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 for Class-Action Certification and Appointment of Class Counsel under Civ.R. 23**

I. Introduction

In opposing certification of the three sets of class-action claims at issue, Defendants have failed to meaningfully address the evidence supporting Plaintiffs' allegations of three fraudulent schemes by which each member of all three putative classes was victimized. Unable to confront this evidence, Defendants assiduously seek to overcomplicate the Court's analysis by tossing forth a plethora of "issues" purporting to require "individualized inquiry," the resolution of which are either entirely irrelevant to the certification analysis or actually constitute common proof showing Defendants' class-wide liability. Not only do the Defendants misrepresent and deflect from the facts at issue, they disregard that courts in Ohio and nationwide routinely hold that minor inconsistencies in class members' interactions with defendants do not defeat class-certification where class-members credibly allege the existence of fraudulent schemes intentionally designed to defraud them.

Additionally, Defendants' approach ignores that the appropriateness of class-wide equitable relief, particularly so as to deter wrongdoing, further ensures predominance of common issues so as to warrant certification. While Defendants' opposition briefs assume the posture of parties to a run-of-the-mill business case regarding arms-length transactions of parties with equal bargaining power, they were not selling widgets here. Rather, Defendants are all licensed professionals who aggressively

marketed themselves to obtain a position of trust over the vulnerable car-accident victims whom they defrauded by their calculated schemes.

In urging the Court to ignore these key principles as well as the thrust of Plaintiffs' allegations and evidence, Defendants ask the Court for an extremely rigid misapplication of Rule 23's requirements that is further contrary to the well-established principle that the class-action mechanism is a tool of equity that trial courts are permitted wide discretion to apply.

The bottom line is that Plaintiffs have submitted substantial allegations supported by predominant common proof of three fraudulent schemes that damaged all defined class-members. As shown below, Defendants' arguments in opposition only serve to affirm that the Court should certify all three classes.

II. Plaintiffs have satisfied Civ.R.23's commonality, predominance, and typicality requirements as to Class A, the price-gouging class.

The bulk of Plaintiffs' motion for class-certification sets forth evidence showing that the Defendants conspired to subject KNR's clients to a price-gouging scheme by which the clients were duped into paying exorbitant and unconscionable rates for healthcare administered by Defendant Ghoubrial. Based on this evidence, the Plaintiffs have moved for certification of a class (Class A) including all current and former KNR clients who paid fees from their settlements to Defendant Ghoubrial for these charges.

In opposing certification of this class, Defendants mainly argue that individual issues predominate over common ones, contrary to the requirements of Civ. R. 23(B)(3). In making this argument, Defendants fail to meaningfully counter the evidence submitted by the Plaintiffs proving the existence of the scheme, and that every class member was damaged by it. Instead, Defendants misrepresent evidence that proves their fraudulent intent in a misleading effort to argue that because some of this evidence doesn't apply to every class member in exactly the same way, that this somehow precludes certification of a class. While this may be the best Defendants can do here, it

does not justify denial of class certification in the face of overwhelming evidence of a fraudulent scheme establishing central issues of liability to all Class A members. Additionally, Defendants fail to disprove Plaintiffs' entitlement to disgorgement and other equitable relief that further warrants certification of the price-gouging class.

In summary, as explained below, Defendants' misrepresentation and misanalysis of collateral issues does nothing to negate the common evidence showing that every class-member who was charged Ghoubrial's standard rates for the "treatment" he provided—regardless of the specific combination of treatment received—was in fact defrauded into and damaged by having paid those rates.

A. Proof of a fraudulent scheme affecting all class members dictates a "common sense approach" recognizing that the class members' common interest "is not defeated by slight differences in their positions," and "ensures that common questions predominate over individual issues at trial."

Under Civ.R.23(B)(3), "[c]ommon questions must predominate over any questions affecting only individual members" such that "a class action would achieve economies of time, effort, and expense, and promote" the "uniformity of decision as to persons similarly situated." *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 615 (1997) (internal citations omitted). The "common" questions "must be 'capable of class-wide resolution," meaning that the "truth or falsity will resolve an issue that is central to the validity of each one of the claims in one stroke.'" *Creech v. Emerson Elec. Co.*, S.D.Ohio No. 3:15-cv-14, 2019 U.S. Dist. LEXIS 66321, at *15 (Apr. 18, 2019), quoting *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 338, 131 S.Ct. 2541, 180 L.Ed.2d 374 (2011). At the certification stage, the Court is only to consider the merits of the claims "to the extent necessary to determine" whether the plaintiff has satisfied Civ.R. 23. *Cullen v. State Farm Mut. Auto Ins. Co.*, 137 Ohio St. 3d 373, 2013-Ohio-4733, 999 N.E.2d 614, ¶17; *Carder Buick-Olds Co. v. Reynolds & Reynolds*, 148 Ohio App.3d 635, 2002-Ohio-2912, 775 N.E.2d 531, ¶ 38 (2d Dist.).

It is true that if "the circumstances of each proposed class member need to be analyzed to prove the elements of the claim or defense, then individual issues would predominate and class certification would be inappropriate." *Augustus v. Progressive Corp.*, 8th Dist. Cuyahoga No. 81308, 2003-Ohio-296, ¶ 21. But a trial court abuses its discretion in denying class certification "by applying impermissible legal criteria and so narrowly applying Civ.R.23 to substantially hinder the remedial purpose of the rule." *Ojalvo v. Bd. of Trustees*, 12 Ohio St.3d 230, 236, 466 N.E.2d 875 (1984). *See also Carder Buick-Olds Co. v. Reynolds & Reynolds*, 148 Ohio App.3d 635, 2002-Ohio-2912, 775 N.E.2d 531, ¶ 31 (2d Dist.) ("[C]ertification should not be denied based on an overly narrow construction of Civ.R.23(B)(3).").

Accordingly, "when a common fraud is perpetrated on a class of persons, those persons should be able to pursue an avenue of proof that does not focus on questions affecting only individual members." *Cope v. Metro. Life Ins. Co.*, 82 Ohio St.3d 426, 430, 1998 Ohio 405, 696 N.E.2d 1001 (1998) (collecting cases). Where, as here, "a fraud was accomplished on a common basis, there is no valid reason why those affected should be foreclosed from proving it on that basis." *Id.* at 430; Particularly concerning fraud-based claims, "it would be senseless to require each of the members … to individually assert their fraud claims against the defendants, especially where a single underlying scheme, rather than a variety of distinct misrepresentations, is the fundamental basis for those claims." *Cope*, at 432 (internal quotations omitted). *See also Ritt v. Billy Blanks Enters.*, 171 Ohio App.3d 204, 2007-Ohio-1695, 870 N.E.2d 212, ¶ 69 (8th Dist.) ("Since liability depends on whether the marketing scheme utilized by defendants was misleading and/or deceptive, individualized testimony is not required regarding each person's decision whether or not to purchase the membership program.") (internal punctuation omitted).

In other words, where, as here, the class claims arise out of a fraudulent scheme, courts in Ohio and nationwide have properly taken a "common sense approach that the class is united by a

common interest in determining whether a defendant's course of conduct is in its broad outlines actionable, which is not defeated by slight differences in class members' positions, that the issue may profitably be tried in one suit." *Elkins v. Equitable Life Ins. Co.*, M.D.Fla. Civil Action No. 96-296-CIV-T-17B, 1998 U.S. Dist. LEXIS 1557, at *47 (Jan. 27, 1998). Here, despite Defendants' arguments to the contrary addressed below, it cannot be legitimately be disputed that gist of the Class A claims pertains to "a common nucleus of operative facts all pointing toward violations of the same legal interests." *Davis v. Avco Corp.*, 371 F.Supp. 782, 792 (N.D.Ohio 1974).[1]

B. Common proof predominates as to the existence of the price-gouging scheme and the damage it caused to each class-member.

Unable to credibly deny the evidence of their price-gouging scheme, Defendants attempt to rely on a misleading presentation that conflates and misapplies the commonality and predominance standards to argue that because all class members were not drawn into the scheme in the same way or otherwise identically affected by it, that common questions do not predominate. Remarkably, the Defendants acknowledge that "courts have long cautioned against putting any significant weight" on

[1] *See also Harman v. Lyphomed, Inc.*, 122 F.R.D. 522, 526 (N.D.Ill.1988) ("In this case, plaintiffs allege a continual, unchanging scheme on the part of all defendants, extending throughout the class period, to withhold information from the class members. The fraud alleged is common to all defendants and each plaintiff has the same motive to expose defendants' deceptions."); *In re NASDAQ Mkt.-Makers Antitrust Litigation*, 169 F.R.D. 493, 518 (S.D.N.Y.1996) ("Where many purchasers allegedly have been defrauded over time by similar misrepresentations, or by a common scheme to which alleged non-disclosures related, courts have found that the purchasers have a common interest in determining whether the defendants' course of conduct is actionable."); *Zinberg v. Washington Bancorp, Inc.*, 138 F.R.D. 397, 410 (D.N.J. 1990) ("Where all class members are united in their desire to establish the defendants' complicity and liability, individual issues, if they exist, are secondary."); *Saroza v. Ltd. Fin. Servs., L.P.*, D.N.J. Civil Action No. 16-6259 (JLL), 2018 U.S. Dist. LEXIS 150002, at *11-12 (Sep. 4, 2018) ("[I]n cases where it is alleged that the defendant made similar misrepresentations, non-disclosures, or engaged in a common course of conduct, courts have found that said conduct satisfies the commonality and predominance requirements."); *Shankroff v. Advest, Inc.*, 112 F.R.D. 190, 193 (S.D.N.Y. 1986) ("Since plaintiff's allegations focus on overall managerial decisions which affected all [of defendant's] clients, questions of oral representations or individual reliance do not overwhelm the issues common to the class."); *In re Am. Continental Corp./Lincoln S. & L. Secs. Litigation*, 140 F.R.D. 425, 431 (D.Ariz.1991) ("It is the underlying scheme which demands attention. Each plaintiff is similarly situated with respect to it, and it would be folly to force each" consumer "to prove the nucleus of the alleged fraud again and again.").

"lists of common issues" submitted by class-action Plaintiffs (KNR Opp. at 9; Ghoubrial Opp. at 39), but nevertheless go on to dedicate the bulk of their briefs to addressing the list of common questions presented by the Plaintiffs as to the price-gouging class. KNR Opp. at 8–38; Ghoubrial Opp. at 39–64. Not only does this presentation misrepresent and misanalyze the evidence going to Defendants' fraudulent intent and existence of the scheme, it effectively ignores the common evidence showing that all class members were damaged by the scheme, as explained fully below.

1. Evidence of Defendants' fraudulent intent applies on a class-wide basis to establish predominance notwithstanding Defendants' misleading efforts to argue to the contrary.

For example, the KNR Defendants spend 10 pages (nearly 20%) of their 54-page brief under a single sub-heading trying to convince the Court that because not all class members were "unlawfully solicited" by KNR via the well-documented *quid pro quo* relationships with chiropractors, that common questions somehow would not predominate. KNR Opp. at 14–24; *See also* Ghoubrial Opp. at 44–46, Floros Opp. at 60–63, 73–75 (making the same argument as to the predominance, commonality, and typicality requirements). This misses the point in a big way. Plaintiffs readily admit that not all class members were among the thousands of KNR clients solicited through the chiropractors who would help the firm circumvent rules barring direct solicitation by attorneys. *See* Pls' Mot. at 11–15. But it isn't necessary to prove that each class member was solicited in this way to have been subject to and damaged by the price-gouging scheme. Rather, the evidence of Defendants' referral trading only goes to show the existence of the larger scheme and the fraudulent intent behind it—including the firm's need to sustain a high volume of clients through and with the assistance of compliant chiropractors who were willing to send these clients to receive the fraudulent treatment from Ghoubrial. *See Id.* at 4–10. Evidence that some of the class members came to the firm in other ways would be irrelevant at trial, because Plaintiffs need only show to support their

claims that a substantial number of clients were in fact solicited in this manner in order to further the scheme. *Id.* at 11–15.

Further, to the extent such evidence could be relevant at all, it would only be so on a class-wide (not individual) basis to support an argument by Defendants that such *quid pro quo* referrals didn't actually take place on a widespread basis. In other words, the fact that Defendants' scheme was widespread, multifaceted, and ultimately successful does nothing to excuse them from class-wide liability under the applicable standards as summarized above. *Cantlin* at ¶ 46 (8th Dist.) ("Permitting a fraud because it was so successful that people didn't know they were being cheated only rewards the cheater's ingenuity and is hardly consistent with justice."); *Broomfield v. Craft Brew Alliance, Inc.*, N.D. Cal. No. 17-CV-01027-BLF, 2018 U.S. Dist. LEXIS 177812, at *39-40 (Sep. 25, 2018) (as to the "scienter" or intent element of fraud, "the question of" a defendant's "state of mind" is "common to the class"); *Garfinkel v. Memory Metals, Inc.*, 695 F.Supp. 1397, 1404 (D.Conn.1988) ("[T]he presence or absence of scienter ... are questions common to all members of the putative class.").

Defendants nevertheless continue, in an effort to overcomplicate the Court's analysis, to misrepresent various categories of evidence that was submitted by the Plaintiffs as proof of the existence of the overarching scheme. This includes Defendants' efforts to discount the evidence showing that they intentionally disregarded and suppressed feedback from auto-insurance carriers who were wise to Defendants' *quid pro quo* relationships and viewed treatment from Ghoubrial and the Defendant chiropractors as fraudulent and unworthy of compensation. KNR Opp. at 33–34, 36; Ghoubrial Opp. at 62. In response to this evidence (set forth at pages 31–43 of Plaintiffs' Motion), the Defendants argue that Plaintiffs must show that "each Defendant, separately, must have known that 'their relationships were viewed as fraudulent' by every insurance company and every insurance adjuster dating back to 2010." KNR Opp. at 33; Ghoubrial Opp. at 62.

This, again, misses the point. The fact that Defendants disregarded and suppressed this well-documented feedback from insurance representatives and their own attorneys—some of whom explicitly accused firm management of prioritizing the Defendant providers' interests over those of the class-members (*See*, *e.g.*, Pls' Mot. at 32–35, Ex. 23, Oct. 14, 2014 Kelly Phillips email)—goes to the existence of and fraudulent intent behind the scheme. Plaintiffs need not show that this negative feedback was provided by insurance providers in every case or even most cases for this evidence to be meaningful and relevant to the claims of all class members, who, as common evidence (discussed below) will show, were defrauded into paying unconscionable rates for Ghoubrial's treatment. As with the alleged *quid pro quo* solicitation and referral relationships, to the extent that Defendants wish to counter Plaintiffs' evidence on this point, that evidence would apply on a class-wide basis, even if it did involve evidence pertaining to individual class-members' cases.

The same analysis applies to Defendants' attempt to wave away the evidence showing Ghoubrial's intent to enrich himself by administering as many of the fraudulent and exorbitantly priced trigger-point injections as possible. KNR Opp. at 34–35; Ghoubrial Opp. at 58–60. Defendants argue that for this evidence (set forth at pages 16–20 of Plaintiffs' Motion; *See also Id.* at 21–24) to be meaningful, "it must be determined whether Dr. Ghoubrial in fact carried out his intention as to each class member." KNR Opp. at 35; Ghoubrial Opp. at 59 (same). This again misrepresents the application of this evidence to what Plaintiffs are actually claiming. It does not matter whether some class-members managed to resist Ghoubrial's high-pressure tactics in delivering the injections, nor does it matter whether any class member believes the injections were helpful. This is because evidence of these tactics goes to show that the entire purpose of Ghoubrial's involvement in class-members claims, including his high-volume delivery of the medically

indefensible injections,[2] was to enrich the Defendants by inflating medical bills through Ghoubrial's exorbitant and unconscionable rates. *See Gaines v. Preterm-Cleveland, Inc.*, 33 Ohio St.3d 54, 514

[2] In response to Plaintiffs' voluminous evidence—including comprehensive summaries of all available peer-reviewed medical research—showing that Ghoubrial's use of the trigger-point injections on car-accident victims is medically indefensible (Pls' Opp. at 20–24), the Defendants have only managed to dig up a single study that they claim supports this practice. KNR Opp. at 31, Ex. M-8; Ghoubrial Opp. at 17. This study ("the Kocak study"), which was published in 2019 by researchers in Turkey, involved the administration of the injections to only 22 subjects (*see* p. 3), and involved no evaluation of long-term results (*see* p. 5), unsurprisingly does not stand for what Defendants claim it does. This is apparent from the excerpt from the study's conclusion quoted by Defendants in their opposition briefs, which states, "In this small randomized study with several methodological limitations, TPI [trigger-point injections] was superior to the intravenously administered NSAID [non-steroidal anti-inflammatory drugs] in the acute treatment of LBP [lower back pain] **caused by trigger points**." KNR Opp. at 31; Ghoubrial Opp. at 17 (emphasis added). The point here that Defendants either do not understand or from which they seek to intentionally mislead, is that trigger points themselves are a chronic condition that develop over time. They do not immediately result from car accidents. Indeed, as set forth in Plaintiffs' Motion and further confirmed by the Kocak study, the presence of trigger points in a patient dictates a diagnosis of Myofascial Pain Syndrome (MPS), which is a chronic condition that is, as noted in the Kocak study (at 1) "an uncommon cause of musculoskeletal pain." *See also* Pls' Mot. at 22 citing Ghoubrial Tr. 378:22–384:10, Ex. 43, Ex. 15, Walls Aff., ¶ 4. The presence of damage to bodily tissue resulting from a recent car accident makes it effectively impossible to isolate the source of pain so as to diagnose the presence of active trigger points that would possibly benefit from TPIs. Pls' Mot. at 21, 24 citing, *inter alia*, Walls Aff. at ¶ 3, ¶ 5. This explains why the Kocak study explicitly concerns itself with the "treatment of MPS" (Kocak study at 1, 4), and was expressly limited to patients for whom "at least one TrP [trigger point] [was] identified as the cause of the pain." *Id.* at 2; *See also Id.* at 4 ("We focused on TrP [trigger point] related LBP so our results are [*sic*] cannot be generalized to all population [*sic*].") At his deposition, Ghoubrial admitted that he has never diagnosed a class-member with MPS, which, as confirmed by the Kocak study, is the only condition for which TPIs have ever proven effective in treating. Pls' Mot. at 22 citing, *inter alia*, Ghoubrial Tr. 125:11–15. Thus, there remains not a shred of peer-reviewed evidence supporting Ghoubrial's mass delivery of TPIs to car-accident victims. *See* Ghoubrial Opp. at 47 citing Ex. G, Ghoubrial Aff. (admitting that he administered TPIs to "approximately half" of the class-members). Defendants' baseless argument to the contrary at most creates an issue of fact that will be determined by common proof notwithstanding Defendants' nonsensical argument that courts are somehow prohibited from considering medical evidence in evaluating a fraud claim, or that the use of such evidence would convert a well-pleaded fraud claim to a medical malpractice claim. Ghoubrial Opp. at 83–84; *Contra Gaines*, 514 N.E.2d 709, 712–713; Evid.R. 401 ("'Relevant evidence' means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence."); Evid.R. 402 ("All relevant evidence is admissible ... ."). As stated in Plaintiffs' motion for certification (at 20, footnote 11), the Class A claims do not depend on proving that Ghoubrial deviated from the applicable standard of care in administering the trigger-point injections, but this deviation was in fact so extreme that it strongly supports Plaintiffs' allegations of the fraudulent intent behind their administration, consistent with the fraudulent intent behind the alleged price-gouging scheme.

N.E.2d 709, 712–713 (recognizing the availability of a cause of action for fraud against a physician whose "knowing misrepresentation of a material fact" "appear[s] to have been driven by 'motivations unrelated and even antithetical to appellant's physical well-being.'"). As detailed immediately below, common evidence will show that every class-member who was charged Ghoubrial's standard rates for the "treatment" he provided—whether they received an injection or not—was in fact defrauded into and damaged by having paid those rates.

2. Common proof will show that each class-member was damaged by the price-gouging scheme.

Contrary to Defendants' arguments that individual questions predominate, Plaintiffs have submitted generalized proof common to all price-gouging-class members that will show that every such member was damaged by the scheme. For example, Plaintiffs have submitted substantial common proof showing that,

- all class members were charged standard across-the-board rates by Ghoubrial, as will be shown by the Form 1500s and settlement memoranda contained in the files of every KNR client who treated with his practice; Pls' Mot. at 17, 25–26; 60–61;
- These rates were exorbitant and unconscionable, far in excess of of what the class members insurers would have otherwise paid for similar care from readily available sources; *Id.* at 17–18, 25–26; 60–61;
- Ghoubrial and the Defendant chiropractors did not accept insurance for payment from the class members, and insisted on billing them directly from their KNR settlements, which allowed them to escape scrutiny by insurance companies for the care provided and the exorbitant rates charged; *Id.* at 17, 28–31; The Defendants have no legitimate reason for their refusal to accept insurance from the class members, and their purported reasons are transparently pretextual and impeachable; *Id.* at 36–41;
- Ghoubrial admits that he never discussed the cost or price of care with the class members, and uses a standardized medical lien or "letter of protection" that purports to relieve him of liability for overcharging his patients; *Id.* at 27 citing Ghoubrial Tr. 296:11–24; 314:14–23); As discussed below, it can be inferred on a class-wide basis that all affected KNR clients relied on Defendants'

omissions regarding the financial impact of Ghoubrial's treatment under the "letters of protection" or medical liens; *Id.* at 75–79.

- All of the class members treated with Ghoubrial in connection with their KNR cases because they were directed to do so by KNR or the KNR-affiliated chiropractors, who worked in concert to refer clients to Ghoubrial in order to further the price-gouging scheme; *Id.* at 15–16; 19–20. Ghoubrial admits that he does not advertise for his "personal injury clinic," and that he receives all such business from what he calls "chiropractor" referrals; *Id.* at 15–16;

- The purpose of the scheme was to enrich the Defendants by sustaining KNR's high-volume settlement mill; specifically, to allow the Defendants to inflate medical bills and KNR's attorneys' fees with a minimum of effort *via* Ghoubrial's overpriced and formulaic treatment; Pls' Mot. at 4–11; 16–20; 41–44; Former KNR attorneys have explained that they were expressly directed by firm management to send their clients to Ghoubrial to receive injections precisely because his rates were so high; Pls' Mot. at 19–20.

This common proof alone—not to mention that discussed above in Section B.1. going to the existence of and intent behind the scheme—will establish Defendants' liability to all class members on the claims alleged, thus establishing predominance. In other words, this common proof will show that any KNR client who was charged Ghoubrial's standard rates suffered actual damages in fraud, as well as under an unconscionable contract, and in a manner that requires disgorgement pursuant to the class's unjust enrichment claim. The Class A claims will thus "prevail or fail in unison." *Musial Offices, Ltd. v. Cty. of Cuyahoga*, 2014-Ohio-602, 8 N.E.3d 992, ¶ 32 (8th Dist.), quoting *Amgen Inc. v. Connecticut Retirement Plans & Trust Funds*, 568 U.S. 455, 459, 133 S.Ct. 1184, 185 L.Ed.2d 308 (2013). Certain of Defendants' subsidiary arguments to the contrary—regarding class-wide reliance, methods of calculating damages, the availability of equitable remedies, and Defendants' heavy reliance on the *Felix v. Ganley* decision—are addressed in the following sub-sections.

i. The class-members are entitled to an inference of class-wide reliance.

Defendants erroneously suggest that the Court cannot certify the price-gouging class because individual issues such as reliance and inducement would predominate. KNR Opp. at 28-29; Ghoubrial Opp. 86–92. But "reliance in a fraud-based class action can be established by presumption or inference." *Stanich v. Travelers Indemn. Co.*, 249 F.R.D. 506, 519 (N.D.Ohio 2008) (internal quotations omitted).

Indeed, as the Supreme Court of Ohio has explained, where class members "can establish by common proof" that Defendants made common misrepresentations or omissions, "then at least a presumption of reliance would arise as to the entire class, thereby obviating the necessity for individual proof." *Baughman v. State Farm Mut. Auto. Ins. Co.*, 88 Ohio St.3d 480, 491, 727 N.E.2d 1265 (2000); That presumption would accordingly "stand in place of individual testimony" and "displant any unrealistic evidentiary requirement that each class member take the stand and speculate" about how he or she would have acted had defendants not engaged in the fraudulent scheme. *Id.*; *See also Simmons v. Am. Gen. Life & Acc. Ins. Co.*, 140 Ohio App.3d 503, 510, 748 N.E.2d 122 (6th Dist.2000) ("*Baughman* found that where there are common omissions" "across the entire class, certification was proper, and that, in fact, inducement and reliance could be inferred."); *Carder*, 2002-Ohio-2912 at ¶ 49, citing *Baughman* (class members should not be required "to speculate on how they would have reacted if material information had been disclosed or if misrepresentations had not been made" because a contrary rule "would place an unrealistic evidentiary burden on" those injured by a scheme to defraud).

Here, as noted above, the fact that the class members allowed themselves to be charged Ghoubrial's exorbitant rates under the commonly applicable circumstances summarized above is sufficient in itself to prove reliance and inducement. *E.g.*, *Stanich* at 519, 521 ("[C]ircumstantial evidence leading to legitimate inferences could lead a reasonable factfinder to conclude beyond a

preponderance of the evidence that each individual plaintiff relied on the defendants' misrepresentations.").

ii. The damages suffered by each class-member can be proven on a class-wide basis and calculated using class-wide methodologies regardless of the purported "discounts" Ghoubrial provided to the individual class-members.

Defendants also falsely claim that it would be impossible to tell whether any class member was actually damaged by the alleged scheme, let alone all of them on a class-wide basis.

More specifically, Defendants contend that because Ghoubrial sometimes accepted reductions in the payment he received from each KNR client *vis a vis* the amount billed, it would be impossible to tell whether any given class member has been damaged by the alleged overcharges. KNR Opp. at 26 ("KNR discounted nearly every client's medical reimbursement to Ghoubrial. Plaintiffs ignore this aspect of the case"); Ghoubrial Opp. at 50–51, 79–80, 93, 95–96 ("[Ghoubrial's reductions] would necessitate analyzing each settlement to determine the amount of each individual reduction and whether the reduced amounts met some made up test up [*sic*] for what doctors 'should' charge."). Relatedly, Defendants argue that damages could not be determined on a class-wide basis because if Ghoubrial's inflated bills were intended to inflate KNR's attorney's fees as alleged, this inflation must have also benefited the class members in the form of higher settlements. KNR Opp. at 35; Ghoubrial Opp. at 84–86.

These are self-serving *non-sequiturs* that seek to distract from the facts that (1) Ghoubrial's so-called "discounts" were taken from prices that were wildly inflated in the first place; (2) any resulting increases in the class members' settlements, less the so-called "discounts," were necessarily retained by the Defendants, as KNR's fees were calculated from the gross settlement amount collected before medical expenses were deducted (Pls' Opp. at 19)[3]; and, (3) as discussed fully in Section

[3] Ghoubrial's suggestion that his exorbitant billing might not have damaged class-members because it might have led to a corresponding increase in the amounts that class-members pocketed from

II.B.2.iii. below, Ghoubrial's relationship with the KNR Defendants and the conspiring chiropractors was so corrupt—with Ghoubrial's exorbitantly priced injection-mill intended to allow the Defendants to profit from handling a higher volume of cases with a minimum of effort, regardless of the impact on individual class members' settlements (*Id.* at 4–11; 16–20; 41–44)—that the fees collected by these parties pursuant to the alleged scheme are subject to disgorgement under Ohio law regardless of whether any class member sustained resulting damage.

The Court need not, however, find that Defendants' fees are entirely subject to disgorgement to certify this class because alternative methodologies are available to show that each class member was, in fact, damaged simply by virtue of having been charged Ghoubrial's standard rates.

For example, merely by reviewing the settlement memorandum and Form 1500 from Plaintiff Thera Reid's KNR file (Pls' Mot. at 60–61, Ex. 8 (Reid Aff., ¶ 15, Ex. E), Ex. 32 (Form 1500s)), it can be readily determined that Ms. Reid, who was billed $3,460 by Ghoubrial and had insurance coverage through Medicaid, was overbilled by $3,054.56 from what she would have otherwise paid for the same "care" under Medicaid's standard reimbursement rates.[4] While

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their settlements is akin to an argument that because he successfully defrauded one party (the underlying defendants' auto insurers), he's thus excused from defrauding another (the class members). Ghoubrial Opp. at 61–62; 85–86. It is also beside the point. Ghoubrial's agreement with the class-members was simply to provide competent and reasonably necessary healthcare at a cost that was "fair and reasonable," as was expressly stated in all of the medical liens or "letters of protection" he required the class-members to sign as a condition of treating with him. *See*, *e.g.*, Pls' Mot. at 28, Ex. 9 (Carter Aff.), Ex. C, Ex. F (medical liens); Ex. 10 (Beasley Aff.), Ex. C (medical lien); Ex. 14 (Harbour Aff.), Ex. A, Ex. C (medical liens); Ex. 11 (Norris Aff.), Ex. C (medical lien). Under no circumstances did Ghoubrial's agreement or relationship with any class member permit him to charge exorbitant rates for his care based on the hypothetical, unprovable, and unbargained-for possibility that by doing so the class-member might realize a resulting benefit in the form of a larger settlement payment. Ghoubrial's attempt to argue to the contrary is essentially an admission of fraud.

[4] These documents show that Reid was billed $3,460.00 by Ghoubrial's practice, broken down as follows: Three $800 charges for trigger-point injections under code 20553, one $300 charge for an initial office visit under code 99203, four $150 charges for follow-up office visits under code 99213,

Ghoubrial reduced his massively inflated bill by $460 in ultimately collecting $3,000 from Ms. Reid's settlement, which amounts to 87% of the amount billed, this adjustment can simply be deducted from the amount overcharged in an amount proportional to the reduction. In other words, because Ghoubrial collected 87% of what he billed Ms. Reid, 87% of the $3,046.56 that he overbilled her—$2650.51—would constitute her damages.

The same calculation would show damages for every class member, regardless of whether and in what amount Ghoubrial ultimately reduced his bill in collecting from each KNR client.[5] For class members who were covered by Medicaid, Medicare, or other private insurance benefits, the insurers' reimbursement rates would be used to calculate the amount overbilled as above. The amounts overbilled to uninsured class members would be identically calculated by reference to evidence of prevailing market rates for the care provided. Because common proof will show that these rates were dramatically lower than the rates charged by Ghoubrial as to all modes of care delivered (*See* Pls' Mot. 17–18; 39–40),[6] it will thus be shown that all class members were damaged

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and three $40 charges and one $80 charge for the kenalog steroid used for her trigger-point injections under codes J1030 and J1040 respectively. Medicaid would have only reimbursed Ghoubrial a maximum of $405.44 for the "care" he delivered to Reid: $43.48 for each round of the trigger-point injections (again, assuming these injections were legitimately delivered despite that they were not), $75 for the initial office visit, $50 for each follow up office visit, and nothing for the kenalog, for which Medicaid does not reimburse separately from the injections. Pls' Mot. at 17 (citing Ghoubrial Tr. 256:22–258:3, Ex. 25), 25 (citing Ghoubrial Tr. 269:22–271:14, Ex. 27).

[5] Ghoubrial also attempts to excuse himself from class-wide liability by arguing that Plaintiffs should have sued Clearwater Billing, the company that "billed and collected for all medical services [he] provided." Ghoubrial Opp. at 94. There is no dispute, however, that Ghoubrial is the sole owner of Clearwater Billing, and exercises complete control over the company. Ghoubrial Tr. at 11:2–12:16; 292:8–19; 389:25–390:1.

[6] Contrary to Defendants' argument (*See* Ghoubrial Opp. at 79–80) it does not matter that class members were overcharged for differing combinations of treatment, because the standard charges for each mode of treatment delivered by Ghoubrial will be shown by common evidence to be fraudulent, exorbitant, and unconscionable. *See* footnote 3, above; *See also Estate of Reed v.* Hadley, 163 Ohio App.3d 464, 2005-Ohio-5016, 839 N.E.2d 55, ¶ 36 (4th Dist.) ("While the amount of damages suffered by each member of the proposed subclasses" "will differ depending on the

and individual differences in the damages calculations will not defeat class certification. *Carder*, 2002-Ohio-2912, ¶ 55 ("[N]o matter how individualized damages are, liability can still be tried as a class."); *Ojalvo*, 12 Ohio St.3d 230, 232 ("[A] trial court should not dispose of a class action solely on the basis of disparate damages."); *Vinci v. Am. Can Co.*, 9 Ohio St.3d 98, 101, 459 N.E.2d 507 (1984) (rejecting argument that predominance was not satisfied "because the amount of damages may vary among class members."). *In re NASDAQ Market-Makers Antitrust Litig.*, 169 F.R.D. 493, 517 (S.D.N.Y. 1996) ("It is sufficient to note at this stage that there are methodologies available, and that Rule 23 … allow[s] ample flexibility to deal with these issues.").

In other words, "there are ... available means to address individual damages that would allow the Court to adjudicate fairly and efficiently the many issues common to the plaintiffs while allowing a fair resolution also of the individual damages issue." *In re Prudential Ins. Co. of Am. Sales Practices Litigation*, 962 F.Supp. 450, 517 (D.N.J. 1997). This is true even apart from the availability of disgorgement as a remedy to class members of all fees collected by all of the Defendants pursuant to their unlawful conspiracy, discussed immediately below.

iii. The appropriateness of equitable relief further ensures commonality and predominance and further warrants certification of the price-gouging class.

When "named plaintiffs can prove for themselves" that they are "entitled to the disgorgement of every dime paid, then they can prove it for the whole class." *Pivonka v. Sears*, 8th Dist. Cuyahoga No. 106749, 2018-Ohio-4866, ¶ 56. Accordingly, "the appropriateness of equitable relief likewise insures predominance." *Elkins v. Equitable Life Ins. Co.*, M.D.Fla. Civil Action No. 96-296-CIV-T-17B, 1998 U.S. Dist. LEXIS 1557, at *46-48 (Jan. 27, 1998). *See also In re NASDAQ*, at 520 ("[T]he contours of appropriate equitable relief will be a common question of critical

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services purchased and the prices charged, it is unreasonable to conclude that the class as a whole did not or will not suffer damages if the" plaintiff "successfully proves its claims.").

importance at trial."); *Lon Smith & Assocs. v. Key*, 527 S.W.3d 604, 635 (Tex.App.2017), quoting *Amgen* at 459 ("[W]hether class members are entitled to statutory disgorgement of monies paid … 'predominate[s] over any questions affecting only individual class members.'")*; Bokusky v. Edina Realty, Inc.*, D.Minn. No. 3-92 CIV 223, 1993 U.S. Dist. LEXIS 21692, at *27-28 (Aug. 6, 1993) (where plaintiffs seek the remedy of disgorgement, "the question of each individual's damages also fails to override the predominance of the common questions in this action.").

Despite this well-established principle, Defendants—while apparently conceding that disgorgement is an appropriate remedy for Class A members' claims, if proven (KNR Opp. at 40)—argue that this remedy would require individual inquiries and thus predominate over common questions. *Id.* at 40–44. In making this argument, Defendants rely primarily on *Burrow v. Arce*, 997 S.W.2d 229 (Tex. 1999) for the proposition that disgorgement requires "the weighing of evidence particular to each Class Member" as disgorgement of the entire fee is "not automatic." KNR Opp. at 40–42. *Burrow* does not, however, help Defendants, as it held that entitlement to disgorgement does not depend on the client's individual damages. Rather, as the *Burrow* court stated,

> [a]n agent's breach of fiduciary duty should be deterred even when the principal is not damaged. We therefore conclude that a client need not prove actual damages in order to obtain forfeiture of an attorney's fee for the attorney's breach of fiduciary duty to the client.

Id. at 29. This holding is consistent with the purposes underlying the remedy of disgorgement both for unjust enrichment and to deter breaches of loyalty, which focuses on and is intended to deter the defendants' wrongful conduct, and does not require consideration of the monetary harm incurred by a plaintiff. *See*, *e.g.*, *Hendry v. Pelland*, 73 F.3d 397, 402 (D.C. Cir. 1996) (holding that self-dealing attorneys face liability for forfeiture or disgorgement regardless of any proof of consequential injury); *Miller v. Cloud*, 7th Dist., No. 15 CO 0018, 2016-Ohio-5063, ¶ 92 ("[W]hen a party is a wrongdoer, disgorgement is an option."); *Myer v. Preferred Credit*, 117 Ohio Misc. 2d 8, 9, 2001-Ohio-4190, ¶¶ 23, 26, 30, 33, fn 20, 38, 766 N.E.2d 612 (2001), quoting OHIO JURISPRUDENCE 3D

(1984) 191, Fiduciaries, § 94 ("The law is strict in seeing that a fiduciary shall act for the benefit of the person to whom he stands in a relation of trust and confidence and in maintaining the trust free from the pollution of self-seeking on the part of the fiduciary."); *United States v. United Technologies Corp.*, 190 F. Supp. 3d 752, 759 (S.D. Ohio 2016), quoting *Dobbs*, LAW OF REMEDIES, at 555 (2d ed. 1993) ("[R]estitution ... concentrates on the defendant—preventing unjust enrichment, disgorging wrongfully held gains, and restoring them to the plaintiff.").[7]

Additionally, unlike in *Burrow*, given the corrupt nature of the relationships between the lawyers, chiropractors, and doctors who drew the class members into the scheme at issue here, this is not a case where any hair-splitting is required. As in *Pivonka*, 2018-Ohio-4866, ¶ 56, the common proof summarized above will show that plaintiffs, and thus all class-members "are entitled to the disgorgement of every dime paid," if not of all fees collected by the Defendants pursuant to the alleged conspiracy, then at least of the amount overcharged by Ghoubrial in excess of prevailing rates. *Pivonka v. Sears*, 8th Dist. Cuyahoga No. 106749, 2018-Ohio-4866, ¶ 56. In other words, the conduct at issue in this case raises questions that the law deems intolerable in and of themselves, regardless of answers about whether alleged victims can prove actual damages.

Thus, here, regardless of whether the Court finds that the entirety of the fees collected by

[7] *See also In re Binder: Squire v. Emsley*, 137 Ohio St. 26, 38, 47, 57, 57, 27 N.E.2d 939 (1940) (holding that disgorgement is a proper remedy against a self-dealing fiduciary "notwithstanding there may be no causal relation between [the defendants'] self-dealing and the loss or deprecation incurred," as matter of "public policy" to deter "self-dealing . . . [in] relation[s] which demand[ ] strict fidelity to others," and to deter the natural "temptation to wrong-doing" that fiduciary relations create); *Greenberg v. Meyer*, 50 Ohio App.2d 381, 384, 363 N.E.2d 779 (1st Dist. 1977) ("The rule [providing that "it is immaterial whether the principal suffered injury or damage" when "agents/fiduciaries" breach their duties of "absolute good faith and loyalty"] does not depend upon whether . . . the principal is injured by the conduct of the agent."); *First United Pentecostal Church v. Parker*, 514 S.W.3d 214, 221 (Tx. 2017) (the "central purpose" of this principle "is to protect relationships of trust by discouraging ... disloyalty"); RESTATEMENT (SECOND) OF AGENCY, § 469 (1958) (an attorney an attorney "is entitled to no compensation for conduct which is disobedient or which is a breach of his duty of loyalty; if such conduct constitutes a willful and deliberate breach of his contract of service, he is not entitled to compensation even for properly performed services for which no compensation is apportioned").

the Defendants are subject to disgorgement, it is clear that Plaintiffs need only "reasonabl[y] approximat[e the] profits causally connected" to Defendants' wrongdoing. *United States SEC v. Thorn*, S.D.Ohio No. 2:01-CV-290, 2002 U.S. Dist. LEXIS 21508, at *9-10 (Sep. 30, 2002) ("[T]he remedy is equitable, and ... precision of calculation will often be impossible."); *See also United Technologies Corp.*, at 759 ("A party seeking disgorgement is not required 'to produce data to measure the precise amount of the ill-gotten gains."); *In re Smith*, 365 B.R. 770, 789 (Bankr.S.D.Ohio 2007), fn 8 (same); *SEC v. Wyly*, 56 F. Supp. 3d 394, 426 (S.D.N.Y.2014) ("[C]ourts commonly order defendants to disgorge not only the proceeds of a fraud or the profits of an unlawful trade, but also salary and bonuses earned during the period of a fraud."); *Desai v. Franklin*, 177 Ohio App.3d 679, 2008-Ohio-3957, 895 N.E.2d 875, ¶ 14 (9th Dist.) ("Unjust enrichment occurs when a person "has and retains money or benefits which in justice and equity belong to another."). Defendants' reliance on *Burrows* and related authority is therefore unavailing, and the availability of disgorgement on Plaintiffs' claims for unjust enrichment, unconscionable contract, and breach of fiduciary duty further shows predominance under Rule 23(B).

iv. The common proof supporting Plaintifs' allegations shows that Defendants' reliance on *Felix v. Ganley Chevrolet* is misplaced.

In opposing certification, Defendants' primarily rely on *Felix v. Ganley Chevrolet, Inc.*, 145 Ohio St.3d 329, 2015-Ohio-3430 for the proposition that "a proposed class where some class members have been harmed, while others have not, lacks predominance." KNR Opp. at 12; *See also* Ghoubrial Opp. at 81–82. In *Felix*, the Ohio Supreme Court held that "all members of a class in a class-action litigation **alleging violations of the OCSPA** must have suffered injury alleged as a result of the conduct alleged in the suit." *Id.* at ¶ 36 (emphasis added). Crucial to the *Felix* Court's holding was that the OCSPA contained language expressly "limiting the scope of damages that were available" "in class actions to actual damages." *Id.* at ¶ 29.

Defendants attempt to apply *Felix's* holding broadly to all Ohio class actions. *Felix*, however, "did not announce a new rule of law, but rather clarified the law respecting class action damages under OCSPA." *Strickler v. First Ohio Banc & Lending, Inc.*, 9th Dist. Lorain No. 17-CA-011117, 2018-Ohio-3835, ¶ 23 ("[W]e are not persuaded that the Supreme Court intended to extend its holding in *Felix* to apply, not only to OCSPA class actions, but also to other types of class actions.").

Here, even if the Court applies *Felix* for the broad proposition Defendants have urged, certification would still be appropriate because, as shown above, Plaintiffs have shown that common questions will show that all class-members in fact suffered damage as a result of the conduct alleged. The Court should not, however, read *Felix* nor any of the inapposite cases Defendants cite for similar principles[8] as supplanting or overruling the well-established authority providing disgorgement as a remedy to deter wrongful conduct, to which none of these cases applies.

[8] Defendants also rely on *Hoang v. E*trade Group*, 151 Ohio App.3d 363, 2003-Ohio-301, 784-N.E.2d 151 (8th Dist. 2003), where the plaintiff sought certification of a class including "all Ohio residents who had a trading account with E*Trade on the dates when E*Trade's system experienced interruptions." *Id.* at ¶ 8. Because the class would encompass customers not damaged by the service interruptions, the court found that a "simple loss of services without economic loss does not create a compensable claim." *Id.* at ¶ 27. Here, in addition to their entitlement to disgorgement as a result of wrongdoing the likes of which are not at issue in *Hoang*, Plaintiffs have sufficiently alleged that all class-members in fact suffered economic loss as a result of the scheme at issue. Defendants similarly rely on *Linn v. Roto-Rooter, Inc.*, 8th Dist. Cuyahoga No. 82657, 2004-Ohio-2559 for the proposition that class certification is not appropriate where "some class members were not damaged because they 'received more in value than the amount of miscellaneous supplies charged.'" *See* KNR Opposition, at 13. But *Linn* is inapposite for a fundamental reason: the alleged fraud in that case involved "a predetermined fixed charge, **disclosed to the customer in advance of the decision to accept goods or services** and included within the price …." *Linn*, at ¶ 16 (emphasis added). Similarly, Defendants mistakenly rely on *Petty v. Wal-Mart Stores, Inc.*, 148 Ohio App.3d 348, 2002-Ohio-1211, 773 N.E.2d 576 (2d Dist.), for the proposition that Plaintiffs must show that "each class member was the subject of the tortious conduct." See KNR Opposition, at 2. Petty involved "an alleged practice where employees were pressured to work off the clock." KNR Opposition, at 11. In *Petty*, however, unlike here, there were no allegations of a coordinated scheme, nor were there allegations that uniform evidence would show that class-members were uniformly subject to the alleged "practice," which, unlike here, could be proven or disproven only with regard to each individual employee. *Id.* at 356. Importantly, neither *Felix* nor any of the related cases on which Defendants' rely involve organized and intentional schemes to defraud like that at issue here.

C. The Court should reject Defendants' meritless arguments that the Named Plaintiffs' claims are not typical of the class-members.'

While the KNR Defendants do not challenge the typicality of the Named Plaintiffs' claims, Defendants Ghoubrial and Floros argue that "certification fails" for failure to meet this requirement. Ghoubrial Opp. at 65–73; Floros Opp. at 73–75. To support this argument, Defendants misrepresent a series of out-of-context selections from Named Plaintiffs' depositions (including from Mr. Harbour's underlying personal injury case) to support his claim that they raise "issues" that "destroy typicality." *Id.*

This disregards both the law and the facts at issue. To prove typicality, plaintiffs need only show the absence of any "express conflict" between their interests and eligible claimants.' *Hamilton v. Ohio Savings Bank*, 82 Ohio St.3d 67, 77, 1998-Ohio-365, 694 N.E.2d 442. "Factual differences" will not render the plaintiffs' claim atypical if it "arises from the same event or practices … that gives rise to the claims of the class members, and … it is based on the same legal theory." *Musial*, 2014-Ohio-602 at ¶ 24. Meanwhile, a "unique defense" applicable to the plaintiff "will not destroy typicality … unless it is so central to the litigation that it threatens to preoccupy the class representative to the detriment of other class members." *Baughman*, 88 Ohio St. 3d 480 at 487.

It is not necessary to address Defendants' presentation point-by-point because it is apparent that none of their out-of-context selections of Plaintiffs' testimony creates an "express" or "central" conflict among class members regarding the common proof that is actually at issue. *See* Sections II.B.1 and II.B.2, above. Rather, it is sufficient to note that Defendants do not begin to show that any of the Plaintiffs consented to the exorbitant rates at issue (including, for example, to pay $500 for TENS units that they could have purchased for $27 online), or to receive fraudulent injections that were unnecessary and contraindicated for their injuries. Nor could Defendants excuse or obtain consent from the Plaintiffs' for the inherent conflicts of interest that drove and independently invalidate the charges at issue.

The typicality of Named Plaintiffs' claims is further affirmed by the affidavits they submitted with Plaintiffs' motion for class certification (Pls' Mot. at Ex. 8 (Reid Aff.), Ex. 11 (Norris Aff.), Ex. 14 (Harbour Aff.)), and well-reasoned case law rejecting challenges to typicality based "on admissions during [named plaintiffs'] deposition[s] that contradicted the class complaint." *Westgate Ford Truck Sales, Inc. v. Ford Motor Co.*, 8th Dist. Cuyahoga No. 86596, 2007-Ohio-4013, ¶ 56, citing 1 NEWBERG ON CLASS ACTIONS (3 ED. 1992) 3-74–3-77, § 3.13.[9]

III. Plaintiffs have satisfied Civ.R.23's commonality and predominance requirements as to Class B, the narrative-fee class.

Plaintiffs have moved for certification of a class of KNR clients who paid for narrative reports "automatically" prepared by Defendant Floros of Akron Square Chiropractic and other select chiropractors pursuant to a kickback arrangement with the firm. The Plaintiffs have presented evidence that KNR ordered a report from these select practitioners in virtually every case, regardless of whether the client's situation warranted it. KNR obtained the reports as a means of compensating the chiropractors for referring cases to the firm. KNR forced class members to foot the bill for this kickback by deducting the narrative fees from their respective settlements. The Plaintiffs seek to recoup these amounts under claims brought on behalf of the class for fraud, breach of fiduciary duty, and unjust enrichment.

As with the price-gouging class, Defendants primarily contend that individual issues predominate over common ones, contrary to the requirements of Civ. R. 23(B)(3). In making this argument, the Defendants primarily challenge the sufficiency of the Plaintiffs' proof of the kickback scheme, while failing to negate it. The Defendants also wrongly assert that the Plaintiffs have failed to establish the narrative reports' complete worthlessness in every instance, claiming that this dooms

[9] Ghoubrial also suggests that Plaintiffs are seeking to recover on behalf of current clients whose personal injury cases with KNR haven't yet settled and who thus haven't yet been charged the unlawful fees. Ghoubrial Opp. at 68. This is simply not the case. Plaintiffs are only seeking to recover on behalf of KNR clients who have actually been charged the fees at issue.

certification. According to the Defendants, since the reports procured for certain clients might have had some value, the Plaintiffs cannot establish that all class members suffered injury, as the Supreme Court requires in *Felix*. This misrepresents the evidence and the essence of Plaintiffs' claims, and also ignores the appropriateness of equitable disgorgement as a remedy.

A. Common proof predominates as to whether the narrative fee functioned as a kickback.

In moving for class certification, the Plaintiffs presented proof that KNR automatically procured a narrative report in virtually every instance when one of its clients treated with one of the selected chiropractors.[10] Pls' Mot. 45–46. KNR management was responsible for adopting this policy that was dictated to the firm's attorneys and was non-negotiable. *Id.* The Plaintiffs also presented proof that the practice served to provide these chiropractors with a *quid pro quo* for referring cases to KNR, and that the narrative fees were ultimately worthless. *Id.*, pp. 45-48.

Plaintiffs submit that this evidence, supplemented by merits discovery, will ultimately carry the day at trial. Whatever the eventual outcome, the Plaintiffs have conclusively shown that the Court can decide for all class members in the course of a "single adjudication" (1) whether KNR did have a policy of automatically ordering narrative reports from Floros and other Plambeck practitioners; and (2) whether its doing so operated as a kickback. *Cantlin*, 2018-Ohio-4607 at ¶33. Common issues predominate under these circumstances, regardless of the Defendants' aspersions concerning the quality of the Plaintiffs' proof.

[10] Defendants also seem argue that certification is inappropriate because Plaintiffs' evidence only pertains to narrative-fees paid to Defendant Floros and other chiropractors from Plambeck-owned clinics, while Plaintiffs additionally seek recovery from these and "certain other chiropractors identified in KNR documents as 'automatic' recipients of the fee." Pls' Mot. at 50. Plaintiffs' have submitted un-negated proof identifying these "automatic recipients," and showing that any chiropractor subject to "automatic" payment of these fees is necessarily receiving a kickback for referrals. *Id.* at 43–50. No other possible reason explains why KNR would obtain a narrative report for each and every client treating with that practitioner, regardless of whether the attendant facts justify the expense. The class thus properly includes clients who paid these "certain other chiropractors," along with those who paid Floros and his Plambeck colleagues. *Id.*

B. Common proof predominates as to whether all members of the narrative-fee class have suffered injury.

The substantial evidence presented by the Plaintiffs proving the essential worthlessness of narrative reports for prospective class members will serve to establish injury causation thus establishing predominance, despite Defendants' reliance on the *Felix* decision in arguing to the contrary. KNR Opp. at 45; Floros Opp. at 64–65. Not only is it legitimately in dispute as to whether these reports had any value at all across-the-board, the Defendants fail to identify a single client who realized any palpable benefit from a report procured by KNR. The existence of these supposedly uninjured class members remains purely hypothetical.

More to the point, while arguing for the purported value of the reports, the Defendants fail to take into account the untoward circumstances under which KNR obtained class members' reports from the chiropractors. KNR did not order any of these reports based on the particular attributes of the client's case. The firm was apparently not even trying to realize any of the benefits these documents supposedly can provide. Instead, KNR paid the narrative fees to hold up its end of an unholy bargain. It remitted cash to selected chiropractors in exchange for their agreement to continue as referral sources for the firm. KNR was exclusively advancing its own interests in incurring this expense. It had no legitimate basis to seek reimbursement from clients for this practice, and it may properly be inferred pursuant to the standards on class-wide reliance discussed above in Section II.B.2.i. that no client would have consented to the charge had they been advised of its true nature.

Thus, for these independent reasons, any client who paid a single cent for these reports was necessarily damaged,[11] meeting any requirement imposed by *Felix* and warranting certification under a "common sense approach" to Rule 23 as discussed above in Section II.A.

[11] Floros argues that he "has no ownership rights in ACS" and is "only an employee." Not only is this irrelevant to the narrative-fee claims, as the fee was paid directly by KNR on behalf of its clients

C. The appropriateness of equitable relief further warrants certification of the narrative fee class.

As with the price-gouging class, the availability of equitable remedies to all class members further warrants certification of the narrative-fee class. *See* Section II.B.2.iii., above. Evidence showing that the narrative fee functioned as a kickback warrants disgorgement of all such fees collected from the class-members as a remedy to deter the self-dealing alleged regardless of whether any class-member suffered actual damages. *Id.*

IV. Plaintiffs have satisfied Rule 23's predominance requirement as to Class C, the investigation-fee class.

The Plaintiffs have moved for certification of a class of KNR clients who had an "investigation" fee deducted from their settlements by the firm. The Plaintiffs have presented evidence that

- the "investigation" fee is really a "sign-up" fee paid to so-called "investigators" who meet with prospective KNR clients to obtain signatures on fee agreements and other documentation the firm needs to begin its engagement;
- while purportedly independent contractors, KNR "investigators" in truth function as employees of the firm; and
- to the extent "investigators" incidentally perform investigatory work in a given case, their doing so bears no relation to payment of the "investigation" fee, which pertains exclusively to the "sign-up."

The Plaintiffs have shown that in light of these considerations, the misleadingly named "investigation" fee does not constitute a legitimate expense, separately chargeable to class members. Instead, KNR's contingency fee should have subsumed whatever costs it attributes to "sign ups" and the ad hoc services provided by its "investigators."

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to the chiropractors, personally (See Pls' Mot. at 49–50), it is essentially false according to Floros's own testimony. At his deposition, Floros confirmed that he is paid 50% of the profits earned by Akron Square Chiropractic, the Plambeck-owned clinic that he runs. Floros Tr. at 57:21–58:3.

A. Common questions predominate as to the illegitimate nature of the investigation fee.

In opposing certification of the "investigation" class, the Defendants do not challenge the Plaintiffs' proof of any of the elements under Civ. R. 23(A). Instead, they argue only that individual issues predominate over common ones for purposes of Civ. R. 23(B)(3). In this regard, the Defendants list various and sundry tasks KNR "investigators" might perform in a particular case. KNR Opp. at 50. Supposed variations between the services any particular client receives and differences in the value of those services purportedly foreclose the Plaintiffs from proving predominance of common issues under Civ. R. 23(B)(3). *Id.*

The Defendants would have the Court believe that the dispute over "investigation" fees focuses upon whether each individual class member received sufficient "investigative" services to justify the flat charge. As the essence of their claims, however, the Plaintiffs allege that the "investigation" fee constitutes an across-the-board sham, a subterfuge through which KNR extracts payment from clients for the ordinary overhead cost of performing a "sign up." The Court can determine the validity of the proposition on a class-wide basis, in the course of a "single adjudication." *Cantlin*, 2018-Ohio-4607 at ¶33. It does not matter whether differences exist between the nature and value of "investigatory" services provided to individual class members, since these services had nothing to do with the true rationale for charging the "investigation" fee.

The Defendants have not disproven this last point. While cataloging the type of services KNR "investigators" might handle, they have submitted no evidence that the firm kept track of the specific "investigatory" tasks "investigators" performed on a case-by-case basis. The additional services (if any) performed for Client A remains a matter of pure conjecture, as it does for Clients B, C, and D, and all other clients. The lack of information concerning the particular "investigative" services performed for particular clients confirms its irrelevancy to the "investigation" fee charged by KNR.

It also exposes the fallacy to the Defendants' argument that individual issues predominate as to the type and value of "investigatory" services performed respectively for each class member. KNR saw no purpose in maintaining this data, leaving the Plaintiffs with no conceivable way of ever assembling it, even if it were pertinent to their claims. The Defendants have manufactured an individual issue for class members where KNR itself did not recognize or acknowledge one, either by recording the different "investigatory" services performed for particular clients or by charging something other than a flat fee, depending upon what its "investigators" had done.

The Plaintiffs have presented substantial proof that KNR had "investigators" for the specific overriding purpose of performing "sign ups." Pls' Mot. at 51–52. They also have demonstrated that the ad hoc services "investigators" might also handle for KNR had no necessary connection to the payment they received from the firm, which clients have had to repay in the form of the "investigation" fee. *Id.*, pp. 53-54. The import of this and related evidence represents the "gravamen" of all class members' claims. *Baughman*, 88 Ohio St. 3d at 489. Common issues predominate over individual ones.

B. Common proof will show that all class-members suffered damages by having to pay the "investigation" fee and the appropriateness of equitable relief to Class C members further warrants certification.

As with the other two putative classes, the Defendants argue that the *Felix* decision dooms all of the Class C claims. KNR Opp. at 54. They base this contention on the Plaintiffs' purported inability to establish that "no matter the service provided," KNR's "investigation" fee was not "illegal." *Id.* On this basis, the Defendants assert that class members could not have possibly suffered damage from the charge. *Id.*

Class members do not receive any "service" in exchange for the "investigation" fee. They are instead paying for a "service" KNR provides to itself—the "service" of soliciting new clients and securing their business.

The Plaintiffs have unmistakably accused the Defendants of committing unlawful conduct under their various claims relating to the "investigation" fee and have submitted credible proof to support this accusation. In suing for fraud, Plaintiffs allege that the Defendants purposefully deceived class members about the true nature of the fee. Under the claim for breach of contract, the Plaintiffs portray the fee as an "[un]reasonable" expense ineligible for reimbursement pursuant to KNR's client contracts. The claim for breach of fiduciary duty charges the Defendants with violating their professional obligations in collecting the fee. The unjust enrichment count turns on the premise that "justice and equity" entitle class members to return of the "investigation" fees withheld. *Desai v. Franklin*, 177 Ohio App. 3d 679, 2008-Ohio-3957, 895 N.E.2d 875, ¶14 (9th Dist.).

Class members all "were damaged" under these theories of liability. *Felix*, 2015-Ohio-3430 at ¶35. They each had to pay an "investigation" fee which the Defendants misrepresented, had no legitimate authority to charge, and which "justice and equity" entitle them to recoup. *Desai*, 2008-Ohio-3957 at ¶14. Additionally, as with Class A and Class B, evidence as to KNR's deliberate intent to enrich itself by charging what it knew or should have known to be an illegitimate fee warrants disgorgement as a remedy to deter the self-dealing alleged even apart from whether any class-member suffered actual damages. *See* Section II.B.2.iii., above.

Thus, neither *Felix* nor anything else poses an impediment to certification of the investigation-fee class.

VI. The claims of all three putative classes have been sufficiently alleged in the Fifth Amended Complaint.

Defendants Ghoubrial further argues that Plaintiffs have attempted to certify classes not alleged in the Fifth Amended Complaint, and that certification should be denied for this purported reason. *See* Ghoubrial Opp. at 34–38. Mainly, Ghoubrial complains that he didn't know Plaintiffs would seek to recover for the unconscionable rates he charged for office visits and back braces in addition to those he charged for injections and TENS units. Ghoubrial Opp. at 35. This contention

is amply addressed in the Supplement to Plaintiffs' Motion for Class Certification, filed on May 23, 2019, which is incorporated herein by reference.

In sum, the pending Fifth Amended Complaint put all of the Defendants sufficiently on notice as to the theories of liability and streamlined class definitions set forth in Plaintiffs' motion for certification and no Defendant can legitimately claim "surprise" as to either. Rule 23(C)(1)(a) provides that class certification should be determined "at an early practicable time after a person sues or is sued as a class representative." Defendants cannot begin to argue that Plaintiffs have been dilatory in pursuing discovery or relief in this lawsuit. The small differences between the class definitions set forth in the Fifth Amended Complaint and Plaintiffs' certification motion, respectively, only reflect Plaintiffs' necessary efforts to adjust to the newly discovered evidence in this case as promptly and straightforwardly as is practicable under the circumstances.[12] In any event, any possible issues created by these discrepancies would be cured by the Court granting Plaintiffs' pending motion for leave to file a Sixth Amended Complaint,[13] the allegations of which identically track the pending motion for class-certification. *See* Ghoubrial Opp. at 36, footnote 20, quoting

[12] Despite Plaintiffs' diligent efforts to obtain complete documentary discovery and schedule depositions well in advance of the April 15, 2019 class-discovery deadline, Defendants Floros and Ghoubrial only made themselves available to be deposed on March 20, and April 9, respectively. Additionally, Ghoubrial only produced the bulk of his written discovery responses and document production on April 1, only 8 days before his deposition and 14 days before the class-discovery deadline, despite a February 5 Court order pursuant to Plaintiffs' December 21, 2018 motion to compel requiring him to do the same. The extent of the obstruction faced by Plaintiffs in conducting discovery is well (if not completely) summarized in Plaintiffs' respective (and successful) motions for extension of the class-discovery deadline filed on April 11, 2019, January 2, 2019, September 18, 2018, as well as the various (also primarily successful) motions to compel that the Plaintiffs have been required to file against Ghoubrial.

[13] Floros also argues that certification of Class A should be denied "because it alleges claims against him that were not alleged in Plaintiffs' operative Fifth Amended Complaint." Floros Opp. at 32–33. Plaintiffs' motion for class certification does assert that Floros is liable to all Class-A members for having participated in the price-gouging scheme (*e.g.*, Pls' Mot. at 44), but Plaintiffs acknowledge that certification against Floros as to this Class would be inappropriate unless and until the Court grants Plaintiffs' motion for leave to file their Sixth Amended Complaint. This in no way warrants denial of certification against Ghoubrial and the KNR Defendants.

Costelo v. Chertoff, 258 F.R.D. 600, 604–605 (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") (emphasis added); *See also* Section VII., below.

V. If the Court is inclined to deny certification of any of the three proposed classes, it should first consider redefining the class, including by creating subclasses.

While Plaintiffs have sufficiently shown that common proof will predominate so as to justify certification of all three classes defined in their motion for certification, the Court should not deny class-certification without first considering whether certification of redefined classes, or sub-classes, would be appropriate. "To the extent that ... variations" among class-members' claims "require distinct demonstrations of proof, the subclasses may, if necessary, be redefined by the trial court." *Rimedio v. SummaCare, Inc.*, 9th Dist. Summit No. 25068, 2010-Ohio-5555, ¶ 76. *See, e.g.*, *Stammco, L.L.C. v. United Tel. Co.*, 125 Ohio St.3d 91, 2010-Ohio-1042, 926 N.E.2d 292, ¶ 12 ("[T]he trial judge who conducts the class action and manages the case must be allowed to craft the definition with the parties."); *Marks v. C.P. Chem. Co., Inc.*, 31 Ohio St.3d 200, 201, 509 N.E.2d 1249 (1987) ("It is at the trial level that decisions as to class definition and the scope of questions to be treated as class issues should be made."); and *Unifund CCR Partners v. Piaser*, 2018-Ohio-2575, 116 N.E.3d 675, ¶ 50 (11th Dist.) ("[C]ourts have discretion to redefine a class to avoid" a "problem"). This well-established principle additionally serves to void Defendant Ghoubrial's argument that the Court is strictly "bound to the class definitions provided in the complaint." Ghoubrial Opp. at 34–38.

VIII. Conclusion

The Court should reject Defendants' efforts to overcomplicate its analysis by their serial reference to irrelevant issues. Plaintiffs have set forth compelling evidence that applies on a class-wide basis to prove their cogent allegations regarding Defendants' schemes to defraud. The class-action mechanism was designed precisely to ameliorate such conduct and should be used to do so here.

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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