IN THE COURT OF COMMON PLEAS
SUMMIT COUNTY, OHIO

MEMBER WILLIAMS, e*t al.*, Plaintiffs, vs. KISLING, NESTICO & REDICK, LLC, *et al.*, Defendants.	Case No. 2016-CV-09-3928 Judge James A. Brogan **DEFENDANT MINAS FLOROS' BRIEF IN OPPOSITION TO PLAINTIFFS' MOTION FOR CLASS CERTIFICATION**

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Memorandum in Support

I. Introduction

The bulk of Plaintiffs' 85-page motion has nothing to do certifying the class claims alleged in Plaintiffs' Fifth Amended Complaint. Instead, Plaintiffs spend 57 pages making irrelevant, baseless, and generalized attacks against large personal-injury firms and medical providers that focus on treating injured victims. It is obvious that Plaintiffs' counsel is more concerned with writing a hit piece against KNR than certifying Plaintiffs' class claims.

Because if Plaintiffs wanted to certify their class claims, then they would have offered a plan on how their class claim could be managed and tried without going into thousands of mini-trials and inquiries to each member's case. They would have explained which class definitions go with which legal claims. They would have outlined evidence common to all class members. They would have offered credible evidence and admissible expert testimony in support of certification. And they would have sought to certify the claims alleged in their operative Fifth Amended Complaint and not new theories and accusations.

Plaintiffs have failed to do so here. Instead analyzing the stringent requirements necessary for certification, Plaintiffs have decided to improperly argue new conspiracy theories against Defendants and broaden the class definitions alleged in their Fifth Amended Complaint.

In the end, Plaintiffs' entire case against Floros is based on speculative and inadmissible opinion testimony from a disgruntled ex-KNR employee. They have no credible evidence or standing for their claims against Floros. And even if they had standing, Plaintiffs' class claims would be uncertifiable because it would require thousands of individual inquiries and mini trials to determine the viability of each potential member's claim against Floros.

II. Narrative Fee Class Allegations (Class B)

Plaintiffs have filed putative class claims against Floros on behalf of Thera Reid and Monique Norris, who claim to represent a sub-class comprising "[a]ll current and former KNR clients who had a narrative fee deducted by KNR from their settlement proceeds to be paid to a chiropractor." *See* Fifth Amended Complaint (FAC), Class B, ¶¶ 217-229.

The basis for Class B is that Floros had an undisclosed quid pro quo relationship with KNR. *Id*. Plaintiffs claim that KNR would pay Floros to produce a narrative summary report of a client's injuries, which KNR would use in negotiating a settlement with the opposing party. *Id*., ¶ 65. Plaintiffs claim that these narrative reports were worthless and only served a way to generate kickback payments to Floros for referrals KNR. *Id*. Punitive Class B relies on two separate theories of liability: breach of fiduciary duty and unjust enrichment. *Id*.

In their motion for certification, Plaintiffs have also proposed the following definition for Class B:

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

As discussed below, Plaintiffs' Class B claims do not satisfy the requirements under Civ. R. 23.

III. Price Gouging Class Allegations (Class A)

In Plaintiffs' Fifth Amended Complaint, Plaintiffs only alleged the "Class B" narrative fee claims (unjust enrichment and breach of fiduciary) against Floros. For the first time, Plaintiffs are now trying to include Plaintiffs into a new Class A, which alleges a price-gouging, unlawful solicitation, conspiracy, and aiding and abetting between Ghoubrial, Floros, and KNR. For Class A, Plaintiffs have proposed the following definition:

> 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.

Plaintiffs cannot certify class claims that they did not allege in their operative Fifth Amended Complaint. *Glazer v. Chase Home Fin*., LLC, 2017 U.S. Dist. LEXIS 49339, at *7 (N.D. Ohio Mar. 31, 2017). This Court is bound the claims that Plaintiffs pleaded in their operative complaint. Plaintiffs did not assert claims against Floros for unlawful solicitation, price gouging, conspiracy, and aiding and abetting in their operative Fifth Amended Complaint. This Court, therefore, cannot consider certification of Plaintiffs' "Class A" claims. Allowing otherwise would deny Floros and the other Defendants their due process rights.

Along with violating his due process rights, it would be inherently unfair and prejudicial for this Court to even entertain these new arguments, since Floros has not had a chance to conduct discovery on these new claims or move to have the new claims dismissed. *Bar told v. Glendale Fed. Bank*, 81 Cal.App.4th 816, 827 (2000). "Class A" must be denied and stricken on this basis alone.

Floros, therefore, will mainly focus on the class claims that Plaintiffs actually alleged against Floros and not the new claims that Plaintiff just made up for their motion to certify.[1]

IV. Facts

A. Floros provides chiropractic care at ASC where he focuses on treating victims with personal injuries resulting from auto accidents

[1] Floros incorporates into his brief the evidence, facts, and arguments raised in KNR's and Ghoubrial's brief in opposition to Plaintiffs' motion to certify. Floros also incorporates the full depositions transcripts filed in this case.

In 2004, Floros became a licensed chiropractic doctor in Ohio. Ex. A, Floros Affidavit; Ex. B, Floros Tr. 7-12. In that same year, ASC hired him as employee to perform chiropractic services at their clinic. *Id*. At ASC, Floros provides various treatments to injured patients including all passive and active therapies, consultations, spinal manipulation, muscle stimulation, trigger point therapy, intersegmental traction, dry hydrotherapy, active release technique, passive stretching, therapeutic exercises, and neuromuscular reeducation. *Id*. Ex. B.

Floros also diagnoses injuries and provides each patient with a treatment plan. *Id*. Each patient has unique injuries and conditions, which require individual plans tailored to their specific needs. *Id.* No patient is the same. *Id*. Some patients require 15 minutes of treatment during a visit; others require 45 minutes. Ex. B, 21. When necessary, Floros will also refer patients to other medical doctors for a medical consultation. Ex A.

While ASC treats all injured patients, the clinic focuses treating victims of personal injuries resulting from car accidents. *Id*. With car accident victims, the most common injuries that Floros treats are soft tissue injuries, also known as whiplash injuries. *Id.* These types of injuries are considered "subjective" because they cannot be easily seen or diagnosed like a broken bone or laceration. *Id*. These types of injuries can also take a prolonged time heal, depending on several factors (e.g., preexisting conditions, source of impact, position when injured, age, prior injuries, location of injury). *Id*. If left untreated, these injuries can evolve into a condition requiring more invasive treatments, like surgery. *Id.* For this reason, it is important that car victim receives immediate care. *Id.*

That said, injured car victims with subjective soft-tissue injuries have an uphill battle in proving their claim with insurance companies, since there is no objective proof of their injury. Ex. C, Vallillo, Aff. Insurers will not just take the car victim's word that treatment is necessary.

Insurers will require medical proof from the car victim that the accident caused their injuries. *Id.* They will scrutinize every aspect of the accident, including the severity of the impact, the amount of damage, and how quickly the injured victim sought treatment. If the car victim is not diligent in seeking medical attention right after the accident, insurers will often contend that the injury and accident are unrelated. *Id*; Ex. B Floros Tr. 97-99. Insurers also take this adverse position if the car victim does not continue to seek uninterrupted medical treatment. *Id*.

To make matters worse, injured car victims often lack the resources necessary to obtain treatment for their injuries. Many have no insurance or limited coverage. Because of these health risks, potential issues in proving their claim, and the need for immediate care with no upfront costs, injured car victims often prefer treatment with chiropractic clinics, like ASC.

In treating personal injury patients, it is also common for patients to want legal help. Ex. A. Since ASC's and Floros' services are limited to chiropractic treatments only, they do not provide legal assistance. *Id*. They will, however, recommend various law firms to patients. *Id*; Ex. B, 73-76; 83-88.

While Floros does not have a policy on recommending patients to any particular law firm, he often recommends KNR. *Id*. He does this for multiple reasons. First, he is friends with Rob Nestico and other attorneys at KNR. *Id*. Second, he believes that KNR's attorneys will treat his patients well. *Id.* Third, KNR is one of the largest personal injury firms in the Akron area and offers legal assistance past working hours. *Id*. This is important because Floros often treats patients until 7:00 pm. *Id.* And fourth, Floros believes that KNR will pay (with the permission of their client) ASC's bill for chiropractic treatment or portion of it from the settlement proceeds. *Id.* Further, the fact that Floros is willing to accept significant reductions on his bills is extremely

beneficial to any law firm with whom he may have a relationship because this helps to more quickly, and efficiently, settle claims.

There is no quid pro quo agreement, however, between ASC/Floros and KNR (or any other law firm and medical provider) for patient recommendations. *Id*. Nor has Floros ever received payments for patient recommendations. *Id*.

In fact, Floros will often recommend patients to other attorneys, such as Slater & Zurz, Gary Himmel, Alberto Pena, Elk and Elk, Amourgis and Associates, and Skolnick Weiser Law Firm, and Lisa Haywood. *Id;* Ex. B. 85-87. Sometimes he will also recommend several attorneys at once to a patient. This allows the patient to choose the attorney or law firm that best fits their needs. *Id.*

B. Attorneys requests narrative reports from Floros because they are necessary in litigation and helpful with presenting, proving, and negotiating personal injury claims.

When Floros is treating a patient that is also represented by a law firm, like KNR, an attorney will often send him a request to prepare a narrative report for the patient/client. Ex. A, Floros Aff.; Ex. C, Vallillo Aff. This request for the narrative report occurs after Floros has finished treating the patient/client. *Id*. The narrative reports are prepared and provided with the client's consent, to support the client's lawsuit. *Id*. Law firms, like KNR, request narrative reports because they are necessary in litigation. Ex. D, Nestico Tr. 279-283; 285-288. The reports are also helpful with presenting, proving, and negotiating personal injury claims. *Id*.

In his narrative reports, Floros summarizes a patient's experience and treatment. Ex. A; Ex B, 107-108; Ex. C. This helps laypersons (adjusters and attorneys) understand the medical notations in the patient's file so that it may be presented cohesively in the representation of their client. *Id.* Floros also provides his expert medical opinion on whether the client's injuries were

caused by the accident within a degree of reasonable chiropractic probability. *Id*. He also opines on what treatment was necessary and may be necessary in the future, as well as the estimated cost of future care. *Id*. He also includes citation to published reports in support of his opinion. *Id*. And when applicable, Floros opines on preexisting injuries that may have been exacerbated by the accident *Id*.

John Lynette, Jr., an attorney with Slater & Zurz, has also provided affidavit testimony on the many benefits of narrative repots and why he recommends that his clients see doctors, like Floros.[2] Ex. E, Lynette Aff. According to Lynette, he often has clients with soft-tissue injuries that resulted from the negligence of another person in a motor vehicle crash. *Id*. These injuries often require treatment and therapy that can law weeks, or even months. *Id*. Often, Lynette's clients do not have personal medical insurance or other means that would allow them access to the care they need without his help. *Id.*

Thus, to provide the best possible services to his clients, Lynette recommends to his clients certain doctors (like Floros) and facilities that will treat his clients with the understanding that these providers will not try to collect payment for those services until their claims have been settled or adjudicated. *Id.*

With the permission of his clients, Lynette also agrees to withhold an amount of agreed upon health care services fees from his clients' settlement or judgment and to pay those amounts directly to the doctor or healthcare facility. *Id*. This promise, according to Lynette, benefits his client because it puts the healthcare provider at ease knowing that if there is a monetary resolution to the claim, doctors (like Floros) will get some portion of their fees paid. *Id.*

[2] Lynette's affidavit testimony was presented to Robert Horton (one of Plaintiffs' alleged liability witnesses). He agreed with the Lynette's statements. Horton Depo. 101-109.

This allows his client to get the timely medically necessary treatment required. And if the settlement does not adequately payment for the full amount incurred by his client for medical care, then Lynette knows that he can negotiate with the medical provider (like Floros) for a reduction in the amount that the medical provider will accept as full compensation for services rendered. *Id*.

In his normal course of business, Lynette also requests written narrative reports from Floros and other health providers once the client is finished with treatment. *Id.* According to Lynette, narrative reports are useful in negotiating with claims adjusters. *Id.* This is because the narrative report explains the causal relationship between the motor vehicle accident in which his client was involved, and the injuries sustained. *Id.* The plain language used in narrative reports, like the ones provided by Floros, make it easy for a layperson to understand what caused the injury, what the injury was, what treatment was administered, and what the patient's prognosis is. *Id.*

Lynette also testified that Floros' narrative reports are obtained for the benefit of his clients in negotiating a settlement and for use in anticipation of litigation. *Id*. And that it is separate expense of litigation and not part of the health care treatment. *Id.*

John Vallillo J.D. LPCS, an insurance expert with 37 years of experience, has also provided affidavit testimony on the benefits of narrative reports.[3] Ex. C, Vallillo Aff. According to Vallillo, insurance claims personnel are expected to obtain all pertinent information to evaluate properly each claim, which includes narrative reports:

> "One of those tools of evaluation is obtaining a narrative report from treating physicians that provides basic information regarding the patient including brief

[3] John Vallillo has over 37 years of experience in the insurance industry including positions at Kemper Insurance Company, Economy Fire, and Casualty Company, Northeast Adjusting Services Inc., and Auto Owner's Insurance Company.

> medical history, a record of the current injury or sickness including claimed and evident symptoms, a diagnosis by the treating physician, a record of the treatment regimen, and a prognosis of recovery. These reports also often include opinions regarding causation. Rather than deciphering volumes of medical records, the narrative report provides an efficient method of evaluating each claim and is a common document to be used by both claims personnel and attorneys."

Id.

Vallillo then testified that it is common for attorneys to obtain narrative reports and that it cannot be inferred that the purpose is to improperly divert client funds to a chiropractor:

> "It is not unusual, nor may an improper relationship be inferred by an attorney's decision to obtain narrative reports in any soft tissue injury cases. Many insurance carriers request copies of narrative reports as a matter of course in evaluating injury claims. Therefore, it cannot be said that it is unusual or unreasonable for attorneys to request such reports as a matter of course. In my experience, the purpose of these reports is to help get the case resolved. It cannot be inferred that the purpose of the reports is to improperly divert client funds to a chiropractor."

Id. Thus, you cannot infer that the fees received for preparing narrative reports are kickback payments. *Id*. Nor can you infer that there is a quid pro quo relationship between a doctor and attorney because they request and pay for narrative reports. *Id*. Rather, it is reasonable and routine practice between attorneys, adjusters, and doctors in personal injury claims. *Id.*

C. Floros spends a significant amount of time in reviewing a patient's medical records and preparing narrative reports, which are different for every patient.

It is undisputed that Floros spends a significant amount of time in preparing narrative reports, which includes reviewing the patient's entire medical file. Ex. A, Floros Aff.; Ex B Floros Tr. 104, 108; Ex. F, Petti Tr. 420-421. This can take hours in some cases. *Id.* It is different for each patient. Ex. A. It can vary depending on the complexity of the case and the volume of medical records. *Id.* For instance, on Plaintiff Reid's narrative report, Floros estimated that it

took him between 1-2 hours to complete, since she experienced significant injuries and saw several doctors.[4] *Id*; Ex B, 104.

Because he spends time in preparing the reports, Floros charges a fee to the law firm of either $150 or $200 for each narrative. Ex. A. This is a more than reasonable fee for an expert report. *Id.* Doctors will often charge much more for an expert report that merely gives a causation statement. *Id*; Ex. F, Petti Tr. 436.

Each narrative report is also different. Ex. A; Ex G, Narrative Reports. Each report has facts and opinions unique to each patient, and often include an outline of future risks, a future care opinion, and estimated costs of future care. *Id.* These opinions are not boilerplate. *Id*; Ex F, Petti Tr. 442-443; Ex. I, Reid Tr. 170-176; 335-337.[5] Nor are these opinions readily available anywhere in the medical records. *Id;* Ex. H, Reid's and Norris' Medical Records.

Often, Floros has changed the style, content, and format of his narrative reports. Ex. A; Ex. G. And in the past 15 years of preparing reports, Floros has never had an attorney complain about his narrative being deficient or needing more information. *Id*.

Floros, however, is not attorney. *Id*. He has no legal knowledge of what should be in an expert report. *Id.* He has no legal knowledge of what effect his narrative report will have on each client's case or what value it will add. *Id*. He usually knows nothing about the status of the case and whether it is in litigation. *Id*. He has no legal knowledge of what adjusters and attorneys are looking for in an expert report. *Id*.

[4] Gary Petti (Plaintiffs' main kickback theory witness) estimated that it would have taken Floros at least an hour to complete Reid's narrative report.

[5] Both Plaintiffs and their witness Petti testified that the narrative reports had information not from the medical records. Both testified that narrative reports had information that was not boilerplate but instead particular to the patient

Floros also knows nothing about the conversations that attorneys have with their clients about their narrative reports. *Id.* Nor does he have knowledge on whether an attorney deducts a narrative fee from their client's settlement as an expense. *Id*. These are all conversations privy to the attorney and the client. *Id*.

D. Named Plaintiffs testified that Floros' narrative reports were helpful and had value.

The two named class representatives with claims against Floros are Plaintiff Thera Reid and Plaintiff Monique Norris. In their depositions, both refuted the class allegations that Floros' narrative reports were worthless and only contained "boilerplate" language and information "readily apparent" from the medical records.

For instance, Reid testified that Floros' narrative report did not just contain boilerplate language and information "readily apparent" from her medical records. *See* Ex. I. Reid's Depo., 170-176. Reid admitted that the narrative expert report helped her case. *Id*., 176-177, 181, 213-214, 272. And Reid denied that the narrative reports were fraudulent. *Id*.

Reid also admitted that she knew that her attorney was ordering a narrative report and that Floros would be entitled to compensation for preparing her narrative report.

> Q. And one of the things that Matt would have told you is we need to give a report to the insurance company from some type of health care provider in order to facilitate and help with the settlement, true?
> **A Yes.**
> Q And you didn't expect that report from the expert to be free, did you?
> **A No.**
> Q How much did you think you were going to pay for that report? Did you have any idea?
> **A No.**
> Q Do you know what other experts charged for their reports?
> **A No.**
> Q Did you ever ask to see the report?
> **A No.**

Id. 133. Reid, however, believed that the narrative report was overpriced and should only cost around $85 instead of $150. *Id*., 177, 186, 214, 258, 288. Reid based this belief on a conversation she had with a relative that is a chiropractor in San Diego, California. *Id*.

Reid also admitted that she benefited from Floros' chiropractic services and the $525 reduction in her chiropractic bill, which was greater than the amount of the narrative report:

> Q Okay. So if they negotiated a discount of $525 off that bill, that's 525 extra dollars that went in your pocket, true?
> **A If they negotiated it, yes.**
> Q If so you look at the top, the 150 for this report, would you have rather had them negotiate 520 off and pay the 150 or would you have rather paid the whole 5,025?
> **A I guess I would have rather negotiated.**
> ***
> Q So if we look here at Akron Square, what do you see was the total amount billed that's in the parenthesis there?
> **A 5,025.**
> Q And what was the amount that Akron Square accepted as full payment?
> **A 4,500.**
> Q Okay. And I believe you're now aware that's because KNR negotiated that bill down, correct?
> **A I am now.**
> ***
> Q Have you called other chiropractors to see what they charge?
> **A No, but I get they're expensive.**
> Q Okay. And in fact, they had to forego getting paid for --
> **A A few visits, yes, I understand that. Quite a while actually.**
> Q Exactly, which is money they could have had in their business?
> **A I understand that.**
> Q Okay. You're certainly grateful to Akron Square for reducing their bill by $525, aren't you?
> **A Yes.**

Id. 184, 297-298.

Like Reid, Norris testified that the narrative reports had value but should have been cheaper. Ex. J, Norris Depo., 151-156. Norris believed the reports were only worth $50. *Id*. Norris based this on her personal belief that it was "just a piece of paper" with a summary of the

chiropractor's thoughts after he "skimmed" through the medical records. *Id.* 152. Norris, however, admitted that her belief was based on speculation. *Id.* 153.

On top of their own testimony, the documents that Reid and Norris received and signed with KNR also contradicts their claims. For instance, the initial letter that Reid received from her KNR attorney specifically told her that KNR would be requesting an expert report from her treating doctor when her case was ready to be settled:

> "As you are aware, insurance companies and their claims processes often times do not move as quickly as we would like. Insurance companies will not finalize or settle a claim until they receive a full and final release signed by you. Clients often ask us when their case will be settled. Your case will be ready to settle when your treating **doctors can tell us in a report** what kind of recovery you have made and if you will have any ongoing disability, and, if so, how that disability will affect your ability to function in the future."

Id. Ex. K, Reid Letter.

Under KNR's standard fee agreement, Reid and Norris authorized and directed KNR "to deduct from [the client's] share of proceeds and pay, directly to any doctor, hospital, expert or other medical creditor, any unpaid balance due them for [the client's] care and treatment." Ex. K. (Reid and Norris also agreed and authorized KNR to "deduct from any proceeds recovered, any expenses which may have been advanced by [KNR] in preparation for settlement and/or trial of Clients case." Ex. M, Contingency Agreements. Thus, based on this contract language, Reid and Norris agreed in writing that KNR could deduct from their settlement proceeds any funds that KNR paid in preparation for settlement, which would include narrative fees to Floros. *Id*.

Reid and Norris also signed a settlement memorandum with KNR. Ex. P, Settlement Agreements. The settlement memorandum shows that KNR paid Floros a fee of $150 for Reid and $200 for Norris. *Id*., Settlement Agreement. The settlement memorandum lists this amount under a section titled "Deduct and Retain to Pay: Kisling Nestico & Redick, LLC." *Id*. The

settlement memorandum also lists Reid's and Norris' unpaid bill for chiropractic treatment, which Floros provided through Akron Square Chiropractic. KNR listed this bill under the section "Deduct and Retain to Pay to Others: Akron Square Chiropractic." *Id.* The settlement agreement also had this 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.[6]

Id.

In signing their settlement agreement, both Reid and Norris "acknowledge[d] that [the settlement] accurately reflects all costs" including KNR's expenses for Floros' narrative report. Thus, it is undisputed that KNR's attorney/client closing statement disclosed the narrative fee to their clients, as required by the ethical rules governing KNR, and that the patient approved the narrative report fee by signing the closing statement.

V. This Court should reject Plaintiffs' false accusations against Floros and Akron Square Chiropractic.

Plaintiffs' motion for class certification goes way beyond discussing the Class Claims. Plaintiffs and their counsel improperly used it as another opportunity to make baseless and false accusations against Defendants. Most of these accusations have nothing to do with class

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

certification or the claims alleged in Plaintiffs' Fifth Amended Complaint. But they should be addressed and rejected by this Court.

A. Floros has no ownership rights in ASC; he is only an employee.

Plaintiffs claim that Floros owns ASC. This is false. In 2004 ASC hired Floros as an employee to provide chiropractic treatment. Floros explained this Plaintiffs' counsel during his deposition: "I am just an employee of Akron Square Chiropractic. I'm required to treat the patients and that's it." Ex. B, 56. Floros has never had ownership rights in ASC. *Id*. Rather, Floros has always been a W2 employee. *Id*.

Floros is also not the only chiropractor that works at ASC. Dr. Michael Dumond also works at ASC. *Id*. 60.[7] He is the chiropractor that Reid initially saw on her first visit to ASC. And at times, ASC has hired temporary chiropractors from a staffing agency when Floros and Dumond are unavailable. *Id*; Ex. A.

B. KNR does not requests a narrative report from Floros on every claim.

Plaintiffs claim that KNR requests a narrative report from Floros on every claim. This is false. Floros only prepares narrative reports on request. Ex. A. On many occasions, attorneys at KNR do not require Floros to prepare narratives reports. *Id*. For instance, attorneys at KNR do not usually request a narrative report if a patient is a minor (under 15 years old), if the patient has not received care for two weeks, or if the patient has under 6 treatment visits.[8] *Id*; Ex. D, Nestico Tr. 313-319.

C. ASC lawfully solicitated patients under OAC 4734-9-02.

[7] Dr. Dumond saw Reid on her first visit to ASC. Ex. J, 101.
[8] Plaintiffs' alleged liability witness, Gary Petti, also verified in his deposition that narrative reports are not requested on every case. Ex. F, 440.

Plaintiffs falsely accuse ASC and Floros of unlawfully soliciting patients through telemarketing. This has never happened. Floros and ASC lawfully solicit and advertise under OAC 4734-9-02, which allows chiropractors to solicit over the phone. Ex A. Floros and ASC have never received a complaint for unlawful solicitation. *Id.* Nor have they ever been reprimanded by the Ohio Chiropractic Board Association. *Id.* Aff. ASC is also the entity that employs telemarketers and conducts the telemarketing; not Floros. *Id.*

Moreover, when a patient is solicited, ASC has the patient sign a form acknowledging the statements made from the telemarketer when they first visit the clinic. *Id*; Ex M. In this form, the new patient agrees that they were "not pressured to set an appointment by the caller(s), and decided to make an appointment and go to the chiropractor solely out of the concern for my own health and well-being, after my recent accident." Plaintiff Reid signed this form on her first visit to ASC. *Id.* [9]

Insurance expert Vallillo has also presented evidence refuting Plaintiffs' accusations that Floros unlawfully used solicitation to refer clients to other entities, like law firms. Ex. C, Vallillo Aff. According to Vallillo, it is common practice for chiropractic offices to solicit new patients from publicly available accident reports and there is no basis to infer that chiropractors using the reports to solicit clients on behalf of law firms:

> During my career of handling injury claims, it is was well-known in the insurance industry that chiropractic offices would review publicly available accidents reports for potential clients who may have been injured. It cannot be inferred that chiropractors solicited clients on behalf of specific lawyers or law firms. Chiropractors may refer or recommend patients to any number of attorneys or law firms upon requests of the patient.

[9] ASC does not offer free rides to car-accident victims in their solicitations, as Plaintiffs allege. *Id.* Nor does ASC employ drivers or advertise free rides. *Id.* Rather, ASC only obtains transportation if the injured party cannot drive and obtain transportation because of their injuries, which is what happened in Reid's case. None of Plaintiffs' other witness testified that they were offered free rides.

Id.

D. ASC does not include KNR's contingency agreement in their new patient packet forms.

Plaintiffs falsely allege that Floros provided clients with a packet of paperwork at their office which includes KNR's contingency-fee agreement. ASC and Floros do not have KNR contingency agreements or any other attorney fee agreements at their office. Ex. A. When a new patient comes to ASC, they fill out paperwork typical for medical providers, which includes new patient information and medical history. *Id*. This paperwork never includes an attorney fee agreement. *Id*.

If a patient wants to speak to an attorney and decides on their own that they need legal representation, then employees at ASC (which is not always Floros) recommend various attorneys (not KNR only). *Id.* At times, law firms will call and fax over forms for the patient to review and sign if the patient wants immediate representation. *Id*. When this happens, the law firms have spoken to the patient over the phone. *Id.* Floros and ASC, however, never keep blank attorney agreements at their office. *Id.*

E. ASC has accepted insurance payments and does not only work on a letter of protection.

As part of their new "price gouging" Class A claims, Plaintiffs falsely claim that ASC and Floros do not accept any insurance and only work on a letter of protection (LOP) with attorneys. ASC accepts payments from medpay and workers' compensation insurance.[10] Ex A; Ex B, Floros Tr. 94-101. Often, patients injured in a car accident will also work directly with an insurance company and not go through an attorney to avoid attorney fees. *Id*. In those cases,

[10] One potential class member that Plaintiffs' counsel represents, Taijuan Carter, paid for his chiropractic treatment through his medpay insurer. Ex. O, Carter Medpay Letter.

patients often pay ASC directly by cash or bank draft for services rendered. *Id*. ASC will also often work directly with car insurance companies. *Id*. Floros even estimates that thousands of their bills are directly submitted and negotiated with a car insurance company and not an attorney. *Id*.

ASC has also submitted claims to patients' health insurer, but these claims are usually denied because ASC is out-of-network with health insurance providers. *Id.* But at one point, ASC was in network with the insurance provider Coventry Health Network. *Id.*

Plaintiffs are also falsely assuming that insured patients want to use their health insurance for chiropractic treatment in a personal injury case or that the insured patient would be better off using their health insurance. For many reasons, a patient may not want to use their health insurance and prefer a letter of protection (LOP). Ex. B, 94-97.

For instance, the patient may have a high deductible and co-pays that they have to pay upfront and out-of-pocket if there is no recovery on their claim. In signing a LOP, the patient removes the risk of upfront and out-of-pocket expenses. The patients' health insurance provider may have also limited provider network that does not include most chiropractors in their area. The patient's insurer may also require preauthorization that often denies chiropractic treatment and related treatment, such as MRI. A LOP also protects the patient from being billed if his case does not settle.

Floros explained this to Plaintiffs' counsel during his deposition:

> **Q**. So you typically do not accept health insurance payments from a patient who is involved in litigation, correct?
> **A . I'll accept any forms of payment. It doesn't --I accept Med Pay. Any time they've asked me to bill their out of network -- I'm out of network with all insurance companies, many times they've asked me to bill their health insurance companies. We've done it, we don't get paid by them. We're out of network, so I'm not in network with anybody, but many times some providers will accept bills and records from us and then if the**

> **patient -- and again, I'm sorry, I don't know all the terminology in the medical insurance worlds. Many times they haven't met their deductible. Many times, like I said, I'm out of network, they don't even consider my billing. The same goes for MRI facilities. Like they need a preauthorization of some kind to get an MRI and, again, if they're not represented by a law firm, their personal health insurance will just deny it. The patient can't get an MRI. I try my best to do whatever is possible. Whatever is best for the patient. If they ask me to bill an insurance company, I would do it.**

Id. 94-95.

This Court should also reject Plaintiffs' glib assertion that all injured victims would qualify for free healthcare or that they must have insurance because it is mandated under ACA. It is insult to the millions of uninsured that have (and continue) to go through the burden of financial ruin from medical debt. It is also an insult to the millions of uninsured that cannot afford needed medical treatment. A LOP benefits these injured victims who would otherwise be unable to receive the treatment that they need or forced to go into debt.

Indeed, a large number of people remained uninsured after the Affordable Care Act went into effect in 2013. For instance, in 2013, 16.8% of U.S. Citizens (44 million) were uninsured. [11] In 2017, 8.8% (28.5 million) were uninsured.[12] Many of these uninsured are lower income working families or individuals who do not qualify for Medicaid or other poverty-assistance

[11] "Even under the ACA, many uninsured people cite the high cost of insurance as the main reason they lack coverage…Most uninsured people are in low-income families and have at least one worker in the family." https://www.kff.org/uninsured/fact-sheet/key-facts-about-the-uninsured-population/.

[12] https://www.census.gov/library/publications/2018/demo/p60-264.html.

programs.[13] These uninsured cannot afford the ACA premiums and instead choose the tax penalty.[14]

In his deposition, Floros also explained to Plaintiffs' counsel the benefits that LOPs offer his patients:

> Q. The patients want their bills to get paid?
> **A. Oh, yeah. Patients main concern when they come into our office is who's going to pay this bill? Like, am I going to be left with any bills here? That's their main concern. So a letter of protection protects, I guess, myself, my bill, and the patient from not owing any money when the case settles. Again, whether the patient has an attorney or not, it's the same thing, they want to have protection, we want to have protection. And most physicians who treat patients injured in auto accidents including facilities that do MRIs and specialists and surgeons, they all want letter of protections. It's not just my office that wants a letter of protection in a patient injured in a motor vehicle accident. We also have patients who are involved in work injuries sign letter of protections to make sure that the Bureau of Workers' Compensation pays the bill as well.**

Id. 96-97. Floros also explained to Plaintiffs' counsel that he will treat a patient even if they do not sign a LOP:

> Q. If they don't sign the letter of protection, you will treat them anyway?
> **A. I will treat every single patient -- that comes into my office. Peter, many times a patient refuses to sign forms. I don't – I don't care. I'm just an employee of Akron Square Chiropractic. I like getting patients well. If they sign a letter of protection, if they don't, it doesn't make any difference to me. I will treat them, I will give them the best possible care I can give them. And if we get paid on it, great, and if we don't, hey, it happens, what are you going to do? Mr. Carter, who you just presented me a bill, has never paid his bill from 2015. Maybe he didn't sign his letter of protection. What am I going to do? He's injured, I'm going to treat him and we move on.**

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[13] "For many uninsured people, the costs of health insurance and medical care are weighed against equally essential needs, like housing, food, and transportation to work, and many uninsured adults report financial stress beyond health care." https://www.kff.org/uninsured/report/the-uninsured-and-the-aca-a-primer-key-facts-about-health-insurance-and-the-uninsured-amidst-changes-to-the-affordable-care-act/

[14] Plaintiffs' potential class member Taijuan Carter had no health insurance when he received treatment from ACS. His chiropractic bill was paid with medpay insurance. Ex. O.

Id. 99.

Thus, although ASC asks clients to a LOP, Floros will still provide treatment to injured victims even they refuse to sign it. *Id.* And Floros has never sued a patient for unpaid bill. *Id.*

F. ASC charges reasonable and customary rates for chiropractic services in Ohio.

Plaintiffs accuse Floros of charging "exorbitantly inflated prices." This is false. ASC determines the cost of chiropractic treatment; not Floros. Ex. A. The amount that ASC charges patients for chiropractic treatments is reasonable, customary, and akin to other chiropractors in Ohio. *Id*.

Plaintiffs have also offered no evidence showing that these costs were inflated or unreasonable. In fact, Plaintiff Reid admitted in her deposition that the charges for chiropractic care were proper and reasonable. Ex. I, Reid Tr. 297-298. She also admitted that she benefited from the deferring payment to ASC and the reduction in her chiropractic bill:

> Q Okay. And you're not alleging that the cost of that treatment was improper, are you?
> **A No**.
> Q Are you alleging in any way that Akron Square's bills to you, the $5,025 for the treatment that you received there was fraudulent or incorrect in any way?
> **A No, just costly.**
> Q Well --
> **A I get they're costly.**
> Q Well, how much was it a visit?
> **A I don't know how much it was a visit.**
> Q How many visits did you have?
> **A I don't even remember.**
> Q Have you called other chiropractors to see what they charge?
> **A No, but I get they're expensive.**
> Q Okay. And in fact, they had to forego getting paid for --
> **A A few visits, yes, I understand that. Quite a while actually.**
> Q Exactly, which is money they could have had in their business?
> **A I understand that.**

> Q Okay. You're certainly grateful to Akron Square for reducing their bill by $525, aren't you?
> **A Yes.**
> Q Okay.

Id. (objection omitted).

Indeed, in most cases, ASC takes significant reductions on their bills. Ex. A. And unlike other health providers, ASC and Floros do not seek reimbursement from their patients' personally or pursue collections against their patients for unpaid bills. Ex. A; Ex. B, Nor do they sell outstanding bills to collection companies, which is a frequent practice of other medical providers. In fact, in 2014, nearly 20% of U.S. consumers with credit records—42.9 million people—had unpaid medical debt in collections, according to the Consumer Financial Protection Bureau. [15]

Thus, ASC takes on the risk of nonpayment if patient does not have insurance coverage or if there is limited or no recovery on the injury claim, which is a common occurrence. ASC also takes on the client's debt for owed medical treatment interest free. This is a great benefit for many clients, especially clients with limited or no health insurance.

Insurance expert Vallillo has also refuted Plaintiffs' claim that the amount health insurers charge medical providers is determining whether a charge is reasonable:

> When an insurance adjuster is reviewing the cost of medical care submitted in connection with a claim, the evaluation of whether a charge is reasonable is subject to the elements of proof in a particular jurisdiction and may be the subject of expert testimony by physicians or other medical care providers. In my experience, the discounted rates negotiated by Medicare or health insurance carriers are not the limit of a reasonable charge.

[15] https://www.modernhealthcare.com/article/20141211/NEWS/312119987/42-9-million-americans-have-unpaid-medical-bills.

Id. Vallillo then notes that rates paid vary among health insurance providers as does rates charged by medical providers:

> Different health insurance providers may negotiate different amounts of payment for the same service, and many physicians only offer these discounted rates for health insurance purposes. The rates charged by physicians for similar services may vary in a significant manner and are not categorically unreasonable in the view of third party claims professional simply because Medicare or a health insurance carrier will only pay a discounted rate. Further, the amount charged is often more than the amount accepted by physicians for payment. Thus, the determination of whether a particular payment to a medical care provider was reasonable would vary form claim to claim.

Id.

Ohio statutory law has also rejected Plaintiffs' argument that a health insurer's reimbursement rates can be used to determine whether medical bills are reasonable. Specifically, R.C. 2317.45, as amended in March 2019, now prevents the use of an insurer's reimbursement rates as evidence of reasonable value of medical services. R.C. 2317.45(B), provides:

> Any insurer's reimbursement policies or reimbursement determination or regulations issued by the United States centers for Medicare and Medicaid services or the Ohio department of Medicaid regarding the health care services provided to the patient in any civil action based on a medical claim are not admissible as evidence for or against any party in the action and may not be used to establish a standard of care or breach of that standard of care in the action.

Thus, along with being irrelevant to the claims alleged in their operative complaint, Plaintiffs' new "price-gouging" argument is both factually and legally baseless.

G. Floros has never pressured patients to see Dr. Sam Ghoubrial.

Plaintiffs falsely accuse Floros of pressuring patients to see Dr. Sam Ghoubrial. Floros refers less than a third of patients to medical physicians, including Ghoubrial. Floros only refers a patient to a medical physician for a medical consult. Ex. A; Ex. B, 88-92. He does this when patient does not have their own physician and wants to see a doctor and when the patient is still in significant pain despite chiropractic treatments. Id. Indeed, Floros' patients often already have

medication from their emergency room visit and do not need additional help with pain management. Id. Or his patients have their own family physician or pain management physician that can provide additional help. As Floros explained to Plaintiffs' counsel:

> **Q.** You refer your personal injury clients to Dr. Ghoubrial, correct?
> **A**. Correct.
> **Q**. And what do you do that for?
> **A**. They're injured-–they got high inflammatory levels. The patient advised me that their medication ran out from the hospital, they can't sleep, they're in high levels of pain. They hurt more when they're working. It helps me get the patient better faster. I'm not a medical doctor. I can't prescribe the medication, so, yeah, I refer a lot of patients to Dr. Ghoubrial, he's a great doctor.

Id. at 90. Moreover, Floros' patients also usually respond well to treatment from Dr. Ghoubrial. Ex. A.

Nor did Floros financially benefit from referring patients to Ghoubrial. In fact, the opposite often happened. As discussed earlier, Floros and ASC routinely take significant reductions on their bills. This reduction is even greater when other medical providers, like Ghoubrial, need to be paid from the settlement. This is especially true when a claim is settled for less than the medical bills—which is common on soft-tissue and low-impact claims—because the settlement has to be split between the attorney, the client, case expenses, and medical providers. There is thus no financial incentive to refer patients to Ghoubrial. Floros only does it because it helps the patient.

H. If auto-insurers are denying a KNR client's claim because they do not like or trust KNR or the medical provider, then they are likely acting in bad faith and violating Ohio law.

Plaintiffs have falsely alleged that auto-insurance carriers have routinely denied or refused to pay reasonable amounts on KNR's client's claims because they do not like or trust KNR or the medical providers that treated the KNR client. First, if this was true, then the auto-insurers would likely be acting in bad faith and violating Ohio insurance law. As this is not a

valid reason to deny a claim under Ohio Unfair Claims Settlement Act. OAC 3901-07;3901-1-54. See also *Zoppo v. Homestead Ins. Co*., 71 Ohio St.3d 552, 644 N.E.2d 397 (1994).

Second, Plaintiffs cannot point to any specific examples when an auto-insurance carrier refused to pay on a KNR client's claim because the insurer did not trust KNR or the client's medical providers. None of the named Plaintiffs had issues with the insurance company denying their claim. Nor did they have issues with the insurance company refusing to pay on claims for the health services provided.

And third, Plaintiffs own expert, Nora Freeman Engstrom, has refuted Plaintiffs' claim that insurance companies treated claims with KNR negatively. According Engstrom, insurance adjusters like larger firms like KNR. PL's Mot. Ex 1, Engstrom, *Run-of-the-Mill Justice* 1544-1546. ("Insurers like settlement mills"). This is because insurance adjusters can process claims efficiently and there is more certainty with settlement ranges when dealing with larger firms. Id. ("Insurers also like settlement mills because the interests of settlement mills and insurers overlap along two dimensions: speed and certainty.").

VI. Plaintiffs have offered no credible evidence of a quid pro quo relationship or that the narrative reports were kickbacks.

Plaintiffs have failed to produce any credible or direct evidence showing that Floros and KNR had a quid pro quo relationship or that Floros received kickback payments for referrals.[16] Instead, Plaintiffs entirely rely on baseless speculation from a disgruntled ex-KNR employee (Gary Petti) and a former insurance fraud adjuster (Larry Lee) whose career depended on trying to find reasons for insurance adjusters to not pay on claims.

[16] Floros has specifically denied receiving kickback payments from KNR, Rob Nestico, Rob Redick, Dr. Sam Ghoubrial. Ex B. Floros Tr. 259-260; Ex. A. Floros Aff.

As elaborated on later, Petti's and Lee's testimony is inadmissible under Ohio law and cannot support a motion for class certification because: 1) Plaintiffs have failed to timely and properly identify the parties as expert witnesses; 2) their opinions are not phrased in a reasonable degree of certainty or probability; 3) their opinions are based on inadmissible hearsay communications and speculation; and 4) their opinions are improper legal conclusions without factual support.

Plaintiffs' other alleged liability witnesses have also rejected Petti's and Lee's kickback conspiracy theory. For instance, Robert Horton specifically testified that there was no quid pro quo relationship between KNR and Floros. Ex. Q., Horton Tr. 104. Kelly Phillips also testified that KNR did not have a quid pro quo agreement with chiropractors. Ex. R. Phillips Tr. 183, 215, 365.

Plaintiffs have also been unable to explain away a giant hole in their kickback conspiracy: If the narrative fee was a kickback for patient referrals from Floros, then why would KNR pay a kickback on cases that KNR referred to Floros? This makes no sense. But this is what happened on Plaintiff Norris' case.

It is also worth noting that Plaintiffs are now trying to spin and change their quid pro quo conspiracy theory. Knowing that their narrative fee claim will fail, Plaintiffs are now trying to argue "KNR sustained quid pro quo relationships" with chiropractors and medical providers by "paying disproportionately high percentage on their inflated bills, at high rates that the client's health insurers would pay." PL's MFC, pg. 43.

While both claims lack merit and are based on pure speculation, Plaintiffs' new "inflated bills theory" contradicts their "kickback theory." Because if KNR used inflated bills as kickbacks

to get patients from Floros, then it would not make sense for KNR to pay also narrative fee kickbacks.

Plaintiffs' claims would also create an untenable precedent. Every treating doctor in Ohio would be at risk of a potential kickback claim if the doctor 1) recommended a patient to an attorney; 2) provide an expert report upon request from the attorney; and 3) charged for the attorney for the doctor's services in drafting the expert report. This would implicate almost every doctor that routinely treats patients with personal injury and workers' compensation claims.

VII. Law and Argument

A. Legal Standard

The Ohio Supreme Court has defined seven prerequisites to class certification under Ohio Civ. R. 23(A) and (B):

1. an identifiable class must exist, and the definition of the class must be unambiguous;
2. the named representatives must be members of the class;
3. the class must be so numerous that joinder of all members is impractical;
4. there must be questions of law or fact common to the class;
5. the claims or defenses of the representative parties must be typical of the claims or defenses of the class;
6. the representative parties must fairly and adequately protect the interests of the class; and
7. one of the three Civ.R. 23(B) requirements must be satisfied.

In re Consol. Mtge. Satisfaction Cases, 97 Ohio St.3d 465, 2002-Ohio-6720, 780 N.E.2d 556, ¶ 6, citing *Warner v. Waste Mgt., Inc.*, 36 Ohio St.3d 91, 96–98, 521 N.E.2d 1091 (1988).

Civ. R. 23 is not a "mere pleading standard." *Felix v. Ganley Chevrolet, Inc.*, 145 Ohio St.3d 329, 2015-Ohio-3430, 49 N.E.3d 1224, ¶ 26Civ. Rather, Civ. R. 23 "imposes stringent requirements for certification that in practice exclude most claims." *Am. Express Co. v. Italian Colors Rest.*, 133 S. Ct. 2304, 2310 (2013); *see also Wal-Mart Stores, Inc. v. Dukes*, 564 U.S.

338, 345 (2011).[17] Failure to prove any class prerequisite "'will defeat a request for class certification.'" *Stammco*, 136 Ohio St. 3d 231 ¶ 24 (citation omitted). The party seeking class certification bears the burden of proving that they met the requirements of Civ.R. 23(A) and (B) by a preponderance of the evidence. *Cullen v. State Farm Mut. Auto. Ins. Co.*, 137 Ohio St.3d 373, 2013-Ohio-4733, 999 N.E.2d 614, ¶ 15.

A court, therefore, must "carefully apply the class action requirements" and to conduct a "rigorous analysis" into whether the prerequisites for class certification under Civ. R. 23 have been satisfied. *Id.* This entails "resolv[ing] factual disputes relative to each [Civ. R. 23] requirement and to find, based on those determinations, other relevant facts, and the applicable legal standard, that the requirement is met." *Id.* ¶ 16.

B. This Court must deny and strike Plaintiffs' Class A because it alleges claims against Floros that were not alleged in Plaintiffs' operative Fifth Amended Complaint.

Ohio courts do not permit plaintiffs to add new class definitions, theories, and allegations in a 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). Due process also requires that parties have a right to conduct pre-certification discovery. *Bar told v. Glendale Fed. Bank*, 81 Cal.App.4th 816, 827 (2000) ("due

[17] *Marks v. C.P. Chem. Co., Inc.*, 31 Ohio St. 3d 200, 201 (1987) ("federal authority is an appropriate aid to interpretation of the Ohio [class-action] rule").

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 …' ").[18]

Plaintiffs cannot certify class claims that they did not allege in their operative Fifth Amended. This Court is bound the claims and class definitions that Plaintiffs pled in their operative complaint. This Court cannot consider certification of claims outside the class pleadings. Allowing otherwise would deny Defendants their due process rights.

Indeed, Floros has not had an opportunity move to dismiss the new allegations for failure to state a claim. Nor has Floros had a chance to conduct discovery on the new allegations against him. Floros, therefore, requests that this Court deny and strike the Class A allegations against him.

C. This Court must resolve all factual or legal disputes relevant to class certification, even if they overlap with the merits.

Civ. R. 23 does not seal off class questions from merits questions. Instead, a court considering certification must examine the "enmeshed legal and factual issues that are part of the merits of the plaintiff's underlying claims." *Felix v. Ganley Chevrolet, Inc*., 145 Ohio St. 3d 329, 2015-Ohio-3430 ¶ 26; *Dukes*, 564 U.S. at 351; *Comcast Corp. v. Behrend*, 569 U.S. 27, 34 (2013). Sometimes, resolving a merits question will not affect class certification. In those cases,

[18] *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."); *McCurley v. Royal Seas Cruises, Inc.*, S.D.Cal. No. 17-cv-00986-BAS-AGS, 2019 U.S. Dist. LEXIS 52173, at *35 (Mar. 27, 2019)("The Court is bound to class definitions provided in the complaint and, absent an amended complaint, will not consider certification beyond it.)

the merits issues can be reserved for a merits-stage decision. *Stammco*, 136 Ohio St. 3d 231 ¶ 44 (noting the rule but finding it inapplicable).

But if a merits question's answer would glue a class together under one answer, and shatter it into individual inquiries under another, the court must give an answer at the class stage. *See, e.g., Felix*, 145 Ohio St. 3d 329 ¶ 28 (evaluating relevant law); *Cullen*, 137 Ohio St. 3d 373 ¶¶ 37-48 (wading through evidence before concluding that lower court should not have certified class); *Dukes*, 564 U.S. at 358-59 (evidence could not unite all class members); *Behrend*, 569 U.S. at 36-37 (damage model did not match only surviving claim of class wide injury); *see also Marcus v. BMW of N. Am., LLC*, 687 F.3d 583, 591 (3d Cir. 2012)(a court confronting a class motion "cannot be bashful. It 'must resolve all factual or legal disputes relevant to class certification, even if they overlap with the merits.'").

A court's obligation to decide merits questions bearing on class certification extends to legal questions. *See, e.g., Felix*, 145 Ohio St. 3d 329 ¶ 27 (finding it "necessary" to examine relevant substantive law before evaluating Rule 23 compliance); *Stammco*, 136 Ohio St. 3d 231 ¶ 51 (looking at the "evidence in this case . . . and the applicable case law") (emphasis added). In the face of disputed legal questions that affect class certification, a court should first "resolve the meaning of [the law] squarely and forthrightly." Nagareda, 84 N.Y.U. L. Rev. at 162; *Ellis v. Costco Wholesale* Corp., 657 F.3d 970, 981 (9th Cir. 2011) (in such situations a "court must consider the merits"); *see also* Principles of the Law of Aggregate Litigation § 2.06, cmt. a (2010) (if class treatment "turns upon the resolution of an underlying question about the content of substantive law, then the court is obligated to decide that question before authorizing aggregate treatment.").

In short, to evaluate class suitability, "a court must understand the claims, defenses, relevant facts, and applicable substantive law in order to make a meaningful determination." *Castano v. Am. Tobacco Co*., 84 F.3d 734, 744 (5th Cir. 1996); *Amchem Prods., Inc. v. Windsor* (1997), 521 U.S. 591, 615(holding that a trial court must recognize the claims, defenses, relevant facts and the applicable substantive law "in order to make a meaningful determination of the certification issues"); *Felix v. Ganley Chevrolet, Inc*., 145 Ohio St.3d 329, 2015-Ohio-3430, 49 N.E.3d 1224, ¶ 26 ("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.").

D. Plaintiffs' "expert" testimony cannot be offered in support of class certification because their opinions are unreliable, irrelevant, untimely, and inadmissible.

The Supreme Court has emphasized that the class certification analysis must be "rigorous." *Comcast*, 133 S. Ct. at 1432. This "rigorous analysis" applies to expert testimony used to prove class certification requirements. *Id.* 1433.

Expert testimony insufficiently reliable to satisfy the *Daubert* standard cannot "prove" that the Rule 23(a) prerequisites have been met "in fact," nor can it establish "through evidentiary proof" that Rule 23(b) is satisfied. *In re Blood Reagents Antitrust Litigation*, 783 F.3d 183, 187 (3d Cir.2015); *In re Carpenter Co., No*. 14-0302, 2014 U.S. App. LEXIS 24707, 2014 WL 12809636, at *3 (6th Cir. Sept. 29, 2014) (holding that, in light of *Comcast* and *Dukes*, the district court properly applied *Daubert* at the class certification stage); *Sher v. Raytheon Co*., 419 F. App'x 887, 890 (11th Cir. 2011) (holding that the district court erred as a matter of law by failing to conduct a *Daubert* analysis at the class certification stage). *In re Behr Dayton Thermal Prods., LLC, S.D.Ohio* No. 3:08-CV-326, 2015 U.S. Dist. LEXIS 194279, at *22 (Feb. 27,

2015)("It is clear that the Court cannot consider [plaintiffs' expert] testimony in connection with the class certification motion without making some inquiry into the relevancy and reliability of his expert witness opinions.").[19]

Ohio courts also require experts to express their opinions with reasonable certainty and probability:

> The admissibility of expert testimony that an event is the proximate cause is contingent upon the expression of an opinion by the expert with respect to the causative event in terms of probability. An event is probable if there is a greater than fifty percent likelihood that it produced the occurrence at issue. Inasmuch as the expression of probability is a condition precedent to the admissibility of expert opinion regarding causation, it relates to the competence of the evidence and not its weight. Consequently, expert opinion regarding a causative event, including alternative causes, must be expressed in terms of probability irrespective of whether the proponent of the evidence bears the burden of persuasion with respect to the issue.
>
> ***
>
> We therefore conclude that expert opinion regarding a causative event, including alternative causes, must be expressed in terms of probability irrespective of whether the proponent of the evidence bears the burden of persuasion with respect to the issue.
>
> ***
>
> [A]n expert for the defense is precluded from engaging in speculation or conjecture with respect to possible causes as is an expert who testifies for the plaintiff.

Stinson v. England, 69 Ohio St.3d 451, 1994-Ohio-35, 633 N.E.2d 532, 45.

[19] *Messner v. Northshore Univ. HealthSystem*, 669 F.3d 802, 812 (7th Cir. 2012) ("When an expert's report or testimony is 'critical to class certification,' we have held that a district court must make a conclusive ruling on any challenge to that expert's qualifications or submissions before it may rule on a motion for class certification."); *In re Zurn Pex Plumbing Prods. Liab. Litig.*, 644 F.3d 604, 614 (8th Cir. 2011) (approving "a focused *Daubert* analysis which scrutinized the reliability of the expert testimony in light of the criteria for class certification and the current state of the evidence"); *Ellis v. Costco Wholesale Corp.*, 657 F.3d 970, 982 (9th Cir. 2011) ("In its analysis of Costco's motions to strike [expert testimony at the class certification stage], the district court correctly applied the evidentiary standard set forth in *Daubert*"). Furthermore, we believe the Supreme Court's dictum in Dukes buttresses our decision. *See Dukes*, 131 S. Ct. at 2553-54 ("doubt[ing]" a district court's "conclu[sion] that Daubert did not apply to expert testimony at the certification stage of class-action proceedings").

Thus, when an expert does give an opinion based on the expert's experience and knowledge in a certain field, that opinion must be phrased in terms of a reasonable degree of certainty or probability. *Id*; *see also Scroggins v. CSX Transp*., 6th Dist. Lucas No. L-93-079, 1994 Ohio App. LEXIS 1754, at *1 (Apr. 29, 1994)("An expert must testify in terms of reasonable certainty, probability, or extreme likelihood, not possibility, of results or conditions on which he is giving an opinion. The trier of fact must be given evidence that the injury was more likely than not caused by defendant's negligence. Opinions expressed with a lesser degree of certainty must be excluded as speculative."); *Waste Mgt. v. Mid-America Tire*, 113 Ohio App.3d 529, 536, 681 N.E.2d 492 (2d Dist.1996) ("An expert is thus precluded from engaging in speculation or conjecture with respect to possible causes."); *O'Conner v. Fairview Hospital*, 2013 Ohio App. Lexis 1672, ¶14 (8th Dist. 2013)("expert opinion...must be expressed in terms of probability irrespective of whether the proponent bears the burden of persuasion with respect to the issue."); *Jackson v. Huppert*, 2012 Ohio App. Lexis 2564 (8th Dist. 2012) (report properly stricken when the opinion was not expressed in a reasonable degree of probability);

It is also improper for an expert's opinion to set forth conclusory statements and legal conclusions without sufficient supporting facts. *Douglass v. Salem Community Hosp*., 153 Ohio App.3d 350, 2003-Ohio-4006, 794 N.E.2d 107, ¶ 1 (7th Dist.). "Letting expert witnesses make these types of unsupported conclusions creates the possibility, if not the probability, of misinterpretation of the legal standard by the witness and the factfinder's inability to perceive this misinterpretation." *Id.*

Statements in affidavits must also be based on personal knowledge and cannot be legal conclusions. *Ohio Turnpike Comm. v. Spellman Outdoor Advertising Servs., LLC*, 6th Dist. Erie

No. E-09-038, 2010-Ohio-1705, ¶ 14 ("[A]n [expert's] affidavit cannot state legal conclusions.").[20]

Under Civ. R. 26, Ohio courts have also required parties to disclose during discovery the identity of their expert witness and the subject matter on which he is expected to testify. "This duty * * * is necessary because preparation for effective cross-examination is especially compelling where expert testimony is to be introduced." *Shumaker v. Oliver B. Cannon & Sons, Inc*., 28 Ohio St.3d 367, 370, 28 Ohio B. 429, 504 N.E.2d 44 (1986), abrogated on other grounds in *State v. D'Ambrosio*, 67 Ohio St.3d 185, 1993 Ohio 170, 616 N.E.2d 909 (1993); *Culp v. Olukoga*, 2013-Ohio-5211, 3 N.E.3d 724, ¶ 37 (4th Dist.). A trial court may exclude expert testimony as a sanction when it is not timely disclosed under Rule 26. *Id*; *see also Huffman*, 19 Ohio St.3d at 84; *Jones v. Murphy*, 12 Ohio St.3d 84, 12 Ohio B. 73, 465 N.E.2d 444 (1984), *Wright v. Suzuki Motor Corp.*, Meigs App. Nos. 03CA2, 03CA3, 03CA4, 2005-Ohio-3494, ¶64.

Moreover, when a witness is identified as fact witness and not an expert witness, that witness can only testify to their factual knowledge and cannot give an expert opinion. *Vance v. Marion Gen. Hosp., Inc.*, 165 Ohio App.3d 615, 2006-Ohio-146, 847 N.E.2d 1229, ¶ 12 (3d Dist.); See *Vaught v. The Cleveland Clinic Foundation* (Sept. 6, 2001), 8th Dist. No. 79026, 2001 Ohio App. LEXIS 3958, unreported, 2001 WL 1034705, at *2-3.

In support of their "Class B" claims against Floros, Plaintiffs are relying on testimony from Gary Petti and Larry Lee. In support of their "Class A" claims Plaintiffs are also relying on testimony from David George D.C., Ryan Fisher, Nora Freeman Engstrom, and Michael Walls,

[20] *Brannon v. Rinzler*, 77 Ohio App.3d 749, 603 N.E.2d 1049 (2d Dist.1991) ("'Personal knowledge' is defined as, '[k]nowledge of the truth in regard to a particular fact or allegation, which is original, and does not depend on information or hearsay.")(quoting Black's Law Dictionary).

M.D. As discussed below, these opinions are unreliable, irrelevant, untimely, inadmissible, and cannot be used in support of class certification.

1. Gary Petti

Plaintiffs are improperly trying to use Petti as both a fact and expert witness. They are using Petti as a fact witness for his limited time he worked as an attorney for KNR. Petti's fact-witness testimony, however, is only relevant for the limited time he worked at KNR (March 2012 to December 2012) and his limited personal dealings with Floros. Outside that, his fact testimony would not be based on his personal experience and knowledge; it would be based on speculation, rumors, and hearsay.

Plaintiffs are also using Petti for his "expert" theory that Floros' narrative reports were all worthless and only served as a kickback referral payment to Floros.[21] To begin with, Plaintiffs have failed to disclose Petti as an expert giving a legal opinion and there has been Daubert inquiry into Petti's legal opinion. *Vance v. Marion Gen. Hosp., Inc.*, 165 Ohio App.3d 615, 2006-Ohio-146, 847 N.E.2d 1229, ¶ 12 (3d Dist.); *In re Behr Dayton Thermal Prods., LLC, S.D.Ohio* No. 3:08-CV-326, 2015 U.S. Dist. LEXIS 194279, at *22. This alone disqualifies Petti's legal opinion testimony for class certification purposes.

Petti's expert theory is also not based on credible facts that he witnessed; it is based on speculation and hearsay. Petti never heard another attorney claim that Floros' narrative reports were secretly kickback payments. Petti has also had limited experience with Floros, and he only remembers reviewing a few narrative reports from Floros. *Id*. 292, In fact, Petti admitted that the

[21] Although Plaintiffs have not formerly declared Petti an expert witness, they are using his legal opinions in support of their claim that all of Floros narrative reports were worthless and kickback payments. This goes beyond fact witness testimony.

newer narrative reports for Reid and Norris were "advanced" and contained more information. *Id.*

Rather, Petti claimed that his "kickback" conspiracy theory was based on the following: 1) a conversation he had with an unknown chiropractor while working a previous law firm, Slater & Zurz; 2) a rumor that he heard while working at Slater & Zurz that KNR started receiving a higher volume of cases after paying narrative fees; 3) a conversation with KNR's office manager (Brandy Gobrogge) where he alleged that she said Rob Nestico "invented" the narrative report; and 4) his litigation experience.

As to the conversation with an unknown chiropractor, Petti claimed that someone in Columbus once asked him to pay for a narrative report while he was working at Slater & Zurz. Petti does not remember the name of the chiropractor but is sure that it was not Floros. Ex. F, Petti Tr. 438-439. The unknown chiropractor told Petti that KNR always pays for narrative reports. Petti replied that he would not pay for a narrative fee. Based on this exchange, Petti believes that the unknown chiropractor did not refer him cases based on his refusal to pay for a narrative report.

Petti's alleged conversation with an unknown chiropractor is inadmissible hearsay. Petti's belief that the chiropractor wanted a kickback payment is also pure speculation. For many reasons, the unknown chiropractor may have not wanted to refer patients to Petti. This should not be considered credible evidence in support of Plaintiffs' claims and their motion to certify, especially since the parties cannot question the unknown chiropractor. Likewise, Petti's belief that KNR only started receiving more cases after paying narrative fees is also speculative, since he has no personal knowledge of that fact.

As to the Petti's claim that KNR's office manager told him that Rob Nestico "invented the narrative report," this makes no sense. Floros has been preparing and charging for narrative reports since 2004, before KNR existed. When Petti was confronted with this fact, he backtracked and agreed that it was untrue statement and that Nestico did not invent the narrative report. *Id*. 486. Petti also acknowledge in his deposition that medical providers routinely charge for narrative expert reports. *Id*. 487.

As to Petti's opinion that Floros narrative reports were all worthless based on his litigation experience, this opinion is an improper legal conclusion and lacks proper foundation. *Brannon v. Rinzler*, 77 Ohio App.3d 749, 603 N.E.2d 1049 (2d Dist.1991). Indeed, Petti has only reviewed a limited amount of Floros' narrative reports and has not qualified how his legal expertise gives the basis for his opinion that all of Floros' narrative reports are worthless.

Petti also contradicted his opinion that the narrative reports were "boilerplate" and "worthless" during his depositions and often admitted that his opinions were based on speculation. *Id*. 192, 431, 437, 446. For instance, Petti admitted that narrative reports would be useful and necessary in litigation after filing a claim and that it could be useful to have narrative report prior to filing a claim. *Id*. 447-449, 458-459. Petti admitted that narrative reports had information not in the medical records. *Id*. 454. Petti admitted that Floros spent considerable time on the narrative reports. *Id*. 445, 491. Petti even estimated that Floros spent an hour preparing Reid's narrative report. *Id.* 445, 491.

Petti admitted that Floros would have a right to be paid for the services he performed in preparing the narrative reports. *Id.* Petti admitted that he is "not an expert at anything" since he mostly stopped practicing law, including the value of narrative reports. *Id*. 492. Petti admitted that his experience with Floros was limited and that they never discussed narrative reports. *Id.*

427-428. And Petti admitted that you would have to look at each case individually to determine if the narrative fee was a kickback payment or needed for the case. *Id*. 279.

Based on this, it's not Floros' narrative reports that are worthless; it's is Petti's "expert" testimony. This Court should not consider his opinions in determining class certification.[22] If anything, Petti's opinions about the individual inquiries needed to determine whether each narrative fee was an alleged kickback or were useful goes against certification.

2. Larry Lee, David George, D.C., Nora Freeman Engstrom, Ryan Fisher, and Michael Walls, M.D.

Plaintiffs have failed to disclose the identity of their new experts (Larry Lee, David George D.C., Ryan Fisher, Nora Freeman Engstrom, and Michael Walls, M.D.) before the deadline for discovery on class certification issues, which was April 15, 2019. Instead, Plaintiffs waited until May 9, 2019 to reveal the identity of their experts. Plaintiffs also waited until the filing of their motion for certification to provide the affidavits of their experts, even though the same experts signed the affidavits on or about May 9th. After KNR moved to subpoena Plaintiffs' recently disclosed experts, Plaintiffs also moved for a protective order. This prevented Defendants from conducting inquiries into the relevancy and reliability of Plaintiffs' expert witness opinions.

Based on Plaintiffs' untimely disclosure of their expert witnesses and refusal to provide discovery on those witnesses, their opinions cannot be used in support of class certification. Allowing otherwise would violate Civ. R. 26 and Ohio law. *In re Behr Dayton Thermal Prods.,*

[22] Plaintiffs may try to argue that inadmissible expert testimony should be allowed because Defendants did not produce all their expert affidavits before the discovery deadline. This argument lacks merit. Plaintiffs have the burden of proving their case. This means that Plaintiffs need expert testimony to show that class certification is proper, not Defendants. So goes Plaintiffs' experts, so goes their case.

LLC, S.D.Ohio No. 3:08-CV-326, 2015 U.S. Dist. LEXIS 194279, at *22 (Feb. 27, 2015)("It is clear that the Court cannot consider [plaintiffs' expert] testimony in connection with the class certification motion without making some inquiry into the relevancy and reliability of his expert witness opinions.").

Plaintiffs new "expert" opinions are also improper because: 1) their opinions are not phrased in terms of reasonable certainty, probability offered; and 2) there opinions state conclusory statements and legal conclusions without sufficient supporting facts. *Scroggins v. CSX Transp*., 6th Dist. Lucas No. L-93-079, 1994 Ohio App. LEXIS 1754, at *1 (Apr. 29, 1994); *Ohio Turnpike Comm. v. Spellman Outdoor Advertising Servs., LLC*, 6th Dist. Erie No. E-09-038, 2010-Ohio-1705, ¶ 14. Lee's opinion is additionally improper because he is not an attorney or insurance adjuster with experience in evaluating personal injury claims and medical reports.

As to George, Engstrom, Fisher, and Walls, these experts only offer opinions that are relevant to Plaintiffs "Class A". None of these witnesses opine on issues relevant to "Class B" (narrative fee). These expert opinions, therefore, are also worthless, since this Court needs to deny "Class A" because it improperly argues claims against Floros that Plaintiffs did not allege in their operative complaint.

Their opinions also go against Plaintiffs' arguments in support of certifying Class A. For instance, Fisher stated many times in his affidavit that he prefers to go to health providers that accept medpay. Floros accepts medpay. Fisher also only opines in general terms: "**Generally**, the clients will always be better off paying for healthcare through their own health insurance, or medpay provider, because healthcare providers **typically** have negotiated discounted rates with health-insurance providers and that the healthcare providers are required to accept." PL's Mot. Ex. 20. This means there are times when clients are not better off paying with healthcare (e.g.,

high deductible and copays). This also means that there are times that healthcare providers have not negotiated discounted rates with health-insurance provider (e.g., out-of-network). Thus, based on Fisher's "expert" opinion, this Court would have to individual inquiries into each case to determine whether the client was better off using their health insurance.

Engstrom also opined that larger firms like KNR are beneficial for injured victims with smaller claims, because other firms typically reject these cases, even if the case has merit. PL's Mot. Ex. 1, Engstrom Affidavit; Run-of-the-Mill Justice. Engstrom also opined that claimants with larger non-meritorious claims also do well with larger firms like KNR "because, even if an insurance adjuster recognizes that a particular claim lacks merit, if he is negotiating with a plaintiffs' 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." *Id.* 1535-1537.Thus, based on Engstrom's expert opinion, this Court would need to do individual inquiries into each class member's claim to see if it was a smaller claim or larger non-meritorious claim, as those class members were likely better off having KNR as their attorneys.

E. Plaintiffs have failed to satisfy the requirements under Civ. R. 23(B)(3) and cannot prove that the questions of law or fact common to the members of the class predominate.

Certification under Civ. R. 23(B)(3) requires the trial court to make two findings: (1) that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and (2) that a class action is superior to other available methods for the fair and efficient adjudication of the controversy. *Cullen* at ¶ 29-30.

A "key purpose" of the predominance requirement "is to test whether the proposed class is sufficiently cohesive to warrant adjudication by representation." *Felix*, 145 Ohio St.3d 329, 2015-Ohio-3430, 49 N.E.3d 1224 ¶ 35. "For common questions of law or fact to predominate it

is not sufficient that such questions merely exist; rather, they must represent a significant aspect of the case.'" *Cullen*, 137 Ohio St.3d 373, 2013-Ohio-4733, 999 N.E.2d 614, at ¶ 30. They must also be "capable of resolution for all members in a single adjudication." *Id*.

Thus, it is not enough for class certification under Civ. R. 23(B)(3) that the allegations of the complaint merely raise "a colorable claim." Id. at ¶ 34. The plaintiff must prove—and the trial court must find—that "questions common to the class in fact predominate over individual ones." *Id*. "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." *Id*. at ¶ 30, quoting *Randleman v. Fidelity Natl. Title Ins. Co.*, 646 F.3d 347, 352-353 (6th Cir.2011).[23]

1. Plaintiffs lack standing to bring fiduciary duty claim against Floros.

In determining class certification, courts look to see if the parties have standing to bring their claims. *Estate of Mikulski v. Centerior Energy Corp*., 8th Dist. Cuyahoga No. 107108, 2019-Ohio-983("Individual standing is a threshold to all actions, including class actions."). This requires a legal analysis of the elements underlying the cause of action. *Id; see also Erica P. John Fund, Inc. v. Halliburton Co.*, 563 U.S. 804, 809 (2011)(Whether "'questions of law or fact common to class members predominate' begins, of course, with the elements of the underlying cause of action.").

[23] 5 Moore, Federal Practice, Paragraph 23.21[3][c] (3d Ed.2012) ("A class definition is inadequate if a court must make a determination of the merits of the individual claims to determine whether a particular person is a member of the class."); *Randleman v. Fid. Natl Title Ins. Co.*, 646 F.3d 347, 353 (6th Cir.2011) (rejecting class definition that defined class as persons "entitled to relief" and required "substantial, individual inquiries"); *Stewart v. Cheek & Zeehandelar*, LLP, 252 F.R.D. 387, 391 (S.D.Ohio 2008)(where "individualized assessments" or "'extensive factual inquiries" are necessary to determine class membership, class certification is improper) (Citation omitted.).

For Class B, Plaintiffs allege that Defendants, including Floros, breached their fiduciary duty by "charging and collecting a narrative fee from their clients as a kickback reward to referring chiropractors, and in failing to disclose their quid pro quo relationship with one another." *Id*., ¶¶ 217-224. Plaintiffs allege that the narrative reports were "worthless" and did "not make an opposing party any more likely to settle a client's case," and had "nothing to do with individual clients' needs." *Id*., ¶ 65. Even if we assume these facts in favor of Plaintiffs, they still lack standing to bring their claims.

A "fiduciary" is "[a] person having duty created by his undertaking, to act primarily for another's benefit in matters connected with such undertaking. *Strock v. Pressnell* (1988), 38 Ohio St.3d 207, 216, 527 N.E.2d 1235 (emphasis added). A fiduciary relationship is formed when, "special confidence and trust is reposed in the integrity and fidelity of another and there is a resulting position of superiority or influence, acquired by virtue of this special trust." *In re Termination of Employment* (1974), 40 Ohio St.2d 107, 115, 321 N.E.2d 603. The rule imposing liability for breach of fiduciary duty only contemplates matters coming within "the scope of the relation." *See* Restatement [Second] of Torts § 874, Comment A.

The elements for a breach of fiduciary duty include "(1) the existence of a duty arising from a fiduciary relationship; (2) a failure to observe the duty; and (3) an injury resulting proximately therefrom." *Wells Fargo Bank, N.A. v. Sessley,* 188 Ohio App.3d 213, 2010-Ohio-2902, ¶ 36, 935 N.E.2d 70 (10th Dist.). Without a fiduciary relationship between the parties, a breach of fiduciary claim necessarily fails. *Waffen v. Summers*, 6th Dist. No. OT-08-034, 2009-Ohio-2940, ¶ 41.

Although the definition of "fiduciary" seems broad, "[Ohio] courts have been reluctant to characterize relationships between individuals as being fiduciary in nature, with the obvious

exception of those relationships that involve statutorily-imposed duties." *Casey v. Reidy*, 180 Ohio App.3d 615, 2009-Ohio-415, 906 N.E.2d 1139 (7th Dist.) (collecting cases); *Valente v. Univ. of Dayton*, 438 F. App'x 381, 387 (6th Cir.2011). Courts have required a showing of "complete dependence by the inferior party" to establish a fiduciary relationship. I*d.*

Ohio courts have not ruled on what (if any) fiduciary duties a chiropractor owes to their patient. Nor are there any "statutory-imposed duties" on chiropractors that are relevant to Plaintiffs' claims. *Id*. Rather, the only guidance we have on this issue involve cases ruling on licensed physician's fiduciary duty to their patients.

Physician-fiduciary cases, however, have limited guidance here. For instance, in *State v. Massien*, 125 Ohio St.3d 204, 2010-Ohio-1864, the Ohio Supreme Court found that a nurse does not have the same level of trust and fiduciary duty that physician has with a hospital. In reaching their holding, the *Massien* court reasoned that "the practice of medicine, which includes the diagnosis of an adverse health condition and the prescription of a course of treatment for its management and care, is limited by law to licensed physicians."

Thus, while nurses may have some fiduciary duties involving their treatment of patients, it does not follow that nurses have the same heightened fiduciary duties that licensed physicians owe their patients. This is because a nurse does not have the same level of expertise, training, and discretion in making life-altering medical decisions.

Likewise, a chiropractor is limited in the scope of medical services and cannot practice general medicine.[24] This means that chiropractic patients do not have the same heightened

[24] Under R.C. 4734.09 "chiropractic care" is defined as "utilization of the relationship between the musculoskeletal structures of the body, the spinal column and the nervous system, in the restoration and maintenance of health, in connection with which patient care is conducted with due regard for first aid, hygienic, nutritional, and rehabilitative procedures."

vulnerability to mistakes, since–unlike physicians–chiropractors are not making life altering decisions involving medications, surgery and diagnosing diseases. A chiropractor, therefore, should not have the same heightened duty of a physician practicing medicine.

That said, even if we analyze this case under the physician-fiduciary standard, Plaintiffs have still failed to state a claim and lack standing. A physician owes a fiduciary duty to their patient with respect to diagnosing and treating diseases and illnesses; this duty does not extend beyond the medical relationship. *N. Ohio Med. Specialists, LLC v. Huston*, 6th Dist. Erie No. E-09-13, 2009-Ohio-5880, ¶ 16 (2009).[25]

In *Huston*, the plaintiff—whose case had been dismissed on the pleadings—argued on appeal that he had pleaded "sufficient, operative facts to support recovery under his claims that a doctor, . . . [has] a fiduciary duty to submit claims to an insurance company when he promises to do so." *Huston*, 6th Dist. Erie No. E-09-13, 2009-Ohio-5880, ¶ 16 (2009). While recognizing that a physician owes a fiduciary duty to their patients with respect to diagnosing and treating diseases and injuries, the Sixth District held that this duty does not extend beyond the medical relationship:

> A physician undisputedly owes a fiduciary duty to his or her patient with respect to diagnosing and treating diseases and injuries. **Appellants, however, direct us to no authority that such a duty extends beyond the medical**

[25] *Otto v. Melman*, 25 Misc.3d 1235(A), 2009 NY Slip Op 52421(U), 906 N.Y.S.2d 774, ¶ 3 (Sup.Ct.)("In the case at bar, [defendant's] service to [plaintiff] as a physician and as a fiduciary did not include the solicitation of the latter for investment in the new drug company. Such solicitation was not one of the " matters within the scope of the relation."); *Thomas v. Archer*, 384 P.3d 791, 797 (Alaska 2016)(" The physician's alleged promise to obtain pre-authorization of medical treatment for purposes of insurance coverage was outside the scope of the physician's fiduciary duty."); *Restatement [Second] of Torts § 874, Comment (a)*. ("A fiduciary relation exists between two persons when one of them is under a duty to act for or to give advice for the benefit of another **upon matters within the scope of the relation**.")(emphasis added); *Strock v. Pressnell* (1988), 38 Ohio St.3d 207, 216, 527 N.E.2d 1235 ("[A fiduciary is a] person having duty **created by his undertaking**, to act primarily for another's benefit in **matters connected with such undertaking**.")(emphasis added).

> **relationship.** Consequently, appellants' claim premised on a fiduciary duty fails as a matter of law.

Id. (citations omitted) (emphasis added).

Likewise, Plaintiffs are claiming that Floros had a fiduciary duty to disclose any self-dealings he had with a law firm. A law firm referral has nothing to do with chiropractic treatment. Just as in *Huston*, Plaintiffs are trying to extend the fiduciary duty beyond the clinical relationship. And as in *Huston*, Plaintiffs cannot point to any cases in Ohio where the courts extended a physician's duties beyond the scope of the medical relationship.

In dismissing the breach of fiduciary claims against Ghoubrial, this Court has also already held that a medical provider's fiduciary duty does not extend beyond the medical relationship:

> Judge Singer noted in the appellate court's opinion that a physician undisputedly owes a fiduciary duty to his or her patients with respect to diagnosing diseases and injuries at ¶16, citing *Tracy v. Merrell Dow Pharmaceutical* 58 Ohio St.3d 147, 150 (1991). But the court noted the appellant cited no authority that such duty extends beyond the medical relationship. Consequently, the court held appellants' claim on a fiduciary duty fails as a matter of law.
>
> This Court agrees that the Plaintiffs do not have a separate claim for breach of a duty against Dr. Ghoubrial and, thus Defendant Ghoubrial's motion for Judgment on the Pleadings as to Plaintiffs' claim for breach of fiduciary duty is hereby granted and ordered dismissed.

See Order, 05/09/2019. Thus, under the law of this case, Plaintiffs also lack standing to bring a breach of fiduciary claim against Floros.

Moreover, Plaintiffs have no credible evidence showing that Floros and KNR had a "quid pro quo" relationship or that the narrative fees are kickback payments. Rather, as discussed above, Plaintiffs' allegations are based on speculation, hearsay, and inadmissible "expert" testimony. As a result, their claims cannot be certified under Civ. R. 23.

2. Plaintiffs lack standing to bring unjust enrichment claims against Floros.

Plaintiffs' unjust enrichment claim alleges that Plaintiffs "unwittingly" allowed KNR to "deduct and pay a narrative fee" to Floros without knowledge of the quid pro quo relationship he had with KNR. FAC, ¶¶ 253-257. Plaintiffs characterize the narrative fee as a "substantial benefit to Defendant Floros," the retention of which would be "unjust and inequitable." *Id.*, Plaintiffs also falsely allege that KNR paid a "narrative fee' to Floros for every referred client. *Id.*, ¶¶ 64, 72.

Plaintiffs have no standing for their unjust enrichment claim against Floros. Unjust enrichment is a quasi-contractual claim, in which each of these elements must be satisfied: "(1) a benefit conferred by a plaintiff upon a defendant; (2) knowledge by the defendant of the benefit; and (3) retention of the benefit by the defendant under circumstances where it would be unjust to do so without payment." *See Poston on behalf of Poston v. Shelby- Love*, 8th Dist. Cuyahoga No. 104969, 2017-Ohio-6980, ¶ 20.

The Ohio Supreme Court has held that the purpose of an unjust enrichment claim "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." *Johnson v. Microsoft Corp.*, 106 Ohio St.3d 278, 2005-Ohio-4985, 834 N.E.2d 791, ¶ 21. This means it is not enough that a plaintiff suffers a loss and a defendant receives a benefit. *Id.* Rather "a plaintiff must establish that a benefit has been conferred upon that defendant by that **particular plaintiff."** *Ohio Edison Co. v. Direct Energy Business*, LLC, N.D. Ohio No. 5:17 CV 746, 2017 U.S. Dist. LEXIS 117025 (July 26, 2017)(emphasis in original).

Thus, to show that a plaintiff conferred a benefit upon a defendant, "an economic transaction must exist between the parties." *Caterpillar Fin. Servs. Corp. v. Harold Tatman &*

Son's Ents., Inc., 2015- Ohio 4884, 50 N.E.3d 955, 967 (Ohio Ct. App. 2015); *see also In re Whirlpool Corp. Front-Loading Washer Prods. Liab. Litig*., 684 F. Supp. 2d 942, 952 (N.D. Ohio 2009); *City of Cleveland v. Sohio Oil Co*., No. 78860, 2001 Ohio App. LEXIS 5192, 2001 WL 1479233, at *7 (Ohio Ct. App. Nov. 21, 2001) (holding that when a defendant breached its contract with the city by allowing customers to park in its parking lot overnight, the wrongfully obtained parking revenues had been conferred on the defendant by its customers and not by the city.); *Metro Life Ins. Co. v. Franks*, No. 98AP-8, 1998 Ohio App. LEXIS 3794, 1998 WL 514134, at *2 (Ohio Ct. App. Aug. 20, 1998) (holding that where a life insurance company mistakenly overpaid one beneficiary to the detriment of the another, the insurance company—not the underpaid beneficiary—conferred the benefit).

In *Johnston*, the Ohio Supreme Court held that a plaintiff who had bought a personal computer from a retailer could not maintain an unjust enrichment claim against software-maker Microsoft. *Johnston*, 106 Ohio St.3d 278, 286. The Ohio Supreme Court first noted "that an indirect purchaser cannot assert a common-law claim for restitution and unjust enrichment against a defendant without establishing that a benefit had been conferred upon that defendant by the purchaser." *Id*. The Ohio Supreme Court thus held that "no economic transaction occurred between Johnston and Microsoft, and, therefore, Johnston cannot establish that Microsoft retained any benefit to which it is not justly entitled." *Id.* (internal quotations omitted).

As in *Johnston*, Plaintiffs have failed to allege a direct economic transaction between them and Floros in the form of narrative fee payments. Any alleged benefit that Plaintiffs claim they conferred from their settlement proceeds resulted from a transaction between KNR and Plaintiffs. Plaintiffs have not alleged that they directly paid the narrative fee payment to Floros.

Nor have Plaintiffs cited any caselaw that would provide an exception to the rule requiring a direct transaction between the aggrieved party and the beneficiary.

Floros expects that Plaintiffs will try to distinguish the requirement in *Johnston* for "direct transaction" by arguing that Plaintiffs would not have conferred a benefit to KNR, in the form of settlement deductions, if they knew about Floros' alleged wrongdoing. This is not a valid exception *Johnston*. If it was, then the plaintiff in *Johnston* could have sufficiently pleaded a claim for unjust enrichment against Microsoft (software developer/indirect beneficiary) by simply arguing that plaintiff would not have purchased a personal computer from Gateway (retailor/direct beneficiary) if they knew about Microsoft's alleged wrongdoings. This would undermine the reasoning behind the *Johnston* rule of requiring a direct transaction.

Plaintiffs' unjust enrichment claim also fails with second "knowledge" element. As mentioned above, Floros received the narrative fee payment from KNR, no matter if a client settled their case with KNR. Floros, therefore, was without knowledge of whether KNR deducted the narrative fee from their client's settlement.

Plaintiffs may try to get around this issue by making unsupported and conclusory allegations that Floros knew he was receiving kickback payments at Plaintiffs' expense and that the narrative reports were worthless. Plaintiffs, however, have failed to allege (or offer evidence on) how Floros would be aware that KNR deducted the narrative fee from their client's settlement proceeds and when that occurred, since KNR paid Floros for the narrative fee no matter if the KNR client recovered money in a settlement or judgment. *See, e.g., Ohio Edison Co. v. Direct Energy Business,* LLC, N.D. Ohio No. 5:17 CV 746, 2017 U.S. Dist. LEXIS 117025 (July 26, 2017)(finding that the plaintiffs alleged an improper legal conclusion with no

factual support when they failed to allege "how" the defendant knew about the benefit when the defendant was allegedly not responsible for keeping track of payments).

Plaintiffs' claim also fails with third element on whether it would be unjust for Floros to retain a narrative fee. Plaintiffs' unjust claim is premised on the argument that Floros had a fiduciary duty to disclose a quid pro quo relationship he had with KNR and that he received narrative fees as payments for referring patients to KNR. As discussed earlier, Plaintiffs have no evidence in support of these claims. These allegations are based on speculation, hearsay, and inadmissible "expert" testimony.

That said, even if we accept Plaintiffs' unsupported claim that Floros had a legal referral relationship with KNR, Floros would still not have a fiduciary duty to disclose this alleged relationship to his patients. This is because a legal referral relationship would be outside the scope of his clinical relationship with his patients. Thus, there was no unjust act on Floros' part.

Moreover, Floros prepares the narrative reports based solely on an agreement between him and KNR, without regard to whether KNR would deduct it from their client's settlement. And it is undisputed that Floros put time and effort into drafting the narrative reports. Petti even estimated that it would have taken Floros at least an hour to draft the narrative report for Reid. Ex. _ Floros also estimated that it took him between 1-2 hours to complete Reid's narrative report. As a result, any dispute over KNR unjustly deducting the narrative fee from their clients' settlement is between KNR and their clients.[26] Floros is entitled to receive compensation for the

[26] It is undisputed that Plaintiffs agreed in writing that KNR could deduct from their settlement proceeds any funds that KNR paid in preparation for settlement, which would include narrative fees to Floros. It is also undisputed that KNR's attorney/client closing statement disclosed the narrative fee to their clients, as required by the ethical rules governing KNR, and that the patient approved the narrative report fee by signing the closing statement.

time and effort he put into reviewing medical the records and drafting the narrative reports; these are earned fees.

Plaintiffs, therefore, cannot satisfy any of the elements required to prove an unjust enrichment claim. As a result, the claims cannot be certified under Civ. R. 23.

3. Plaintiffs have admitted that individual inquires would be needed to determine whether a fiduciary duty relationship existed.

Ohio courts have been reluctant to grant certification on common-law breach of fiduciary cases. This is because the existence and scope of fiduciary duty is, in part, involves questions "of fact dependent upon the circumstances of each case." *See, e.g., Cullen v. State Farm Mut. Auto. Ins. Co.*, 137 Ohio St.3d 373, 2013-Ohio-4733, 999 N.E.2d 614; *Shaver v. Std. Oil Co.*, 89 Ohio App.3d 52, 623 N.E.2d 602 (6th Dist.1993)(*"*[T]he manner of proving the existence of a fiduciary duty in this case requires a case-by-case demonstration of the existence of special confidence and trust. Because a case-by-case demonstration is required, individual questions are more predominant than common questions and class certification is not appropriate as to this cause of action pursuant to Civ. R. 23(B)(3)."); *see also* (*Estate of Mikulski v. Centerior Energy Corp.*, 8th Dist. Cuyahoga No. 107108, 2019-Ohio-983; *Bungard v. Ohio Dept. of Job & Family Servs*., Ct. of Cl. No. 2002-08521, 2004-Ohio-7302; *Hoang v. E*trade Group*, 151 Ohio App.3d 363, 2003-Ohio-301, 784 N.E.2d 151 (8th Dist.)*; Wenner v. Midland Title Sec.*, 5th Dist. Richland No. 03CA107, 2004-Ohio-3989.[27]

[27] Ohio courts have been less reluctant to certify breach of fiduciary claims when they are based on statutory disclosure requirements, uniform practices, and standardized forms (i.e. "form document cases"). *See, e.g., Cope v. Metropolitan Life Ins*. Co., 82 Ohio St. 3d 426, 436, 696 N.E.2d 1001(1998); *Hamilton v. Ohio Savings Bank,* 82 Ohio St.3d 67, 694 N.E.2d 442 (1998). These cases, however, are distinguishable because Plaintiffs' Class B is based on alleged common-law fiduciary duties, non-standard practices, and non-standard narrative reports.

Plaintiffs even acknowledge and argued this legal premise in their brief in opposition to Floros' Motion to Dismiss: "Because the existence and scope of fiduciary duty involves questions "of fact dependent upon circumstances in each case," such questions are not be resolved on motion to dismiss." *See* Plaintiffs' BIO to Floros' MTD, pg. 3. In their Brief in Opposition to Floros' Motion to Dismiss, Plaintiffs also raised individual factual arguments that they believed supported a finding fiduciary duty, which were particular to the individual named representatives, such as allegations that Floros "advised" and "persuaded" Norris and KNR clients to refrain from treating with another chiropractor. *Id*., ___; see also FAC, ¶__. Plaintiffs also argue and allege that the Plaintiffs "would not have authorized the narrative fees" if they knew about the "improper" relationship between Floros and KNR. *Id*, pg. 9; see also FAC, ¶221.

Thus, Plaintiffs have already admitted that the existence of a fiduciary duty requires an examination of the facts in each case. Plaintiffs have also admitted that they are relying on facts unique to the named representatives. Thus, even if this Court assumes that Plaintiffs have standing, Plaintiffs' claims are improper for class certification.

4. Individual inquiries would be needed to determine whether the narrative reports were worthless or had value for each class member.

Plaintiffs' class certification claims also fail the predominance requirements of Civ. R. 23 (B)(3). To determine whether Floros breached fiduciary obligations or was unjustly enriched by accepting payment for allegedly "worthless" narrative reports, this Court would need to decide many peculiarly individualized factual and legal questions to determine whether each report was "worthless." This would require an evaluation of each narrative report that Floros drafted and review of the particular circumstances of each patient.

Each narrative report would also have to be compared to each patient's medical records to determine whether the information in the narrative report was "readily apparent" from the medical records or "boilerplate," as alleged.

For instance, Petti testified that narrative reports can be useful and sometimes necessary.[28] Ex F, Petti Tr. 310-311, 418, 421-425, 435. Petti also testified that to determine the value and need for each report, you would have to look at each case individually:

> Q What if the lawyer on that individual case believed in his professional judgment that the narrative report had value
> A Then--
> Q That wouldn't be a kickback, would it?
> **A No, it wouldn't.**
> Q Okay. And different lawyers have different judgments about what's valuable to a case, don't they?
> **A They do.**
> ***
> Q. So you'd have to look at each individual case to see whether a report was necessary?
> **A. Yeah. There's no way to do it on virtually every one of them.**
> Q. You just can't blanketly say none of the cases need reports, you can't say that, can you?
> **A. Right, that's fair.**
> Q. And again, you'd have to look at the medical records, talk to the attorney who was involved in the case, talk to the claims examiner, there's all sorts of things you'd have to look at, fair?
> **A. That's, generally speaking, fair.**
> ***
> **Q.** And to know whether this particular narrative report was beneficial or not, you'd have to look at this case and all the records and the negotiations, true?
> **A. Yeah, that's true.**
> Q. That's true for every case, isn't it?
> **A. It is true.**

[28] Petti's deposition testimony was all over the place and he often contradicted himself. Thus, Plaintiffs will likely point to examples of Petti testifying that he believed that Floros' narrative reports were worthless and kickback payments. All this shows, however, is that Petti's testimony is unreliable and not credible evidence on those issues. Petti, however, was consistent on his belief that each narrative report would have to be looked at individually to determine if it was valuable or necessary. This testimony destroys Plaintiffs' arguments for class certification.

Ex. F, Petti Tr. pp. 279, 324-325, 339.

In fact, after reviewing Reid's narrative report information and medical records, Petti changed his earlier testimony about Floros' narrative reports being "boilerplate" and only having information "readily apparent" from the medical records. Id. 442-443. Petti testified that Floros' narrative reports had since "advanced" seen he last saw them and now have more information. *Id*. Thus, when doing a case-by-case inquiry, Petti changed his own opinion on Floros' narrative reports. This Court would have to do a similar independent analysis for each potential class member.

Plaintiff Reid also testified that the value and benefit of the narrative reports would be different for each client.[29] Ex. I., Reid Tr. 214-216, 249-250, 290. According to Reid, each case would require a separate inquiry to determine why the clients received chiropractic treatment and whether that treatment harmed a client's specific case:

> Q Okay. And you don't know how much time Dr. Floros or any other chiropractor put into any narrative report for any other client, do you?
> **A No.**
> Q We'd have to look at each one of those cases separately, fair?
> **A Fair.**
> Q You don't know how much value any of the insurance companies put value wise on those reports for anybody's case, do you?
> **A No, I don't.**
> Q You'd have to ask every individual claims examiner how much value they put on that report?
> **A Yes.**
> ***

[29] Floros expects that Plaintiffs' counsel will argue that the testimony of the named Plaintiffs is irrelevant because Plaintiffs are not expected to understand fully the law and legal principles. Plaintiffs' testimony, however, does not involve complex legal matters. Likewise, Plaintiffs are relying on their own affidavit testimony in support of their legal theories. Plaintiffs cannot have it both ways. *See also Circuit Berger v. Compaq Computer Corp*., 257 F.3d 475, 482–483 (5th Cir. 2001) (plaintiff should understand actions in which they are involved, and that knowledge should not be limited to knowledge acquired through counsel).

> Q Okay. If there's a thousand of those people, then we'd have to look at a thousand different sets of records to determine whether the $150 is valuable in that case?
> **A Yeah.**

Id. 214-216.

Reid also testified that Floros' narrative report did not just contain boilerplate language and information from her medical records. *Id*. 170-176, 335-337. And she admitted that her narrative expert report helped her case and were not fraudulent. *Id*. at 176-177, 181, 213-214, 272.

Rather, Reid's main gripe with the report is that it should have been cheaper ($85 instead of $150). *Id*. 177, 186, 214, 258, 288. Reid based this belief on a conversation she had with a relative that is a chiropractor in San Diego, California. *Id*. 186-188. Reid, however, admitted that she benefited from Floros' chiropractic services and the $525 reduction in her chiropractic bill, which was greater than the amount of the narrative report. *Id*. 184, 298.

Like Reid, Norris testified that the narrative reports had value but should have been cheaper. Ex. J, Norris Tr. 151-156. Norris believed the reports were only worth $50. *Id*. Norris based this on her personal belief that it was "just a piece of paper" with a summary of the chiropractor's thoughts after he "skimmed" through the medical records. *Id.* 152. Norris, however, admitted that her belief was based on speculation. *Id.* 153.

Moreover, Floros does not have standardized narrative reports. Ex A; Ex G. He has often changed the content, style, and information in his narrative reports, which is why the narrative reports that Plaintiffs reference in their motion for certification are different in content, style, and information. *Id.*

In looking Reid's and Norris' narrative reports, there can also be no doubt that it has additional information that is particular to each patient and separate from the medical records.

Ex. G; Ex. H. For instance, Reid's narrative report includes an outline of future risks, a future care opinion, and estimated costs of future care. *Id*. These opinions are not boilerplate. Nor are these opinions readily available anywhere in the medical records.

The relative role of the chiropractic care in each Plaintiff's lawsuit—and the corresponding value of the narrative report to their lawsuit—also depends on countless circumstances unique to each patient's injuries and legal case (What body parts were injured? Did the patient have pre-existing medical problems that needed to be addressed? Did the patient treat with the chiropractor for days? Months? Years? Was the patient compliant with the chiropractor's treatment suggestions? Was there a dispute about whether future chiropractic care would be required?).

Similarly, the ascribed value of a narrative report in a lawsuit can differ depending on the type of defendant being sued, the insurance company paying to defend and indemnify the defendant, and even the particular insurance adjuster assigned to the claim. Indeed, one adjuster may claim to find the narrative report "worthless," while another may refuse to settle a case without a narrative report from all treating clinicians. For instance, in former Plaintiff Matthew Johnson's case, Erie Auto Insurance requested an expert report from his counsel. Ex. N, Johnson Letter.

A typed and organized narrative report would certainly have value to adjuster when medical records are voluminous, unorganized, and handwritten. As insurance expert Vallillo stated: "Rather than deciphering volumes of medical records, the narrative report provides an efficient method of evaluating each claim and is a common document to be used by both claims personnel and attorneys." Ex. C, Vallillo Aff.

The ascribed value of a narrative report could also differ depending on the venue of the patient's lawsuit, or the judge assigned to decide the case (if not a jury trial). For instance, Ohio courts have routinely held that expert opinions and reports are necessary in soft-tissue sprain and strain cases. *Argie v. Three Little Pigs, Ltd*., 10th Dist. Franklin No. 11AP-437, 2012-Ohio-667, ¶ 1("Soft-tissue injuries like neck and back strains and sprains require expert testimony to establish a causal connection, because they are injuries that are internal and elusive, and are not sufficiently observable, understandable, and comprehensible by the trier of fact."); *Davie v. Nationwide Mut*. Ins. Co., 8th Dist. Cuyahoga No. 101285, 2015-Ohio-104; *see also* Cuyahoga Cty. Loc. R. 21 (requiring expert reports). A narrative report cannot be considered "worthless" when it is required by law.

What effect a particular narrative report had on an opposing party's settlement agreement cannot be addressed on a class-wide basis with common proof. Rather, it would require evidence from thousands of insurance adjusters and hundreds of defense attorneys from over the last 12 years. These and countless other individual considerations will predominate (qualitatively and quantitatively) over any common legal or factual questions. There is no generalized proof that all the narrative proof that Floros' drafted were "worthless." Thus, even if Plaintiffs had standing for their Class B claims (which they do not), this Court would have to look at each individual case to determine the narrative report was "worthless."

5. Individual inquiries into each class member would be needed to determine if 1) Floros referred the patient to KNR; and 2) if the patient relied on Floros' referral to KNR.

Plaintiffs' claims fail if they did not rely on Floros' recommendation to hire KNR. As a result, this Court would need conduct individual inquiries into each case to determine whether:

1) Floros referred the patient to KNR; and 2) the patient relied on Floros' recommendation to see KNR.

Floros did not recommend either Reid or Norris to KNR. As discussed earlier, Floros is also not the only employee at ASC that recommends patients to KNR and other attorneys. Ex. A. ASC has employed other chiropractors (currently Dr. Michael Dumond) that have recommended KNR to patients. *Id.* ASC's administrative staff has also recommended KNR and other law firms to new patients. *Id.* In fact, Reid testified that Floros did not refer to KNR. Rather, according to Ried, it was ASC staff and Dr. Michael Dumond that recommend KNR. Ex. J, 101; PL's Mot. Ex. 11, Reid Aff. Likewise, KNR recommend to Norris that she treat with Floros.

Indeed, Plaintiffs have acknowledged that KNR is one of the largest personal injury firms in the Akron. Plaintiffs have also acknowledged that KNR advertises heavily in the Akron area. Based on this, it would not be unusual for an injured person in Akron to receive advertising from both Floros and KNR. It would also not be unusual for an injured person to receive referrals from other clients of KNR, which is what happened with Norris. As a result, this Court would need to do an individualized inquiry into each case to determine which ASC employee recommended KNR's legal services.

Plaintiffs may try to argue that this Court should infer reliance based on *Cope v. Metropolitan Life Ins. Co.*, 82 Ohio St. 3d 426, 436, 696 N.E.2d 1001(1998). This argument, however, lacks merit. *Cope* involved a narrow exception, which depended on distinguishable facts and statutory laws that do not apply here.[30] In *Cope*, the alleged fraudulent conduct was

[30] In *Cope*, the plaintiffs, owners of existing life insurance or annuity policies with MetLife, alleged that MetLife executed a uniform scheme to obtain higher commissions by classifying and charging replacement insurance policies as new insurance policies. *Id.* The core theory was that MetLife intentionally omitted a disclosure of the replacement financing as well as a state-mandated statutorily required written warning. *Id.*, 426, 433. The Supreme Court of Ohio

omitting statutorily required disclosures. Since no oral communications could alter the statutory forms requirement, the Ohio Supreme Court held that class members were entitled to an inference of reliance based solely on the omission of statutorily required transaction documents. Id. at 435-36.

Unlike in *Cope*, this is not a case with standardized forms, statutory requirements, and routinized practices across the entire class. Rather, there will have to be separate examinations into each prospective class member to determine whether the KNR client relied on Floros' recommendation to receive representation from KNR. *See e.g., Young v. FirstMerit Bank, N.A.*, 2011-Ohio-614, PP 27, 32 (8th Dist.)(reversing grant of class certification because the evidence showed that the allegedly fraudulent conduct was not standardized and the representations were not identical, and some potential class members relied on representations by other investors and not from the alleged defendant or on oral representations by the defendant); *Cannon v. Fid. Warranty Servs., Inc*., 2006-Ohio-4995, ¶¶75-89 (5th Dist.)(affirming denial of class certification related to a claim that the defendant used car company had fraudulently misrepresented and concealed material facts from purchasers using standardized contracts and training procedures because the evidence showed potential variations in the actual representations made and the resulting reliance); *Knoop*, 2007-Ohio-1371, ¶31 (holding that the fact a patient received and read the claimed standardized document "does not lead to the conclusion that the patient interpreted the terms of the document in a certain way or that the patient detrimentally relied

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reversed a denial of class certification, noting that the U.S. Supreme Court had declared that predominance is 'readily met' in certain consumer or securities violations. *Id*., 429. *Cope* emphasized the fact that the state statute required that anything pertaining to the issuance or delivery of life insurance in Ohio be incorporated into a single instrument, which constituted the entire contract between the parties and served as notice of all negotiations and matters between the parties. *Id*., 433-34.

upon that interpretation"); *Linn v. Roto-Rooter, Inc*., 8th Dist. Cuyahoga No. 82657, 2004-Ohio-2559 ¶18 (individualized questions predominated where customers challenged a miscellaneous supply fee charged in connection with services, which depended on the existence of facts specific to each transaction such as the value of the supplies and the type of work to determine whether customers received more or less in value than they paid).

There is thus no uniform or clear-cut answer over whether a potential class member relied on Floros' actual recommendation to see KNR or based their determination on other advertising and referral sources. And the mere fact that Floros treated a KNR patient is not enough to prove reliance. There would have to be an individual inquiry into each case. Reliance cannot be inferred here.

6. Individual inquiries into each class member would be needed to determine if Floros' knew that KNR deducted the full narrative fee amount from their client's settlement.

As discussed earlier, to prove a claim for unjust enrichment, Plaintiffs would have to show "knowledge by the defendant of the benefit." *See Ohio Edison Co. v. Direct Energy Business*, LLC, N.D. Ohio No. 5:17 CV 746, 2017 U.S. Dist. LEXIS 117025 (July 26, 2017)(dismissing an unjust enrichment claim because plaintiffs failed to allege how the defendant knew about the benefit when the defendant was allegedly not responsible for keeping track of payments). Here, Plaintiffs have failed to plead any facts showing that Floros knew that his narrative reports were allegedly worthless.

Plaintiffs have also failed to plead any facts showing that Floros knew that KNR deducted the narrative fee from Plaintiffs' settlement. This is because KNR's narrative fee payment to Floros did not hinge on Plaintiffs settling their personal injury claims. Rather, KNR

paid Floros his fee for producing a narrative report no matter if the KNR client recovered money in a settlement or judgment.

That said, even if Plaintiffs could show that Floros became aware of when KNR deducted a narrative fee from a client's settlement proceeds, this would require an individual inquiry into each case. This makes the unjust enrichment claim improper for class certification.

7. Individual inquiries would be needed to determine whether Plaintiffs suffered damages.

Plaintiffs in class-action suits must show that they can prove, through common evidence, that all class members were in fact injured by the defendant's actions. *Felix v. Ganley Chevrolet*, Inc., 145 Ohio St.3d 329, 2015-Ohio-3430, 49 N.E.3d 1224, ¶ 33. "If the class plaintiff fails to establish that all of the class members were damaged (notwithstanding questions regarding the individual damages calculations for each class members), there is no showing of predominance under Civ.R. 23(b)(3)." *Id*. ¶35.

For instance, in *Felix*, the Ohio Supreme Court vacated the trial court's order certifying the plaintiffs' proposed class of consumers who purchased vehicles from particular car dealerships and signed purchase contracts that allegedly contained an unconscionable arbitration clause. The Ohio Supreme Court held that the class, as certified, failed because there was 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 ¶ 37.

In *Hoang v. E*trade Group*, 151 Ohio App.3d 363, 2003-Ohio-301, 784 N.E.2d 151 (8th Dist.), the court also reversed a trial court's order granting certification because not all of the

potential members suffered injury from E*Trade's system interruptions, and some may have benefitted. *Id* .¶¶19-24 ("The trading of customers who were impacted by the system interruptions would have to be analyzed on a 'trade by trade' basis to determine what price the customer might have obtained had the system interruption not occurred.").

In *Estate of Mikulski v. Centerior Energy Corp*., 8th Dist. Cuyahoga No. 107108, the court also reversed a trial court's order granting certification when the plaintiffs failed to show actual injury to all class members. In that case, the plaintiffs alleged that the alleged breach of fiduciary and misrepresentation itself proves injury and that there is no separate requirement to show actual damages. *Id*. ¶¶ 61-65. The plaintiffs also alleged there was no need to prove damages when there was an "informational" injury. *Id.* The Eighth District rejected both arguments and held that the class members lacked a sufficient injury to confer standing and warrant class certification. *Id*. ¶73.

Plaintiffs Class B fails the predominance requirement because they cannot show how all the class members suffered an injury in fact. Because if a narrative report was helpful or necessary for a member, then that member did not suffer an injury in paying for the helpful or necessary narrative report. As a result, a mini trial would be needed for each case to determine the value of the narrative report in each claim.

Moreover, like with Reid and Norris, Class B would include several members who received a reduction in chiropractic bills that was greater than the narrative fee payment. In those cases, the Plaintiffs would have suffered no damages. Plaintiffs' overbroad Class B would also include people that Floros did not recommend or refer to ASC, like Norris. Those members would not have suffered any injury, since KNR would not have paid a kickback referral fee to Floros on a case that Floros did not refer to KNR.

8. *In re: Binder* and *Myer v. Preferred Credit* are noncontrolling and distinguishable as they concern trustee fiduciary duties in probate court and broker disclosure requirements specifically set forth by statutes.

Floros expects that Plaintiffs will argue that they do not have to prove causation or actual damages based on *In re: Binder*, 137 Ohio St. 26 (1940) and *Myer v. Preferred Credit,* 117 Ohio Misc. 2d 8, 9, 2001-Ohio-4190, ¶ 23, 766 N.E.2d 612 (C.P. 2001). *Binder* concerned duties owed by a trustee under an express testamentary trust subject to probate court supervision. In that case, the Ohio Supreme Court noted the special and unique position of a trustee:

> "The law is jealous to see that a **trustee** shall not engage in double dealing to his own advantage and profit. The reason is not difficult to discover when **trusteeship** is primarily and of necessity a position of trust and confidence, and that it offers an opportunity, if not a temptation, to disloyalty and self-aggrandizement. **The connotation of the word and name 'trustee' carries the idea of a confidential relationship calling for scrupulous integrity and fair dealing."**

Id. (emphasis added). Thus, in the world of fiduciaries and probate law, a trustee has one of the highest duties of undivided loyalty to the beneficiary. Based on this duty, *Binder* held that an estate has a right to rescind a transaction when a trustee breaches their duty of undivided loyalty and is guilty of self-dealing, even if the estate has not suffered a loss. *Id*. 57.

Binder has no application here. First, Ohio courts have refused to extend *Binder* to situations not involving land trust certificates or where a trustee violates their duty of loyalty in buying securities. *Cent. Natl. Bank v. Brewer*, 8 Ohio Misc. 409, 413, 220 N.E.2d 846 (C.P.1966)("No reason appears for extending the conclusions announced in the *Binder* and *Stone* cases to situations not covered by the facts furnishing a setting for such decisions.")(quoting *In re Estate of Stafford* (1946), 46 Ohio Law Abs. 260); *In Re Estate of Stone*, 138 Ohio St. 293, on page 302, 34 N.E.2d 755, 760, 134 A.L.R. 1306("In the *Binder* case the general rule is laid down that a trustee violates his duty of loyalty if he buys securities."). In fact, since *Binder* was

decided in 1940, it has only been cited in appellate cases involving trustees, apart from one mortgage broker case.

Second, *Binder* was a probate decision where money judgments were not permitted. Plaintiffs, in contrast, are seeking money judgments against Defendants. Third, Ohio law has never held that chiropractors or medical professionals hold the same heightened fiduciary duties that a trustee owes an estate. Thus, if this Court accepts Plaintiffs' argument, then it would be creating a new heightened fiduciary standard for medical professionals.

Third, even if *Binder* were applicable, it does not establish predominance. The equitable remedy of rescission still requires individual proof. And the party seeking rescission must give back to the wrongdoer the benefits received under the agreement. *Miller v. Beighler*, 123 Ohio St. 227, 233, 174 N.E. 774 (1931). Thus, if Plaintiffs want to recover the narrative fee payment, they will need to return to Defendants the value of narrative reports rendered in each case. Individual proof of whether a narrative report helped settle case would be required in thousands of cases.

Fourth, there is higher burden of proof when a party seeks the equitable remedy of recession based on claims of fraud and the finding of fraud must be "clear and convincing. *Morris v. Investment Life Ins. Co*. (1969), 18 Ohio App.2d 211, 47 O.O. 349, 248 N.E. 216; *Schluter v. PSL, Inc.*, 5th Dist. Richland Case No. 96-CA-110, 1998 Ohio App. LEXIS 776 , 15 (Feb. 3, 1998) ("The law is clear that the evidence necessary to sustain a finding of fraud as a basis for equitable rescission or reformation of a written agreement must be clear and convincing."). Thus, to the extent that Plaintiffs' Class B claims are based on fraud and equitable rescission, Plaintiffs must prove that certification is warranted by "clear and convincing" evidence, which they have failed to do.

And fifth, Ohio courts have routinely held that common-law breach of fiduciary claims require proof of injury and that the breach of fiduciary itself does not constitute injury. *Strock v. Pressnell*, 38 Ohio St. 3d 207, 527 N.E.2d 1235 (1988); *In Crow v. Fred Martin Motor Co*., 2003 Ohio App. LEXIS 1230, 2003-Ohio-1293 (9th Dist. 2003); Holiday Props. Corp. v. Lowrie, 2003 Ohio App. LEXIS 1077, 2003-Ohio-1136 (9th Dist. 2003)(A claim of fiduciary duty requires proof of "an injury resulting proximately therefrom."); *Estate of Mikulski v. Centerior Energy Corp.*, 8th Dist. Cuyahoga No. 107108, 2019-Ohio-983("The elements of breach of fiduciary duty show that the breach of the duty cannot constitute the injury itself; the breach of duty and injury are two separate elements.")(collecting cases).[31]

Like *Binder*, Plaintiffs' reliance on *Myer v. Preferred Credit*, 117 Ohio Misc.2d 8, 2001-Ohio-4190, 766 N.E.2d 612 (C.P.) also lacks merit. *Myer* concerned a "secret profit" rule or secret fee-splitting agreement between brokers, which is not permitted under statutory law. The

[31] *Estate of Mikulski v. Centerior Energy Corp.*, 8th Dist. Cuyahoga No. 107108, 2019-Ohio-983, ¶ 63("Many appellate districts have recognized that the misrepresentation or breach of duty itself is not the injury. *See Huffman v. Groff*, 4th Dist. Athens No. 10CA54, 2013-Ohio-222, ¶ 43 (affirming the trial court's dismissal of the plaintiff's claim for breach of fiduciary duty because "there [was] no evidence that Ray or the Hollar have suffered, or will suffer, any damages as a result of Roxanne's alleged misconduct."); *Kademian v. Marger*, 2d Dist. Montgomery No. 24256, 2012-Ohio-962, ¶ 64-66 ("[T]he appropriate consideration in breach of fiduciary duty is not whether the alleged wrongdoer benefitted — it is whether an injury proximately resulted from the breach. * * * [T]he focus should be on the damages sustained by Kademian as a result of Marger's alleged breach of fiduciary duty."); *KMA Acquisitions Corp. v. Coleman*, 10th Dist. Franklin No. 92AP-1635, 1993 Ohio App. LEXIS 5108, *7 (Oct. 19, 1993) (affirming dismissal of the case because the plaintiff's complaint failed "to allege any injury to plaintiff"). *Compare Camp St. Mary's Assoc. of the W. Ohio Conference of the United Methodist Church, Inc. v. Otterbein Homes*, 176 Ohio App.3d 54, 2008-Ohio-1490, 889 N.E.2d 1066, ¶ 19 (3d Dist.) ("[T]his cause of action arises based on the parties' actions when Otterbein Homes allegedly made its representations to the Association and the land and money were transferred to Otterbein Homes. Should the Association prove its claims, it will have suffered injury, and therefore, it has individual standing to bring a claim for breach of fiduciary duty.").

plaintiff was alleging that the broker violated his statutorily imposed fiduciary duties under Ohio Mortgage Broker Act and R.C. Chapter 1322.

Myer's ruling was based on controlling statutory law where the violation of the statute itself was considered an injury. This case does not involve statutory law or brokers. Rather, Plaintiffs are asserting a common-law claim for breach of fiduciary and unjust enrichment, which both require proof of injury.

Indeed, Ohio courts have already rejected the argument that *Meyer* should apply to cases not involving brokers, mortgages, and R.C. 1332. *See, e.g., Estate of Mikulski v. Centerior Energy Corp*., 8th Dist. Cuyahoga No. 107108, 2019-Ohio-983, ¶ 65. ("We find that the Ohio cases to which plaintiffs cite *** *Myer v. Preferred* Credit, Inc., 117 Ohio Misc.2d 8, 2001-Ohio-4190, 766 N.E.2d 612 (C.P. 2001) *** are both noncontrolling and distinguishable as they concern broker disclosure requirements specifically set forth by statutes."). This Court should do the same here.

9. Individual inquiries would be needed into Plaintiffs' "Class A" claim.

As discussed earlier, Plaintiffs' "Class A" must be stricken because it seeks to certify class claims that were not alleged in Plaintiffs' complaint. Floros cannot be expected to respond and defend himself without conducting any discovery on these new accusations. Floros should also have the opportunity in dismissing these new claims since they have no legal basis.

That said, it is clear on its face that "Class A" claims are improper for certification because it would require individual inquiries into Plaintiffs' allegations of unlawful solicitation, unlawful referrals to other medical providers, and unlawful charges for chiropractic treatments. This Court would have to examine the conversations between ASC's telemarketers and each potential class member. This Court would also have to look to see if each potential class member

had health insurance. If the class member did have health insurance, this Court would have to look at the class member's deductible and copay to determine if it would be cheaper to use insurance. This Court would also have to look at the value of reductions in each case. This Court would have to talk to each adjuster to see if they would have offered more money if the injured victim was not a client of KNR and did not treat with Floros or Ghoubrial. This Court would have to talk to each client to see if they benefited from the treatment that Floros and Ghoubrial provided and determine the worth of the benefit.

In her testimony, Plaintiff Reid even agreed that there would have to be individual inquiries into each case to determine whether a client was pressured for treatment or whether the treatment was detrimental to a client's case:

> Q And whether a certain client felt pressured into unwanted or unneeded chiropractic care, each of those cases would be different, true?
> **A Yes.**
> Q It's not true in your case, but if it's true in somebody else's, they'd have to look at that particular case, fair?
> **A Yes.**
> ***
> Q Okay. And if we wanted to find out whether or not treating with a chiropractor was detrimental to any specific client's case, we'd have to look at all those cases separately to determine that?
> Q True?
> **A I would say, yes.**
> Q And that's because whether your treatment with Akron Square was detrimental or beneficial to your case has nothing to do with whether it was beneficial or detrimental to somebody else's case, true?
> **A True.**

Id. 217, 290-291. Plaintiff Reid also admitted that she was not pressured to treat with Floros, and that the treatment was helpful:

> Q And you went to those visits with the chiropractor because you believed you needed that treatment, true?
> **A True.**
> ***
> Q I mean, you would have stopped going if it didn't help, true?

A Correct.
Q The reason you continued to go was because the chiropractic treatment was effective for you?
A Yes.
***
Q You're not complaining about the treatment the chiropractor gave you, are you?
A No.
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.
Q Okay. So if we look at your answer to Interrogatory Number 29, and before you told me that the conflicted legal representation was your own internal conflict because you were vulnerable or whatever the words are you used, but that's not the answer you gave when you were under oath answering these interrogatories, is it? Would you agree your answer to Interrogatory Number 29 is completely different from what you told me before about conflicted local representation?
A Yes.
Q And your answer to Interrogatory Number 29, it indicates "pressuring clients into unwanted and needed chiropractic care." And you've already told us they didn't do that to you. Do you know anybody they did do that too?
A I'm unsure.

Id., 100-102, 239-240. And as discussed earlier, Reid testified that her chiropractic bills were reasonable and that she benefited when ASC reduced her bill by $525. *Id*. 297-298.

These and countless other individual considerations will predominate (qualitatively and quantitatively) over any common legal or factual questions. There is no generalized proof that can answer these questions. Thus, even if Plaintiffs had alleged the "Class A" claim against Floros in their Complaint (which they did not), this Court would have to look at each individual case to determine whether there was unlawful solicitation, price gouging, and unlawful referrals, as well as whether each member suffered actual damages.

F. Class B is too broad and includes claims against chiropractors that are not party to this action.

Plaintiffs have given the following definition for Class B:

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

This class definition is too broad. In violation of due process, it would include chiropractors and businesses that are not party to this action. It also goes beyond allegations in Plaintiffs' Fifth Amended Complaint and would also members who were not harmed by Defendants' alleged misconduct *Stammco,* 136 Ohio St.3d 231, 2013-Ohio-3019, ¶ 53("If a class is defined so broadly as to include a great number of members who for some reason could not have been harmed by the defendant's allegedly unlawful conduct, the class is defined too broadly to permit certification."); *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); *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 …' ").

It would also be improper to certify a class without a representative who is a member of that class. *Gawry v. Countrywide Home Loans, Inc*., 640 F.Supp.2d 942, 950 (N.D.Ohio 2009)("[A]n litigant must be a member of the class which he or she seeks to represent at the time the class action is certified by the district court."). As of right now, Plaintiffs have only named class representatives that received chiropractic care from ASC. Plaintiffs have named representatives for the other unknown "chiropractors" employed at other clinics.

Moreover, Plaintiffs' only evidence in support of their alleged claim that narrative fee payments were "automatic" for certain chiropractors are a few emails from 2012 where KNR's office manager asked attorneys to pay narrative fees for certain clinics and chiropractors. Thus, even assuming if Plaintiffs' "automatic" payment claim is true (which it is not), then this would not support class claims for narrative fees before 2012. This overly broad class would also include KNR clients that had cases in litigation, where it is undisputed that narrative expert reports are necessary. This overly broad class would also include KNR clients that Floros and other chiropractors did not refer to KNR.

G. The named Plaintiffs' claims do not typify those of other class members and there are no common questions that would drive aggregate litigation

The commonality requirement of Civ.R. 23(A)(2) requires the presence of "questions of law or fact common to the class." This satisfied only where there is a common nucleus of operative facts or a common liability issue, *Hamilton v. Ohio Savs. Bank*, 82 Ohio St.3d 67, 71, 694 N.E.2d 442 (1998). Additionally:

> [I]n determining whether common questions of law or fact predominate over individual issues, it is not sufficient that common questions merely exist; rather, the common questions must represent a significant aspect of the ease and they must be able to be resolved for all members of the class in a single adjudication.

Schmidt v. Avco Corp., 15 Ohio St.3d 310, 313 (1984); *see also Walmart*, 131 S.Ct. at 2551"(Dissimilarities within the proposed class are what have the potential to impede the generation of common answers."); *General Telephone Co. of Southwest v. Falcon*, 457 U.S. 147, 157, 102 S.Ct. 2364, 72 L.Ed.2d 740. (Commonality "requires the plaintiff to demonstrate that the class members 'have suffered the same injury.'").

To certify a class action, the claims of the class representatives must also be typical of the claims of the class. Civ. R. 23(A)(3). "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). The typicality requirement of Rule 23(a)(3) serves to ensure that proof of the class representatives' claims will also prove claims of the class:

> "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. In other words, when such a relationship is shown, a plaintiff's injury arises from or is directly related to a wrong to a class, and that wrong includes the wrong to the plaintiff. Thus, a plaintiff's claim is typical if it arises from the same event or practice or course of conduct that gives rise to the claims of other class members, and if his or her claims are based on the same legal theory."

Baughman v. State Farm Mut. Auto. Ins. Co., 88 Ohio St.3d 480, 485, 2000- Ohio 397, 727 N.E.2d 1265 (2000).; *See also Wenner v. Midland Title Sec*., 5th Dist. Richland No. 03CA107, 2004-Ohio-3989, ¶ 50 (finding that the plaintiff's nonchalant attitude made his justifiable reliance atypical of other potential class members.).

The named Plaintiffs were not exposed to the same course of alleged "solicitation" and "referral" conduct. For instance, Floros did not refer Reid to KNR. Rather, according to Reid, a representative from ASC referred her to KNR. Ex. I, Reid Tr. 100-102; PL's Mot. Ex. 8, Reid Aff. In fact, Reid did not even treat with Floros on her initial visit; she treated with the chiropractor at ASC, Dr. Dumond.

Norris was also not solicited by KNR, ASC, or Floros. Rather, a family member referred Norris to KNR. And KNR recommend ASC to Norris. Thus, contrary the claims in Class B, Floros did not refer or recommend Reid or Norris to KNR. Their claims, therefore, are not typical. Both Norris and Reid lack justifiable reliance.

In support of their certification claims, Plaintiffs are also using the argument that Norris felt pressured to treat with Floros based an alleged statement he made to Norris that changing chiropractors could hurt her case. Reid did not have the same experience and does not claim that

Floros pressured her into receiving treatment. In fact, Reid signed a form stating that she was not pressured to seek treatment from ACS. Thus, because Norris has unique allegations that she was pressured to see Floros, her claim is not typical and lack commonality.

Both Reid and Norris also had reductions on their chiropractic bills greater than $200. Reid's chiropractic bill was reduced by $525. Norris chiropractic bill was reduced by $224. Because Floros would have a set-off defense against both Norris and Reid, their claims are also not typical and lack commonality.

Reid and Norris also both testified that the narrative reports were useful to their case but overpriced. They also both agreed—along with Petti—that Floros deserved compensation for the time that he spent on the narrative reports. This contradicts the Class B claim that the narrative reports were "worthless."

H. Plaintiffs' counsel will not fairly and adequately represent the members of the class.

Adequacy refers to the class representative's ability to protect all the members' interests in the action. *Musial Offices, Ltd. v. Cuyahoga Cty*., 2014-Ohio-602, PP 27-28 (8th Dist.). In making this determination, courts must consider two questions: "(1) do the named plaintiffs and their counsel have any conflicts of interest with other class members, and (2) will the named plaintiffs and their counsel prosecute the action vigorously on behalf of the class?" *Id*., citing *Hanon v. Dataproducts Corp*., 976 F.2d 497, 508 (9th Cir. 1992);*New Albany Park Condo. Assn. v. Lifestyle Communities, Ltd.,* 195 Ohio App.3d 459, 2011-Ohio-2806, 960 N.E.2d 992, P 53 (10th Dist.).

Plaintiffs' lead counsel, Petter Pattakos, is a direct competitor of KNR and practices personal injury litigation in the same location as KNR. [32] This means that Pattakos stands to receive a benefit (i.e., more clients) from any harm this lawsuit causes to the reputation of KNR and their business contacts, which includes Floros and Ghoubrial. The benefit of more clients to Pattakos could be great, since KNR is one of the largest personal injury law firms in Northeast Ohio.

Indeed, Pattakos has not been shy about using this lawsuit to promote his law firm on social media and the press. And based on some comments on his Facebook page, it has helped him get new clients.[33] This creates a conflict with potential class members because Pattakos has a financial incentive in trying to take down Defendants and promote his law firm, rather than resolve the pending class claims.

Pattakos has also been vocal that his motive in suing Defendants also goes beyond the actual class claims. He has indicated to Defendants (and on social media) that his goal is to "reform" how large plaintiff firms and personal-injury healthcare providers conduct business in Ohio.[34] This creates a conflict for the class members that only want reimbursement for litigation expenses, and not to take down large personal-injury firms.

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[32] Pattakos Law Firm LLC advertises "personal injury" as a practice area. https://www.pattakoslaw.com/. On their website, they include the following description: "Our law firm is not like some personal-injury firms that take every case that comes through the door. We do not engage in mass advertising, we do not operate on a volume business-model, and we direct our client representations based on our clients' needs, not our own."

[33] https://www.facebook.com/pattakoslaw/

[34] On his law firm website where he advertises his personal injury services, Pattakos even takes a dig at larger plaintiff firms: "Our law firm is not like some personal-injury firms that take every case that comes through the door. We do not engage in mass advertising, we do not operate on a volume business-model, and we direct our client representations based on our clients' needs, not our own." https://www.pattakoslaw.com.

Pattakos has also—and continues—to make potentially defamatory accusations against Defendants that have nothing to do with the pending claims, which Defendants have discussed in past motions. This creates a huge conflict for potential class members. Because if the named representatives endorse these false accusations, they may potentially liable for defamation under Ohio law. *Am. Chem. Soc. v. Leadscope, Inc*., 133 Ohio St.3d 366, 2012-Ohio-4193, 978 N.E.2d 832(the Ohio Supreme Court indicated that a client can be vicariously liable for their attorney's defamatory statements if the client authorized or ratified the statements).[35]

Pattakos has also engaged in a public smear campaign against Defendants and their business contacts on social medial and local news outlets. This Court has even opined that some of the social media posts are misleading. As held in *Creative Montessori Learning Centers v. Ashford Gear LLC*, Case No. 11-8020, 2011 U.S. App. LEXIS 23324 (7th Cir. November 22, 2011), attorney misconduct in misleading potential class members can be grounds for finding that the counsel cannot adequately represent the class. In *Creative Montessori Learning Centers* defendant opposed certification by arguing that class counsel's misconduct showed that counsel would not adequately represent the class. *Id*. 8. The alleged misconduct was that plaintiffs' counsel obtain material on the false promise of confidentiality and implied to potential putative class members that the class had already been certified. Id. The district court ruled that the proper

[35] In *Am. Chem. Soc. v. Leadscope, Inc*., 133 Ohio St.3d 366, 2012-Ohio-4193, 978 N.E.2d 832, the plaintiffs alleged that the defendants breached employee agreements and misappropriated trade secrets. The defendants denied all claims and filed counterclaims seeking damages from the plaintiffs for unfair competition, tortious interference with business relations and defamation. In their counterclaim, the defendants contended that the plaintiffs' claims were based on speculation, lacked probative evidence, and not legally valid. The defendants also claimed that they were defamed by statements that the client's counsel made to the press. The jury came back in favor of the defendants and awarded them $26.5 million in civil damages on their counterclaims for defamation and tortious interference. The Ohio Supreme upheld the award and the claim for tortious interference, but reversed the defamation claim because there was no evidence that the client ratified or authorized the attorney's press comments.

sanction for the improper conduct was discipline by the bar association and not the denial of class certification. *Id.* The United Stated Court of Appeals for the Seventh Circuit disagreed, reversing the decision and remanding the case with instructions to re-evaluate the gravity of class counsel's misconduct and its implications for the likelihood that class counsel will adequately represent the class. *Id*. 14-15.

Judge Posner wrote that "[c]lass counsel owe a fiduciary obligation of particular significance to their clients when the class members are consumers, who ordinarily lack both the monetary stake and the sophistication in legal and commercial matters that would motivate and enable them to monitor the efforts of class counsel on their behalf" *Id*. 9. Judge Posner further stated that in such cases, "the court takes the place, as monitor of counsel, of nominal clients" *Id.* "When class counsel have demonstrated a lack of integrity, a court can have no confidence that they will act as conscientious fiduciaries of the class" *Id*. 12. The Seventh Circuit further rejected the position that "'only the most egregious misconduct' by class counsel should require denial of class certification on grounds of lack of adequate representation" *Id.* Rather, the Seventh Circuit held that "[m]isconduct by class counsel that creates a serious doubt that counsel will represent the class loyally required denial of class certification" *Id*.

Lastly, Pattakos has no experience with class action litigation. His recent improper attempt at certifying claims not alleged Plaintiffs' operative complaint reflects his lack of experience. No qualified counsel would make such a mistake, which has needlessly wasted this Court's and Defendants' time.

Taking together Pattakos' conflicts of interest with potential class members, his past misconduct, and his lack of class action experience and knowledge, this Court should find that he is inadequate representative.

VIII. Conclusion

In summary, Floros requests that this Court deny Plaintiffs' motion for class certification these reasons:

1. Plaintiffs have improperly added new class definitions, theories, and allegations that were not pleaded in their operative Fifth Amended Complaint.

2. Plaintiffs' "expert" testimony cannot be offered in support of class certification because their opinions are unreliable, irrelevant, untimely, and inadmissible.

3. Plaintiffs have offered no credible evidence of a quid pro quo relationship or that the narrative reports were kickback payments.

4. Plaintiffs lack standing for their breach of fiduciary and unjust enrichment claims against Floros.

5. Plaintiffs have failed to satisfy the requirements under Civ. R. 23(B)(3) and cannot prove that the questions of law or fact common to the members of the class predominate.

6. Plaintiffs class B fails because of the individual determinations needed. This would include: 1) whether a fiduciary relationship existed for each member; 2) whether Floros' narrative reports were worthless or had some value for each class member; 3) the content of each narrative report and the corresponding medical records; 4) Floros' knowledge of whether the narrative fee was deducted from the client's settlement; 5) how the narrative report affected each claim; 6) whether the case was in litigation or close to being filed; 7) whether the attorney used the narrative report as leverage in settling a case; 8) whether the client and attorney agreed to request the narrative report and approved the fee; 9) whether each class member relied on Floros' recommendation to seek legal representation from KNR; 10) whether the adjuster would have agreed to a settlement without a narrative causation statement; and 11) whether the each class member suffered an injury.

7. Even it was proper alleged, Class A still fails because of individual determinations needed. This would include 1) conversations between ASC's telemarketers and each potential class member: 2) whether Floros unlawfully solicited each member; 2) whether Floros unlawfully referred each class member to other medical providers; 3) whether Floros unlawfully charged for chiropractic treatment; 4) whether each potential class member had health insurance and corresponding deductible and copays; 5) whether the bills were reduced; 6) whether class member had health insurance and their deductible and copay amounts; 7) whether each adjuster would have offered more money if the injured victim was not a client of KNR and did not treat with Floros or Ghoubrial; 8) whether the client benefited from the treatment that Floros and Ghoubrial and the worth of the benefit; 9) whether the member suffered damages.

8. Plaintiffs and their own witnesses have testified that each members' case would require an individual inquiry into whether they have a valid claim.

9. Plaintiffs' class definitions are too broad and ambiguous.

10. Plaintiffs have failed to satisfy the typicality and commonality requirements under Civ. R. 23(A) because the named Plaintiffs' claims are different from those of other class members and they did not suffer the same alleged damages.

11. Plaintiffs have failed to the adequacy requirements under Civ. R.23(A) because the named Plaintiffs' counsel will not fairly and properly represent the members of the class.

Respectfully submitted,

/s/ Shaun H. Kedir
Shaun H. Kedir (#0082828)
KEDIR LAW OFFICES LLC
1400 Rockefeller Building
614 West Superior Avenue
Cleveland, Ohio 44113
Phone: (216) 696-2852
Fax: (216) 696-3177
shaunkedir@kedirlaw.com
Counsel for Defendant Minas Floros

CERTIFICATE OF SERVICE

A copy of Defendant Floros' Brief in Opposition to Plaintiffs' Motion for Certification was served electronically on this 15th day of June, 2019. Notice of this filing will be sent to all parties by operation of the Court's electronic filing system.

/s/ Shaun H. Kedir
Shaun H. Kedir (#0082828)