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 **Supplement to Plaintiffs' Motion for Class-Action Certification re: the Ohio Corrupt Practices Act**

In its order dated July 26, 2019, the Court granted Plaintiffs Harbour, Norris, and Reid leave to assert claims against the Defendants under the Ohio Corrupt Practices Act, R.C. 2923.34 ("OCPA") regarding the price-gouging scheme at issue in this case (putative Class A). In the same order, the Court stated that it "will allow supplemental briefing on the new allegations during the class-certification process." *Id.* at 3, fn 1. Thus, Plaintiffs submit the following to briefly assert that the OCPA claims are particularly amenable to class-certification, for the same reasons set forth in Plaintiffs' motion for certification and the related reply brief.

As Plaintiffs have explained in their earlier class-certification briefing, Ohio law provides that "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).

Thus, claims under anti-racketeering statutes like the OCPA are especially amenable to class-action treatment because they pertain to damage proximately caused by a "pattern of corrupt activities" that "impacted the class." *CSAHA/UHHS-Canton, Inc. v. Aultman Health Found.*, 5th Dist. Stark No. 2010- CA-00303, 2012-Ohio-897, ¶ 77; *Just Film, Inc. v. Buono*, 847 F.3d 1108, 1120 (9th Cir. 2017). Accordingly, Plaintiffs "need not show that each members' damages from that conduct are identical." *Just Film Inc.* at 1120. Rather, certification is appropriate where the class members are "able to 'show that their damages stemmed from the'" overarching scheme that "created the legal liability." *Id.* at 1121.

For example, in *Community Bank of N. Virginia Mtge. Lending Practices Litigation, PNC Bank NA*, 795 F.3d 380, 385 (3d Cir. 2015), plaintiffs brought class claims based on a "scheme affecting numerous borrowers" that was spearheaded by a group of entities that "offered high-interest mortgage-backed loans to financially strapped homeowners." The plaintiffs specifically alleged that fees listed on relevant documents "included illegal kickbacks" that "did not reflect the value of any

services actually performed," and that the defendants "actively worked" "to expand the loan volume generated by the scheme." *Id.* at 386. On appeal from the district court's order certifying the class, the court of appeals rejected defendants' arguments that certification was improper due to the existence of individualized inquiries:

> PNC asserts that the question of whether each settlement fee at issue was somehow improper will require a loan-by-loan and fee-by-fee analysis ... Individual issues will predominate, says PNC, because the Plaintiffs will need to demonstrate the difference between the fees that they paid and the fees that they should have paid. Once more ..., that argument fails—the Plaintiffs do not assert that [defendants] rendered inadequate services for which the class members are entitled to claw back part of the fee. They assert that [defendants] performed no services and was entitled to no fee at all.

Id. at 408.

Likewise, in *Iron Workers Local Union No. 17 Ins. Fund v. Philip Morris Inc.*, 23 F.Supp.2d 771, 786 (N.D.Ohio 1998), the court certified a class alleging claims under the OCPA despite defendants' claims that the court would "be required to evaluate individualized proof and independent evidence regarding the claims of each of ... more than 100 trust funds." The court found allegations that "defendants engaged in a common course of misrepresentation designed to affect all plaintiffs in like fashion" sufficient to "establish issues common to the class." *Id.*

As set forth in detail in Plaintiffs' motion for class-certification and motion for leave to file their Sixth Amended Complaint, Plaintiffs have set forth cogent evidence of a scheme to defraud them that meets the three elements of an OCPA claim.[1] While Plaintiffs have shown that they have

[1] A civil claim under the OCPA requires proof "(1) that the conduct of the defendant involves the commission of two or more specifically prohibited state or federal criminal offenses; (2) that the prohibited criminal conduct of the defendant constitutes a pattern; and (3) that the defendant has participated in the affairs of the enterprise or has acquired and maintained an interest in or control of an enterprise." *Morrow v. Reminger & Reminger Co. LPA*, 183 Ohio App.3d 40, 2009- Ohio-2665, 915 N.E.2d 696, ¶ 27 (10th Dist.), quoting *Patton v.* Wilson, 8th Dist. Cuyahoga No. 82079, 2003-Ohio-3379, ¶ 12.

all suffered actual injury as a result of the price-gouging scheme, a civil claim under the OCPA does not require that a plaintiff have suffered "direct injury" caused by the pattern of corrupt activity. Rather, "[a]ny person who is injured *or threatened with injury* by a violation of section 2923.32 of the Revised Code ... may institute a civil proceeding seeking relief from any person whose conduct violated or allegedly violated" that section. *See* R.C. 2923.34(A); *Schlenker Ents., LP v. Reese*, 3d Dist. Auglaize Nos. 2-10-16, 2-10-19, 2010-Ohio-5308, ¶ 38 ("A civil OCPA claim" "can be brought by persons who are injured or threatened with injury from an OCPA violation."); *Samman v. Nukta*, 8th Dist. Cuyahoga No. 85739, 2005-Ohio-5444, ¶ 24 (explaining that R.C. 2923.34 "permits a civil action for violations of R.C. 2923.32 by any person" "threatened with injury from the violation.").[2]

For these reasons, and those stated fully in Plaintiffs motion for class-certification and the related reply brief, the proposed Class A members should be permitted to pursue their OCPA claims as a class-action as with the other Class A claims alleged.

Respectfully submitted,

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[2] *See also Aultman Health*, at ¶ 77 ("Given Ohio's recognition of recovery for indirect injury ... we find the evidence sufficient to support the jury's inference/conclusion" that a "pattern of corrupt activities proximately caused damage."); *Lowe v. Ransier*, 581 B.R. 843, 849 (Bank. 6th Cir. 2018) (the OCPA "offer[s] standing to a broader class of plaintiffs than federal RICO statutes"); *Iron Workers Local Union No. 17 Ins. Fund v. Philip Morris Inc.*, 23 F.Supp.2d 771, 786 (N.D.Ohio 1998) ("In choosing to broaden standing to bring RICO claims under state law, the Ohio General Assembly decided to widen the right to bring an action ... the Ohio General Assembly has determined that persons indirectly injured should have standing to bring an action.").

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Certificate of Service

The foregoing document was filed on August 23, 2019, using the Court's electronic-filing system, which will serve copies on all necessary parties.

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