IN THE COURT OF COMMON PLEAS
SUMMIT COUNTY, OHIO

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

On July 26, 2019, this Court issued Order allowing Plaintiffs to amend their complaint for a sixth time and to assert a new claim under R.C. 2923.34.[1] In that Order, this Court also stated that the parties could submit supplemental briefing on the new claims. In response to that Order and Plaintiffs' supplemental brief, Floros submits the following brief.

**Memorandum in Support**

## I. Plaintiffs' OCPA Allegations

Plaintiffs allege that Defendants violated Ohio Corrupt Practices Act (R.C. 2932.34) by conspiring to subject KNR's clients to price-gouging scheme "by inducing them to waive their health-insurance benefits and receive fraudulent healthcare from Defendant Ghoubrial for which they were charged unconscionable rates." SAC ¶189. As to the underlying illegal acts in support of their OCPA claims, Plaintiffs allege that "Defendants have engaged in 'corrupt activity' under

[1] Floros incorporates the objections raised in his brief in oppositions to Plaintiffs' motion to amend.



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R.C. 2923.31(I) by engaging in telecommunications fraud under R.C. 2913.05 and mail and wire fraud under 18 U.S.C. 1341 and 1343 in furtherance of their scheme." *Id.* 190.

Plaintiffs further allege that Defendants used "mail and telecommunications wires, including to disseminate its ads and telemarketing communications, to drive the high volume of clients that sustains the KNR settlement mill," and that the mail and wire fraud statutes strictly prohibit using "'interstate mails or wires communications system in furtherance of a scheme to misuse' the 'fiduciary relationship for gain at the expense of the party to whom the fiduciary duty was owed,' which includes a kickback arrangement between a law firm and chiropractor."' *Id* ¶¶191-192. As to Floros, Plaintiffs also allege that he "makes extensive use of telemarketers to unlawfully solicit clients on KNR's behalf, trade referrals with the firm, and assist the other Defendants in coercing the clients into waiving their health-insurance benefits and receiving fraudulent medical care from Defendant Ghoubrial pursuant to Defendants' price-gouging scheme." *Id.* ¶ 7.

Tellingly, Plaintiffs do not allege what specific telecommunications, mailings, or wires were fraudulent or used to defraud the named Plaintiffs. Instead, Plaintiffs rely on unsupported and conclusory accusations. As shown below, this cannot warrant class certification.

## II. Plaintiffs' OCPA claims lack standing and evidentiary support.

Civ. R. 23 does not seal off class questions from merits questions. Instead, a court considering certification must examine the "enmeshed legal and factual issues that are part of the merits of the plaintiff's underlying claims." *Felix v. Ganley Chevrolet, Inc.*, 145 Ohio St. 3d 329, 2015-Ohio-3430 ¶ 26; *Dukes*, 564 U.S. at 351; *Comcast Corp. v. Behrend*, 569 U.S. 27, 34 (2013). A court's obligation to decide merits questions bearing on class certification extends to legal questions. *See, e.g., Felix*, 145 Ohio St. 3d 329 ¶ 27 (finding it "necessary" to examine



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relevant substantive law before evaluating Rule 23 compliance); *Stammco,* 136 Ohio St. 3d 231 ¶ 51 (looking at the "evidence in this case . . . and the applicable case law") (emphasis added).

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

**A. OCPA Elements**

The OCPA, which is primarily a criminal statute, is modeled after the federal RICO statute. *Bradley v. Miller,* 96 F. Supp. 3d 753, 771 (S.D.Ohio 2015). These statutes were enacted to "enhance the government's ability to quell organized crime." *State v. Schlosser,* 79 Ohio St. 3d 329, 681 N.E.2d 911, 914 (Ohio 1997). The OCPA contains three distinct prohibitions:

> (A)(1) No person employed by, or associated with, any enterprise shall conduct or participate in, directly or indirectly, the affairs of the enterprise through a pattern of corrupt activity or the collection of an unlawful debt.
>
> (2) No person, through a pattern of corrupt activity or the collection of an unlawful debt, shall acquire or maintain, directly or indirectly, any interest in, or control of, any enterprise or real property.
>
> (3) No person, who knowingly has received any proceeds derived, directly or indirectly, from a pattern of corrupt activity or the collection of any unlawful debt, shall use or invest, directly or indirectly, any part of those proceeds, or any proceeds derived from the use or investment of any of those proceeds, in the acquisition of any title to, or any right, interest, or equity in, real property or in the establishment or operation of any enterprise.
>
> A purchase of securities on the open market with intent to make an investment, without intent to control or participate in the control of the issuer, and without



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> intent to assist another to do so is not a violation of this division, if the securities of the issuer held after the purchase by the purchaser, the members of the purchaser's immediate family, and the purchaser's or the immediate family members' accomplices in any pattern of corrupt activity or the collection of an unlawful debt do not aggregate one per cent of the outstanding securities of any one class of the issuer and do not confer, in law or in fact, the power to elect one or more directors of the issuer.

A claim under R.C. 2923.32(A)(1) requires proof: (1) that 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 an 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 ¶ 27 citing Patton v. Wilson, 8th Dist. No. 82079, 2003-Ohio-3379, ¶12, citing *Kondrat v. Morris* (1997), 118 Ohio App.3d 198, 209, 692 N.E.2d 246, and *Universal Coach, Inc. v. New York City Transit Auth., Inc*. (1993), 90 Ohio App.3d 284, 291, 629 N.E.2d 28.

An "acquisition" claim under 2923.32(A)(2) 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 of corrupt activity, and (3) that the defendant . . . has acquired or maintained an interest in or control of an enterprise" or real property." *Bradley v. Miller*, 96 F. Supp. 3d 753, 771 (S.D.Ohio 2015). Lastly, an "investment" claim under 2923.32(A)(3) requires proof: (1) that the defendant knowingly received proceeds derived from a pattern of corrupt activity, (2) that the defendant used or invested those proceeds (3) to acquire an interest in real property or in the establishment of an enterprise. *Id.*



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Plaintiffs have failed to specify which subsection each Defendant violated of R.C. 2923.32(A). That said, it can be assumed that Plaintiffs are only alleging that Defendants violated 2923.32(A)(1), since they have not argued that Defendants unlawfully acquired interest or control in Plaintiffs' property or unlawfully invested proceeds. It is worth, however, discussing some differences between all three prohibitions to make sure that the correct legal standard and proof requirements are applied, especially since Plaintiffs continue to misrepresent the relevant proof required. For instance, violations of sections R.C. 2923.32A(1) and (2) require proof that the defendant personally committed two or more predicated acts that constitute a pattern of corrupt activity. *Id*. Violations of R.C. 2923.32A(3), on the other hand, do not require proof that the defendant committed the acts that are the basis for the pattern of corrupt activity, but do require a culpable mental state. *Id.*

In a civil action under OCPA, the pattern of corrupt activity that forms the basis of a civil claim "shall include at least one incident other than a violation of"' state and federal criminal statutes prohibiting mail or wire fraud, securities fraud, or interstate transportation of stolen goods." *Id*.; 2923.34(E).[2] This means that the plaintiffs "must demonstrate that **each defendant** engaged in a pattern of corrupt activity that includes at least one predicate act that is not a form of securities fraud, mail or wire fraud, or the interstate transportation of stolen property or securities." *Bradley v. Miller*, 96 F. Supp. 3d 753, 774 (S.D.Ohio 2015)(emphasis added).

[2] R.C. 2923.34(E) provides: "[T]he pattern of corrupt activity alleged by an injured person or person threatened with injury shall include at least one incident other than a violation of division (A)(1) or (2) of section 1707.042 [securities fraud] or division (B), (C)(4), (D), (E), or (F) of section 1707.44 of the Revised Code [securities fraud], of 18 U.S.C. 1341 [mail fraud], 18 U.S.C. 1343 [wire fraud], 18 U.S.C. 2314 [transportation of stolen goods, securities, moneys, fraudulent state tax stamps, or articles used in counterfeiting], or any other offense involving fraud in the sale of securities."



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Moreover, Ohio applies the stricter federal pleading standard when analyzing OCPA claims, since it is directly adopted from RICO. *Dixon v. Huntington Natl. Bank,* 8th Dist. Cuyahoga No. 100572, 2014-Ohio-4079, ("case law clearly establishes that this court has adopted stricter standards for cases in which RICO and/or OCPA claims are alleged."); *Universal Coach, Inc. v. New York City Transit Auth., Inc*., 90 Ohio App.3d 284, 291, 629 N.E.2d 28 (Cuyahoga 1993); *Dottore v. Vorys, C.P. No*. CV 10 741375, 2012 Ohio Misc. LEXIS 142, at *25-34 (Aug. 3, 2012); *Canterbury v. Columbia Gas of Ohio,* S.D.Ohio No. C2-99-1212, 2001 U.S. Dist. LEXIS 26286, at *32-40 (Sep. 29, 2001). This requires specifying the time, place, and content of the alleged fraudulent communications or transactions. *Id.*

**B. Plaintiffs have failed to allege a pattern of racketeering.**

R.C. 2923.31(E) defines a "[p]attern of corrupt activity" as "two or more incidents of corrupt activity, whether or not there has been a prior conviction, that are related to the affairs of the same enterprise, are not isolated, and are not so closely related to each other and connected in time and place that they constitute a single event." *Id.* The commission of two incidents of corrupt activity alone cannot demonstrate a pattern of corrupt activity. *Id*. The OCPA enumerates the offenses that constitute a corrupt activity for purposes of an OCPA claim. R.C. 2923.31(I)(1)-(5). The plaintiff also must show that "the racketeering predicates are related, and that they amount to or pose a threat of continued criminal activity." *H.J. Inc. v. Nw. Bell Tel. Co.*, 492 U.S. 229, 239, 109 S. Ct. 2893, 106 L. Ed. 2d 195 (1989) (emphasis in the original); *Ouwinga v. Benistar Plan Servs., Inc*., 694 F.3d 783, 795 (6th Cir. 2012) (same).

Plaintiffs' OCPA claim alleges only incidents of mail and wire fraud as predicate acts. SAC ¶¶ 189-191. In an attempt to side-step OCPA's requirements, Plaintiffs allege, in conclusory fashion, that Defendants committed "telecommunications fraud" in violation of R.C.



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2913.05. *Id*. Ohio's telecommunications fraud statute, however, is substantively identical to the federal mail and wire fraud statutes. *Compare* R.C. 2913.05(A) with 18 U.S.C. 1341 and 18 U.S.C. 1343. The acts that constitute the alleged telecommunications fraud are the same acts that constitute the alleged federal mail and wire fraud—i.e., unlawful solicitations. Thus, any "incident" that constitutes a "violation" one of Ohio's telecommunications fraud statutes is also an "incident" that constitutes a "violation" of the federal mail and wire fraud statutes. R.C.2923.34(E).

Because Defendant's alleged telecommunications fraud does not stem from a separate "incident," it cannot establish a pattern of racketeering activity under the OCPA. *See Cap City Dental Lab LLC v. Ladd*, S.D.Ohio No. 2:15-cv-2407, 2016 U.S. Dist. LEXIS 118566, at *17-18 (Sep. 1, 2016)("Here, Plaintiff has adequately pled only theft by deception and receiving stolen property as criminal offenses, which constitute a single event and cannot support a pattern of corrupt activity within the meaning of the OCPA.").

Plaintiffs have thus failed to allege a pattern of racketeering, since the act violations of R.C. 2913.05(A) and 18 U.S.C. 1341 and 1343 involve the same forms of mail, wire, and telecommunications fraud.

**C. Plaintiffs have failed to plead mail and wire fraud with the required particularity.**

The elements of 18 U.S.C. 1341, the predicate act of mail fraud alleged by Plaintiffs, are a scheme or artifice to defraud and a mailing for the purpose of executing the scheme. *Dottore v. Vorys, C.P.* No. CV 10 741375, 2012 Ohio Misc. LEXIS 142, at *25-34 (Aug. 3, 2012). The scheme to defraud must involve intentional fraud, consisting of deception intentionally practiced to induce another to part with property or to surrender some legal right, and which accomplishes the end designed. *Epstein v. United States*, 174 F.2d 754, 765 (6th Cir. 1949). A scheme to



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defraud requires intent to deceive or defraud, and a plaintiff must allege that intent. *Id*. The scheme to defraud must also involve "misrepresentations or omissions reasonably calculated to deceive persons of ordinary prudence and comprehension." *United States v. Van Dyke*, 605 F.2d 220, 225 (6th Cir.1979). "Those misrepresentations too need to be alleged with particularity." *Dottore v. Vorys, C.P.* No. CV 10 741375, 2012 Ohio Misc. LEXIS 142, at *25-34 (Aug. 3, 2012).

Likewise, under 18 U.S.C. 1343 "claim of honest-services fraud must allege the fraudulent deprivation of honest services through a bribery or kickback scheme." *Huff v. Firstenergy Corp.,* 972 F.Supp.2d 1018, 1034 (N.D.Ohio 2013). A plaintiff must allege the existence of a quid pro quo agreement with particularity. *Id*. For instance, in *Huff*, the court dismissed a plaintiffs' wire fraud claim because the plaintiff's bribery allegations were "nothing more than innocuous facts mixed with conclusory allegations:"

> Nonetheless, the only facts offered in support of this conclusory allegation include the existence of campaign contributions, the reversal, on reconsideration, by the Ohio Supreme Court, the fact that this ruling benefited FirstEnergy defendants, plaintiffs' belief that such a ruling was "unprecedented" and legally erroneous, and that plaintiffs' counsel was "literally stunned" by the Ohio Supreme Court's ruling. Close-in-time contributions, standing alone, will not suffice to establish a quid pro quo agreement. Moreover, the fact that plaintiffs and their counsel disagree with the ruling is insufficient to establish that it was the unlawful result of bribery. If such were the case, every dissatisfied state court litigant could maintain a bribery action in federal court.
>
> Plaintiffs attempt to fill in the gaps with additional conclusory allegations that the reversal "smacks of a payoff[,]" that plaintiffs are "forced to suspect" that "an unlawful ex parte influence was involved" in the ruling, and that FirstEnergy defendants "were unable to resist the exigent need to utilize their bought and paid for political influence to gain access to the [judicial defendants], ex parte, and communicate explicitly and/or implicitly the unacceptable nature of their failure to perform their end of the quid pro quo." On a Rule 12(b)(6) motion, however, these conclusory allegations must be disregarded.

*Huff v. Firstenergy Corp*., 972 F.Supp.2d 1018, 1034-1036 (N.D.Ohio 2013)(citations omitted).



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Thus, when pleading the predicate act of wire fraud for a OCPA claim, a plaintiff must: "(1) specify the statements that the plaintiff contends were fraudulent, (2) identify the speaker, (3) state where and when the statements were made, and (4) explain why the statements were fraudulent." *Heinrich v. Waiting Angels Adoption Servs., Inc*., 668 F.3d 393, 404 (6th Cir. 2012) (citations and internal quotation marks omitted). *Dixon v. Huntington Natl. Bank*, 8th Dist. Cuyahoga No. 100572, 2014-Ohio-4079, ¶ 7-21

Plaintiffs' OCPA claim is based on allegations that Defendants violated R.C. 2923.31(I) by engaging in telecommunications fraud under R.C. 2913.05 and mail and wire fraud under 18 U.S.C. 1341 and 1343. But despite over 255 paragraphs of unsupported and conclusory allegations, Plaintiffs have failed to plead any telecommunications or mail fraud with the requisite particularity. For instance, nowhere in Plaintiffs' complaint does it allege when and where Defendants specifically engaged in interstate mail fraud under U.S.C. 1341 and 1343, what fraudulent statements were made, or how the mailings related to Defendants' alleged acts of wrongfully referring patients to Ghoubrial. *Dottore v. Vorys, C.P.* No. CV 10 741375, 2012 Ohio Misc. LEXIS 142, at *25-34 (dismissing wire fraud claim because the plaintiffs failed to allege the specific defendant that defrauded them and the date of the fraudulent act).

As to telecommunications fraud under R.C. 2913.05, Plaintiffs only make the conclusory argument that Floros engaged in unlawful solicitation by hiring telemarketers to solicit clients. Plaintiffs fail to plead with specificity how Floros' telemarketing solicitations were "deceptive," "defrauded," or "deprived" Plaintiffs, as required under R.C. 2913.05.[3] Plaintiffs have failed to

[3] Under R.C. 2913.01, "Deception" means knowingly deceiving another or causing another to be deceived by any false or misleading representation, by withholding information, by preventing another from acquiring information, or by any other conduct, act, or omission that creates, confirms, or perpetuates a false impression in another, including a false impression as to law, value, state of mind, or other objective or subjective fact. "Defraud" means to knowingly obtain,



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show any specific statements were knowingly false or otherwise gave a false impression. Plaintiffs barely even discusses what was said in the solicitations, other than offering a free consultation. SAC¶ 37. *McGee v. E. Ohio Gas Co.*, 111 F.Supp.2d 979, 986-987 (S.D.Ohio 2000)(dismissing OCAP claim where "Plaintiff has not alleged sufficiently the time, place or content of the telecommunications misrepresentation on which she relied."); *Cap City Dental Lab, LLC v. Ladd*, S.D.Ohio No. 2:15-CV-2407, 2016 U.S. Dist. LEXIS 118570, at *25-26 (Sep. 1, 2016)(dismissing OCPA claim because Plaintiff failed to allege what specific telecommunications constituted an act of fraud). Plaintiffs' unlawful telecommunications claim also fails because OAC 4734-9-02 specifically allows chiropractors to solicit over the phone.

**D. Plaintiffs have failed to provide any evidence in support of their telemarketing and mail fraud claim.**

Plaintiff Thera Reid is the only named member that received an alleged solicitation from Floros. At her deposition, Plaintiff Reid admitted to signing a disclosure and agreeing that she "not pressured to set an appointment by the caller(s), and decided to make an appointment and go to the chiropractor solely out of the concern for my own health and well-being, after my recent accident." *See* Ex. F, Reid Tran. 273-280.[4]

Plaintiff Reid also admitted that she was not "coerced" to treat with Floros, that the treatment was helpful, and that the cost of her treatment was correct and nonfraudulent. *Id.*, 100-

by deception, some benefit for oneself or another, or to knowingly cause, by deception, some detriment to another. "Deprive" means to do any of the following: (1) Withhold property of another permanently, or for a period that appropriates a substantial portion of its value or use, or with purpose to restore it only upon payment of a reward or other consideration; (2) Dispose of property so as to make it unlikely that the owner will recover it; (3) Accept, use, or appropriate money, property, or services, with purpose not to give proper consideration in return for the money, property, or services, and without reasonable justification or excuse for not giving proper consideration.

[4] The exhibits from Floros' brief in opposition to class certification are incorporated and referenced in this brief.



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102, 184, 239-240, 297-298. Reid similarly testified that her treatment with Ghoubrial was helpful and nonfraudulent. *Id*. 477-478. Reid also testified that Floros did not actually refer her to KNR. Rather, according to Reid, it was ASC staff and Dr. Michael Dumond that recommend KNR. Ex. J, 101; PL's Mot. Ex. 11, Reid. There can be no question here that Reid's testimony directly contradicts Plaintiffs' claim that Floros unlawfully solicited or coerced her into representation with KNR or unneeded treatment at unconscionable rates.

Moreover, Floros did not personally solicit patients. *See* Floros Aff. Ex. A. Nor did he hire people to solicit patients on his behalf. *Id*. Rather, ASC employed telemarketers. *Id*. Floros is only an employee of ASC, which also employs other chiropractors. *Id*. Floros also has no ownership rights in ASC. *Id.* Plaintiffs have failed to provide any evidence disputing these facts. Nor have Plaintiffs provided any evidence showing that Floros pierced the corporate veil or that Floros should be individually liable for his employer's conduct.

**E. Plaintiffs cannot show proximate cause.**

In addition to establishing a violation or conspiracy to violate R.C. 2923.32(A), "a plaintiff in a civil OCPA action must prove he or she was injured, directly or indirectly, by the OCPA violation and the injuries were proximately caused by that violation" *Bradley v. Miller*, 96 F. Supp. 3d 753, 774 (S.D.Ohio 2015); *CSAHA/UHHS-Canton, Inc. v. Aultman Health Found*., 2012-Ohio-897, 2012 WL 750972, at *9-10 (Ohio App. 2012)( "it is "clear a plaintiff bringing a [civil] claim under [OCPA] must prove its damages were proximately caused by the defendant's' conduct in violation of § 2923.32(A)"); *see also* R.C. 2923.34(E).

Ohio courts apply "traditional notions of proximate cause" to civil OCPA actions. *Cleveland v. JP Morgan Chase Bank, N.A.*, 2013-Ohio-1035, 2013 WL 1183332, at *5, *8 (Ohio App. 2013). Accordingly, "the language in § 2923.34(E) that any person directly or indirectly



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injured can state a private cause of action informs the analysis of whether, but does not relieve the burden to prove that, the illegal conduct proximately caused the plaintiff's injury." *W. & S. Life Ins. Co. v. JPMorgan Chase Bank, N.A., F. Supp.* 3d, No. 1:11-cv-495, 54 F. Supp. 3d 888, 2014 U.S. Dist. LEXIS 147941, 2014 WL 5308422, at *25 (S.D. Ohio Oct. 16, 2014). *Lesick v. Manning*, No. 91-C-70, 1992 Ohio App. LEXIS 6374, 1992 WL 380284, at *3 (Ohio App. Dec. 17, 1992)(Proximate cause "requires a showing of connection between the violations and the claimed injuries."); *Bradley v. Miller, 96 F. Supp.* 3d 753, 774 (S.D.Ohio 2015)("A civil action premised on a violation of § 2923.32(A)(1) requires proof that the defendant's pattern of corrupt activity proximately caused the plaintiff's injury.").

Plaintiffs have failed to provide any evidence that price gouging scheme proximately caused their injuries, or that they were even in-fact injured. This is because Plaintiffs would need to show what the insurance company would have paid if Plaintiffs presented claims without Ghoubrial's treatment or presented claims with healthcare payments at Medicaid/Medicare rates. Indeed, every attorney who testified in this case has opined that the amount the insurance company will pay on a claim relates to the cost of medical care (i.e. the higher the medical cost, the higher the settlement value).

Moreover, if Plaintiffs' claims were true and Plaintiffs presented claims to insurance companies that included unnecessary, fraudulently, or wildly over-priced medical treatment, then those insurance companies would have a right to disgorge those entire funds from Plaintiffs under Plaintiffs' proposed theories of law. The insurance companies could make the same claim against Plaintiffs, which is that they presented an insurance claim involving fraudulent care and misrepresented the cost of the treatment. Plaintiffs would also be at risk for an unjust enrichment or insurance fraud claim under R.C. 2913.47. Likewise, under Plaintiffs' unsupported conspiracy



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theory, every chiropractor in Ohio that solicits patients and recommends these patients to lawyers or other doctors that work on a LOP could be liable for OCPA violations.

**F. Plaintiffs cannot show that their OCPA claim is plausible**.

Plaintiffs' OCPA claims fail the plausibility test. A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged. *Dottore v. Vorys*, C.P. No. CV 10 741375, 2012 Ohio Misc. LEXIS 142, at *25-34 (Aug. 3, 2012). The plausibility standard is not akin to a "probability requirement," but it asks for more than a sheer possibility that a defendant has acted unlawfully. *Id*. When a complaint pleads facts that are merely consistent with a defendant's liability, it stops short of the line between possibility and plausibility of entitlement to relief. *Id.*

For instance, in *Dottore*, the court denied the plaintiffs' Ohio RICO claim when the defendant did not benefit in participating in the alleged scheme:

> "The plaintiffs' RICO claim lacks facial plausibility. The plaintiffs allege that Vorys bribed elected officials by hiring their sons for work that did not exist or that they were not qualified to do, and then charged the expense of those bribes to the plaintiffs in the form of unjustified bills. That allegation ignores the purpose — indeed, the primary element — of a bribe: getting something for the bribe. A bribe is supposed to pay for itself. To find the plaintiffs' allegations plausible, the court has to conclude that Vorys was so inept at making a bribe — defined at R.C. 2921.02(A) as giving a public official a thing of value with the purpose to improperly influence the official in the performance of his duties — that it had to cover the expense of the bribe by defrauding its clients and not by getting anything for the bribe. Such a "scheme or artifice to defraud" may be possible but it stops well short of crossing the line to plausibility."

As in *Dottore*, Plaintiffs' OCPA lacks plausibility because there is no financial incentive for Floros or other chiropractors to refer patients to Ghoubrial. Plaintiffs acknowledge this in their Motion. *See* PL's Mot. Pg. 26. Plaintiffs specifically cite testimony from former KNR



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employees where they talk about "cut[ting] the heck" out of [chiropractic bills] in order to preserve Dr. Ghoubrial…Dr. Ghoubrial always go the biggest share of [the client settlements]." Plaintiffs try to dismiss this glaring flaw in their argument by claiming that it the chiropractors still engaged in the scheme to their financial detriment because it meant possibly more referrals. Plaintiffs, however, fail to offer any allegations in support of this claim in their proposed-sixth Complaint. Nor do Plaintiffs have any admissible evidence in support of these allegations.

**G. Plaintiffs cannot show conspiracy claim under OCPA.**

The "failure to successfully allege an OCPA violation negates a civil conspiracy cause of action." *Herakovic*, 2005-Ohio-5985 at ¶ 37, citing *Stachon v. United Consumers Club Inc*., 229 F.3d 673, 677 (7th Cir.2000); *Miller v. Norfolk S. Ry. Co*., 183 F.Supp.2d 996, 1002-03 (N.D.Ohio 2002). As explained in *Herakovic*:

> Without these parameters, individual plaintiffs could fashion broad conspiracy claims that have the illusion of a pattern and of an enterprise, when, in fact, they have individual defendants acting in their own individual affairs and not that of an enterprise. This would nullify the mandate under OCPA that before one can claim conspiracy, one must allege with specificity an OCPA violation.

*See also Dixon v. Huntington Natl. Bank*, 8th Dist. Cuyahoga No. 100572, 2014-Ohio-4079, ¶ 21-27(dismissing conspiracy OCPA claim when the plaintiff failed to state with specificity the underlying OCPA violation).

For Plaintiffs to have a valid conspiracy claim against Floros, they would need to show that Floros knew that his patients were receiving fraudulent and unconsciously overpriced medical from Ghoubrial. Plaintiffs have alleged no facts showing this knowledge. Nor have Plaintiffs provided any evidence showing that Floros should have known that Ghoubrial was providing fraudulent and unconsciously overpriced medical care.

**H. Plaintiffs have failed to present credible evidence in support of their price-gouging scheme.**



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Although not one of the predicated illegal acts recognized under OCPA, Plaintiffs have alleged that Defendants engaged in an unlawful price-gouging scheme. Plaintiffs, however, have failed to cite a law that Ghoubrial violated in setting his prices for healthcare. This is because there are no "price-gouging" laws in Ohio. Plaintiffs are simply making up claims and is hoping their use of incendiary words like "price-gouging" will sway this Court.

In their OCPA claims, Plaintiffs have also included allegations for unconscionable contract. Plaintiffs, however, have only plead their unconscionable contract claims against Ghoubrial individually. Plaintiffs contracted with Clearwater Billing; not Ghoubrial. Thus, there unconscionable contract claim is against the wrong parties.

Plaintiffs have also failed to provide any credible evidence showing that Ghoubrial's pricing was unconscionable. The alleged evidence that Plaintiffs cite only relates to whether Ghoubrial's healthcare services were proper and necessary, which are malpractice issues. There can be no question that Plaintiffs lack standing to bring medical malpractice claims for unnecessary, fraudulent, or improper medical treatment. Likewise, as discussed in Floros' Brief in Opposition to Certification, Plaintiffs' alleged evidence chiefly comes from non-admissible expert testimony and scholarly articles, which Plaintiffs cherry pick and grossly mischaracterize. This is not evidence that can be considered in determining certification.

Simply claiming that the charges are unconscionable because they are much higher than the actual cost of the materials is also insufficient to establish a legal claim. Nor is it enough to just compare it to the cost that Medicare or Medicaid charges for services. Because if that was the standard for determining whether a charge was exorbitant then every hospital and healthcare provider would be likely have violated the law, as the cost for medical services are notoriously at a higher rate.



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Plaintiffs have also failed to cite any law that requires healthcare providers to use a patient's health insurance in paying claims. This is because there is no law requiring a healthcare provider to use a patients' health insurance. In fact, most hospitals only accept a limited amount of insurance and contracted managed care plans. For instance, while Cleveland Clinic is one of the largest medical providers in Ohio, it is currently only contracted to accept marketplace-insurance plans from Oscar and UPMC.[5]

Likewise, as Floros discussed in his Brief in Opposition to Certification, Plaintiffs' claim that Floros/ASC refused to accept a patient's insurance is false. ASC accepts payments from medpay and workers' compensation insurance.[6] Ex A; Ex B, Floros Tr. 94-101. Often, patients injured in a car accident will also work directly with an insurance company and not go through an attorney to avoid attorney fees. *Id*. In those cases, patients often pay ASC directly by cash or bank draft for services rendered. *Id*. ASC will also often work directly with car insurance companies. *Id*. Floros even estimates that thousands of their bills are directly submitted and negotiated with a car insurance company and not an attorney. *Id*. ASC has also submitted claims to patients' health insurer, but these claims are usually denied because ASC is out-of-network with health insurance providers. *Id.* But at one point, ASC was in network with the insurance provider Coventry Health Network. *Id.* Plaintiffs have failed to provide any non-conclusory evidence that rebuts these claims.

Plaintiffs' assertion that is illegal or a fraudulent scheme for attorneys or healthcare providers to have a high volume of patients and clients is entirely baseless. While Plaintiffs'

[5] https://my.clevelandclinic.org/patients/accepted-insurance#marketplace-tab
[6] One potential class member that Plaintiffs' counsel represents, Taijuan Carter, paid for his chiropractic treatment through his medpay insurer. Ex. O, Carter Medpay Letter.



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counsel may think that KNR's clients would be better suited with a smaller firm like his own, this opinion has no legal merit.

## II. Plaintiffs' OCPA claim fails to meet the predominance requirement of Ohio Civil R. 23(B)(3).

Like with their other claims, Plaintiffs have failed to identify a uniform set of evidentiary facts that would establish the existence of the alleged OCPA claim that affected each Class Member. For example, as to the OCPA claim, this Court will have to look at each class member's case to determine that Floros knew what Ghoubrial charged and received for his medical services. In each case, this Court will have to determine that Floros knew or should have known that these charges were unconscionable. This Court will have to examine Floros' state of mind in each case to see if he knew or should have known how the insurance industry viewed his relationship with other Defendants since 2010. This Court will have at examine the referral conversations that each class member had with Floros and KNR to determine if they were referred to Ghoubrial by Floros for a medical consult. This Court will have to examine each alleged solicitation by ACS/Floros to show that it was unlawful and deceptive. This Court will have to examine the treatment that Ghoubrial provided to each patient to see if it was reasonable, necessary, or helpful.

This Court will have to examine the conversations between Defendants and each member to determine if they were pressured to seek care with Ghoubrial or otherwise pressured to not use their health insurance. This Court will have to examine whether Ghoubrial provided the treatment or another doctor at his practice. This Court will have to examine the reduction numbers on each settlement. This Court will have to examine each member's case to see if they were proximately harmed as a result of relying on Defendants' alleged mail or telecommunications fraud. This Court would have to examine each



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settlement to see what the adjusters would have offered if Plaintiffs received the same treatment at Medicaid/Medicare or their insurance company rates. If the member did not have health insurance, this Court would have to look to see if they qualified for free healthcare based on low income. This Court will look at each case to see if Medpay was used and if the carrier had a right to subrogation. This Court will have to examine the mind of each adjuster to see if they paid differently on each claim because the patient received care from Floros or Ghoubrial.

That said, Plaintiffs repeatedly misrepresent the law in their supplemental motion, which must be addressed. For instance, Plaintiffs cite *Cope v. Metro. Life Ins. Co*., 82 Ohio St.3d 426, 430, 1998 Ohio 405, 696 N.E.2d 1001 (1998) and *Ritt v. Billy Blanks Enters*., 171 Ohio App.3d 204, 2007-Ohio1695, 870 N.E.2d 212, ¶ 69 (8th Dist.) for the proposition that any fraud claim is suitable for certification if the plaintiff alleges that there was a fraudulent scheme. *See* PLs' Supp. Brief pg. 1-2. This is not the law. Plaintiffs' reliance on these cases in support of their OCPA claim is baseless and misplaced.

Indeed, neither *Cope* nor *Ritt* involved OCPA claims. Rather, in *Cope*, the plaintiffs sued MetLife alleging that it omitted "state-mandated written disclosure warnings when issuing replacement life insurance." *Id*. 433. The fraud was in uniform documents. *Id*. There were no oral misrepresentations or presale conduct at issue. *Id*. 432-433. The Ohio Supreme Court held the case was suited for class action treatment, since the claims involved the use of form documents, standardized practices and procedures, and common omissions as to every customer. *Id* 433-437. In reaching its decision, the Ohio Supreme Court emphasized the fact that the state statute required that anything relating the issuance or delivery of life insurance in Ohio be



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incorporated into a single instrument, which constituted the entire contract between the parties and served as notice of all negotiations and matters between the parties. *Id*.

*Ritt* involved a fraud case where there was a uniform telemarketing script that contained fraudulent information in violation of Ohio's consumer sales statutes. The uniform script falsely promised no additional fees. In granting certification, the Eighth District Court noted that the class members all received the same fraudulent script:

> "The case at hand is not the complex case this court was faced with in *Hoang*. Rather, the facts show that when persons called a toll-free number to purchase a Tae-Bo video, they were all read a scripted, thirty second upsell, emphasizing that they were being given a "RISK FREE" membership, for which they "WON'T BE BILLED." Subsequently, their credit cards were charged for an annual membership. An individualized inquiry is not necessary to determine liability here as it was in *Hoang*."

*Id.* 60. In *Estate of Mikulski v. Centerior Energy Corp*., 8th Dist. Cuyahoga No. 107108, 2019-Ohio-983, the Eighth District later distinguished *Ritt* from cases (like here) where there is no common proof establishing injury:

> "We find this case is more akin to *Hoang* and *Agrawal* than it is to *Ritt*. Like *Hoang* and *Agrawal*, there is no common proof that will establish injury for each class member. The Forms 1099-DIV that Centerior distributed to its shareholders in the relevant years are not sufficient alone to show a class-wide injury. Instead, to determine whether a person was injured and can be included in the Subclass, a court would have to apply and consider a number of factors, such as the individual's tax-rate bracket, how the individual filed (individually or jointly), the amount of other dividends the member received from Centerior, the length of time that the member held stock in Centerior, the type of stock ownership, and the amount of state income taxes paid in one year and deductible of federal income taxes that or the next year.
>
> **Unlike *Ritt*, the facts of this case do not in any way suggest that all of the plaintiffs received identical information, filed identical tax returns, and paid identical amounts to the Internal Revenue Service.** Further, like *Hoang*, the application and consideration of those factors could result in a finding that a particular member was not injured, but instead benefitted from Centerior's alleged misrepresentations. Applying United States federal income tax law to each member of the Subclass to determine whether that member was actually injured (i.e., overpaid his or her taxes in the relevant years) requires an individualized inquiry that fails to satisfy the predominance requirement under Civ.R. 23(B)(3)."

*Id*. ¶50-51 (emphasis added).

As in *Estate of Mikulski*, this case does not involve standardized fraudulent conduct. There is no uniform or clear-cut answer on whether a potential class member relied on Floros' recommendation to see KNR or Ghoubrial. There is no uniform way to adjudicate the OCPA claim without analyzing each patient's consent, reliance, and the individual circumstances on each patient's medical lien and settlement agreement. Nor is there a uniform way to establish injury for each class member.

Plaintiffs next cite *Elkins v. Equitable Life Ins. Co*., M.D.Fla. Civil Action No. 96-296-CIV-T-17B, 1998 U.S. Dist. LEXIS 1557 (Jan. 27, 1998) for a standard of Ohio law. *Elkins* involved Florida law. The parties already reached a settlement and were waiting for settlement approval from the court. As discussed in *In re Worldcom, Inc*., 343 B.R. 412, 428 (Bankr.S.D.N.Y.2006), which rejected the plaintiffs' reliance on *Elkins*, "settlement-only cases [like *Elkins*] do not require a court to analyze the management problems." *Elkins*, therefore, has no relevance here.

Citing *CSAHA/UHHS-Canton, Inc. v. Aultman Health Found.*, 5th Dist. Stark No. 2010- CA-00303, 2012-Ohio-897, ¶ 77 and *Just Film, Inc. v. Buono*, 847 F.3d 1108, 1120 (9th Cir. 2017), Plaintiffs next argue that "claims under anti-racketeering statutes like the OCPA are especially amendable to class action treatment." PLs' Supp. Brief, pg. 2. *CSAHA/UHHS-Canton, Inc* was not a class action. The Fifth District never opined about RICO or OCPA being "especially amendable to class action treatment" or about alleged corrupt activities that "impacted the class" as Plaintiffs falsely claim. Plaintiffs' quote from CSAHA/UHHS was cherry picked and misrepresented.



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Moreover, while *Just Film Inc*., involved class action issues, the court never held that RICO claims "are especially amendable to class action treatment." *Just Film Inc.* is also a case from California that interpreted and involved California law. *Id.* 1114. The alleged fraud in that case involved uniform and unauthorized ACH debits and credit card processing fees. The plaintiffs accused the Defendants of violating California's consumer sales act (Sections 17200 and 17500 of California Business and Professional Code) and Fair Credit Reporting Act (FCRA), 15 U.S.C. 1681. The only difference in injury for each party was the amount of unauthorized fee.

*Just Film Inc*. has no relevance here. Plaintiffs here are not alleging that Defendants made uniform unauthorized and undisclosed fees on their credit card. Plaintiffs are not alleging a violation of California law or FCRA. Moreover, contrary to what Plaintiffs argue, in analyzing typicality, *Just Film Inc.* actually held that the plaintiff must show that it was injured by one of the predicated illegal acts under a RICO charge, as well as the same pattern of racketeering. *Id*. 1118.

Plaintiffs reliance on *Community Bank of N. Virginia Mtge. Lending Practices Litigation, PNC Bank NA*, 795 F.3d 380, 385 (3d Cir. 2015) is also misplaced and meritless. *In re Community Bank* is from the Third Circuit and does not involve Ohio law. It was a uniform form document case. The plaintiffs claimed that they were improperly charged a fee associated with loans, in violation of RESPA. Plaintiffs argued that the defendant was required under federal law to disclose and itemize this service fee in their HUD-1 documents. Plaintiffs further claimed that the defendant performed no services at all in exchange for the fraudulent fee.



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Unlike in *Community Bank*, Plaintiffs are not claiming that Ghoubrial failed to provide medical treatment or medical equipment. Rather, Plaintiffs are claiming that Ghoubrial charged an unconscionable price for his medical services. In contrast to *Community Bank*, Plaintiffs are also not alleging that Defendants failed to provide statutorily disclosures required under federal law. Nor are there uniform documents that contained the same fraudulent representation.

Moreover, courts in the Third Circuit have distinguished *Community Bank* in cases that do not involve allegations that the defendant uniformly failed to include statutory disclosures in form documents. For instance, in *Coleman v. Commonwealth Land Title Ins. Co.*, 318 F.R.D. 275, 288-292 (E.D.Pa.2016), the class plaintiffs alleged that they did not receive discounts to which they were entitled to under state law, which resulted in an overcharge. The plaintiffs filed a RICO action alleging wire fraud, violation of statutory consumer-protection laws, common law fraud, and breach of fiduciary duty. The plaintiffs cited *Community Bank* in support of their motion for class certification. The *Coleman* court rejected Plaintiffs' reliance on *Community Bank* and denied class certification:

> "[In *Community Bank*], [t]he Third Circuit found that the HUD-1 form constituted common evidence of a common scheme because the mere existence of the form—and its inclusion of any service fee which was in fact an illegal kickback—was evidence of fraud, for no services were provided at all. *Id.* at 403, 408. "Under the facts of [that] case," the HUD-1 provided common evidence because, under federal regulation, the HUD-1 was required to itemize fees for settlement services, and no services were provided for the fees paid. *Id*. at 403.
>
> In this case, Plaintiffs allege that Defendants schemed to have their title agents overcharge title insurance premiums by not applying a discount to which class members were entitled. This alleged scheme is distinguishable from that in *Community Bank*. The use of the HUD-1 to perpetuate that alleged scheme is different in kind from the alleged scheme in this case. In *Community Bank*, the HUD-1 could be used as common evidence because all of the forms included a charge for a nonexistent item—a sham service fee—whatever that charge may have been. Here, Plaintiffs allege that the HUD-1 forms that class members signed



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> contained a misrepresentation in the form of an overcharge. But an individualized inquiry is required to determine if each HUD-1 does in fact contain an overcharge and if the prospective class member was in fact entitled to a discount that was not given. That is, the appearance of a charge on the HUD-1 in Community Bank was common to all class members.
>
> The nature of the charge and whether it constitutes an illegal overcharge on the HUD-1's in this case is not common to class members. Indeed, Plaintiffs acknowledge that an overwhelming majority of the HUD-1's in question contain accurate bona fide charges, and a large proportion of the potentially questionable HUD-1's compiled by the Pakter Model are false positives. Thus, the mere existence of the HUD-1 is not evidence of fraud. Individual issues predominate, and the HUD-1 form itself is not common evidence of a common scheme because the alleged misrepresentation on the HUD-1, unlike that in Community Bank, is not a common factor.

*Id*. 288-292. In *Coleman*, the court also refused to certify the plaintiffs RICO, which had wire fraud as the predicated act, because the plaintiffs failed to show '"more likely than not' that the defendants designed an illegal scheme to defraud insurance customers by denying them discount rates." *Id*.

Plaintiffs next rely on *Iron Workers Local Union No. 17 Ins. Fund v. Philip Morris Inc.*, 23 F.Supp.2d 771 (N.D.Ohio 1998). This decision did not rule on class certification issues; it only ruled a motion to dismiss for standing. The facts here are also entirely different. In *Iron Workers Local Union No. 17*, the plaintiffs alleged a RICO action which involved antitrust claims, fraud, and intentional infliction of harm. The plaintiffs also alleged that the defendants lied to Congress under oath. This case provides no guidance here on class certification.

Plaintiffs lastly cite *Schlenker Ents., LP v. Reese*, 3d Dist. Auglaize Nos. 2-10-16, 2- 10-19, 2010-Ohio-5308, and *Samman v. Nukta*, 8th Dist. Cuyahoga No. 85739, 2005-Ohio-5444. These cases are also distinguishable and contrary to Plaintiffs' position. In *Schlenker Ents., LP*, the court dismissed the plaintiff's OCPA claim. "Because he failed to show how he had been injured from the OCPA violations, the trial court was correct in dismissing his OCPA

claims…for lack of standing." *Schlenker Ents., LP* ¶38. Likewise, in *Samman* the court upheld summary judgment on plaintiff's OCPA claim. "[Plaintiff] was not injured or threatened with injury by [defendant's] activity, so he cannot maintain a civil RICO claim on this basis." *Samman*, 2005-Ohio-5444, ¶ 26.

In summary, none of the cases Plaintiffs cite support a finding of class certification. There are still too many individual inquiries required to prove their OCPA claim. Like with their other claims for Class A, Plaintiffs must also show actual harm and proximate causation to prevail on their OCPA claim. Plaintiffs have failed to do so.

**Conclusion**

For these reasons, Floros requests that this Court deny Plaintiffs' request for class certification.

Respectfully submitted,

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CERTIFICATE OF SERVICE

A copy of Defendant Floros' Supplemental Brief in Opposition to Plaintiffs' Motion for Certification was served electronically on this 11th day of September, 2019. Notice of this filing will be sent to all parties by operation of the Court's electronic filing system.

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



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