IN THE COURT OF COMMON PLEAS
SUMMIT COUNTY, OHIO

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

As discussed during oral arguments, it cannot be determined through common evidence whether each KNR client paid more than a reasonable amount for Ghoubrial's services. Nor can it be determined through common evidence 1) that Floros unlawfully solicited and referred each class member to Ghoubrial; 2) that Floros knew what Ghoubrial was charging for services and what reductions were made for each class member; and 3) that Floros knew that Ghoubrial was charging and collecting an unreasonable amount for his services. Since Plaintiffs cannot show through common evidence that all class members were in fact injured by Defendants' actions, their class claims cannot be certified.

In a last-ditch attempt, Plaintiffs have now filed a second supplemental brief in support of class certification. Relying on distinguishable case law mostly involving statutory mortgage violations and antitrust claims, Plaintiffs are arguing that there is no need to show that all class members suffered an actual injury. As discussed below, this is not the law. Plaintiffs' claims against Floros and other Defendants all require proof of actual injury. Plaintiffs' mere assertion that there was a common "scheme" or "conspiracy" does not eliminate this requirement.

Memorandum in Support

I. Since actual damages are required element for Plaintiffs' claims, they must show, through common evidence, that all the class members were in fact injured by the defendants' actions.

In *Felix v. Ganley Chevrolet,* Inc., 145 Ohio St.3d 329, 2015-Ohio-3430, 49 N.E.3d 1224, ¶ 33-35., the Ohio Supreme Court vacated the trial court's order certifying the plaintiffs' proposed class of consumers who bought vehicles from particular car dealerships and signed purchase contracts that allegedly contained an unconscionable arbitration clause. The Ohio Supreme Court held that the class, as certified, failed because there was no showing that all class members suffered an actual injury:

> "Perhaps the most basic requirement to bringing a lawsuit is that the plaintiff suffer some injury. Apart from a showing of wrongful conduct and causation, proof of actual harm to the plaintiff has been an indispensable part of civil actions."
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> Here, the class, as certified, fails because there is no showing that all class members suffered an injury in fact. The broadly defined class encompasses consumers who purchased a vehicle at Ganley through a purchase contract that contained the unconscionable arbitration provision. But 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(citations omitted).

While *Felix* involved OCSPA violations, Ohio courts have applied its holding to other causes of actions where damages are a required element. *Blue Ash Auto, Inc. v. Progressive Cas. Ins.* Co., 8th Dist. Cuyahoga Nos. 104251, 104252, 2016-Ohio-7965(finding class certification under Civ.R. 23(B)(3) was improper because uniform application of a "clean" standard and determination of the fact of injury to all lessees was not susceptible to common class-wide proof); *Ford Motor Credit Co. v. Agrawal,* 2016-Ohio-5928, 71 N.E.3d 671 (8th Dist.)(finding denial of class certification proper where resolution of the dispute would require a case-by-case

analysis of every repair conducted by each potential class member); *Estate of Mikulski v. Centerior Energy Corp*., 8th Dist. Cuyahoga No. 107108, 2019-Ohio-983 (reversing a trial court's order granting certification when the plaintiffs failed to show actual injury to all class members for alleged breach of fiduciary duty and misrepresentations.); *Estate of Mikulski v. Centerior Energy Corp.*, 8th Dist. Cuyahoga No. 107108, 2019 Ohio App. LEXIS 2329, at *12 (May 22, 2019)(on reconsideration)(holding that the "Ohio Supreme Court did not limit [*Felix's*] injury requirement to OSCPA cases.").

Despite the above cases, Plaintiffs are now arguing that *Felix* has no application outside OSCPA cases. Plaintiffs are basing this argument on *Strickler v. First Ohio Banc & Lending, Inc*., 9th Dist. Lorain No. 17CA011117, 2018-Ohio-3835, where the plaintiffs only alleged statutory claims under Ohio Mortgage Broker Act ("OMBA"). In *Strickler*, the Ninth District held that *Felix's* requirement for showing injury did not apply because OMBA does not require proof of actual damages. *Id.* Rather, under OMBA, the violation of the statute itself can constitute an injury. *Id.*

Strickler has no application here. This case does not involve statutory violations of OMBA. The claims that Plaintiff are alleging against Floros, which include breach of fiduciary duty, unjust enrichment, fraud, conspiracy, and violations of OCPA, all require proof of actual injury.

Moreover, the Eighth District rejected similar arguments in *Estate of Mikulski v. Centerior Energy Corp*., 8th Dist. Cuyahoga No. 107108, 2019-Ohio-983. In that case, the plaintiffs asserted breach of fiduciary and fraudulent misrepresentation claims based on allegations that the defendants intentionally misstated and manipulated corporate earnings to stock holders. The plaintiffs argued that the alleged breach of fiduciary and misrepresentation

itself proves injury. *Id*. ¶¶ 61-65. The plaintiffs also alleged there was no need to prove damages when there was an "informational" injury. *Id.* The Eighth District denied both arguments and held that the class members lacked a sufficient injury to confer standing and warrant class certification. *Id*. ¶73.

In reaching its decision, *Estate of Mikulski* first recognized that breach of fiduciary claims require proof of actual injury. *Id*. 62-66. In doing so, the Eighth District rejected the plaintiffs' claim that the wrongdoing was enough to show damages:

> Foremost, the elements of breach of fiduciary duty show that the breach of the duty cannot constitute the injury itself; the breach of duty and injury are two separate elements. We have recognized the fact that the breach of a fiduciary duty and injury are separate elements on many occasions. *See Dueck v. Clifton Club* Co., 2017-Ohio-7161, ¶ 70, 95 N.E.3d 1032, quoting *Scanlon v. Scanlon*, 2013-Ohio-2694, 993 N.E.2d 855 (8th Dist.) ("'To prove a breach of fiduciary duty, appellants must demonstrate: (1) the existence of a duty arising from a fiduciary relationship; (2) a failure to observe the duty; and (3) an injury resulting proximately therefrom.'"). For example, in *Harwood v. Pappas & Assocs*., 8th Dist. Cuyahoga No. 84761, 2005-Ohio-2442, we held that the plaintiff "failed to present any evidence that the alleged breaches of duty proximately caused him an injury" and affirmed the trial court's order granting a directed verdict to the defendant "because there [was] no evidence that the breach proximately caused injury."
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> The requirement that there be an injury in addition to the breach of a fiduciary duty is not unique to our appellate district either. Many appellate districts have recognized that the misrepresentation or breach of duty itself is not the injury. See *Huffman v. Groff*, 4th Dist. Athens No. 10CA54, 2013-Ohio-222, ¶ 43 (affirming the trial court's dismissal of the plaintiff's claim for breach of fiduciary duty because "there [was] no evidence that Ray or the Hollar have suffered, or will suffer, any damages as a result of Roxanne's alleged misconduct."); *Kademian v. Marger*, 2d Dist. Montgomery No. 24256, 2012-Ohio-962, ¶ 64-66 ("[T]he appropriate consideration in breach of fiduciary duty is not whether the alleged wrongdoer benefitted — it is whether an injury proximately resulted from the breach. * * * [T]he focus should be on the damages sustained by Kademian as a result of Marger's alleged breach of fiduciary duty."); *KMA Acquisitions Corp. v. Coleman*, 10th Dist. Franklin No. 92AP-1635, 1993 Ohio App. LEXIS 5108, *7 (Oct. 19, 1993) (affirming dismissal of the case because the plaintiff's complaint failed "to allege any injury to plaintiff").

¶¶ 62-65. The Eighth District then rejected the plaintiffs' reliance on *Strickler* and other mortgage/broker related cases, since those cases involved statutory disclosure violations, which do not require additional proof of damages:

> Plaintiffs cite to case law from Ohio and federal courts in support of their argument that the misrepresentation is the injury. We find that the Ohio cases to which plaintiffs cite — *Strickler v. First Ohio Banc & Lending, Inc.*, Lorain C.P. No. 07-CV-151964 (Sept. 13, 2010 and Oct. 12, 2011); *Myer v. Preferred Credit, Inc.*, 117 Ohio Misc.2d 8, 2001-Ohio-4190, 766 N.E.2d 612 (C.P. 2001); *Hill v. Moneytree*, Lorain C.P. No. 06-CV-148815 (Jan. 11, 2012) — are both noncontrolling and distinguishable as they concern broker disclosure requirements specifically set forth by statutes. *Myer* concerned a "secret profit" rule or secret fee-splitting agreement between brokers. Id. at ¶ 32. *Strickler* and *Hill* both concerned a bank's alleged violation of the Ohio Mortgage Broker Act and R.C. Chapter 1322, which sets forth disclosure obligations for mortgage brokers.

Id. ¶65.

On reconsideration, *Estate of Mikulski* reaffirmed its holding and reliance on *Felix*:

> Further, the additional burden of proof that Felix recognized for OSCPA class actions was that "[p]laintiffs bringing OSCPA class-action suits must allege and prove that actual damages were proximately caused by the defendant's conduct." *Felix* at ¶ 31. That proposition of law, however, does not undermine Felix's holding that "[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." The Ohio Supreme Court did not limit that injury requirement to OSCPA cases and neither did this court in Satterfield, 2017-Ohio-928, 86 N.E.3d 830.

Estate of Mikulski v. Centerior Energy Corp., 8th Dist. Cuyahoga No. 107108, 2019 Ohio App. LEXIS 2329, at *12 (May 22, 2019).

Similarly, this Court should reject Plaintiffs' reliance on *Strickler*. While *Felix* may not extend to statutory causes of action under OMBA—where actual damages are not a required element—*Felix's* holding is relevant where proof of actual damages is required element.

Felix is also not the only Ohio case that has ruled on this issue. Before *Felix*, Ohio courts routinely denied class certification where the plaintiff failed to show that all the class members

suffered damages. For instance, in *Cullen v. State Farm Mut. Auto Ins. Co.*, 137 Ohio St.3d 373, 2013-Ohio-4733, 999 N.E.2d 614 ¶ 24, the plaintiff alleged that State Farm had breached the terms of its standard automobile insurance policy by encouraging policyholders to repair damaged windshields rather than replace them. The trial court certified a class on the theory that a standardized script used by State Farm representatives, which allegedly failed to disclose the replacement option, could serve as common proof that State Farm had breached its contracts. The class sought a declaration that State Farm's practices were illegal and violated the policies and the obligations owed by fiduciaries under the law, as well as a declaration establishing the damages and remedies due to class members.

The Ohio Supreme Court, however, found that the claimants had not established that all class members would benefit from the declaratory relief sought because some of the class members were no longer State Farm policyholders. Thus, the court concluded that those members could not be injured by any future actions taken by State Farm. The court also found that current policyholders who had previously repaired rather than replaced their windshields would have to suffer another damaged windshield that State Farm repaired rather than replaced in order to benefit from the proposed injunctive relief. The Ohio Supreme Court reversed the appellate court's judgment affirming class certification.

In *Hoang v. E*trade Group*, 151 Ohio App.3d 363, 2003-Ohio-301, 784 N.E.2d 151 (8th Dist.), the Eighth District reversed a trial court's order granting certification because not all of the potential members suffered injury from E*Trade's system interruptions, and some may have benefitted:

> Similarly, in the instant case, some of the plaintiffs have suffered damages as a result of E*Trade's system interruptions while others have not. Some E*Trade customers may not have been trading during any of the system interruptions, in which case they were not injured and have no claims. Customers that were

> trading may not have suffered any losses as a result of a system interruption, in which case they have no claims. The trading of customers who were impacted by the system interruptions would have to be analyzed on a "trade by trade" basis to determine what price the customer might have obtained had the system interruption not occurred.
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> This analysis is complex because it requires consideration of each individual transaction, other transactions in the same security that occurred in the market, as well as the market conditions at the time, including the number of orders waiting to be executed in the market, the size and type of those orders, and other factors. Further, some customers who were impacted by the system interruptions may have actually benefitted from the interruption, in which case they have no claims.

Id .¶¶19-24

In *Linn v. Roto-Rooter, Inc*., 8th Dist. Cuyahoga No. 82657, 2004-Ohio-2559, the Eighth District denied class certification where the plaintiffs alleged that the customers were wrongfully charged an illegal supply fee in connection with services, since there would need to be individual inquiries into whether each member was actually injured:

> Contrary to the trial court's holding, we find that the mere allegation of Roto-Rooter's purported "profit-making scheme" does not negate the necessity for establishing the essential elements of each claim. In regard to the claims for unjust enrichment and fraud, each plaintiff must establish actual injury before Roto-Rooter's liability can be determined. *See, e.g., Hambleton v. R.G. Barry* Corp. (1984), 12 Ohio St.3d 179, 183, 12 Ohio B. 246, 465 N.E.2d 1298 (HN5 claim for unjust enrichment requires proof that defendant received a benefit without compensating plaintiff); *Gaines v. Preterm-Cleveland, Inc*. (1987), 33 Ohio St.3d 54, 55, 514 N.E.2d 709 (essential element for common-law civil fraud is injury resulting from reliance upon representation or concealment). Indeed, Roto-Rooter's liability hinges on whether a customer actually received little or no miscellaneous supplies to establish that the charge was unjust or fraudulent.
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> Rather, the issue of whether the alleged “scheme” is actionable is dependent on the existence of other factors specific to each transaction, i.e., amount and value of supplies used, nature of the work performed, and representations made by service technicians. For example, customers who received more in value than the amount of miscellaneous supplies charged would have no claims. Additionally, given the large variance in the jobs performed, i.e., a $ 75 service call as compared to a $ 7,500 service call, the amount of miscellaneous supplies used would differ. Moreover, approximately 1,500 service technicians

> responded to customers' questions, resulting in countless different representations. Absent an individual analysis of these factors, there is no way to determine Roto-Rooter's liability under each of the plaintiff's claims. Because these factors require individualized inquiries, the trial court abused its discretion by finding common questions of fact predominate.

Id. ¶¶15-18.

In *Petty v. Wal-Mart Stores, Inc*., 148 Ohio App.3d 348 2002-Ohio-1211 (2nd Dist.), the plaintiffs sought to certify a class based on allegations that employees were pressured to work off the clock. The Second District upheld the trial court's decision denying class certification because the class included employees who were not injured or exposed to the alleged illegal conduct:

> The issues in this case are individual to each putative plaintiff. For example, there is evidence that some of the plaintiffs were expressly required to work off the clock by their managers, while others perceived pressure and thought that they had to do so. Some of the plaintiffs testified that they merely chose to work off the clock. There are also issues regarding whether each of the managers in the more than one hundred Ohio stores knew that their employees were working off the clock, and whether they knowingly permitted them to do so. Also, there is evidence that some plaintiffs did not bother to clock in or out regardless of whether they took their breaks and meals, and that some purposely chose not to take their breaks and meals for reasons unrelated to work; e.g., some wanted to leave work early so they skipped breaks and meals, and one putative plaintiff who was trying to quit smoking did not take breaks in order to avoid the temptation to smoke.
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> Also, the evidence in the record indicates that the damages provable by each putative class member will vary widely…In this case, the damages are not susceptible to class-wide proof because there is no acceptable method of computing the damages on a class-wide basis. The damages will be highly individualized and depend on the testimony of each employee to determine how many breaks or meals they missed, how much time they were required to spend working off the clock, as well as the amount of their wages. Therefore, we find that the disparate damages supports the denial of the class certification.

Id. 355-366.

Plaintiffs have sought to distinguish some of the above cases by incorrectly claiming that there were no allegations of "intentional schemes to defraud." *See* Plaintiffs' Reply ISO Certification, pg. 20. This is false. In *Estate of Mikulski*, *Linn*, and *Agawal*, the plaintiffs alleged that the defendants engaged in fraudulent behavior and schemes. And contrary to what Plaintiffs suggest, Ohio courts have rejected the argument that the mere use of buzzwords like "scheme" and "conspiracy" eliminates the need for class members to prove actual injuries. *Linn v. Roto-Rooter, Inc*., 8th Dist. Cuyahoga No. 82657, 2004-Ohio-2559 ¶15 ("Contrary to the trial court's holding, we find that the mere allegation of Roto-Rooter's purported "profit-making scheme" does not negate the necessity for establishing the essential elements of each claim.").

In summary, the causes of action that Plaintiffs allege against Defendants still require proof that each member suffered an actual injury. As a result, this Court must deny class certification because Plaintiffs have failed to show that they can prove, through common evidence, that all the class members were in fact injured by Defendants' actions.

II. In determining injury-in-fact, this Court will have to conduct numerous individual inquiries to see if class members benefitted or were harmed by Defendants' actions.

Citing distinguishable non-Ohio and antitrust cases, Plaintiffs argue that a showing of "injury-in-fact" caused by unlawful billing or pricing schemes cannot be negated by subsequent discounts, reductions, or offsets to amounts overcharged. Plaintiffs' argument misses the point. Individual inquiries are not just needed because reductions were made on almost every case. Rather, individual inquiries are needed to determine whether every class member suffered actual damages or benefited from Ghoubrial's medical charges and services.

For instance, Plaintiffs' alleged expert, Nora Engstrom, has admitted that certain class members benefited from the alleged inflated prices/price gouging scheme. This includes "small

or borderline claims that other firms might reject as unprofitable." Plaintiff's Motion Ex. 2, Engstrom Affidavit, ¶22. This also includes KNR clients with non-meritorious claims. *Id, Run-of-the-Mill Justice* at 1535-1537 ("Settlement mill clients with non-meritorious claims fare well because, even if an insurance adjuster recognizes that a particular claim lacks merit, if he is negotiating with a plaintiff's attorney (or non-attorney) with whom he frequently bargains, he nevertheless has an incentive to tender an acceptable offer, both in order to close the claim expeditiously and to engender good will to pave the way for future bargaining."). Engstrom also acknowledged that high medical bills often result in higher settlements. *Id.* 1485, 1532-33 (2009)(finding that personal injury cases often settle based on "going rates," which is typically two to four times the amount of medical bills).

Where the class members did not have Medicaid/Medicare coverage, this Court would also have to look to see if each class member had insurance. If the class member did not have insurance and did not qualify for Medicaid (i.e., income too high), then they most likely benefitted from Ghoubrial's services. If the class member had a high co-pay and deductibles, then they also most likely benefitted from Ghoubrial's services, since there is no risk of out-of-pocket expenses.[1]

Moreover, Plaintiffs are arguing that Floros is liable for the amounts that Ghoubrial charged for medical services based on allegations that Floros unlawfully solicited and referred patients to Ghoubrial. As Floros discussed in his previous brief in oppositions, these claims lack standing and are without evidentiary support. Yet even if we assume that Plaintiffs' Class A

[1] As to Ghoubrial's LOPs, Plaintiffs have offered no evidence showing that these contracts were unconscionable. Rather, as this Court recognized during oral arguments, LOPs are customarily used by health care providers that specialize in treating injured victims.

claims against Floros have standing and evidentiary support, Plaintiffs would still need to show that Floros caused each Plaintiff an injury-in-fact.

As a result, this Court would have to examine the conversations between ASC's telemarketers and each potential class member to see if Floros unlawfully solicited them. This Court would also have to examine the conversations between Floros and each class member to see if Floros pressured the patients to see Ghoubrial and to waive their insurance coverage. And this Court would have to look at each claim to see if Floros knew what charges and reductions were made on a class member's claim for Ghoubrial's services.

Plaintiffs' reliance on non-Ohio antitrust cases is also misplaced for the simple reason that Plaintiffs are not asserting any antitrust claims. Antitrust claims also involve a different analysis that Ohio courts have not applied to class claims related to fraud, breach of fiduciary duty, conspiracy, unjust enrichment.

The United Supreme Court's decision in *Comcast Corp. v. Behrend*, 569 U.S. 27, 133 S. Ct. 1426, 185 L.Ed.2d 515 (2013) also greatly changed the scrutiny courts now place on antitrust claims when reviewing the plaintiffs' damage theories and models. In *Comcast*, the United States Supreme Court held that courts must conduct a rigorous analysis of plaintiffs' expert's damages model in antitrust class actions. In reaching its decision, *Comcast* rejected the argument the argument that it was unnecessary at class certification stage to probe the damage model to determine whether it was reasonable or speculative:

> Respondents' class action was improperly certified under Rule 23(b)(3). By refusing to entertain arguments against respondents' damages model that bore on the propriety of class certification, simply because those arguments would also be pertinent to the merits determination, the Court of Appeals ran afoul of our precedents requiring precisely that inquiry. And it is clear that, under the proper standard for evaluating certification, respondents' model falls far short of establishing that damages are capable of measurement on a classwide basis. Without presenting another methodology, respondents cannot show Rule

> 23(b)(3) predominance: Questions of individual damage calculations will inevitably overwhelm questions common to the class.
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> The District Court and the Court of Appeals saw no need for respondents to "tie each theory of antitrust impact" to a calculation of damages. That, they said, would involve consideration of the "merits" having "no place in the class certification inquiry." That reasoning flatly contradicts our cases requiring a determination that Rule 23 is satisfied, even when that requires inquiry into the merits of the claim. The Court of Appeals simply concluded that respondents "provided a method to measure and quantify damages on a class-wide basis," finding it unnecessary to decide "whether the methodology [was] a just and reasonable inference or speculative." Under that logic, at the class-certification stage any method of measurement is acceptable so long as it can be applied classwide, no matter how arbitrary the measurements may be. Such a proposition would reduce Rule 23(b)(3)'s predominance requirement to a nullity.

Id. 36-38 (citations omitted). The United Supreme Court then described the individual inquiries that would be needed to determine whether the class member did in fact suffer an injury for the wrong alleged:

> The majority's only response to this was that "[a]t the class certification stage we do not require that Plaintiffs tie each theory of antitrust impact to an exact calculation of damages, but instead that they assure us that if they can prove antitrust impact, the resulting damages are capable of measurement and will not require labyrinthine individual calculations." But such assurance is not provided by a methodology that identifies damages that are not the result of the wrong. For all we know, cable subscribers in Gloucester County may have been overcharged because of petitioners' alleged elimination of satellite competition (a theory of liability that is not capable of classwide proof); while subscribers in Camden County may have paid elevated prices because of petitioners' increased bargaining power vis-a-vis content providers (another theory that is not capable of classwide proof); while yet other subscribers in Montgomery County may have paid rates produced by the combined effects of multiple forms of alleged antitrust harm; and so on.

Id. 38 (citations omitted). After conducting its rigorous analysis, *Comcast* found that the plaintiffs' damages model was defective and overly broad. *Id*. 35-38

Relying on *Comcast,* the DC Circuit Court in *In re Rail Freight Fuel Surcharge Antitrust Litigation*—Mdl No. 1869, 406 U.S.App.D.C. 371, 725 F.3d 244 (2013) also denied certification

because the plaintiffs' expert damage model yielded false positives and potentially included members that were not injured. In reaching its decision, the court discussed *Comcast* and the heightened requirement to probe the plaintiffs' damage model when determining class certification:

> Meeting the predominance requirement demands more than common evidence the defendants colluded to raise fuel surcharge rates. The plaintiffs must also show that they can prove, through common evidence, that all class members were in fact injured by the alleged conspiracy. *See Amchem Prods. v. Windsor*, 521 U.S. 591, 623-24, 117 S. Ct. 2231, 138 L. Ed. 2d 689 (1997). Otherwise, individual trials are necessary to establish whether a particular shipper suffered harm from the price-fixing scheme. That is not to say the plaintiffs must be prepared at the certification stage to demonstrate through common evidence the precise amount of damages incurred by each class member. *Messner v. Northshore Univ. HealthSystem*, 669 F.3d 802, 815-16 (7th Cir. 2012); *see Wal-Mart*, 131 S. Ct. at 2558. But we do expect the common evidence to show all class members suffered some injury.
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> "Questions of individual damage calculations will inevitably overwhelm questions common to the class." Id. Rejected was the view of the Court of Appeals that "attacks on the merits of the methodology . . . have no place in the class certification inquiry." *Behrend v. Comcast Corp*., 655 F.3d 182, 207 (3d Cir. 2011).
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> As we see it, *Behrend* sharpens the defendants' critique of the damages model as prone to false positives. It is now indisputably the role of the district court to scrutinize the evidence before granting certification, even when doing so "requires inquiry into the merits of the claim." 133 S. Ct. at 1433. If the damages model cannot withstand this scrutiny then, that is not just a merits issue…No damages model, no predominance, no class certification.
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> Before *Behrend,* the case law was far more accommodating to class certification under Rule 23(b)(3). Though *Behrend* was grounded in what the Court deemed "an unremarkable premise," Id. at 1433, courts had not treated the principle as intuitive in the past. In determining Rausser's two models are "'plausible,'" the district court understandably relied on these precedents—including the very decision the Supreme Court reversed in *Behrend*….It is now clear, however, that Rule 23 not only authorizes a hard look at the soundness of statistical models that purport to show predominance—the rule commands it.

In re Rail Freight Fuel Surcharge Antitrust Litigation—Mdl No. 1869, 406 U.S.App.D.C. 371, 382, 725 F.3d 244 (2013).[2]

[2] *See also Werdebaugh v. Blue Diamond Growers*, 2014 U.S. Dist. LEXIS 173789, at *47 (N.D. Cal. Dec. 15, 2014) ("[T]he Court is obligated to do more than rubberstamp a proposed damages class merely because the plaintiff's expert [proposes] to … use[] a peer reviewed methodology…."); *Bruton v. Gerber Prods. Co.,* 2018 U.S. Dist. LEXIS 30814, at *34 (N.D. Cal. Feb. 13, 2018)(at a minimum, these cases require that the expert's model be fleshed out, with "a clearly defined list of variables"; "a meaningful explanation as to how the variables will be addressed"; and proof that "the data related to … [the] proposed … variables exists."); *In re Graphics Processing Units Antitrust Litig.,* 253 F.R.D. 478, 492 (N.D. Cal. 2008) (noting that courts are "increasingly skeptical of … experts who offer only generalized and theoretical opinions that a particular methodology may serve [their] purpose without also submitting a functioning model that is tailored to market facts in the case at hand"*)*; *Weisfeld v. Sun Chem. Corp*., 84 F. App'x 257, 261-64 (3d Cir. 2004) (denying certification where expert "state[d] he planned to use … multiple regression" but provided little "independent analysis" or "discussion of the evidence on which [the] analysis was based"); *Piggly Wiggly Clarksville, Inc. v. Interstate Brands Corp*., 100 F. App'x 296, 299-300 (5th Cir. 2004) (same, where expert "did not offer a formula based on regression analysis, but merely opined that one could be found"); *In re Dial Complete Mktg. & Sales Practices Litig*., 2015 U.S. Dist. LEXIS 164346, at *100, 106-07 (D.N.H. Dec. 8, 2015) (same, where experts "discuss[ed] how … conjoint analysis works generally," but "d[id] not provide any specifics"); *Miller v. Fuhu Inc.,* 2015 U.S. Dist. LEXIS 162564, at *64-68 (C.D. Cal. Dec. 1, 2015) (same, where expert proposed to use "Contingent Valuation" or "Conjoint Analysis," but "the few concrete details [he] provided … [were] too vague for the Court to determine … whether it 'properly [could] be applied to the facts in issue' in this case"); *Saavedra v. Eli Lilly & Co.,* 2014 U.S. Dist. LEXIS 179088, at *18-20 (C.D. Cal. Dec. 18, 2014) (same, where expert "ha[d] yet to design the survey … he [would] use in his conjoint analysis" and "ha[d] not decided which attributes will be included"); *Randolph v. J.M. Smucker Co*., 303 F.R.D. 679, 697-98 (S.D. Fla. 2014) (same, where expert proposed to use "hedonic regression and/or conjoint analysis," but offered "no hard-and-fast evidence that the [price] premium is capable of measurement," only "bald, unsupported assertion" that his model would work); *Jones v. ConAgra Foods, Inc*., 2014 U.S. Dist. LEXIS 81292, at *77-78 (N.D. Cal. June 13, 2014) (same, where expert proposed to use "regression analysis," but his proposal was "vague and abstract," did not "provide a clearly defined list of variables," did not show that "the [relevant] data … exist[ed]," and did not show "how he would determine … which competing and complementary products he would use"); *In re ConAgra Foods, Inc*., 302 F.R.D. 537, 549-53, 577-78 (C.D. Cal. 2014) (same, where expert "opine[d] that it is possible to determine damages" using hedonic regression and conjoint analysis, but "d[id] not actually perform either analysis or describe in any detail their specific application to this case"); *Kottaras v. Whole Foods Mkt., Inc.,* 281 F.R.D. 16, 25-26 (D.D.C. 2012) (same, where expert stated he "plan[ned] to run a regression analysis … but his proposal [was] tentative" and "too vague for the Court to even evaluate"; rejecting expert's unsupported "assurance" that "merits discovery [would] further refine [his] assessment"); *Weiner v. Snapple Beverage Corp*., 2010 U.S. Dist. LEXIS 79647 (S.D.N.Y. Aug. 5, 2010) (same; recognizing that a plaintiff's expert need not fully

Here, Plaintiffs have no expert testimony establishing a damage model. For this reason alone, class certification must be denied. Plaintiffs' counsel has instead proposed a layman damage model using Medicaid/Medicare charges as the reasonable price point. This model is based on the false assumption that medical providers have to charge the same rates as Medicaid/Medicare or even accept health insurance payments. Plaintiffs, however, have failed to point to any law or evidence establishing that this is the pricing standard for all medical providers. Plaintiffs' counsel is simply making a damages model based on his unsupported opinion on what constitutes reasonable charges for medical services.

Plaintiffs' damage model also conflicts with R.C. 2317.45(B), as amended in March 2019, which now prevents the use of an insurer's reimbursement rates as evidence of reasonable value of medical services in medical claims.[3] Plaintiffs' damage model also fails to take in account that the potential class would include members that did not qualify for Medicaid/Medicare coverage. For these potential members, a separate damage inquiry would be needed to determine what rate they would have to pay using their own insurance or by paying directly out-of-pocket.

Plaintiffs' damage model also incorrectly compares Ghoubrial's business, which specializes in treating accident victims through LOPs, to other health care providers, like larger hospitals and nonprofit organizations. This is not a fair comparison. At the very least, in

"implement … his methodology at the class certification stage," but that merely "identify[ing] … possible approaches and assert[ing] that they will work" is insufficient).

[3] R.C. 2317.45(B): "Any insurer's reimbursement policies or reimbursement determination or regulations issued by the United States centers for medicare and medicaid services or the Ohio department of medicaid regarding the health care services provided to the patient in any civil action based on a medical claim are not admissible as evidence for or against any party in the action and may not be used to establish a standard of care or breach of that standard of care in the action."

determining whether Ghoubrial's prices were unconscionable high, Plaintiffs' damage model should be comparing Ghoubrial's rates to other health care providers that work on a LOP basis.

For Floros and KNR, Plaintiffs have not even proposed a damage model. Instead, Plaintiffs argue—with no legal support—that they would be entitled to disgorgement of any amounts that Floros collected for his chiropractic services. As Floros discussed in his initial brief in opposition to class certification, Plaintiffs' claims for disgorgement are entirely baseless. *See* Floros' BIO Certification, pp. 65-69.[4]

Tellingly, of the dozen plus antitrust cases that Plaintiffs string cite, only three were decided after the *Comcast* decision: *In re Disposable Contact Lens Antitrust* 329 F.R.D 336, 386 (M.D. Fla. 2018), *Delta/Air Tran Baggage Fee* 317 F.R.D. 675 (N.D. Ga. 2016), and *In re Nexium Antitrust Litig*., 777 F.3d 9, 27 (1st Cir. 2015). In fact, most of the cases Plaintiffs cite are from the 1990s or earlier. To the extent that this Court wants to rely on antitrust law for guidance, cases decided before *Comcast* are no longer relevant on the issue of proving damages with common evidence.

[4] As explained in Floros' initial brief in opposition to class certification, Plaintiffs also have no common evidence showing how each member suffered actual damages for Class B, since narrative reports were helpful in many cases and required in others. This Court would need to conduct individual inquiries into: 1) whether a fiduciary relationship existed for each member; 2) whether Floros' narrative reports were worthless or had some value for each class member; 3) the content of each narrative report and the corresponding medical records; 4) Floros' knowledge of whether the narrative fee was deducted from the client's settlement; 5) how the narrative report affected each claim; 6) whether the case was in litigation or close to being filed; 7) whether the attorney used the narrative report as leverage in settling a case; 8) whether the client and attorney agreed to request the narrative report and approved the fee; 9) whether each class member relied on Floros' recommendation to seek legal representation from KNR; 10) whether the adjuster would have agreed to a settlement without a narrative causation statement; 11) whether the adjuster settled for a higher amount because of the narrative report; 12) whether the class member had preexisting injuries or complicated injuries that required an expert analysis; and 13) whether the adjuster wanted an expert narrative opinion on future medical cost.

All three post-*Comcast* cases that Plaintiffs cite are also distinguishable and inapplicable. Unlike here, in all three cases the plaintiffs presented an expert model of damages. In *Disposable*, the plaintiffs' expert also opined that discounts would be the same regardless of inflated price. That is not the case here, since Ghoubrial's discounts and reductions varied with each claim member (up to 98% on some claims). According to Plaintiffs' damage model, they would also be comparing varying health insurance rates to determine whether each class member suffered actual damages, which would require another inquiry into varying reimbursement, deductible, and co-pay rates.

In *Delta*, the court limited its holding to horizontal price-fixing cases only. And in *Nexium*, the court found that the number of uninjured claimants was identifiable and *de minimis*. *In re Asacol Antitrust Litig*., 907 F.3d 42, 51-58 (1st Cir. 2018), the First District also greatly limited *Nexium's* holding. *See also In re Rail Freight Fuel Surcharge Antitrust Litigation—MDL No. 1869*, 934 F.3d 619 (D.C.Cir.2019)(distinguishing and limiting *Nexium's* application to antitrust cases).

Lastly, this Court should reject Plaintiffs' reliance on California cases involving interpretation of California's consumer protection statutes. These cases have no application here. Plaintiffs' reliance on cases so far removed from Ohio law only highlights how baseless their claim is for class certification.

III. Plaintiffs' newest legal theory for Class A is full of unsupported assumptions that would require individual inquiries.

Plaintiffs' newest theory of liability for Class A is that Defendants conspired to misled KNR clients into signing letters of protection ("LOPs") and waiving their health insurance benefits for Ghoubrial's fraudulent medical services. Plaintiffs also argue that KNR clients did

not become aware of Ghoubrial's fraudulent medical charges until seeing their settlement paperwork and never had a chance to approve or negotiate the charged rates.

For Plaintiffs' new theory to be viable, this Court would have to stack assumptions on top of assumptions on top of more assumptions. Each assumption would require individual inquiries since Defendants did not have uniform procedures. *Agrawal* at ¶ 23, citing *Cullen*, 137 Ohio St.3d 373, 2013-Ohio-4733, 999 N.E.2d 614("…a plaintiff seeking to certify a class based on allegedly common documents and procedures must establish that the documents and procedures were, in fact, uniformly applied to every potential class member.").

For instance, Plaintiffs are assuming that Defendants uniformly pushed KNR clients into waiving their health insurance benefits and singing LOPs, but no evidence supports this assumption. In fact, Plaintiffs' alleged star witnesses, Gary Petti, and Kelly Phillips all gave testimony that directly contradicts assumption. *See* Petti Tr. pp 241-242; Horton Tr. 50-51; Phillips Tr. 161-162. Plaintiff Reid's testimony also contradicts this assumption, as she specifically testified that she was not pressured to see Floros or Ghoubrial, and that she benefited from their services. *See* Floros Supp. BIO Class Cert. pgs. 10-11.

Plaintiffs new class theory also assumes that all class members were unaware of Ghoubrial's medical charges before seeing their settlement paperwork. There is no evidence, however, showing that KNR had a routine and uniform practice of withholding this information before the client sees their settlement paperwork. In fact, KNR's former employees testified to the opposite. *See e.g.*, Petti Tr. pp 269-272.

Plaintiffs are also assuming that clients never asked KNR about the amount of the medical bills before seeing their settlement paperwork. There is no uniform or common evidence showing that KNR clients were unable to ask about their outstanding medical bills. As a result,

this Court would have to look at each case individually to determine whether each KNR client had discussions with their KNR attorney about Ghoubrial's medical bills prior to seeing their settlement paperwork.

Plaintiffs are also assuming that everyone in the class felt forced and pressured into signing the settlement paperwork and were unable to negotiate further amounts. No evidence shows that this happened on a uniform basis. Nor is there any evidence showing that there was uniform procedure or script that KNR followed in finalizing a client's settlement distribution. An individual inquiry would be needed in each case to determine if the KNR client felt forced to accept the settlement distribution amounts or whether they had a chance to bargain over the distribution rates.

Plaintiffs are also assuming that Floros knew what rates Ghoubrial was charging. There is no evidence here showing that Floros had any knowledge of what Ghoubrial charged on each class member's individual settlement. Nor is there any evidence showing that Floros was aware of what reductions were made on each case.

Plaintiffs are also assuming that Floros and each attorney at KNR knew that Ghoubrial was charging unconscionably prices. No common evidence shows that Floros or the individual KNR attorneys knew Ghoubrial was allegedly charging unreasonable rates for his medical services.

Plaintiffs are also making assumptions on insurer's state of mind. An individual inquiry would be needed to determine whether the adjuster on each claim thought Ghoubrial's charges were unconscionable/fraudulent or reasonable. Another individual inquiry would be needed to

see if the adjuster agreed to a higher settlement amount based on Ghoubrial's services.[5] An individual inquiry would also be needed to see what the adjuster would have offered or settled for if the KNR client had lower medical bills or went to a different medical provider.

As discussed above, Plaintiffs are also incorrectly assuming that the "market rate" for Ghoubrial's medical services can easily be determined by looking at what other health insurers paid for services. And Plaintiffs have offered no expert testimony in support of their proposed damage model.

Lastly, as to Plaintiffs' underlying conspiracy theory against Defendants, Plaintiffs have admitted that the evidence is not common to all class members. Specifically, Plaintiffs have admitted: 1) that Floros did not solicit all class members; 2) that Floros did not refer all class members to Ghoubrial; and 3) that not all insurance companies held a negative view of Ghoubrial. Thus, Plaintiffs lack standing for their conspiracy claims. No underlying unlawful act is common to all class members.

Conclusion

For the reasons stated above and in all other related pleadings from Defendants, Floros requests that this Court deny Plaintiffs' Motion for Class Certification.[6]

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[5] As discussed Floros' supplement brief in opposition to class certification, if the insurer agreed to settle a KNR client's case at a higher amount based on Ghoubrial's services and medical charges, then that insurer could have a claim against Plaintiffs for insurance fraud and unjust enrichment. Certain class members, like Thera Reid and Matthew Johnson, would especially be at risk for a fraudulent insurance claim since they testified that Ghoubrial's medical services were helpful, necessary, and reasonable. Based on this, Plaintiffs' claims also fail to meet the typicality requirement for class certification.

[6] While this supplement motion and oral argument mostly focused on issues of predominance, Floros still maintains, as argued in his initial brief in opposition to class certification, that Plaintiffs have failed to satisfy the other requirements for Civ. 23(A), including "typicality" and "adequacy." Moreover, Plaintiffs' Class B is too broad and improperly includes claims against other chiropractors and individuals who are not a party to this action.

Respectfully submitted,

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CERTIFICATE OF SERVICE

A copy of Defendant Floros' Brief in Opposition to Plaintiffs' Second Supplemental Motion for Certification was served electronically on this 8th day of October, 2019. Notice of this filing will be sent to all parties by operation of the Court's electronic filing system.

/s/ Shaun H. Kedir
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