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 Response to "Supplement to Plaintiffs' Motion For Class-Action Certification of Class A"**

I. Introduction

In this case, the most basic element Plaintiffs must establish to prevail is that Plaintiffs **overpaid** for the services of Dr. Ghoubrial. The Court of Appeals reversed this Court's certification of Class A regarding alleged overpayments to Dr. Ghoubrial by KNR clients and remanded this matter because "the trial court…failed to undertake a rigorous analysis of the requirements of Civ.R. 23(B)." *Decision and Journal Entry*, 9th Dist. Ct. App., March 30, 2022, ("Decision"), ¶33. Indeed, the Court of Appeals expressed several concerns with Plaintiffs' ability to satisfy the Rule 23 requirements of predominance and superiority related specifically to the amount Plaintiffs actually paid for Dr. Ghoubrial's services, and whether Plaintiffs' claims could be resolved by evidence common to all parties in a single adjudication, including:

- How the plaintiffs could prove liability with common evidence when the evidence showed that the individual class members were not similarly situated with respect to health insurance coverage. *Id.* at ¶34.

- How the plaintiffs could prove liability with common evidence when the evidence showed that some patients received significant reductions in their charges for medical care. *Id*. at ¶35.

- How the plaintiffs could prove liability for disgorgement with common evidence when the trial court's damages formula involves identifying the amount of the overcharge in each class member's case. *Id*. at ¶36.

All of these considerations stem from the primary issue in this case: did Plaintiffs pay more than they **contractually agreed to pay** for the services of Dr. Ghoubrial? If a Plaintiff did not pay more than he or she agreed to pay, they have no cause of action. This primary issue cannot be adjudicated in a single proceeding for all Plaintiffs.

First, there is no legally fixed rate for medical services. The amount is not the same across the board for every person in Ohio. People can, and do, pay different rates for the same services. Medical services cost whatever the market and the contract between the parties permits. *Associated Physicians of MCO, Inc. v. Baker*, 6th Dist. No. L-89-209, 1990 Ohio App. LEXIS 3050, at *4 (July 27, 1990). See also *Spectrum Health Hosps. v. Farm Bur. Mut. Ins. Co.*, 960 N.W.2d 186 (Mich. App.2020) ("Generally speaking, absent a contractual limitation or some other restriction imposed by law, healthcare providers are free to charge the public whatever they want[.]"

Second, while a dispute over the amount of damages does not necessarily prevent certification, a proposed class that includes class members who have not suffered any damages does. Plaintiffs' reliance on anti-trust and securities cases is inapposite because those cases are unique in that individual damages can be presumed based on common proof that the market has been harmed and the class member participates in the market. This is not an anti-trust or securities case and proof of actual injury is required.

Third, this predominance problem cannot be swept under the rug by asking the Court to wait and see if a jury decides individual class members have (or have not) suffered damages to determine if they belong to the class – that is a fail-safe class which violates ascertainability, and thus cannot be certified.

Plaintiffs' arguments on remand ignore the concerns raised by the Court of Appeals and continue to insist that these concerns are irrelevant. For example, Plaintiffs expressly argue

"[v]arying health insurance and billing discounts among the members of Class A have no relevance to these issues." *Supplement to Plaintiffs' Motion for Class Action Certification*, December 9, 2022, (hereafter "Plaintiffs' Supplement"), p.2. Similarly, Plaintiffs maintain "[t]here is no need to analyze any differences in health insurance among the Class A members[.]" *Id.* at p.7. "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." *Id.* at p.4.

Plaintiffs simply refuse to recognize that the Court of Appeals has already determined that these issues are not only relevant, but **must** be considered by this Court in conducting its rigorous analysis. The precise basis for the reversal and remand was that that this Court did **not** adequately consider these issues. When these issues are properly considered, Plaintiffs cannot establish that the claims can be resolved by evidence common to all parties in a single adjudication.

In *Schmidt v. Avco Corp.*, 15 Ohio St.3d 310, 313, 473 N.E.2d 822 (1984), the Supreme Court outlined the predominance requirement in Civ.R. 23:

> Thus, while what is meant by 'predominate' is not made clear by the rule, it is generally held that in determining whether common questions of law or fact predominate over individual issues, it is not sufficient that common questions merely exist; rather, the common questions must represent a significant aspect of the case and they must be able to be resolved for all members of the class in a single adjudication.

"Common Proof" is essential to the establishment of predominance. "[D]eciding whether a claimant meets the burden of class certification pursuant to Civ. R. 23 requires the Court to consider what will have to be proved at trial and whether those matters can be presented by **common proof**." *Cullen v. State Farm Mut. Auto. Ins. Co.*, 137 Ohio St.3d 373, 379, 2013-Ohio-4733, 999 N.E.2d 614 (2013) (Emphasis added). "[W]hen there exists **generalized evidence** which proves or disproves an element on a simultaneous, class-wide basis, since such proof obviates the

need to examine each class member's individual position." *Cope v. Metro Life Ins. Co.*, 82 Ohio St.3d 426, 432, 696 N.E.2d 1001 (1998).

In this case, the most basic element that must be established for Plaintiffs to prevail is that the Plaintiffs paid Dr. Ghoubrial more than the amount contractually agreed. This Court cannot determine if any individual Plaintiff "overpaid" without considering the evidence identified by the Court of Appeals. If there were one plaintiff in this case, Defendants would certainly be entitled to demonstrate at trial that the plaintiff paid a fair price for medical expenses to defeat that plaintiff's claim. Thus, Plaintiffs here simply cannot prove that all Plaintiffs are entitled to recover in a single adjudication.

II. There is no legally fixed rate for medical services capable of supporting certification in this case.

Plaintiffs attempt to circumvent the individualized inquiries identified by the Court of Appeals by suggesting that Dr. Ghoubrial's contract with his patients requires his office to charge a limited amount for his services based upon rates adopted by Medicare, Medicaid, and insurance companies. Nothing in the contract expressly limits his charges, but instead, ignoring Dr. Ghoubrial's rate schedule, Plaintiffs maintain that because the cost of the services is allegedly an "open" term, only a "commercially reasonable rate" may be charged. This argument has been repeatedly rejected by courts because the amount charged by a medical provider is not an "open term" when, as here, the patient contractually agrees to pay the scheduled amount for service.

Parol evidence generally may not be presented to contradict the terms of a written contract. However, parol evidence is admissible to fill in the missing terms of a contract. *Jacco & Assocs. v. HVAC, Inc.*, 5th Dist. Tuscarawas No. 2013 AP 03 0016, 2014-Ohio-128, ¶ 46. "[I]f a term cannot be determined from the four corners of a contract, factual determination of intent or reasonableness may be necessary to supply the missing term." *Pate v. Quick Solutions, Inc.*, 10th

Dist. Franklin No. 10AP-767, 2011-Ohio-3925, ¶ 34, quoting *Inland Refuse Transfer Co. v. Browning-Ferris Industries of Ohio, Inc*., 15 Ohio St.3d 321, 322, 15 (1984). However, where parol evidence is required to fill in the missing term of a contract, a plaintiff cannot satisfy the predominance requirement of Civ.R. 23. See, e.g., *Adams v. Kansas City Life Ins. Co.,* 192 F.R.D. 274, 182 (W.D. Mo. 2000), ("By allowing extrinsic evidence of the parties' dealings, the breach of contract claims become individualized and not reasonably susceptible to class action treatment.").

In *Eufaula Hosp. Corp. v. Lawrence*, 32 So.3d 30 (Ala.2009), patients contended that, based on the hospitals' "chargemaster" rates for specific medical services, the hospitals charged insured patients and patients receiving governmental benefits much lower rates than those charged to uninsured or self-pay patients for the same services. The Alabama Supreme Court vacated the certification, concluding that determining a reasonable charge for each class member required an individualized determination that made certification inappropriate. Specifically, the court found that determining the reasonableness of charges required more than review of the schedule rates at the hospital, and that the rates paid by Medicaid, Medicare, and large insurers **did not provide a benchmark for the reasonableness of the hospitals' charges.** Rather, a fact-intensive individual evaluation of each patient's charges was required. As a determination of a reasonable charge for medical services was necessarily dependent on the specific circumstances of each patient, it precluded Rule 23(b)(2) and (b)(3) class certification. See also, *Colomar v. Mercy Hospital, Inc.*, 242 F.R.D. 671 (S.D. Fla. 2007), *Maldonado v. Ochsner Clinic Foundation*, 493 F.3d 521 (5th Cir. 2007), *Howard v. Willis-Knighton Med. Ctr.*, 924 So. 2d 1245, 1263 (La. Ct. App. 2006).

Here, even if Plaintiffs had presented evidence regarding rates paid by Medicare, Medicaid, or private insurers (which they have not), a determination of a "reasonable charge" is necessarily dependent on the specific circumstances of each patient including their contractual arrangement,

whether they asked for a schedule of charges, any conversations they may have had with the doctor or his staff regarding rates, and countless other considerations in addition to those identified by the Court of Appeals.

As it relates to Dr. Ghoubrial, Plaintiffs concede that patients sign a written agreement to pay Dr. Ghoubrial's standard charges from any settlement funds collected. Plaintiffs argue that the amount owed is an "open term" of the agreement because it is unknown what treatment the patient may receive upon agreeing to treatment and/or they were not provided a rate schedule. Thus, Plaintiffs intend to introduce parol evidence to establish the "open term" based upon rates utilized by Medicare, Medicaid, and insurance companies. Even if Plaintiffs were correct that the cost of services is an "open term," Defendants likewise would be permitted to introduce parol evidence of each Plaintiff's intent and subjective beliefs regarding the open term, as well as the intent and subjective beliefs of Dr. Ghoubrial. As in *Eufaula* and the cases cited in this section, the need for such evidence defeats class certification.

III. Subclasses cannot remedy a fundamentally flawed class nor remove the predominance requirement.

Plaintiffs' Supplement continues to insist that the use of "subclasses" somehow resolve the problem of individual Plaintiffs having different types of healthcare insurance, no insurance, and/or having insurance and expressly declining to use it. This Court's initial Order on class certification adopted this Plaintiffs' "subclasses" proposal. However, the Court of Appeals nevertheless reversed and remanded the class certification.

Civ.R. 23(C)(5)(b) allows a court to create sub-classes. Subclasses, however, do not negate the need to satisfy the predominance requirement of Civ.R. 23(B)(3). The Supreme Court of Ohio, in *Schmidt*, 15 Ohio St.3d at 315, unequivocally held:

> This court is well aware that Civ. R. 23(C)(4)(b) specifically authorizes the court to divide the class into appropriate subclasses. Nonetheless, the requirements for a class action must still be met.

The court in *Schmidt* upheld the denial of class certification based on the presence of "individual issues" and the "necessity for the creation of multiple subclasses." *Id*. *See also Marks v. C.P. Chemical Co.*, 31 Ohio St.3d 200, 509 N.E.2d 1249 (1987) (finding that the creation of subclasses does not obviate the need to establish predominance).

Even if Plaintiffs were permitted to utilize Medicare, Medicaid, and private insurance rates to create subclasses, individual evidence of what Plaintiffs claim they should have paid under their insurance would need to be presented at trial. This inquiry would require identification of the insurance policies for over a thousand Class Members dating back nine years. In addition, the amount that each different insurance company would have allowed as reimbursement for the various different services and medical equipment prescribed by Dr. Ghoubrial would need to be determined for each class year as reimbursement rates have changed multiple times over nine 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 their 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 they been directed to use their health insurance as Plaintiffs claim they should have been. In addition, each Class Member received a different combination of treatment from Dr. Ghoubrial. The charges also differed over the nine-year class period. The health insurance facts for Class Members varied over time and individually. Thus, dozens and possibly hundreds of subclasses would need to be created, almost all of which presently have no class representative. This obviously defeats the class on grounds

that the necessary element of superiority fails. The notion that the court can simply take the "average" of various insurance companies' rates to prop up a single subclass ignores the very individual issues this Court was directed to consider and ignores the letter and spirit of Rule 23(B).

IV. Almost all patients of Dr. Ghoubrial received significant reductions in their charges for medical care.

It is undisputed that what Dr. Ghoubrial "charged" was different from what he **accepted as payment** from the Class Members' settlements or judgments. *See* Ghoubrial Opp. to Cert., Exh. G (Ghoubrial Aff.). This is true of not only Dr. Ghoubrial, but is standard practice in medical billing. See, *Eufaula Hosp. Corp.*, supra. While Plaintiffs attempt to paint Dr. Ghoubrial as unique in this regard, all physicians and hospitals charge more than they **ultimately accept** from Medicare, Medicaid and insurance companies. As it relates to whether any particular Plaintiff "overpaid" for medical services, the amount at issue is necessarily the amount Dr. Ghoubrial **ultimately accepted** from each Plaintiff. This amount varies dramatically for Class Members.

KNR was able to negotiate discounts for nearly every client's medical reimbursement to Dr. Ghoubrial upon settlement. *See* KNR Opp. to Cert., Ex. N (Nestico Aff.). For some Class Members, KNR negotiated discounts as high as 98%. *Id*. While in others, it was 88%, 82% or 50% and in some, there was no discount. *Id*. In each of these instances, Dr. Ghoubrial accepted the negotiated reduction as satisfaction of his bill. *See* Ghoubrial Opp. to Cert., Exh. G (Ghoubrial Aff.)

It cannot be rationally claimed, let alone established on a class-wide basis, that every discounted reimbursement to Dr. Ghoubrial resulted in an "overpayment." Such a determination would require a case-by-case factual evaluation. There is no common evidence that could adjudicate this issue for all Class Members in a single proceeding. A trial court determination that the agreed upon payment to Dr. Ghoubrial of $400.00 for a trigger-point injection and two office

visits was unreasonable would not adjudicate the claim of a Class Member who paid $100.00 for a TENS unit. No trial plan exists that would allow anything other than the presentation of evidence in over a thousand individual cases to determine liability.

Furthermore, it is important to recognize that Defendants would be entitled to present evidence of the actual amount paid by the Plaintiff to defeat **an individual** Plaintiff's claim if the claim **was not** pled a class action. Defendants are entitled to pursue all defenses available to them at trial regardless of whether there is one plaintiff or 20,000 plaintiffs. If Defendants have the right to defeat one Plaintiff's claim by proof that the amount paid was reasonable, they do not lose that right merely because the Plaintiffs' attorney wishes to certify a class. To hold otherwise violates Defendants' due process rights. *Carrera v. Bayer Corp*., 727 F.3d 300, 307-308 (3rd Cir. 2013).

While Plaintiffs maintain that these significant and widely differing discounts are irrelevant to the issue of certification, the Court of Appeals has directed otherwise. This Court **must** consider these discounts and account for them in determining whether predominance and superiority have been established pursuant to Civ.R. 23. This simply cannot be accomplished in a manner that allows all Plaintiffs' claims to be adjudicated utilizing common evidence in a single proceeding.

Plaintiffs' newly proposed remedy for their inability to rectify the individual questions that predominate this putative class is to suggest that the Court simply permit a trial that establishes Defendants liability for fraud, breach of fiduciary duty, unjust enrichment, and breach of contract regardless of whether a significant percentage of the putative class members are ultimately not entitled to recover and are thus effectively removed from the class for having suffered no damages. *Plaintiffs' Supplement* at pp. 4-5. This proposal amounts to an illegal fail-safe class.

The Sixth Circuit has defined a fail-safe class as "a class that cannot be defined until the case is resolved on its merits." *Young v. Nationwide Mut. Ins. Co.*, 693 F.3d 532, 538 (6th

Cir.2012). The *Young* court explained that "a 'fail-safe' class is one that includes only those who are entitled to relief. Such a class is prohibited because it would allow putative class members to seek a remedy but not be bound by an adverse judgment—either those 'class members win or, by virtue of losing, they are not in the class' and are not bound." *Id.* See also, *Mahoning Cty. Cach v. Young*, 7th Dist. Mahoning Nos. 15 MA 0176, 15 MA 0177, 2021-Ohio-4638, ¶ 34-36.

Here, the putative class was previously defined as:

> All current and former KNR clients who had deducted from their settlements any fees paid to Defendant Ghoubrial's personal-injury clinic for trigger-point injections, TENS units, back braces, kenalog, or office visits, billed pursuant to the clinic's standard rates from the date of its founding in 2010 through the present.

Recognizing that this definition includes individuals who were not overcharged for services, Plaintiffs now wish to define the class as all individuals above who **were overcharged for services – who will be identified after a decision on the merits.** This would be a classic fail-safe class. Individuals would not be part of the class until a jury purportedly determines the amount Dr. Ghoubrial can permissibly accept as payment for his services. This "class" cannot be redefined into existence. The variables identified by the Court of Appeals preclude certification because a plethora individual issues predominate.

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

Plaintiffs attempt to distinguish between "injury in fact" and the "extent of injury," claiming Defendants' criticisms of certification involve the latter which does not preclude certification. However, 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), the Supreme Court of Ohio held "'[p]erhaps the most basic requirement to bringing a lawsuit is that the plaintiff suffer some injury.'" *Felix* at ¶ 36, [citation omitted]. "Although

plaintiffs at the class-certification stage need not demonstrate through common evidence the precise amount of damages incurred by each class member, * * * they must adduce common evidence that shows all class members suffered *some* injury." *Felix* at ¶ 33. "If the class plaintiff fails to establish that all of the class members were damaged (notwithstanding questions regarding the individual damages calculations for each class members), there is no showing of predominance under Civ.R. 23(B)(3)." *Felix* at ¶ 35. See also, *Duke v. Ohio Univ.*, 2022-Ohio-4694 (10th Dist.), ¶ 42, *Mikulski v. Centerior Energy Corp.*, 2019-Ohio-983, ¶ 12 (8th Dist. 2019).

Plaintiffs continue to cite federal antitrust cases and shareholder derivative cases to argue that injury to each member of Class A may be presumed at the class certification stage. As stated herein and in prior briefing, this "presumption of injury" is unique to these types of cases because individual damages can be presumed based on common proof that the market has been harmed and the class member participates in the market. If the defendant's actions eliminate competition and cause the price of a commodity to go up (the market injury), there is a common injury susceptible to common proof because anyone who purchased that commodity is presumed to have suffered damages. Thus, the requirements of class certification in the context of such cases have been repeatedly applied in a less than stringent manner. As the Supreme Court stated in *Amchem Prods v. Windsor*, 521 U.S. 591, 625 (1997), "predominance is a test readily met in certain cases alleging … violations of the antitrust laws."

That is not the case here. This is not an anti-trust case in which individual damages of market participants can be presumed from proof of damage to the market. Here, individualized issues include: 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.

In reverting to reliance on anti-trust matters, Plaintiffs again fail to address the fact that **the reasoning and cases cited by Plaintiffs have been consistently rejected by Ohio courts.** See, e.g., *Johnson v. Jos. A. Bank Clothiers, Inc.*, 2014 U.S. Dist. LEXIS 115113 (S.D. OH 2014), (requiring proof of actual injury in a case alleging "overcharges" by a clothier who allegedly discounted inflated prices). In *Gerboc v. ContextLogic, Inc.*, 867 F.3d 675 (6th Cir. 2017), 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 suffered no actual damages, regardless of the original price or the amount of discount promised. *Id.* at 680. Similarly, in *Ice v. Hobby Lobby,* 2015 U.S. Dist. LEXIS 131336 (N.D. OH 2015) plaintiff argued that he was damaged because a 50% discount was taken from an inflated list price and not the price at which the goods were always sold. 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. 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. *Id.* at 16.

In footnote two of *Plaintiffs Supplement*, Plaintiffs again attempt to impose the anti-trust standard of predominance onto this case stating, "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." Defendants' explanation is simple and legitimate – these cases and the principles for which they stand have been repeatedly rejected by Ohio courts and thus are of no import to this Court. Perhaps more importantly, the Court of Appeals has **already determined** that the standard in *Felix* applies here. "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." *See* Decision, pg. 15, quoting *Felix*, supra, ¶ 33. Thus, Plaintiffs' invitation to ignore the well settled requirement of actual injury must be rejected and certification must be denied.

VI. The Proposed remedy for disgorgement precludes a finding of predominance.

Plaintiffs' claimed remedy against KNR is disgorgement. Initially, this Court held in certifying the class that KNR pay each Class Member the amount of "additional fees" it received as a result of Dr. Ghoubrial's overcharge. *Opinion*, December 17, 2019, p. 51-52. The Court of Appeals rejected this approach because this Court's damages formula involved identifying the amount of the overcharge in each class member's case without establishing a method for doing so that would comport with Civ.R. 23. Plaintiffs now argue KNR's **entire fee** should be disgorged for any client who treated with Dr. Ghoubrial regardless of the amount each Plaintiff paid for services. *Plaintiffs' Supplement* at p. 13-14.

Plaintiffs again ignore the express holding in the Court of Appeals. This case was not remanded to determine if Plaintiffs were entitled to disgorgement of KNR's entire fee. The case was remanded because the Court failed to consider the factual differences amongst the individual Plaintiffs in analyzing the predominance and superiority requirements of class certification. Plaintiffs are openly inviting the Court to ignore these record facts in direct contravention of the task the Court of Appeals directed to this Court to undertake. To be clear, Plaintiff is suggesting

that a Plaintiff with a 98% reduction in Dr. Ghoubrial's bill is nevertheless entitled to disgorgement of KNR's entire fee for "fraud" where the "charges" listed in the original bill may have increased the amount of the settlement in the first place. Plaintiffs' citations to cases involving "theft" are gratuitous and irrelevant without proof that a "theft" occurred **for each Plaintiff** in the putative class and that this "theft" can be established in one adjudication for all class members.

Plaintiffs are attempting to circumvent and avoid the express holding of the Court of Appeals. The health insurance status of claimants, Dr. Ghoubrial's discounts, and even KNR's discounts from client fees cannot simply be ignored. This Court **must** analyze and account for these facts in determining predominance and superiority. Plaintiffs cannot satisfy the standard set forth in Civ.R. 23 when these factors are properly considered.

VII. Plaintiffs are not entitled to pursue Declaratory Judgment.

In Section VI of Plaintiffs' Supplement, Plaintiffs assert that the Court can certify the case for a trial on liability only based upon "declaratory judgment." First, this is a new argument which was not raised on class certification in the trial court or the Court of Appeals. Therefore, it is arguably waived. Even if the argument may be advanced at this stage, it is meritless.

"The declaratory judgment statutes contemplate a distinct proceeding that a party generally initiates by filing a complaint." *In re J.D.F.*, 2008-Ohio-2793, ¶9 (10th Dist.). A declaratory judgment can only be brought as a claim, not as a motion. *Turner v. Univ. of Cincinnati*, 2020-Ohio-248, ¶ 13 (10th Dist.). A request for a declaratory judgment cannot be adjudicated where it has not been appropriately initiated. *Id.* Here, Plaintiffs' Complaint does not seek declaratory relief. Therefore, this Court cannot proceed with a declaratory judgment proceeding on the issue of liability. Moreover, proof that class members suffered some damages as a proximate result of

Dr. Ghoubrial's alleged breach of contract and tortious conduct are *prima facie* requirements of Plaintiffs' claims. Thus, liability still cannot be established absent proof of actual damages.

VIII. Conclusion

Plaintiffs' arguments regarding Class A are driven by a fundamental misunderstanding of the purpose of class certification. According to Plaintiffs, "the class-action mechanism was designed precisely to ameliorate the egregiously fraudulent conduct at issue in this case." *Id*. at p. 15. Civ.R. 23 was not created for the purpose ameliorating allegedly "fraudulent conduct." It is a procedural vehicle which permits a trial court to utilize a single proceeding to adjudicate multiple claims which can be resolved by evidence common to all parties. Plaintiffs are not entitled to class certification merely because they allege fraudulent conduct by the Defendants. They must establish the requirements Civ.R. 23 and cannot do so when forced to account for the numerous issues raised by the Court Appeals.

For the reasons stated herein, KNR's prior filings in opposition to class certification and oral arguments which are all incorporated herein by reference, the KNR Defendants respectfully request that this Court deny Plaintiffs' Motion for Class Certification.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The foregoing Defendants Kisling, Nestico & Redick, LLC, Alberto Nestico and Robert Redick's Response to Supplement to Plaintiffs' Motion for Class-Action Certification of Class A was filed electronically with the Court this 6th day of January, 2023. The parties may access this document through the Court's electronic docket system.

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