IN THE COURT OF COMMON PLEAS
SUMMIT COUNTY, OHIO

MEMBER WILLIAMS, et al.,

Plaintiffs,

v.

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

Defendants.

Case No. CV-2016-09-3928

Judge James Brogan

Defendant Sam Ghoubrial, M.D.'s Opposition to Plaintiffs' Supplemental Motion for Class Action Certification re: Injury-In-Fact Sustained by all Members of the Price-Gouging Class

I. Introduction

Plaintiff's Supplemental Motion for Class Action Certification confirms the non-certifiable nature of the proposed price gouging class. Simply put, no matter how much Plaintiffs distort the facts or twist the law, common evidence does not exist to prove all proposed class members were injured-in-fact, or the extent of injury, if any. Plaintiffs cannot satisfy Civil Rule 23's predominance requirement. Plaintiffs' Supplement, a last-ditch desperate gasp to maintain this litigation as a class action, relies on factually distinct and legally inapplicable antitrust litigation and ignores the difference between **entitlement** to damages vs. **amount** of damages. Moreover, Plaintiffs' Supplement utterly fails to address the individualized nature of the evidence required to prove these elements of recovery, which, as this Court so aptly stated, is "the fly in the ointment."

II. Law and Argument

A. Plaintiffs Cannot Show Proof of Actual Injury on a Class-Wide Basis

Plaintiffs cannot hide from the most basic requirement to maintain any litigation, let alone class action litigation: proof of actual injury. This is not a case where injury is presumed by statute. To the contrary, Plaintiffs must actually prove one trial can resolve the injury-in-fact issue for all class members. Such requirement is an indispensable part to class action litigation. *Felix v. Ganley*

Chevrolet, Inc., 145 Ohio St.3d 329, 2015-Ohio-3430, 49 N.E.3d 1224, ¶36. Plaintiffs' Supplement completely ignores the individualized nature of the evidence required to prove injury-in-fact for each class member, as further discussed below. This failure to demonstrate one trial could resolve the issue of whether all prospective class members were actually damaged is critically fatal to certification.

Recognizing this fatal flaw to certification, Plaintiffs repeatedly and intentionally distort two separate and distinct concepts: **entitlement** to damages (i.e., injury-in-fact) vs. **amount** of damages. To determine whether any individual potential class member sustained a physical or monetary injury due to Dr. Ghoubrial's medical treatment or medical charges would be a highly individualized inquiry which would necessarily predominate over class-wide issues. These individual factors would include, but would not be limited to:

- The nature of the individual's injuries;
- The course of care;
- The referral to Dr. Ghoubrial;
- Prior treatment;
- Existence or non-existence of health insurance;
- Whether the individual was Medicare or Medicaid eligible;
- Whether the individual even wanted to bill his own healthcare insurer or Medicare/Medicaid (e.g., Richard Harbour expressly wanted the tortfeasor's insurance, not his own insurance, to pay for his medical bills);
- The identity of the tortfeasor's insurance company, not to mention the nuances of the individual claims' adjuster, and their view on the settlement of soft tissue and other types of injury cases, the impact treatment vs. non-treatment had on settlement evaluation, and many other issues;
- The amount of the tortfeasor's insurance coverage;

- Whether multiple individuals were injured in the same accident, thereby leaving multiple parties at the whim of how the claims' examiners resolved separate matters from one limited pot of insurance coverage (as in the Monique Norris case, which involved three injured parties, one of whom was represented by separate counsel and treated with different healthcare providers, and all of whom were subject to the "per occurrence" insurance coverage limit of the tortfeasor's carrier);

- The amount of medical payments' coverage ("Med Pay") available;

- The Med Pay insurer's willingness or non-willingness to discount its subrogation rights at the time of settlement;

- The existence and/or amount of each individual's UM/UIM coverage;

- Each individual's economic situation, desire to settle, tolerance for litigation, specific economic needs, and other factors which drive settlements (e.g., the individual who demands immediate settlement before treatment is complete, the individual who rejects a reasonable offer and available insurance is paid to another injured party in the meantime, and many other situations);

- How the tortfeasor's insurer viewed the treatment and the treatment providers at all times during the nine-year class period;

- The individual insurance adjuster's positions regarding the treatment and the treatment providers during the nine-year class period;

- The individual's knowledge and understanding of the Letter of Protection (LOP) they all voluntarily executed;

- The individual's knowledge of and consent to the treatment provided;

- The effectiveness of the treatment relative to each individual;

- The charges for the treatment provided;

- The individual reductions of the charges for all treatment provided;

- The amount actually paid from each individual's settlement to satisfy the medical charges;

- Whether the amount actually paid was fair and reasonable;

- Whether each individual would have received different treatment if not treated by Dr. Ghoubrial and how that would have impacted settlement and the net amount of settlement in each individual's pocket;

- Whether Dr. Ghoubrial's charges increased the settlement amount and thereby increased the net amount of settlement dollars in the individual's pocket;

- Whether the individual would have received a higher net recovery if they had not been treated by Dr. Ghoubrial; and

- The many, many, many other issues pertinent to proving whether each individual sustained an injury-in-fact and therefore had standing to maintain an action.

Plaintiffs chose to ignore the "injury-in-fact" requirement, failing to offer a single suggestion as to how one trial can resolve whether all class members were actually injured and therefore entitled to damages. Rather, Plaintiffs instead attempt to circumvent the need to prove "injury-in-fact" and therefore "entitlement to damages" by citing federal antitrust law, which is wholly inapplicable to the facts of this case, as analyzed below.

Plaintiffs' own arguments demonstrate their inability to prove monetary damages (or injury-in-fact) for the Plaintiffs and prospective class members. By Plaintiffs' counsel's own admission, the higher the medical expenses, the higher the settlement. *See* Plaintiffs' Certification Brief, pages. 23-24. Defendant maintains higher settlement almost always means more net dollars in the injured party's pocket, and thus no economic injury. Perhaps this is not always true. However, regardless of whether it "usually" results in higher net recovery or not, it certainly results in higher net recovery for some individuals. And, the real issue is the extent of individualized evidence required to make this determination on a class member by class member basis. The factors listed above would have to be analyzed by experts in the medical, legal, and insurance fields FOR EACH INDIVIDUAL CLASS MEMBER to make this determination.

In other words, a mini-trial would be required for each and every class member for a jury to make the threshold determination of whether that particular individual was actually damaged by the alleged wrongful conduct.[1] There is no way to adjudicate in one proceeding whether all clients/patients were "injured-in-fact" (or were even "overcharged" or provided inappropriate medical treatment for that matter) without individually adjudicating the unique facts of each individual's case in a mini-trial.

Rather than address this issue, Plaintiffs continue to argue "individual differences among class members as to the 'actual damages' or 'quantum of injury' suffered will not defeat class certification." *See* Plaintiffs' Supplement, page 2. This is a red herring and a disingenuous attempt to shift the Court's focus from the actual dispositive issue. Dr. Ghoubrial and the other Defendants have never argued certification should be denied only because *calculating the amount of damages* would be impossible. While that impossibility is certainly one reason class certification should be denied, the more problematic issue for class certification purposes is "each individual will have to litigate numerous and substantial issues to determine the **right to recover**" to establish "**entitlement to…damages**." *Hale v. Sharp Healthcare*, 232 Cal. App. 4th 50, 61 (2014) (Emphasis added).

Having to adjudicate **entitlement to damages** for each class member - that is, whether each individual can recover any damages at all, notwithstanding the amount – is reason alone to deny certification. *See e.g., Hale, supra; Wilens v. TD Waterhouse Group, Inc.*, 120 Cal App. 4th 746, 751 (2003); *Ali v. U.S.A. Cab Ltd.*, 176 Cal App. 4th 1333, 1349 (2009). In *Hale v. Sharp Healthcare, supra*, an uninsured patient filed a class action and alleged that a hospital unfairly overcharged her and other uninsured patients "significantly more for the same services" than they charged other

[1] This says nothing of the fact that in order to have to standing to maintain this action each individual must have suffered an injury-in-fact.

patients covered by private insurance or government plans. 232 Cal. App. 4th at 54. The Court explained there was a lack of predominance of common issues between class members because the issues were not "individual issues regarding calculation of the amount of damages a class member may recover once liability is established, *but determination of the fact of damage*. In other words, *[the problem was whether]…there is any common proof to establish entitlement to or…the right to recover damages*." *Id*. at 61. Ultimately the Court held "each individual will have to litigate numerous and substantial issues to determine the right to recover in the case: issues such as whether a third party ultimately paid for the bill, the amount of the negotiation of the bill by [the hospital], the discount rate and the calculation for the rate, etc." *Id*. Thus the Court decertified "the class based on a lack of predominantly common issues *regarding the right to recover*." *Id*. at 60.

The same logic applies here. Plaintiffs ignore the fact their theory will require the Parties to adjudicate, in a mini-trial, how each of Dr. Ghoubrial's patients *might* have been treated *if* they did not see him and how then they *might* have fared in a new settlement negotiation. It would simply be impossible to reconstruct this counterfactual "reality" for each individual patient. Class certification should be denied because "[u]ncertainty of the fact whether any damages were sustained is fatal to recovery." *Duran v. U.S. Bank Nat'l Association*, 59 Cal. App. 4th 1, 40 (2014); *Ibe v. Jones*, 836 F.3d 516, 532 (5th Cir. 2016) (holding "that individual damages issues predominated over the common issue of breach because [Super Bowl] ticketholders incurred vastly different expenses, which would essentially necessitate mini-trial to adjudicate damages for each ticketholder.").

Plaintiffs' counsel's continued failure to address injury-in-fact is not surprising given the fact he continues to ignore the sworn testimony of his own putative class members. In briefing, and during oral arguments, Plaintiffs' counsel affirmatively represented putative class members were coerced and/or "duped into waiving insurance coverage, waiving their Medicaid coverage…" *See*

Plaintiffs' Motion for Class Certification, page 28; *see also*, transcript from 9/12/19 oral argument, page. 22. To the contrary, Plaintiff Richard Harbour, the original putative class member for trigger point injections, now one of the putative class members for the "price gouging" class, specifically testified he did NOT want his own private insurance OR Medicaid paying for his medical bills. Rather, he wanted a letter of protection because he believed it was to his benefit, and he wanted the tortfeasor's insurance carrier to pay his medical expenses, which they did, all four (4) times he was represented by KNR and both times he treated with Dr. Ghoubrial. Mr. Harbour testified:

> Q. What did you seek legal advice for? What was the reason?
>
> A. Getting the repairs done on my vehicle properly and to make sure that my medical needs were properly taken care of.
>
> Q. When you say your medical needs were properly taken care of, do you mean to help you get to a doctor or do you mean to be paid for the services?
>
> A. **My intention of that was to ensure that the bills that I would incur were <u>not handled by myself or my private insurance but were handled by the at-fault party's insurance and taken care of in that manner</u>.**
>
> ****
>
> Q. Well, even in 2011 when you were being represented, you were worried about the medical bills then, correct?
>
> A. I was.
>
> Q. Some hit your credit report?
>
> A. Yes, they did.
>
> Q. But not Dr. Ghoubrial's or Dr. Auck's, fair?
>
> A. Not that I recall, correct.
>
> Q. Because there was a letter of protection in place, true?

A. Right. I believe the bills would be held off until the case was resolved.

Q. **Okay. And you wanted that, didn't you?**

A. Yes.

Q. That was in your best interest, wasn't it, sir?

A. Yes. *See* 2/2/2019 Deposition of Richard Harbour, page 20, lines 4/17; page 65, lines 1-20. (Emphasis added).

Plaintiff Harbour had neither private medical insurance nor was he Medicaid-eligible the first time he treated with Dr. Ghoubrial. Moreover, even if covered, he wanted the tortfeasor's insurance coverage to satisfy his medical bills, not his own. Nonetheless, Plaintiffs' counsel continues to argue the same false narrative (e.g., alleged evidence class members were "duped" or "coerced" into foregoing insurance coverage) and claims this alleged evidence will help prove liability on a class-wide basis – even though the alleged evidence is not even applicable to putative class representative Richard Harbour. Such is the folly of Plaintiffs' "common evidence."

Similarly, Plaintiffs' counsel inexplicably contends the "first time the class members were ever asked to approve these fees" or even saw "a charge .. to an entity called Clearwater Billing" was at the end of their case when they were asked to sign the settlement agreement. (See Hearing transcript, pages 6-7). The truth is: Plaintiffs' counsel knows this claim isn't true even for his own clients, putative class representatives Mr. Harbour and Ms. Norris.[2]

For example, Richard Harbour saw four different settlement statements, including two with Clearwater charges. He absolutely was aware a Clearwater charge would be on his Settlement Memorandum the first time having signed the LOP and should have been even more sure of it the

[2]Moreover, the Letters of Protection clearly and expressly listed Clearwater. Thus, all class members were aware of Clearwater and actually DIRECTED KNR to pay Clearwater from settlement proceeds.

second time since he had already reviewed and signed a Settlement Memorandum with Clearwater listed. The same is true for Tijuan Carter, who had multiple cases (including a case where he treated with Dr. Ghoubrial and was represented by a law firm other than KNR).

The case of Monique Norris further illustrates the lack of "common proof" among the Plaintiff and perspective class members. Plaintiffs' counsel represented to this Court the following "common proof" critical to a class-wide liability assessment: Clearwater's charges were not shown to clients until pen was in hand to sign the Settlement Memorandum, essentially in order to coerce clients into approving the charges because "if they don't sign off on the charges, they don't get their money."[3] Amazingly, Plaintiffs' counsel was fully aware and admitted on the record in January, 2019, that Ms. Norris was provided her Settlement Memorandum, which clearly listed Clearwater's charges, NINE DAYS before she came in to sign her Settlement Memorandum and receive her settlement check. (*See* January 28, 2019, deposition of Monique Norris, pp. 383-387; *see also* March 21, 2019 deposition of Robert Horton, pp. 167-169). In fact:

1. Plaintiffs' counsel produced in discovery a packet of information emailed to Ms. Norris by Robert Horton, Esq. on May 16, 2014, following a conversation Mr. Horton had with Ms. Norris. Mr. Horton discussed the amount to be held in escrow for Medicaid charges and also attached the draft Settlement Memorandum, advising Ms. Norris: "I have attached a settlement memo for you to look at that shows where everything is going. Call with questions."

2. Ms. Norris obviously received the information, as she produced it (and she admitted to receiving it).

3. Attorney Peter Pattakos, at Ms. Norris' January 28, 2019, deposition, admitted on the record the Settlement Memorandum, which listed the $600 Clearwater Billing Services, LLC charge, was produced. At page 387 of that deposition, after Ms. Norris was backpedaling on whether she

[3]Of course, this is not true for a number of reasons. First, settlements were agreed to before the clients went to sign their Settlement Memorandum and pick up their check. Second, any dispute amount could be put in escrow, with the client receiving the undisputed amount and any dispute charges being resolved later.

> received the document, Attorney Pattakos admitted: "There's no dispute that it was attached [to Rob Horton's email]. That's why we produced it."

And yet, Plaintiffs' counsel continues to cite "common proof" to support class certification even though he knows such alleged "common proof" is blatantly false as to the putative class representatives themselves. How then can Plaintiffs offer common evidence on a class-wide basis for thousands of prospective class members when it is not even true for the class representatives?

An issue often lost in argument and briefing is Dr. Ghoubrial's true role with these patients. He was their physician, not their lawyer. His role was to provide competent and wanted healthcare to the Plaintiffs and prospective class members, all of whom voluntarily treated with him after willingly and knowingly executing a Letter of Protection ("LOP"). These LOPs expressly authorized Dr. Ghoubrial to be paid by the patients' attorneys out of the individual settlement proceeds of each Plaintiff and prospective class member. Plaintiffs are now attempting to hold Dr. Ghoubrial responsible for how much the Plaintiffs received in settlement, which makes little sense considering Dr. Ghoubrial had no role in negotiating the Plaintiffs' individual settlements himself. The fact remains Plaintiffs provide no evidence any named Plaintiff, let alone each and every prospective class member, would have received more money in their pocket or healed more quickly without Dr. Ghoubrial's treatment. In short, Plaintiffs and prospective class members cannot prove they suffered any damage, a necessary element to prove all claims asserted in this case.

Plaintiffs' claims for fraud, unjust enrichment, and breach of contract against Dr. Ghoubrial all stem from allegations there were certain omissions relating to Dr. Ghoubrial's "exorbitant" charges for necessary medical treatment. While Plaintiffs have presented no competent evidence Dr. Ghoubrial's charges for necessary medical treatment were exorbitant, it does not change the fact this is just one more red herring. The "standard rates" charged by Dr. Ghoubrial for necessary medical

treatment are irrelevant as it is undisputed the payments Dr. Ghoubrial actually received in exchange for performing necessary medical treatment was substantially lower than the "standard charges" because the fees were significantly reduced in almost every case. As this Court is acutely aware, none of the named Plaintiffs, and the vast majority of the prospective class members, ever paid the "standard charges." Rather, all paid significantly reduced amounts with the reductions ranging from 10% to 90% of the total charges. These reductions were variable and fact dependent requiring individual scrutiny of each individual file.

Nonetheless, for Plaintiffs to prove Dr. Ghoubrial's medical charges were exorbitant, it would require a class member by class member individualized inquiry and presentation of individual proof of actual injury to each and every class member. Given the individualized inquiry required to prove any damages, it is apparent this case cannot be adjudicated against Dr. Ghoubrial on a class-wide basis.

In their Supplemental Motion, Plaintiffs spend significant time attempting to distinguish *Felix v. Ganley Chevrolet, Inc.,* 145 Ohio St.3d 329, 2015-Ohio-3430, 49 N.E.3d 1224 (2015) from this case, yet continue to ignore the fact the Ohio Supreme Court 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 Charge 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). *See Felix v. Ganley Chevrolet, Inc.*, 145 Ohio St.3d

> 329, 2015-Ohio-3430, 49 N.E.3d 1224, ¶ 33 (2015) (emphasis added).

Plaintiffs continue to ignore well-settled class action litigation case law which states it is a necessity, not an option, that the party seeking class certification has the burden of proof, not just a burden of pleading. *See Halliburton Co., v. Erica P. John Fund, Inc.,* 134 S. Ct. 2398, 2412, 189 L. Ed. 2d 339 (2014). Plaintiffs "must affirmatively demonstrate compliance with Rule 23 by proving that the requirements are in fact satisfied." *See Comcast Corp. v. Behrend,* 133 S. Ct. 1426, 1432, 185 L. Ed. 2d 515 (2013). And, the entire point of a burden of proof is that, if doubts remain about whether the standard is met, "the party with the burden of proof loses." *See Id.* Where a court has doubts about whether the requirements of Civ. R. 23 have been met, the court must refuse certification. *See Brown v. Electrolux Home Prods.,* 817 F.3d 1225, 1233-1234 (11th Cir.2016). Such is the case here.

Despite Plaintiffs' best efforts, Plaintiffs' Supplement does not begin to resolve the individualized nature of the claims which permeate this case. Class certification doubts remain intrinsically intertwined as the very nature of the named Plaintiffs' and the prospective class members' claims against Dr. Ghoubrial require a patient-by-patient review in order to determine whether actual damages exist. In spite of Plaintiffs' repeated efforts to change well settled law, the fact remains Plaintiffs' claims are simply not certifiable because proof of the essential elements of Plaintiffs' causes of action against Dr. Ghoubrial require individual treatment, thereby making class certification impossible. Given that overwhelming individual questions concerning each prospective class member's alleged injury permeate any common questions as it relates to Dr. Ghoubrial's treatment, Plaintiffs cannot show proof of actual injury on a class-wide basis. Plaintiffs' Motion for Class Certification must be denied.

B. Plaintiffs' Cannot Satisfy the Predominance Requirement Because There are no Common Answers

The impossibility of class action treatment is clear when considering the predominance requirement of Civ. R. 23. What must be proven at a class action trial is central to determining predominance. To determine whether common questions predominate, the Court must look to what must be proven and whether that proof is common to the class as opposed to individualized proof:

> deciding whether a claimant meets the burden of class certification …requires the Court to consider what will have to be proved at trial and whether those matters can be presented by common proof. …To meet the predominance requirement, a plaintiff must establish that issues subject to generalized proof and applicable to the class as a whole predominate over those issues that are subject to only individualized proof. [*Cullen*, 137 Ohio St.3d at 379, 382-383].

The predominance test is a more difficult standard to pass because "For common questions of law or fact to predominate, it is not sufficient that such questions merely exist; rather, the common questions must represent a significant aspect of the case and they must be capable of resolution for all members in a single adjudication." *Jacobs v. FirstMerit*, 2013-Ohio-4308, ¶27. This is why class-certification briefing is focused on whether the core issues in the case are amenable to class proof. If review of individual questions requires a mini-trial on thousands of claims, the case could drag on for a lifetime. Such is the case here.

Even if Plaintiffs could meet their burden and demonstrate that common questions predominate regarding whether the prospective class members did suffer an injury-in-fact, this still would not satisfy the stringent requirements of R. 23. It is not enough that common questions exist. To satisfy the predominance requirement, Plaintiffs must be able to demonstrate that common *answers* relevant to resolving the dispute can be generated. As the Supreme Court has stated:

> Any competently crafted class complaint literally raises common "questions"…..What matters to class certification…. is not the raising of common "questions" – even in droves – but, rather the capacity of

> a classwide proceeding to generate common *answers* apt to drive the resolution of the litigation.

See Wal-Mart Stores v. Dukes, 564 U.S. 338, 131 S. Ct. 2541, 2551, 180 L. Ed.2d 374 (2011) (emphasis in original) (quoting Richard A. Nagareda, *Class Certification in the Age of Aggregate Proof*, 84 N.Y.U. L. Rev. 97, 131-32 (2009).

C. Antitrust Litigation is Inapplicable in this Case

Seemingly aware of their inability to demonstrate the predominance of common issues and common answers necessary to satisfy their burden under Civ. R. 23 in this case, Plaintiffs now rely almost exclusively upon antitrust law in a feeble attempt to convince this Court to certify the "price gouging" class. Plaintiffs' attempt is as transparent as it is misguided. Not only are the antitrust cases relied upon by Plaintiffs inapplicable and wholly distinguishable, Plaintiffs once again resort to misrepresenting case holdings and quoting language that does not actually appear in the cases they cite.[4] Plaintiffs cannot obtain class certification through smoke and mirrors. This is not, and has never been, an antitrust "price fixing" case, horizontal or otherwise. Plaintiffs' desperate Hail-Mary attempt to establish predominance where it does not exist must be rejected.

Even if Plaintiffs' assertion "Courts nationwide consistently rejects Defendants' argument" that discounts or negotiated reductions prevent a finding of predominance were accurate, it is only applicable in antitrust cases. The law is well settled in the class action antitrust context, because price-fixing has been found to be "an actual or potential threat to the central nervous system of our economy," the requirements of class certification was been consistently applied in a less stringent manner than in other contexts. *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150, fn 59 (1940).

[4]Dr. Ghoubrial adopts and incorporates Co-Defendant KNRs' Opposition to Plaintiffs' Supplemental Motion for Class Certification as if fully rewritten herein.

In explaining this less stringent class certification standard applicable in antitrust cases, 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 antitrust actions, and wrote that it "enhances 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 (3rd 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 one, should be committed in favor of allowing the class action.").

While predominance is a test readily met in cases alleging violations of antitrust laws, this is not such a case and Plaintiffs' attempt to lessen their burden in this non-antitrust action must be rejected. *Amchem Prods v. Windsor*, 521 U.S. 591, 625, 117 S. Ct. 2231 (1997).

Here, the Court's analysis of predominance necessarily "begins, of course, with the elements of the underlying cause of action." *Erica P. John Fund. Inc. v. Halliburton Co*., 563 U.S. 804, 809, 131 S. Ct. 2179, 180 L. Ed.2d 24 (2011). Damages are an essential elements of every cause of action asserted against Dr. Ghoubrial.[5] As such, Plaintiffs are required to prove damages for all named Plaintiffs and prospective class members or their claims fail as a matter of law. Plaintiffs' inability to prove damages on a class-wide basis destroys predominance and demonstrates why class certification is inappropriate.

> In conducting the predominance inquiry, courts must take into account the claims, defenses, relevant facts, and applicable substantive law to assess the degree to which resolution of the classwide issues will further each individual class members' claim against the defendant. **If proof of the essential elements of the**

[5]The causes of action currently pending against Dr. Ghoubrial are: fraud; unjust enrichment; and unconscionable contract. The breach of fiduciary duty claim asserted against Dr. Ghoubrial was previously dismissed by this Court.

> **cause of action requires individual treatment, then class certification is unsuitable**. Although individual treatment of the *essential* elements of a case precludes certification, it is not necessary that all questions of fact or law be common, but only that some questions are common and that they predominate over individual questions.

Photochromic Lens Antitrust Litig. No. 8:10-CV-00984-T-27EA, 2014 U.S. Dist. LEXIS 46107, 2014 WL 1338605, at *17 (M.D. Fla. April 3, 2014) (Emphasis added). Because damages are an essential element of all of Plaintiffs' claims, class certification is unsuitable in this case and Plaintiffs' Motion for Certification must be denied.

Dr. Ghoubrial certainly recognizes and concedes that Rule 23(b)(3) does not require a plaintiff seeking certification to prove that each element of his or her claim is susceptible to class-wide proof. However, "if the effect of class certification is to bring in thousands of possible claimants who presence will in actuality require a multitude of mini-trials (a procedure which will be tremendously time consuming and costly), then the justification for class certification is absent." *Cardiovascular Care of Sarisota, P.A. v. Cardinal Health, Inc*., No. 8:08-cv-1931-T-30TMB, 2009 U.S. Dist. LEXIS 61751, 2009 WL 928321, at *5 (M.D. Fla. April 3, 2009) (quoting *Blue Bird Body Co. Inc*., 573 F.2d at 328). Here, thousands of mini-trials would be necessary just to determine which Plaintiffs and prospective class members, if any, were actually damaged by the alleged wrongful conduct, i.e., suffered an injury-in-fact which is an essential element of all claims asserted.[6]

Plaintiffs' position the Court should just certify the classes and work these issues out later is as specious as it is contrary to law. Plaintiffs, as the parties seeking certification, have the burden of proof. *See Valley Drug Co. v. Geneva Pharms., Inc*., 350 F.3d 1181, 1187 (11th Cir. 2003). The entire point of the burden of proof is that, if doubts remain about whether the standard is satisfied,

[6]If Plaintiffs could meet this burden, which they cannot, thousands of additional mini-trials would then be necessary to determine, among other things, each individuals' measure of damages.

"the party with the burden of proof loses." *Simmons v. Blodgett*, 110 F.3d 39, 42 (9th Cir. 1997). And, all else being equal, the general presumption is against class certification because class actions are an exception to our constitutional tradition of individual litigation. *See Comcast Corp. v. Behrend*, 133 S. Ct. 1426, 1432, 185 L. Ed.2d 515 (2013); *Hansberry v. Lee*, 311 U.S. 32, 40-41, 61 S. Ct. 115, 85 L. Ed. 22 (1940).

Here, Plaintiffs' Supplement shows Plaintiffs' misplaced reliance on antitrust law which has no applicability outside of price-fixing antitrust litigation. It demonstrates Plaintiffs themselves even have doubts about whether they have met their burden of proof. *See* Supplement. Common evidence and common answers to common questions do not exist to prove all proposed class members were injured-in-fact, let alone to what extent there was injury, if any. Where there is any doubt about whether the requirements of Rule 23 have been met, Courts are encouraged to refuse certification. *See* Fed. R. Civ. P. 23 advisory committee's note to 2003 amendment; *accord In re Hydrogen Peroxide Antitrust Litig*. 552 F.3d 305, 321 (3rd Cir. 2008); *Wallace B. Roderick Revocable Living Trust v. XTO Energy, Inc.* 725 F.3d 1213 (10th Cir. 2013). In the interest of justice, this Court must refuse certification. Plaintiffs cannot meet their burden of proof by complying with the requirements of Civil Rule 23.

III. Conclusion

Wherefore, class certification of the proposed price gouging class is not possible. One trial cannot resolve whether all class members were actually injured and therefore entitled to damages. Plaintiffs Motion for Class Certification must be denied.

Respectfully submitted,

/s/ *Bradley J. Barmen*
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CERTIFICATE OF SERVICE

The undersigned certifies that the foregoing Defendant Sam N. Ghoubrial, M.D.'s Opposition to Plaintiffs' Supplemental Motion for Class Action Certification re: Injury-in-Fact Sustained by all Members of Price-Gouging Class was filed electronically and will served upon all parties by operation of the Court's e-filing system on this 8th day of October, 2019.

/s/ *Bradley J. Barmen*
Bradley J. Barmen (0076515)
Counsel for Defendant
Sam N. Ghoubrial, M.D.