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 Injury-in-Fact Sustained by All Members of the Price-Gouging Class**

Plaintiffs hereby submit the following supplemental memorandum to address the Defendants' argument—expounded upon by the parties and the Court at the September 12, 2019 hearing on class-certification—that because Defendant Ghoubrial frequently accepted so-called "reductions" of the amounts due to satisfy his fraudulently inflated bills for services provided to the putative Class A members (the price-gouging class), the Plaintiffs are therefore, as a matter of law, unable to show that all class-members sustained "injury-in-fact" and cannot meet Civ.R. 23's "predominance" requirement as interpreted by the Supreme Court of Ohio in *Felix v. Ganley Chevrolet, Inc.,* 145 Ohio St.3d 329, 2015-Ohio-3430.[1] *See also* KNR Opp. at 12, citing *Felix* ("A proposed class where some class members have been harmed, while others have not, lacks predominance."); 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

[1] At the close of the September 12, 2019 hearing, the Defendants requested permission to file a supplemental brief to address so-called "misrepresentations" allegedly made by Plaintiffs' counsel at the hearing. The Court granted Defendants leave to file a supplemental brief by September 20, and also granted Plaintiffs leave to file a supplemental brief in response by September 27. The Defendants have since informed the Court by email that they do not intend to file any supplemental brief after all. Thus, Plaintiffs file this brief under the Court's implied authority to do so, in order to address the especially misleading argument at issue that was described by the Court as a "fly in the ointment" at the September 12 hearing.

each individual reduction and whether the reduced amounts met some made up test up [sic] for what doctors 'should' charge.").

While this argument fails to defeat class-certification for the reasons stated in Plaintiffs' earlier briefing on class certification (*see*, *e.g.*, Plaintiffs' 07-22-2019 reply brief at 10–20), Plaintiffs below submit additional caselaw showing that courts nationwide consistently and properly reject Defendants' argument that a showing of injury-in-fact caused by an unlawful pricing scheme could be negated by subsequent discounts, reductions, or offsets to amounts overcharged.

I. Ohio law requires that to meet the predominance element of Civ.R. 23, every class-member must suffer an "injury in fact," but individual differences among class members as to the "actual damages" or "quantum of injury" suffered will not defeat class-certification.

First, a review of *Felix* to clarify its inapplicability here: *Felix* involved "a class of customers who signed purchase agreements" with an auto dealer "that included an arbitration provision" that was found by the trial court to be unconscionable. *Felix*, 2015-Ohio-3430 ¶ 14, ¶ 18, ¶ 20. The trial court found that under Ohio's Consumer Sales Practices Act ("OCSPA"), an award of damages for the auto dealer's inclusion of the unconscionable clause in its purchase agreements was "at least permitted, and perhaps required," and cited its "discretion" in awarding $200 per transaction to each class member. *Id.* at ¶ 18. The Eighth District rejected the auto dealer's appeal, but "did so without squarely addressing the crux of [the auto dealer's] claim, *i.e.*, that there was no showing that all class members had suffered damages." *Id.* at ¶ 20–¶ 21.

In reversing the Eighth District's affirmation of class-certification, the Supreme Court of Ohio first observed that while "the OCSPA authorized class actions, it limited the scope of damages that were available in them." *Id.* at ¶ 29. More specifically, the Court explained that while "treble and statutory damages" were available to individual plaintiffs under the OCSPA, they "were not available in class-action claims brought under the [statute]," which "limit[s] the damages available in class

actions to *actual damages*." *Id.* (emphasis added), citing *Washington v. Spitzer Mgt., Inc.*, 8th Dist. Cuyahoga No. 81612, 2003-Ohio-1735, ¶ 33. The Court thus affirmed that, "Plaintiffs bringing OCSPA class-action suits must allege and prove that *actual damages* were proximately caused by the defendant's conduct." *Id.* at ¶ 31.

Importantly, the Court then went on to explain that "the inquiry into whether there is *damage-in-fact* is distinct from the inquiry into *actual damages*." *Id.* at ¶ 34 (emphasis added). Specifically, as the Court stated,

> the *fact of damage pertains to the existence of injury*, as a predicate to liability; *actual damages involves the quantum of injury*, and relate to the appropriate measure of individual relief. ... When evaluating damages in the predominance inquiry, the *amount of damages* is invariably an individual question and does not defeat class action treatment. ... While *determining the amount of damages does not defeat the predominance inquiry*, a proposed class action requiring the court to determine individualized *fact of damages* does not meet the predominance standards of Rule 23(b)(3).

Id. (emphasis added, internal citations and quotations omitted). In other words, while "[p]laintiffs in class-action suits must demonstrate that they can prove, through common evidence, that all class members were *in fact injured by* the defendant's actions," differences among class members in the quantum of individual damages or "*actual damages*" will generally not defeat class-certification. *Id.* at ¶ 32–¶ 33 (emphasis added). Accordingly, the *Felix* court additionally affirmed that, as with any class-action in Ohio, "all members of a class ... alleging violations of the [Ohio Consumer Sales Practices Act ("OCSPA")] must have *suffered injury* as a result of the conduct challenged in the suit." *Id.* at ¶ 36 (emphasis added).

Based on these standards, the *Felix* court ultimately found that "the class, as certified, fails" because "there is absolutely no showing that all of the consumers who purchased vehicles through a contract with the offensive arbitration provision were injured by it *or* suffered any damages." *Id.* at ¶ 37 (emphasis added).

The Ninth District Court of Appeals, in *Strickler v. First Ohio Banc & Lending, Inc.*, 9th Dist. Lorain No. 17CA011117, 2018-Ohio-3835, ¶ 23, has since, notably, interpreted *Felix*. *Strickler* involved a defendant bank that was found by the trial court to have violated the Ohio Mortgage Broker Act ("OMBA") by having failed to include required disclosures in its standard mortgage-loan forms. *Id.* at ¶ 4. The trial court certified a class including "all persons who purchased services from [the bank] related to a mortgage loan" during the period at issue, finding that the statute "provide[d] for a minimum damage award for [the] violation [at issue]," and that "[s]ome amount of damages must be assumed in order to effectuate the purpose of the statute to provide disclosure of necessary information to the consumer." *Id.* at ¶ 4–¶ 5. The Ninth District affirmed. *Id.* at ¶ 7.

The defendant bank later moved to decertify the class based on *Felix*, arguing that the decision constituted "new controlling case law" mandating that the "loss of information" suffered by the plaintiffs as a result of the missing disclosures was, as a matter of law, insufficient to support a finding of classwide injury. *Id.* at ¶ 16, ¶ 21. The Ninth District rejected this argument, noting that "the Mortgage Broker Act, ... most significantly, does not contain any similar provision to OCSPA language limiting recovery of damages in a class action." *Id.* at ¶ 24. In reaching this result, the court concluded that *Felix* "did not announce a new rule of law, but rather clarified the law respecting class action damages under OCSPA," and further stated that "we 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."

Thus, *Strickler* further clarifies that *Felix's* holding that class-action Plaintiffs under the OCSPA are required to show, for all class-members, *both* proof of actual injury ("injury-in-fact") *and* a particular quantum of damage resulting from that injury ("actual damages") (*See* Felix at ¶ 31, ¶ 34, ¶ 36), that requirement does not extend beyond the context of the OCSPA. Accordingly, as explained in Plaintiffs' earlier briefing and further below, *Felix* cannot apply to defeat certification of

Class A here,[2] where all class-members can show they have been injured-in-fact by having been defrauded into both incurring and paying a substantial portion of Defendant Ghoubrial's standard exorbitant charges for healthcare.

II. All KNR clients who incurred charges at Defendant Ghoubrial's standard exorbitant rates —*i.e.*, all Class A members—suffered injury-in-fact as a result, regardless of the impact that any subsequent "reductions" or "discounts" had on the "quantum of damages" or "actual damages" incurred by each class-member.

The Class A representatives in this case have submitted evidence showing that the Defendants misled all similarly situated KNR clients (the Class A members) them into signing so-called "letters of protection" ("LOPs") by which they unknowingly waived their health-insurance benefits and granted Ghoubrial the entitlement to collect his fees for his medical services directly from the clients' settlement funds. Plaintiffs' 05-15-2019 Motion for Class Certification at 28–31, 76–79, 10–44 (citing evidence). By the time the clients first saw the amount of these charges, which are uniformly exorbitant and unconscionable, they are already legally obligated by the LOPs to pay these rates—rates that Ghoubrial had previously represented in the LOPs to be "fair and reasonable." *Id.* at 76–79 (citing evidence); *See also Id.* at Ex. 8, Reid Aff., ¶ 8, ¶ 16–17; Ex. 11, Norris Aff., ¶ 6–¶ 7, ¶ 9–¶ 10, ¶ 12; Ex. 14, Harbour Aff., ¶ 7–¶ 8, 11; ¶ 15–¶ 16, ¶ 19; Ex. 9, Carter Aff., ¶ 6–¶ 7, ¶ 10–¶ 11, ¶ 14–¶ 15, ¶ 18–¶ 19; Ex. 10, Beasley Aff., ¶ 6–¶ 7, ¶ 9, ¶ 13–¶ 17, ¶ 19–¶ 20. At this point, if the clients do not agree to pay these charges by approving the "settlement memorandum" submitted to them by KNR, they will not obtain their settlement funds. *Id. See also* Nestico Tr. at 171:21–175:2; 175:24–177:7; Petti Tr. at 103:15–104:25; 134:5–12; 503:16–510:21; Phillips Tr. 242:10–252:20. It is from these exorbitant rates that Ghoubrial and KNR then

[2] Similarly, as explained fully in Plaintiffs' pending motion for class-certification and reply in support, *Felix* cannot apply to defeat certification of Class B or C, either, because all class-members suffered injury-in-fact by having been charged the fraudulent narrative and investigation fees at issue, which constituted, respectively, (1) a *quid-pro-quo* kickback to compensate certain chiropractors for participating in the price-gouging scheme at issue, and (2) at best an unlawful double-charge for basic overhead expenses.

sometimes offer to reduce or write down the amounts that Ghoubrial will accept as payment in full of his invoice, as well as the amounts owed to KNR and the conspiring chiropractor. *Id.*

It is important to note that the class-members never had any opportunity to approve or negotiate over these rates before they became legally obligated to pay them. They were instead directed by their KNR attorney and conspiring chiropractor to treat with Ghoubrial, who himself admits that he never discusses the cost of care with these patients but nevertheless proceeds to obtain an LOP before treatment that obliges each client to pay his rates, which are never discussed apart from the fraudulent representation contained in Ghoubrial's LOPs that they are "fair and reasonable." *See* Plaintiffs' 05-15-2019 Motion for Class Certification at 27–31, citing, *inter alia*, Ghoubrial Tr. at 296:11–24, 314:14–23. The clients thus had no meaningful opportunity to bargain over these rates, regardless of any reduction Ghoubrial might have agreed to accept after the fact.

A. Defendants' subsequent offers to "reduce" the amounts accepted to satisfy Ghoubrial's fraudulently inflated bills could only at most serve to offset the "quantum of damages" incurred, but not to negate the "actual injury" sustained.

Thus, all Class A members are injured-in-fact regardless of any reduction Ghoubrial or KNR might have agreed to accept in payment, and any such reductions could only at most serve to offset the amounts by which the class-members have been damaged by having incurred Ghoubrial's exorbitant and unconscionable charges. In other words, any subsequent offer by Ghoubrial to accept a reduced payment only mitigated or set off a class-member's damages, it did not negate the injury-in-fact sustained in becoming obligated to pay his fraudulent rates. As set forth at pages 14–16 of Plaintiffs' reply brief in support of class-certification (filed on July 22, 2019), the quantum of damages for each individual client is easily calculated by reference to the amount overbilled from market rates (to be proven at trial), less the percentage of any reduction provided. That is, if Ghoubrial reduced any given bill by a certain percentage, the quantum of individual damages is easily

calculated by applying the same percentage of reduction to the amount overcharged. *See* Plaintiffs' 07-22-2019 reply brief at 14–15 (showing that $3,046.56 of Ghoubrial's $3,460.00 bill to Named Plaintiff Thera Reid, 88% of the bill, constituted an overcharge, and that Ghoubrial only reduced the bill by 13% in collecting payment, thus establishing $2650.51 as the measure of Ms. Reid's damages (*i.e.*, the $3,046.46 overcharge reduced by the 13% reduction).

Whether or not *Felix* was intended to apply beyond the context of the OCSPA, it would be a perversion of law and justice to read the decision as allowing defendants—especially those in fiduciary positions like the doctors, lawyers, and chiropractors here—to escape class-wide liability for intentional misconduct merely because they offered to accept "reductions" of their fraudulently inflated bills after their clients were already legally obligated to pay them. *See Cardinal Health Solutions, Inc. v. Valley Baptist Med. Ctr.*, S.D.Tex. No. 1:07-CV-111, 2009 U.S. Dist. LEXIS 3909, at *54-57 (Jan. 21, 2009) ("Plaintiff cites no authority suggesting that offset can be used to defeat the injury element of a fraud claim, and the Court has found none."); *Jordache Ents., Inc. v. Brobeck, Phleger & Harrison*, 18 Cal.4th 739, 759, 76 Cal.Rptr.2d 749, 958 P.2d 1062 (1998) ("The court rejected this 'novel and unsupported argument' that actual injury can be negated by some form of offset."), citing *Sirott v. Latts*, 6 Cal.App.4th 923, 928, 8 Cal.Rptr.2d 206 (1992) ("A client suffers damage when he is compelled, as a result of the attorney's error, *to incur or* pay attorney fees.") (emphasis added).

B. Courts nationwide consistently reject Defendants' argument that a showing of injury-in-fact caused by unlawful billing or pricing schemes can be negated by subsequent discounts, reductions, or offsets to amounts overcharged, and this Court should do the same.

While the facts at issue in this case are certainly unique,[3] courts interpreting "injury in fact" requirements, including in the class-action context, regularly reject the argument advanced by Defendants here. For example, in *In re Plastic Cutlery Antitrust Litigation*, E.D.Pa. No. 96-CV-728,

[3] *See, generally*, Affidavit of Nora Freeman Engstrom, Ex. 1 to Plaintiffs' 05-15-2019 Motion for Class-Certification.

1998 U.S. Dist. LEXIS 3628, at *18-22 (Mar. 20, 1998), the defendants argued that classwide injury-in-fact was impossible to show by common proof because "rebates and discounting programs caused actual transaction prices to vary according to competitive conditions and the needs of individual customers." The defendants also argued, like the Defendants here, that "determining the hypothetical competitive market price would require individualized calculations involving a multiplicity of market factors during different time periods and tailored to the nature of the class members' respective businesses." *Id.* The court rejected these arguments, noting that,

> in a number of price-fixing cases concerning industries where discounts and individually negotiated prices are common, **courts have certified classes where the plaintiffs have alleged that the defendants conspired to set an artificially inflated base price from which negotiations for discounts began**. The theory that underlies these decisions is, of course, that the negotiated transaction prices would have been lower if the starting point for negotiations had been list prices set in a competitive market. **Hence, if a plaintiff proves that the alleged conspiracy resulted in artificially inflated list prices, a jury could reasonably conclude that each purchaser who negotiated an individual price suffered some injury**.

Id. at 20–22, quoting *In re Industrial Diamonds Antitrust Litig.*, 167 F.R.D. 374, 383 (S.D.N.Y. 1996) ("evidence that supracompetitive list prices 'formed the basis for subsequent individualized negotiations' sufficient to satisfy common impact requirement"), citing *Hedges Enters., Inc. v. Continental Group*, 81 F.R.D. 461, 475 (E.D. Pa. 1979) ("proof of inflated base price from which all negotiations began found sufficient to establish fact of damage"). *See also In re Infant Formula Antitrust Litigation*, N.D.Fla. MDL No. 878, 1992 U.S. Dist. LEXIS 21981, at *16 (Jan. 13, 1992) ("Contentions of infinite diversity of product, marketing practices, and pricing have been made in numerous cases and rejected. **Courts have consistently found the conspiracy issue the overriding, predominant question**.") (emphasis added).

Similarly and more recently, a U.S. District Court in the Middle District of Florida held that "even if there is considerable individual variety in pricing because of individual price negotiations,

class plaintiffs may succeed in proving classwide impact by showing that the minimum baseline for beginning negotiations, or the range of prices which resulted from negotiation, was artificially raised (or slowed in its descent) by the collusive actions of the defendants." *In re Disposable Contact Lens Antitrust*, 329 F.R.D. 336, 386 (M.D.Fla. 2018), quoting *In re Commercial Tissue Prods.*, 183 F.R.D. 589, 595 (N.D. Fla. 1998) (citing *In re Catfish Litigation*, 826 F. Supp. 1019, 1043 (N.D. Miss. 1993) ("[I]t is recognized that the calculation of ... damages necessarily involves some acceptable retrospective estimations of what market behavior would have been, absent certain factors."); *In re Domestic Air Transp.*, 137 F.R.D. 677, 689 (N.D.Ga.1991) (inflated fares resulted in artificial 'base' price which became benchmark for discounted or negotiated fares)); *In re Infant Formula*, 1992 U.S. Dist. LEXIS 21981 at *16 *In re Nexium Antitrust Litig.*, 777 F.3d 9, 27 (1st Cir. 2015) ("[A]ntitrust injury occurs the moment the purchaser incurs an overcharge, whether or not that injury is later offset. ... [I]f a class member is overcharged, there is an injury, even if that class member suffers no damages."); *Delta/AirTran Baggage Fee*, 317 F.R.D. at 683 ("[A] person suffers a cognizable injury and is impacted by a price-fixing conspiracy at the moment he pays an antitrust overcharge, even if the anticompetitive conduct at issue also results in offsetting benefits such as base-fare reductions or a reduced second-bag fee.")). *See also In re Methionine Antitrust Litigation v. Rhone-Poulenc*, N.D.Cal. No. 99-3491 CRB, MDL 00-1311, 2001 U.S. Dist. LEXIS 13402, at *3-4 (Aug. 24, 2001) ("The statute only requires that a plaintiff, including an indirect purchaser, prove 'injury;' it does not require a plaintiff to prove injury by proving that it somehow 'absorbed' the overcharge."); *Hawaii v. Standard Oil Co. of Cal.*, 405 U.S. 251, 262 n.14, 92 S. Ct. 885, 31 L. Ed. 2d 184 (1972) ("[C]ourts will not go beyond the fact of this injury to determine whether the victim of the overcharge has partially recouped . ..."); *In re Plastic Cutlery* at *22-23 (plaintiffs [prove classwide] impact by generalized proof [including] regression analysis, compar[ing] prices and pricing patterns before and during the relevant time period, ... to determine actual customer prices after controlling for various

characteristics of the market, including regional price differences and various types of rebates."); *Brown v. Electrolux Home Prods., Inc.*, 817 F.3d 1225, 1233-34 (11th Cir. 2016) ("any individualized damages issues cannot reasonably be expected to be 'accompanied by significant individualized questions going to liability' and computation of damages is unlikely to be 'so complex, fact-specific, and difficult that the burden on the court system would be simply intolerable.'"); *Klay v. Humana, Inc.*, 382 F.3d 1241, 1259 (11th Cir. 2004) ("If Plaintiffs prevail on their claim, their damages will be determined in a formulaic manner based on the amount of overcharges paid by class members"); *In re Commercial Tissue Prods.*, 183 F.R.D. 589, 596 (N.D.Fla.1998) ("[T]he methods suggested by [class-action plaintiffs] to determine damages are not so insubstantial and illusive as to amount to no method at all."); *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.").

Courts have reached similar results outside of the antitrust context as well, even where the allegedly defrauded consumers—unlike the Class A members here—are in a meaningful position to forgo purchasing the unlawfully priced product or service at issue. This includes cases interpreting consumer-protection statutes where "injury in fact" was found based on the mislabeling of products, or the misrepresentation of a product's "normal price." *See Kwikset Corp. v. Superior Court*, 51 Cal.4th 310, 329-330, 120 Cal.Rptr.3d 741, 246 P.3d 877 (2011) ("For each consumer who relies on the truth and accuracy of a label and is deceived by misrepresentations into making a purchase, the economic harm is the same: the consumer has purchased a product that he or she paid more for than he or she otherwise might have been willing to pay if the product had been labeled accurately."); *Hinojos v. Kohl's Corp.,* 718 F.3d 1098, 1106 (9th Cir. 2013) ("Misinformation about a product's 'normal' price is ... significant to many consumers in the same way as a false product label would be."); *B. Sanfield, Inc. v. Finlay Fine Jewelry Corp.*, 168 F.3d 967, 972 (7th Cir.1999) ("If, on the other hand, the former price

being advertised is not bona fide but fictitious—for example, where an artificial, inflated price was established for the purpose of enabling the subsequent offer of a large reduction—the 'bargain' being advertised is a false one; the purchaser is not receiving the unusual value he expects.").

Defendants do not and cannot explain why these sound and well-established principles should not apply with equal if not greater force here, where the putative class-members lacked any meaningful choice as to the pricing scheme fraudulently imposed on them by their trusted doctors, lawyers, and chiropractors.

Given this Court's "considerable discretion" "in equitable matters" "to fashion any remedy necessary and appropriate to do justice," it is plainly within its purview to treat the so-called "reductions" as an offset to the injury-in-fact at issue here, at least as to Plaintiffs' unjust enrichment claims, if not the fraud claims, applying the basic damages calculation described above and in more detail at pages 14–16 of Plaintiffs' reply brief. *Kayatin v. Petro*, 9th Dist. Lorain No. 06CA008934, 2007-Ohio-334, ¶ 21. That is, to the extent the Court does not find that all fees collected by the Defendants, self-dealing fiduciaries, pursuant to the price-gouging scheme at issue are subject to disgorgement in their entirety under the well-established principles intended to deter such breaches of loyalty. *See* Plaintiffs' 07-22-2019 reply brief at 16–19 (citing cases).

In any event, it should be clear that "[t]he difficulties or challenges which may face the court in the damages phase of this litigation, should it proceed that far, are frail obstacles to certification when measured against the substantial benefits of judicial economy achieved by class treatment of the predominating, common issues." *In re Catfish Litigation*, 826 F. Supp. 1019, 1043.

Respectfully submitted,

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Certificate of Service

The foregoing document was filed on September 24, 2019, using the Court's electronic-filing system, which will serve copies on all necessary parties.

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