acceptable offer, both in order to close the claim expeditiously and to engender good will to pave the way for future bargaining.").

Here, Plaintiffs and Engstrom argue KNR does not usually turn away potential accident victims, and thus there likely are some unmeritorious claims that KNR pursues on behalf of accident victims. But *Plaintiffs' own expert admits, these victims are "winners" from the services provided by KNR*. *Id.* *She admits that KNR benefits clients because "Insurers like settlement mills."* *Id.* at 1543.[29] Plaintiffs own evidence proves that their case cannot be tried as a class action because many of the putative class member accident victims were indisputably "winners" based on KNR's services, as well as from the medical care provided by Dr. Ghoubrial and/or Clearwater.

Predominance cannot be established because indisputably some patients have not been damaged (professor Engstrom's "winners") and thus there would be no efficient way to sort them out. In *Felix*, 145 Ohio St.3d 329, plaintiffs sought to certify a class under the Ohio Consumer Sales Practices Act relating to a loan agreement. The court held predominance r had not been established:

[29] She further explains" Insurers benefit from the presence of settlement mills partly because serious claims, which present the highest chance of a catastrophic verdict, are apt to be resolved at a discount ... It is, after all, profitable for an insurer to overpay on a lot of debatable $2,000 claims if, every once in a while, it will only have to pay $50,000 to discharge what could be—in the hands of a conventional attorney—a $500,000 or $1 million judgment. Insurers also like settlement mills because the interests of settlement mills and insurers overlap along two dimensions: speed and certainty." *Id.* at 1544.

> If the class plaintiff fails to establish that all of the class members were damaged …, there is no showing of predominance under Civ.R. 23(b)(3). …. Indeed, a key purpose of the predominance requirement is to test whether the proposed class is sufficiently cohesive to warrant adjudication by representation.
>
> Here, *the class, as certified, fails because there is no showing that all class members suffered an injury in fact*. The broadly defined class encompasses consumers who purchased a vehicle at Ganley through a purchase contract that contained the unconscionable arbitration provision. But there is absolutely no showing that *all* of the consumers who purchased vehicles through a contract with the offensive arbitration provision were injured by it or suffered any damages. [*Id.* at 337, 338.[30]]

Another analogous case is *Cullen*,137 Ohio St.3d, 373, where the plaintiff alleged State Farm had wrongly failed to replace damaged windshields and providing the cost of repair instead. In finding that common issues did not predominate, the court reasoned that individual determinations would need to be made as to whether each class member's repair restored the windshield to its pre-damage condition. The individual proof as to the extent of repair in *Cullen* is analogous to the extent of medicals that were necessary and whether each client benefited from treatment. This proof is central to the liability analysis and overwhelms common issues.

Plaintiffs here have indisputably failed to "demonstrate that they can prove, through common evidence, that all class members were in fact injured by the defendant's actions." *Felix*, 145 Ohio St.3d 329, ¶33. Because not all class members were "injured" (if any), there is "no common evidence that shows all class members suffered *some* injury." *Id.* And thus there is no way to try the case without thousands of mini trials.[31]

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[30] See *Konarzenski v. Ganley, Inc.*, 2017 Ohio 4297, ¶17 (denying certification, finding "[t]he 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"); *Hoang v. E* trade*, 151 Ohio App.3d 363 (2003) (denying certification based on need for individual proof to establish the existence of damage for each class member).

[31] *Timoneri v. Speedway, LLC*, 186 F. Supp. 3d 756, 763-764 (N.D.Ohio 2016) ("determining liability as to each Speedway location would *require the court to hold a series of "mini-trials,"* where it would have to conduct an *individualized analysis* of each location's compliance or non-compliance with the ADA based on the age of the facility and the type of violation claimed"); *Mielo v. Bob Evans Farms, Inc.*, 2015 WL 1299815, *7 (W.D. Pa. Mar. 23, 2015) (finding "the Court would have to conduct a *mini-trial* for each restaurant" to determine if the ADA standards were met and this would be "*too fact-intensive and individualized* to be effectively addressed in a single class action"); *Wagner v. White Castle Sys.*, Inc., 309 F.R.D. 425, 431-32 (S.D. Ohio 2015) (plaintiffs who had encountered accessibility barriers

(footnote continued)

B. Individual Issues Predominate, including whether Clearwater Physicians were Justified in their Treatment, the Benefit Conferred on the Patient, the Amount Accepted as Full and Final Payment, Communications between the Defendants, Communications between Defendants and Non-Parties, and Communications between Class Member and the Defendants and/or Non-Party "Co-Conspirators"

Plaintiffs' theory is incompatible with class litigation because they have put every patient's medical treatment at issue.[32] Plaintiffs' motion attempts to provide *expert evidence* that Dr. Ghoubrial committed medical malpractice and that (1) use of the trigger-point injections is "medically indefensible", (2) that their use "*deviates extremely from the standard of care*," and (3) attempts to explain the appropriate standard of care to the Court. Mot. p. 20-24. Plaintiffs provide the declaration of Michael Walls, M.D. who claims he does not administer or agree with Dr. Ghoubrial's use of trigger point injections. Walls Aff. ¶4 (providing no indication he reviewed the medical files of any of the named representatives or did an independent medical examination of any of the named plaintiffs). Because plaintiffs are treating this case like a (time-barred) medical-malpractice case and putting medical evidence at issue, Dr. Ghoubrial would have the right to offer its own expert testimony as to every patient/putative class member and would have a right to an independent medical examination of every putative class member

In short, every patient would require an independent medical analysis to see if they fared worse or better as a result of Dr. Ghoubrial or Clearwater's treatment. Plaintiff *Harbour has already admitted that Dr. Ghoubrial's treatment using trigger point injections benefited him and provided*

at White Castle could not maintain class action against restaurant because they could not "demonstrate[] that the class members at the various 54 Ohio restaurants would share common legal issues or salient core facts").

[32] Plaintiffs have stated that this is not a medical malpractice case and thus the issue of whether Dr. Ghoubrial met the standard of medical care is not an issue. See Opp. to Mot. For judgment on the pleadings (filed 3/4/2019). The reason plaintiffs admitted this was not a medical malpractice case is that the representative *plaintiffs cannot bring medical-practice claims or theories are because they are indisputably time-barred by the one-year statute of limitations for medical-malpractice claims*. Dr. Ghoubrial was only added to the Fourth Amended Complaint, which wasn't filed until 2018. Dr. Ghoubrial only treated Monique Norris once in 2013. He last treated Richard Harbour in 2014, and he last saw Thera Reid in May of 2016.

him relief. *See* Harbour Deposition, page 118. Likewise plaintiff Reid is on record as stating she was satisfied with her medical treatment from Dr. Ghoubrial's treatment. By including experts/arguments on the proper standard of care, Plaintiffs are ***admitting*** the case needs expert evidence and Dr. Ghoubrial would have to offer individual expert evidence and testimony in response. The trier of fact would also have to know what would happen if these patients went *without treatment* from Dr. Ghoubrial and whether they would have fared better or worse in terms of both their medical conditions and the settlements of their individual law suits.

There is simply no feasible way to adjudicate the standard of care and medical treatment of hundreds or thousands of patients with common evidence. This is precisely why the Ohio Supreme Court mandates that defenses that indisputably raise individual issues—like the individual defenses as to medical treatment as to every patient—warrant denial of class certification.[33] The named Plaintiffs' claims will not "prevail or fail in unison" and have no bearing as to the facts of *other* patients. *Musial Offices, Ltd. v. Cty. of Cuyahoga*, 2014-Ohio-602, ¶32.

C. Individual Issues Predominate because the Trier of Fact Needs to Hear Evidence from the Attorneys, the Plaintiff, the Medical Lienholders, Insurance Claims Adjusters, Non-Party Alleged Co-Conspirators, and Every Putative Class Member

Plaintiffs' motion rests entirely on an assumption—without analysis, evidence, or authority that—if the clients had lower medical expenses, the clients would net a greater return from a

[33] *Cullen*, 137 Ohio St.3d 373, ¶50 (court erred by failing to consider whether defendant's defenses raised individualized issue, and finding plaintiffs did not satisfy the predominance requirement because class trial would entail examining the condition of ever windshield at issue "and the individual knowledge and consent of each class claimant entail inspection of tens of thousands of automobiles and an individualized assessment of the damages each class member sustained, if any"); see *Modern Holdings, LLC v. Corning, Inc.*, 2018 U.S. Dist. LEXIS 52559, at *47 (E.D.Ky. Mar. 29, 2018)(in toxic tort case where plaintiffs alleged injuries, the court found "The varied nature of the named Plaintiffs' afflictions, their lengths of exposure, the sources through which their alleged exposure occurred, their *unique medical histories*, inconsistencies between the injuries from which the named Plaintiffs suffer and those they complain of, etcetera, all reveal individual issues that predominate over common issues …").

settlement. Mot. p. 44. Defendants will offer evidence that even if plaintiffs could prove this is true for *some* clients, it is not true for ***most*** clients. The universal rule is that the dollar amount of medical specials greatly affects the settlement value. *Robinson v. Bates*, 112 Ohio St.3d 17, ¶7 ("In personal-injury cases, an injured party is entitled to recover necessary and reasonable expenses arising from the injury."). As plaintiffs' own expert admits, insurers are often are willing to settle for 2 or 3 times the medical specials. Plaintiffs' Mot. Ex. 2, Engstrom, *Run-of-the-Mill Justice* at 1532-33. Where that is the case, having larger medical expenses increases the settlement value of the case. Even though more has to be paid to the treating doctor at the end of the case, the multiplier gets a 2 or 3 times higher gross settlement amount and this typically result, even after paying more to the doctor, in ***a higher net settlement amount to the accident victim***. Plaintiffs provide no evidence showing they deduct the "improper" charges/medical from the settlement and declare this would increase their net recovery since the medical expenses justify a higher total settlement.

Even assuming that "exorbitantly inflated prices for medical treatment and equipment" were charged by KNR's "preferred health care providers pursuant to price-gouging schemes," to determine whether any individual client netted more or less would require looking at the facts of that each individual client's case and the net results obtained for that client. The results would not necessarily be the same for all clients. Plaintiffs' Motion offers evidence that higher medical expenses *may* not have gotten higher settlement offers where the insurer was Allstate or Nationwide. Mot. p. 32-34. If that is true, this would simply point to the need of taking evidence as to each client as to who the insurers were on their case. If it was Allstate or Nationwide, maybe this would be important. If a different insurer, then higher medical bills likely netted a higher settlement.

The Ohio Supreme Court permits parties to put on evidence of what the "reasonable value of the medical care required to treat the injury" is, as well as what was charged ***and what was paid***.[34]

[34] See *Robinson v. Bates*, 112 Ohio St.3d 17, ¶7 ("Since those expenses [that can be recovered in a personal injury suit] include the reasonable value of the medical care required to treat the injury, the question is raised as to how to determine the reasonable value of the medical care. [p]roof of the amount paid or the amount of the bill rendered and of the nature of the services (footnote continued)

Dr. Ghoubrial would thus be entitled to show not only what he charged, but what was ultimately paid to Clearwater out of each patient's settlement to prove that what was paid was reasonable in each individual case.

To determine if the particular plaintiff (who possibly did not have a meritorious case) did better due to Dr. Ghoubrial's treatment and/or KNR's representation, the trier of fact would have to hear from everyone involved in the negotiations—including the lawyers, plaintiff(s), doctors, and claims examiners. As Plaintiffs' evidence indicates, each settlement involves negotiations between these numerous interested parties that are making adjustments to "make the math work." *See* Motion, Ex. 2 former KNR attorney Gary Petti Deposition at p. 104:14-15. Mr. Petti stated "I'm not sure again that the treatment from Clearwater added value to the client's case." *Id.* at p. 121:8-9. To determine if Dr. Ghoubrial "added value" would require individualized review of client-specific evidence. Even if the four named Plaintiffs could prove their theory for themselves, which Plaintiff Harbour certainly cannot for the reasons states above, that does not mean the same evidence would prove the theory for all other putative class members. It is not possible for Plaintiffs to prove that Dr. Ghoubrial's medical treatment provided no "added value" to their cases and/or that they were "overcharged" for those medical services without looking at each individual patient's treatment and settlement.

D. Individual Issues with Plaintiffs' Fraud Claim Predominate

The elements of fraud are: (a) a misrepresentation or concealment of fact; (b) that is material to the transaction at hand; (c) made falsely, with knowledge of its falsity or with utter disregard and recklessness as to whether it is false; (d) with the intent of misleading another into relying upon it; (e) justifiable reliance upon the misrepresentation or concealment; and (f) resulting injury proximately caused by the reliance. *Cohen v. Lamko, Inc.*, 10 Ohio St.3d 167, 169 (1984). Plaintiffs

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performed constitutes prima facie evidence of the necessity and reasonableness of the charges for medical and hospital services. Thus, either *the bill itself or the amount actually paid can be submitted to prove the value of medical services*.") (cleaned up).

have not explained what Dr. Ghoubrial allegedly concealed or failed to disclose that could be proven on a class-wide basis. The medical lien (LOP) that Dr. Ghoubrial's personal-injury patients signed clearly states that each patient "direct[s] you [their lawyer] *to pay* to Clearwater Billing Services, LLC *from the net proceeds of any settlement*, claim, judgment, verdict or award, for any and all services rendered as a result of an injury that I received on ___." *See* Motion, Ex. 35. The plain reading of this statement is that payment to Clearwater for the medical services provided would be made out of the patient's settlement. There is no misrepresentation or material omission contained in the LOP each patient voluntarily signed and none of the named Plaintiffs or purported class members paid Clearwater directly for the services provided.

Understanding this, Plaintiffs' counsel resorts to stating, without a shred of authority or evidentiary support, that this medical lien "form [does not] disclose that the clients are waiving their own health-insurance benefits by signing." *See* Motion at page 77. This highlights an individual issue that cannot be ignored. It may be true, as Plaintiffs suggest, that "clients have no reason to believe they would ever end up paying more for this care than it would have cost them to simply pay through their health-insurance policies, and no reason to even believe that the Defendant providers wouldn't bill their insurance companies." *Id.* But an equally plausible reading, is the plain reading of the signed agreement that states the patients agree to "pay" Clearwater out of their settlement. Individual evidence would have to be gathered as to *each patient* to determine what they knew and understood the agreement they signed to mean and what they were told. Plaintiffs' counsel theory assumes: 1) each patient had options for medical treatment other than Dr. Ghoubrial and/or Clearwater; 2) each patient had medical insurance; 3) each patient wanted the medical bills submitted to their medical insurance; and 4) each patient expected Clearwater to bill their medical insurance. However, one need only look to Plaintiff Harbour to see not only are Plaintiffs' counsel's assumptions false, evidence pf each individual's situation, needs, expectations, understanding, and resources would need to be introduced and challenged.

Further, numerous patients, including the named Plaintiff Harbour , hired KNR multiple times, and he treated with Dr. Ghoubrial at Clearwater following two separate motor vehicle

accidents during the pendency of two separate law suits. Plaintiff Harbour signed multiple contingency fee agreements with KNR, he signed multiple LOPs and other documentation with Clearwater, and he signed multiple settlement memorandums detailing the distribution of all settlement proceeds. The documentation Plaintiff Harbour signed with Clearwater, including the LOPs, clearly indicated he was being treated by Clearwater and that he was authorizing his attorneys to pay Clearwater directly from his settlement proceeds. How could Plaintiff Harbour and the other repeat-players possibly argue "justifiable reliance" to support a fraud claim since they would have known exactly what happened from the prior suit? At the very least, this raises individual issues regarding each individual patient's experience, including their consent, knowledge, understanding and reliance. Repeat patients like Plaintiff Harbour flatly contradict Plaintiffs' evidence-free assertion that if victims would have known about charges they would not have agreed to treat with Dr. Ghoubrial and/or Clearwater. *See* Motion, at page 79.

The same issues of consent, knowledge, and reliance arise related to the "Settlement Memorandum" that each KNR voluntarily client signs. These settlement memorandums provide line items for each deduction from the settlement, and each client agrees to the following disclosure (or one like it):

> I hereby approve the above settlement and distribution of proceeds. I have reviewed the above information and attorney's fees with Kisling, Nestico & Redick. I *acknowledge that it accurately reflects all costs, including but not limited to, the investigation fee, and all outstanding expenses associated with my injury claim. I further understand that the itemized bills listed above will be deducted end paid from the gross amount of my settlement except as otherwise indicated*. If any amount was withheld from the settlement for potential subrogation interests, any balance due after the subrogation Interest is satisfied may be subject to Attorney Fees not to exceed the contractually agreed amount Finally, I understand that any bills not listed above, including but not limited to Health Insurance or Medical Payments Subrogation and/or those Initialed by me to indicate that they are not being paid from the settlement are my responsibility and not the responsibility of Kisling, Nestico & Redick.[35]

[35] The Settlement Memoranda of the named plaintiffs are attached to Plaintiffs' Motion, Ex. 30.

The clients thus "*acknowledge that [the settlement[accurately reflects all costs*" including those of Clearwater and Dr. Ghoubrial. To determine if any particular patient was misled would require an individual review of whether they understood the agreements they signed. Every settlement was the product of negotiations, including Clearwater's bills.[36] The clients were involved in these negotiations, and what *each* client told their lawyers about what they were expecting and what they understood about the settlement/deductions is prime evidence to determine if they were "misled." As such, this matter cannot be adjudicated on common proof because while there are arguably common questions, there are no common questions.

There is no way to adjudicate the fraud claim without individually analyzing each patients consent, reliance, and individual circumstances regarding their agreement to the medical lien and settlement memorandum. Contrary to Plaintiffs' assertion, a *presumption of reliance cannot be used with these disparate factual situations consistent with Dr. Ghoubrial's due process rights to put on a defense*. Plaintiffs reliance on cases where the alleged fraud could be proven with "form documents" is misplaced. Those cases are easily distinguishable because here the patients/clients knew the *effects* of the documents they were signing. In the cases Plaintiff site, unlike here, there was a uniform fraud that did not depend on the individual's knowledge, consent, or reliance. In *Cope v. Metropolitan Life Ins. Co.*, 82 Ohio St.3d 426 (1998), plaintiffs sued MetLife alleging that it "intentionally omit[ed] the *state-mandated* written disclosure warnings when issuing replacement life insurance." *Id.* at 433. There was no "oral or affirmative misrepresentations" or any presale conduct at issue. *Id.* at 432. The Supreme Court held the case was suited for class action treatment, since the claims involved the use

[36] As a former KNR lawyer explains: "So I would get an offer from the insurance company, *get authority from the client* to accept a certain net amount, was the way I did it, *net amount in their pocket*. And in order to make that work, I would have to *adjust the medical bills*, reduce doctor whomever, and then I'd write it all up saying, okay, you know, this makes the math work if Dr. Kahn, for example, cuts her bill from 5,500 to four, then the math works, *the client gets what they're expecting*, we get whatever in a fee, and then you take that file all written up and set it in Nestico's office [KNW lawyer].And then at some point later, you get it back with an 'okay" I think he wrote on it. …Or no. … you've got to get more, we've got to take less or cut somebody else." Plaintiffs' Mot. Ex. 2 attorney Gary Petti Depo. at p. 104:7-24.

of form documents, standardized practices and procedures, and common omissions as to *every* customer. *Id.* at 437.

Likewise in *Carder Buick-Olds Co. v. Reynolds & Reynolds*, 148 Ohio App.3d 635 (2002), a computer seller stated in an "***identical letter*** sent to all class members" that it would keep computer systems up to date, but years later it said it would not keep system up to date due to a purported YTK defect requiring all current customers to obtain a new computer system. *Id.* ¶¶2-6, 54. There was no language in the form contract saying the seller would stop maintenance due to a YTK defect. *Id.* ¶41-42. The allegation was that the seller "(1) knew about the defect; (2) was required to repair the defect but did not intend to do so; (3) did not reveal this knowledge or requirement to the dealerships; and (4) *continued to charge dealerships their monthly maintenance fees*." *Id.* ¶51. Because the seller sent a an *identical letter* to all dealers that contained an identical "misrepresentation," the court found that if the plaintiff can "prove the misrepresentation across the board, inducement and reliance can also be inferred, obviating the necessity for individual proof." *Id.* ¶54. The court found common issues predominated because the seller acted in the same purported fraudulent manner as to all of its auto-dealer clients and that common proof could be used so that "liability can still be tried as a class." *Id.* ¶55.

In *Carder*, *it was the **exact same written representation in every single case**, and the representation was between defendant the consumer in every case*. But here, different information necessarily was said to different patients/clients, both when they signed a medical lien and when they sign their settlement memorandum. Unlike *Carder*, Plaintiffs herein do not offer evidence that their ***oral*** discussions with Dr. Ghoubrial and other doctors/employees at Clearwater was uniform and/or done via a script when they signed the medical lien/LOP. Plaintiffs offer no evidence of what was said when they signed, who they spoke to, what if any questions they asked, or their understanding of the lien agreements. The medical liens each patient signed clearly indicated the reasonable charges for the medical treatment provided would be paid out of their settlement, and the settlement memorandums they signed indicated they understood and agreed to Clearwater's fees.

Clearwater/Ghoubrial and all parties negotiated a settlement that everyone considered a reasonable amount for the medicals after the reduction Clearwater provided for nearly every patient.

Plaintiffs could never prove Dr. Ghoubrial acted with "knowledge of falsity," as in he knew that every patient would pay an unreasonable amount in medical bills in the final agreed-upon Settlement Memoranda. In *Carder*, it was easy for the court to conclude that the "knowledge" element (the defendant knew of the YTK defect but continued to charge maintenance fee) could be proven on a class basis as the plaintiffs were able to point to a single "identical letter" sent to all dealers. *Carder*, 148 Ohio App.3d 635, ¶¶51, 54. If the defendants knew of a defect at the time of sending that letter, the consumers win as to the entire class. Not so here. *Dr. Ghoubrial never knows how much the patient will ultimately pay after all parties negotiate the settlement*. Citation__. Clearwater did all the medical billing, and Dr. Ghoubrial did not participate in all or most of the negotiations, nor did he personally treat all patients in the clinic. It is just not possible that Dr. Ghoubrial knew that every patient (even those he did not treat) would ultimately pay an "unreasonable" amount in medical bills after the patients and all parties negotiated the bills. In other words, *Carder* was entirely based on common evidence but here the evidence is entirely individualized.

In short, *Cope* and *Carder* are the polar opposite of this case where proof will be different for each patient, and depend on their individual knowledge concerning multiple signed agreements that included disclosures and whether the settlement they agreed to actually harmed them or not. Unlike those cases, this case cannot be tried based on "form documents" because the *individual effects* of the settlement memorandum are what determines liability for each client/patient. Unlike *Cope*, there are different oral and affirmative representations at issue since what was discussed with each patient when they signed their medical liens/ settlement memorandum goes to the particular patient's (1) knowledge about the contracts, (2) reliance, and (3) whether they were misled. *Cope*, 82 Ohio St.3d at 432. Unlike those cases, the alleged fraud is not "capable of resolution for all members in a single adjudication." *Cullen*, 137 Ohio St.3d at 382; see *Castano v. Am. Tobacco Co.*, 84 F.3d 734, 745

(5th Cir. 1996) ("[A] fraud class action cannot be certified when individual reliance will be an issue.").

E. Individual Issues with Plaintiffs' Unjust Enrichment Claim Predominate.

There are just as many problems with certifying Plaintiffs' unjust enrichment claim. "To recover for unjust enrichment, a plaintiff must demonstrate: (1) that it conferred a benefit upon the defendant; (2) that the defendant knew of the benefit; and (3) that, *under the circumstances, it would be unjust to allow the defendant to retain the benefit without payment*. [T]he purpose of such claims is not to compensate the plaintiff for any loss or damage suffered by him but to compensate him for the benefit he has conferred on the defendant. A person is not entitled to compensation on the ground of unjust enrichment if he received from the other that which it was *agreed between them the other should give in return*." *Scott Charles Laundromat, Inc. v. City of Akron*, 2012-Ohio-2886, ¶12-13. First, the claim fails because Dr. Ghoubrial is not the one who conferred a benefit upon his patients (who all contracted with Clearwater to receive medical treatment in exchange for their agreements to authorize payment for those services out of their settlements). Plaintiffs cannot meet their burden to show "*under the circumstances,*" it would be unjust to allow Dr. Ghoubrial to retain the payments for the medical services because it was Clearwater that received the payments, not Dr. Ghoubrial personally.[37] Separate and apart for the fact this claim cannot properly stand against Dr. Ghoubrial in his individual capacity, it invites an individual review of the "circumstances' regarding treatment and the settlement because this is the only way to determine if it would be "unjust" to disgorge the settlement money patients indisputably agreed to pay.

To determine whether any fee paid to Clearwater (under an agreed medical lien) is unjust would necessarily require individual determinations as to the medical work provided and the value it

[37] Plaintiffs may argue because Dr. Ghoubrial owns Clearwater Billing, LLC he is personally liable for any alleged unjust enrichment. However, that is not the law in Ohio. Plaintiffs have neither pled nor alleged the corporate veil should be pierced and they have followed the steps to pierce the corporate veil enumerated by the Ohio Supreme Court in *Belvedere Condominium Unit Owners Assn. v. R.E. Roark Cos., Inc.* (1993), 67 Ohio St.3d 274, 1993 Ohio 119, 617 N.E.2d 1075..

added to each individual class member's case. For example, there are settlements in which the patient only paid Clearwater a total of $50 for a TENS unit based on negotiated reductions, etc. Citation__. Those patients did *not* confer an unjust benefit upon Dr. Ghoubrial or Clearwater. And like Plaintiffs' fraud claim, each individual patient's claim depends on their specific knowledge because there is no unjust enrichment if the patient "*agreed" to the payment* as a matter of law. *Scott Charles Laundromat, Inc.*, 2012-Ohio-2886, ¶ 13.

F. Individual Issues with Plaintiffs' Unconscionable Contract Claim Predominate

Plaintiffs' state there is an "unconscionable contract" but do not explain *what* contract existed or how it was unconscionable. *See* Motion at page 44. More problematic is that there is no such thing as a cause of action for "unconscionable contract" in Ohio. Rather, unconscionability it is defense to the enforcement of an otherwise binding contract. "The determination of whether a contractual provision is unconscionable is *fact-dependent* and requires an analysis of the circumstances of the particular case before the court." *Bayes v. Merle's Metro Builders*, 2007-Ohio-7125, ¶6. If Plaintiffs are stating the medical lien is unconscionable, then this would require "fact-dependent" analysis of the circumstances surrounding the signing of the contract as to each patient and whether the lien resulted in "unconscionable" deductions from the settlement *Id.* Assuming this were a viable claim, which it is not, it would require individual analysis of the reduced amounts paid out of each individual's settlement to resolve the medical lien. Further individual analysis and evidence would then be necessary to determine if each reduced amount actually paid was reasonable.

Adding to the difficulty, Plaintiffs ignore the fact there are no written contracts between Dr. Ghoubrial and any patient and there never were (the medical liens were made for the benefit of Clearwater). This leads to further individual analysis and required additional proof of whether Dr. Ghoubrial impliedly contracted with each patient. Each patient would have a "heavy burden" to establish an implied contract and would have to "demonstrate the existence of each element

necessary to the formation of a contract including, inter alia, the exchange of bilateral promises, consideration, and mutual assent." *Sagonowski v. The Andersons, Inc.*, 2005-Ohio-326, ¶14. How does Plaintiff Norris and the other purported class members who never actually treated with Dr. Ghoubrial prove an implied contract with him personally? The individual analysis of Plaintiff Norris alone trying to establish an implied contract with a doctor that never treated her would be "too unwieldy to be handled adequately on a class action basis." *Cope*, 82 Ohio St.3d at 435. Complicating this further is that "there cannot be an express agreement and an implied contract for the same thing existing at the same time." *Hughes v. Oberholtzer*, 162 Ohio St. 330, 335 (1954). Plaintiffs cannot have it both ways. There is no way to adjudicate in a class action a claim that does not exist.

G. Plaintiffs Sued the Incorrect Defendant

Dr. Ghoubrial treated personal injury patients but he did it under a company called Clearwater. Plaintiffs' operative complaint and Motion ignore this reality. The medical liens the patients signed were for Clearwater, not Dr. Ghoubrial personally. The doctors did not personally bill any of the patient nor did they personally receive payment for the services provided. The LOPs and the settlement memoranda show that it was the Clearwater that billed and collected for all medical services provided. The money deducted from the KNR clients' settlements for the doctors' services was done on behalf of Clearwater. Plaintiffs have, for some unknown reason, chosen not to sue Clearwater, instead naming Dr. Ghoubrial personally. Given these facts, *there is no way to prove, without individual evidence, how each plaintiff was defrauded by Dr. Ghoubrial when he did not treat all named plaintiffs and Clearwater is the company that allegedly billed at an "exorbitant" rate*.

Because Plaintiff Norris never received treatment from Dr. Ghoubrial, she is not a proper plaintiff and she has no standing to sue Dr. Ghoubrial personally. Any patient that saw Dr. Gunning,

or another doctor at the clinic other than Dr. Ghoubrial likewise would lack standing and therefore not be proper plaintiff . Plaintiffs' failure to sue the right entity raises individual issues as to whether a particular plaintiff treated with Dr. Ghoubrial, and whether they had some basis to sue him and not Clearwater.

H. Plaintiffs Lack a Proper "Damages Model"

In *Comcast v. Behrend*, 569 U.S. 27 (2013), the Supreme Court held that a plaintiff cannot obtain class certification with an inadequate damages model and the court must probe the merits of plaintiffs' damages model because an arbitrary or speculative damages model would defeat predominance. *Id.* at 35. Plaintiff "must affirmatively demonstrate" through "evidentiary proof" that damages are measurable on a class-wide basis through a common methodology. *Id.* at 33. The *Comcast* plaintiffs failed to satisfy the predominance requirement because their proffered damages model failed to "identif[y] [only] the damages that are the result of the wrong." *Id*. at 37. As such, their model could not "possibly establish that damages [were] susceptible of measurement across the entire class for purposes of Rule 23(b)(3)." *Id.* at 35. And absent such a showing, the Court found, "[q]uestions of individual damage calculations [would] inevitably overwhelm questions common to the class." *Id.* at 34.

Here, Plaintiffs' damages theory is that they are entitled to "disgorgement of all fees collected by Dr. Ghoubrial." *See* Motion, at page 44. However, since this is not a medical malpractice case where the standard of Dr. Ghoubrial's medical care is at issue, disgorgement is not a proper remedy. Plaintiffs' theory of liability is that the medical bills are "exorbitant." *See* Motion at page 10. Plaintiffs' Motion and theories contradicts themselves. As in *Comcast*, Plaintiffs' damages theory is disconnected from their theory of liability. Plaintiffs' damages model must "measure only those damages attributable to that theory" of liability. *Comcast*, 569 U.S. at 28. Here, Plaintiffs have not proposed an actual model to adjudicate the "reasonable value" of the medical

services Dr. Ghoubrial and/or Clearwater provided. Ghoubrial's charges were middling—not the highest or lowest. *See* Ghoubrial Affidavit, (attached as Exhibit G). And his charges were nearly always reduced for the settlement. There is no possible way to adjudicate the value of the medical services without an individual analysis of each patient's medical history, treatment, charges, reductions, and settlements.

Most if not all patients, like Plaintiff Harbour, enjoyed and benefited from the treatment of Dr. Ghoubrial and Clearwater provided. Plaintiffs attempt to avoid articulating a method of showing class-wide damages by parroting buzzwords like "scheme." However, because the proposed class would include individuals with no damage (their bills, at least as reduced prior to settlement, were not "exorbitant"), predominance cannot be established. And courts do not have the "power to order relief to any uninjured plaintiff, class action or not." *Tyson Foods, Inc. v. Bouaphakeo*, 136 S.Ct. 1036, 1053 (2016). Every class member must have an "injury in fact" under the Ohio "common-law standard,"[38] and Plaintiffs have no plan to ensure that could be adjudicated in a class action trial because it would be impossible.

III. A CLASS ACTION DEVICE IS NOT A SUPERIOR METHOD: IT WOULD NOT BE MANAGEABLE TO TRY THE CASE AND IT WOULD DEPRIVE DEFENDANTS OF THEIR DUE PROCESS RIGHTS TO PUT ON A MEANINGFUL DEFENSE.

Plaintiffs could also never show that "a class action is superior to other available methods for fairly and efficiently adjudicating the controversy." Civ. R. 23(B)(3). Courts must determine if a class action trial could be manageably tried. *In re Hyundai & KIA Fuel Economy Litig.*, 2019 U.S. App. LEXIS 17047, at *16-17 (9th Cir. June 6, 2019) (en banc & published) ("In deciding whether

[38] *Smith v. Ohio State Univ.*, 2017-Ohio-8836, ¶10 ("Ohio courts generally adhere to the traditional principles of standing that require litigants to show, at a minimum, that they have suffered (1) an injury that is (2) fairly traceable to the defendant's allegedly unlawful conduct, and (3) likely to be redressed by the requested relief…. These three requirements are considered the irreducible constitutional minimum of standing.").

to certify a litigation class, a district court must be concerned with manageability at trial."). In *Duran v. U.S. Bank* (2014) 59 Cal.4th 1, the California Supreme Court reviewed a class action trial that denied the defendant their due process right to put on a defense. The court ruled "trial courts deciding whether to certify a class must consider not just whether common questions exist, but also whether it will be *feasible to try the case as a class action*." *Id.* at 27. *Duran* explained *courts cannot "abridge" the presentation of a "defense simply because that defense [is] cumbersome to litigate in a class action," and "a class cannot be certified on the premise that [the defendant] will not be entitled to litigate its statutory defenses to individual claims*." *Id.* at 35. The court emphasized "[t]hese principles derive from both class action rules and *principles of due process*." *Id.* (finding due process requirements were violated in class trial because trial court "refus[ed] to permit any inquiries or evidence … [of class members] outside the sample group"). Thus, when "considering whether a class action is a superior device for resolving a controversy, *the manageability of individual issues is just as important* as the existence of common questions uniting the proposed class. . . . ." *Id.* at 28-29.

Plaintiffs provided no analysis how the case could be efficiently tried in a class trial. Besides the need for hundreds if not thousands of mini trials, the nature of the claims necessarily raises issues of attorney-client privilege (against the attorney defendants) and physician-patient privilege (against Dr. Ghoubrial). The privilege and confidentiality issues preclude a defense and make class certification an inappropriate manner to handle these claims (i.e., not "superior").

A. A Class Action would Deny Defendant Dr. Ghourbial Due Process because of the Physician-Patient privilege (ORC 2317.02) and would Require the Release of Confidential Medical Information

The physician–patient privilege protects communications between a patient and her doctor from being used against the patient. "The physician-patient privilege is designed to "promote health by encouraging a patient to fully and freely disclose all relevant information which may assist the

physician in treating the patient.'" *Med. Mut. v. Schlotterer*, 122 Ohio St.3d 181, ¶15."Physician-patient …privileges have been codified in Ohio to deny the use of such [medical record] information in litigation except in certain limited circumstances. See R.C. 2317.02(B)(1) and 4732.19." *Hageman v. Southwest Gen.*, 119 Ohio St.3d 185, ¶¶9-11. And "the federal Health Insurance Portability and Accountability Act of 1996 ('HIPAA') prevents healthcare providers from disclosing health information except in certain specific circumstances." *Id.*

Here, in order to mount a defense, Dr. Ghoubrial would need to testify about every patient's care, introduce their confidential medical records, and have an expert review and discuss their medical records. This lawsuit has thus put Dr. Ghoubrial in an ***untenable catch 22***—defend himself by breaching physician/patient confidentiality and subject himself to sanction and suit, or not defend himself in this suit even though the confidential medical evidence would absolve him of liability. A patient that does not consent to Dr. Ghbourial's use of their confidential medical information at trial would have a meritorious lawsuit against him if he used their confidential information to defend himself. *Hageman*, 119 Ohio St.3d 185, ¶ 10 ("the breach of patient confidentiality is a palpable wrong"). However, because none of the members of the putative class have consented to the use of their confidential medical information, and because Plaintiffs' counsel has not articulated a plan to obtain the "express consent" of every patient under R.C. 2317.02(B)(1)(a)(i), Dr. Ghoubrial would be precluded from exercising his Constitutional right to defend himself against these claims. And this suit is not a "medical claim" (as in malpractice), the medical information cannot be used without the express consent of each individual in the class. R.C. 2317.02(B)(1)(a)(iii).

To obtain this necessary consent, Plaintiffs' counsel would have to obtain a written HIPPA release and consent from every patient to litigate the claims against Dr. Ghoubrial. Otherwise, Dr. Ghoubrial would be unable to defend himself. The named Plaintiffs in this suit have not and cannot

consent on behalf of all of Dr. Ghoubrial's *other* patients. Of course, "When a party puts in issue a matter that is normally privileged, the privilege may be waived, and a plaintiff waives the physician-patient privilege to the extent that physical condition is an issue in the suit." *L.A. Gay & Lesbian Center v. Sup. Ct.*, 194 Cal. App. 4th 288, 310 (2011). But "*in an opt-out class action, merely by passively consenting to membership in the class, a class member does not expressly place his or her medical condition at issue*, therefore the exception [of when a patient puts their medical condition at issue] does not apply." *Id.* In short, "the named class Plaintiffs do not hold the privilege on behalf of the unnamed class members …" *Id.* Because the putative class have not all signed consent forms, Dr. Ghoubrial cannot present medical evidence that could acquit him at trial, and thus a class trial would deprive him of his due process right to defend himself.

B. A Class Trial would Deny Due Process due to the Attorney-Client Privilege

The defense also turns on what Dr. Ghoubrial's patients told KNR lawyers about their medical treatment, as well on lawyer-client communications. That's because what the client knew and what he understood about the settlement, their medical bills/liens, is all powerful and necessary evidence. But these communications are also privileged. "The attorney-client privilege is covered by a statute: R.C. 2317.02(A)(1) provides that an attorney may not testify about 'a communication made to the attorney by a client in that relation' unless the client either waives the privilege, or 'voluntarily reveals the substance of attorney-client communications in a nonprivileged context.'" *State v. Tench*, 2018-Ohio-5205, ¶ 234. An attorney offering advice on whether to seek medical treatment strikes at the heart of work product and attorney-client privilege. Defendants would thus need both doctor and attorney testimony to defend themselves and could not do so due to these two privileges without express waivers from all class members. For the reasons already discussed, the named Plaintiffs cannot waive the privilege on behalf of unnamed KNR clients.

Plaintiffs' Motion puts the clients' attorney communications squarely at issue. For example, Plaintiffs quote a former KNR attorney who discussed the possibility of unnecessary medical treatment being recommended by her. She said *" it depends on the case*" whether she gave attorney advice on whether to get her back adjusted if the client only hurt their ankle and said it was a "*sometimes, yes and no"* situation. *See* Motion, Ex.1, Engstrom Dec. ¶39 (quoting Lantz Tr. 199:6-18). Plaintiffs' evidence demonstrates that the attorney-client communications are significant and Defendants need to probe them in order to mount a meaningful defense.

This again places Defendants in an untenable situation. There is an "inherent unfairness in allowing a plaintiff to bring a claim, which, by its very nature necessitates a defense based on confidential information." *People ex rel. Herrera v. Stender*, 212 Cal.App.4th 614, 646 (2012); see *McDermott, Will & Emery v. Superior Court* (2000) 83 Cal.App.4th 378, 385 ("We simply cannot conceive how an attorney is to mount a defense in a shareholder derivative action alleging a breach of duty to the corporate client, where, by the very nature of such an action, the attorney is foreclosed, in the absence of any waiver by the corporation, from disclosing the very communications which are alleged to constitute a breach of that duty."). In short, *'[t]he privilege which protects attorney-client communications may not be used both as a sword and a shield." Chevron Corp. v. Pennzoil Co.* (9th Cir. 1992) 974 F.2d 1156, 1162. The defense cannot call former clients/ patients without breaching privileges, and thus there is no possible way to litigate the case consistent with due process, making the case unmanageable for class litigation.

IV. PLAINTIFFS' PROPOSED CLASS IS NOT ASCERTAINABLE BY REFERENCE TO OBEJECTIVE CRITERIA

The trial court must define the class if it can be certified. Civ.R. 23(C)(1)(b) ("An order that certifies a class action shall define the class and the class claims, issues, or defenses, and shall appoint class counsel under Civ.R. 23(F).") To do this *"an identifiable class must exist and the*

definition of the class must be unambiguous." *Cullen*, 2013-Ohio-4733 at ¶12. "The requirement that there be a class will not be deemed satisfied unless the description of it is sufficiently definite so that it is *administratively feasible* for the court to determine whether a particular individual is a member. The test is whether the means is specified at the time of certification to determine whether a particular individual is a member of the class." *Cantlin v. Smythe Cramer Co.*, 2018-Ohio-4607, ¶16.

Here, this cannot be done. Plaintiffs' class claims are exceedingly overbroad. A proposed class is facially "overbroad if it includes significant numbers of consumers who have not suffered any injury or harm." *Loreto v. The Procter & Gamble Co.*, 2013 U.S. Dist. LEXIS 162752, at *12 (S.D. Ohio Nov. 15, 2013) (class overboard because majority of consumers who purchased the products did not suffer an injury). Overbroad classes violate Ohio's standing requirements to have an injury in fact. *Smith v. Ohio State Univ.*, 2017-Ohio-8836, ¶10. Rule 23 must be interpreted consistently with Ohio's common law standing requirement.

Making matters more difficult in the present case is that each and individual case would have to be examined before determining breach of contract or unjust enrichment. In fact, it is IMPOSSIBLE to determine unjust enrichment without examining each client file individually. An individual has standing only if he suffered an injury-in-fact that is causally connected to a defendant's alleged wrongdoing. *Id.* A class cannot be certified if any members in the class lack standing. *Amchem Prods. v. Windsor*, 521 U.S. 591, 612-13 (1997). Likewise, here the class is overbroad because it includes patients who got what they bargained for - medical treatment that reduced their pain and was expressly agreed to – and payment for which they agreed to in the LOP AND in the settlement memoranda. *Colley v. P&G*, S.D.Ohio, 2016 U.S. Dist. LEXIS 137725, at

*25 (Oct. 4, 2016) (classes overbroad since they would included consumers "who suffered no injury and thus have no standing to bring claims or recover on them").

V. CONCLUSION

BASED ON THE FOREGOING, PLAINTIFFS' MOTION FOR CLASS CERTIFICATION MUST BE DENIED.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned certifies that a copy of the foregoing was filed electronically with the Court and sent via email to the below parties on the 17th day of June 2017. The parties, through counsel, may also access this document through the Court's electronic docket system.

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