IN THE COURT OF COMMON PLEAS
SUMMIT COUNTY, OHIO

MEMBER WILLIAMS, *et al.*, Plaintiffs, vs. KISLING, NESTICO & REDICK, LLC, *et al.*, Defendants.	Case No. CV-2016-09-3928 Judge James A. Brogan **Supplement to Plaintiffs' Motion for Class-Action Certification re: Certification of Class A (the Price-Gouging Class)**

Plaintiffs submit this supplemental memorandum to address the Ninth District's order, on Defendants' appeal of this Court's 12/17/2019 order certifying claims by Class A (the "Price-Gouging Class") that the KNR Defendants conspired with Defendant Ghoubrial to overcharge Class A members (all former clients of the KNR personal-injury law firm) for medical care. Specifically, the Ninth District held that a more rigorous analysis is required to show how liability and damages for the price-gouging scheme can be proven with common and predominant evidence in light of (1) varying health-insurance coverage among Class A members; (2) varying reductions (so called "discounts") accepted by Ghoubrial from the class members after they had become obligated to pay his inflated bills for care; and, relatedly, (3) whether disgorgement of the allegedly overcharged amounts could be an appropriate remedy in light of these differences among the class-members between what, if any, insurance they carried, any so-called "discounts" offered to off-set the overcharges, and the differing courses of treatment each class-member received. *Williams v. Kisling, Nestico, & Redick, LLC*, 9th Dist. Summit Nos. 29630, 29636, 2022-Ohio-1044, ¶ 33–37

The issue of the "discounts" that Defendants used to off-set their overcharges was analyzed extensively, with supporting caselaw, in the Supplemental Brief in Support of Class Certification, and the related Supplemental Reply brief filed by Plaintiffs in this Court on 9/24/2019 and 10/22/2019.

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The issue of calculating damages for each class-member irrespective of differences in the "discounts," health-insurance coverage, and differing courses of treatment each class-member received was also addressed in Plaintiffs' Reply in Support of Class-Action-Certification filed on 7/22/2019, at pages 13–16. And the standard prices charges by Ghoubrial for each element of treatment, and standardized documentation of same in the "Form 1500s" contained in every Class A member's file, is also discussed at pages 60–61 of Plaintiffs' original Motion for Class-Action Certification filed on 5/15/2019. Thus, Plaintiffs refer the Court to this earlier briefing, and expressly incorporate it herein.

These issues are also analyzed further below to further demonstrate that common proof of Defendants' scheme predominates, including as to Defendants' liability for the Class A claims and injury-in-fact for each class member. Varying health insurance situations and billing discounts among the members of Class A have no relevance to these issues. Instead, their relevance is limited to calculating the specific amount that each class member was overcharged as part of a damages analysis. This does not create a predominance issue at the class certification stage for several reasons:

First, Plaintiffs can present common proof showing that the rates Ghoubrial charged were far beyond any amount that could be considered reasonable, and were charged in a way that allowed Defendants to "escape scrutiny by the insurance carriers and other government agencies" (12/16/2019 Order, p. 50), thus establishing injury-in-fact for all class members. Where injury-in-fact is proven with common evidence, courts uniformly hold that varying damages levels do not preclude class certification when the members' claims share other legal and factual commonality.

Second, even if the need for individual overcharge calculations for each class member must be presumed, that analysis would still involve predominant common proof that would not defeat class-certification substantial common evidence. As only one adjudication is necessary to determine that the prices charged by Ghoubrial to Class A members were far beyond an average or maximum

reasonable rate, incurring those unreasonable charges necessarily caused at least *some* injury to each of the class members, and while a subsequent discount may affect the calculated *amount* of those damages, it does not negate the *fact* of the injury in the first instance.

Third, large groups within Class A are similarly situated for insurance purposes, and the Court can appropriately create subclasses to account for these differences. For example, one subclass would include uninsured members, whose overcharge would consist of the fees paid to Ghoubrial in excess of average or maximum reasonable prices determined by common proof. The substantial number of Class members who received Medicaid benefits could form another subclass, whose overcharge would be calculated based on Medicaid's reimbursement rates that are readily determined from public sources. And class-members who carried private insurance could likewise collect the difference between what they paid for Ghoubrial's services and an average rate determined from common evidence provided by insurance carriers. From this common proof of standard rates for each category, all overcharges could be easily calculated in a spreadsheet.

Finally, while the above calculations would also determine the amounts to be disgorged by Ghoubrial, to the extent that disgorgement is found to be an appropriate remedy, there is also sufficient proof of the KNR's participation in a fraudulent price-gouging scheme that warrants disgorgement of their entire legal fee for each class member.

In sum, while variations in health insurance, treatment received from Ghoubrial, and "discounts" from what Ghoubrial ultimately collected from his inflated bills, these differences only affect calculation of damages and can easily be accounted for as part of a straightforward mathematical computation. A rigorous analysis of these issues will only further confirm the appropriateness of certifying Class A's claims as a superior method of adjudication, just as this Court found in its initial analysis.

I. Legal standards

Plaintiffs refer the Court to the legal standards set forth in their initial Motion for Class Certification filed on 9/15/2019, at pages 57–59, 66–67, and 73–75, as well as the standards set forth in their 7/22/2019 Reply at pages 3–5, which provide that class-action certification is especially appropriate in cases where "when a common fraud is perpetrated on a class of persons." *Id.*, citing *Cope v. Metro. Life Ins. Co.*, 82 Ohio St.3d 426, 430, 1998 Ohio 405, 696 N.E.2d 1001 (1998) (collecting cases).

II. Common evidence can prove liability for each of Class A's claims against Defendants in a single adjudication without the need to consider any differences in health insurance or billing discounts among the price-gouging class.

As a threshold matter, it is important to recognize how prevalent the common issues are in this case. As this Court previously recognized, the core of Class A's claims is Defendants' fraudulent price-gouging scheme, which evidence shows was implemented through systematic and routine policies. The scheme itself represents substantial commonality among the Class A members' claims, which can be proven with common evidence in a single adjudication. "Cases alleging a single course of wrongful conduct are particularly well-suited to class certification." *Powers v. Hamilton Cty. Pub. Defender Comm.*, 501 F.3d 592, 619 (6th Cir. 2007).

Defendants' fraudulent price-gouging scheme relied on the KNR Defendants' concealment of the true nature of their relationship with Ghoubrial from their clients, including KNR's financial motivation for having its clients seek treatment from Ghoubrial, and Ghoubrial misrepresenting that his standard fees were reasonable. And as this Court previously found, Plaintiffs have presented evidence that the price-gouging scheme was implemented through systematic and routine policies, making the alleged scheme amenable to proof by common evidence through a single adjudication. Thus, Defendants' liability for fraud, breach of fiduciary duty, unjust enrichment, and breach of contract all depend entirely on proof of the common fraudulent scheme, without any need to

consider differences in health insurance or billing discounts among the Class A's members.

The Class A representatives in this case have submitted evidence showing that the Defendants misled all similarly situated KNR clients (the Class A members) into signing so-called "letters of protection" ("LOPs") by which they unknowingly waived their health-insurance benefits and granted Ghoubrial the entitlement to collect his fees for his medical services directly from the clients' settlement funds. *See* Plaintiffs' 05-15-2019 Motion for Class Certification at 28–31, 76–79, 10–44 (citing evidence). By the time the clients first saw the amount of these charges, which are uniformly exorbitant and unconscionable, they were already legally obligated by the LOPs to pay these rates—rates that Ghoubrial had previously represented in the LOPs to be "fair and reasonable." *Id.* at 76–79 (citing evidence); *See also Id.* at Ex. 8, Reid Aff., ¶ 8, ¶ 16–17; Ex. 11, Norris Aff., ¶ 6–¶ 7, ¶ 9–¶ 10, ¶ 12; Ex. 14, Harbour Aff., ¶ 7–¶ 8, 11; ¶ 15–¶ 16, ¶ 19; Ex. 9, Carter Aff., ¶ 6–¶ 7, ¶ 10–¶ 11, ¶ 14–¶ 15, ¶ 18–¶ 19; Ex. 10, Beasley Aff., ¶ 6–¶ 7, ¶ 9, ¶ 13–¶ 17, ¶ 19–¶ 20.

Defendants' liability for this class-wide fraud would be proven by common evidence related to the issues described above, without the need to consider any given member's insurance status or any billing reductions applied. This common evidence plainly applies to Plaintiffs' claims for fraud, and unjust enrichment, as well as to their claims of breach of contract against Ghoubrial, and breach of fiduciary duty against the KNR Defendants.

As to the breach of contract claim, it is notable that a contract with an open price term is enforceable when the parties clearly manifest an intention to be bound. *Malaco Constr., Inc. v. Jones*, 10th Dist. No. 94APE10-1466, 1995 Ohio App. LEXIS 3534 (Aug. 24, 1995), citing *Oglebay Norton Co. v. Armco*, 52 Ohio St.3d 232, 236, 556 N.E.2d 515 (1990). If the parties intend to be bound by a contract with an open price term, evidence must establish that the open price term was filled with a reasonable price. *Cook & Son-Pallay, Inc. v. Hillman*, 10th Dist. Franklin No. 14AP-448, 2014-Ohio-5444, ¶ 12. Filling the open price term with an unreasonable price is a breach of the contract's

implied duty of good faith. *See Lucarell v. Nationwide Mut. Ins. Co.*, 152 Ohio St.3d 453, 2018-Ohio-15, 97 N.E.3d 458, ¶ 42 ("In addition to a contract's express terms, every contract imposes an implied duty of good faith and fair dealing in its performance and enforcement.")

The Ohio Supreme Court has held that honesty in fact does not exist when the actions at issue are "commercially unjustifiable." *Master Chem. Corp. v. Inkrott*, 55 Ohio St. 3d 23, 563 N.E.2d 26, 31 (Ohio 1990). Under Ohio law, to show that a merchant-seller lacks good faith in fixing a price pursuant to a contract with an open price term, it must be shown that the price was not fixed in a commercially reasonable manner and, moreover, that the pricing was commercially unjustifiable. *Tom-Lin Ents. v. Sunoco*, Inc., 349 F.3d 277, 281-282 (6th Cir. 2003).

Common evidence shows that Ghoubrial did not discuss the cost of the medical care he was providing to KNR clients. He simply represented in his LOPs that the costs would be reasonable. The evidence also shows that KNR clients never agreed to a specific price, so they trusted Ghoubrial to fill the open price term with a reasonable price. When the time came to bill for his services, Ghoubrial charged his standard rates instead of reasonable rates, thus breaching the contract. Common evidence shows that Ghoubrial's standard rates were commercially unjustifiable.

Similarly, in their role as attorneys for the Class A members, the KNR Defendants had a fiduciary duty to their clients. Common evidence will show how KNR knew it had a duty to reasonably inform its clients about material issues affecting their legal interests; knew its clients would be misled into believing that Ghoubrial's charges were reasonable and could be recovered at law; and systematically concealed this vital information from clients and misled them about the true nature of its relationship with Ghoubrial for its own financial gain. The KNR Defendants breached their fiduciary duty to the Class A members when it encouraged them to seek treatment from (or continue treatment with) Ghoubrial while knowing his excessive rates, and the very nature of their relationship, were contrary to their clients' financial and legal interests.

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III. Common evidence will determine an average or maximum reasonable price for the handful of medical services Ghoubrial provided to Class A members during the class period, thus establishing injury-in-fact for every Class A member to the extent they were charged rates exceeding those maximums, regardless of any member's health insurance status. Subsequent "reductions" or "discounts" to Ghoubrial's unreasonably excessive charges do not undo the injury-in-fact caused.

There is no need to analyze any differences in health insurance among the Class A members in order to prove that all Class A members suffered injury-in-fact. Common evidence will establish average or maximum commercially reasonable rates for the handful of medical services Ghoubrial provided and thus prove that Ghoubrial's standard charges in excess of those rates were unreasonable and contrary to his false representations and duty to only charge reasonable rates.

A jury can easily determine the average or maximum reasonable charge for each of the handful of medical procedures provided by Ghoubrial to all Class A members during the class period (*e.g.* trigger point injections, TENS units, back braces, etc.) based on common evidence of what other providers in the community charge for the same services. "The use of aggregate damages calculations is well established" in class-action cases "and implied by the very existence of the class action mechanism itself." *In re Restasis (Cyclosporine Opthalmic Emulsion) Antitrust Litigation*, 335 F.R.D. 1, 31 (E.D.N.Y.2020). Additionally, "the value of medical services, as a general rule, is to be ascertained and fixed by the usual price paid for like services at the time and place of performance." *Univ. Hosp. v. Wells*, 1st Dist. Hamilton No. C-210132, 2021-Ohio-3666, ¶ 6. "Thus, individualized damages calculations will not qualitatively outweigh the plaintiffs' reliance on common proof" in cases involving overcharges for medical services where "average price[s]" can be calculated for such services, including by common evidence of "copay and coinsurance amounts" collected from insurance companies. *In re Restasis*, 335 F.R.D. 1, 31, citing *In re Air Cargo Shipping Servs. Antitrust Litigation*, E.D.N.Y. No. MDL No. 1775, 2014 U.S. Dist. LEXIS 180914, *61–62 (Oct. 15, 2014) (collecting cases in which "courts have permitted the use of averages to calculate overcharges"); *See*

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also In re Ranbaxy Generic Drug Application Antitrust Litigation, 338 F.R.D. 294, 303 (D.Mass.2021) ("Any potential variation among class members in the actual prices paid for each drug is more relevant to assessing the extent of the injury suffered than to determining the existence of an injury at all."). These average rates would then be compared to what each class member paid for those services, and then reduced by the percentage of any "discounts" or off-sets offered by Defendants after the fact. *See* Plaintiffs' 7/22/2019 Reply Br., p. 14–16. Any amount exceeding the determined maximum rates would constitute *some* injury to each of the members of Class A. This general injury exists, regardless of whether some or all of the class members have a claim for additional damages.

Moreover, the exorbitant and unconscionable charges Ghoubrial originally imposed upon class members resulted in injury-in-fact, regardless of whether or how much he or KNR discounted the amount they ultimately accepted in payment.[1] In its original ruling on class certification, the Court held that Ghoubrial initially overcharged class members for medical services as part of the conspiracy between the Defendants. This finding that class members "incurred an enforceable legal obligation" to pay the exorbitant fees for Ghoubrial's services establishes injury-in-fact, regardless of whether Ghoubrial eventually discounted the charges he collected. *Chavarria v. Fleetwood Retail Corp.*, 137 N.M. 783, 2005-NMCA-082, 115 P.3d 799, ¶ 15 ("Thus, even though Plaintiffs have not yet paid on the promissory note, by signing the note and affirming the sale, they incurred an enforceable legal obligation and thus have sustained actionable damage for fraud."). *See also San Allen, Inc. v. Buehrer*, 8th Dist. Cuyahoga No. 94651, 2011-Ohio-1676, ¶ 13 ("Here, each employer would have actually suffered damages if they were in fact overcharged for premiums through inflated base rates in any of the policy years. Insofar as the BWC seeks to apply individual setoff or recoupment

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[1] As noted above, this issue was previously briefed, and this memorandum incorporates the arguments fully expressed in the *Supplement to Plaintiffs' Motion for Class-Action Certification re: Injury-in-Fact Sustained by All Members of the Price Gouging Class*, filed on 9/24/2019, and the related reply brief filed on 10/22/2019.

defenses to the claims, 'a trial court should not dispose of a class certification solely on the basis of disparate damages.'"); *Anderson, Greenwood & Co. v. Martin*, 44 S.W.3d 200, 212 (Tex. Ct. App. 2001) ("The word 'damage' should not be restricted to a monetary loss; that is, it need not be measured in money, but it is sufficient if the defrauded party has been induced to incur legal liabilities or obligations different from that represented or contracted for."); 37 C.J.S. Fraud § 55, at 242-43 (1997) ("[T]he fact that actual monetary loss has not yet occurred will not preclude recovery for fraud if such loss is inevitable, as where the defrauded party has incurred a binding legal obligation").

That Ghoubrial may have later agreed to discount his fees does not change the fact of the original injury, even if the amount of injury was later completely offset. *See Lazzaro v. Picardini*, 11th Dist. Lake CASE NOS. 91-L-023 and 91-L-024, 1992 Ohio App. LEXIS 211, at *9-10 (Jan. 24, 1992) (finding injury where fraudulent actions caused another to enter into an unconscionable lease and incur $95,000 in back rent, even though the legal obligation to pay the back rent was later extinguished); *Morgan v. Mikhail*, 10th Dist. Franklin Nos. 08AP-87, 08AP-88, 2008-Ohio-4598, ¶ 77 (finding that injury occurred when money given under fraudulent pretenses, notwithstanding fraudster's later unsuccessful attempt to mitigate loss); *Jerome R v. Centerior Energy Corp.*, C.P. No. CV-01-457866, 2017 Ohio Misc. LEXIS 20254, at *47-49 (Mar. 26, 2017) ("Regardless, not everyone in the Taxpayer Subclass has to receive a damage award so long as they were injured. The fact that some Subclass members may have zero dollars of damages does not prevent certification.").

In its prior certification order, the Court observed that Ghoubrial required KNR personal injury patients to make payments out of their settlement proceeds. And the Court also noted that KNR prepared the letter of protection Ghoubrial used to ensure that the payment was made. Those letters of protection created a medical lien on settlement proceeds as ***additional*** security but did not otherwise change any patient's personal responsibility for paying for the services charged by Ghoubrial. The letters produced in discovery required patients to agree to the following language:

> I fully understand that I am directly and fully responsible to Clearwater Billing Services, LLC for the aforementioned account submitted to me by Clearwater Billing Services, LLC for services rendered to me, and that this agreement is made solely for its additional protection and in consideration of awaiting payment. I further understand that such payment is not contingent on any settlement, claim, judgment, verdict or award by which I may eventually recover said fee.

Ghoubrial's discounts or reductions of his excessive bills do not change the fact that each member of Class A suffered a cognizable legal injury upon being overcharged for services as they were provided. This is a common question across the class based on Ghoubrial's regular use of the LOPs to protect his right to payment. The LOPs constitute common proof that Class A members incurred a personal, legal payment obligation at the time of receiving any medical service from Ghoubrial. That is itself a cognizable legal injury because by the time the clients first saw the amount of these charges, which are uniformly exorbitant and unconscionable, they are already legally obligated by the LOPs to pay these rates—rates that Ghoubrial had previously represented in the LOPs to be "fair and reasonable." *Id.* at 76–79 (citing evidence); *See also Id.*, Ex. 8, Reid Aff., ¶ 8, ¶ 16–17; Ex. 11, Norris Aff., ¶ 6–7, ¶ 9–10, ¶ 12; Ex. 14, Harbour Aff., ¶ 7–8, 11; ¶ 15–16, ¶ 19; Ex. 9, Carter Aff., ¶ 6–7, ¶ 10–11, ¶ 14–15, ¶ 18–19; Ex. 10, Beasley Aff., ¶ 6–7, ¶ 9, ¶ 13–17, ¶ 19–20.

IV. Accounting for variations in health insurance and billing discounts among Class A members would be a straightforward mathematical process going to individual damages, not injury-in-fact, and thus would not predominate over other significant common issues presented.

To the extent it is necessary to conduct a specific calculation of how much the Class A members were overcharged for Ghoubrial's services, as the Ninth District suggested, Plaintiffs submit that this can also be done largely with common evidence through a straightforward mathematical calculation and that individualized considerations of health insurance and billing discounts would not predominate over all of the other common issues involved in proving Defendants' liability for the Price-Gouging scheme.

While variations in health insurance and billing discounts introduce some factual differences among Class A members, these differences, to the extent they are relevant, only affect calculation of damages. The law is clear that "determining the amount of damages does not defeat the predominance inquiry." *Jerome R v. Centerior Energy Corp.*, C.P. No. CV-01-457866, 2017 Ohio Misc. LEXIS 20254, at *47 (Mar. 26, 2017) (quoting *Felix v. Ganley Chevrolet, Inc.*, 145 Ohio St.3d 329, 2015-Ohio-3430, 49 N.E.3d 1224, ¶ 34). Indeed, "[v]arying damage levels rarely prohibit a class action if the class members' claims possess factual and legal commonality." *Mayer v. Mylod*, 988 F.2d 635, 640 (6th Cir. 1993).

In this case, the accounting for any variation in insurance and billing discounts among the Class A members would be a straightforward mathematical calculation based largely on common evidence. As discussed in the section above, a single adjudication can determine the maximum reasonable charge for each of the handful of medical procedures provided by Ghoubrial to all Class A members during the class period based on common evidence of what other providers in the community charge for the same services. Any amount actually paid to Ghoubrial by any class member (whether or not insured) in excess of the established average or maximum reasonable price constitutes damages for overcharge. For uninsured members, the analysis ends there.

In addition, a subclass or subclasses of members who had available insurance would be entitled to additional damages based on being wrongfully induced to forgo insurance benefits, which would account for what they otherwise would have paid through insurance. For those members, including the "plenty" (by one former KNR lawyer's estimate, 80%) of the class-members who were insured by Medicaid (*See* Horton Tr. 264:1–9; Lantz Tr. 324:23–325–2; Phillips Tr. 363:8–14), the calculation of overcharge would simply involve comparing the amounts an insured member paid to Ghoubrial with the amounts that the member's insurer would have paid for those services, based on standard rates and billing codes. *See* Plaintiffs' 5/15/2019 Motion for Class Certification, pp. 17, 25;

7/22/2029 Reply, pp. 14–15 (discussing Medicaid's standard reimbursement rates for the modalities delivered by Ghoubrial, readily determined by reference to CMS.gov).

Similarly, reimbursement rates for private insurance can be similarly established by common evidence, whether on a carrier-by-carrier basis or as a market average. For example, in *In re Restasis*, 335 F.R.D. 1, 31 cited in the section above, the court approved the plaintiffs' determination of amounts unlawfully overcharged for a prescription drug to each of "three categories of class members," including "TPPs [third-party payors], insured consumers, and cash payors." *Id.* The court found it was "reasonable" to measure overcharges by "determin[ing] the monthly average price each category paid for a prescription of [the drug] in the actual world" and a reasonable "but-for" price, that the consumers otherwise would have been fairly charged, including by reference to annual surveys from insurance companies "regarding generic copay and coinsurance amounts," and prices of comparable drugs. *Id.*, 12, 31–32. Additionally, the *Restasis* court observed that such a methodology is "especially appropriate" in cases involving a clear violation, but where it is difficult to prove individual "damages with precision," as "the most elementary conceptions of justice and public policy require that the wrongdoer shall bear the risk of the uncertainty which his own wrong has created." *Id.*, 32.[2]

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[2] Defendants will likely argue, again, that the *Restasis* case and other cases cited herein, and in Plaintiffs' earlier supplemental briefing, involve analyses of amounts of overcharges arising from the antitrust context. *See* KNR 10/08/2019 Sur-reply at 4–5. And again, Defendants will not be able to legitimately explain why similar methods should not be used to address overcharges incurred by laypersons who were systematically defrauded by doctors and lawyers who subjected them to a fraudulent price-gouging scheme. *See*, *e.g.*, *Amchem Prods. v. Windsor*, 521 U.S. 591, 625, 117 S.Ct. 2231, 138 L.Ed.2d 689 (1997) ("Predominance is a test readily met" not only in antitrust cases, but "in certain cases alleging consumer or securities fraud."). 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.

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Here, similarly, common evidence can easily prove average, or maximum reasonable prices that Ghoubrial could have charged to three sub-classes of Class A member, such as Medicaid beneficiaries, uninsured parties, and parties with private insurance. And once these amounts are proven by common evidence, the calculation of damages would simply compare those figures to what each class member actually paid. In all such cases, billing discounts are accounted for by using the amounts actually paid to Ghoubrial as part of the calculation, which are readily obtained from either Defendant's records, including KNR settlement statements. Thus, calculation of overcharge would be a simple matter of arithmetic applied to the correct figures, reduced by the percentage of the so-called "discount" or off-set that Ghoubrial ultimately accepted.

In light of the simplicity and straightforwardness of these calculations, the effects of individual variations in class members' insurance are minimal and do not predominate over the common issues in this case, particularly the common evidence of the fraudulent price-gouging scheme undergirding every Class A member's claims.

V. Whether disgorgement is an appropriate remedy will be determined by common proof, and evidence of the KNR Defendants' participation in the price-gouging scheme warrants disgorgement of their entire fee collected from Class A members.

The analysis above (including that incorporated from Plaintiffs' earlier briefing) addresses the Ninth District's concerns about determining the specific amounts to be disgorged to each class-member vis a vis differing insurance, "discounts" or off-sets, and courses of treatment received from Ghoubrial, it is also important to note that there is strong proof of the KNR's participation in a fraudulent price-gouging scheme that warrants disgorgement of their entire legal fee for each class member. *See Buckingham, Doolittle & Burroughs, L.L.P. v. Bonasera*, 157 Ohio Misc.2d 1, 2010-Ohio-1677, 926 N.E.2d 375, ¶ 56 (C.P.) ("[I]t is clear in Ohio that a lawyer is not entitled to retain a legal fee otherwise due for work that included theft or some other clear and serious violation of a duty owed to a client."); *State v. Silverman*, 10th Dist. Franklin Nos. 05AP-837, 05AP-838, 05AP-839,

2006-Ohio-3826, ¶ 159-160 (affirming inclusion of agreed attorneys' fees as part of restitution order for attorney's theft from client). As for attorney fees, courts have recognized that a lawyer is not entitled to a fee if the lawyer engages in fraudulent conduct against the client. *See In re Fraelich*, Trumbull App. No. 2000-T-0016, 2004 Ohio 4538, at P23; *King v. White* (Kan.1998), 265 Kan. 627, 642, 962 P.2d 475. "'A lawyer engaging in clear and serious violation of duty to a client may be required to forfeit some or all of the lawyer's compensation for the matter.'" *Fraelich* at P23, quoting Restatement of the Law 3d, Governing Lawyers (2000), Section 37. Similarly, "'[a] lawyer who does not at all times represent the client with undivided fidelity is not entitled to compensation for his or her services[.]" *White* at 642, quoting 7 Am.Jur.2d, Attorneys at Law Section 279, Fidelity and professional competence. "'An attorney who is guilty of actual fraud or bad faith toward a client … is not entitled to any compensation for his or her services.'" *Id.* The amount of KNR's fee can be taken directly from KNR's settlement statements for each member of Class A.

At a minimum, Ghoubrial must be required to disgorge that portion of his bills that exceed a maximum reasonable amount for the services he provided, as set forth above. Similarly, KNR must at least be required to disgorge that part of its fee attributable to Ghoubrial's excessive charges. Calculation of those amounts can be done with common evidence without any need to analyze individual differences among class members' health insurance.

VI. The Court can certify the class with respect to the issue of liability, even if it finds that no uniform method exists for quantifying the damages of individual class members.

Finally, and in the alternative to proceeding as set forth above, the Court can certify the class with respect to the issue of liability even if it determines that no uniform method exists for quantifying the damages of individual class members. Civil Rule 23(C)(4) authorizes class certification "with respect to particular issues." *See Marks*, 31 Ohio St. 3d at 205; *Gottlieb v. City of S. Euclid*, 157 Ohio App. 3d 250, 2004-Ohio-2705, 810 N.E.2d 970, ¶32 (8th Dist.); *Helman v. EPL*

Prolong, Inc., 7th Dist. Columbiana No 2001 CO 43., 2002-Ohio-5249, ¶10, ¶13. This provision gives "trial courts maximum flexibility in handling class actions" by enabling them to pinpoint specific parts of a lawsuit for class treatment. *Marks*, 31 Ohio St. 3d at 205. "Common issues, such as liability, may be certified even if damages cannot be certified under Rule 23(b)(3)." *Baker v. Saint-Gobain Performance Plastics Corp.*, __ F. Supp. 3d __, N.D.N.Y. No. 1:16-CV-0917 (LEK/DJS), 2022 WL 9515003 at *18 (Sept. 30, 2022); *Ford Motor Credit Co. v. Agrawal*, 8th Dist. Cuyahoga No. 96413, 2011-Ohio-6474, ¶ 52, *rev'd on other grounds*. 137 Ohio St. 3d 561, 2013-Ohio-5199, 2 N.E.3d 238.

If a court certifies a class with respect to liability, "[c]lass members would receive the benefit of a declaratory judgment (if the class prevails) on ... [that] issue but would need to proceed in individual suits to seek damages." *Bennett v. Dart*, __ F.4th ___, 7th Cir. No. 22-8016, 2022-WL 16915837 at *1 (Nov. 22, 2022). "[B]y contrast, if the class loses, ... [they] would be bound through the doctrine of issue preclusion." *Id. See also Treviso v. National Football League*, N.D. Ohio No. 5:17CV00472, 2020 WL 7021357, *7 (Nov. 30, 2020) ("A liability-only class issue concerning whether each class member suffered a breach of contract for which they are entitled to damages presents a common question that predominates over thousands of mini-trials on the identical question making this class amenable to class certification for resolution of this particular issue.").

Plaintiffs have advanced a means of calculating damages above (and in their earlier briefing) that eliminates any threat the question of damages might pose to the predominance of common issues under Civ. R. 23(B)(3), and maintain that the class-action mechanism is the only way to justly and effectively adjudicate the entirety of their claims. But if this Court is inclined to hold to the contrary, it should at least certify the claims pertaining to Class A on the issue of liability.

In closing, Plaintiffs again urge that the class-action mechanism was designed precisely to ameliorate the egregiously fraudulent conduct at issue in this case, and should be employed to do justice here.

Respectfully submitted,

/s/ Peter Pattakos
Peter Pattakos (0082884)
Zoran Balac (0100501)
Gregory Gipson (0089340)
THE PATTAKOS LAW FIRM LLC
101 Ghent Road
Fairlawn, Ohio 44333
Phone: 330.836.8533
Fax: 330.836.8536
peter@pattakoslaw.com
zbalac@pattakoslaw.com
ggipson@pattakoslaw.com

/s/ Joshua R. Cohen
Joshua R. Cohen (0032368)
Ellen Kramer (0055552)
COHEN ROSENTHAL & KRAMER LLP
The Hoyt Block Building, Suite 400
Cleveland, Ohio 44113
Phone: 216.781.7956
Fax: 216.781.8061
jcohen@crklaw.com
emk@crklaw.com

Attorneys for Plaintiffs

Certificate of Service

The foregoing document was filed on December 9, 2022, using the Court's e-filing system, which will serve copies on all necessary parties.

/s/ Peter Pattakos
Attorney for Plaintiffs