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 **Reply in Support of Supplement to Plaintiffs' Motion for Class-Action Certification re: the Injury-in-Fact Sustained by All Members of the Price-Gouging Class**

Plaintiffs herein briefly address Defendants' recently filed "sur-replies" regarding their argument that the Supreme Court of Ohio's ruling in *Felix* excuses them from facing class-wide liability because they incorporated so-called "discounts" into their scheme to defraud KNR clients with inflated medical bills. *See* Defs' 10/08/2019 Sur-replies citing, *inter alia*, *Felix v. Ganley Chevrolet, Inc.,* 145 OhioSt.3d 329, 2015-Ohio-3430.

In trying to distinguish Plaintiffs' recently cited cases against this argument, many of which arise in the antitrust context (Pls' 09/24/2019 Supp. Br. at 7–11), Defendants refer to the "societal importance of enforcing antitrust laws," and the "critical" role that class actions fulfill in doing so. KNR 10/08/2019 Sur-reply at 4–5; Ghoubrial Sur-reply at 14–15.[1] This raises obvious questions, the answers to which Defendants talk in circles to avoid: Mainly, why would it be any less "societally important" to enforce laws against fraud, and why would a class-action be any less critical—indeed, necessary—to do so on the facts at issue here?

[1] This brief only addresses Defendants' new arguments pertaining to the antitrust cases discussed in Plaintiffs' 09/24/2019 supplemental brief. While the 10/08/2019 sur-replies filed by Defendants Ghoubrial and Floros largely rehash their earlier arguments claiming that certification should be denied due to a purported need for individualized inquiry in adjudicating the class members' claims, these arguments are amply addressed in Plaintiffs' 05/15/2019 motion for class certification and 07/26/2019 reply in support and Plaintiffs see no need to revisit those arguments here.

The parallels here are obvious, as antitrust laws prohibit parties from conspiring to set inflated market prices for goods and services. Here, Defendants have not only conspired to do just that, they have done so by way of fraudulent misrepresentations about the value and ultimate cost to the putative class-members of the medical services at issue. Importantly, while victims of an antitrust violation would at least be free to avoid the unlawfully inflated prices by declining to purchase the product or service at issue, the fraud victims here have no such choice. Here, Defendants have already abused their fiduciary positions to defraud the Plaintiffs into becoming liable to pay Defendant Ghoubrial's rates—on the misrepresentation that these rates will represent the "fair and reasonable" value of services— before the Plaintiffs ever learn what the rates actually are, let alone how they compare to the market rates for identical services. *See* Pls' 09/24/2019 Supp. Br. at 5–6 (citing evidence); *See also* FN2, below.

Thus, just as courts in certifying antitrust class-actions "consistently f[i]nd the conspiracy issue the overriding, predominant question" regardless of any subsequent discounts or offsets provided to market purchasers, there is all the more reason for the Court to the same here, where the so-called "discounts" are part and parcel of an intentional scheme by fiduciaries to defraud their captive clients. *Id.* at 8, quoting, *inter alia*, *In re Infant Formula Antitrust Litigation*, N.D.Fla. MDL No. 878, 1992 U.S. Dist. LEXIS 21981, at *16 (Jan. 13, 1992). In other words, there is all the more reason for the Court here to find that despite any "variety in pricing because of individual price negotiations," plaintiffs "succeed in proving classwide impact by showing that the minimum baseline for beginning negotiations, or the range of prices which resulted from negotiation, was artificially raised by the collusive" and, here, fraudulent "actions of the defendants." *Id.* at 8–9, quoting, *inter alia*, *In re Disposable Contact Lens Antitrust*, 329 F.R.D. 336, 386 (M.D.Fla. 2018).

As convenient as it may be for the Defendants to pretend there is something unique about antitrust law that would prohibit this sound and well-established principle from applying to remedy

class-wide fraud in this case (*e.g.*, KNR 10/08/2019 sur-reply at 1–2, 4–7; Ghoubrial Sur-reply at 14–17), the truth is quite the opposite. Indeed, it is hard to imagine another scenario where this principle could be so usefully applied given the unique manner in which Defendants have sought to take advantage of their fiduciary positions—not to mention recently relaxed restrictions on attorney advertising and loopholes allowing telephonic solicitation by chiropractors[2]—to "corner the market" for medical services on their high volume of clients by imposing Ghoubrial's fraudulent pricing scheme on them. Even cases cited by the Defendants recognize the wider application of such principles, including *Amchem Prods. v. Windsor*, 521 U.S. 591, 625, 117 S.Ct. 2231, 138 L.Ed.2d 689 (1997), where the Court stated that "[p]redominance is a test readily met" not only in antitrust cases, but "in certain cases alleging consumer or securities fraud." Ghoubrial 10/08/2019 Sur-reply at 15.[3]

This conclusion is further warranted by the evidence showing that Ghoubrial's so-called "discounts" never fully offset the amounts by which the Class A members were fraudulently

[2] *See*, *generally*, Pls' 05/15/2019 Mot. for Class-Certification at pages 2–44, Ex. 1 (Engstrom Aff.).

[3] Defendants also seek refuge in a series of cases decided under the Ohio Consumer Sales Practices Act (OCSPA) that are inapposite here because they did not involve any credible allegations that the defendants induced plaintiffs to purchase the goods or services at issue by concealing material facts about their nature or value. *See* KNR 10/08/2019 Sur-reply at 9–11 (citing the cases discussed in this footnote). For example, in *Gerboc v. ContextLogic, Inc.*, 867 F.3d 675, 681 (6th Cir. 2017), the named plaintiff bought a $27 speaker "that was offered as a $27 item and that works like a $27 item," thus, because there was no "allegation that [it] was not worth what [plaintiff] paid, or that he could have obtained a better price in the relevant market," the plaintiff "fail[ed] to allege actual injury in support of his OCSPA class claim[.]" (internal citations and quotations omitted). Similarly, in *Johnson v. Jos. A. Bank Clothiers, Inc.*, S.D.Ohio No. 2:13-cv-756, 2014 U.S. Dist. LEXIS 115113, at *15–*19 (Aug. 19, 2014), the putative class members who purchased four suits for a total of $795 failed to allege actual injury because they did not "allege that the suits purchased ... were not worth, collectively, the amount ... paid or that similar suits could have been purchased elsewhere for less." Likewise, in *Ice v. Hobby Lobby Stores, Inc.*, N.D.Ohio No. 1:14CV744, 2015 U.S. Dist. LEXIS 131336, *18–*20 (Sep. 29, 2015), the court found that the named plaintiff failed to allege classwide injury because the terms of the transaction were disclosed to him and he did not allege "that he could have obtained a better price in the relevant market." Here, unlike in these cases cited by the Defendants, Plaintiffs have put forth voluminous evidence showing that Defendants serially and materially misrepresented the cost, nature, and value of Ghoubrial's medical services.

overcharged.[4] In the unlikely event that such a "discount" ever did completely offset the overcharges, this determination could and would properly be made in calculating the amount of damages due to each class-member, each of whom was necessarily injured by having been made to negotiate these "discounts" from the overbilled amounts. *Carder Buick-Olds Co. v. Reynolds & Reynolds*, 148 Ohio App.3d 635, 2002-Ohio-2912, 775 N.E.2d 531, ¶ 55 (2d Dist.) ("[N]o matter how individualized damages are, liability can still be tried as a class."); *Ojalvo v. Bd. of Trustees*, 12 Ohio St.3d 230, 236, 466 N.E.2d 875 (1984). ("[A] trial court should not dispose of a class action solely on the basis of disparate damages."); *Cardinal Health Solutions, Inc. v. Valley Baptist Med. Ctr.*, S.D.Tex. No. 1:07-CV-111, 2009 U.S. Dist. LEXIS 3909, at *54-57 (Jan. 21, 2009) ("Plaintiff cites no authority suggesting that offset can be used to defeat the injury element of a fraud claim, and the Court has found none."). This should in no event be deemed a basis for denying class-members the only opportunity they have, due to Rule 23, to seek a remedy for the fraud at issue.

As the Ninth District held, "*Felix* did not announce a new rule of law." *Strickler v. First Ohio Banc & Lending, Inc.*, 9th Dist. Lorain No. 17CA011117, 2018-Ohio-3835, ¶ 24, Rather, it merely applied established Rule 23 jurisprudence in analyzing claims under the OCSPA, a statute that "limit[s] the damages available in class actions to actual damages," in a case where it was clear that the vast majority of class members would never be impacted by the allegedly deceptive conduct at issue. *Felix*, 145 OhioSt.3d 329, ¶ 29, ¶ 37 ("[T]here is absolutely no showing that all of the

[4] The evidence shows that Ghoubrial's standard rates exceeded readily available market prices to extreme degrees under all of the billing codes to which the Class A claims relate: (1) trigger point injections by **1,800%** (($800 vs. $43.48) Ghoubrial Tr. at 256:22–258:3, Ex. 25.); (2) TENS units by **1,740%** (($500 vs. $28.75) *Id.* at 208:1–23; 256:22–258:3, Ex. 25; 284:6–18, Ex. 29; Lantz Tr. 184:6–11; Pls' May 15, 2019 Class-Cert. Mot. at p. 25–26, Ex. 19); (3) back braces by **1,500%** (($1,500 vs. $100) *Id.* at p. 25–26, Ex. 18, citing Ghoubrial Tr. 208:1–23, 256:22–258:3, Ex. 25, 284:6–18, Ex. 29; Lantz Tr. 184:6–11); and (4) office visits by **300%** to **400%** ($300/$150 vs. $75/$50) *Id.* at p. 25–26 citing Ghoubrial Tr. 269:22–271:14, Ex. 27. Even if the Court were to accept Ghoubrial's entirely unsupported claim that he provided an "average discount between 30% and 70%" to the Class A members (Ghoubrial Tr. at 159), it is clear that even discounts at and above that "average" level would only partially offset the amounts fraudulently overcharged.

consumers who purchased vehicles through a contract with the offensive arbitration provision were injured by it or suffered any damage."). To the extent that this decision represents a "fly in the ointment" here (KNR 10/08/2019 Sur-reply at 1), it is only because Defendants have insisted so due to their lack of any legitimate argument to avoid class-wide liability for their conduct.

Thus, the Court may and should sanitize the proverbial ointment here by simply clarifying that *Felix* does not divest Ohio courts of their mandate and authority to fulfill Rule 23's purpose by using the class-action mechanism where it is the only means to remedy a widespread fraud. *See*, *e.g.*, *Cope v. Metro. Life Ins. Co.*, 82 Ohio St.3d 426, 430, 1998 Ohio 405, 696 N.E.2d 1001 (1998) ("When a common fraud is perpetrated on a class of persons, those persons should be able to pursue an avenue of proof that does not focus on questions affecting only individual members.") (collecting cases); *Elkins v. Equitable Life Ins. Co.*, M.D.Fla. No. 96-296-CIV-T-17B, 1998 U.S. Dist. LEXIS 1557, at *46-48 (Jan. 27, 1998) ("The appropriateness of equitable relief likewise ensures predominance."). Just as courts in antitrust cases consistently find class-wide injury, regardless of any subsequently offered "discounts," when defendants collude to impose unlawful pricing schemes on plaintiffs, there is every reason for this Court to do the same in this case. *See also Rimedio v. Summacare*, 172 Ohio App.3d 639, 2007-Ohio-3244, 876 N.E.2d 986, ¶ 12 (9th Dist.) ("Any doubts a trial court may have as to whether the elements of class certification have been met should be resolved in favor of upholding the class, subject to the trial court's authority to amend or adjust its certification order as developing circumstances demand ...").[5]

[5] Ghoubrial asks the Court to invert this binding prouncement by the *Rimedio* court by urging the very opposite—that "the court must refuse certification" "where [it] has doubts about whether the requirements of Civ.R. 23 have been met." Ghoubrial 10/08/2019 Sur-reply at 12. In any event, there should be no doubt that certification is warranted here.

Respectfully submitted,

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The foregoing document was filed on October 22, 2019, using the Court's electronic-filing system, which will serve copies on all necessary parties.

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