

IN THE COURT OF COMMON PLEAS  
SUMMIT COUNTY, OHIO

MEMBER WILLIAMS,	)	CASE NO. CV-2016-09-3928
	)	
Plaintiff,	)	JUDGE ALISON BREAUX
	)	
v.	)	
	)	
KISLING, NESTICO & REDICK, LLC, et al.,	)	<b><u>DEFENDANTS' PARTIAL MOTION FOR</u></b>
	)	<b><u>JUDGMENT ON THE PLEADINGS</u></b>
Defendants.	)	<b><u>REGARDING PLAINTIFF'S FIRST</u></b>
	)	<b><u>AMENDED COMPLAINT</u></b>

Pursuant to Ohio R. Civ. P. 12(C), Defendants Kisling, Nestico & Redick, LLC and Alberto R. Nestico respectfully file this Motion for Judgment on the Pleadings and move this Court for an order dismissing Plaintiff Member Williams' request for declaratory and injunctive relief against Defendants.

Defendant previously filed a Motion for Judgment on the Pleadings to Plaintiff's original Complaint. In response, Plaintiff filed a Motion For Leave to File First Amended Complaint, which was granted. Based on the First Amended Complaint, Defendants file this Motion for Judgment on the Pleadings. A memorandum in support of this motion and proposed judgment entry and order are attached.

Respectfully submitted,

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KISLING, NESTICO & REDICK, LLC,	)	<b><u>MEMORANDUM IN SUPPORT OF</u></b>
et al.,	)	<b><u>DEFENDANTS' PARTIAL MOTION FOR</u></b>
	)	<b><u>JUDGMENT ON THE PLEADINGS</u></b>
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**I. INTRODUCTION**

Without standing, a plaintiff cannot pursue a lawsuit, including claims for injunctive and declaratory relief. That is the case here. There are absolutely no factual allegations in Plaintiff's First Amended Class Action Complaint ("Amended Complaint") to support her having standing to seek generic declaratory and injunctive relief against Defendants, Alberto R. Nestico and Kislring, Nestico & Redick, LLC ("KNR"). As such, Plaintiff's claims against Mr. Nestico and request for injunctive relief should be dismissed with prejudice.

Plaintiff has no standing to seek declaratory and injunctive relief, as she has no personal stake in the outcome of that relief (i.e., the injunctive relief would not benefit her). Because she already knows about KNR's investigation fee and her allegations that such a fee is purportedly fraudulent, Plaintiff will never use KNR or pay the investigation fee again. Without a risk of future harm from KNR's conduct, Plaintiff has no personal stake in seeking to enjoin KNR's conduct, and therefore, she has no standing to pursue such an injunction. Plaintiff's request for injunctive and declaratory relief should be dismissed with prejudice.

**II. ALLEGED FACTUAL BACKGROUND**

Plaintiff has filed a putative class action lawsuit against KNR for breach of contract, fraud, and unjust enrichment and against Mr. Nestico for fraud and unjust enrichment. Plaintiff's

lawsuit is based on whether KNR's investigation fee charged to Plaintiff was valid and lawful.<sup>1</sup> KNR represented Plaintiff in an automobile matter. (Amended Complaint, ¶ 5.) Prior to the representation, Plaintiff entered into a contingency fee agreement with KNR in which purportedly the agreement, implicitly or expressly, allowed KNR to "deduct only reasonable expenses from a client's share of" a settlement or judgment. (*Id.*, ¶¶ 5; 10-12.) Allegedly, Plaintiff understood that "KNR would not incur expenses unreasonably and would not charge them for unreasonable expenses." (*Id.*, ¶ 12, emphasis added.) KNR obtained a settlement for Plaintiff. (*Id.*, ¶ 5.)

As part of that settlement and as required by Ohio law, Plaintiff voluntarily signed a Settlement Memorandum that outlined the settlement amount and the fees and expenses that were deducted from that amount to be paid to KNR, with the remaining paid to Plaintiff. (Amended Complaint, ¶¶ 14; 29.) The first expense on the Settlement Memorandum was \$50 that was paid to MRS Investigations, Inc. for an investigation fee. (*Id.*, ¶ 29 and Ex. C to the original Complaint.) Plaintiff, however, contends that "KNR never advised Plaintiff as to the purpose of the charge to MRS Investigations, Inc., and never obtained Plaintiff's consent for the charge." (*Id.*, ¶ 29, emphasis added.) Plaintiff further alleges that she never interacted with anyone from MRS Investigations and that "[n]o services were ever provided to Plaintiff in connection with the \$50 payment to MRS Investigations, Inc." (*Id.*)

Based on these allegations against KNR, Plaintiff sued KNR for breach of contract, fraud, and unjust enrichment and Mr. Nestico for fraud and unjust enrichment. In addition, despite not asserting a claim for it, Plaintiff also seeks declaratory and injunctive relief against Defendants. (Amended Complaint, Prayer for Relief, ¶ 3.) Plaintiff, however, does not allege that she will use KNR as counsel in the future or pay the investigation fee. It is simply included without any detail or substance in the prayer for relief.

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<sup>1</sup> By reciting the allegations of the First Amended Complaint in this Motion for Judgment on the Pleadings, Defendants do not admit or agree to those allegations. In fact, Defendants incorporate by reference herein their Answers.

### III. LEGAL ANALYSIS AND ARGUMENT

A. **Plaintiff's claims against Mr. Nestico and her request for declaratory and injunctive relief cannot survive this Civ. R. 12(C) Motion.**

Civ. R. 12(C) provides that “[a]fter the pleadings are closed but within such time as not to delay the trial, any party may move for judgment on the pleadings.” Civ. R. 12(B)(6) and 12(C) motions are similar, with Civ. R. 12(C) motions used for resolving questions of law. *State ex rel. Midwest Pride IV, Inc. v. Pontious*, 75 Ohio St.3d 565, 569, 1996-Ohio-459 (citing to *Peterson v. Teodosio* (1973), 34 Ohio St.2d 161, 166). “Under Civ. R. 12(C), dismissal is appropriate where a court (1) construes the material allegations in the Complaint, with all reasonable inferences to be drawn therefrom, in favor of the nonmoving party as true, and (2) finds beyond doubt, that the plaintiff could prove no set of facts in support of his claim that would entitle him to relief.” *Id.*

In other words, Civ. R. 12(C) requires a determination that no material factual issues exist and that the movant is entitled to judgment as a matter of law. *Id.*, at 570. *See also Ohio Ass’n of Public School Employees (OAPSE)/AFSCME LOCAL 4, AFL-CIO v. Madison Local School Dist. Bd. of Ed.*, 190 Ohio App.3d 254, 2010-Ohio-4942, ¶ 17 (11th Dist.). A claim is doomed by law when, taking the factual allegations in the complaint as true and disregarding unsupported conclusions, it appears that the plaintiff can prove no set of facts that would justify a court granting relief. *State ex rel. Hickman v. Capots*, 45 Ohio St.3d 324, 324 (1989); *O'Brien v. Univ. Comm.Tenants Union, Inc.*, 42 Ohio St.2d 242, 245 (1975). Plaintiff's request for declaratory and injunctive relief against Defendants does not survive this standard.

B. **Because Plaintiff will never seek representation from KNR again, Plaintiff has no standing to request declaratory and injunctive relief.**

Although Plaintiff does not assert a declaratory judgment or injunctive relief claim, Plaintiff seeks a generic declaratory judgment and injunctive relief against Defendants' “unlawful conduct” in her prayer for relief. (Amended Complaint, Prayer for Relief, ¶ 3.) However, Plaintiff does not have standing to seek declaratory and injunctive relief against Defendants. Therefore, the request for declaratory and injunctive relief should be dismissed.

Standing determines whether a plaintiff may properly assert a particular claim. *Woods v. Oak Hill Community Medical Center, Inc.*, 134 Ohio App.3d 261, 268 (4th Dist. 1999). The standing issue is dependent on whether the plaintiff has a “personal stake in the outcome of the controversy.” *Id.* at 268 (quoting *Cleveland v. Shaker Heights*, 30 Ohio St.3d 49, 51 (1987)). The personal stake requirement has three elements: “(1) injury in fact to the plaintiff that is concrete and particularized; (2) a causal connection between the injury and the conduct complained of; and (3) redressability.” *Id.* at 268-69 (quotations and citations omitted). In this particular case, the standing requirement is necessary regardless of whether plaintiff brings a class action: “Thus, if a named plaintiff purporting to represent a class does not establish the requisite standing, he may not seek relief on behalf of himself or any other member of the class.” *Id.* at 269 (citing *O’Shea v. Littleton*, 414 U.S. 488, 494 (1974)). “The relevant inquiry in an analysis of standing for injunctive relief focuses on whether the injunction sought would provide the [plaintiff] with some tangible good, i.e., whether he has some ‘personal stake’ in the injunction being granted.” *Id.* at 270 (quoting *Ottawa Cty. Bd. of Commrs. v. Marblehead*, 102 Ohio App.3d 306, 316 (6th Dist. 1995)). Under this three-prong test, Plaintiff does not have standing to sue for injunctive and declaratory relief.

Ohio and federal courts, applying the same three-prong test for standing, *Fednav Ltd. v. Chester*, 547 F.3d 607, 614 (6th Cir. 2008), have concluded that where the plaintiff already knows of the alleged wrongful conduct (fraud, deceptive advertising, etc.) that she is seeking to enjoin, and receive the relief sought, the plaintiff does not have standing to sue for injunctive and declaratory relief. In *Woods*, the plaintiff sought medical treatment from defendant where a blood test was performed. *Woods*, 134 Ohio App.3d at 265. The test results indicated that the plaintiff’s lab results were within the “normal” range, when in fact they were not. *Id.* In that class action, the plaintiff sought injunctive relief requiring the defendant to notify its other patients that the lab reports were incorrect. *Id.* at 269. The Fourth Appellate District Court affirmed the dismissal for lack of standing because the plaintiff was already made aware of the inaccurate

lab results. *Id.* at 269. The court further concluded that even if the plaintiff could argue that the incorrect lab results caused an injury in fact, the plaintiff could not prevail on the redressability element because he already received the relief for which he sought. *Id.* See also *Feathers v. Gansheimer*, 11th Dist. No. 2007-A-0052, 2008-Ohio-1652 (the plaintiff had no standing as he already received the relief sought); *Hange v. City of Mansfield*, 257 Fed. Appx. 887, 891 (6th Cir. 2007) (“[t]he individual must allege a substantial likelihood that he or she will be subjected in the future to the allegedly illegal policy.”); *Neuman v. L’Oreal USA S/D, Inc.*, No. 1:14-CV-01615, 2014 U.S. Dist. LEXIS 146525 (N.D. Ohio Oct. 14, 2014) (concluding that a plaintiff who suffers no risk of future injury cannot obtain an injunction). “In sum, ‘[p]ast exposure to illegal conduct does not in itself show a present case or controversy regarding injunctive relief . . . if unaccompanied by any continuing, present adverse effects.’” *Hange*, 257 Fed. Appx. at 892 (quoting *O’Shea*, 414 U.S. 488, 94 S. Ct. 669 (1974)). See also, *Cattie v. Wal-Mart Stores, Inc.*, 504 F. Supp. 2d 939, 951 (S.D. Cal. 2007) (finding that the plaintiff lacked standing to seek injunctive relief because “it is unclear how prospective relief will redress her injury, since she is now fully aware of the linens’ thread count” and she was not “realistically threatened by a repetition of the violation” to support declaratory or injunctive relief.)(citation omitted).

Here, Plaintiff seeks injunctive and declaratory relief, but cannot demonstrate any possibility, let alone likelihood, that her alleged injury will occur again. In other words, she has no personal stake in the matter to seek injunctive relief. She already suffered the alleged damage of being charged the investigation fee, without any argument that she would pay the fee again. Indeed, Plaintiff does not, nor could she, allege that she would retain KNR as counsel in a lawsuit in the future. Based on her allegations of fraud and deception, it would be illogical for Plaintiff to retain KNR in the future. Rather, Plaintiff’s sole remedy is to seek reimbursement of the investigation fee, which she is already pursuing in this lawsuit. Prospective relief in the form of an injunction will not redress her injury (i.e., she will receive no benefit from the requested injunction). Without a personal stake in obtaining injunctive relief,

Plaintiff's request for declaratory and injunctive relief should be dismissed with prejudice for lack of standing.

#### IV. CONCLUSION

Plaintiff has offered no facts to contend that she has standing to seek declaratory and injunctive relief. Because she will not use KNR as her future counsel, let alone again pay the investigation fee, Plaintiff has no personal stake in obtaining the injunctive relief. Accordingly, Plaintiff lacks standing to pursue this relief and the declaratory and injunctive relief claim should be dismissed with prejudice.

Respectfully submitted,

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	)	<b><u>JUDGMENT ENTRY AND ORDER</u></b>
KISLING, NESTICO & REDICK, LLC,	)	<b><u>GRANTING DEFENDANTS' PARTIAL</u></b>
et al.,	)	<b><u>MOTION FOR JUDGMENT ON THE</u></b>
	)	<b><u>PLEADINGS REGARDING PLAINTIFF'S</u></b>
Defendants.	)	<b><u>FIRST AMENDED COMPLAINT</u></b>

Based on Defendants Motion for Judgment on the Pleadings Regarding Plaintiff's First Amended Complaint, and after having fully reviewed and analyzed all briefs on this Motion, Defendants' Motion is well taken and granted in its entirety. Therefore, it is ordered and decreed that Plaintiff's request for injunctive and declaratory relief against Defendants is hereby dismissed with prejudice.

SO ORDERED:

\_\_\_\_\_  
Judge Alison Breaux



**CERTIFICATE OF SERVICE**

A copy of the foregoing Partial Motion for Judgment on the Pleadings was filed electronically with the Court on this 21st day of February, 2017. The parties may access this document through the Court's electronic docket system.

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