IN THE COURT OF APPEALS
NINTH JUDICIAL DISTRICT
SUMMIT COUNTY, OHIO

MEMBER WILLIAMS, *et al.*, Appellees/Cross-Appellants, v. KISLING, NESTICO & REDICK, LLC, *et al.*, Appellants/Cross-Appellees.	Case Nos. CA-31007 and CA-31008 On Appeal from Common Pleas Case No. CV-2016-09-3928 **Cross-Appellants' Merit Brief** **ORAL ARGUMENT REQUESTED**

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Table of Contents

Table of Contents (Continued)

Table of Authorities

Cases

Table of Authorities (continued)

Table of Authorities (continued)

Table of Authorities (continued)

Statutes **Page(s)**

Other Authorities

I. Cross-Assignments of Error

PLAINTIFFS' CROSS-ASSIGNMENT OF ERROR 1: The trial court erred by excluding from Class A (the "price-gouging class") any alleged victims who received so-called "discounts" of their fraudulently inflated medical bills and/or those alleged victims who were told not to use available health insurance for Dr. Ghoubrial's medical services.

PLAINTIFFS' CROSS-ASSIGNMENT OF ERROR 2: The trial court abused its discretion when it issued a ruling on the class-certification issue without first completing an *in camera* review of Julie Ghoubrial's Oct. 12, 2018 deposition transcript showing that Defendants [redacted] to conceal their price-gouging scheme.

II. Issue Presented

On December 17, 2019, the trial court entered a well-reasoned and highly detailed 56-page order certifying Plaintiffs' proposed "price-gouging" class (Class A), which was defined as follows:

> 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.

In support of its certification of this class, the trial court noted that the gravamen of the price-gouging class was "whether KNR and its medical providers engaged in a fraudulent price-gouging scheme." (Trial Ct. Decision 12/17/2019, p. 30.) As to Rule 23(B)'s predominance and superiority requirements, the trial court explained that Plaintiffs' allegations relate not just to isolated incidents of "price gouging" but rather a "price gouging scheme" or "conspiracy" involving all Defendants. (*Id.* p. 31.) The existence of this common scheme or conspiracy could be determined in a single adjudication as well as the fact that all putative class members were subjected to this common scheme. The trial court also rejected Defendants' arguments that individual issues predominate because the class members had varying insurance coverage and received varying discounts to their original overcharges. Specifically, the trial court

found these arguments unpersuasive, citing *Vinci v. American Can Co.*, 9 Ohio St. 3d 98 (1984) and *Mozingo v. Gaslight Ohio, LLC*, 2016-Ohio-4828.

On appeal (*Williams v. Kisling, Nestico, & Redick, LLC*, 9th Dist. Summit Nos. 29630, 29636, 2022-Ohio-1044) ("*Williams I*"), this Court found the trial court's analysis lacking and remanded the case for the trial court to perform a more "rigorous analysis" of the predominance issue in light of the fact that members of Class A had varying health insurance coverage and received varying "discounts" of their bills. However, on remand, instead of providing further analysis of how these nominal differences would affect the predominance inquiry, the trial court simply re-certified the class and subdivided the class into various subclasses. This, too, was appealed, and in *Williams II*, this Court found that the trial court did not actually perform the analysis required from *Williams I* and remanded the matter (again) so that the trial court could perform a rigorous analysis of the same issues.

Now, for the third time, the trial court again certified Class A, but instead of performing the rigorous analysis required by this Court, the trial court took a shortcut. This time, it simply eliminated from Class A all those victims who received "discounts" or were told to not use their medical insurance by Defendants. In other words, instead of following this Court's directives to assess the effect of varying insurance and discounts among class members, the trial court's latest certification order avoided the question altogether. Had the trial court engaged in the required analysis, it could only have properly concluded that common issues predominate in this case for all members of Class A, notwithstanding differences in health insurance and billing "discounts" among them. By avoiding that analysis and excising a significant number of victims from the price-gouging class, the trial court abused its discretion by denying those victims a

viable class action remedy that complies with Civ.R. 23(B).

Additionally, this case also presents the issue of Julie Ghoubrial's Oct. 12, 2018 deposition in her divorce from Defendant/Appellant Sam Ghoubrial, as it relates to the issue of class certification. Since October of 2019, Plaintiffs diligently sought access to the transcript of Julie Ghoubrial's deposition, believing it to contain further evidence to support their class certification efforts. In response, Defendants/Appellants pulled out all the stops to try to prevent this transcript from coming to light. However, despite all their efforts, the trial court nevertheless required Defendants to produce a copy of the transcript for *in camera* review. Despite possessing a copy of this transcript and having reason to know what it contained, and despite repeatedly ruling that the transcript "is highly relevant, probative, and subject to discovery in this case," (R. 2200, Rulings on Motions, p. 5), the trial court inexplicably sat on this information and failed to complete its proposed *in camera* review for years. Indeed, the trial court explicitly ordered that it would not review the transcript until *after* the class-certification issue in this case was finally resolved. The contents of Julie's transcript have only just recently become known to Plaintiffs, which confirms that Defendants [redacted] to conceal the very price-gouging scheme at issue. This evidence [redacted] puts to rest any question that individual issues may predominate over common questions in this case, including by eliminating any reasonable doubt as to whether disgorgement is an appropriate remedy in this case. Therefore, the trial court's failure to complete its *in camera* review of Julie's transcript and certify the "price gouging" class in full based on the evidence [redacted] contained therein independently constitutes an abuse of discretion.

III. Introduction and Summary of Argument

This is now the third appeal of the same class-certification question in a case

where Plaintiffs have presented voluminous evidence of a fraudulent scheme by a personal injury law firm and a conspiring former doctor (who has since had his license to practice medicine permanently revoked) to overcharge thousands of the firm's similarly situated clients. Specifically, the underlying record establishes that Defendants engaged in an elaborate price-gouging scheme, whereby clients of the KNR law firm were intentionally overcharged for medical services by former doctor Sam Ghoubrial in order to inflate Defendants' profits through fraudulent means. Defendants employed various strategies to perpetuate this fraud, including urging KNR clients to avoid using available health insurance (so as to avoid scrutiny of Ghoubrial's inflated bills) and reducing clients' medical bills after the fact to cover their tracks *after* their fraudulently inflated profits were already earned. While giving varying discounts to clients with varying health insurance coverage may add some factual nuance to a case, it does not overshadow the entire class certification analysis, especially when those tactics were deliberately employed in service of a singular, common fraudulent scheme, as case after case, across jurisdictions, have uniformly recognized. Defendants should not be rewarded simply because they were more clever in how they defrauded others. Such a precedent would simply provide a roadmap to fraudsters on how to avoid accountability.

Everyone who was overcharged by Ghoubrial for the defined procedures and supplies as part of his fraudulent scheme with the KNR Defendants suffered the same injury-in-fact, even if some victims had their bills later reduced or had varying insurance coverage. Every class member was victimized in the same manner, which led to Defendants retaining millions in ill-gotten profits. Those profits must be disgorged, regardless of whether the unreasonable amount charged to any particular victim for medical services was ultimately offset by a "discount." For those members who did not

receive an adequate "discount" or otherwise paid more than they would have had they used available insurance, they suffered *additional* damages, but the fact of injury and claim for disgorgement doesn't change. To hold otherwise would be taking the concept of "injury in fact" too far and would undermine the equitable purpose of the class action.

Just as ill-gotten profits earned from stolen money must be disgorged, even if the original money is returned, so too must ill-gotten profits earned from a fraudulent overcharging scheme, even if some or all of the overcharges are later "discounted" by varying amounts. This is precisely why Plaintiffs' original proposed "price-gouging" class must be certified in full. The trial court erred in limiting the class as it did.

The case for disgorgement and overcharge is even more clear in light of new evidence that shows that Defendants' price-gouging scheme was supported by [redacted]. Defendant Ghoubrial's former wife, Julie, testified in a deposition that [redacted] Plaintiffs have all along suspected that [redacted] was at play in this case, but Defendants have moved heaven and earth to try to prevent Julie's transcript from coming into the record. It was only because of a clerical error that Plaintiffs' counsel was able to see Julie's transcript and confirm this evidence of [redacted] Otherwise, Plaintiffs might never have learned the truth because even though the trial court was given a copy for *in camera* review, the trial court resolved to sit on the transcript until after the class certification issue was finally

determined.

Now that the details of Defendants' [redacted] are known, there can be no doubt that Plaintiffs' proposed "price-gouging" class satisfies the predominance and superiority requirements of Civ.R. 23(B)(3). Moreover, given what the trial court knew regarding what was alleged to be contained in Julie's transcript, the trial court's inexplicable failure to put this critical evidence into the record before improperly limiting Plaintiffs' proposed class was itself an abuse of discretion and constitutes reversible error.

In sum, this case presents a fraudulent price-gouging scheme in which a doctor systematically overcharged thousands of patients for medical services [redacted]. The defendants involved made millions from this scheme. Differences in the victims' health insurance and any "discounts" a particular victim may have received are simply red herrings. This case presents exactly the circumstances the class-action mechanism was designed to address, and Defendants' self-serving suggestion that our courts are incapable of addressing the fraudulent conduct at issue in this case insults the very purpose of our legal system.

IV. Statement of Facts

Plaintiffs hereby incorporate sections II.A. and II.B. of their 05/15/2019 motion for class-action certification filed in the trial court (R. 3844),[1] which sets forth the common and predominant evidence showing the following: (1) KNR operates a high-

[1] R. 3844, Plaintiffs' 05/15/2019 Motion for Class-Action Certification, can be accessed at the following link to the Summit County Clerk of Courts' online docket: https://clerkweb.summitoh.net/PublicSite/Documents/sumzzzn8000003EA.pdf

volume "settlement mill" whose business model places the firm's interests fundamentally at odds with those of its unwitting clients; (2) To exploit and sustain its settlement mill, KNR conspires with Defendant Ghoubrial to defraud its clients with a price-gouging scheme for healthcare that the clients are pressured to accept; (3) Pursuant to this scheme, Defendants charged class-members unconscionable rates, pursuant to standard billing codes and procedures, for certain healthcare supplies and services—including TENS units, and back braces, and trigger-point injections that are serially administered in systematic disregard for less-expensive and less-invasive modes and sources of treatment; (4) Defendants also coerced the KNR clients to forego coverage from their health-insurance providers in order to avoid scrutiny of, and obtain higher fees for, their fraudulent healthcare services; And (5) KNR continued to direct its clients to treat with Ghoubrial despite knowing that the auto-insurance carriers responsible for paying the clients' claims view his treatment as fraudulent and unworthy of compensation. This evidence, along with the above referenced evidence from Julie Ghoubrial's deposition transcript of Defendants' illegal kickbacks that were used to conceal their scheme, is discussed in more specific detail below in specifically addressing its relevance to the instant appeal.

V. Law and Argument

A. First Cross-Assignment of Error: The trial court erred by excluding from Class A (the "price-gouging class") any alleged victims who received so-called "discounts" of their fraudulently inflated medical bills or and/or those alleged victims who were told not to use available health insurance for Dr. Ghoubrial's medical services.

The "spirit" of Civ.R. 23 is "to open the judicial system to more people" through class actions. 73 OHIO JUR.3D *PARTIES* § 46 (2018). This procedure permits the resolution of "disputes involving common issues between multiple parties in a single

action." *Beder v. Cleveland Browns*, 129 Ohio App. 3d 188, 199, 717 N.E.2d 716 (8th Dist. 1998). The "policy at the very core" of the "class action mechanism," is to overcome the problem that small recoveries do not provide the incentive for any individual to bring a solo action prosecuting his or her rights. A class action solves this problem by aggregating the … potential recoveries into something worth [the] labor. *Ritt v. Billy Blanks Enter.*, 171 Ohio App. 3d 204, 2007-Ohio-1695, 870 N.E.2d 212, ¶32–33 (8th Dist.). Consistent with the "spirit" of Civ.R.23, courts must not "so narrowly apply[] Civ.R. 23 to substantially hinder the remedial purpose of the rule[.]" *Ojalvo*, 12 Ohio St.3d 230, 236.

Class certification generally becomes appropriate where "standardized practices and procedures" of the defendant affect multiple victims in the same way. *Cope v. Metropolitan Life Ins. Co.*, 82 Ohio St. 3d 426, 437, 1998-Ohio-405, 696 N.E.2d 1001. Plaintiffs must prove the appropriateness of class certification by a preponderance of the evidence, and the trial court is required to conduct a "rigorous analysis" of the prerequisites under Civ. R. 23 in assessing whether the plaintiffs have carried this burden. *Warner v. Waste Mgmt.*, 36 Ohio St. 3d 91, 94, 521 N.E.2d 1091 (1988); *Baughman*, 88 Ohio St. 3d 480, 483. In conducting this analysis, "[a]ny doubts … as to whether the elements of class certification have been met should be resolved in favor of upholding the class, subject to the trial court's authority to amend or adjust its certification order as developing circumstances demand." *Rimedio*, 2007-Ohio-3244, ¶12, citing *Baughman*, 88 Ohio St. 3d 480, 487.

In this case, while the trial court was correct to certify the "price gouging" class, it failed to provide a rigorous analysis that would justify re-defining the class in a manner that eliminated a substantial number of victims affected by Defendants' fraudulent and

illegal price-gouging/kickback scheme. Indeed, it appears the trial court eschewed its obligation to perform the analysis required by this Court (with regard to predominance in light of varying insurance and billing discounts) and instead simply redefined the class to avoid those questions entirely. However, as explained below, had the trial court performed the proper analysis, per this Court's prior directives, it could only conclude that the price-gouging class (Class A) must be certified in full, notwithstanding differences in health insurance and billing discounts among the putative class members.

1. Proof of a fraudulent scheme affecting all class members dictates a "common sense approach" recognizing that the class members' common interest "is not defeated by slight differences in their positions," and "ensures that common questions predominate over individual issues at trial."

Rule 23(B)(3) requires that "issues subject to generalized proof and applicable to the class as a whole predominate over those issues that are subject only to individualized proof." *Cullen*, 2013-Ohio-4733, ¶30. This balancing test is "qualitative, not quantitative." *Musial Offices, Ltd. v. Cty. of Cuyahoga*, 2014-Ohio-602, 8 N.E.3d 992 (8th Dist.), ¶32. It does not turn on the "time" required to resolve "common issues" as compared to "the time that individual issues" will consume. *Hamilton v. Ohio Savs. Bank*, 82 Ohio St.3d 67, 85, 694 N.E.2d 442 (1998) ("[C]lockwatching is neither helpful nor desirable in determining the propriety of class certification."). Rather, the predominance analysis is focused on whether central points of dispute in the case are "capable of resolution for all members in a single adjudication." *Cantlin v. Smythe Cramer Co.*, 2018-Ohio-4607, 114 N.E.3d 1260, ¶33 (8th Dist.), *quoting Marks v. C.P. Chem. Co.*, 31 Ohio St.3d 200, 204, 509 N.E.2d 1249. Common issues predominate if all class members will "prevail or fail in unison," or where the "gravamen" of every class members' claim "is the same." *Baughman*, 88 Ohio St. 3d 480, 489; *Musial*, 2014-Ohio-

602, ¶32. Under such circumstances, factual differences between class members' claims do not "defeat class certification" even where "the trial court might end up spending a significant amount of time on individual issues." R. 4921, 12/17/2019 Order, quoting *Mozingo* 2016-Ohio-4828, ¶ 32; *See also Consolidated Mortgage Satisfaction Cases*, 97 Ohio St.3d 465, 2002-Ohio-6720, 780 N.E.2d 556, ¶ 10.

Accordingly, Ohio law is clear that "when a common fraud is perpetrated on a class of persons, those persons should be able to pursue an avenue of proof that does not focus on questions affecting only individual members." *Cope*, 82 Ohio St.3d 426, 430 (collecting cases). Where, as here, "a fraud was accomplished on a common basis, there is no valid reason why those affected should be foreclosed from proving it on that basis." *Id*. 430; Particularly concerning fraud-based claims, "it would be senseless to require each of the members … to individually assert their fraud claims against the defendants, especially where a single underlying scheme, rather than a variety of distinct misrepresentations, is the fundamental basis for those claims." *Cope*, 432 (internal quotations omitted). *See also Ritt v. Billy Blanks Enters.*, 171 Ohio App.3d 204, 2007-Ohio-1695, 870 N.E.2d 212, ¶69 (8th Dist.) ("Since liability depends on whether the marketing scheme utilized by defendants was misleading and/or deceptive, individualized testimony is not required regarding each person's decision whether or not to purchase the membership program."); *Elkins v. Equitable Life Ins.*, M.D.Fla. Civil Action No. 96-296-CIV-T-17B, 1998 U.S. Dist. LEXIS 1557, *47 (Jan. 27, 1998) ("Where confronted with a class of purchasers allegedly defrauded over a period of time by a similar common thread or scheme to which all alleged non-disclosures or misrepresentations relate, 'courts have taken the common sense approach that the class is united by a common interest in determining whether a defendant's course of conduct

is in its broad outlines actionable, which is not defeated by slight differences in class members' positions, that the issue may profitably be tried in one suit.'").

Thus, applying these principles, the trial court should have certified the "price gouging" class in full, without redefinition because Plaintiffs have demonstrated that common issues capable of resolution in a single adjudication will predominate. Specifically, Defendants' fraudulent price-gouging scheme and [redacted] is the predominant factor in this case that links all members of Plaintiffs' proposed Class A.

As the trial court recognized in its initial 56-page certification order, the core of Class A's claims is Defendants' fraudulent price-gouging scheme, which evidence shows was implemented through systematic and routine policies, and uniform overcharges made pursuant to standard procedures and billing codes that are well-documented in Defendants' own records. The basics of this scheme apply to all class-members' claims, and can be proven with common evidence in a single adjudication. "Cases alleging a single course of wrongful conduct are particularly well-suited to class certification." *Powers v. Hamilton Cty. Pub. Defender Comm.*, 501 F.3d 592, 619 (6th Cir. 2007); *See also Cope*, 82 Ohio St.3d 426, 430.

Defendants' scheme relied on the KNR's concealment of the true nature of its relationship with Ghoubrial from their clients, including KNR's financial motivation for having its clients seek treatment from Ghoubrial, and Ghoubrial misrepresenting that his standard fees were reasonable. And as the trial court previously found, Plaintiffs have presented evidence that the price-gouging scheme was implemented through systematic and routine policies, making the alleged scheme amenable to proof by common evidence through a single adjudication. Thus, Defendants' liability for fraud,

breach of fiduciary duty, unjust enrichment, and breach of contract all depend entirely on proof of the common fraudulent scheme, without any need to consider differences in health insurance or billing discounts among the class's members.

The class representatives have below submitted evidence showing that the Defendants misled all similarly situated KNR clients into signing so-called "letters of protection" ("LOPs") by which they unknowingly waived their health-insurance benefits and granted Ghoubrial the entitlement to collect his fees for his medical services directly from the clients' settlement funds. *See* R. 3844, Plaintiffs' 05-15-2019 Motion for Class Certification at pp. 27–31, 76–79, 10–44 (citing evidence). By the time the clients first saw the amount of these charges, which (as common evidence will show) are uniformly exorbitant and unconscionable (*Id*. at Sections II.B.2.a., pp. 16–20; II.B.2.c., pp. 25–26 (citing evidence)), they were already legally obligated by the LOPs to pay these rates—rates that Ghoubrial had previously represented in the LOPs to be "fair and reasonable." *Id*. at 76–79 (citing evidence); *See also Id*. at Ex. 8, Reid Aff. (R. 3853), ¶ 8, ¶ 16–17; Ex. 11, Norris Aff. (R. 3853), ¶ 6–¶ 7, ¶ 9–¶ 10, ¶ 12; Ex. 14, Harbour Aff. (R. 3854), ¶ 7–¶ 8, 11; ¶ 15–¶ 16, ¶ 19; Ex. 9, Carter Aff. (R. 3853), ¶ 6–¶ 7, ¶ 10–¶ 11, ¶ 14–¶ 15, ¶ 18–¶ 19; Ex. 10, Beasley Aff. (R. 3853), ¶ 6–¶ 7, ¶ 9, ¶ 13–¶ 17, ¶ 19–¶ 20.

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

As to the breach of contract claim, it is notable that a contract with an open price term is enforceable when the parties clearly manifest an intention to be bound. *Malaco Constr., Inc. v. Jones*, 10th Dist. No. 94APE10-1466, 1995 Ohio App. LEXIS 3534 (Aug. 24, 1995), citing *Oglebay Norton Co. v. Armco*, 52 Ohio St.3d 232, 236, 556 N.E.2d 515 (1990). If the parties intend to be bound by a contract with an open price term, evidence must establish that the open price term was filled with a reasonable price. *Cook & Son-Pallay, Inc. v. Hillman*, 10th Dist. Franklin No. 14AP-448, 2014-Ohio-5444, ¶ 12. Filling the open price term with an unreasonable price is a breach of the contract's implied duty of good faith. *See Lucarell v. Nationwide Mut. Ins. Co.*, 152 Ohio St.3d 453, 2018-Ohio-15, 97 N.E.3d 458, ¶ 42 ("In addition to a contract's express terms, every contract imposes an implied duty of good faith and fair dealing in its performance and enforcement.")

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

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

instead of reasonable rates, thus breaching the contract. Common evidence will show that Ghoubrial's standard rates for the specific medical services and supplies at issue were commercially unjustifiable. *See* R. 3844, Plaintiffs' 05-15-2019 Motion for Class Certification at Sections II.B.2.a., pp. 16–20; II.B.2.c., pp. 25–26 (citing evidence).

Similarly, in their role as attorneys for the class members, the KNR Defendants had a fiduciary duty to their clients. Common evidence shows that KNR knew it had a duty to reasonably inform its clients about material issues affecting their legal interests; knew its clients would be misled into believing that Ghoubrial's charges were reasonable and could be recovered at law; and systematically concealed this vital information from clients and misled them about the true nature of its relationship with Ghoubrial for its own financial gain. *Id*. at Section II.A., pp. 4–10, II.B.1–B.2.a., pp. 10–20, II.B.3–5, pp. 28–44. Thus, common proof will show that the KNR Defendants breached their fiduciary duty to the class members when they encouraged them to seek treatment from (or continue treatment with) Ghoubrial while knowing his excessive rates, and the very nature of their relationship, were contrary to their clients' financial and legal interests.

Individual differences among the class members with regard to health insurance and billing "discounts" only affect the calculation of damages and thus do not predominate over a common fraudulent conspiracy affecting thousands of victims. The court will not have to determine whether Defendants could justify their exorbitant overcharges to certain clients but not others. The legitimacy of the overcharges and how they form part of Defendants' fraudulent scheme will depend upon "generalized proof" that applies across-the-board, without variation from class member to class member. *Cullen*, 2013-Ohio-4733, ¶30. The trial court can thus resolve these issues for all class members "in a single adjudication." *Cantlin*, 2018-Ohio-4607, ¶33. And the class

members' claims will "prevail or fail in unison," depending upon the court's evaluation of these questions. *Musial*, 2014-Ohio-602, ¶32.

2. Common proof will show that anyone who was billed at Ghoubrial's standard exorbitant rates for the specific categories of medical supplies and services at issue was necessarily injured-in-fact by Defendants' scheme. Being intentionally overcharged for medical services far in excess of reasonable rates as part of a fraudulent "price gouging" scheme to wrongfully inflate profits necessarily constitutes an injury-in-fact, even if those overcharges are later reduced or modified.

There is no need to analyze any differences in health insurance or after-the-fact write-offs among the class members in order to prove that all of them suffered injury-in-fact. Common evidence will establish average or maximum commercially reasonable rates for the defined categories of medical services and supplies at issue, thus prove that Ghoubrial's standard charges in excess of those rates were unreasonable and contrary to his false representations and duty to only charge reasonable rates. Furthermore, common proof of Defendants' fraudulent scheme will show how they wrongly profited from their price-gouging scheme and why those ill-gotten profits must be disgorged. Subsequent "reductions" or "write-offs" to what Defendants' ultimately accepted in satisfaction of these overcharges do not undo the injury-in-fact caused, especially when those discounts were *part of* the very same fraudulent scheme that allowed Defendants to earn fraudulent profits.

a. Common and predominant evidence will determine an average or maximum reasonable price for the specific categories of medical services and supplies at issue.

A jury can easily determine the average or maximum reasonable charge for each of the handful of medical procedures provided by Ghoubrial to all class members during the class period (*e.g*. trigger point injections, TENS units, back braces, office visits)

based on common evidence of what other providers in the community charge for the same services. "The use of aggregate damages calculations is well established" in class-action cases "and implied by the very existence of the class action mechanism itself." *In re Restasis*, 335 F.R.D. 1, 31. Additionally, "the value of medical services, as a general rule, is to be ascertained and fixed by the usual price paid for like services at the time and place of performance." *Univ. Hosp. v. Wells*, 1st Dist. Hamilton No. C-210132, 2021-Ohio-3666, ¶ 6. "Thus, individualized damages calculations will not qualitatively outweigh the plaintiffs' reliance on common proof" in cases involving overcharges for medical services where "average price[s]" can be calculated for such services, including by common evidence of "copay and coinsurance amounts" collected from insurance companies. *In re Restasis*, 335 F.R.D. 1, 31, citing *In re Air Cargo Shipping Servs. Antitrust Litigation*, E.D.N.Y. No. MDL No. 1775, 2014 U.S. Dist. LEXIS 180914, *61–62 (Oct. 15, 2014) (collecting cases in which "courts have permitted the use of averages to calculate overcharges"); *See also In re Ranbaxy Generic Drug Application Antitrust Litigation*, 338 F.R.D. 294, 303 (D.Mass.2021) ("Any potential variation among class members in the actual prices paid for each drug is more relevant to assessing the extent of the injury suffered than to determining the existence of an injury at all.").

b. Common and predominant evidence shows that each class member, all of whom were billed Ghoubrial's standard rates for the specific categories of medical services and supplies at issue, was injured in fact regardless of differences in class-members' insurance status, and regardless of after-the-fact "write-offs" accepted by Defendants in satisfaction of the inflated bills.

The exorbitant and unconscionable charges Ghoubrial originally imposed upon class members resulted in injury-in-fact, regardless of differences in class-members'

insurance status, and regardless of whether or how much he or KNR discounted the amount they ultimately accepted in satisfaction of the inflated bills. In its original ruling on class certification, the trial court held that it was a common issue as to whether Ghoubrial initially overcharged class members for medical services as part of the conspiracy between the Defendants. R. 4921, 12/17/2019 Order, p. 50–51. Here, the allegation that the class members "incurred an enforceable legal obligation" to pay the exorbitant fees for Ghoubrial's services alleges injury-in-fact for all class members, regardless of any after-the-fact write-offs. *Chavarria v. Fleetwood Retail Corp.*, 137 N.M. 783, 2005-NMCA-082, 115 P.3d 799, ¶ 15 ("Thus, even though Plaintiffs have not yet paid on the promissory note, by signing the note and affirming the sale, they incurred an enforceable legal obligation and thus have sustained actionable damage for fraud."). *See also San Allen, Inc. v. Buehrer*, 8th Dist. Cuyahoga No. 94651, 2011-Ohio-1676, ¶ 13 ("Here, each employer would have actually suffered damages if they were in fact overcharged for premiums through inflated base rates in any of the policy years. Insofar as the BWC seeks to apply individual setoff or recoupment defenses to the claims, 'a trial court should not dispose of a class certification solely on the basis of disparate damages.'"); *Anderson, Greenwood & Co. v. Martin*, 44 S.W.3d 200, 212 (Tex. Ct. App. 2001) ("The word 'damage' should not be restricted to a monetary loss; that is, it need not be measured in money, but it is sufficient if the defrauded party has been induced to incur legal liabilities or obligations different from that represented or contracted for."); 37 C.J.S. Fraud § 55, at 242-43 (1997) ("[T]he fact that actual monetary loss has not yet occurred will not preclude recovery for fraud if such loss is inevitable, as where the defrauded party has incurred a binding legal obligation").

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

In its initial certification order, the trial court observed that Defendants required KNR's personal injury clients to satisfy Ghoubrial's bills from their settlement proceeds. R. 4921, 12/17/2019 Order, p. 50. And the Court also noted that KNR prepared the letter of protection Ghoubrial used to ensure that the payment was made. *Id*. Those letters of protection created a medical lien on settlement proceeds as *additional* security but did not otherwise change any patient's personal responsibility for paying for the services charged by Ghoubrial. The letters produced in discovery required patients to agree to the following language:

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

R. 3844, 05/15/2019 Motion for Class Cert., p. 28, citing Ghoubrial Tr. (R. 3853; R. 3531) 278:15–279:5; Phillips Tr. (R. 3853; R. 4783) 51:18–52:12; Ex. 9, Carter Aff. (R. 3853), ¶ 5, ¶ 9, Ex. 14, Harbour Aff. (R. 3854), ¶ 3, ¶ 10; Ex. 11, Norris Aff. (R. 3853), ¶ 6; Ex. 10, Beasley Aff. (R. 3853), ¶ 5, ¶ 6, ¶ 12–¶ 13.

Any subsequent discounts or write-offs of these excessive bills do not change the fact that each member of the class suffered a cognizable legal injury upon being overcharged for services as they were provided. This is a common question across the class based on Ghoubrial's regular use of the LOPs to protect his right to payment. The LOPs constitute common proof that the class members incurred a personal, legal payment obligation at the time of receiving any medical service from Ghoubrial. That is itself a cognizable legal injury because by the time the clients first saw the amount of these charges, which are uniformly exorbitant and unconscionable, they are already legally obligated by the LOPs to pay these rates—rates that Ghoubrial had previously represented in the LOPs to be "fair and reasonable." R. 3844, 05/15/2019 Motion for Class Cert., p. 76–79 (citing evidence); *See also Id.*, Ex. 8, Reid Aff. (R. 3853), ¶ 8, ¶ 16–17; Ex. 11, Norris Aff. (R. 3853), ¶ 6–7, ¶ 9–10, ¶ 12; Ex. 14, Harbour Aff. (R. 3854), ¶ 7–8, 11; ¶ 15–16, ¶ 19; Ex. 9, Carter Aff. (R. 3853), ¶ 6–7, ¶ 10–11, ¶ 14–15, ¶ 18–19; Ex. 10, Beasley Aff. (R. 3853), ¶ 6–7, ¶ 9, ¶ 13–17, ¶ 19–20.

c. Damages can be determined for each class member using a simple mathematical calculation based on predominant common evidence, regardless of variations among the class members in health insurance coverage and write-offs received after the fact.

Furthermore, the calculation of damages for each class member is determined predominantly with common evidence through a straightforward mathematical calculation, regardless of differing health insurance and billing discounts would not predominate over all of the other common issues involved in proving Defendants' liability for the Price-Gouging scheme.

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

In this case, the accounting for any variation in insurance and billing discounts among the class members would be a straightforward mathematical calculation based largely on common evidence. As discussed above, a single adjudication can determine the maximum reasonable charge for each of the handful of medical procedures and supplies at issue to all class members during the class period based on common evidence of what other providers in the community charge for the same services. Any amount actually paid to Ghoubrial by any class member (whether or not insured) in

excess of the established average or maximum reasonable price constitutes damages for overcharge. For uninsured members, the analysis ends there.

In addition, a subclass or subclasses of members who had available insurance would be entitled to additional damages based on being wrongfully induced to forgo insurance benefits, which would account for what they otherwise would have paid through insurance. For those members, including the "plenty" (by one former KNR lawyer's estimate, 80%) of the class-members who were insured by Medicaid (*See* Horton Tr. 264:1–9; Lantz Tr. 324:23–325–2; Phillips Tr. 363:8–14), the calculation of overcharge would simply involve comparing the amounts an insured member paid to Ghoubrial with the amounts that the member's insurer would have paid for those services, based on standard rates and billing codes. *See* R. 4921, Plaintiffs' 5/15/2019 Motion for Class Certification, pp. 17, 25; 7/22/2029 Reply, pp. 14–15 (discussing Medicaid's standard reimbursement rates for the modalities delivered by Ghoubrial, readily determined by reference to CMS.gov).

Similarly, reimbursement rates for private insurance can be similarly established by common evidence, whether on a carrier-by-carrier basis or as a market average. For example, in *In re Restasis*, 335 F.R.D. 1, 31 cited in the section above, the court approved the plaintiffs' determination of amounts unlawfully overcharged for a prescription drug to each of "three categories of class members," including "TPPs [third-party payors], insured consumers, and cash payors." *Id*. The court found it was "reasonable" to measure overcharges by "determin[ing] the monthly average price each category paid for a prescription of [the drug] in the actual world" and a reasonable "but-for" price, that the consumers otherwise would have been fairly charged, including by reference to annual surveys from insurance companies "regarding generic copay and

coinsurance amounts," and prices of comparable drugs. *Id.*, 12, 31–32. Additionally, the *Restasis* court observed that such a methodology is "especially appropriate" in cases involving a clear violation, but where it is difficult to prove individual "damages with precision," as "the most elementary conceptions of justice and public policy require that the wrongdoer shall bear the risk of the uncertainty which his own wrong has created." *Id.*, 32.

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

For example, merely by reviewing the settlement memorandum and standard Form 1500 from Named Plaintiff Thera Reid's KNR file (R. 3844, Class Cert. Mot., 60–61, citing R. 3853, Ex. 8 (Reid Aff. (R. 3853) ¶15, Ex. E); R. 3856, Ex. 32, p. 1–2 (Form 1500s)), it can be readily determined that Ms. Reid, who was billed $3,460 by Ghoubrial and had insurance coverage through Medicaid, was overbilled by $3,054.56 from what she would have otherwise paid for the same items under Medicaid's standard

reimbursement rates.[2] While Defendants ultimately wrote-off $460 in collecting $3,000 from Ms. Reid's settlement to satisfy Ghoubrial's bill, this after-the-fact adjustment can simply be deducted from the amount overcharged in an amount proportional to the reduction. In other words, because Ghoubrial collected 87% of what he billed Ms. Reid, 87% of the $3,046.56 that he overbilled her—$2650.51—would constitute her damages.

The same formulaic calculation would show damages for every class member, regardless of whether and in what percentage Defendants ultimately collected from each class member in satisfying the inflated charges for Ghoubrial's services.

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

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[2] These documents show that Reid was billed $3,460.00 by Ghoubrial's practice, broken down as follows: Three $800 charges for trigger-point injections under code 20553, one $300 charge for an initial office visit under code 99203, four $150 charges for follow-up office visits under code 99213, and three $40 charges and one $80 charge for the kenalog steroid used for her trigger-point injections under codes J1030 and J1040 respectively. Medicaid would have only reimbursed Ghoubrial a maximum of $405.44 for these items for which he billed Reid: $43.48 for each round of the injections, $75 for the initial office visit, $50 for each follow up office visit, and nothing for the kenalog, for which Medicaid does not reimburse separately from the injections. R. 3844, Class Cert. Mot., 17 (citing R. 3531, Ghoubrial Tr. 256:22–258:3, Ex. 25), 25 (*Id.*, 269:22–271:14, Ex. 27), Ex. 8 (Reid Aff. (R. 3853)).

B. Second Cross-Assignment of Error: The trial court abused its discretion when it issued a ruling on the class-certification issue without first completing an *in camera* review of Julie Ghoubrial's Oct. 12, 2018 deposition transcript showing that Defendants [redacted] conceal their price-gouging scheme.

On October 12, 2018, Julie Ghoubrial, then wife of Defendant Ghoubrial, was deposed in connection with her divorce from Sam. During her deposition, Julie testified that [redacted]

Plaintiffs' counsel shortly learned about this testimony, also in October of 2018, and immediately sought production of the transcript of Julie's deposition by issuing a discovery request to Sam Ghoubrial for a copy of the transcript. Plaintiffs have since maintained, correctly, that [redacted] not only allowed Defendants to conceal the true nature of the quid pro quo relationships alleged by Plaintiffs, [redacted] also allowed the KNR Defendants to collect an additional share of Ghoubrial's inflated medical bills in excess of what they disclosed to their clients, and in excess of what would or could be considered a "reasonable" fee under Ohio Rule of Professional Conduct No. 1.5. (R. 1309, Fifth Amended Complaint, ¶ 133.)

Defendant Ghoubrial refused to produce the transcript, claiming that it was protected by spousal privilege, so on April 3, 2019, Plaintiffs' counsel filed a motion to

compel the relevant portions of Julie's transcript. On April 26, 2019, the trial court's magistrate granted the motion and entered an order that the transcript be submitted for *in camera* review. The trial court overruled Defendants' objection to the Magistrate's order on May 14, 2019. The trial court also entered an order on May 31, 2019, which states that "[t]his Court will however not examine in camera Julie Ghoubrial's deposition filed under seal until this Court rules on the certification question." On June 18, 2019, the Court ordered Julie Ghoubrial to submit a hard copy of the transcript to the Court under seal. In response, Sam and Julie Ghoubrial sought a writ of prohibition from this Court to prevent the trial court from getting a copy of Julie's transcript at all, even for *in camera* review. The writ action was dismissed, and on March 23, 2020, a copy of the transcript was provided to the trial court.

The trial court proceeded to certify Class A on three separate occasions, none of which included any analysis or consideration of the information in Julie's transcript, including the order being presently appealed. The trial court took no other action on Julie's transcript prior to this appeal; however, since then, Plaintiffs' counsel was able to obtain a copy of the transcript to confirm its contents.

As noted above, this transcript further confirms that common issues predominate in this case, thus justifying certification of Class A in full. The fact that there are still unadjudicated questions of spousal privilege regarding Julie's transcript does not change the analysis since the transcript makes clear [redacted]

However, if it is determined that the trial court could not have relied on Julie's deposition at all without first completing its *in camera* review, then given what the trial court knew about the contents of the transcript and how it could potentially have

affected the class certification analysis, the trial court's failure to complete its *in camera* review before proceeding with a ruling on class certification was itself an abuse of discretion.

"An abuse of discretion is the trial court's failure to exercise sound, reasonable, and legal decision-making." *State v. Nixon*, 11th Dist. Portage No. 2023-P-0001, 2023-Ohio-4871, ¶ 1. Courts througout this state have recognized that the failure to conduct an *in camera* review can constitute an abuse of discretion when the information to be reviewed is potentially dispositive of an issue to be adjudicated. *See, e.g., State Auto Ins. v. Wilson*, 9th Dist. Summit No. 29678, 2020-Ohio-4456, ¶ 4 (finding abuse of discretion where trial court ruled on Civ.R. 60(B) motion without holding evidentiary hearing to verify facts relevant to motion).[3]

[3] *See also In re Wright*, 10th Dist. Franklin No. 04AP-435, 2004-Ohio-4045, ¶ 1 ("The decision to not conduct an in-camera interview will be reversed only upon a showing that a trial court abused its discretion."); *In re D.M.*, 140 Ohio St.3d 309, 2014-Ohio-3628, 18 N.E.3d 404, ¶ 17-2 (abuse of discretion to dismiss a case for failure to comply with discovery order without first performing in camera inspection of the withheld evidence to determine if the evidence was discoverable); *Kalb v. Morehead* (May 19, 1998), Scioto App. No. 97CA2499, 1998 Ohio App. LEXIS 2281 ("The trial court abused its discretion by issuing a protective order on the basis of R.C. 2305.251 without inspecting the file."); *Akers v. Ohio State Univ. Med. Ctr.*, 10th Dist. Franklin No. 04AP-575, 2005-Ohio-5160, ¶ 16 ("[W]e find the trial court in the present case abused its discretion by granting the broad protective order without conducting an in camera inspection of the information claimed to be subject to the privilege."); *Zeller v. Maumee*

In this case, despite having found that Julie Ghoburial's deposition transcript was highly relevant to the case, the trial court expressly determined that it would *not* complete its *in camera* review of the transcript until *after* the class certification issue was resolved. This inexplicable decision was an abuse of discretion and has resulted in multiple trips to and from this Court on the issue of class certification. Had Julie's transcript been made part of the record and the trial court's "rigorous analysis" in the first place, the trial court could not have reasonably limited membership in Class A as it attempted to do in its third class-certification order.

Therefore, regardless of any potential privilege issues related to Julie Ghoubrial's deposition, the trial court erred by proceeding with the case without first addressing those issues. At a minimum, this case should be remanded so that the trial court can complete its review of Julie Ghoubrial's deposition transcript and taking those facts into consideration before issuing a new ruling on class certification, including as to relevance of [redacted] to the remedy of disgorgement.[4]

Valley Country Day School, 6th Dist. Lucas No. L-19-1085, 2019-Ohio-3708, ¶ 11 ("Here, because the trial court did not hold a hearing or review the documents in camera, we likewise hold that the trial court's April 5, 2019 judgment constituted an abuse of discretion.").

[4] *See Buckingham, Doolittle & Burroughs, L.L.P. v. Bonasera*, 157 Ohio Misc.2d 1, 2010-Ohio-1677, 926 N.E.2d 375, ¶ 56 (Franklin C.P.) ("[I]t is clear in Ohio that a lawyer is not entitled to retain a legal fee otherwise due for work that included theft or some other clear and serious violation of a duty owed to a client."), quoting *State v. Silverman*, 10th Dist. Franklin Nos. 05AP-837, 05AP-838, 05AP-839, 2006-Ohio-3826,

¶ 159-160 (affirming inclusion of agreed attorneys' fees as part of restitution order for attorney's theft from client); *In re Estate of Fraelich*, 11th Dist. Trumbull No. 2000-T-0016, 2004-Ohio-4538, ¶ 23 ("[Attorney's] fraudulent conduct in this case required a fee forfeiture."), quoting Restatement of Law Governing Lawyers 3d, Section 37 ("A lawyer engaging in clear and serious violation of duty to a client may be required to forfeit some or all of the lawyer's compensation for the matter."); *In re Binder: Squire v. Emsley*, 137 Ohio St. 26, 38, 47, 57, 57, 27 N.E.2d 939 (1940) (holding that disgorgement is a proper remedy against a self-dealing fiduciary "notwithstanding there may be no causal relation between [the defendants'] self-dealing and the loss or deprecation incurred," as matter of "public policy" to deter "self-dealing . . . [in] relation[s] which demand[ ] strict fidelity to others," and to deter the natural "temptation to wrong-doing" that fiduciary relations create); *Burrow v. Arce*, 997 S.W.2d 229 (Tex. 1999) ("An agent's breach of fiduciary duty should be deterred even when the principal is not damaged. We therefore conclude that a client need not prove actual damages in order to obtain forfeiture of an attorney's fee for the attorney's breach of fiduciary duty to the client."); *Hendry v. Pelland*, 73 F.3d 397, 402 (D.C. Cir. 1996) (holding that self-dealing attorneys face liability for forfeiture or disgorgement regardless of any proof of consequential injury); *King v. White* (Kan.1998), 265 Kan. 627, 642, 962 P.2d 475, quoting 7 Am.Jur.2d, Attorneys at Law Section 279, Fidelity and professional competence ("'An attorney who is guilty of actual fraud or bad faith toward a client ... is not entitled to any compensation for his or her services.'"); *United States v. Shah*, 84 F.4th 190, 252 (5th Cir.2023) ("But for that illegal conduct of conspiring to send the patients to Forest Park under a handshake deal for a kickback, the surgeons

would not have received their proceeds. As above, the bribe money did not differentiate between federal patients or private patients—the agreement and reimbursement were the same for both. The surgeons' conduct falls squarely within the realm of forfeiture."); *Miller v. Cloud*, 7th Dist., No. 15 CO 0018, 2016-Ohio-5063, ¶ 92 ("[W]hen a party is a wrongdoer, disgorgement is an option."); *United States v. Nicolo,* 597 F.Supp.2d 342, 350 (W.D.N.Y.2009) ("[T]he appropriate measure of forfeiture … is the defendant's gross proceeds."), *Castro v. United States*, 248 F.Supp.2d 1170, 1173 (S.D.Fla.2003) (attorney subject to "forfeiture of $ 77,204.00, reflecting the amount of attorney fees [he was] paid … as a result of the kickback scheme"); *United States SEC v. Thorn*, S.D.Ohio No. 2:01-CV-290, 2002 U.S. Dist. LEXIS 21508, at *9-10 (Sep. 30, 2002) ("[T]he remedy is equitable, and … precision of calculation will often be impossible."); *United States v. United Technologies Corp.*, 190 F. Supp. 3d 752, 759 (S.D. Ohio 2016) ("[R]estitution … concentrates on the defendant—preventing unjust enrichment, disgorging wrongfully held gains, and restoring them to the plaintiff. … A party seeking disgorgement is not required 'to produce data to measure the precise amount of the ill-gotten gains."); *In re Smith*, 365 B.R. 770, 789 (Bankr. S.D.Ohio 2007), fn 8 (same); *SEC v. Wyly*, 56 F. Supp. 3d 394, 426 (S.D.N.Y.2014) ("[C]ourts commonly order defendants to disgorge not only the proceeds of a fraud or the profits of an unlawful trade, but also salary and bonuses earned during the period of a fraud."); *Pivonka v. Sears*, 8th Dist. Cuyahoga No. 106749, 2018-Ohio-4866, ¶ 56 (When "named plaintiffs can prove for themselves" that they are "entitled to the disgorgement of every dime paid, then they can prove it for the whole class."); *Elkins,* 1998 U.S. Dist. LEXIS 1557 at *46-48 ("The appropriateness of equitable relief likewise ensures predominance.").

VI. Conclusion

Instead of conducting a rigorous analysis to conclude that differences in health insurance and billing "discounts" among members of Plaintiffs' proposed Class A would not predominate over the common issue of a singular, fraudulent price-gouging scheme, the trial court avoided the question entirely by simply limiting membership in the class. That was an abuse of discretion that deprives a substantial number of Defendants' victims of relief for the fraud perpetrated against them. The trial court's error is especially clear in light of Julie Ghoubrial's deposition transcript, which confirms [redacted], and the trial court's failure to consider that transcript as part of its class certification analysis (and refusal to even conduct an *in camera* review of it) constitutes an abuse of discretion. Although the trial court was correct to certify Class A (for the third time), it erred by limiting membership in that class without providing any analysis for why particular victims of Defendant's fraudulent scheme must be excluded. As discussed above, a proper analysis would conclude that no limitation of the class is necessary for common issues to predominate, notwithstanding any differences in insurance and discounts among the class members. The Court should remand this case with instructions for the trial court to conduct a rigorous analysis of the predominance question in this case in light of the foregoing authority. Moreover, given that this is now the third appeal on this matter and that the issue of predominance continues to crop up, this Court should provide guidance to the trial court regarding the law on injury-in-fact (i.e. intentionally overcharging a client in order to generate fraudulent profits constitutes an injury-in-fact, even if a subsequent discount is provided) so that the trial court may correctly apply that law to its analysis of the predominance question on remand.

Respectfully submitted,

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Certificate of Service

The foregoing document was filed on August 8, 2024, using the Court's electronic-filing system, which will serve copies on all necessary parties.

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