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 **Defendants Kisling, Nestico & Redick, LLC, Alberto Nestico and Robert Redick's Sur-Reply to Supplement to Plaintiffs' Motion For Class-Action Certification re: the Injury-in-Fact Sustained by All Members of the Price-Gouging Class**

Plaintiffs' latest submission is a desperate attempt to evade what has become readily apparent in this matter – that certification is improper for multiple reasons and undoubtedly fails the predominance test because common evidence does not exist to prove that all (or any actually) Class Members were injured or the extent of each Class Member's injury. Indeed, the testimony demonstrates that in most cases Kisling, Nestico & Redick, LLC ("KNR") negotiated significant reductions in Dr. Ghoubrial's medical bills[1] so that determination of whether any individual paid more than a reasonable amount cannot be determined through common evidence. [Jun. 14, 2019 Affid. of A. Nestico filed as Ex. N on Jun. 17, 2019; Depo. of K. Phillips at pp. 227, 295; Depo. of R. Horton at pp. 127-128; Depo. of G. Petti at 354, attached hereto]. As aptly framed by the Court during argument, this is "the fly in the ointment."

Recognizing this fatal flaw in their certification motion, Plaintiffs now assert that this Court can presume individual injury at the class certification stage even when it is readily apparent class certification will include a large number of proposed Class Members who suffered no damage.

[1] The record also reflects that in the majority of cases KNR charged a legal fee below what the contract with a client provided. *See, e.g.,* Depo. of K. Phillips at pp. 227.

This is not the law. A presumption of injury is unique to class actions involving **antitrust claims**. It is the exception rather than the rule. This exception has no bearing here because this case does not involve an antitrust claim.

I. Ohio Law Requires That All Class Members Must Have Suffered Actual Injury to Show Predominance.

Plaintiffs spend multiple pages trying to distinguish between "injury in fact" and the "quantum [extent] of injury," claiming Defendants' criticisms of their motion involve the latter which does not preclude certification. This argument is a red herring because the Plaintiffs cannot prove either through common evidence.

In *Felix v. Ganley Chevrolet, Inc.*, 145 Ohio St.3d 329, 2015-Ohio-3430, 49 N.E.3d 1224, ¶ 33 (2015) (emphasis added), a case that involved the Ohio Consumer Sales Practices Act, the Supreme Court of Ohio held:

> **Plaintiffs 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.** *In re Rail Freight Fuel Surcharge Antitrust Litigation*—MDL No. 1869, 725 F.3d at 252. Although plaintiffs at the class-certification stage need not demonstrate through common evidence the precise amount of damages incurred by each class member, *Behrend*, 569 U.S.__, 133 S.Ct. at 1433, 185 L.Ed.2d 515, citing *Story Parchment Co. v. Paterson Parchment Paper Co.*, 282 U.S. 555, 563, 51 S. Ct. 248, 75 L. Ed. 544 (1931), they must adduce common evidence that shows all class members suffered some injury. *In re Rail Freight Fuel Surcharge Antitrust Litigation* at 252, citing *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 623-624, 117 S.Ct. 2231, 138 L.Ed.2d 689 (1997), and *Messner v. Northshore Univ. HealthSystem*, 669 F.3d 802, 815-816 (7th Cir.2012).

Attempting to distinguish *Felix*, Plaintiffs cite one case, *Strickler v. First Ohio Bank & Lending, Inc.*, 2018-Ohio-3835 (9th Dist. 2018), and argue that the Supreme Court's holding is limited in application to claims under the Ohio Consumer Sales Practices Act. Notably, however, the cases cited by the Ohio Supreme Court in *Felix* supporting the necessity of proving damages through common proof did not involve consumer sales statutes. Further, close examination of

Strickler demonstrates why it is not relevant to this matter: First, the trial court had already found that the individuals who were subject to these statutory violations had suffered injury. "In making its ruling, the court determined that any violation of R.C. 1322.062 gives rise to a damage award under R.C. 1322.11 because '[s]ome amount of damage must be assumed in order to effectuate the purpose of the statute * * *'." *Strickler*, 2013-Ohio-1221, ¶ 4. In other words, in *Strickler* there was a judicial determination that all class members had suffered damage.

Second, the statute at issue in *Felix* allowed for class actions but only allowed for actual damages to be awarded in a class action. This restriction did not exist in the statute that was being sued upon in *Strickler*. In the present matter, like in *Felix*, all claims that Plaintiffs are pursuing required damages as an element of the claim.

Third, as outlined during oral argument, the express reasoning of *Felix* that all members of the class need to have suffered injury has been adopted in non-OCSPA cases by other Ohio courts. "The Ohio Supreme Court did not limit that injury requirement to OCSPA cases and neither did this court in *Satterfield*, 2017-Ohio-928." *Mikulski v. Centerior Energy Corp.*, 2019-Ohio-983, *12 (8th Dist. 2019). *See also*, *Ford Motor Co. v. Agrawal*, 2016-Ohio -5928 (8th Dist. 2016) (applying the injury requirement of *Felix* and reversing certification of class that did not involve CSPA claim.).

Lastly, Plaintiffs admit that they must be able to prove with common evidence that all Class Members were damaged as a result of Dr. Ghoubrial's base price regardless of the amount of the discount or what was actually paid. ("… *Felix* cannot apply to defeat certification of Class A here, 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.") (Pls' Supp. Brief, p. 4-5).

II. The Case Law Quoted By Plaintiffs Does Not Support A Finding That All Class A Members (Price Gouging Class) Suffered An Injury.

Plaintiffs cite some federal antitrust and a few California cases in an attempt to argue that injury to each member of Class A may be presumed at the class certification stage despite the multitude of individualized issues including: 1) discounts and how they varied; 2) health insurance plans (offered by countless different companies and/or public entities like Medicare or Medicaid) or lack of health insurance; 3) deductibles and where that person was on satisfying their yearly deductible; 4) co-pays; 5) years of treatment as that could be determinative on the initial amount billed, changes in the amounts billed as well as the health insurance plans in effect when treatment occurred; 6) types of treatment; and 7) all of the other variables that exist amongst Class Members in proposed Class A to argue that all of these differences do not matter. However, antitrust is its own unique area of law that has absolutely no application to this case. Further, the reasoning of the few non-antitrust cases (California cases) quoted by Plaintiffs do not apply to this type of situation either and, even if it did, Ohio courts have specifically rejected this line of reasoning.

A. The Liberal Judicial Approach To Class Certification In Antitrust Cases Has Not Been Extended Beyond The Antitrust Context.

Plaintiffs assert that "Courts nationwide consistently reject Defendants' argument" that discounts or negotiated reductions prevent a finding of predominance. To support this overstatement, Plaintiffs cite a series of antitrust class actions allowing a presumption of antitrust injury at the class certification stage that have never found application outside of the antitrust arena, and therefore have no application here.

Class actions are critical to the private enforcement of antitrust laws. The societal importance of enforcing antitrust laws was articulated by the U.S. Supreme Court when it

described price-fixing as an "actual or potential threat to the central nervous system of our economy." *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150, fn 59 (1940). As a result, the requirements of class certification, in the context of an antitrust case, have been repeatedly applied in a less than stringent manner.

Citing the U.S. Supreme Court, the court in *In Re: Infant Formula Litig*., 1992 U.S. Dist LEXIS 21981, at *7-8 (N.D. Fla. 1992) stated:

> **In *Hawaii v. Standard Oil Company,* the Supreme Court recognized the important role Rule 23 plays in the private enforcement of <u>antitrust actions</u>**, and wrote that it "enhance[s] the efficacy of private actions by permitting citizens to combine their limited resources to achieve a more powerful litigation posture." 405 U.S. 251, 266, 92 S. Ct. 885, 893, 31 L. Ed. 2d 184 (1972). In furtherance of this policy, courts resolve any doubt in favor of certifying the class in these cases. *Kahan v. Rosenstiel,* 424 F.2d 161, 169 (3d Cir. 1970), *cert. denied,* 398 U.S. 950, 90 S. Ct. 1870, 26 L. Ed. 2d 290 (1970); *see also Esplin v. Hirschi,* 402 F.2d 94, 101 (10th Cir. 1968), *cert. denied,* 394 U.S. 928, 89 S. Ct. 1194, 22 L. Ed. 2d 459 (1969) ("The interests of justice require that in a doubtful case . . . any error, if there is to be one, should be committed in favor of allowing the class action."). (emphasis added).

The Court in *In re Lorazepam & Clorazepate Antitrust Litig*., 202 F.R.D. 12, 35-36 (DC 2001), reinforced this long-standing treatment of class certification in antitrust cases:

> The Court additionally notes in this particular context that long ago the Supreme Court recognized the importance that class actions play in the private enforcement of antitrust actions…..
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> ***
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> *See also, e.g., Brown v. Pro Football, Inc.,* 146 F.R.D. 1, 4 (D.D.C. 1992) (stating that "the framers of Rule 23 seemed to target cases such as this [antitrust action] as appropriate for class determination"); … And because of this important role for class actions in the private enforcement of antitrust claims, "courts resolve doubts in favor of certifying the class." *Playmobil,* 35 F. Supp. 2d at 239 (*citing In re Control Data Corp. Sec. Litig.,* 116 F.R.D. 216, 219 (D. Minn. 1986)); accord *Plastic Cutlery,* 1998 U.S. Dist. LEXIS 3628, *4, 1998 WL 135703 at *2.

As the Supreme Court stated in *Amchem Prods v. Windsor*, 521 U.S. 591, 625, 117 S.Ct. 2231, ___ (1997), "predominance is a test readily met in certain cases alleging … violations of the antitrust laws."

Plaintiffs' argument and citation of multiple cases do indeed establish that **in the antitrust context** courts almost ignore individual damage issues and the need to establish class-wide injury with common proof. In antitrust cases, the willingness of courts to find common evidence of class-wide injury is wholly consistent with the judicial mandate that "courts should resolve doubt in favor of certifying the [antitrust] class." *In re Plastic Cutlery Antitrust Litig.*, 1998 US Dist. Lexis 3628 (E.D. Pa. 1998). In an antitrust case cited by Plaintiffs, the court expressed the public policy need to ignore issues of individual damages to allow a finding of predominance:

> Indeed, decisions in this District have recognized that if individual damage questions were a barrier to class certification, 'there would be little if any place for the class action device in the adjudication of antitrust claims.'

In re NASDAQ Market-Makers Antitrust Litig., 169 FRD 493, 524 (S.D. N.Y. 1996). (Internal citations omitted).

The requirements for class certification in antitrust litigation do not undergo the same rigorous scrutiny as seen in other cases. Class actions are a necessary part of safe-guarding our economic system from antitrust violations. Thus, the predominance requirement has been recognized by courts as a hurdle that must be minimized to allow class certification **in antitrust cases**. However, application of antitrust principles of class certification to the present matter is not only unwarranted, it is unprecedented.

B. Plaintiffs' Claim That Courts Have Applied The Principles Of Antitrust Class Action Certification Beyond Antitrust Cases Is Unfounded.

In addition to citing inapplicable antitrust law, Plaintiffs state that "[c]ourts have reached similar results outside of the antitrust context as well[.]" (Supplement to Plaintiffs' Motion for Class Certification at p.10). It is difficult to understand how Plaintiffs can argue that the cases they cite even imply that the antitrust law has been extended beyond the body of antitrust cases. Without any mention of the facts, Plaintiffs quote *Kwikset Corp. v. Superior Court*, 51 Cal. 4th, 310, 246 P.3d 877, (2011) as evidence that other cases have reached similar results outside of the antitrust context. Literally nothing could be further from the truth. *Kwikset* involved a customer who purchased a lockset that was labeled as "Made in U.S.A." The customer filed a representative action against Kwikset claiming that because of the origin of various parts of the lock it was not made in the U.S.A. California Proposition 64 required that in order for a plaintiff to have standing they must have "lost money or property." Kwikset argued that the plaintiff did not lose money or property since the plaintiff received the benefit of their bargain, i.e. a fully functioning lockset, even if the label contained misrepresentations about where it was made that might have been relied upon. *Id.* at 892. The court rejected defendant's argument and held that plaintiff did have standing to sue since he alleged that he would not have bought the product but for the misrepresentation. *Id.* at 890. By way of emphasis, the issue before this Court is whether there is class-wide common proof to determine whether Dr. Ghoubrial's medical charges were reasonable. The *Kwikset* opinion and law has nothing to do with this matter. It is a standing case under a California statute; it did not, in any fashion, relate to a predominance inquiry; and there was no issue with respect to variation of discounts or negotiated prices. Plaintiffs' suggestion that this case somehow represents an extension "outside of the antitrust context" is puzzling.

Plaintiffs also cite *Hinojos v. Kohl's Corp.*, 718 F.3d 1098, 1106 (9th Cir 2103) again for the proposition that antitrust law has been expanded beyond antitrust cases. This case does not

remotely stand for that proposition. *Kohl's* was a class action that targeted Kohl's practice of continual markdowns of merchandise from a fictious original or regular price. The merchandise was routinely sold at the sale or reduced price and not the original or regular price. *Id.* at 1102. The lower court granted a motion to dismiss finding that plaintiff did not suffer "lost money or property" as a result of the false advertising. The court of appeals, relying upon the newly issued *Kwikse*t opinion, reversed the granting of the motion to dismiss holding:

> In sum, price advertisements matter. Applying *Kwikset* in a straightforward manner, we hold that when a consumer purchases merchandise on the basis of false price information, and when the consumer alleges that he would not have made the purchase but for the misrepresentation, he has standing to sue under the UCL and FAL because he has suffered an economic injury.

Id. at 1107. This proposition of law has nothing to do with a predominance inquiry. The present matter is not a claim based on a false advertising statute and there is no claim or factual assertion that any of the prices advertised were false. It is unclear why Plaintiffs cite this case, but it does not represent an expansion of antitrust law and bears no relation to the present case.

The last citation by Plaintiffs as "proof" that the antitrust law has been expanded beyond antitrust cases is *B. Sanfield, Inc. v. Finlay Fine Jewelry Corp.*, 168 F.3d 967 (7th Cir. 1999). *Sanfield* was a Lanham Act case. The Lanham Act allows a competitor to sue another competitor for its false advertising. In *Sanfield*, a local jewelry store (Sanfield) sued a national retailer (Finlay) claiming that Finlay's advertisements that it sold jewelry at large discounts (40%-65%) off the regular price was misleading since it never sold the jewelry at regular prices. Again, the argument was that the advertised discounts off regular price were false since the regular price was actually the discounted price. The trial court found that Finlay's advertisements were not deceptive. *Id.* at 969. However, the court did not consider the state or federal regulations that offered guidance on what constituted false advertising. The appellate court in *Finlay* simply remanded to the trial

court to consider the regulations in reaching its decision about whether the advertisements were in fact deceptive. Again, a ruling that has absolutely nothing to do with this case. *Finlay* was not a class action, there was no issue concerning predominance and it was brought pursuant to the Lanham Act.

Most significant, the reasoning and cases cited by Plaintiffs have been consistently rejected by Ohio courts. In *Johnson v. Jos. A. Bank Clothiers, Inc.*, 2014 U.S. Dist. LEXIS 115113 (S.D. OH 2014), the plaintiffs brought a class action claiming that defendant's advertisements were false and that the "'regular price' of each purchased suit was 'vastly inflated above the true regular market price regularly paid by consumers for Jos. A. Bank suits'." *Id.* at *4. A theory that is identical to the above pricing cases cited by Plaintiffs. As here, the *Johnson* plaintiffs specifically argued the applicability of *Hinojos* and urged the court to adopt this as part of Ohio law. The court expressly declined:

> The Ninth Circuit [*Hinojos*] did not calculate the precise economic injury suffered by the bargain hunting consumer; that court merely held that such a consumer has standing to sue under California law. Indeed, in dismissing the original Complaint, this Court held, 'Although the price charged in a consumer transaction may be generally representative of the quality of the items sold, the price charged does not, by itself, constitute a representation that a product is of a particular quality. Accordingly, the Complaint fails to state a colorable claim for relief under O.R.C. § 1345.02(B)(2).'
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> Defendant urges this Court to reject the reasoning of *Hinojos* as improperly conflating the concepts of causation and damages.
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> This Court agrees with this analysis and declines to import the Ninth Circuit's *[Hinojos]* theory of loss of subjective expectancy into the OCSPA.
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> It is clear to this Court that the Amended Complaint fails to allege actual injury or damage as a result of the alleged OCSPA violation.

Id. at *16-19.

The assertions made by the Plaintiffs in the present matter were again rejected in *Gerboc v. ContextLogic, Inc.*, 867 F.3d 675 (6th Cir. 2017). In *Gerboc*, the Sixth Circuit analyzed Ohio law for the same issue – i.e. whether grossly inflated prices that are subsequently discounted was actionable in a class action. The court found that an individual who receives the product promised has suffered no actual damages, regardless of what the original price was and or the amount of discount promised. *Id.* at 680.

The Northern District of Ohio reached same result in *Ice v. Hobby Lobby*, 2015 U.S. Dist. LEXIS 131336 (N.D. OH 2015) where the plaintiff argued that he was damaged because the 50% discount was taken from the inflated list price and not the price at which the goods were always sold. Again, a case identical to the others where the plaintiff is claiming that the inflated original or list price makes the alleged discount illusory. Interpreting Ohio law, the court found that the inflated base price did not create any damages. *Id.* at *18-19.

The same finding was made in *Martin v. Lamrite West, Inc.*, 2017-Ohio-8170 (8th Dist. 2017) wherein the court held that inflated base prices from which a large advertised discount was taken did not create damages. Similarly, in an earlier appeal in *Martin* (*Martin v Lamrite West, Inc.*, 2015-Ohio-3585, 41 N.E.3d 850 (8th Dist. 2015)), the court held that inflated base prices cannot create an unjust enrichment or breach of contract cause of action. ("Regardless of the nature of the discounts, both appellants received the benefit of what they paid for in an arm's-length transaction, so they cannot recover on the basis that it would be unjust to all Pat Catan's to retain the purchase price." *Id.* at 16.)

After citing *Hinojos* and *Finlay*, Plaintiffs in this case declare "Defendants do not and cannot explain why these sound and well-established principles should not apply with equal force here …" (Pls' Supp. Brief, p. 11). Defendants' explanation is simple – these cases and the principles for which they stand have been repeatedly rejected by Ohio courts.

C. Even If Applicable, The Antitrust Cases Cited By Plaintiffs Do Not Support A Finding Of Predominance.

As outlined above, not only does the body of antitrust cases have no application outside the price-fixing area, but the facts of the antitrust cases cited by Plaintiffs make them inapposite to the present matter. Plaintiffs string quotations from various antitrust cases without any references to the facts. Some of the quotations are inaccurate leaving a misleading impression. When the facts of Plaintiffs' cases are examined, it becomes clear that none of them address the allegations in this case relating to the existence of damages. Plaintiffs avoid addressing their own allegations of damages, because to do so would make plain the lack of predominance.

The most glaring difference between the cases quoted by Plaintiffs and the present case relates to how Plaintiffs define damages. Plaintiffs allege that putative Class Members were damaged because each paid Dr. Ghoubrial more than what their government or private health insurance would have reimbursed. ("These rates were far in excess of what the Class Members' insurers would have otherwise paid..." Pls. Reply Brief, p. 10). ("Thus, the clients have no reason to believe that they would ever end up paying more for this care than it would have cost them to have simply pay through their health-insurance policies…" Pls. Mot. Class. Cert. p. 77). Consistent with its allegations, Plaintiffs' damage calculation example uses the Medicaid reimbursement rate of Class Representative Tara Reid to determine the existence of damages. (Pls. Reply Brief, p. 15). With respect to all other Class Members, plaintiffs state "for Class Members who were covered by Medicaid, Medicare or other private insurance benefits, the insurers'

reimbursement rates would be used to calculate the amount overbilled as above." (Pls. Reply Brief, p. 15). Plaintiffs acknowledged the need for this individual inquiry at the oral argument:

> But we would also submit evidence showing it won't be hard to get to – serve subpoenas on all of the major healthcare insurance providers to say what were your reimbursements rates for these codes. (Pls. Counsel's Statement during Argument, p. 164)

Under Plaintiffs' allegation of damage, not only will there be a need for individual determinations of what each Class Member paid after varying reductions, but individual evidence of what Plaintiffs claim they should have paid under their insurance will need to be presented as well. This individual Class Member evidence of insurance is independent of any analysis with respect to discounts or price reductions. This inquiry would require identification of the insurance policies for thousands of Class Members dating back nine (9) years. The amount that each different insurance company allowed as reimbursement for the various different services and medical equipment prescribed by Dr. Ghoubrial would need to be determined. Certainly, reimbursement rates have changed multiple times over nine (9) years. Further, the policy applicable to a specific Class Member would need to be obtained to understand the individual Class Member's deductible and co-pay provisions pursuant to his or her insurance. Information regarding the co-pay and deductible would be necessary to determine the total amount of out of pocket expense to each Class Member had he or she been directed to use his or her health insurance as Plaintiffs claim they should have been. So, while Plaintiffs' cite to several **antitrust** cases which find predominance despite negotiated price reductions, they have no application to the individual inquiry necessary to determine actual damage to each Class Member in this case. Plaintiffs cannot ignore their own theory of damages in attempting to establish the illusion of common evidence and predominance.

While courts have consistently applied a liberal view to the preponderance requirement in antitrust cases, not even the antitrust cases selected by Plaintiffs in this case support a finding of common, class-wide evidence. Plaintiffs quote and misquote a series of antitrust cases without a mention of the facts of any of the cases. This approach creates the misimpression that the holdings were not fact driven and that these cases are factually similar and thus supportive of Plaintiffs' position. An analysis of the facts of Plaintiffs' cited cases leads to a different conclusion.

Plaintiffs quote *In re Commercial Tissue Prods.*, 183 F.R.D. 589 (N.D. Fla. 1998). Similar to the other cases cited, the court noted that the issue of predominance is "by design and necessity, a fact sensitive process for each case." *Id.* at 595. In *Commercial Tissue*, the plaintiffs produced an expert who opined that given the nature of the wholesale tissue paper industry negotiated discounts were based on the unlawfully inflated prices. Therefore, all class members were injured. The court found that the nature of the expert evidence was "classwide" and found predominance. The same cannot be said for the present case. The determination of what a client receives from a personal injury settlement is the result of provider negotiations, insurance subrogation negotiations, attorney's fee reductions and the gross settlement. Dr. Ghoubrial's price reductions ranged from 98% to 0%. Added to this, as previously outlined, an analysis of each putative Class Member's health insurance (reimbursement, deductible and co-pay) would be necessary to determine whether he or she were injured. The "fact sensitive process for each case" highlights the inapplicable nature of *Commercial Tissue* to the current matter.

Plaintiffs quote a footnote from *Hawaii v. Standard Oil Co. of Cal.*, 405 U.S. 251 (1972) to support its argument that individually negotiated charges will not prevent a finding of predominance. The *Hawaii* case was not a class action (the lower court refused to certify a class action). It did not involve discounts or negotiated prices or issues of predominance. The Supreme

Court in *Hawaii* addressed the issue of whether the state of Hawaii could bring an action under The Clayton Act. This case has no application to the present matter.

Plaintiffs quote from the case *Delta/Air Tran Baggage Fee* 317 F.R.D. 675 (N.D. Ga. 2016) is misleading. Plaintiffs quote the *Delta* case as follows:

> [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.

What Plaintiffs fail to point out is the court's expression that this principle was articulated within the context of a "horizontal price-fixing case":[2]

> As a result of the anti-competitive nature of price-fixing, courts have refused to allow defendants accused of such antitrust violations to assert claims that their unlawful conduct in some way benefitted the plaintiffs. 'Whatever economic justification particular price-fixing agreements may be thought to have, the law does not permit an inquiry into their reasonableness. They are all banned because of their actual or potential threat to the central nervous system of the economy.' *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 226 N.59, 60 S.Ct. 811, 84 L. Ed. 1129 (1940). Consequently, 'mitigation and offset generally do not affect the ultimate measure of damages' in horizontal price-fixing cases. *In re Airline Ticket Comm'n Antitrust Litig.*, 918 F. Supp. 283, 286 (D. Minn. 1996). (emphasis in original).

The matter before this Court is not a horizontal price-fixing case, nor does it involve any allegations of offsets. The principles espoused by the Court in *Delta*, as with all price-fixing cases, have no application outside the realm of price-fixing adjudications.

Plaintiffs quote *In re Infant Formula Antitrust Litigation*, N.D. Fla. MDL No. 878, 1992 U.S. Dist. LEXIS 21981, at *16 (Jan. 13, 1992). This case is absent any discussion concerning the need to prove class-wide injury and common evidence. What Plaintiffs do not disclose is that *In*

[2] The horizontal price-fixing alleged in *Delta* was a *per se* violation of the Sherman Act. *Id*. at 684.

re Infant Formula was another "horizontal price-fixing case" with no application to the current case.

Plaintiffs quote *In re Industrial Diamonds Antitrust Litig.*, 167 F.R.D. 374, 383 (S.D. N.Y. 1996) without any mention of its facts. The language quoted does not appear in the court's opinion, and it is misleading. The defendants in *Diamonds* argued that the existence of individually negotiated diamond prices prevented a finding of common proof to establish injury to all class members. The court stated that it was required to "examine the circumstances of the industry in question to determine whether common proof of impact is possible in that case." *Id.* at 381. Plaintiffs produced evidence from its expert who analyzed list prices and transaction prices and found a direct correlation between the two. The court concluded that this was common evidence of class-wide injury. No such evidence exists in the present case. No such evidence is possible where negotiated reductions vary from 98% to 0% and factors such as the gross settlement, attorney's fees and other subrogated interests affect price reductions.

Hedges Enterprises, Inc. v. Continental Group, 81 F.R.D. 461, 475 (E.D. Pa. 1979) is also quoted by Plaintiffs. The statement quoted by Plaintiffs does not appear in the opinion. The *Hedges* case involved the price fixing of commercial bags. After analyzing the market, the court concluded:

> In the case s*ub judice*, as in those cases noted in support of our conclusion, the market is not so inherently diverse nor are individual negotiations so entirely unique that at least some common basis of proof of the fact of damage could not be found.

Id. at 474.

In the present case, individual negotiations are so "inherently diverse" that one Class Member might pay $150.00 for an office visit with Dr. Ghoubrial while another might pay $15.00. One Class Member might pay $1,000.00 for a trigger point injection, while another might pay

$50.00. The court in *Hedges* emphasized that "whether or not fact of damage can be proven on a common basis therefore depends upon the circumstances of each case." *Id.* at 473. The circumstances upon which the court in *Hedges* found common evidence bears no resemblance to the facts of the present case.

Plaintiffs quote and rely on *In re Methionine Antitrust Litig. v. Rhone-Poulenc*, 2001 U.S. Dist. LEXIS 13402 (N.D. Cal. 2001) to support their claim of predominance. Plaintiffs' reliance on this case is difficult to understand. The *Methionine* case is not a class action so there was no predominance issue addressed and there were no facts relating to price reductions. The Court addressed the claims of the Plaintiff-wholesalers and found that overcharges were not the only form of damages they might suffer from price fixing (i.e. loss of business).

Plaintiffs quote *In re NASDAQ Market-Makers Antitrust Litig*., 169 F.R.D. 493, (S.D. N.Y. 1996). This case alleged that multiple investment banking firms, in relation to the trading of over 5,000 stocks, conspired to inflate purchase prices of stock by fixing the spread between bid and ask prices of a given security. Plaintiffs proposed to prove class-wide damages by expert testimony using six (6) different statistical methodologies involving complex modeling, which the court found to be common to all class members. With that finding, the court found predominance. The factual backdrop of *In re NASDAQ* bears no resemblance to the facts before this Court.

Plaintiffs cite *In re Catfish Antitrust Litigation,* 826 F.Supp. 1019 (N.D. Miss. 1993) to support their argument that negotiated discounts do not prevent a finding of predominance. The Court in *Catfish* found common evidence to prove class-wide damages based primarily on an expert's statistical analysis and the finding of a "strong," "stable," and "systematic relationship" between the inflated price and the discounted price. There is no such evidence in the present case. One class member could have paid $15.00 (90% discount) for a Dr. Ghoubrial office visit while

another paid $135.00 (10% discount). There is no common evidence in this matter of a "strong," "stable," and "systemic relationship" between Dr. Ghoubrial's stated prices and what he ultimately agreed to charge in each case. The amount of the Ghoubrial discounts were negotiated by more than a dozen different attorneys and were dependent on the facts of each case, the attorney, the gross settlement amount, other subrogation amounts, the strength of liability, and ultimately trying to satisfy the client.

Finally, Plaintiffs extensively quote *In Re Disposable Contact Lens Antitrust*, 329 F.R.D. 336 (M.D. Fla. 2018). While the Court found common proof of damage where discounting occurred, it did so under facts very different from the present case. In *Disposable*, the court relied on expert testimony that the price discounts were not affected by the price fixing – meaning that the discounts would have been the same regardless of the inflated price. In the present case, Dr. Ghoubrial's charges were discounted by amounts as high as 98%. Had Class Members used their health insurance as Plaintiffs claim should have been done, the existence or extent of any discounts would have been determined by the insurance company. It is unrealistic to claim that the Ghoubrial discounts would have been mirrored by some yet to be identified group of insurance companies. The *Disposable* case has no application to this matter.

By reason of the expansive treatment of the predominance requirement consistently applied by courts in the analysis of antitrust cases, such cases have no application to this case. The Supreme Court of the United States has mandated this approach in antitrust litigation to allow private enforcement of antitrust laws through the certification of class actions. Beyond this consideration, the holdings in the antitrust cases quoted by Plaintiffs are expressly driven by the facts of each case and provide limited, if any, guidance to this Court.

III. The Lack Of Common Evidence To Prove Class-Wide Damage Is Just One Of The Hurdles To The Establishment Of Predominance.

Plaintiffs seek to hold KNR responsible for charges paid to Dr. Ghoubrial by putative Class Members pursuant to a contract where Class Members agreed to pay Dr. Ghoubrial reasonable charges. In order to hold KNR responsible for such payments, Plaintiffs have zealously attempted to make this into a conspiracy case.

Plaintiffs cannot show the existence of the alleged "conspiracy" with evidence that is common to all Class Members. At this stage of the briefing, the impossibility of such a showing is obvious. Plaintiffs have admitted that the "chiropractor *quid pro quo*" facet of the alleged conspiracy does not apply to all Class Members. Plaintiffs have admitted that the negative view of Dr. Ghoubrial allegedly held by some auto insurance companies does not apply to all Class Member cases. This aspect of Plaintiffs' alleged conspiracy therefore does not involve class-wide proof. The allegation that Class Members were wrongfully pressured into foregoing their health insurance does not apply class-wide because some Class Members had no insurance and others refused to use theirs. The allegation that KNR referred its clients to Dr. Ghoubrial does not apply class-wide based on the testimony of former attorneys Horton, Phillips and Petti, who all testified that they never referred clients to Dr. Ghoubrial. (Defs. Brief in Opp. P. 16)

Plaintiffs cannot certify a "conspiracy" class against KNR and hold it responsible for monies paid to Dr. Ghoubrial. Plaintiffs cannot establish the existence of the alleged conspiracy with evidence that applies to **all** Class Members. Plaintiffs have utterly failed in this regard.

IV. Conclusion

For the reasons stated herein, all of the earlier pleadings and the oral argument , the KNR Defendants respectfully request that this Court deny Plaintiffs' Motion For Class-Action Certification.

Respectfully submitted,

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Counsel for Defendants

CERTIFICATE OF SERVICE

The foregoing Defendants' Sur-Reply to Supplement to Plaintiffs' Motion For Class-Action Certification re: the Injury-in-Fact Sustained by All Members of the Price-Gouging Class was filed electronically with the Court this 8th day of October, 2019. The parties may access this document through the Court's electronic docket system.

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Daniel Frech
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Counsel for Plaintiffs

/s/ R. Eric Kennedy
R. Eric Kennedy (0006174)
Weisman Kennedy & Berris Co., LPA

IN THE COURT OF COMMON PLEAS
SUMMIT COUNTY, OHIO

MEMBER WILLIAMS, et al.,	)	Case No. CV-2016-09-3928
	)	
Plaintiffs,	)	Judge James A. Brogan
	)	
vs.	)	*Affidavit of Alberto Nestico, Esq.*
	)	
KISLING, NESTICO, & REDICK, LLC, et al.,	)	
	)	
Defendants.	)	

Now comes Affiant Alberto Nestico, having first been sworn upon his oath, and attests as follows:

1. I am of legal age, sound mind, and otherwise competent to testify.
2. I am a licensed Attorney in Ohio in Good Standing.
3. I am licensed to practice in all Ohio courts, the Sixth Circuit Court of Appeals, the Northern Federal District of Ohio and the United States Supreme Court.
4. This affidavit is based on my personal knowledge.
5. Kisling, Nestico and Redick rarely refers clients to Dr. Sam Ghoubrial. In fact, KNR refers on average two or less (2) cases per year to Dr. Sam Ghoubrial.
6. Kisling, Nestico and Redick refers clients to over a dozen chiropractors who refer patients to Dr. Sam Ghoubrial.
7. Kisling, Nestico and Redick plays no role in the decision as to whether a chiropractor refers a patient to Dr. Ghoubrial.
8. During the class period, less than fifteen percent (15%) of Kisling, Nestico and Redick's clients were treated by Dr. Sam Ghoubrial.
9. The vast majority of Dr. Sam Ghoubrial's medical billings regarding Kisling, Nestico and Redick clients are negotiated and discounted between 0% to 98% by the attorneys handling the cases.
10. During certain times the reimbursement determination and negotiation with Dr. Sam Ghoubrial was made by individual Kisling, Nestico and Redick lawyers. At other

Sandra Kurt, Summit County Clerk of Courts

times, negotiations were done by me after consultation and input from the lawyers handling those cases.

11. To my knowledge, Dr. Sam Ghoubrial had formed his personal injury practice and accepted chiropractor referrals long before Kisling, Nestico and Redick ever referred him a patient.

12. Approximately one-third (1/3) of Kisling Nestico and Redick's business derives from chiropractors, one-third (1/3) from direct marketing and one-third (1/3) from client referrals.

13. During the class period, Kisling Nestico and Redick has referred cases to over one hundred (100) different chiropractic offices.

14. Referrals are made to chiropractic physicians by KNR lawyers for a variety of reasons, including but not limited to: (a) some clients do not have principal care physicians; (b) many clients have principal care physicians that choose not to treat injury victims; (c) chiropractors are readily willing to author report(s) and/or give trial testimony; (d) chiropractors are more apt to find proximate cause between a trauma and the treatment and support the care as it relates to an automobile accident; (e) some clients prefer a holistic non-invasive approach, (f) chiropractors will often not harass clients for payment until the case is resolved; (g) chiropractors are generally faster to begin treatment, as p c p's sometimes require weeks to get appointments; (h) chiropractors are more likely to negotiate their bills to facilitate settlement; (i) some clients are not interested in pain pills or anti-inflammatory pills as treatment; (j) chiropractors are good to refer to appropriate specialists when necessary; (i) chiropractors more often understand the claims process; (j) better documentation of injuries and pain and suffering; (k) some lawyers find chiropractic treatment personally beneficial and thus advocate it for clients; (l) past chiropractic success with this client; (m) client requested a chiropractor; (n) traditional medicine has not been beneficial for this client in past; (o) client did not want to pay copays for treatment or bill their own health insurance; (p) more reasonable testimony rates beneficial to soft tissue clients; (q) better bedside manners; (r) more convenient location to client; (s) chiropractors keep unconventional hours that benefit many clients; (t) for clients with transportation issues, many

Sandra Kurt, Summit County Clerk of Courts

chiropractors will accommodate; (u) some attorneys at KNR believe client satisfaction is higher with chiropractic treatment.

15. Kisling, Nestico and Redick's attorneys refer clients to a large number of physicians, in addition to chiropractors, including but not limited to family doctors, rehabilitation specialists, physical therapists, orthopedic surgeons, plastic surgeons, podiatrists, neurologists, neurosurgeons, psychologists and psychiatrists.

16. A review of the class representatives' individual medical reports and medical records indicate no attorney ordered medical narrative reports until the client was finished treating.

17. At various times, between ten (10) and twelve (12) investigators have provided services to Kisling, Nestico and Redick. Four of the investigators are retired police officers.

18. The investigator fees paid by KNR to the investigators is a pass through expense.

19. A review of the records of class representatives shows Dr. Floros provided no care in five (5) of the seven (7) personal injury cases Kisling, Nestico and Redick pursued on behalf of the four (4) class representatives.

20. Kisling, Nestico and Redick reduces its fee in 75% to 80% of all of its personal injury cases.

21. Some class members had had their cases tried before a jury where Dr. Sam Ghoubrial testified live or by deposition.

22. It is my estimate that a significant number of individuals we have represented since 2010 have no health insurance.

23. Some clients voluntarily forego billing their own medical insurance coverage for fear it will affect their premiums and other reasons.

FURTHER AFFIANT SAYETH NAUGHT.

Alberto Nestico

Sandra Kurt, Summit County Clerk of Courts

STATE OF OHIO)
) SS:
COUNTY OF Summit)

SWORN TO AND SUBSCRIBED in my presence by, Alberto Nestico, Esq. this 14th day of June, 2019.

Angela Simonyi
NOTARY PUBLIC

NOTARIAL SEAL STATE OF OHIO

ANGELA SIMONYI
NOTARY PUBLIC
FOR THE
STATE OF OHIO
My Commission Expires
May 26, 2024

Sandra Kurt, Summit County Clerk of Courts

IN THE COURT OF COMMON PLEAS

OF SUMMIT COUNTY, OHIO

~~~~~~~~~~~~~~~~~~~~

MEMBER WILLIAMS et al.,

Plaintiffs,

vs. Case No. CV 2016 09 3928

KISLING, NESTICO & REDICK, LLC, et al.,

Defendants.

~~~~~~~~~~~~~~~~~~~~

DEPOSITION OF

KELLY PHILLIPS III

February 22, 2019
10:07 a.m.

Taken at:
Pattakos Law Firm
101 Ghent Road
Akron, OH

Kurt M. Spencer, Notary Public

Q. You do know that there were reductions in KNR's fee in the majority of cases?

A. I believe, we reduced the fee in most cases when I was there.

Q. And, that was more than the $50 investigator fee, and more than the $150 narrative report fee, in most cases?

A. I don't know what it was in that one, but, I would say, at least, in some cases, for sure.

Q. The majority, fair?

A. I don't know. I honestly don't know.

Q. You can't dispute it?

A. I cannot dispute it, certainly.

Q. And, now, when you were talking before about 20% less cases, and making 30% more money, where would those 20% of people that KNR didn't take, where would they go?

A. I just think, if they would have been able to properly handle the mid-level to upper-level cases, because you weren't dealing with all of these tiny -- I will tell you 50% of my phone calls were on the 10% smallest

required to work in concert with everybody else reducing like we did. Everyone was agreeing to reduce, and they reduced less.

Q. To find out that they were reducing theirs to about 29% or 30% of this total, when you look at all the cases, would you change your feelings on that?

A. I guess I would have to see it.

Q. You don't know how much they were reducing in other offices, fair?

A. That's fair.

Q. How many cases do you think that you have had, where there was an attempt to reduce a Clearwater bill on your cases?

A. Say that again.

Q. How many times did you handle a case at KNR, when the Settlement Memorandum came around, you had to reduce a Clearwater bill, approximately, how many cases?

A. That there was some form of a reduction?

Q. Uh-huh.

A. I would say every case there was some form of a reduction.

Q. And, how many of those were there?

The State of Ohio,)

County of Summit.) SS:

IN THE COURT OF COMMON PLEAS

Member Williams, et al.,

Plaintiffs;

vs.

No. CV-2016-09-3928
Judge James Brogan

Kisling, Nestico &
Redick, LLC, et al.,

Defendants.

- - - -

Videotaped deposition of ROBERT PAUL HORTON, one of the Defendants herein, taken before Mary Lou Mellinger, a Registered Professional Reporter and Notary Public within and for the State of Ohio, at the offices of Thomas A. Skidmore Co., L.P.A., One Cascade Plaza, 12th Floor, PNC Center Building, Akron, Ohio, commencing at 9:09 A.M., Monday, February 25, 2019, pursuant to notice of counsel.

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chiropractor, medical doctor or healthcare provider sending any payments to KNR, its employees or its owners, for referral of any claimant to that healthcare provider?

A Correct.

Q And you're certainly not aware of Akron Square Chiropractics or any other chiropractor or other healthcare provider making a payment or a kickback to KNR, Nestico or Redick, true?

A Correct.

Q Would you agree KNR voluntarily discounted their fees in the vast majority of the cases that you settled while working there?

A I suppose it would depend on how you define "vast majority," but yes, we regularly reduced our fees.

Q If you look at paragraph 33 of your affidavit, can you just read that?

A Yeah, "vast majority of cases." I mean, if I handled 1500 cases, if you define "vast majority" as predominantly, then, yeah.

Q Probably over -- at least over a thousand of those?

A Oh, yeah.

Q Okay.

A I guess almost on every case.

Q Okay.

A Very rarely, with how the business works, you are taking a full fee on anything, but --

Q Okay. And you would agree that almost every time that fee was enough to cover the cost of both the $50 investigation fee and the cost of a narrative report if there was one?

A I couldn't tell you one way or the other. I mean, potentially, but --

Q You never did an analysis like that?

A No.

Q But the fee usually wasn't a $50 reduction, was it, it was usually more than that?

A I would say that's accurate.

Q You'd agree that usually the reduction in the fee was 200 or more at least, usually?

A Probably.

Q Okay.

A I mean, I can't say for certain, but --

Q To know what it was in any case, of course you'd have to look at --

A The specific reduction, yeah.

Q Okay. When you went over settlement memorandums -- if you would look at paragraph 24 and 25.

A Of my affidavit?

Q Of your affidavit.

IN THE COURT OF COMMON PLEAS

SUMMIT COUNTY, OHIO

MEMBER WILLIAMS, et al.,

Plaintiffs,

-vs- CASE NO. CV-2016-09-3928
VOLUME II

KISLING, NESTICO
& REDICK, LLC, et al.,

Defendants.

- - - -

Videotaped deposition of GARY PETTI, taken as if upon examination before Brian A. Kuebler, a Notary Public within and for the State of Ohio, at the Pattakos Law Firm, 101 Ghent Road, Fairlawn, Ohio, at 9:33 a.m. on Friday, March 1, 2019, pursuant to notice and/or stipulations of counsel, on behalf of the Plaintiffs.

- - - -

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fair?
A. Not even more, but they'd participate relatively equally.
Q. Well, they'd get two thirds versus your one third, fair? Of any interest --
A. Yeah, yeah. The math -- that math is correct.
Q. So it would benefit your client even more, true?
A. Yes.
Q. I mean, using your logic of what you just said, anytime you do something to increase the value --
A. I didn't say it was -- I'm sorry. Go ahead.
Q. Okay. It's not a bad thing, right?
A. That's -- those were going to be my exact words.
Q. Okay. So if you increase the settlement value it may increase the fee, but it doesn't always increase the fee, does it, because you may take a cut?
A. That's hard. Yeah, I suppose.
Q. Wouldn't you agree that on the vast majority of cases at KNR you reduce the KNR fee?
A. The fee on the vast majority -- I mean semantics. It certainly was common.
Q. And most of your cases had a fee reduction, true? You don't recall?
A. Right, I don't know.