IN THE COURT OF COMMON PLEAS
SUMMIT COUNTY, OHIO

MEMBER WILLIAMS, et al., Plaintiffs, v. KISLING, NESTICO & REDICK, LLC., et al., Defendants.	Case No. 2016-CV-09-3928 Judge James A. Brogan **DEFENDANT SAM GHOUBRIAL, M.D.'S SUPPLEMENT TO HIS BRIEF IN OPPOSITION TO PLAINTIFFS' MOTION FOR CLASS ACTION CERTIFICATION OF CLASS A**

Now comes Defendant, Sam Ghoubrial, M.D. ("Dr. Ghoubrial"), by and through counsel, and hereby submits his Supplemental Memorandum relative to the Ninth District Court of Appeals' March 30, 2022, Decision and Journal Entry ("Decision") reversing this Court's December 17, 2019, Order certifying Class A[1] and remanding the matter back to this Court to conduct the rigorous analysis required by Civ. R. 23(B) relative to the issues of predominance and superiority. The Ninth District Court of Appeals' Decision reversing this Court's December 17, 2019, Order certifying Class A recognized the critical issues demonstrating precisely why the claims asserted in Class A cannot be resolved by common evidence in a single adjudication. When that rigorous analysis is performed, it becomes clear that Class A cannot be certified as a class action. Simply put, the class proposed by Plaintiff would require an individual mini-trial for each

[1]Class A has been pejoratively labeled the "Price Gouging Class." However, the phrase "price gouging" is absolutely inaccurate and inapplicable, even assuming the underlying allegations were true, which they are not. Price gouging is a pejorative phrase used to describe the situation when a seller increases the prices of goods, services, or commodities to a level much higher than is considered reasonable or fair in response to a demand or supply shock. For example, the phrase is commonly used to describe price increases of basic necessities after natural disasters. The class at bar was not subjected to an unexpected supply shock or demand or any national emergency or natural disaster. Thus, Defendant Sam Ghoubrial, M.D. will simply refer to this class as "Class A", without the use of pejorative labels.

Plaintiff class member to determine multiple issues, including the critical requirement of an actual injury-in-fact to each class member.

I. STANDARD OF REVIEW

The Ohio Supreme Court has adopted the strict certification standards set by the U.S. Supreme Court, which has held most claims cannot be certified:

> [C]lass-actions suits are the *exception* to the usual rule that litigation is conducted by and on behalf of only the individually named parties. To fall within the exception, the party bringing the class action must *affirmatively demonstrate compliance with the procedural rules governing class actions.* … The United States Supreme Court has insisted that courts give careful consideration to the class-certification process, holding Fed.R.Civ.P. 23 is not "a mere pleading standard." Rather, the party seeking class certification must affirmatively demonstrate compliance with the rules for certification and be prepared to prove "that there are in fact sufficiently numerous parties, common questions or law and fact, etc." After *Dukes*, there can be no dispute that *a trial court's rigorous analysis* of the evidence often requires *looking into the enmeshed legal and factual issues that are part of the merits of the plaintiff's underlying claims*. In doing so, however, the trial court may probe the underlying merits of the cause of action only for the purpose of determining that the plaintiff has satisfied Civ. R. 23. *Felix v. Ganley Chevrolet, Inc*., 145 Ohio St.3d 329, ¶35-37 (2015) (emphasis added).

Civ. R. 23 has seven requirements that *must* be met before a class action can be certified. If a plaintiff fails to establish any one of the seven requirements, the class *cannot* be certified. *See* Civ. R. 23; *Cullen v. State Farm Mut. Auto Ins. Co*., 137 Ohio St.3d 373 (2013). Both Civ. R. 23 and the Ohio Supreme Court mandate that a necessary prerequisite to class certification is that "the court finds that the questions of law or fact common to the class members predominate over any questions affecting only individual members." *See Id*. at ¶12. The standard of review trial courts must follow in certifying class actions has been clearly articulated by the Ohio Supreme Court. *See, Hamilton v. Ohio Savings Bank*, 82 Ohio St.3d 76, 80, 694 N,E,2d 442 (1998). While trial courts have broad discretion in deciding to certify a class… "the trial court's discretion is in deciding whether to certify a class is not unlimited, an indeed *is bounded by and must be exercised*

within the framework of Civ. R. 23. The trial court is required to carefully apply the class action requirements and conduct a rigorous analysis into whether the prerequisites of Civ. R. 23 have been satisfied." *Id*. (emphasis added).

Plaintiffs' Supplement to their Motion for Class-Action Certification ("Plaintiffs' Supplement") does nothing more than reiterate the same arguments the Ninth District Court of Appeals found unavailing in its Decision reversing and remanding relative to Class A. Plaintiffs' Supplement adds nothing and does nothing to advance the rigorous analysis the Ninth District Court of Appeals directed this Court to perform. This is likely because Plaintiffs recognize that actually performing that rigorous analysis leads to only one conclusion, that Class A cannot be certified because individual questions abound that cannot be resolved by common evidence in a single adjudication. Plaintiffs' Supplement admits as much as they finally acknowledge it would need to be determined what each class member actually *paid* to satisfy the charges, and then those actual payments would need to be compared to the average maximum rates, just to determine if each member of Class A suffered "some injury". *See* Plaintiffs' Supplement, pg. 8. This has always been the fly in the ointment preventing certification of the Class A.

II. INDIVIDUAL ANALYSIS OF EVERY CLASS MEMBER IS NECESSARY TO DETERMINE IF THE CLASS MEMBER SUFFERED AN INJURY-IN-FACT

To establish the predominance requirement under Ohio law, the Plaintiff has the burden of proof to establish that each class member suffered an injury-in fact as a predicate to liability. Even the Plaintiffs admit this is the state of the law in Ohio. (*See, for example, Plaintiffs' 9/24/19 Supplement to their Motion for Class-Action Certification*). Despite this recognition, Plaintiffs continue to argue, without a shred of legal support, that simply being *charged* allegedly exorbitant rates for Dr. Ghoubrial's medical treatment satisfies the injury-in-fact requirement - without any

consideration of the amount each individual class member actually *paid* – and which Dr. Ghoubrial accepted - as full and final payment for those medical services.

In fact, Plaintiffs are attempting to convince this Court to use a "rigorous analysis" that includes zero consideration as to the manner and extent to which the **amount charged** by Dr. Ghoubrial impacted each individual Plaintiff. Moreover, that Dr. Ghoubrial is bound by some objective reasonable charge and any amount he charged is excessive and unreasonable if it exceeds this amount. In addition to ignoring the **amount actually paid**, the Plaintiffs also turn a blind eye to whether the **amount charged** was actually a benefit an individual Plaintiff because it increased the amount of the settlement and resulted in a higher net settlement paid to that Plaintiff.

Plaintiffs are essentially arguing that Ohio law does not require a determination of the threshold matter of whether each individual class member has actually, "in fact", been damaged by the alleged wrongful conduct. This is just one of several factors that demonstrate why Class A cannot be certified in this matter. To be clear, to look only at injury in fact would force the court to totally ignore not only the first three elements of class certification, but also what the parties agreements were and all extrinsic evidence that explains why and how they contracted to begin with. Rather, Plaintiff's analysis assumes that all charges, despite written agreements and extrinsic evidence demonstrating otherwise, were unreasonable. Class certification is only appropriate when an objective standard is available, and this objective standard cannot be accurately implied absent a more in-depth analysis of the unique habits and practices of each specific party so as to understand why they agreed to the terms as they stood.

Critically, the Ninth District Court of Appeals expressly recognized that Dr. Ghoubrial's interpretation of the Ohio Supreme Court's holding in *Felix* is correct and controlling. In its Decision, the Ninth District, quoting *Felix*, held that "[p]laintiffs 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. In addition, the Ninth District Court of Appeals recognized that in order to make this threshold determination, it would require, "*at a minimum*," determinations with respect to "whether Dr. Ghoubrial's standardized rates constituted an overcharge for the medical care and equipment, *the extent to which Dr. Ghoubrial's clinic ultimately accepted reduced payments as satisfaction for each patient's bill*, as well as the manner in which KNR attorneys played an active role in facilitating those reductions based on the settlement value of each case in order to perpetuate the scheme." *See* Decision, pg. 15 (emphasis added). Further still, the court would need to inquire whether Dr. Ghoubrial's charges, if greater than some arbitrary market value, at face are even unreasonable to begin with[2]. These necessary determinations cannot be completed without conducting thousands of mini trials just to determine if each individual class member actually suffered an injury-in-fact.

In addition, the same in-depth analysis and mini-trials would need be done to determine: the amount each individual class member actually paid for medical services as well as how the "charges" and the "actual amounts paid" impacted that individual class member's measure of damages. To be clear, what was charged, which has still not been proven unreasonable, is not what was paid. The Plaintiffs focus exclusively on the "standard charges" for the medical treatment provided while ignoring *what was actually accepted as payment in full* for those services (because Plaintiffs are well aware that complex individual inquiries would need to be conducted to determine if any Class Member *actually paid* exorbitant and/or unconscionable rates).

[2]To be clear, it is not actionable if a charge was "unreasonable" compared to the charges of other care providers. The CCF, University Hospitals and many other health care providers have charges higher than normal charges but that doesn't make it actionable, as long as the parties agreed to the actual amount paid for the medical services. In actuality, the Plaintiff's proposed class cannot be certified even if the charges are deemed unreasonable. Of course, as outlined above, it would take an individual mini-trial in each case to make such an "unreasonable" determination.

Damages for the causes of action pending against Dr. Ghoubrial *require* patient-specific individual determinations because they cannot be calculated with straight forward mathematical formulas. *See Rivell v. Private Health Care Sys*., 2010 U.S. Dist. LEXIS 157621 (S.D. Ga 2010); *In Re Conagra Peanut Butter Prods. Liab. Litig*., 251 F.R.D. 689, 698 (N.D. Ga 2008). Here, the complex individual evaluations and calculations necessary to determine market value, charged amount, and only then both injury-in-fact and the measure of damages for each class member prevents the mechanical application of any formula and requires mini-trials.

As the Ninth District recognized, determining the amount of the reduction each individual received is paramount to the determination of whether each individual class member actually suffered an injury-in-fact. What each individual actually paid to satisfy the charges would then need to be compared to the established reasonable rate for each treatment modality or medical equipment at the precise moment during the nine-year class period. This is because, again, what the class members were charged for the medical services and equipment is wholly irrelevant. What matters to the necessary determination of whether each class member suffered an injury-in-fact is the amount each individual class member actually *paid* to satisfy the charges for the medical services and equipment and how the **initial charges** and **amounts actually paid** impacted that particular Plaintiff.[3] Recognizing this fatal flaw to the certification of Class A, Plaintiff continue to conflate two separate and distinct concepts: the entitlement to damages (i.e., injury-in-fact) vs. the amount of damages an injured class member is entitled to recover. However, the Ninth District Court of Appeals clearly recognized this fatal flaw.

Class action cases distinguish between the amount of damages, the calculation of which can, but ordinarily will not, defeat class certification, and the fact of injury and causation, which

[3] It is undisputed that all named Plaintiffs and every class member identified to date received a reduction in the charges before the charges were satisfied from the settlement proceeds. It is also undisputed that the percentages of the reductions were different for all Plaintiffs and class member, as were their injuries and their course of treatment.

are liability elements of a claim that can defeat class certification. *Hoang v. E*trade Group* (2003), 151 Ohio App.3d 363, 369. In order to determine whether any individual class member sustained an actual injury, monetary or otherwise, due to Dr. Ghoubrial's medical treatment and/or the charges for that treatment 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 following:

- The nature of the individual's injuries;
- The individual's course of care;
- Preexisting conditions and 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 or her own healthcare insurer or Medicare/Medicaid (e.g., named Plaintiff Richard Harbour expressly wanted the tortfeasor's insurance, not his own insurance, to pay for his medical bills), *See* Decision, pg. 14;
- The identity of the tortfeasor's insurance company and the individual claims' examiner within the insurance company;
- The amount of the tortfeasor's insurance coverage;
- The nuances of the individual insurance adjusters and their views on settlement of soft-tissue motor vehicle cases;
- The impact the treatment vs. non-treatment had on the settlement evaluation and amounts ultimately paid to settle the case;
- The amount of available Med Pay coverage, if any;
- The existence and/or amount of each individual's UM/UIM coverage;
- How the tortfeasor's insurer viewed the treatment and the treatment providers at all times 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 and consent to the treatment provided;
- The effectiveness of the treatment relative to each individual;
- The charges for the treatment provided;
- The reasonable average cost for those treatments during the relevant period during the nine-year class period;
- The individual reductions of the charges for all treatment provided;
- How those reductions compared to the average rates for those treatments during the relevant time during the nine-year class period;
- The amounts actually paid from each individual's settlement to satisfy the medical charges;
- Whether the amount actually paid was fair and reasonable after the reduction every Plaintiff and class member received;
- 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 recovery to each individual;
- Whether each individual would have received a higher net recovery if they had not been treated by Dr. Ghoubrial; and
- Any and all other issues pertinent to proving whether each individual actually sustained an injury-in-fact and therefore has standing to maintain an action.

III. INDIVIDUAL ANALYSIS IS REQUIRED TO DETERMINE WHETHER DR. GHOUBRIAL'S CHARGES ACTUALLY INCREASED THE NET RECOVERY OF SETTLEMENT DOLLARS IN AN INDIVIDUAL'S POCKET

Not only will the court have to consider individual injury-in-fact and individual damages, but the court will also need to determine whether Dr. Ghoubrial's charges increased the settlement amount and therefore the net recovery of settlement dollars paid to each member. The evidence is unequivocal and undisputed that nearly every patient treated in Dr. Ghoubrial's personal injury practice over a ten-year period received a reduction on their medical reimbursement. See Docket

4351: Ghoubrial Opp. to Cert., Exh. G (Ghoubrial Aff.) KNR negotiated a reduction of the medical charges for the vast majority of their clients once their claims resolved. See Docket #4315: KNR Opp. to Vert., Exh. N (Nestico Aff.), Exh. W (Angelotta Aff.), and Exh. X (Zerrusen Aff.); See also, Docket #4351: Ghoubrial Opp. to Cert., Exh G (Ghoubrial Aff.) Typically, the charges for the medical treatment were reduced between 30% and 70%, and some charges were reduced 100%. See Id. Dr. Ghoubrial agreed to reduce the charges "on 99.9 percent of the cases." See Docket # 4351: Ghoubrial Opp. to Cert., Exh. H (Ghoubrial Dep., p. 152, lines 2-3). It is undisputed that none of the three named Plaintiffs in Class A actually paid the "standard rates." Moreover, Plaintiffs have not, and cannot, identify a single Class Member who actually paid Dr. Ghoubrial's "standard rates" for any of the medical treatment provided. Further, Plaintiffs have likewise not shown that Dr. Ghoubrial is bound by an objectively reasonably charge and therefore the charges to begin with were unconscionable.

Despite this, Plaintiffs have based their entire injury in fact argument on the value *charged* to each class member rather than the value each member paid. To be clear, charges themselves were the product of an agreement between Dr. Ghoubrial and the patient. Dr. Ghoubrial is not limited to some arbitrary "ceiling" on charges to a patient. Dr. Ghoubrial, much like The Cleveland Clinic Foundation ("CCF"), University Hospitals, and other physicians, hospitals, and health care providers across the state, make their own determinations on how much to charge for certain services. The CCF, for example, likely has higher overhead than some entities and might charge more accordingly. As another example, Dr. Ghoubrial takes the risk of receiving no payment at all or receiving only a small fraction of the overall charges. Each health care provider has to make these determinations for themselves. The patient, on the other hand, has the option

to agree or not agree to the charge. All of the alleged class members would have had to agree to the amount being paid to Dr. Ghoubrial's company before such payment was made.

Moreover, determination of the agreed charge for any particular service would also need to be a mini-trial for each class member. To determine the agreed-upon charge, the fact finder would look to: 1) the written agreement between the patient-class member and Dr. Ghoubrial's company; 2) extrinsic evidence of the parties intent to agree to the charge (interaction between the class members and Dr. Ghoubrial or other physicians; prior treatment and charges; discussion with KNR attorneys re: charges during signing of the documents re: settlement; and many other issues); 3) the amount the patient-class member actually agreed to pay for the services. If and only if there is no evidence of an agreement to contract for services at the charged rate, then and only then can the court impose an objective agreed upon value for services based on the market value. The record is clear that despite reaching an agreement of the net value to be charged, few if any class members actually paid the full value as charged. As a result, the settlement amount and net recovery as it stands now will likely compensate all members for value of services charged, which factually the record is clear is more than the value of services actually paid. Accordingly, the court needs to determine the existence of an injury-in-fact individually, as not all members paid what they were charged. The court needs to determine what if any settlement an individual is owed based on actual payment. Finally, the court must determine how much of the settlement money was increased based on charge value, not money paid, and how that increase impacts individual recovery.

Considering these factors, it is clear the Plaintiffs cannot satisfy the predominance requirement of Civ. R. 23(B)(3). The predominance test is a more difficult standard to pass because "[f]or 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 must be capable of resolution for all members in a single adjudication." *Jacobs v. FirstMerit*, 2013 Ohio App. LEXIS 4531, 2013-Ohio-4308, ¶27 (11th App. Dist., 2013). 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 mini-trials on thousands of claims, the case could drag on for a lifetime. Such is the case here where "each individual will have to litigate numerous and substantial issues to determine the **right to recover**" just to establish "**entitlement to …damages**." *Hale v. Sharp Healthcare*, 232 Cal. App. 4th 50, 61 (2014) (emphasis added). The simple reality is that Class A cannot be adjudicated in a single proceeding with proof common to all class members for the reasons stated above. Plaintiffs' Motion to Certify Class A must be denied.

IV. WHEN THE REQUIRED RIGOROUS ANALYSIS IS PERFORMED IT BECOMES CLEAR THAT LIABILITY CANNOT BE PROVEN WITH COMMON EVIDENCE ON THE ISSUES OF HEALTH INSURANCE AND THE CALCULATION OF DAMAGES

In its Decision reversing and remanding this Court's decision certifying Class A, the Ninth District Court of Appeals rightly questioned how Plaintiffs could prove liability with common evidence considering the named Plaintiffs and class members "were not similarly situated with respect to health insurance coverage." *See* Decision, pg. 14. Because one of core allegations in the alleged price gouging[4] scheme was that class members were overcharged for medical care compared to what they would have been charged had they been able to use health insurance, the Ninth District Court of Appeals recognized that it would be necessary to analyze each class

[4] While the class has been identified as the "Price Gouging Class" this term is not applicable here. Price gouging is a pejorative term used to describe the situation when a seller increases the prices of goods, services, or commodities to a level much higher than is considered reasonable or fair. Usually, this event occurs after a demand or supply shock. This term is commonly used to describe price increases of basic necessities after natural disasters. The class at bar was not subjected to an unexpected supply shock or demand and no services were charged at a rate that was "unfair" or "unreasonable." As a result, the term "Price Gouging" is inapplicable to the Class.

member's insurance situation. Specifically, it would need to be determined which class members actually had health insurance or Medicare or Medicaid as many class members had none, some, like named Plaintiff Richard Harbour, had health insurance but preferred not to use it, and yet other members allegedly had health insurance and were coerced not to use it as part of the "scheme". *See Id*. And this is only the beginning of the analysis relative to health insurance.

After determining who had health insurance, who preferred to use their health insurance, and who was allegedly coerced not to use their own health insurance, additional individual analysis would still be required for each class member. Specifically, it would still be necessary to further analyze:

- The individual's health insurer;
- The individual's type of health coverage;
- The allowable reimbursements pursuant to each individual patient's health coverage during the relevant time during the nine-year class period;
- The individual's amount of co-pay or deductible, if any;
- The individual's health insurer's right of subrogation, if any; and
- How each individual's charges, after the reductions they all received, compared to what they would have paid after taking all of these other factors into consideration.

Ultimately, The Ninth District Court of Appeals recognized the necessary factors that would need to be considered for each individual class member cannot be accomplished on a class-wide basis and adjudicated in one trial.

Likewise, the Ninth District Court of Appeals recognized that Plaintiffs' damages formula, which this Court endorsed and adopted in its Order certifying Class A, necessarily involved *identifying the amount of the alleged overcharges for each individual class member*. *See* Decision, pg. 16. As discussed above, the calculation of the overcharge, after reduction, would involve a

number of considerations for each individual class member beyond the threshold matter of injury-in-fact. Plaintiffs seek disgorgement from Dr. Ghoubrial but would only be entitled to the disgorgement of the amount of each individual class member's actual overcharge. Conducting the required rigorous analysis of the damage question establishes that calculating the overcharge for each individual class member cannot be accomplished with common evidence in a single adjudication.

CONCLUSION

When the required rigorous analysis mandated by Civ. R. 23 is preformed, it is clear that individual issues predominate such that Class A cannot be certified as a class action. Based on the allegation, the evidence, and the law, thousands of mini-trials would be necessary to establish injury-in-fact, causation, whether the settlement as it stands could create unjust enrichment and damages for each individual class member. Clearly, this Court's decision to certify Class A was outside the framework of Civ. R. 23(B) and was inconsistent with the spirit and the letter of the law. Because individual issues predominate and because Plaintiffs cannot prove each individual class member was damaged, Plaintiffs' Motion for Certification of Class A must be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned certifies that the foregoing Opposition to Plaintiffs' Supplement to Motion for Class Action Certification of Class A was filed electronically and served upon all parties via the Court's Electronic Filing System on this 6th day of January, 2022.

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