IN THE COURT OF COMMON PLEAS
COUNTY OF SUMMIT

MEMBER WILLIAMS, ET AL.	)	CASE NO.: CV-2016-09-3928
	)	
Plaintiffs	)	JUDGE JAMES A. BROGAN
-vs-	)	(Sitting by Assignment #18JA1214)
	)	
KISLING NESTICO & REDICK LLC, ET AL.	)	**DECISION**
	)	
	)	
Defendants	)	

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This matter comes before the Court upon Plaintiffs' Motion for Class Certification and Appointment of Counsel pursuant to Civ.R. 23. Oral arguments on the Motion were held on September 12, 2019. All evidence has been filed for the record and all parties submitted supplemental briefs. For the reasons set forth below, the Motion is GRANTED IN PART AND OVERRULED IN PART.

CASE BACKGROUND

Defendant Kisling, Nestico, and Redick, LLC ("KNR") is a relatively large law firm in Akron, Ohio which represents primarily personal injury victims in low impact soft tissue injury automobile accidents. Defendants Alberto ("Rob") Nestico and Robert Redick are owners of the firm. Defendant Dr. Minas Floros is an Akron chiropractor who works for Akron Square Chiropractic Clinic. Floros actively pursues victims of automobile accidents to provide them chiropractic care. Floros refers a large number of his patients to KNR for possible litigation. Floros also refers his patients to Defendant Sam Ghoubrial, M.D., if his patient is in need of medical care. Dr. Ghoubrial is an internist who practices primarily in the Akron area under the name Clearwater Billing, LLC ("Clearwater"). Dr. Ghoubrial, like Floros, is a close personal friend of Nestico and he refers many of his personal injury patients to KNR.

Plaintiffs Member Williams, Thera Reid, and Monique Norris were patients of Floros and Ghoubrial and were represented by KNR. Plaintiff Richard Harbour was a patient of Dr. Ghoubrial and was represented by KNR. They all claim that Ghoubrial fraudulently overcharged them for certain medical devices and procedures with the knowledge of KNR to boost the settlement value of their claims against the tortfeasor's insurance carriers. They all claim they were fraudulently charged a "sign up" fee which provided no value except to KNR. All Plaintiffs except Harbour claim they were charged a phony "narrative fee" of $200 by Dr. Floros which provided no value to their case, but only operated as a "kickback" to Floros for referring them to KNR.

The Plaintiffs seeks certification pursuant to Civ.R. 23 to proceed as a class action for the following classes:

A. KNR clients who paid exorbitantly inflated prices for medical treatment and equipment provided by KNR's "preferred" healthcare providers pursuant to a price-gouging scheme by which the clients were pressured into waiving insurance benefits that would have otherwise protected them;

B. KNR clients charged for a sham narrative fee that KNR paid as a kickback to select chiropractors as compensation for referrals and participation in the price-gouging scheme; and,

C. KNR clients who had a bogus "investigation" fee deducted from their settlements to pay so called "investigators" whose job was primarily to chase new clients down to sign them up before they could sign with a competing firm.

The Plaintiffs claim they can satisfy the prerequisites to class certification under Civ.R. 23 because each of the proposed classes will seek recovery based on "standardized practices and procedures" of KNR that afflicted all of its members. *Cope v. Metropolitan Life Ins. Co.*, 82 Ohio St.3d 426, 437, 1998-Ohio-405, 696 N.E.2d 1001. And each class asserts "fraud [claims] that involve a single underlying scheme and common proof." *Carder Buick-Olds Co. v. Reynolds & Reynolds*, 148 Ohio App.3d 635, 2002-Ohio-2912, 775 N.E.2d 531, ¶47 (2nd Dist.)

citing *Cope*, 82 Ohio St.3d at 432. The Court they say can thus adjudicate, in a single ruling, the validity of each class of claims for all of the putative class-members and the class-action mechanism exists for this type of case. They also say the Court should certify the three classes at issue and should appoint the attorneys from the Pattakos Law Firm, LLC and Cohen Rosenthal & Kramer, LLP as class counsel pursuant to Civ.R. 23(F).

The Plaintiffs have provided the affidavit of Stanford University professor Nora Freeman Engstrom to describe the emergence of high volume personal injury firms like KNR, described by her as "settlement mills," made possible by *Bates v. Arizona*, 429 U.S. 1059, 97 S.Ct. 782 (1977), which invalidated state bans on attorney advertising. Professor Engstrom stated in her affidavit that KNR operates the business model of a "settlement mill." She stated that these types of firms embody the following characteristics:

> Settlement mills are: (1) high-volume personal-injury practices, that (2) engage in aggressive advertising from which they obtain a high proportion of their clients, (3) epitomize "entrepreneurial legal practices," and (4) take few, if any, cases to trial.
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> In addition to these defining characteristics, settlement mills tend to, but do not always: (5) charge tiered contingency fees; (6) fail to engage in rigorous case screening and thus primarily represent accident victims with low-dollar (often, soft-tissue injury) claims; (7) fail to prioritize meaningful attorney-client interaction; (8) incentivize settlements via mandatory quotas imposed on their employees or by offering negotiators awards or fee-based compensation; (9) resolve cases quickly, usually within two-to-eight months of the accident; and (10) rarely file lawsuits.
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> Plaintiffs Ex. 1 Engstrom Aff. ¶8.

The Plaintiffs note Engstrom reviewed discovery depositions and stated that KNR qualifies as a settlement mill because of the following:

1. KNR handles thousands of cases each year, and the firm's individual lawyers juggle extraordinary case volumes, up to "around 600" cases at any given time; Nestico Tr. 134:20-136:4, 137:13-23; Phillips Tr. 28:9-17; Horton Tr. 210:8-21; 225:2-4,

2. KNR engages in aggressive advertising, with most of its business coming to the firm from advertising and referrals from healthcare providers as opposed to from traditional sources (attorney referrals or client word-of-mouth); Petti Tr. 85:24-88:4;

id. 19:19-25; Phillips Tr.19:16-25; 112:14-113:13; Lantz Tr. 19:7-14; Nestico Tr. 234:3-7;

3. KNR epitomizes an "entrepreneurial law practice," whereby the practice of law is approached as a business, rather than a learned profession, efficiency and fee generation trump process and quality, and signing up clients, negotiating with insurance adjusters, and brokering deals is prioritized over work that draws on a specialized legal education; Lantz Tr. 283:2-284:1 (explaining that, "[t]o meet the quotas...you couldn't spend that much time" and estimating that each case received "no more than five hours" of attorney time "and that might be generous"); Petti Tr. 87:2-87:3; accord Horton Tr. 205:19-20 (describing KNR as "an efficient business for sure"); see also Petti Tr. 193:20-22 ("[M]ost of those cases really settle themselves. Again, like I said earlier, there's very little legal stuff going on.").

4. KNR takes comparatively few cases to trial; Petti Tr. 27:4-12 (recalling that, during his time at the firm, none of his cases went to trial); Horton Tr. 222:1-7; (recalling that, of the cases he handled while at the firm, only one ended up going to trial); *accord* Lantz Tr. 279:6-9 ("We were just encouraged – you get more money in pre-litigation or you get more money settling the case than you do going to trial);

5. The firm charges clients via a contingency fee, and requires clients to "advance litigation expenses" of approximately $2000 if a client insists on taking a case to trial; Nestico Tr. 33:25-34:4 (explaining that the firm's billing is "99 percent…[i]f not 100 percent" contingency-based); Lantz Tr. 363:16-25, 365:11-12 (describing the threatened $2000 fee as "our way to get them to take settlements"); *Id.* 503:4-23 (further discussing how the obligation to front $2000 in litigation expenses was strategically used to dissuade clients from taking claims to trial);

6. The firm does not engage in rigorous case screening, accepts nearly every case that comes through the door, and primarily represents clients with low-dollar claims, and minor soft-tissue injuries; Horton Tr. 220:16-23; *accord* Phillips Tr. 36:4-13; 40:6-19, quoting Nestico ("I want them all"); Petti Tr. 26:2-10 (recalling that the "typical case settled for less in terms of fees than $2000"); Lantz Tr. 279:4-9 ("I mean they were low value cases."); Phillips Tr. 36:14-27:24; Lantz Tr. 157:6-10; 434:3-8;

7. KNR does not prioritize meaningful attorney-client interaction, and instead encourages "persuasive tactics" to encourage clients "to settle"; Lantz Tr. 153:13-16 ("[O]n the volume that we were dealing with, you can't differentiate between cases. You don't see your clients half the time."); *Id.* 113:15-21 ("They wanted – even when the cases got to litigation here, all of them settled, regardless if you had to shove the settlements down the client's throat… ."); *Id.* 363:16-25; Petti Tr. 21:18-25;

8. KNR imposes quotas on its attorneys, requiring them to generate a certain sum (typically, $100,000) in fees per month on penalty of probation or termination, and basing compensation on the total fees generated; Phillips Tr. 28:18-29: 12; Petti Tr. 21:18-22:15 ("I cannot think of anything else that they ever said other than generate

fees. And the goal was $100,000 a month and you've got to meet the goal."); Lantz Tr. 55:17-56:3; 60:5-9 ("I mean I would be to the point of tears some months because I was so worried I wasn't going to hit the 100 grand goal."); Phillips Tr. 33:10-33:18 ("[Y]ou got paid percentages, based on how many fee dollars you came up with. Then, once you hit certain markers in fee dollars during the year, that percentage would go up."); Horton Tr. 203:23-25; Nestico Tr. 61:5-16; 148:8-154:10;

9. Finally, and accordingly, KNR rarely files lawsuits. *See* Lantz Tr. 282:20-283:1 (estimating that, of her cases, approximately 5% went into litigation); Petti Tr. 27:4-12 (recalling that, of his cases, "less than five percent" ever even went to the litigation department); Lantz Tr. (*Id*. 113:15-21 "[A]ll of them settle… .]").

Plaintiffs Ex. 1 ¶11- ¶19.

Plaintiffs note that Professor Engstrom opined that:

> [i]f an attorney obtains the majority or vast majority of his business via paid advertising, rather than by referrals or word-of-mouth, he need not have a sterling reputation among fellow practitioners or past clients. He requires only a big advertising budget and a steady supply of unsophisticated consumers from which to draw.

Id. ¶25. Thus, "aggressive advertising reduces the long-term cost of economic self-dealing." *Id.*, s*ee also Id*. ¶26-¶27 ("[S]ettlement mills… tend to represent individuals who are poor, uneducated, and/or who belong to historically disadvantaged ethnic and racial minority groups); *accord* Nestico Tr. 477:11-25 (explaining that "a lot" of KNR's clients come from lower socioeconomic backgrounds); Horton Tr. 432:6-18 ("We had a lot of African-American clients… ."); Petti Tr. 172:12-15; Lantz Tr. 192:13-16 (explaining that the majority of KNR's clients "don't have the network of family lawyers that they would refer to.").

Further, Engstrom notes that the settlement mill model incentivizes "medical build-up" the practice of seeking unnecessary treatment to inflate a plaintiff's claimed damages, which increases the amount of the firm's contingent fee.

The Plaintiffs argue that the mis-aligned interests inherent in KNR's business model gave rise to the fraudulent schemes at issue in this lawsuit. The Plaintiffs argue that the

incentive for medical build-up and the need for a steady stream of clients caused KNR to enter into a *quid pro quo* relationship with providers who trade referrals and conspire to collect exorbitant fees for healthcare.

CLASS A – THE "PRICE GOUGING" CLASS

The Plaintiffs argue that discovery has shown that Defendants Ghoubrial and Floros charged KNR's clients exorbitant and unconscionable rates for medical care, medical supplies, and chiropractic care in disregard for less expensive and less invasive modes and sources of treatment. Plaintiffs contend that KNR used "preferred" chiropractors like Floros to solicit poor clients who, with KNR, would refer them to Ghoubrial who would overcharge them for care. Also, the Plaintiffs contend that KNR and the healthcare providers would coerce the clients to forgo their own health insurance coverage and other benefits that would have otherwise been provided by the patients' health insurance carriers.

The Plaintiffs argue that this evidence demonstrates that chiropractors (including Dr. Floros) typically made referrals to Dr. Ghoubrial, who then overcharged KNR clients for medical care. The Plaintiffs note Dr. Ghoubrial admitted at his deposition he has collected nearly eight million dollars from KNR client settlements in eight years. The Plaintiffs note that Dr. Ghoubrial offered the great majority of his patients trigger-point injections. (See Petti, Phillips, and Lantz's depositions). Dr. Ghoubrial required that his patients sign a form giving him the right to collect the full amount of his bills from their settlements through the KNR firm. Petti Tr. 26:11-18. KNR prepared the form on Ghounbrial stationary. The Plaintiffs argue further as follows in their brief:

> Ghoubrial's refusal to accept payment from the KNR clients' health insurers allows him to charge an exorbitant rate for this procedure. At his deposition, Ghoubrial confirmed that his practice charges in increments of $400, $800, and $1,000 for a series of trigger-point injections administered in a single appointment. Ghoubrial Tr. at 35:4-36:19; 257:5-258:3; 214:23-215:5; 234:23-

> 25; 244:18-19; 207:25-208:3; 184:14-21. By contrast, the U.S. government's Center for Medicare & Medicaid Service's public "physician fee-schedule search" available at CMS.gov, confirms that the most Medicare or Medicaid would ever compensate Ghoubrial for a series of trigger point injections administered under the same billing codes is $43.48. *Id*. at 256:22-258:3, Ex. 25.

Plaintiffs' Motion for Class Certification, pg. 17.

Plaintiffs note that former KNR attorney Amanda Lantz, who became the longest tenured pre-litigation attorney in the firm's Columbus office, testified that the trigger point injections were readily available from other local physicians for $200 or less. Lantz Tr. 29:17-19; 30:14-20. And physician Michael Walls, M.D., a board certified pain-management specialist, formerly the Chief Fellow of the Cleveland Clinic's Pain Management unit from 2008-2009, who has since treated thousands of patients from Ohio and Kentucky for back and neck pain since 2009, submitted an affidavit confirming that his office is typically reimbursed between $70 and $90 by insurers for the injections. Exhibit 15, affidavit of Michael Walls, M.D., ¶6.

The Plaintiffs note that Dr. Ghoubrial confirmed the prices his office charged for his patients for medical care:

> $1,500 for back braces for which Medicaid would not have reimbursed, that Ghoubrial purchases for $100 and that would have been readily available for purchase by the clients from alternative sources for $100 or less; Ghoubrial Tr. at 184:22-185:2, 227:24-228:17; 256:22-258:3, Ex. 25; 284:6-24, Ex. 29; 05/09/2019 Google search results from Cybertech one size fits all brace, attached as Exhibit 18.
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> and $500 for "Ultima 3T" electrical stimulation devices ("TENS units") for which Medicaid would not have reimbursed, that Ghoubrial purchased for $28.75, and that similarly would have been readily available for purchase by the clients from alternative sources at $28.75 or less; *E.g., Id*. 208:1-23; 256:22-258:3, Ex. 25; 284:6-18, Ex. 29; Lantz Tr. 184:6-11; 05/09/2019 Google search results from Ultima 3T TENS Unit, attached as Exhibit 19.

Plaintiffs' Motion for Class Certification, pg. 25.

The Plaintiffs note that Ghoubrial stated that he charged these prices for back braces and TENS units to compensate him for his overhead expenses and he "felt we were on par with what they sell for generally." Ghoubrial Tr. 280:17-21, 284:19 – 285:25.

Plaintiffs note that Amanda Lantz testified that KNR management directed staff that 'if our client wanted an M.D., send them to Dr. Ghoubrial because Ghoubrial charges a lot more for his treatment which means it increases the value of the case.' Lantz Tr. 27:15-23; 29:17-19; 30:14-20.

Plaintiffs similarly point out that Dr. Floros and all of KNR's "preferred" chiropractors do not accept health insurance payments from KNR's clients and require a letter of protection as a condition of treating them. See Plaintiffs' Motion for Class Certification at pg. 30. Plaintiffs also point out that former KNR attorney Kelly Phillips testified that he expressed his concern to his employer, KNR, that Nationwide Insurance was flat out refusing to consider anything related to Clearwater (Ghoubrial's personal injury practice) making settlement a near financial impossibility. In the e-mail to Nestico, he stated that it was not difficult to make an argument that "we are treating Clearwater's interest as equal to our clients." Ex. 23. The Plaintiffs noted that Nestico angrily responded to Phillips' e-mail and Phillips was terminated two months later. Plaintiffs point out that both Amanda Lantz and Kelly Phillips disputed Nestico's claim that there was a shortage of doctors who would treat personal injury patients and accept their health insurance. As Lantz testified, "there was always options." Lantz Tr. 323:6; Phillips Tr. 76:23-77. Dr. Walls corroborated the former KNR attorneys' testimony.

Plaintiffs argue that the corrupt nature of KNR's relationships with the Defendant healthcare providers renders all of the fees collected pursuant to these relationships fraudulent and subject to disgorgement as a matter of law.

Thus, the Plaintiffs seek certification of a class that includes:

> 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.

These class members, Plaintiffs assert, including Named Representatives Norris, Harbour, and Reid are all entitled to disgorgement of all fees collected by Ghoubrial, Floros, and the KNR Defendants pursuant to the price-gouging scheme on claims for fraud, breach of fiduciary duty, unconscionable contract, and unjust enrichment.

The KNR Defendants have addressed the Plaintiffs' factual allegations relating to Class A, the Price Gouging Class. KNR asserts that it rarely refers clients to Dr. Ghoubrial. In his affidavit, Nestico states that KNR refers clients to over a dozen chiropractors, who in turn refer a small percentage of their patients to Ghoubrial. KNR notes that Ghoubrial has referred patients to over 30 chiropractors in Ohio and has treated patients represented by more than 50 attorneys. KNR notes that during the class period less than 15% of KNR clients were treated by Ghoubrial.

KNR argues as follows:

> Once a KNR client agrees to treat with a chiropractor, the course of treatment is determined by the chiropractor. Exh. D, Nestico Tr. p. 401; Exh. B, Petti Tr. p. 58; Exh. A, Phillips Tr. p. 147; Exh. P, Floros Aff. Each chiropractor, based upon the patient's physical condition, history and clinical needs, makes an independent determination as to the patient's treatment plan. Exh. P, Floros Aff. A small percentage of Dr. Floros' patients are referred to Dr. Ghoubrial. Exh. P, Floros Aff. KNR plays no role in the decision as to whether or not an individual chiropractor refers a patient to Dr. Ghoubrial. Exh. N, Nestico Aff.
>
> Dr. Ghoubrial, in addition to himself, has employed as many as five (5) different physicians over the class period. Exh. O, Ghoubrial Aff. The patients' course of care, treatment and medical needs, are determined by each physician based upon the patient's history, injuries and clinical examination. Exh. L, Ghoubrial Tr. pp. 65-69; 120-121. KNR has no role in determining the specific treatment prescribed to any patient. Exh. O, Ghoubrial Aff. KNR plays no role in setting or determining the initial amounts charged by Dr. Ghoubrial for care, treatment, medical devices or therapies. Exh. O. Ghoubrial Aff.

> KNR's relationship to Dr. Ghoubrial, like that of nearly 50 attorneys through Ohio, stems from the fact that they represent a fraction of his patients. In that role, KNR negotiates and discounts the treatment amounts charged by Dr. Ghoubrial to their clients. The vast majority of Dr. Ghoubrial's medical charges are reduced by KNR. Exh. N, Nestico Aff. The discounted reimbursement, which is agreed to by Dr. Ghoubrial, ranges from 98% to 0%. Exh. N, Nestico Aff. During certain times in the class period, the reimbursement determination and negotiation with Dr. Ghoubrial was conducted by individual KNR lawyers. Exh. N, Nestico Aff.; Exh. W, Angelotta Aff.; Exh. X, Zerrusen Aff. At other times, this function was handled by Defendant, Attorney Alberto Nestico. Exh. N, Nestico Aff.

KNR Defendants Brief in Opposition at pg. 3.

Nestico further stated in his affidavit that KNR has referred clients to well over 100 chiropractors and various physicians. KNR argues that there is no issue that KNR kept track of which clients were sent to which chiropractors because the purpose was to keep positive relations with chiropractors. KNR notes that Brandy Gobrogge testified that KNR sent clients to chiropractors who sent them business and to chiropractors that didn't. Ex. E. Gobrogge Tr. p 237.

For his part, Dr. Ghoubrial notes that he has been a licensed physician for over 20 years in good standing. He states that he treats victims of auto accidents referred to him by chiropractors like Dr. Floros. He states that while some of the parties are represented by KNR, Ghoubrial has no referral contract with KNR or chiropractors. See Ex. G, Ghoubrial Aff. He states that he regularly sees injury patients represented by approximately 70 law firms and his charges for medical services are uniform for all patients. Dr. Ghoubrial states he started his personal injury practice, now run under Clearwater Billing, LLC ("Clearwater"), to serve individuals who are often without health insurance or government assistance. He states Clearwater physicians have significant experience in treating traumatically induced soft tissue injuries.

Ghoubrial states he takes a multidisciplinary approach to treat patients with soft tissue injuries consistent with the standard of care in Ohio. He states as follows:

> In addition to physical therapy with a PT specialist or chiropractor, treatment modalities for these injuries generally include a combination of pain medication, muscle relaxers, NSAIDs, and various other medications depending on the circumstances. Treatment may also include the use of back braces, TENS units, the release of trigger points through the use of trigger point injections, referrals to health care providers who provide services Clearwater does not, and other potential treatments.

Ghoubrial Brief at p. 15.

Ghoubrial states that trigger point injections with or without steroids are one of the several common accepted methods of treatment. Dr. Ghoubrial notes that Dr. Adam Carinci, M.D., a professor at the University of Rochester Medical School, testified in his affidavit that the administration of a trigger point injection is medically appropriate and used on a fairly routine basis in the medical profession to treat patients with traumatically-induced soft tissue injuries. He also indicated medical studies support his statements. Finally, Dr. Ghoubrial points out that Thera Reid admitted the trigger point injections provided her relief of her pain and helped her heal. Reid Tr. at 373-375.

Dr. Ghoubrial notes that Dr. Carinci takes the same position concerning the efficacy of TENS units and he supplied medical literature to corroborate Dr. Carinci's testimony. Dr. Ghoubrial testified that each individual patient is specific and treatment modalities are different. (Ghoubrial Tr. 135 lines 7-9).

Dr. Ghoubrial states he never coerced patients into forgoing insurance coverage and patients agreed to pay Clearwater from settlement proceeds rather than out-of-pocket. He also states he agreed to reduce his bills in nearly every case. Dr. Ghoubrial also points out that that other physicians have stated his charges are within the standard range for charges. Dr. Ghoubrial stated in his deposition that he regularly sees reductions from 30-75% in paid amounts from amounts billed. *Id*. at Ghoubrial Tr. 152 lines 11-13. He states he never treated

Ms. Norris at any time, but he supports the treatment given her by his associate, Dr. Gunning. Lastly, Dr. Ghoubrial states that non-party Sharde Perkins was a sophisticated patient who requested a TENS unit which was provided by a Clearwater physician (a Ultima 3T Tens Unit).

In his factual statement regarding the price-gouging class, Minas Floros stated he provides chiropractic care at Akron Square Chiropractic ("ASC") where he is an employee. Floros states that he provides various treatments to injured patients both passive and active therapies, and other treatments. Ex. B, Floros Tr. He notes that he provides each patient with a treatment plan and when necessary refers patients to medical doctors for medical consultation. Ex. A. He states his clinic focuses on treating victims of personal injuries resulting from car accidents who present with soft-tissue injuries commonly. He notes that these injuries take a long time to heal and if unattended can lead to surgery.

Floros states that it is common for his patients to seek legal help and he will recommend various law firms to patients. His counsel states in his brief the following:

> While Floros does not have a policy on recommending patients to any particular law firm, he often recommends KNR. *Id*. He does this for multiple reasons. First, he is friends with Rob Nestico and other attorneys at KNR. *Id*. Second, he believes that KNR's attorneys will treat his patients well. *Id*. Third, KNR is one of the largest personal injury firms in the Akron area and offers legal assistance past working hours. *Id*. This is important because Floros often treats patients until 7:00 p.m. *Id*. And fourth, Floros believes that KNR will pay (with the permission of their client) ASC's bill for chiropractic treatment or portion of it from the settlement proceeds. *Id*. Further, the fact that Floros is willing to accept significant reductions on his bills is extremely beneficial to any law firm with whom he may have a relationship because this helps to more quickly, and efficiently, settle claims.
>
> There is no *quid pro quo* agreement, however, between ASC/Floros and KNR (or any other law firm and medical provider) for patient recommendations. *Id*. Nor has Floros ever received payments for patient recommendations. *Id*.
>
> In fact, Floros will often recommend patients to other attorneys, such as Slater & Zurz, Gary Himmel, Alberto Pena, Elk and Elk, Amourgis and Associates, and Skolnick Weiser Law Firm and Lisa Haywood. *Id*; Ex. B 85-87.

> Sometimes he will also recommend several attorneys at once to a patient. This allows the patient to choose the attorney or law firm that best fits their needs. *Id*.

Defendant Floros' Brief in Opposition, pp. 9-10, citing Ex. B. Floros Tr.

CLASS B – THE "NARRATIVE FEE" CLASS

Putative Class B relates to KNR's practice of charging its clients an across-the-board "narrative fee," which Plaintiffs say functioned as a "kickback" to high-referring "preferred" chiropractors. The Plaintiffs say the evidence shows that KNR only paid the narrative fee to selected chiropractors, immediately upon referral to or from a case with those chiropractors, before it was ever determined whether a narrative would be useful in resolving a given clients' case.

Former KNR employees Petti and Horton described in their depositions how KNR utilized the use of narrative reports. The Plaintiffs note the following:

> Lawyers at KNR had no say in deciding whether to obtain a narrative report in the cases they were handling. Management at the firm demanded that they do so, with the decision to order the report based entirely on the identity of the chiropractor who is treating the particular client. Horton Tr. 300:15-25; Petti Tr. 78:23-79:12 ("[L]awyers had nothing to do with whether or not there was a narrative report fee."). Thus, certain "preferred" chiropractors, including Defendant Floros and other chiropractors from Plambeck-owned clinics, "create" a narrative report on "every single case or virtually every single case." Petti Tr. 284:23-285:6. KNR procured the reports "automatically, immediately, as soon as the case comes in," before anyone at the firm had an opportunity to evaluate the relevant facts. *Id*., 284:23-285:12; 317:22-318:1. Nestico admitted that narrative fees were ordered from these chiropractors as a "default" policy. Nestico Tr. 313:21-25.

Plaintiffs' Motion for Class Certification, p. 45.

The Plaintiffs point out that the "Plambeck Clinics"[1] which includes Akron Square Chiropractic and Dr. Floros were among "the only narrative fees that get paid." Ex. 26 Dr. Floros confirmed that between 2013 and 2017, KNR and Floros referred more than four thousand clients to one another. Floros Tr. 168:12. Floros prepared a narrative report in

[1] "Plambeck Clinics" are those chiropractic clinics owned by Kent Michael Plambeck.

virtually every case. See Petti and Horton transcripts. Petti testified that the narrative reports had no independent value whatsoever and Lantz opined the reports did nothing to increase the value of clients' cases. Petti Tr. 277:9-12; Lantz Tr. 267:9.

Insurance industry expert Larry Lee stated in his affidavit that Plambeck Clinics had become the subject of fraud investigations and lawsuits by several large companies and was well known in the insurance industry for suspected over-billing. Ex. 21.

Lee explained the chiropractors provided the reports in every case regardless of any apparent accident-related causation issues. He stated that these reports rarely contained supportive information to document the treatment provided to the law firm's client. The Plaintiffs point out that Dr. Floros admitted that causation is basically assumed in the great majority of cases KNR handles. Floros Tr. 117:4-118:21, 119, 120.

The Plaintiffs argue that it was clear to KNR's attorneys that the narrative fee was a "kickback" to compensate "preferred chiropractors" for continuing to refer cases to the law firm. Petti Tr. 277:1-12; 67:4-23; 80:5. Petti testified that KNR's operations manager, Brandy Gobrogge believed that Nestico had "invented" the narrative fee. Gobrogge believed that Nestico had "invented the narrative report thing" and told Petti it was after Nestico "invented" the narrative reports that "business really took off." *Id*. 68:15-21. A Plambeck Clinics chiropractor confirmed as much when he asked Petti, who was then unaffiliated with KNR whether he would match the $200 that KNR paid for client referrals and told him, "if you want referrals from me, you've got to get a narrative report every time." *Id*., 91:10-19; 283:4-13. Another Columbus-area chiropractor told Petti that "he had lunch with [Nestico] and [Nestico] brought up the narrative report and if he wanted to get narrative reports – or produce narrative reports as part of their relationship and [the chiropractor] said, no." *Id*., 461:24-462:6.

Further, Plaintiffs note that the KNR handbook explicitly stated that the firm should remit narrative fees to the doctors personally rather than to the clinics through which they operated their practices. Gobrogge Tr. 298:6-9; Ex. 33.

Upon these facts, Plaintiffs seek certification of a class that includes:

> All current and former KNR clients who had deducted from their settlements a narrative fee paid to (1) Dr. Minas Floros of Akron Square Chiropractic, (2) all other chiropractors employed at clinics owned by Michael Kent Plambeck, and (3) certain other chiropractors identified in KNR documents as "automatic" recipients of the fee, from KNR's founding in 2005 to the present.

Plaintiffs argue that these class members, including Class Representatives Norris and Reid, are all entitled to damages and disgorgement of all narrative fees deducted from their settlements on claims of fraud, breach of fiduciary duty, and unjust enrichment.

KNR for its part argues that the narrative report fee is not a "kickback" because this allegation ignores the fact that KNR pays this fee to all chiropractors and doctors that provide them these reports, not just those that Plaintiffs have identified as "preferred chiropractors." Ex. Q. KNR argues that attorneys throughout Ohio have been paying narrative fees for decades. Nestico testified that KNR believes that narrative reports are of value in settling the cases of their clients. Lastly, KNR pays every chiropractor and doctor who provides a narrative report. Relating to the class certification issue, KNR argues that the treatment of each class member was different and the content of each narrative report varies and the value of his report is different.

Floros argues the narrative reports are necessary in litigation in negotiating personal injury claims. Floros points to the Affidavit of John Lynette, Jr., an attorney with a personal injury firm Slater and Zurz. Ex E. Lynette Aff. According to Lynette, narrative reports are useful in negotiating with claims adjusters. *Id*. This is because the narrative report explains the causal relationship between the motor vehicle accident in which his client was involved, and

the injuries sustained. *Id*. The plain language used in narrative reports, like the ones provided by Floros, make it easy for a layperson to understand what caused the injury, what the injury was, what treatment was administered, and what the patient's prognosis is. *Id*. Lynette also testified that Floros' narrative reports are obtained for the benefit of his clients in negotiating a settlement and for use in anticipation of litigation. *Id*. And, that it is separate expense of litigation and not part of the health care treatment. *Id*.

Floros also points out a highly experienced insurance expert, John Vallillo, provided an affidavit on the benefits of narrative reports. He stated:

> "One of those tools of evaluation is obtaining a narrative report from treating physicians that provides basic information regarding the patient including brief medical history, a record of the current injury or sickness including claimed and evident symptoms, a diagnosis by the treating physician, a record of the treatment regimen, and a prognosis of recovery. These reports also often include opinions regarding causation. Rather than deciphering volumes of medical records, the narrative report provides an efficient method of evaluating each claim and is a common document to be used by both claims personnel and attorneys."

Ex. C, Vallillo Aff.

Vallillo then testified that it is common for attorneys to obtain narrative reports and that it cannot be inferred that the purpose is to improperly divert client funds to a chiropractor:

> "It is not unusual, nor may an improper relationship be inferred by an attorney's decision to obtain narrative reports in any soft tissue injury cases. Many insurance carriers request copies of narrative reports as a matter of course in evaluating injury claims. Therefore, it cannot be said that it is unusual or unreasonable for attorneys to request such reports as a matter of course. In my experience, the purpose of these reports is to help get the case resolved. It cannot be inferred that the purpose of the reports is to improperly divert client funds to a chiropractor."

Id.

Floros further notes each narrative report is also different. Ex. A; Ex G. Each report has facts and opinions unique to each patient, and often include an outline of future risks, a future care opinion, and estimated costs of future care. *Id*. These opinions are not boilerplate.

Id; Ex. F, Petti Tr. 442-443; Ex. I, Reid Tr. 170-176; 335-337.[2] Nor are these opinions readily available anywhere in the medical records. *Id*; Ex. H, Reid's and Norris' Medical Records.

Floros notes he reviews the patient's entire file and this can take hours in some cases and Petti himself estimated it would have taken Floros at least an hour to complete Reid's narrative report.

Floros notes that Thera Reid denied the narrative report was fraudulent and Monique Norris testified the reports had value but should have been cheaper. Floros notes that Gary Petti explained the reports are used to explain why the plaintiffs' injuries were different or more challenging than they might appear from the contents of the medical reports. Ex. 24. Floros also notes that Petti even estimated that he spent an hour preparing Reid's narrative report. And finally Floros notes that in some cases narrative reports are useful and you would have to look at each case individually to determine if the narrative fee was a kickback payment or was actually needed in case preparation. Petti Tr. at 310, 311.

CLASS C – THE "INVESTIGATIVE FEE" CLASS

Putative Class C relates to KNR's practice of charging clients an across the board $50 - $100 "investigation fee" to each client when it settles their case. KNR portrays the payment as reimbursement of a payment made to a specified "investigation" firm that worked on the case. Plaintiffs assert the fee actually represents the cost of basic marketing and administrative functions which are already subsumed in the KNR contingency fee contract, and for which KNR could not lawfully double-charge its clients. KNR has charged this fee to the vast majority of its clients since 2009, approximately 40,000 to 45,000 of them. Nestico Tr. 132:18-15; 136:15 –137:16.

[2] Both Plaintiffs and their witness Petti testified that the narrative reports had information not from the medical records. Both testified that narrative reports had information that was not boilerplate but instead particular to the patient.

KNR employees generally referred to the fee as a "sign-up" fee reflecting its true purpose: to sign clients as soon as possible so they are not lost to KNR's competitors. See e.g., Gobrogge Tr., 206:22-207:14. KNR pays the $50 - $100 to "investigators" after they meet with a client to obtain his or her signature on the KNR engagement letter, collect any relevant paperwork or information, and sometimes take photographs of any injury or damage the client may have sustained. The evidence from internal KNR emails, and deposition testimony from two of the alleged "investigators" make clear the "sign ups" serve as a means of quickly procuring clients. Testimony from former KNR attorneys similarly confirms the purpose of the investigators was to assist the firm in obtaining clients before they sign with a competing law firm. See Lantz, Horton depositions. Plaintiffs state the "investigators" only perform, at most, basic administrative tasks that any law firm would have to perform to adequately represent the client.

Nestico defended the investigation fee by claiming that in addition to sign ups, the investigators are "on the hook" to perform other administrative tasks or messenger services on an ad hoc basis, as might be necessary on any given case. Nestico Tr. 602:19-604:21. But, the firm's list of criteria for the investigator's work only refers to basic administrative tasks relating to the sign-up, including (1) the signed contingency fee agreement and related "authorization" and "proof of representation" forms; and (2) photos of the client, the client's insurance cards, any visible injuries, the vehicle and related police report. Plaintiffs Ex. 29; see also Lantz Tr. 102:20-25 (explaining that the investigators gathered only "the basic information," such as "name, address, how many people were involved, where to get the police report" and then get "the document signed."). She further stated when a potential client communicated with the firm it was KNR's policy to send an investigator to sign the client to a fee agreement within 24 hours and that certain chiropractic offices also followed the policy and requested KNR

investigators to come to their offices to sign patients to KNR fee agreements. Plaintiffs Ex. 28, Affidavit of Amanda Lantz. Lantz stated the supervisors at KNR made it clear that the purpose of sending the "investigators" was to avoid losing the potential client to another law firm. *Id*. She confirmed the "investigation fee" was charged as a matter of firm policy whether an "investigator" ever met with a client or not. *Id*.

Further, KNR charges the "investigation fee" even on cases where an investigator performs no tasks at all. KNR documents and testimony from former KNR attorneys confirms that investigators are compensated on cases on a rotating basis, even where they perform no sign-ups and no task at all in connection with the case. Former KNR attorney Rob Horton confirmed that "investigators" Simpson and Czetli were paid on a total of 22 cases that were signed up on a single day across the state of Ohio, including Toledo, Columbus, Akron, Canton, Shaker Heights, Elyria, and Youngstown.

By this method, the firm compensates certain investigators for other odd jobs the "investigators" perform around the office, and essentially pays the salaries of functional employees who serve as in-house messengers and office assistants. Plaintiffs argue the "investigators" are functionally KNR employees, working as part of the machinery for signing up and retaining new clients. The "investigators" do the "sign ups" in accordance with specific instructions contained in the KNR emails and record and report their work on I-Pads provided to them by the firm. The investigators do not invoice KNR for the work, nor account for their work at all, they rely exclusively on the firm to account for the jobs they handled. Former KNR attorneys testified that the investigators have their own offices at KNR, are in the office every day, and are expected to be on call to handle sign ups and other small tasks similarly to other full-time employees of the firm. Further, Plaintiffs argue the so-called "investigators" lack any credentials to perform actual investigations.

Plaintiffs assert KNR systematically and deliberately misleads its clients as to the true nature of the "investigation fee." The settlement memoranda provided to KNR clients listed the name of an "investigation" company and the amount of money it would be receiving from the settlement proceeds and clients are never informed of the true nature of the "investigation fee." And, the settlement memoranda do not disclose that the payments pertained to a "sign up," a failure that is especially misleading in the context of KNR's constant promises to prospective clients of a "free consultation." Plaintiffs' Ex. 31. The initial consultation is generally the only meeting a client may have with the so called "investigators" who merely obtain the client's signature for KNR contracts. Amanda Lantz confirmed that KNR attorneys, including herself, "intentionally misled [KNR clients] as to what those investigation fees were."[3]

For its part, KNR argues that it charges a fixed rate regardless of the services provided, and it is charged pursuant to the client contract that allows for the deduction of "reasonable expenses" from the client's settlement or judgment. Defendant Nestico stated in an affidavit that the fee is a "pass through expense." He further stated that KNR utilizes between 10-12 different investigators who are not KNR employees and who perform a variety of services, four of whom are former police officers. And, KNR provided affidavits of some of its investigators, attesting to the variety of services performed including taking accident scene photos, obtaining property damage photos at body shops, taking photos of client injuries, obtaining medical records and bills, locating witnesses, delivering and obtaining documents from clients, locating clients who are not responding to correspondence, and filing pleadings at various courthouses.

[3] Ms. Lantz, upon termination of her employment with KNR, filed a report with Disciplinary Counsel relating to the investigation fee and other practices of the KNR firm.

Plaintiffs assert all named class representatives (Williams, Norris, Harbour, and Reid) and Class C members are entitled to damages and disgorgement of all "investigation fees" deducted from their settlements on claims of fraud, breach of fiduciary duty, breach of contract and unjust enrichment. Plaintiffs seek certification of Class C: All current and former KNR clients to whom KNR charged sign-up fees paid to AMC Investigations, Inc., MRS Investigations, Inc., or any other so-called "investigator" or "investigation" company, from 2008 to the present (i.e., the "investigative fee class").

STANDARD OF REVIEW

The Ohio Supreme Court has defined seven prerequisites to class certification under Ohio Civ. R. 23(A) and (B):

1. an identifiable class must exist, and the definition of the class must be unambiguous;
2. the named representatives must be members of the class;
3. the class must be so numerous that joinder of all members is impractical;
4. there must be questions of law or fact common to the class;
5. the claims or defenses of the representative parties must be typical of the claims or defenses of the class;
6. the representative parties must fairly and adequately protect the interests of the class; and
7. one of the three Civ.R. 23(B) requirements must be satisfied.

In re Consol. Mtge. Satisfaction Cases, 97 Ohio St.3d 465, 2002-Ohio-6720, 780 N.E.2d 556, ¶6, citing *Warner v. Waste Mgt., Inc*., 36 Ohio St.3d 91, 96-98, 521 N.E. 2d 1091 (1988).

Civ.R. 23 is not a "mere pleading standard." *Felix v. Ganley Chevrolet, Inc*., 145 Ohio St.3d 329, 2015-Ohio-3430, 49 N.E.3d 1224 ¶26. Rather, Civ. R. 23 "imposes stringent requirements for certification that in practice exclude most claims." *Am. Express Co. v. Italian*

Colors Rest., 570 U.S. 228, 133 S.Ct. 2304, 2310 (2013); *see also Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 345, 131 S.Ct. 2541 (2011). Failure to prove any class prerequisite "will defeat a request for class certification." *Stammco, LLC v. United Telephone Co.*, 136 Ohio St.3d 231, 2013 Ohio 3019, ¶24, 994 N.E.2d 408 (citation omitted). The party seeking class certification bears the burden of proving that they met the requirements of Civ.R. 23(A) and (B) by a preponderance of the evidence. *Cullen v. State Farm Mut. Auto. Ins. Co*., 137 Ohio St.3d 373, 2013 Ohio 4733, ¶15, 999 N.E.3d 614.

A court, therefore, must "carefully apply the class action requirements" and conduct a "rigorous analysis" into whether the prerequisites for class certification under Civ.R. 23 have been satisfied. *Id*. This entails "resolv[ing] factual disputes relative to each [Civ.R. 23] requirement and to find, based on those determinations, other relevant facts, and the applicable legal standard, that the requirement is met." *Id*. ¶16.

Nevertheless, "any doubts a trial court may have as to whether the elements of class certification have been met should be resolved in favor of upholding the class." *Carder Buick Olds Co. v. Reynolds and Reynolds*, 148 Ohio App.3d 635, at 639, citing *Baughman v. State Farm Mut. Auto. Ins. Co*., 88 Ohio St.3d 480 at 487, 2000 Ohio 397, 727 N.E.2d 1265.

1. <u>Identifiable and Unambiguous Classes</u>

For an identifiable and unambiguous class, Plaintiffs must clearly identify the group of claimants they seek to represent the lawsuit in a manner that permits identification of members with "reasonable effort." *Hamilton v. Ohio Savings Bank*, 82 Ohio St.3d 67, 72, 1998 Ohio 365, 694 N.E.2d 442 (1998). Here, each proposed class is comprised of current and former KNR clients who were variously charged fees in the three separate allegedly fraudulent schemes.

The Plaintiffs argue that all three classes are identifiable from the Defendants' patients and client files, including the settlement statements each KNR client signed upon resolving this case. Thus, all Class A members they say can be identified by the "reasonable effort" it would take to review these documents that are in every client's file. *Hamilton v. Ohio Savings Bank*, 82 Ohio St.3d 67, 71, 1998 Ohio 365, 694 N.E.2d 442 (1998).

The settlement memoranda for each of the Named Representatives also confirm that they each had the contested fees deducted from the amount remitted to them by KNR: (1) Named Representatives Norris, Harbour, and Reid were charged $600, $3,000, and $3,900, respectively, for payment to Ghoubrial under the price-gouging scheme; (2) Named Representatives Norris and Reid were charged $200, and $150, respectively, for narrative fees paid to Floros; and (3) all four Named Representatives were charged the investigation fee. Ex. 30, Williams Aff., ¶3, Ex. B, Ex. 14, Harbour Aff., ¶8, ¶14, Exs. B, D; Ex. 8, Reid Aff., ¶15, Ex. E; Ex. 30, Williams Aff., ¶3, Ex. B; Ex. 11, Norris Aff., ¶13 Ex. E.

Because all three proposed classes are identifiable from Defendants client files, primarily through settlement statements that each KNR client signed upon resolving their claims it is essentially a clerical task to weed out individuals who were not subject to the fraudulent schemes at issue. Thus, the members' identity for each class can be determined with reasonable effort.

2. <u>Class Membership</u>

Class membership requires that the names Plaintiffs belong to the class and class members have the same interests and have suffered the same injury shared by all members of the class.

As demonstrated above, Plaintiffs argue they are indisputably among the members of the prospective classes. *See generally Mozingo v. 2001 Gaslight Ohio LLC*, 9th Dist., No.

27759, 2016-Ohio-4828, ¶17 (class membership requires that plaintiff "have the same interest and have suffered the same injury shared by all members of the class"). By virtue of having paid fees in the three alleged fraudulent schemes, Plaintiffs have the same interests and suffered the same injury shared by all members of the class that he or she seeks to represent.

3. <u>Numerosity</u>

Numerosity means the size of the proposed class makes it impracticable to join all eligible members.

The plaintiffs argue that all three classes are sufficiently numerous for purposes of Civ. R. 23(A) because joinder of all prospective class members is impracticable. For Class A Plaintiffs note that Dr. Ghoubrial's personal injury clinic has treated thousands of KNR clients since it opened in 2005 (approximately 1,000 members). (Ghoubrial Tr. pp. 41, 151, 154-155).

As to Class B, the narrative-fee class, plaintiffs argue that there is no dispute that Dr. Floros alone treated more than 4,000 KNR clients just between 2013 and 2017. As noted above, Floros prepared a narrative report in "every single [one] or virtually every single" one of these cases, and as KNR documents reflect, other chiropractors did likewise, "automatically," for the cases they shared with KNR. Petti Tr. 284-85; Horton Tr. 298:9-18; 300:15-25; 305:18-19; Ex. 25 (Gobrogge Tr. Ex. 33 ("Updated Narrative and WD Procedure for Plambec [sic] Clinics and Referring Physicians," identifying "the only Narrative Fees that get paid automatically"); *see also* Ex. 26, Gobrogge Tr. 298:6-9, 301:24-313:10; Nestico Tr. 340:23-3441:1, Ex. 50 (same); Gobrogge Tr. 293:17-297:22, Ex. 32 (same).

As to Class C, the investigation-fee class, there is no dispute that KNR has charged this fee to "the vast majority" of its clients since 2009, approximately 40,000 to 45,000 of them. Nestico Tr. 132:18-15; 136:15-137:16.

In summary, the plaintiffs argue that common sense suggests this Court could not practically join the thousands of eligible claimants from Classes A, B, and C as actual parties to the lawsuit. Thus, all three classes are sufficiently numerous and these numbers make joinder impracticable.

4. Commonality

Plaintiffs argue that all three putative class members share common legal and factual issues.

This requirement of class certification generally requires that "common questions" and "common answers" "drive the resolution" of class claims. *Stammco, LLC. v. United Telephone Co.*, 2013 Ohio 3019, ¶32. Civil Rule 23(A), Plaintiffs argue, does not require "[t]otal commonality." *Planned Parenthood Ass'n v. Project Jericho*, 52 Ohio St. 3d 56, 64, 556 N.E.2d 157 (1990). Instead, only a single issue common to all class members will suffice. *Berdysz v. Boyas Excavating*, 2017 Ohio 530, ¶30, 85 N.E.3d 288 (8th Dist.)

And this rule suggests, a "common nucleus of operative facts, or a common liability issue" establishes commonality. *Hamilton*, 82 Ohio St. 3d at 77. Plaintiffs argue that commonality does not disappear simply because "factual variations" exist between the claims of individual class members. *San Allen, Inc. v. Buehrer*, 2014 Ohio 2071, ¶150, 11 N.E.3d 739 (8th Dist.). In fact, differences between class members' individual claims do not even merit consideration in assessing commonality under Civ. R. 23(A). *Marks v. C.P. Chem. Co.*, 31 Ohio St.3d 200, 202, 509 N.E.2d 1249 (1987); *Pyles v. Johnson*, 143 Ohio App.3d 720, 733, 758 N.E.2d 1182 (4th Dist. 2001). Given the nature of KNR's high-volume business and the routinized nature of the practices at issue, the claims of all three sets of class-members present various factual and legal "common questions." All claims are primarily based in fraud, breach

of fiduciary duty and unjust enrichment and the elements of these claims are subject to the same proof.

Plaintiffs argue that the Class A price-gouging class is derived entirely from a "common nucleus of operative facts," and "common liability issues." Specifically:

> (1) Did KNR unlawfully conspire with chiropractors to solicit clients and direct their treatment pursuant to a routinized course of care calculated to maximize the Defendants' profits?
>
> (2) Did the Defendants conspire to inflate KNR clients' medical bills by the administration of trigger-point injections and other medical supplies and healthcare for which the clients were charged exorbitant and unconscionable rates?
>
> (3) Did the Defendants mislead their clients into forgoing coverage from health insurance providers in order to avoid scrutiny of, and obtain higher fees for, fraudulent healthcare services?
>
> (4) Did the Defendants intentionally and serially fail to disclose that the care they administered was unnecessary and/or readily available from alternative sources at a fraction of the price they charged the clients?
>
> (5) Did the Defendants intentionally and serially fail to disclose that their relationships were viewed as fraudulent by auto-insurance companies responsible for paying KNR clients' claims, and were thus damaging the KNR clients' cases?
>
> (6) Did Ghoubrial deliberately set out to administer as many of the injections, and distribute as many of the overpriced supplies as possible, precisely to enrich himself and his co-conspirators?
>
> (7) Did KNR and Floros refer clients to Ghoubrial with the knowledge and intention that his exorbitant charges would raise the cost of settling their claims and thereby increase the amount that KNR and Floros would collect from the clients' settlements?
>
> (8) Did the Defendants intentionally disregard the negative impact that the Defendant providers' involvement had on the clients' individual cases because it was more profitable to simply drive a greater number of them through their high-volume, highly routinized business model?
>
> (9) Are the Defendants liable for fraud, breach of fiducially duty, breach of contract, or unjust enrichment based primarily on the answers to the questions above?

Plaintiffs Brief at pp. 67-68.

Plaintiffs argue that the Class B narrative fee is derived entirely from a "common nucleus of operative facts," and "common liability issues." Specifically:

(1) Did KNR automatically pay a narrative fee to Dr. Floros and certain other chiropractors as a matter of firm policy for every, or nearly every KNR client they treated?

(2) How and why did KNR differentiate between the chiropractors who automatically produced narrative reports and those who didn't?

(3) Did KNR have legitimate reasons for automatically requesting a narrative report from just these chiropractors?

(4) Did KNR attorneys have any discretion to decide whether or not to obtain a narrative report from these chiropractors?

(5) Did KNR pay narrative fees to these chiropractors as a kickback, or a clandestine means of compensating them for referring clients and participating in their price-gouging scheme?

(6) Did KNR truthfully inform clients about these narrative fees?

(7) Are the Defendants liable for fraud, breach of fiduciary duty, breach of contract, or unjust enrichment based primarily on the answers to the questions above?

Plaintiffs Brief at pp. 68-69.

Plaintiffs argue the Class C investigation-fee class is derived entirely from a "common nucleus of operative facts," and "common liability issues." Specifically:

(1) Was KNR having clients pay for a basic administrative or marketing cost in charging them in the "sign-up" fee?

(2) Were KNR's "investigators" truly involved in investigatory work?

(3) Were KNR's "investigators" functionally employees of KNR, in-house messengers and office assistants who did not operate independently from the firm?

(4) Did KNR intentionally mislead clients about the "sign-up" fee by representing it on settlement memoranda as an amount paid to an "investigator" or "investigation" company and by failing to disclose the true nature of the charge?

> (5) Did the KNR engagement letters permit the firm to deduct charges like the "sign-up" fee from clients' recovery?
>
> (6) Are the KNR Defendants liable for fraud, breach of fiduciary duty, breach of contract, or unjust enrichment based primarily on the answers to the questions above?

Plaintiffs Brief at p. 69.

Plaintiffs have demonstrated there is at least one question that is common to the classes whose resolution would advance this litigation. The evidence of fraudulent intent and existence of the scheme applies on a class-wide basis. Factual differences between Plaintiffs claims and those of a putative class member do not defeat the commonality requirement.

5. <u>Typicality</u>

The Plaintiffs assert their claims typify those of other class members. The requirement of typicality under Civ. R. 23(A) ensures "that the interests of the named plaintiffs are substantially aligned with those of the class." *Baughman*, 88 Ohio St.3d at 484. Plaintiffs do not have to demonstrate that their claims identically match those of other eligible participants in the litigation. *Id.*

To prove typicality, plaintiffs say they need only show the absence of any "express conflict" between their interests and eligible claimants. *Hamilton*, 82 Ohio St.3d at 77. "Factual differences" will not render the plaintiffs' claim atypical if it "arises from the same event or practices… that gives rise to the claims of the class members, and… it is based on the same legal theory." *Musial*, 2014 Ohio 602, at ¶24.

Plaintiffs say that no "express conflict" exists between the Named Representatives and members of the proposed classes. *Hamilton*, 82 Ohio St.3d at 77. The Named Representatives and class-members all had the allegedly unlawful charges deducted from their KNR settlements pursuant to the same schemes. *See also* Exs. 8, 9, 10, 11, 14, 30 (affidavits of the four Named

Representatives Reid, Norris, Harbour, and Williams, and former KNR clients Mr. Carter, and Ms. Beasley). Plaintiffs and class-members all signed effectively identical fee agreements, and the Defendants did not provide the Plaintiffs with any special information about the allegedly fraudulent fees that would threaten the typicality of their claims. *Id*. Thus the Plaintiffs claims derive from the same events and practices that gave rise to the other class members claims.

6. <u>Adequacy of Representation</u>

To demonstrate adequacy of representation Plaintiffs and their counsel must prove their capability to prosecute the litigation fairly and adequately on behalf of the class. "In making this determination, courts consider two questions (1) do the named plaintiffs and their counsel have any conflicts of interest with other class members, and (2) will the named plaintiffs and their counsel prosecute the action vigorously on behalf of the class?" *Musial*, 2014 Ohio 602, ¶27. A class representative is adequate provided that his interest is not antagonistic to that of the prospective class members. *Id*. The representative's counsel is adequate if the lawyers are qualified, experienced, and generally able to conduct the proposed litigation. *Id*.

Here, Plaintiffs have all had the same allegedly unlawful fees that KNR deducted from settlements for all three classes and they all have the same interest in recouping the allegedly unlawful charges as other class members and seek to do so on identical legal grounds. And, there is no evidence to suggest that the named Plaintiffs interests are antagonistic to those of other class members.

Named Plaintiffs and their counsel Peter Pattakos (lead counsel), Josh Cohen and Ellen Kramer do not have any obvious conflicts of interest with other class members and counsel have demonstrated that they will prosecute the action vigorously. Pattakos has experience in complex litigation and has navigated this lawsuit zealously over three years; Josh Cohen and Ellen Kramer (co-counsel) both have experience in handling class action litigation.

The Court finds Plaintiffs' counsel are qualified, experienced, and generally able to conduct the proposed litigation.

7. Civ.R. 23(B)(3) Predominance and Superiority

Civ.R. 23(B)(3) requires that the court find "that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members [predominance], and that a class action is superior to other available methods for fair and efficient adjudication of the controversy [superiority]." *Carder Buick-Olds Co., Inc. v. Reynolds & Reynolds, Inc.*, 148 Ohio App.3d 635, 2002 Ohio 2912, ¶20, 775 N.E.2d 531 (2nd Dist.). This inquiry requires a court to balance questions common among class members with any dissimilarities between them and if the court is satisfied that common questions predominate it then should consider whether any alternative methods exist for resolving the controversy and whether the class method is in fact superior. *Cullen*, 2013 Ohio 4733, ¶29 (internal citations omitted).

Predominance exists where the gravamen of every class members' claim is the same. *Baughman*, 88 Ohio St.3d at 489. The gravamen of the three proposed classes of claims are (1) whether KNR and its medical providers engaged in a fraudulent price-gouging scheme; (2) whether the "narrative fee" functioned as a kickback; and (3) whether the "investigation fee" constituted an unlawful double charge for overhead expenses.

Given the nature of KNR's high-volume settlement mill, the routinized nature of the practices at issue Class Representative allege fraud and a common business practice that is typical of the claims. The legitimacy of all three classes of charges will depend upon generalized proof of their true nature that applies across the board without variation from class member to class member, *Cullen*, 2013 Ohio 4733, ¶30, and the court can resolve these issues for all class members in a single adjudication. *Cantlin*, 2018 Ohio 4607, ¶33.

Certification becomes appropriate under Civ.R. 23(B)(3) when (1) legal or factual issues common to the entire class predominate over questions unique to individual class members and (2) a class action is superior to other available methods for the fair and efficient resolution of the case.

KNR argues that Civ. R. 23(B)(3) is particularly relevant in demonstrating that a class action is not appropriate in this lawsuit. It notes that Civ.R. 23(B)(3) requires that "the court find that the questions of law or fact common to class members predominate over any questions affecting only individual members, and that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy." Civ.R. 23(B)(3). This inquiry requires a court to balance questions common among class members with any dissimilarities between them, and if the court is satisfied that common questions predominate, it then should "consider whether any alternative methods exist for resolving the controversy and whether the class action method is in fact superior." *Cullen v. State Farm Mut. Auto. Ins. Co.*, 137 Ohio St.3d 373, 382, 2013 Ohio 4733.

In addressing the "Price Gouging Class," KNR argues that it is critical to understand the allegations underlying this Class. KNR notes that Plaintiffs' allegations are not just that of "price gouging" but rather a "price gouging scheme" or "conspiracy." KNR Brief at p. 8, citing Pls. Mot. pp. 9, 10, 11, 75, 76. It is not against one Defendant, but all Defendants. It is not three individual claims, but rather the combination or concert of actions that Plaintiffs' claim amounts to a "conspiracy." To establish predominance, Plaintiffs must convince this Court that there exists a set of evidentiary facts that would establish the existence of the alleged conspiracy that affected each Class Member. Plaintiffs concede their obligation to establish

that in a "single adjudication," all Class Members were victims of the conspiracy which they specifically describe. *Id*., citing Pls. Mot. p. 74.

KNR argues that even if the Plaintiffs' could establish a conspiracy as to some class members, it does not mean that the conspiracy involved all class members. In other words, a conspiracy as to some does not make it common to the Class. KNR argues that Plaintiffs' claim that they can establish a body of common evidence that class members will prevail or fall in unison is undermined by their own outline of the common issues.

Plaintiffs' list of common issues does not by itself satisfy the predominance requirement. The necessary analysis is whether there is evidence or proof, common to all Class Members, that allows a single adjudication to resolve the issue for all Class Members. The ability to set forth a laundry list of common questions therefore does not answer the question of predominance. Courts have long cautioned against putting any significant weight on such lists. The Supreme Court, in *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 349, 350, 131 S.Ct. 2541 (2011), addressed such lists as follows:

> The crux of this case is commonality – the rule requiring a plaintiff to show that "there are questions of law or fact, common to the class." That language is easy to misread, since "any competently crafted class complaint literally raises common 'questions'." Nagareda, Class Certification – The Age of Aggregate Proof, 84 N.Y.U.L. Rev. 97, 131-132, (2009). For example, do all of us plaintiffs indeed work for Wal-Mart? Do our managers have discretion over pay? Is that an unlawful employment practice? What remedies should we get? Reciting these questions is not sufficient to obtain class certification.
>
> ***
>
> What matters to class certification… is not the raising of common 'questions' – even in droves – but, rather, the capacity of a class-wide proceeding to generate common answers apt to drive the resolution of the litigation. Dissimilarities within the proposed class are what have the potential to impede the generation of common answers.

See also Schmidt v. Avco Corp., 15 Ohio St.3d 310, 314, 473 N.E.2d 882 (1984), wherein the court stated that to predominate the common question 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.

KNR acknowledges that cases that involve a scheme or common misrepresentation or omission across the class are particularly subject to common proof. *Cantlin v. Smyth Cramer Co*., 2018 Ohio 4607, 114 N.E.3d 1260 (8th Dist.). When considering the predominance requirement, the Supreme Court has found, KNR notes, that it will be satisfied "when there exists generalized evidence which proves or disproves an element on a simultaneous class-wide basis…" citing *Carder, supra*. Thus, KNR argues that Plaintiffs must establish "common proof" that would determine liability to all class members in a single adjudication. Of particular relevance is the requirement that all class members were the subject of wrongful conduct. KNR cites the Second District case of *Petty v. Wal-Mart Stores, Inc*., 148 Ohio App.3d 348, 2002 Ohio 1211, wherein the plaintiffs sought to certify a class based on an alleged practice where employees were presurred to work off the clock. In holding that Plaintiffs could not satisfy the predominance requirement, the Court noted that the class definition included employees who "were not exposed to the alleged conduct of Walmart." *Id*. at 352. The court stated:

> *Petty* later defined the class as including all 174,000 past and present Wal-Mart employees. Although this definition was not set forth in the complaint or the motion for certification filed by *Petty*, it was addressed by the trial court, which found that this definition must also fail because it is clear from the evidence that not all putative class members were required or permitted to work off the clock or miss meal breaks.
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> * * *
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> **As defined, the persons who were exposed to the conduct would be a subset of the class rather than the class.** If this type of class were permitted, plaintiffs would be able to define a class as broadly as possible in the hope of netting a certain percentage of injured members. This practice would render the class action vehicle unduly cumbersome, and ultimately ineffective. Without a definition of the class related to

> plaintiff's theory of recovery, the trial court would have to conduct individualized inquiry with respect to each individual's exposure to the alleged conduct of Wal-Mart in order to determine whether the individual was the subject of tortious conduct by Wal-Mart, which would obviate the purpose of class actions.

Id. at 354 (emphasis added).

KNR notes the requirement that all class members must have suffered some damage to satisfy the predominance requirement, *Felix v. Ganley Chevrolet, Inc*., 145 Ohio St.3d 329, 2015 Ohio 3430, and plaintiffs must adduce common evidence demonstrating that all class members suffered some injury. *Id*. at 337-338.

KNR notes that the first issue identified by Plaintiffs involves the allegation of its unlawful conspiracy with chiropractors to solicit clients and direct their treatment through a course of care to maximize KNR's profits. KNR argues that Plaintiffs must show that all of the class members were "unlawfully solicited" by the alleged conspiracy. Predominance exists, KNR argues "if all Class Members will prevail or fail in unison." *Musial*, 2014 Ohio 602, ¶32. KNR argues the evidence of unlawful solicitation as to each Class Member is not common. Some Class Members came to KNR as former clients, without any solicitation by KNR or any chiropractor. These Class Members could not be the victims of an unlawful conspiracy to solicit. Some Class Members were referred to KNR as family members of KNR employees – again without solicitation, let alone an unlawful conspiracy. Other Class Members were solicited through a KNR advertisement and became KNR clients without involvement of any chiropractor. Some Class Members were directly solicited by Dr. Floros via a telephone call without any involvement of Dr. Ghoubrial or KNR.

KNR argues, the Court need look no further than the proposed class representatives to understand the different methods of solicitation that brought a Class Member to KNR. Dr. Floros is the only chiropractor identified as part of the solicitation conspiracy. Yet, he had no involvement in five (5) of the seven (7) KNR cases pursued by four (4) of the Class

Representatives. Ex. N, Nestico Aff. Class Representative Thera Reid was referred to KNR by Akron Square Chiropractors. Ex. F, Reid Tr. p. 101. Richard Harbour was represented by KNR on four (4) different occasions and originally came to KNR because of radio advertisements. Ex. G, Harbour Tr. p. 22. Monique Norris was recommended to KNR, either by her aunt, Carolyn Holsey, or by her uncle. Ex. H, Norris Tr. p 16; Ex. DD, Holsey Tr. pp. 82-83. Member Williams was related to a KNR secretary by marriage. Ex. J, Williams Tr. p 65. Former Class Representative Mathew Johnson was referred to KNR by his roommate's father. Ex. BB, Johnson Tr. p. 151. KNR argues the methods of solicitation or instances of no solicitation that led a client to KNR are limitless.

Plaintiffs' first issue simply asks "Did KNR unlawfully conspire **with chiropractors** to solicit clients…" KNR Brief at p. 14, citing Pls. Mot. P. 67 (Emphasis in original). To address this issue on a class-wide basis, first it would need to be determined whether each Class Member treated with any chiropractor and then the identity of the chiropractor would have to be established. Some Class Members did not treat with any chiropractor, yet they are within the class definition. Evidence for each identified chiropractor would have to be presented to determine if they were involved with a KNR conspiracy to solicit. The adjudication of whether a solicitation conspiracy existed between KNR and Chiropractor "A," who treated certain Class Members would not adjudicate the issue for Class Members who treated with Chiropractor "B," "C" or "D." KNR has referred Class Members to over a dozen chiropractors throughout Ohio over the eight (8) year class period. Ex. N, Nestico Aff. KNR argues that Plaintiffs have not attempted to establish a common scheme among the unidentified chiropractors and KNR, and there is a total lack of evidence that all class members were "subjected" or "exposed" to the wrongful conduct as required by the *Petty* court.

KNR further argues that Plaintiffs have outlined evidence of various referral relationships between KNR and certain chiropractors that they claim are *quid pro quo* relationships and whether these relationships amount to an "unlawful conspiracy" is a question left for a merits determination. What is relevant to class certification, KNR says, is whether these relationships existed with the unidentified chiropractors that treated Class Members.

KNR notes that the Plaintiffs allege that a *quid pro quo* relationship existed between KNR and Dr. Ghoubrial, but Rob Horton did not remember ever referring a client to Ghoubrial, Gary Petti never did, and Amanda Lantz said each file would have to be examined to see if KNR referred its client to Dr. Ghoubrial. KNR admits that their office manager, Brandy Gobrogge admitted to directing KNR attorneys to refer their clients to certain chiropractors, but in practice KNR attorneys did not abide by her orders. See Ex. A, Phillips Tr. at 185. Phillips testified that toward the end of his time at KNR he didn't follow Gobrogge's directions. Ex. A, Phillips Tr. 161-162. KNR argues that even if an unlawful *quid pro quo* relationship existed with some chiropractors there is no evidence it existed with all chiropractors that treated Class Members. KNR argues that at least two of their attorneys did not always participate in the *quid pro quo* practice negates the existence of a class-wide practice that is the heart of Plaintiffs' unlawful solicitation claims.

KNR further argues that in many instances Class Members never saw Dr. Floros, the only chiropractor named as a Defendant and thus, he could not have possibly conspired to direct any aspect of these Class Members' treatment. This portion of the class would need its own adjudication. What the unidentified chiropractors did or did not do to direct Class Members' treatment would be subject to evidence specific to that chiropractor and his Class Member patients. Additionally, some Class Members were treated by Dr. Ghoubrial before becoming KNR clients.

KNR notes that the care provided by Dr. Floros and the unidentified chiropractors to each class member was not the same and the reasons Floros recommended his patients see Dr. Ghoubrial would have been different.

The second issue KNR addresses is the allegation that the defendants conspired to inflate KNR clients' medical bills by the administration of trigger point injections and other medical supplies and healthcare for which the clients were charged exorbitant and unconscionable rates. KNR argues that this issue focuses on a "conspiracy" to charge "exorbitant or unconscionable rates" by Dr. Ghoubrial and the cost of trigger-point injections is put at issue. The cost of trigger-point injections varied over time and certainly since 2010, the start of Plaintiffs' Class. Ex. O, Ghoubrial Aff. Plaintiffs' issue, however, is not limited to just charges for trigger-point injections, it also includes "medical supplies" and "healthcare." What "medical supplies" and the corresponding cost as it relates to each Class Member would have to be determined. What "health care" and its cost for each Class Member would have to be identified. Once determined, there would need to be an adjudication of whether each of the charges for each Class Member were exorbitant or unconscionable. Not only have Dr. Ghoubrial's charges changed over the eight (8) year class period, but what was considered a reasonable cost for medical supplies and care has changed over the eight (8) year class period. Ex. O, Ghoubrial Aff.

KNR states, what Plaintiffs ignore is that what is relevant is not what Dr. Ghoubrial charged but rather what he accepted as reimbursement from the Class Members' settlements. All physicians and hospitals charge more than they accept from Medicare, Medicaid and insurance companies. KNR discounted nearly every client's medical reimbursement to Dr. Ghoubrial. KNR argues that Plaintiffs ignore this aspect of the case. For some Class Members, KNR discounted the medical reimbursement to Dr. Ghoubrial by 98%. Ex. N,

Nestico Aff. While in others, it was 88%, 82% or 50% and in some, there was no discount. Ex. N, Nestico Aff. In each of these instances, Dr. Ghoubrial accepted the reduction as satisfaction of his charges. KNR asserts, Plaintiffs cannot rationally claim, let alone establish, that every discounted reimbursement to Dr. Ghoubrial was excessive. Such a determination would require a case by case evaluation.

KNR also states, during certain times in the class period, different KNR lawyers handling the individual cases would determine and negotiate the reduction with Dr. Ghoubrial. Ex. W, Angelotta Aff; Ex. X, Zerrusen Aff. During other periods, Nestico would make the final determination as to the reduction after a recommendation by the individual attorney. Ex. N, Nestico Aff. KNR argues Plaintiffs have not even attempted to establish that each of these KNR attorneys were part of a conspiracy to price gouge their Class-Members-clients and without such proof, the empty allegations of a class-wide conspiracy must fail.

KNR argues there is no common evidence that could adjudicate this issue for all Class Members. A trial court determination of whether the actual, agreed upon payment to Dr. Ghoubrial of $400.00 for a trigger-point injection was exorbitant would not adjudicate the same claim of a Class Member who only paid $100.00.

KNR argues there is no common proof that they misled their clients into foregoing coverage from health insurance providers in order to avoid scrutiny of, and obtain higher fees for fraudulent healthcare services. KNR notes that a significant percentage of Class Members had no health insurance coverage and thus are distinct from those members who did have insurance. They note also that most physicians will not wait for payment during the pendency of a Class Members lawsuit and even if 80% have insurance coverage that does not establish a class-wide allegation.

Equally significant KNR argues is the fact that Plaintiffs claim that each of the Defendants "misled" the Class Members into foregoing health insurance coverage. Some Class Members never treated with Dr. Floros, so he could not have misled them. An adjudication against Dr. Ghoubrial or KNR would not bind Dr. Floros. This group of Class members would be subject to their own adjudication. Other Class Members began treatment with Dr. Ghoubrial or Dr. Floros before becoming KNR clients. Any alleged misrepresentation concerning health insurance would have occurred before KNR met the Class Member. These Class Members would be subject to yet another adjudication. Class Representative, Richard Harbour, had health insurance but chose not to use it for any of the medical bills related to his auto accident. Ex. G, Harbour Tr. p. 20. Mr. Harbour is not the only Class Member who chose not to use his or her own health insurance. Some clients forego their own coverage for fear it will affect their premiums. Ex. N, Nestico Aff. This is yet another distinct fact pattern with different liability implications.

Plaintiffs make the sweeping allegation that Class Members "end up paying more for this care than it would have cost them to simply pay through their health insurance policies." KNR Brief at p. 28, citing Pls. Mot. p. 77. Like so many of Plaintiffs' class-wide allegations, KNR argues there is no way to determine their truth without looking to the facts of each case. When a Class Member uses his or her health insurance, most will pay a deductible and co-pay. What the health insurance pays will be reimbursed to the insurance company from the Class Member's settlement, pursuant to the subrogation clause in the insurance policy.

In discussing the fourth issue in the Price Gouging Class, KNR notes that Defendants intentionally failed to disclose that the care they administered (the doctors) was unnecessary and readily available from alternate sources at a fraction of the price and the KNR Defendants knew it. KNR argues the claim is ill-suited for a class action because each patient's care was

different. Ghoubrial Tr. 65-69; 117-124. KNR also argues that the plaintiffs' claim that trigger point injections are not indicated for the treatment of acute pain according to "all available medical research" is simply false. KNR refers to a randomized study in the American Journal of Medicine (2019) which refutes Plaintiffs' claim.

As to issue five in the Price Gouging Class, KNR argues that just because some insurance companies viewed the Defendants symbiotic relationship with each other as fraudulent and damaging to KNR's clients does not translate into class-wide knowledge regarding all insurance companies dating back to 2010. KNR argues that to determine whether or not each Class Member was damaged in this fashion would be highly individualized and probably not possible. It would involve recreating each file and attempting to understand the thought process of each insurance company in deciding to settle the claim at the specified amount. Then, a determination would need to be made as to whether the settlement would have been higher, lower or the same had Dr. Ghoubrial's charges been less. In this regard to Dr. Ghoubrial, KNR noted that treatment by Dr. Ghoubiral varied. Some received trigger point injections, some did not. Some were prescribed TENS Units, some were not. KNR argues that there are no common facts that would allow this issue to be resolved in a single adjudication.

Issue six involves Plaintiffs' claim that Dr. Ghoubrial deliberately set out to administer as many of the injections and distribute as many of the overpriced supplies as possible to enrich himself and his co-conspirators. KNR argues that this issue provides an illustration of why the predominance requirement cannot be satisfied. KNR argues that bad intentions, unacted upon, do not constitute a cause of action and the care provided to each Class Member must be examined to determine whether Dr. Ghoubrial in fact deliberately injected and/or distributed as many medical supplies as possible to each Class Member. KNR also asserts that Plaintiffs' overriding argument that Defendants created a wrongful conspiracy and thereafter, there is no

need to establish that each Class Member was subjected to and harmed by the wrongful conduct is contrary to the holdings in *Petty*, *Felix*, and *Ganley*, *supra*.

The seventh issue outlined by Plaintiffs is as follows:

> Did KNR and Dr. Floros refer clients to Dr. Ghoubrial with the knowledge and intention that his exorbitant charges would raise the cost of settling their claims and thereby increase the amount that KNR and Dr. Floros would collect from the clients' settlements?

KNR addressed this by observing that Plaintiffs seem to indicate that KNR knew that by referring Class Members to Dr. Ghoubrial, KNR would received a larger attorney fee. ("…increase the amount…KNR would collect…"). The only way KNR's contingency fee would increase is if the client's case settled for a higher amount. This is what Plaintiffs appear to indicate when they state "raise the cost of settling." Under most circumstances, if the settlement amount was "raise[d]," the Class Member would receive more money. If KNR acted with knowledge and the intention to increase the settlement amount received by each Class Member, how is this actionable? If this increase were true with respect to some Class Members and not others, it is yet another instance where class-wide harm is absent.

The eighth and final issue raised by Plaintiffs in the Price Gouging Class is as follows:

> Did the Defendants intentionally disregard the negative impact that the Defendants' providers' involvement had on clients' individual cases because it was more profitable to simply drive a greater number of them through the high-volume, highly routinized business model?

KNR contends the allegation in issue eight contradicts issue seven. In any event, KNR argues that there is clearly no common proof to address these issues in a single adjudication because common evidence would not predominate over individualized inquiries.

KNR argues that it is absolutely true that the Defendants never told any Class Member that Dr. Ghoubrial's charges were exorbitant, but where the Class Members' charges were not exorbitant, there was no misrepresentation. See KNR brief at p. 37. They argue also that to

determine whether there was a misrepresentation or failure to disclose requires an individual Member inquiry. Common, wrongful, class-wide conduct is what is required, KNR argues to establish predominance. Also, KNR argues that under well-settled Ohio law, Plaintiffs must prove causation and damages in order to recover damages for a breach of fiduciary duty. *Strock v. Pressnell*, 38 Ohio St.3d 207, 527 N.E.2d 1235 (1988).

KNR notes that the Plaintiffs seek disgorgement of all fees collected by Dr. Ghoubrial, Dr. Floros, and the KNR Defendants pursuant to their price gouging scheme. KNR argues the disgorgement remedy sought against KNR requires individual evidence and inquiry with respect to each Class Member. Complete forfeiture of an attorney's entire fee is not automatic as Plaintiffs suggest. The extent of the disgorgement is limited to the amount of the profit or fee generated by the wrongdoing. The Restatement of the Law 3d, Restitution and Unjust Enrichment, §51 Enrichment by Misconduct; Disgorgement; Accounting states that it is not the total gain (attorney fees) that is subject to disgorgement, but rather the amount of the gain resulting from the wrongdoing:

> Disgorgement does not impose a general forfeiture: Defendant's liability in restitution is not the whole of the gain from a tainted transaction, but the amount of the gain that is attributable to the underlying wrong. Restatement 3d, Comment 1.

KNR argues that Plaintiffs request that the Defendants disgorge their profits would require the evaluation of the lawyers work for each Class Member. For example, they note some cases were settled without suit, in some a suit was filed and extensive discovery took place, and in some cases were tried to a jury. KNR concedes that the existence of disparate damages alone does not prevent class certification, there are exceptions. They point to *Petty, supra* at 356, where that court stated:

> With regard to the issue of differing damages, we note that the "overwhelming weight of authority" indicates that class certification should not be denied solely

> on the basis of disparate damages. *Hamilton v. Ohio Sav. Bank*, 82 Ohio St.3d 67, 81, 694 N.E.2d 442 (1998). However, disparate damages may present an adequate basis for denial in some cases. Id. 82 Ohio St.3d 67. In this case, the damages are not susceptible to class-wide proof because there is no acceptable method of computing the damages on a class-wide basis…Therefore, we find that the disparate damages supports the denial of the class certification.

Lastly, KNR argues there is no law which would support the total disgorgement of "all fees collected."

Next, KNR addresses the claim by the putative Narrative Fee Class that the narrative fees charged by the chiropractors used by KNR were worthless and were nothing more than "kickbacks."

The proposed Narrative Fee Class includes:

> All current and former KNR clients who had deducted from their settlements a narrative fee paid to (1) Dr. Minas Floros of Akron Square Chiropractic, (2) all other chiropractors employed at clinics owned by Michael Kent Plambeck and (3) certain other chiropractors identified in KNR documents as "automatic" recipients of the fee, from KNR's founding in 2005 to present.

KNR notes that Plaintiffs make their claim that the narrative fees are worthless based on four lines of testimony from Gary Petti wherein he states that the narrative reports were of "no independent value." KNR argues that Petti later in his deposition agreed that to assess the value of a Class Member's narrative report would depend on the specific facts of the case, to wit:

> Q. So you'd have to look at each individual case to see whether a report was necessary?
> **A. Yeah. There's no way to do it on virtually every one of them.**
> Q. You can't just blanketly say none of the cases need a report, you can't say that, can you?
> **A. Right, that's fair.**
> Q. And again, you'd have to look at the medical records, talk to the attorney who was involved in the case, talk to the claims examiner, there's all sorts of things you'd have to look at, fair?
> **A. That's, generally speaking, fair.**

Ex. B, Petti Tr. pp. 324-325.

After reviewing the narrative report of the Class-Representative Thera Reid, Attorney Petti testified:

> Q. And to know whether this particular narrative report was beneficial or not, you'd have to look at this case and all the records and the negotiations, true?
> **A. Yeah, that's true.**
> Q. That's true for every case, isn't it?
> **A. It is true.**

Ex. B, Petti Tr. p. 339.

Attorney Petti further outlined the various factors that would need to be applied in each case to determine the value of the narrative ("pre-existing injuries," "future pain," "future care," "causal relation"). Ex. B, Petti Tr. pp. 310-311. He also admitted that if a case is in litigation, narrative reports are "mandatory." Ex. B, Petti Tr. p. 418. The value of each narrative report would vary depending on the application of these factors.

Plaintiffs also alleged "the narrative reports never contain any information that is not readily apparent and easily accessible from the client's medical records." Pls. Fifth Amend. Comp. ¶65. But KNR asserts, looking no further than the Class Representative's narrative report belies the truth of this statement. Attorney Petti reviewed the narrative of Class Representative Thera Reid at his deposition:

> Q. Okay. And, in fact, this has, if you look down at two paragraphs from the bottom where is starts, "Thera Reid sustained, joint, disc and ligamentous injury." Do you see that?
> **A. No, I'm not looking there.**
> Q. Four lines up from the bottom.
> **A. Four lines, yes, I see it.**
> Q. And it says, "The cost to stabilize her condition over the next year is approximately $5,000." Did you see that?
> **A. Yes, I did.**
> Q. And that's information you didn't find in the medical record, true?
> **A. That is true.**
> Q. And if you look at the next line where it talks about reasonable chiropractic probability and a necessity as a result, that wasn't in the medical records, was it?
> **A. It wasn't, no.**
>
> * * *

> Q. - - these risk factors will serve to significantly lower the threshold for injury and increase the probability for long-term symptoms. That wasn't in the records, was it?
> **A. Not that I saw.**
> Q. And the next line wasn't in the records either, was it?
> **A. Not that I saw.**

Ex. B, Petti Tr. pp. 335-336.

Thus, comparing the narrative and the medical records of Thera Reid (Class Representative) reveals that her narrative contains an outline of risk factors, a future care opinion and estimated costs. These opinions were not "readily available" in the medical records. In fact, they were totally absent from her records. Whether some, all, or no other Class Member dating back to 2005 have a narrative similar to that of Reid can only be known with an investigation into the records and reports of each Class Member.

Where a client has suffered an injury with permanent ramification, a statement of "prognosis" in the narrative that is not in the records is of considerable value KNR contends. An opinion in the narrative of this need and its estimated cost of future care is of significant value. Whether this statement of prognosis is in the medical records would need to be examined for each case. If a client's case is in suit in Cuyahoga County, a narrative is required by local rule. Cuyahoga County Local Rule 21.1. Certainly, where a narrative is required by law, it is not "worthless." Where the medical records are voluminous, not organized well, and handwritten, a typed, organized narrative has a value different that a case where the records are typed and well organized. Some insurance companies and adjusters request narrative reports. Ex. CC, Vallillo Aff.. The thousands of different records for each class member were prepared in different offices, by different chiropractors over fourteen (14) years.

Plaintiffs further attempt to create class-wide damages by alleging "the narratives never contain any information that is not readily apparent and easily accessible from the client's medical records." Pls. Fifth Amend. Comp. ¶65; see also Pls. Mot. p. 47. KNR disputes

Plaintiffs claim that KNR did not obtain narrative reports from any other chiropractors other than the "preferred chiropractors." KNR Brief, citing Pls. Mot. p. 48 ("….decision to order [narrative reports] is based solely on the identity of the chiropractor." Id. at 45). KNR states it has ordered, received and paid for narrative reports from hundreds of different chiropractors and doctors throughout Ohio, dating back to 2005 (beginning of Class period). Ex. Q, Major Aff. Most were and are not on Plaintiff's loosely defined list of "preferred chiropractors."

Next, Plaintiffs allege that narrative reports are ordered as "soon as the case comes in, before anyone at the firm has an opportunity to review the relevant facts." KNR Brief at p. 5, citing Pls. Mot. p. 45. KNR asserts that this is another attempt to create a class-wide practice. This allegation is based on the testimony of Attorney Petti, who admitted he had no first-hand knowledge of when narratives were ordered. Ex. B, Petti Tr. 318. The practice was to request narrative reports at the completion of the client's treatment. Ex. D, Nestico Tr. pp. 278-279.

KNR claims that Plaintiffs ignore the evidentiary record when they claim the narrative fee was paid to "certain selected chiropractors, immediately upon referral" of the client to those chiropractors. Pls. Mot. p. 44. First, KNR says this statement is made without any citation of support because there is no support. The only witness that addressed this allegation directly was KNR Operations Manager, Brandy Gobrogge. When asked by Plaintiffs' counsel if KNR paid for the narrative fees at the time a client was signed up, her response was "no never." Ex. E, Gobrogge Tr. p. 290. She further testified that KNR only paid for reports that were actually prepared by the chiropractor or physician. Ex. E, Gobrogge Tr. 289.

Plaintiffs next attempt to create a class-wide wrongdoing by claiming that "…clients pay a narrative fee on every case involving certain chiropractors." KNR Brief at p. 49, citing Pls. Mot. p. 45. Again, this is supported solely by the testimony of Gary Petti. Ex. B, Petti Tr. p. 284. Mr. Petti worked at KNR for less than nine (9) months in 2012, and he only worked on

KNR cases for a fraction of that time. Ex. Y, Petti Aff. His testimony and affidavit reference only narratives from Dr. Floros and Plambeck-owned clinics. KNR notes that Plaintiffs proposed class covers fourteen (14) years and includes a group of all chiropractors described as "certain other chiropractors identified in KNR documents as 'automatic' recipients of the fee, from KNR's founding in 2005 to present." KNR Brief at p. 49, citing Pls. Mot. p. 50. KNR argues that Plaintiffs have failed to establish a class-wide harm. To do so would require individual inquiry as to the value of each Class Member's narrative report and Plaintiffs attempt to establish a class-wide practice of wrongdoing is lacking in evidentiary support.

KNR argues that certification is improper because common evidence does not exist to prove that all or any class members were injured. KNR notes that in most cases KNR negotiated significant reductions in Dr. Ghoubrial's bills so that determination of whether any individual paid more than a reasonable amount cannot be determined by common evidence. KNR notes that a presumption of injury is unique to class actions involving antitrust claims and Plaintiffs cannot prove than all class members suffered some damage. KNR argues that the requirements for class certification in antitrust litigation do not undergo the same rigorous scrutiny as seen in other cases because class actions are a necessary part of safeguarding our economic system from antitrust violations.

KNR cites *Ice v. Hobby Lobby*, 2015 U.S. Dist. LEXIS 131336 (N.D. Ohio 2015) wherein the court found that the inflated base price did not create any damages if the discount results in a reasonable price. KNR cites two other cases which make no sense stating that a person suffers no injury when he purchases an item at an inflated price because it is after all an "arms length" transaction. (Citations omitted for good reason).

KNR argues that the Plaintiffs cannot meet the predominance requirement because individual evidence of what Plaintiffs claim they should have paid under their insurance will

need to be presented and information regarding co-pay and deductibles would be necessary to determine the out-of-pocket expense for each member. KNR notes that Dr. Ghoubrial's price reductions ranged from 98% to 0%.

KNR argues that in the present case individual negotiations are so "inherently diverse" that one Class Member might pay $150.00 for an office visit with Dr. Ghoubrial while another might pay $15.00. One Class Member might pay $1,000.00 for a trigger point injection while another might pay $50.00. KNR argues that the amount of the Ghoubrial discounts were negotiated by a dozen different attorneys and were dependent on the facts of each case. Lastly, KNR argues that the addition of the claim under R.C. 2923.34 does nothing to cure the Plaintiffs failure to identify a set of evidentiary facts that would establish the existence of a conspiracy between Dr. Floros, Dr. Ghoubrial, and KNR.

Ghoubrial makes similar arguments about class certification. He argues that the class proposed against him is simply uncertifiable as thousands of mini trials would be required to determine the viability of each patient's claims. Ghoubrial argues that the Plaintiffs fail to demonstrate that the claims can be adjudicated in a single trial. He argues that that when common questions of fact and law exists, the real issue is whether common answers to those questions exist for all class members. He claims the answers are widely varied dependent on the individual lawyers, clients, claims examiners, insurance companies and health care providers involved.

Ghoubrial argues that the Plaintiffs ignore the different roles of the defendants. He notes the lawyers do not control the medical care and the healthcare providers do not control the lawyering. The lawyers do not control the medical costs and the healthcare providers do not control the contingency agreement or settlement distribution. Ghoubrial argues that he never allowed a law firm to dictate or direct his medical care and Plaintiffs have failed to

provide any evidence that any single class member would have netted any more money without Dr. Ghoubrial's involvement.

Dr. Ghoubrial argues he complied with the standard of care in recommending his patients have trigger point injections or use TENS units. Ghoubrial argues there would have to be individual trials to determine whether he charged exorbitant prices for medical devices and injections. Ghoubrial argues that Plaintiffs amorphous theories require an individual analysis of:

- Each patient's individual medical treatment;
- The amount Clearwater Billing, LLC accepts as payment in full for the medical treatment;
- The reasonable charges for this treatment based on prevailing standards for the precise treatment during a precise period of time (as the Complaint spans 10 years)
- The quality of their medical treatment (necessary for unjust enrichment analysis);
- How much of the charges were paid by the "settlement" portion as opposed to "medical payments";
- A determination of the impact of the care on the ultimate settlement and net to the class member;
- The reasonable value of the medical treatment.

In *Stammco, supra*, the Ohio Supreme Court held that a trial court is permitted to consider the merits in determining whether class certification prerequisites are satisfied. *Duke v. Wal-Mart Stores, Inc., supra*, followed. The court noted that the office of Rule 23(B)(3) certification ruling is not to adjudicate the case, rather it is to select a method best suited to adjudication of the controversy fairly and efficiently, citing *Amgen v. Connecticut Retirement Plans & Trust Funds*, 568 U.S. 455, 133 S.Ct. 1184, 1191 (2013).

Evidence was presented that many of Dr. Ghoubrial's patients were administered trigger point injections and sold TENS units and back braces. Evidence was presented that Dr. Ghoubrial substantially overcharged his patients for these items. There was evidence that only Nestico was authorized to reduce Dr. Ghourbrial's bills and the reductions when they were made to by only a twenty percent reduction. (Petti Tr. at 103). There was evidence presented that although more than 50% of Dr. Ghoubrial's personal injury patients were covered by some form of health insurance, he required the patients to make payments out of the settlement proceeds. It is also undisputed that KNR prepared the letter or protection on Ghoubrial's stationary to insure the payment was made. It is clear that payments made to Dr. Ghoubrial in this manner insured the charges he made would escape scrutiny by the insurance carriers and other government agencies.

While there is some considerable dispute in the medical field whether trigger point injections or TENS units are effective, the Court will accept for the purposes of this motion that they are effective.

The argument by Dr. Ghoubrial and KNR that there are no common questions which predominate because some of Dr. Ghoubrial's patients received a reduction in their charges for these items is not persuasive. Although all class members will have to show they suffered some damage their individual differences will not defeat class certification. *Vinci v. American Can Co*., 9 Ohio St.3d 98, 101 (1984).

Judge Hensal of the Ninth District wrote an excellent opinion joined by her colleagues in *Mozingo v. Gaslight Ohio*, LLC, 2016 Ohio 4828. The case involved a class action brought by a mobile home park tenant for breach of contract alleging that an undisclosed fee was included in the tenant's monthly gas bill and the tenant was paying a higher rate for gas than the park was paying the gas company. Judge Hensal observed:

> Upon review of the record, it appears that all of the tenants of the park were subject to the same natural gas policies, regardless of whether they had a written lease or rented on a month-to-month basis. Accordingly, it was reasonable for the trial court to conclude that common questions of whether the Waligas and Gaslight Ohio breached their contracts or the Revised Code when they charged their tenants a meter-reading fee and an increased rate for gas "represent a significant aspect of the case [which is] able to be resolved for all members of the class in a single adjudication." *Stammco*, 2013 Ohio 3019 at ¶56, 136 Ohio St.3d 231, 994 N.E.2d 408, quoting *Schmidt v. Avco Corp.*, 15 Ohio St.3d 310, 313, 473 N.E.2d 822 (1998). Class certification will allow common questions such as the statute of limitations and whether the defendants committed a breach of contract and/or the Revised Code to be answered consistently as to all class members. We also agree with the trial court that, under *Hamilton*, the fact that each of the class members may have suffered a different amount of damages does not automatically make the class unmanageable. Since the Waligas and Gaslight Ohio allegedly were charging the same fee and upcharge to all of their tenants each month, it would seem that the court could calculate each class members' damages off of their monthly gas bills using a straight-forward mathematical calculation. In addition, the fact that the trial court might end up spending a significant amount of time on individual issues does not defeat class certification. See *Pyles v. Johnson*, 143 Ohio App.3d 720, 738, 758 N.E.2d 1182 (4th Dist. 2001). The Ohio Supreme Court has indicated that "clockwatching is neither helpful nor desirable in determining the propriety of class certification." *Hamilton*, 82 Ohio St.2d at 85, 694 N.E.2d 442. We, therefore, conclude that the trial court did not abuse its discretion when it determined that common questions predominate in this action.

Mozingo, ¶33.

Also it is clear that those Ghoubrial patients who did not receive reductions could form a class and those who did could be placed in a sub-class of the price-gouging class representing the percentage of reduction.

It is at least a jury question whether Nestico on behalf of KNR knew that Dr. Ghoubrial was overcharging his patients. The firm had been operating since 2005 and made heavy use of Dr. Ghoubrial, who Nestico referred to as "Gubs." Having worked in the field of low impact automobile accidents he could not have been unfamiliar with the usual charges for these treatments and devices.

Dr. Ghoubrial would be required to disgorge to the class member the amount of overcharge. KNR would be required to disgorge the amount of the contingent fee attributable

to the overcharges made by Dr. Ghoubrial. For example, if the settlement amount was increased by $4,000.00 in overcharge, and KNR's contingent fee was one-fourth of the recovery, then KNR would have to disgorge $1,000.00 of the fee as to that class member.

There was no evidence presented that Dr. Floros overcharged his patients or knew that Dr. Ghoubrial may have been doing otherwise. There was evidence that some insurance carriers did not value Floros' narrative reports as useful. Garry Petti however acknowledged that in some cases the reports served a useful purposes to explain why a patient's injuries were more challenging than might appear from Floros' examination records. Dr. Floros testified that each patient presented different problems and had different prognosis. Plaintiffs also presented no logical reason why Dr. Floros would participate in Dr. Ghoubrial's alleged overcharging when such conduct would endanger his own ability to recover his fees in any settlement.

As to Floros, Plaintiffs have failed to demonstrate that questions of fact common to the "narrative fee" members predominate over questions affecting only class members. Civ.R. 23(B)(3).

For Class C, the investigative fee class, all Plaintiffs were exposed to same conduct (charged a fee), fee varied from $30, $50, or $100 deducted from each settlement, and all present the same claims: fraud, breach of contract, breach of fiduciary duty, unjust enrichment. The generalized common proof shows the charge and KNR lacking an accounting of the alleged investigative service provided. All Plaintiffs claim no investigation was provided and instead the fee is a sham "sign-up fee." The investigation fee class will "prevail or fall in unison" because it pertains to a single underlying scheme [with] common misrepresentations or omissions across the class [that] are particularly subject to common proof. *Carder Buick-Olds Co*., 148 Ohio App.3d 635, ¶47, citing *Cope*, 82 Ohio St.3d 426, 430. Common questions predominate the illegitimate nature of the investigation fee – the investigation fee is alleged to

be an across the board sham, a subterfuge through which KNR extracts payment from their clients for the ordinary overhead cost of performing a "sign up." Thus, it does not matter whether differences exist between the nature and value of the "investigatory" services provided to the individual class members since these services had nothing to do with the true rationale for charging the investigation fee. There is no evidence that KNR kept track of the specific "investigatory" tasks "investigators" performed on a case-by-case basis so the Defendants claim of actual services performed, or individual inquiries required, is pure speculation as KNR saw no purpose in maintaining the data.

Common proof will show that all class members suffered damages by having to pay the "investigation fee" and the appropriateness of equitable relief to all Class C members further warrants certification – class members do not receive any "service" in exchange for the "investigation fee" – they are instead paying for a service KNR provides to itself – the service of soliciting new clients and securing their business. Regardless of how a client decides to call KNR – whether through KNR's marketing (TV, radio, bus ads or other advertisements) or even referrals from chiropractors (after being solicited from chiropractors) or even word of mouth – KNR's policy it to "sign-up" a client within 24 hours of the contact, regardless of the circumstances or merit of litigation/personal injury.

"Virtually all" KNR clients are charged a fee to fund KNR's 24-hour sign up policy which is essentially an "ambulance chasing" fee to ensure KNR receives the client's business rather than any competitor law firm. KNR argues the fee is a "pass through" for legitimate services provided but there is no evidence that KNR or its investigators account for their work for this "investigative fee." Without any accounting of the actual work provided KNR's arguments are pure speculation.

In fraud, Plaintiffs allege the KNR Defendants purposefully deceived class members about the true nature of the fee; under breach of contract the Plaintiffs portray the fee as an "[un]reasonable" expense ineligible for reimbursement pursuant to the KNR client contracts; the claim for fiduciary duty charges the defendants with violating their professional obligations in collecting the fee; the unjust enrichment count turns on the premise that "justice and equity" entitle class members to return of the "investigation fees" withheld. *Desai v. Franklin*, 177 Ohio App.3d 679, 2008 Ohio 3957, 895 N.E.2d 875, ¶14 (9th Dist). The legal issue – whether the fee is fraudulent skimming from clients – is overwhelmingly and obviously common to the class members because every single class members claims would be won or lost on an answer to that question. All class members claim they were damaged under these theories of liability and as with Class A, evidence of KNR's deliberate intent to enrich itself by charging what it knew or should have known to be an illegitimate fee warrants disgorgement of the fee.

Finally, a Class Action is a superior method for litigating the claims for Class A and C as eligible class members would realize no benefit by filing their own separate cases to seek recovery based on the unlawful fees charged by KNR. The costs of such litigation would be prohibitive compared to the limited amounts ($50 to approximately $2,000) and certifying the class will not present the Court with any "likely difficulties" that would not arise in any case of this sort. Civ.R. 23(3). The Plaintiffs have an interest in grouping their actions together in order to save time, money, and to avoid inconsistent judgments. As a certified class, Plaintiffs can spread the cost of the action amongst themselves and can avoid inconsistent judgments which may result even though the same allegations and facts exist. Further, the desirability of a class action is evident since allowing separate action for each affected person would clog the Court's docket and be a waste of judicial resources. While there may be some difficulties in management of this class action, they are not so insurmountable as to deny class certification.

Civ.R. 23(F) Class Counsel

Plaintiffs argue that their counsel in this lawsuit should be appointed counsel pursuant to Civ.R. 23(F). They note that the Court should consider (1) the work counsel has done in investigating potential claims in this action (2) counsel's experience in class actions and complex litigation, (3) counsel's knowledge of the law, and (4) the resources counsel will commit to representing the class. Floros objects because he believes Peter Pattakos is a direct competitor of KNR and has financial incentives to take down defendants rather than resolve the pending class claims. Also, Floros contends that Peter Pattakos has made defamatory statements about the defendants and if a named representative endorses those statements they could be liable for defamation. *Am. Chem Soc. v. Leadscape, Inc.*, 133 Ohio St. 3d 366. Lastly, Floros argues that Peter Pattakos has no experience in class action litigation.

This Court has considered the arguments and has reviewed the affidavit of Peter Pattakos and Joshua Cohen and finds that they and their respective law firms are qualified to represent the members of the classes certified by this Court in this action.

CONCLUSION

Class Representatives Reid, Norris, and Harbour assert claims of fraud, breach of fiduciary duty, unjust enrichment against all Defendants. They assert these claims on behalf of all the class members defined in Class A, the "price-gouging class." This Court finds that claims (one through four)[4] are appropriate claims for class action against all Defendants except Floros, and the breach of fiduciary claim as to Dr. Ghoubrial. As per prior discussion, Claims six, seven, and eight, made by Class Representatives Reid and Norris (Class B) have no basis for certification by this Court. Willims, Reid, Norris and Harbour's claims in Class C relating

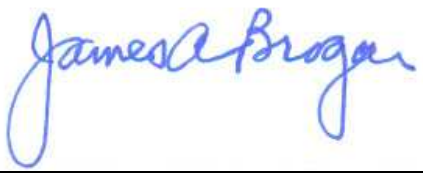
[4] There is no evidence to support claim five, for violations of the Ohio Corrupt Practices Act, concerning Class A the price-gouging class.

to the investigation fees (claims nine, ten, eleven, and twelve) may proceed as a class claims against the KNR Defendants.

The KNR Defendants and Defendant Dr. Ghoubrial shall notify all class members that this litigation is pending. The Plaintiffs shall be entitled to such relief as the trier of fact finds appropriate.

Pursuant to R.C. 2505.02(B)(5), this is a final and appealable order and there is no just cause for delay.

IT IS SO ORDERED.



JUDGE JAMES A. BROGAN
Sitting by Assignment #18JA1214
Pursuant to Art. IV, Sec. 6
Ohio Constitution

The Clerk of Courts shall serve all counsel/parties of record.