IN THE COURT OF COMMON PLEAS
SUMMIT COUNTY, OHIO

MEMBER WILLIAMS, *et al.*, Plaintiffs, vs. KISLING, NESTICO & REDICK, LLC, *et al.*, Defendants.	Case No. 2016-CV-09-3928 Judge James A. Brogan **Reply in Support of Plaintiffs' Motion to Amend the Complaint to Conform to the Evidence**

Based on evidence discovered in April 2019 confirming the highly organized and standardized nature of the alleged price-gouging scheme at issue in this case, Plaintiffs immediately requested leave to amend their complaint to conform to this evidence, including to assert claims for violations of the Ohio Corrupt Practices Act. In response, Defendants have predictably argued that the proposed amendments are futile and that the proposed amendments would somehow unduly prejudice them, just as they have with the preceding amended pleadings Plaintiffs have filed.

These arguments both misrepresent the law at issue on Plaintiffs' new claims, ignore the essential reality of this lawsuit in which the Plaintiffs have faced extreme obstruction in discovering the extent and organized nature of the scheme at issue. There is no legitimate argument that Plaintiffs have been dilatory in pursuing discovery and relief in this lawsuit and it would be pointless and a waste of judicial resources to require Plaintiffs to file a separate lawsuit to adjudicate the new claims. Thus, as explained further below and in Plaintiffs' original motion, leave to file the Sixth Amended Complaint should be granted whether under Civ.R. 15(A) or Civ.R. 15(B).

I. The proposed amendments are not futile.

Defendants assert a series of arguments arising from their contention that Plaintiffs lack standing under the OCPA. *E.g.*, Floros Opp. at 4 ("Plaintiffs [are] thus seeking to file a claim with no client. This cannot be done in good faith."); KNR Opp. at 6 ("The futility of Plaintiffs' proposed

amendment is evidenced by the fact that they lack standing to pursue the proposed new claims against any of the putative new Defendants and KNR."); Town & Country Opp. at 8-9 (arguing that Plaintiffs lack standing because "Khan, Rendek, and Town & Country never treated Williams, Reid, Norris, and Harbour").

These arguments all fail because (1) the plain language of the OCPA broadly offers standing to any person threatened with injury from a pattern of corrupt activity; (2) Plaintiffs have pled their OCPA claims with requisite particularity by explaining in great detail how the fraudulent scheme operates; and (3) Plaintiffs have plausibly alleged that each Defendant participated in an unlawful scheme to defraud; and (4) Plaintiffs need not "pierce the corporate veil" to establish Defendants' personal liability.

A. Plaintiffs have standing under the OCPA.

"The plain language of the OCPA grants standing to anyone injured 'directly or indirectly' by conduct that violates the Act," and therefore provides "standing to a broader class" of persons than the federal RICO statute. *Lowe v. Ramsier*, 581 B.R. 843, 849 (Bankr.6th Cir.2018). *See also CSAHA/UHHS-Canton, Inc. v. Aultman Health Found.*, 5th Dist. Stark No. 2010-CA-00303, 2012-Ohio-897, ¶ 77 (discussing "Ohio's recognition of recovery for indirect injury" as "broader than the comparable federal RICO requirement."). Anyone who is threatened with injury from corrupt activity has standing to bring an OCPA claim. *Peirce v. Szymanski*, C.P. No. G-4801-CI-201101117-000, 2011 Ohio Misc. LEXIS 15427, at *8 ("Persons … threatened with injury by a violation of the OCPA may pursue a civil remedy"); *Bourke v. Carnahan*, 163 Ohio App.3d 818, 2005-Ohio-5422, 840 N.E.2d 1101, ¶ 12 (10th Dist.) ("The act thus provides that persons indirectly injured by violations of the act have standing."); and *Aultman* at ¶ 77 (discussing "Ohio's recognition of recovery for indirect injury").

When a group of defendants attempt to perpetrate a fraud through coordinated conduct, the

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OCPA does not require proof that each individual defendant directly caused injury to each plaintiff. For example, in *Iron Workers Local Union No. 17 Ins. Fund v. Philip Morris, Inc.*, 23 F.Supp.2d 771, 777 (N.D. Ohio 1998), the plaintiffs asserted an OCPA claim, alleging that a group of tobacco companies had unlawfully "shifted the large health care costs of smoking onto plaintiffs, proposed class members, and other health care payers," and that the companies "expected, foresaw, and planned this shift of expenses," to the detriment of "plaintiffs and all similar trust funds" due to the resulting "substantial expenditures" and "smoking-related illnesses and addiction." In rejecting defendants' arguments that plaintiffs lacked standing under the OCPA, the court explained:

> In choosing to broaden standing to bring RICO actions under state law, the Ohio General Assembly decided to widen the right to bring an action. Such determination is clearly a policy matter. Making this policy decision is within the prerogative of the legislature. Courts need show extreme deference to the policy determinations of the popularly elected legislature … Because the Ohio General Assembly has determined that persons indirectly injured should have standing to bring an action under the Ohio Pattern of Corrupt Activity Act, the Court finds defendants' standing argument here without merit.

Id. at 788.

Moreover, when the existence of an overarching scheme is an essential component of the theory upon which Defendants' liability is based, "the plaintiff is not required to prove that each defendant committed two or more predicate acts." *Unencumbered Assets Trust v. JP Morgan Chase Bank*, 604 F.Supp.2d 1128, 1157 (S.D.Ohio 2009). *See also In re Chrysler-Dodge-Jeep EcoDiesel Marketing, Sales Practices & Prods. Liab. Litigation*, 295 F. Supp. 3d 927, 979-980 (N.D.Cal.2018) (discussing that knowing participants in a scheme to defraud "'are legally liable for their co-schemers use of the mails or wires,'" such that all participants "can all be held liable for" using "the mails and wires in furtherance of the scheme"). Because the existence of an overarching scheme enables the participants to "divide up the work," plaintiffs may sufficiently allege injury under the OCPA by showing how the participants caused or threatened to cause them injury through the scheme. *Salinas*

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v. United States, 522 U.S. 52, 63, 118 S.Ct. 469, 139 L.Ed.2d 352 (1997).

Here, the proposed Sixth Amended Complaint alleges that Defendants caused and threatened to cause injury to the Plaintiffs and all putative class members through implementing and furthering the price-gouging scheme. *See, e.g.*, Plaintiffs' Motion, Ex. 1 (Sixth Amended Complaint ("SAC") ¶ 194 ("Plaintiffs and Class A members have all been directly injured, indirectly injured, and threatened with injury by Defendants' administration of the scheme. R.C.2923.34(A)."). Plaintiffs seek to represent a class of "current and former KNR clients who had deducted from their settlements any fees paid to Defendant Ghoubrial," where such persons received treatment from Ghoubrial as the result of a scheme by which KNR and its preferred chiropractors directed their patients to seek care from Ghoubrial. *Id.* at ¶ 149(A). The chiropractors' participation was an integral component of the scheme because Ghoubrial received the "vast majority" "of the patients of [his] personal-injury clinic" through chiropractor referrals. *See* Plaintiffs' Motion, at 15 (citing Ghoubrial Tr., 43:16–19). Since the scheme depended on chiropractor referrals, including from Floros, Khan, and Rendek, it is immaterial that Plaintiffs were not treated by each chiropractor or that each chiropractor did not interact with Plaintiffs.

Consistent with the OCPA's broad standing provisions and the substantial body of authority establishing that each defendant need not have actually committed two or more predicate acts against each plaintiff for purposes of OCPA liability,[1] the Court should reject Defendants'

[1] *See, e.g.*, *State v. Habash*, 9th Dist. Summit No 17071, 1996 Ohio App. LEXIS 281, at *15 (Jan. 31, 1996) (affirming conviction for violation of the OCPA where "the evidence established that defendant assisted" in the scheme, even though he himself did not commit "the actual acts"); *Dowling v. Select Portfolio Servicing, Inc.*, S.D.Ohio No. 2:05-cv-049, 2006 U.S. Dist. LEXIS 39340, at *19 (Mar. 7, 2006) ("To the extent [Defendants] argue they cannot be liable under Ohio RICO because they did not personally commit predicate acts, the Court finds such an argument to be without merit"); *Salinas*, at 64 (discussing that the law does not "require an overt act to be proven against every member of the conspiracy," because such a requirement "would render moot prosecutions for the offence nugatory."); *Assets Trust*, at 1157 ("Courts have therefore held that when liability is premised upon a conspiracy, the plaintiff is not required to prove that each defendant committed two or more predicate acts."); and *United States v. Corrado*, 286 F.3d 934, 937

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arguments that Plaintiffs do not have standing as to the new chiropractor defendants.

B. Plaintiffs have pleaded their OCPA claims with sufficient particularity.

Defendants next argue that the Sixth amended complaint fails to allege with requisite detail why their conduct gives rise to OCPA liability. Town & Country Opp. at 10 ("Plaintiffs make no effort identifying what statements and/or misrepresentations Khan and/or Rendek allegedly made to them.") and Floros Opp. at 14 ("Plaintiffs have failed to show any specific statements were knowingly false or otherwise gave a false impressions."). But consistent with the purpose underlying the "particularity" requirement—to provide Defendants with notice of the claims against them—Plaintiffs have pled in great detail that their claims against Defendants arise out of an overarching fraudulent scheme.

Ohio courts rely on federal case law to interpret an Ohio rule of procedure that is similar to the rule's federal version. *Myers v. City of Toledo*, 110 Ohio St.3d 218, 2006-Ohio-4353, 852 N.E.2d 1176, ¶ 18. Because Fed. R. Civ. P. 9(b) is nearly identical to Ohio Civ.R. 9(B), federal case law is instructive to the proper interpretation of Civ.R. 9(B). In interpreting the federal rule, the Sixth Circuit has explained that courts must balance the "particularity" requirement against "the policy of simplicity in pleading" established in Rule 8's standard of "simple, concise, and direct allegations." *Michaels Bldg. Co. v. Ameritrust Co., N.A.*, 848 F.2d 674, 679 (6th Cir.1988). As the two rules "must be read in harmony," "it is inappropriate to focus exclusively on the fact that Rule 9(b) requires particularity in pleading fraud." *Id.*, quoting 5 *C. Wright & A. Miller*, FEDERAL PRACTICE AND PROCEDURE § 1298, at 407 (1969).

A complaint satisfies the "particularity" requirement as to a "scheme to defraud" under RICO if it alleges how defendants made "misrepresentations or omissions which were reasonably calculated to deceive persons of ordinary prudence and comprehension.'" *Am. Eagle Credit Corp. v.*

(6th Cir.2002), quoting *Salinas* ("'[T]he supporters are as guilty as the perpetrators … so long as they share a common purpose, conspirators are liable for the acts of their co-conspirators.'").

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Gaskins, 920 F.2d 352, 354 (6th Cir.1990), quoting *Dana Corp. v. Blue Cross & Blue Shield*, 900 F.2d 882, 885 (6th Cir.1990). When numerous different actors participated in an alleged scheme, the plaintiff can satisfy the particularity requirement through alleging details about "the overall fraudulent scheme." *State Farm Mut. Auto. Ins. Co. v. Pointe Physical Therapy, LLC*, 107 F. Supp. 3d 772, 788 (E.D.Mich.2015).

For example, when the complaint alleges that defendants used the mails and wires to further a fraudulent scheme, "a detailed description of the underlying scheme and the connection therewith of the mail and/or wire communications, is sufficient to satisfy Rule 9(b)." *AIU Ins. Co. v. Olmecs Med. Supply, Inc.*, E.D.N.Y. No. CV-04-2934 (ERK), 2005 U.S. Dist. LEXIS 29666, at *34 (Feb. 22, 2005); *Schmuck v. U.S.*, 489 U.S. 705, 715, 109 S.Ct. 1443, 103 L.Ed.2d 734 (1989) ("The relevant question at all times is whether the mailing is part of the execution of the scheme as conceived by the perpetrator at the time"); *In re Sumitomo Copper Litigation*, 995 F.Supp. 451, 456 (S.D.N.Y.1998) ("Rule 9(b) does not require that the temporal or geographic particulars of each mailing or wire transmission made in furtherance of the fraudulent scheme be stated with particularity."); *Allstate Ins. Co. v. Total Toxicology Labs, LLC*, E.D.Mich. No. 16-12220, 2017 U.S. Dist. LEXIS 134517, at *19 (Aug. 23, 2017), citing *U.S. v. Kennedy*, 714 F.3d 951, 959 (6th Cir.2013) (discussing that allegations of an overall scheme and the defendants' participation are sufficient because "a defendant may be liable for mail fraud, even if [he] did not do the mailing himself.").

Here, the Sixth Amended Complaint contains sufficient particularity as to the structure and operation of Defendants' fraudulent scheme. *See*, e.g., Motion to Amend at 11 (discussing the evidence that KNR's conspiring "with chiropractors, including Defendant Floros, who employ telemarketers to solicit the clients directly on the firm's behalf, going so far as to send drivers directly to the clients' doorstep to transport them to the chiropractors' offices where they become engaged by the law firm."), 12 (discussing the evidence that KNR and chiropractors, like Floros,

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were constantly communicating to ensure the payment of narrative fees and to negotiate disbursement of settlement proceeds), 14 (discussing the evidence that Akron Square Chiropractic and KNR would consistently attempt to ensure that they sent individuals back and forth from one another), 15 (discussing the evidence that Floros and KNR would ensure that as many clients as possible were directed to receive care from Ghoubrial or Ghoubrial's practice), 16 (discussing the evidence showing that Floros "benefits from having KNR direct thousands of patients to attend multiple appointments with him…"), 24 (discussing the evidence that Khan and Rendek of Town & County "had an explicit agreement in place requiring KNR to send 'at least one' case to Town & Country "for every three" that was sent to KNR"); and 26-27 (discussing the evidence that Ghoubrial's involvement on meant that the amount of medical bills would increase for all involved). Consistent with the purposes underlying the "particularity" requirement, Plaintiffs have provided ample notice of their claims against Defendants.

C. Plaintiffs' OCPA allegations are beyond plausible.

Despite the substantial evidence, including voluminous sworn testimony of Defendants and former KNR lawyers, contained in the Sixth Amended Complaint, Defendants erroneously argue that Plaintiffs have not plausibly alleged the existence of a scheme that violates the OCPA. More specifically, the chiropractor Defendants claim that Plaintiffs have failed to plausibly allege that they have a financial incentive to participate in the scheme.[2] *See, e.g.*, Floros Opp. at 17 ("Plaintiffs'

[2] While the stricter "plausibility" standard applies to federal RICO claims, it is not clear that it applies to claims arising only under the OCPA, because Ohio courts generally apply the "no facts" standard to state-law claims, which asks whether it appears "'beyond a doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief.'" *Brown v. Carlton Harley-Davidson, Inc.*, 8th Dist. Cuyahoga No. 99761, 2013-Ohio-4047, ¶ 13, quoting *O'Brien v. Univ. Community Tenants Union, Inc.*, 42 Ohio St.2d 242, 245, 327 N.E.2d 753 (1975); *Dottore v. Vorys, Sater, Seymour & Pease, L.L.P.*, 8th Dist. Cuyahoga No. 98861, 2014-Ohio-25, ¶ 121 (holding "conversely" that plaintiffs "could prove no possible facts in support of their bribery claim absent allegations encompassing the missing elements that are required to establish a violation of the bribery statute."). In any event, Plaintiffs here have plainly met either standard.

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OCPA [claim] lacks plausibility because there is no financial incentive for Floros or other chiropractors to refer patients to Ghoubrial."); Town & Country Opp. at 11 ("As should be readily apparent, there is no financial incentive for Khan and Rendek to participate in such a conspiracy.").

This argument ignores the allegations showing that the chiropractors participated in the scheme precisely because it ensured them a steady stream of referrals, as well as a disproportionately high percentage of their fees from treating the KNR clients. *E.g.*, SAC ¶ 21, ¶ 36–¶ 44, ¶ 72, ¶ 78, ¶ 106–¶110, citing, *inter alia*, Lantz Tr. at 19:7–14; 298:19–300:16; Philips Tr. at 47:7–21; 50:2–11; 373:14–18 (confirming that "the whole point of the Columbus office was to keep Dr. Khan happy"). Indeed, paragraphs 109–110 are under a point heading titled, "The Defendant chiropractors are integral to the price-gouging scheme," and contain specific allegations citing evidence showing how the chiropractors benefit financially from the scheme.

Even apart from these allegations, Plaintiffs need not show that Defendants were financially incentivized to participate in the scheme to plausibly allege that Defendants' involvement. *See, e.g.*, *In re Duramax Diesel Litigation*, 298 F. Supp. 3d 1037, 1083-1087 (E.D.Mich.2018) ("The Sixth Circuit has" "repeatedly confirmed that concealment of material facts can constitute a fraudulent scheme sufficient to establish RICO liability.").

In light of this principle and the detailed evidence of the chiropractors' financial benefit summarized in the SAC, the Court need not dwell on Floros' attempt to rely on *Dottore v. Vorys*, C.P. No. CV 10 741375, 2012 Ohio Misc. LEXIS 142, at *25-34 (Aug. 3, 2012), for the proposition that an "Ohio RICO claim" fails "where the defendant did not actually gain any benefit in participating in the alleged scheme." Floros Opp. at 17. *Dottore*, however, only held that the plaintiffs' RICO claims failed to meet the "plausibility" standard because their RICO claims were based on bribery, an essential element of which required that the defendants "[got] something for the bribe." *Id.* at *34. The Eighth District affirmed, precisely because a claim for bribery requires "the purposeful

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corruption or improper influence of a public servant or party official." *Dottore v. Vorys, Sater, Seymour & Pease, L.L.P.*, 8th Dist. Cuyahoga No. 98861, 2014-Ohio-25, ¶ 116. Here, rather than bribery, Plaintiffs' OCPA claims are based on telecommunications fraud, mail fraud, and wire fraud, which do not require proof that the perpetrator had a specific financial motivation to defraud a class of persons. *See* R.C. 2913.01(B (for purposes of telecommunications fraud, to "defraud" includes causing "by deception, some detriment to another."); 18 U.S.C. 1341 and 1343 (imposing criminal liability for "transmit[ting] or caus[ing] to be transmitted" information "for the purpose of executing" a "scheme or artifice to defraud").

Nor does RICO liability depend on direct proof that a defendant participated in the unlawful scheme. It is axiomatic that whether a defendant participated in an unlawful scheme or conspired to so participate "may be inferred from acts of his which furthered the" unlawful scheme's objectives. *U.S. v Kopituk*, 690 F.2d 1289, 1323 (11th Cir.1982). A RICO claim is adequately pled when the complaint alleges, for example, that "an intricate relationship between all defendants" existed as part of a design "to perpetrate a scheme whereby Defendants agreed to conceal material facts" in furtherance of the scheme. *Church Mut. Ins. Co. v. Coutu*, D.Col. No. 17-CV-209-RM-NYW, 2018 U.S. Dist. LEXIS 22569, at *29 (February 2, 2018).

As discussed above, Plaintiffs have alleged in detail how Defendants violated the OCPA by implementing and furthering a scheme through which KNR, Ghoubrial, and one of several chiropractors—including Floros, Khan, and Rendek—have committed and attempted to commit repeated acts of telecommunications fraud, mail fraud, and wire fraud against masses of KNR clients. Such facts are sufficient at the pleading stage to show that a scheme existed, that Defendants cooperated in furthering the scheme, and that the operation of the scheme injured and threatened to injure Plaintiffs and the class members they seek to represent.

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D. The Town & Country Defendants face liability under the OCPA and for conspiracy to commit fraud regardless of whether an aiding and abetting claim is available against them.

Putative Defendants Khan and Rendek of Town & Country argue that Plaintiffs' claims against the new chiropractors must fail since "Ohio law does not recognize a tort of aiding and abetting fraud" or "any tortious act by a third party." Town & Country Opp. at 8-9. This argument, even if true, does not doom the Sixth Amended Complaint.

To the contrary, as discussed above, participating or to attempting to participate in acts of fraud is sufficient to violate the OCPA and federal RICO, in addition to well-established principles of conspiracy law as alleged in Count 1 of the Sixth Amended Complaint. *See Gosden v. Louis*, 116 Ohio App.3d 195, 219, 687 N.E.2d 481 (9th Dist.1996) (the existence of a conspiracy "does not require a showing of an express agreement between defendants, but only a common understanding or design, even if tacit, to commit an unlawful act."); *Pumphrey v. Quillen*, 102 Ohio App. 173, 178, 141 N.E.2d 675 (9th Dist.1955) ("[I]t is sufficient that the parties in any manner come to a mutual understanding that they will accomplish the unlawful design that the essential element of the charge of conspiracy (to defraud) is the common design, and that an affirmative fraudulent representation need not be shown, but that a concealment of the true nature of the transaction is sufficient to show fraud."); PROSSER ON TORTS, Section 109, at 1094 ("All those who actively participate, by co-operation or request, in a tortious act to defraud which results in damage, or who lend aid to the wrongdoers, or ratify or adopt the acts done for their benefit, are equally liable with him.").

Plaintiffs have sufficiently alleged that Khan and Rendek conspired with KNR and Ghoubrial to participate or attempt to participate in the price-gouging scheme in violation of the principles set forth above. SAC ¶ 21 (describing the structure and design of the scheme, including how Khan and Rendek participated in it); ¶ 37 (detailing how the chiropractors draw individuals into the scheme and ensure that they receive treatment from the scheme's participants); ¶ 41 (describing

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the agreement between Khan, Rendek, and KNR); and ¶ 44–¶ 45 (explaining that nearly all of KNR clients who treated with Khan or Rendek were treated onsite by Ghoubrial). The chiropractor defendants are not immune from liability on this basis, especially in light of Plaintiffs' detailed allegations regarding the chiropractor Defendants' participation in the scheme.

E. Plaintiffs are not required to "pierce the corporate veil" to recover on their new claims.

Khan and Rendek also make a conclusory argument that the Court cannot add the chiropractor Defendants to the lawsuit because Plaintiffs purportedly made "no effort to even allege that Town & Country's corporate veil should be pierced in order to hold Khan and Rendek personally responsible for acts they purportedly performed as agents of the company." Town & Country Opp. at 9-10. But where an individual personally violates Ohio law, "piercing the corporate veil" is unnecessary. *See, e.g.*, *Mohme v. Deaton*, 12th Dist. Warren No. CA2005-12-133, 2006-Ohio-7042, ¶ 9 ("[A] corporate officer can be held personally liable for tortious acts he or she has committed and, under such circumstances, a plaintiff need not pierce the corporate veil to hold individuals liable who have personally committed such acts."); *State ex rel. Cordray v. Evergreen Land Dev., Ltd.*, 7th Dist. Mahoning Nos. 15 MA 0115, 15 MA 0116, 2016-Ohio-7038, ¶ 20 (discussing that an individual can be held personally liable where he personally participates in unlawful conduct and the statutory scheme applies to an individual as well as to the corporate form); and R.C. 2923.34 (authorizing a civil proceeding against "*any person* whose conduct violated or allegedly violated" the OCPA). Moreover, plaintiffs have alleged that the chiropractor Defendants, including Khan and Rendek, exercised control over their clinics as the owners and operators. *See, e.g.*, Plaintiffs' Motion, Ex. 1, at ¶ 7 (alleging that the chiropractor defendants "own and operate clinics") and ¶ 41 (same).

II. The proposed amendments will not unduly prejudice Defendants.

Defendants' collective and varied assertions of "undue prejudice," they fail to convincingly explain why the proposed amendments also miss the mark. *See* Ghoubrial Opp. at 8 ("Permitting

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Plaintiffs' untimely Sixth Amended Complaint would deprive Dr. Ghoubrial, as well as the other defendants, of due process as they were not afforded the opportunity to conduct relevant depositions concerning the newly alleged conspiracy"); Town & Country Opp. at 6 ("[P]ermitting amendment of Plaintiffs' complaint for a sixth time will cause undue prejudice to Defendants."); KNR Opp. at 5 ("The prejudice inflicted all Defendants in this case by an amendment at this late date should be fairly obvious."); and Floros Opp. at 13 (claiming undue prejudice because "Floros will have [to] conduct new discovery and re-depose Plaintiffs in the new claims.").

A. The new allegations have been timely pursued and could not have been practicably alleged without access to the recently discovered evidence from Defendants Ghoubrial and Floros.

Plaintiffs' motion to amend sets forth in detail the evidence supporting the new claims and makes clear that this these claims could not have practicably been alleged until receiving Defendants Ghoubrial and Floros's testimony and documentary discovery, the production of which was intentionally delayed by Defendants until early April, days before the expiration of the class-discovery deadline. See Pls' Mot. at 1 (footnote 1), 14–16, 22–29.

Defendants nevertheless claim that the proposed amendments are untimely because "Plaintiffs have known the cost of the medical care provided by the medical defendants since the outset of the claims against" Defendants. *See* KNR Opp. at 3-4 and Floros Opp. at 8 ("The costs and reductions of" "medical bills is not 'new information.'"). To support this argument, Defendants rely on *Wright v. Nationwide Mut. Ins. Co.*, 9th Dist. Lorain No. 2363, 1976 Ohio App. LEXIS 6832, for the proposition that "a claim that 'new evidence' exists, by itself, does not justify leave to amend a complaint." KNR Opp. at 4; Floros Opp. at 8 and KNR Opposition at 4. But *Wright* is readily distinguishable from the circumstances under which Plaintiffs have sought leave to amend their complaint. In *Wright*, the plaintiff sought to amend her complaint on the basis of "new evidence," but failed to ever submit a proposed complaint to the trial court. *Id.* at *4. Thus, the Ninth District

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affirmed the trial court's decision to deny the amendment because it was based on nothing more than the plaintiff's "statement" that she had uncovered 'new evidence.'" *Id.* at *5. *Wright* does not stand for the proposition, as Defendants have urged, that a proposed amendment is improper if the proposed complaint actually sets forth or substantiates the "new evidence."

Additionally, here, unlike in *Wright*, Plaintiffs have shown that the proposed amendments are properly grounded in newly discovered evidence that collectively establishes a "previously-missing evidentiary link upon which the ultimate finder of fact, if it finds Plaintiffs' evidence credible and persuasive, could *conceivably* find merit in [their] class claims" that may depend on "proof of a systematic pattern and practice…" *See Jacobsen v. Allstate Ins. Co.*, 2012 Mont. Dist. LEXIS 61, *98 (Jan. 30, 2012). If Plaintiffs would have received this evidence in a timely manner, they they would have asserted their OCPA claims sooner. They should not now be punished as a result of Defendants' obstruction, particularly in the absence of any undue prejudice to the Defendants.

B. No undue prejudice would result from allowing the requested amendment.

Additionally, Defendants have failed to demonstrate that they have or will face any "obstacles" occasioned by the amendment "which they would not have faced had the original pleading" raised the same issues. *Hoover v. Sumlin*, 12 Ohio St.3d 1, 6, 465 N.E.2d 377 (1984) ("Appellants were not prejudiced by the addition of the" amendment "as they faced no obstacles by the amendment which they would not have faced had the original pleading raised" it); *See also Keiber v. Spicer Constr. Co.*, 2d Dist. Greene No. 94-CA-95, 1995 Ohio App. LEXIS 4958, at *10 (Nov. 8, 1995) (the party objecting to an amendment was "required to demonstrate some indicia of prejudice that would not have existed if the" substance of the amendment "had been raised in the initial pleading."). Indeed, to the contrary, Defendants have only taken advantage of the fact that the full extent of their conduct remained hidden for as long as it did.

Defendants' nevertheless attempt to rely on *Fowler v. Ohio Edison Co.*, 2008-Ohio-6587, ¶ 100

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to argue that the age of this case constitutes prejudice, *per se*. Floros Opp. at 12; KNR Opp. at 5. In *Fowler*, however, plaintiffs sought to amend their complaint after the court denied class certification. *Id.* at ¶ 20-21. Because the court had already ruled on certification, permitting the amendment would have unduly prejudiced the defendants. Here, unlike in *Fowler*, the Court has not yet ruled on certification. But more to the point, concerns of "undue prejudice" are minimized because Defendants have long been aware that Plaintiffs' allegations derive from the coordinated conduct that has been at issue in this case since the Second Amended Complaint was filed in March of 2017. That these allegations were not specifically made under the OCPA hardly requires the conclusion that Defendants will suffer "undue prejudice."

Likewise, Defendants cannot claim with a straight face that Plaintiffs have been dilatory in pursuing discovery in this case and all available avenues of relief.[3] As discussed above and fully in Plaintiffs' Motion, it only became clear that the proposed amendments were necessary after obtaining testimony and documentary evidence from Defendants Floros and Ghoubrial.

Moreover, even if Plaintiffs could somehow be found to have "delayed" in pursuing their claims, "delay, in itself, should not operate to preclude an amendment." *Hoskinson v. Lambert*, 5th Dist. Licking No. 06 CA 037, 2006-Ohio-6940, ¶ 32. Even where delay exists, courts have recognized that it is "a valid reason for the delay" when the moving party did not have evidence necessary to determine the extent of the parties' involvement in the alleged wrongdoing. *See, e.g.*, *Sheet Metal Workers Local No. 20 Welfare & Ben. Fund v. CVS Pharmacy, Inc.*, 305 F.Supp.3d 337, 345 (D.R.I.2018) ("[E]ven though the time between filing the complaint and moving to amend is considerable, Plaintiffs have in fact provided a valid reason for the delay" in that they "were under

[3] As reflected in the deposition transcripts filed in support of Plaintiffs' Motion for Class Certification, the depositions of Defendant Floros, former KNR attorney Amanda Lantz, and Defendant Ghoubrial were not completed until March 20, 2019, April 3, 2019, and April 9, 2019, respectively. In the midst of class-certification briefing, on May 23, 2019, Plaintiffs moved as quickly as reasonably possible to amend their complaint to add the proposed OCPA claims.

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the impression that the PBMs too were unaware of CVS's alleged pricing scheme."); and *In re Vitamins Antitrust Litigation*, 217 F.R.D. 23, 27 (D.D.C.2003) (granting motion to amend where plaintiffs "only recently became aware of the full extent of the proposed defendant's role in the conspiracy"). As discussed above, any purported "delay" on Plaintiffs' part is justified because until recently, Plaintiffs were not aware of the extent of Defendants' coordinated conduct, nor should they have been.

Defendants nevertheless assert broadly that the proposed amendments would require them to engage in substantial new discovery and result in substantial delay. *See* Town & Country Opp. at 6; Floros Opp. at 12-13; KNR Opp. at 5-6; Ghoubrial Opp. at 6-7. The Court should reject these conclusory assertions of prejudice, because the theory of Plaintiffs' claims—the existence of quid pro quo relationships and a price-gouging scheme—is unchanged.

Further, as to the new chiropractor defendants, Plaintiffs have requested the Court delineate a separate certification track that can take place while the currently pending motion for class certification is up on appeal. *See* Pls' Mot. at 3-4.

Indeed, the only "prejudice" to the Defendants is that Plaintiffs are now aware of and have evidence of the full extent of their fraudulent conduct despite having faced extreme obstruction in conducting discovery to date. This is in no way a basis for denying the requested Amendment.

III. The requested amendment is warranted under Civ.R. 15(A) or Civ.R. 15(B).

Defendants also argue at length that Ohio law, without exception, prohibits the use of Civ.R. 15(B) before trial. *See* Town and Country Opp. at 4, note 2 ("Ohio Civil Rule 15(B) has no application in matters that have not proceeded to trial."); Floros Opp. at 3 ("When there has been no trial, the use of Civ.R.15(B) to amend the pleadings is improper."); KNR Opp. at 1-2 ("Based upon controlling precedent in the Ninth District Court of Appeals, Plaintiffs' motion to amend to conform to the evidence pursuant to Civ.R.15(B) must be denied."); Ghoubrial Opp. at 5 ("[U]nder

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Ohio law Civ. R. 15(B) is wholly inapplicable when the matter has not yet proceeded to trial").

This argument is largely irrelevant given that regardless of its application the Court would be warranted in permitting leave to amend under Civ.R. 15(A), which requires courts to "freely give leave" to parties seeking to amend pleadings "when justice so requires." *State ex rel. Vindicator Printing Co. v. Wolff*, 132 Ohio St.3d 481, 487, 2012-Ohio-3328 ("[T]he language of Civ.R. 15(A) favors a liberal amendment policy and a motion for leave to amend should be granted absent a finding of bad faith, undue delay, or undue prejudice to the opposing party.").

In any event, Ohio courts, including the Ninth District, have ruled contrary to Defendants' arguments about Rule 15(B). For example, in *Sun Life Assur. Co. of Canada v. Belmont Properties, Inc.*, 9th Dist. Lorain C.A. Nos. 2957, 2958, 1980 Ohio App. LEXIS 14036, at *3 (Nov. 12, 1980), the Ninth District reviewed a trial court's order granting summary judgment, which stated:

> Although allegations of fraud appear in the briefs filed by Sun Life and Mellon National Mortgage in support of their motions for summary judgment and although Sun Life and Mellon claim that such allegations are supported by testimony obtained during the depositions … there were no such allegations appearing in the complaint of Sun Life and the cross-claim of Mellon at the time this Court considered the motions for summary judgment and made its ruling thereon. Indeed, Sun Life and Mellon, although they now allege fraud, made no attempt whatsoever to amend their respective claims until *after* summary judgments were granted against them.

Id. at *3-4.

Citing Civ.R. 15(B), the Ninth District reversed the trial court's order granting summary judgment. It found that, because "allegations of fraud appeared in the depositions that were timely filed by [the parties], they should have been considered in the trial court's determination as to whether or not to grant summary judgment." *Id.* at *4. In interpreting Civ.R. 15(B), the Ninth District further noted that Civ.R.(B) was not limited to circumstances in which a trial had already occurred, because "Rule 15(B) indicates that the pleadings can be amended, even after summary judgment, if necessary." *Id.* at *4-5.

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Similarly, in *Brown v. Learman*, 2d Dist. Miami C.A. Case No. 00 CA 30, 2000 Ohio App. LEXIS 5071 (Nov. 3, 2000), the court permitted an amendment under Civ.R.15(B) where the defendant had not objected to evidence that plaintiff gathered in discovery and submitted in pre-trial stipulations and briefs, because "an amendment may be implied where it is never raised by motion." *Id.* at *4-7. Thus, where a party discovers and files evidence relating to an unpleaded claim without its opponent moving to strike it or objecting to it as irrelevant, the court may find that the issue entered the case without the plaintiff formally moving to amend the complaint. *Id.*

These cases present circumstances where denial would be far more warranted than those at issue here, where Plaintiffs have timely pursued their claims in the face of extreme obstruction from the Defendants.

In sum, that it makes no sense for Defendants to argue that Civ.R. 15(B) requires denial of Plaintiffs motion when it allows amendment to conform to evidence "at any time, even after judgment" when Plaintiffs have moved for amendment at a much earlier point in the proceedings, precisely to conform to newly discovered evidence.

IV. Conclusion

To the extent Rule 15(B) does not apply here, the Court has every bit of discretion to permit amendment under Rule 15(A) and should do so in the interest of justice and judicial economy as explained fully in Plaintiffs' Motion to Amend.

Respectfully submitted,

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Certificate of Service

The foregoing document was filed on July 22, 2019, using the Court's electronic-filing system, which will serve copies on all necessary parties.

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