IN THE COURT OF COMMON PLEAS
SUMMIT COUNTY, OHIO

MEMBER WILLIAMS, Plaintiff, vs. KISLING, NESTICO & REDICK, LLC, *et al.*, Defendants.	Case No. CV-2016-09-3928 Judge Alison Breaux

PLAINTIFF WILLIAMS'S MOTION FOR RECONSIDERATION OF THE COURT'S MARCH 16, 2017 ORDER REGARDING DISMISSAL OF CLAIMS AGAINST DEFENDANT NESTICO

I. Issues Presented

1. Under Ohio law, the shield of limited liability does not insulate a wrongdoer from liability for his own tortious acts—and plaintiffs need not pierce the corporate veil to hold corporate officers liable who personally committed fraud. By its March 16 Order dismissing Plaintiff Williams's fraud and unjust-enrichment claims against Defendant Nestico, this Court erroneously relied on contract and veil-piercing standards, and in the process disregarded well-established Ohio law holding that Defendants need not make affirmative misrepresentations to be held liable for fraud, Civ.R. 9(B)'s provision that a defendant's knowledge and intent regarding fraud may be alleged generally, and Civ.R. 12(C)'s requirement that all reasonable inferences be construed in Plaintiff's favor. Additionally, Plaintiffs' proposed Second Amended Complaint refers to new evidence of Nestico's personal liability for Williams's (and new Plaintiffs') claims. Should this Court vacate and reverse its March 16 Order?

2. Under R.C. 2323.51 and Civ.R. 11, sanctions may only be entered against a party or attorney whose conduct demonstrates a lack of good faith. By its March 16 Order, this Court set a hearing on whether Plaintiff Williams should be required to pay Nestico's attorneys' fees under R.C. 2323.51 or Civ.R. 11 despite the abundant caselaw supporting her position, and despite there being not even a hint of bad faith on the part of Plaintiff or her counsel. Should the Court vacate and reverse the portion of its March 16 Order setting a sanction hearing?

II. Introduction

Based on Plaintiffs' proposed Second Amended Complaint, which contains new allegations referring to newly discovered evidence showing that Defendant Alberto ("Rob") Nestico is directly responsible for the "investigation fee" fraud at issue in this case, the Court should vacate and reverse its March 16 Order dismissing Plaintiff Member Williams's fraud and unjust-enrichment claims against Nestico. The Court should also reverse its March 16 Order because the Order—consistent with the unfortunately misleading citations contained in Nestico's 12(C) motion—erroneously relies on legal standards pertaining to contract law and "piercing the corporate veil" that do not apply to Williams's fraud and unjust-enrichment claims. Consistent with the portion of its March 16 Order vacating its March 6 Order, the Court has the authority to—and should—correct these errors. *See* Civ. R. 54(B) ("[A]ny … order or other form of decision is subject to revision at any time before the entry of judgment adjudicating all the claims and the rights and liabilities of all the parties."); Civ. R. 60(B) ("[T]he court may relieve a party … from a[n] … order … [based on] newly discovered evidence … or any other reason justifying relief from the judgment.").

Specifically, the March 16 Order misapplies a principle that only applies to contract law in requiring Plaintiff Williams to allege that Nestico "intentionally or inadvertently [bound] himself," or "personally made any representations to Plaintiff." March 16 Order at 4, quoting *Centennial Ins. Co. v. Vic Tanny International, Inc.*, 46 Ohio App. 2d 137, 142, 346 N.E.2d 330, (6th Dist. 1975). Further, the Order misapplies veil-piercing law, including R.C. 1705.48(A), to require Plaintiff to allege facts showing that "the corporate entity [KNR] should be disregarded." *Id.* But Williams has not alleged that the Court should disregard KNR's corporate form and does not seek to hold Nestico liable for damage caused solely by KNR. Rather, Williams only seeks to hold Nestico liable for conduct for which he, personally, is responsible. Under these circumstances, Ohio law recognizes that "plaintiffs need not pierce the corporate veil to hold individuals liable who allegedly personally committed

fraud." *Yo-Can, Inc. v. Yogurt Exch.*, 149 Ohio App. 3d 513; 2002-Ohio-5194; 778 N.E.2d 80, ¶ 49 (7th Dist). In other words, "the personal participation theory of liability is distinct from piercing the corporate veil." *State ex rel. Cordray v. Evergreen Land Dev., Ltd.*, 7th Dist. Mahoning Nos. 15-MA-0115, 15-MA-0116, 2016-Ohio-7038, ¶ 17.

On the personal-participation theory, Williams only needed to allege, as she did, that Nestico directed or knew about KNR's fraudulent conduct, that he intended KNR's fraudulent representations to be acted upon by Williams and other KNR clients, that Williams and the Class were damaged by the fraud, and, as to the unjust-enrichment claim, that Nestico benefited from the fraudulent conduct. *State v. Warner*, 55 Ohio St. 3d 31, 53, 564 N.E.2d 18 (1990) ("Ohio courts have recognized fraud to include: (1) representation, **or where there is a duty to disclose, concealment, of a matter of fact**; (2) which is material to the transaction at hand; (3) made falsely, with knowledge of its falsity, or with such utter disregard and recklessness as to whether it is true or false that **knowledge may be inferred**; (4) with the intent of misleading another into relying upon it; (5) justifiable reliance upon the representation or concealment; and (6) a resulting injury proximately caused by the reliance.") (emphasis added); *Textron Fin. Corp. v. Nationwide Mut. Ins. Co.*, 115 Ohio App. 3d 137, 684 N.E.2d 1261, (9th Dist. 1996) ("The tort of fraud contains an element of intent, either actual **or inferred**.") citing *Burr v. Stark Cty. Bd. of Commrs.*, 23 Ohio St. 3d 69, 491 N.E.2d 1101 (1986), paragraph two of the syllabus (emphasis added). *Hambleton v. R.G. Barry Corp.*, 12 Ohio St.3d 179, 183, 465 N.E.2d 1298 (1984) ("[T]he elements of [an unjust-enrichment claim] are as follows: (1) a benefit has been conferred by the plaintiff upon a defendant; (2) knowledge by the defendant of the benefit; and (3) retention of the benefit under circumstances where it would be unjust to do so without payment.").

Despite Nestico's misleading argument to the contrary, Ohio law does not require a corporate officer to specifically make statements to a plaintiff to be held liable for fraud. A contrary

interpretation would allow corporate officers to insulate themselves from liability simply by directing or knowingly allowing their subordinates to engage in fraud. *Miles v. McSwegin*, 58 Ohio St. 2d 97, 99–100, 388 N.E.2d 1367 (1979). As the Supreme Court of Ohio held in *Miles*, "It is well established that **an action for fraud and deceit is maintainable not only as a result of affirmative misrepresentations, but also for negative ones, such as the failure of a party to a transaction to fully disclose facts of a material nature** where there exists a duty to speak." *Id.* (emphasis added). The Court added that, "it should be axiomatic that parties who directly benefit from and knowingly participate in a transaction tainted with fraud or deceit, who are under a duty to disclose their knowledge and fail to do so, are liable for damages directly and proximately resulting from their silence." *Id. See also Warner*, 55 Ohio St. 3d 31, 53.

Thus, contrary to the Court's March 16 order, Plaintiff was not required to allege that Nestico made any statements to her himself, or that KNR's corporate form should be disregarded, but only that Nestico's "own actions or *omissions*" caused her to be defrauded. *See* R.C. 1705.48(D) ("Nothing in this chapter affects any personal liability of any member, any manager, or any officer of a limited liability company **for the member's, manager's, or officer's own actions or omissions**.") (Emphasis added).

Under the proper legal standard, the allegations in the First Amended Complaint were more than sufficient to withstand Nestico's 12(C) motion. Plaintiff provided detailed allegations about KNR's fraudulent investigation fee scheme, and also alleged that Nestico owned and completely controlled KNR at all relevant times. These allegations are more than sufficient to support the inferences that Nestico not only knew about the firm's participation in the scheme and failed to stop it, but directed the firm to engage in the fraud for his own benefit and failed to disclose the scheme to clients. In fact, the contrary inference—that such a widespread fraud against all KNR clients could occur without Managing Partner Nestico's knowledge and approval—is highly questionable

on its face, even apart from the fact that the Court is not permitted to consider it on a 12(C) motion to dismiss. *See* Civ. R. 9(B) (providing that while "the circumstances constituting fraud or mistake shall be stated with particularity[,] … **[m]alice, intent, knowledge, and other condition of mind of a person may be averred generally**") (Emphasis added); *State ex rel. Midwest Pride IV, Inc. v. Pontious*, 75 Ohio St. 3d 565, 570, 664 N.E.2d 931 (1996) ("**Dismissal under Civ. R. 12(C) is only 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 [her] claim that would entitle [her] to relief."); *Evergreen Land Dev., Ltd.*, 2016-Ohio-7038, ¶ 33 ("The fact that [plaintiff] may have employed circumstantial evidence and inference in [proving an individual's personal participation in a corporation's unlawful conduct] does not equate to mere speculation. Circumstantial evidence has the same probative value as direct evidence. Moreover, **rational inferences can be drawn based upon facts in the record and even based upon a combination of a fact in the record and another rational inference**.") (emphasis added).

Additionally, the proposed Second Amended Complaint contains new allegations referring to newly discovered evidence proving that Nestico was personally responsible for the "investigation fee" fraud. Thus, consistent with Ohio law, Plaintiff Williams has sufficiently alleged that Nestico's own "actions or omissions," (*e.g.*, his control over KNR, his knowledge of and control over the fraudulent scheme, and his failure to stop it) caused damages to Plaintiff Williams and the Class. To dismiss Nestico from this case without allowing Plaintiff an opportunity to prove his role in the alleged fraud is contrary to both the letter and spirit of Civ. R. 12(C), which allows for dismissal only when, after all allegations and inferences are construed *in Plaintiff's favor*, Plaintiff could prove no set of facts entitling her to relief. The March 16 Order does not reflect any such construction in Plaintiff's favor, and in fact reflects that even *unreasonable* inferences—*e.g.*, that KNR could have

engaged in such widespread fraud without Nestico's knowledge or approval—were construed in *Nestico's* favor.

Finally, whether or not Nestico remains as an individual Defendant on Williams's fraud and unjust-enrichment claims, the Court should reverse and vacate the portion of its March 16 Order setting a hearing on whether Plaintiff should pay Nestico's attorneys' fees under Civ.R. 11 or R.C. 2323.51. Ohio follows the "American rule" establishing that attorney-fee awards may only be entered against parties under specific statutory authority, absent a finding of bad faith. There are no facts establishing that Plaintiff has engaged in any such bad-faith conduct here, and Nestico did not even cite or discuss Civ.R 11 or R.C. 2323.51 in his motion.

III. Law and Argument

A. Civil Rules 54(B) and 60(B) authorize Ohio courts to vacate and reverse orders for any reason, including newly discovered evidence or any other reason justifying relief.

Civil Rules 54(B) and 60(B) authorize Ohio courts to vacate and reverse orders for any reason, including newly discovered evidence or any other reason justifying relief.

Civ. R. 54(B) provides, in pertinent part, that, any "order or other form of decision is subject to revision at any time before the entry of judgment adjudicating all the claims and the rights and liabilities of all the parties."

Civ. R. 60(B) provides, in pertinent part, as follows: "On motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order or proceeding for the following reasons, *inter alia*: (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(B) … or (5) any other reason justifying relief from the judgment."

As discussed above and in more detail below, the Court's March 16 Order dismissing Plaintiff Williams's claims against Nestico is contrary to Ohio law, and Williams's proposed Second

Amended Complaint refers to newly discovered evidence further establishing that Williams's claims against Nestico are sufficiently pleaded. Thus, under Rules 54(B) and 60(B), the Court may and should vacate and reverse the Order.

B. The Court should vacate and reverse the March 16 Order because the Order is contrary to well-established Ohio law.

While Defendant Nestico's 12(C) motion put forth misleading arguments relating to contract law and "piercing the corporate veil," those principles do not apply to Williams's claims and the Court thus should not have applied them in its March 16 Order. As explained fully below, Ohio law only required Williams to allege that Nestico directed or knew about KNR's fraudulent conduct, that he intended that Williams and other KNR clients rely upon KNR's fraudulent statements, that the fraud damaged Williams and the Class, and, as to the unjust-enrichment claim, that Nestico benefited from the fraudulent conduct. Plaintiff's allegations in her First Amended Complaint, taken as true, and with all reasonable inferences construed in Plaintiff's favor, were more than sufficient under Rule 12(C). Further, as explained fully below, the additional facts alleged in Plaintiffs' proposed Second Amended Complaint leave no doubt as to whether Williams's claims have been properly pleaded against Nestico.

1. The March 16 Order erroneously relies on legal standards pertaining to contract law and "piercing the corporate veil," and disregards the controlling principles that all individuals are legally responsible for their own tortious conduct and need not make affirmative misrepresentations to be held liable for fraud.

Consistent with controlling Ohio Supreme Court authority, R.C. 1705.48(D) explicitly provides that corporate officers are personally liable "for their own actions or omissions." Thus, a party "need not pierce the corporate veil to hold individuals liable who allegedly personally committed fraud." *Yo-Can, Inc.*, 149 Ohio App. 3d 513; 2002-Ohio-5194; 778 N.E.2d 80, ¶ 49. The Court's March 16 Order erroneously disregards these controlling principles, and is instead based on contract and veil-piercing standards that do not apply to Williams's claims against Nestico.

First, the Order echoes Nestico's misleading 12(C) motion by citing to *Centennial Ins. Co. v. Vic Tanny Int'l of Toledo, Inc.*, 46 Ohio App. 2d 137, 142, 346 N.E.2d 330, (6th Dist. 1975) for the following proposition: "for an officer of a corporation to be held personally liable for the same conduct for which his corporate principal is liable, the officer must have 'intentionally or inadvertently [bound] himself as an individual.'" March 16 Order at 4.

But the Court's formulation here omits the crucial first part of the *Vic Tanny* court's sentence: "An officer of a corporation is not personally liable **on contracts or on expressed or implied warranties**, for which his corporate principal is liable, unless he intentionally or inadvertently binds himself as an individual." *Vic Tanny* at 142 (emphasis added). Thus, as this principle only applies to contracts, it was error for the Court to apply it to the fraud and unjust-enrichment claims against Nestico, and to require Plaintiff to show that Nestico "intentionally or inadvertently bound himself as an individual," or "personally made any representations to Plaintiff." March 16 Order at 4.[1]

Additionally, the Order wrongly applies legal standards relating to "piercing the corporate veil," *i.e.*, holding an individual corporate officer for the debt or wrongdoing of a corporation, when Williams only sought to hold Nestico liable *for his own wrongdoing*. For example, the Order again echoes Nestico's misleading 12(C) Motion (at 6-7) by quoting the following legal principles:

> No member, manager or officer of a limited liability company is personally liable to satisfy any judgment, decree, or order of a court for, or is personally liable to satisfy in any other manner, a debt, obligation, or liability of the company solely by reason of being a member, manager, or officer of the limited liability company. …

[1] The Court correctly noted that "both Plaintiff and Defendant rely upon" the *Vic Tanny* case. March 16 Order at 3. But the key point here is that Plaintiff and Defendant were relying on two entirely different holdings from the case. Plaintiff was not relying upon the inapplicable contract-related principle as Defendants' did. Nestico 12(C) Mot. at 6. Rather, Plaintiff relied upon the fraud-related holding, stated earlier in the decision, providing that a corporate officer can be held liable for a corporation's fraudulent statements when "he knew the statement[s] w[ere] false, that he intended [them] to be acted upon by the parties seeking redress, and that [they] w[ere] acted upon to the injury of the party." *Vic Tanny* at 141. This principle is confirmed by the well-established Ohio Supreme Court caselaw cited herein.

> Ohio Courts have long been reluctant to disregard a corporate entity in favor of holding an officer personally liable. Ohio Courts have consistently been willing to disregard the corporate entity 'only where the corporation has been used as a cloak for fraud or illegality or where the sole owner has exercised such excessive control over the corporation that it no longer has a separate existence.' The Supreme Court of Ohio has held a corporate entity should not be disregarded unless justice cannot be served otherwise.

March 16 Order at 3-4 (citations omitted).

Here, again, while these are correct statements of law, they do not apply to Williams's claims, which do not ask the Court to pierce the corporate veil or otherwise disregard KNR's corporate form, and only seek to hold Nestico liable for his *own* wrongdoing. Not only does R.C. 1705.48(D) expressly provide that a corporate officer is liable for "[his] own actions or omissions," but Ohio case law is similarly clear that a party "need not pierce the corporate veil to hold individuals liable who allegedly personally committed fraud." *Yo-Can, Inc.*, 149 Ohio App. 3d 513; 2002-Ohio-5194; 778 N.E.2d 80, ¶ 49. *See also Mohme v. Deaton*, 12th Dist. Warren No. CA 2005-12-133, 2006-Ohio-7042, ¶ 28 quoting *Young v. Featherstone Motors, Inc.*, 97 Ohio App. 158, 171–72, 124 N.E.2d 158 (10th Dist. 1983) ("[C]orporate officers may be held personally liable for actions of the company if the officers take part in the commission of the act or if they specifically directed the particular act to be done, or participated or cooperated therein."); In other words, "the personal participation theory of liability is distinct from piercing the corporate veil." *Evergreen Land Dev., Ltd.*, 2016-Ohio-7038, ¶ 17.[2]

[2] *See also Snapp v. Castlebrook Builders, Inc.*, 2014-Ohio-163, 7 N.E.3d 574, ¶ 88 (3rd Dist.) ("[Individual defendant's] personal liability was not based solely on the theory of piercing the corporate veil. Rather, he was liable for his own actions of violating the CSPA, committing fraud, and being unjustly enriched."); *Williams v. Farmwald*, 11th Dist. Lake No. 2015-L-140, 2016-Ohio-7151, ¶ 26 ("Farmwald could still be held liable personally for tortious acts he commits in relation to corporate business, even without piercing the corporate veil."); *Armstrong v. Trans-Service Logistics Inc.*, 5th Dist. Coshocton No. 04CA015, 2005-Ohio-2723, ¶ 55 ("Ohio law provides that a corporate officer can be held personally liable for a tort committed while acting within the scope of his employment. … This rule does not depend on the same grounds as 'piercing the corporate veil' … ."); *Stewart v. R.A. Eberts Co.*, Inc., 4th Dist. Jackson No. 08-CA-10, 2009-Ohio-4418, ¶ 30 ("Each of the individual defendants is also subject to potential liability for any of his individual wrongful conduct against Stewart because neither the corporate shield nor a shield of limited liability insulates a wrongdoer from liability for his or her own tortious acts."); *Evergreen Land Dev., Ltd.,* 2016-Ohio-7038, ¶ 17 ("The magistrate found the members personally liable because they personally participated in the violations;

Thus, it was error for the Court to apply veil-piercing law to require Plaintiff to "state … facts justifying holding Defendant Nestico personally liable for the alleged actions of KNR." March 16 Order at 4. And the Court further erred in failing to apply blackletter Ohio law on fraud: "It is well established that an action for fraud and deceit is maintainable not only as a result of affirmative misrepresentations, but also for negative ones, such as the failure of a party to a transaction to fully disclose facts of a material nature where there exists a duty to speak. It should be axiomatic that parties who directly benefit from and knowingly participate in a transaction tainted with fraud or deceit, who are under a duty to disclose their knowledge and fail to do so, are liable for damages directly and proximately resulting from their silence." *McSwegin*, 58 Ohio St. 2d 97, 99–100 (citations omitted); *Warner*, 55 Ohio St. 3d 31, 53 ("Ohio courts have recognized fraud to include: (1) representation, **or where there is a duty to disclose, concealment**, of a matter of fact; (2) which is material to the transaction at hand; (3) made falsely, with knowledge of its falsity, or with such utter disregard and recklessness as to whether it is true or false that **knowledge may be inferred**; (4) with the intent of misleading another into relying upon it; (5) justifiable reliance upon the representation or concealment; and (6) a resulting injury proximately caused by the reliance.") (emphasis added); *Textron Fin. Corp. v. Nationwide Mut. Ins. Co.*, 115 Ohio App. 3d 137, 684 N.E.2d 1261, (9th Dist. 1996) ("The tort of fraud contains an element of intent, either actual **or inferred**.") citing *Burr v. Stark Cty. Bd. of Commrs.*, 23 Ohio St. 3d 69, 491 N.E.2d 1101 (1986), paragraph two of

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they knew the violations were occurring, had the authority to prevent the violations from continuing, and failed to exercise their authority in such manner."); *Cent. Benefits Mut. Ins. Co. v. RIS Adm'rs Agency, Inc.*, 93 Ohio App. 3d 397, 403, 638 N.E.2d 1049 (10th Dist. 1994) ("When a corporate officer commits a tort while in the performance of his duties, he is individually liable for the wrongful act."); *Luckoski v. Allstate Ins. Co.*, 2013-Ohio-5460, 2013-Ohio-5460; 5 N.E.3d 73, ¶ 36 (2d Dist.) ("[W]e need not determine whether to pierce the corporate veil, since McGarvey's liability is not based upon his status as a shareholder but upon his direct actions in violating the OCSPA."). *Phillips v. Yun*, 6th Dist. Lucas No. No. L-15-1246, 2016 Ohio App. LEXIS 1520, *4–5 (Ohio Ct. App., Lucas County Apr. 22, 2016) (applying 1705.48 to reverse trial court because genuine issues of material fact existed as to individual defendant's "own actions or omissions" in addition to corporate co-defendant's).

the syllabus (emphasis added).[3]

Thus, under the proper legal standard, and contrary to the March 16 Order, Plaintiff was not required to allege that "Nestico was personally involved with Plaintiff's contingency fee agreement" or "that he personally made any representations to Plaintiff." March 16 Order at 4. Despite Nestico's misleading argument to the contrary, nothing in Ohio law requires a corporate officer to specifically make statements to a plaintiff to be held liable for fraud by that plaintiff. A contrary interpretation would allow corporate officers to insulate themselves from liability simply by directing or knowingly allowing their subordinates to engage in fraud. *See McSwegin*, 58 Ohio St. 2d 97, 99–100. Thus, as discussed further below, Williams's First Amended Complaint contained sufficient allegations of Nestico's knowledge and intent regarding the investigation-fee scheme to withstand Nestico's 12(C) motion.

2. The March 16 Order erroneously disregards Civ.R. 9(B)'s provision that a defendant's knowledge and intent may be alleged generally.

While Civ.R. 9(B) requires plaintiffs to allege circumstances constituting fraud with particularity, the Rule also provides that a defendant's "intent, knowledge, and other condition of mind may be averred generally." By its March 16 Order, the Court erroneously disregarded Plaintiff's particularized allegations setting forth the investigation-fee fraud in detail (i.e., "the circumstances constituting fraud") that are summarized again below, and erroneously required Plaintiff to allege Nestico's intent and knowledge of the fraud with particularity. *See* March 16 Order

[3] *See also Layman v. Binns*, 35 Ohio St. 3d 176, 178, 519 N.E.2d 642 (1988) ("An action for fraud may be grounded upon failure to fully disclose facts of a material nature where there exists a duty to speak") citing 37 American Jurisprudence 2d (1968) 196-201, Fraud and Deceit, Sections 144 and 145; *Blon v. Bank One, Akron, N.A.*, 35 Ohio St. 3d 98, 101, 519 N.E.2d 363 (1988) ("Full disclosure may also be required of a party to a business transaction "where such disclosure is necessary to dispel misleading impressions that are or might have been created by partial revelation of the facts") *Textron Fin. Corp. v. Nationwide Mut. Ins. Co.*, 115 Ohio App. 3d 137, 684 N.E.2d 1261, (9th Dist. 1996) ("[A] party is under a duty to speak, and therefore liable for [fraudulent] non-disclosure, if the party fails to exercise reasonable care to disclose a material fact which may justifiably induce another party to act or refrain from acting, and the non-disclosing party knows that the failure to disclose such information to the other party will render a prior statement or representation untrue or misleading.").

at 4 ("Plaintiff has asserted no facts indicative that … Defendant Nestico … personally intended for Plaintiff to act in reliance upon his representations … . This Court finds Plaintiff has failed to plead with particularity the specific representations Nestico allegedly made, to whom he made said representations, and to what end, in accordance with Civ.R. 9(B)."). As explained below, using the proper legal standard, the First Amended Complaint's allegations were sufficient under Civ.R. 9(B) to withstand Nestico's 12(C) Motion.

3. Under the proper legal standard, construing all reasonable inferences in Plaintiff's favor as required by Civ.R. 12(C), the First Amended Complaint contains sufficient allegations that Nestico is personally responsible for the investigation-fee fraud through his own actions and omissions.

As explained above, Ohio law only required Williams to allege that Nestico directed or knew about KNR's fraudulent conduct, that he intended Williams and other KNR clients to act upon KNR's fraudulent statements, that the fraud damaged Williams and the Class, and, as to the unjust-enrichment claim, that Nestico benefited from the fraudulent conduct. *See* Section III.B.1 above. *See also Hambleton*, 12 Ohio St.3d 179, 183, 465 N.E.2d 1298 (1984) ("[T]he elements of [an unjust-enrichment claim] are as follows: (1) a benefit has been conferred by the plaintiff upon a defendant; (2) knowledge by the defendant of the benefit; and (3) retention of the benefit under circumstances where it would be unjust to do so without payment."). Further, under Civ.R. 9(B), Nestico's knowledge and intent regarding the fraud "may be averred generally." And contrary to the March 16 Order (at 4), Williams was not required to allege that Nestico "personally made any representations" to her. *See* Section III.B.1, above, quoting *McSwegin*, 58 Ohio St. 2d 97, 99–100.

Thus, the First Amended Complaint is more than sufficient to withstand Nestico's Civ.R. 12(C) motion, because it

- contains detailed allegations about KNR's fraudulent investigation-fee scheme that concerned every KNR client (¶¶ 6, 9–28, 36–48), and
- alleges that Nestico owned and completely controlled KNR at all relevant times, and caused it to engage in the scheme for his own benefit (¶¶ 6, 36–48, 54–57).

There is no reason to doubt Nestico's ownership and control of KNR, and in any event, under Civ.R. 12(C), the Court is *required* to accept this allegation as true. Civ.R. 12(C) further requires the Court to construe all reasonable inferences in Plaintiff's favor, and one such inference is that a scheme of this nature and magnitude could not possibly occur at a law firm without the controlling partner knowing about it, approving of it, and financially benefiting from it. *State ex rel. Midwest Pride IV, Inc. v. Pontious*, 75 Ohio St. 3d 565, 570, 664 N.E.2d 931 (1996) ("Dismissal under Civ. R. 12(C) is only 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."); *See also Evergreen Land Dev., Ltd.*, 2016-Ohio-7038, ¶ 33 ("The fact that [plaintiff] may have employed circumstantial evidence and inference in [proving an individual's personal participation in a corporation's unlawful conduct] does not equate to mere speculation. Circumstantial evidence has the same probative value as direct evidence. Moreover, rational inferences can be drawn based upon facts in the record and even based upon a combination of a fact in the record and another rational inference.")

Of course, Defendant Nestico will have every opportunity to try to prove that he had nothing to do with the investigation-fee fraud, even though documents prove otherwise. But it was manifest error for the Court to conclude, based on the pleadings, that Plaintiff "could prove no set of facts" establishing Nestico's personal responsibility for the unlawful scheme.

C. The Court should vacate and reverse its March 16 Order because the proposed Second Amended Complaint contains additional allegations that Nestico is personally responsible for the investigation-fee fraud through his own actions and omissions.

While the First Amended Complaint's allegations were sufficient to withstand Nestico's Civ.R. 12(C) motion, as explained above, Plaintiffs' proposed Second Amended Complaint, filed

concurrently with this Motion, underscores the imperative of reversing the March 16 Order.

Specifically, the Second Amended Complaint quotes numerous internal KNR emails, on which Nestico was copied, showing the fraudulent nature of the investigation fee. Proposed Second Amended Complaint at ¶¶ 86-97. These emails show that Nestico knew that the so-called "investigators" never actually performed any investigations, and that KNR nevertheless routinely paid them for so-called investigations that never happened, even those that, according to KNR's own documents, purportedly occurred on the same day up to 200 miles away from one another. Id. at ¶¶ 89-91. These emails also show that KNR attorneys routinely referred to the investigation fee as a "sign-up fee," and that investigation fee was really a way for KNR to fraudulently charge its clients for its high-pressure solicitation practice of sending representatives to meet potential clients to sign them to KNR fee agreements as quickly as possible. *Id.* at ¶¶ 86-97.

The Second Amended Complaint further alleges that Nestico "personally reviews every KNR client's Settlement Memorandum before it is submitted to the client for approval, including to personally approve reductions to chiropractic charges, as stated in a July 31, 2013 email from [KNR office manager Brandy] Lamtman to all KNR attorneys." Proposed Second Amended Complaint at ¶ 73. Additionally, the Second Amended Complaint contains detailed allegations, quoting dozens of KNR emails, showing Nestico's involvement in additional schemes, involving chiropractors and high-interest loan companies, to deceive and defraud KNR clients. *Id.* at ¶¶ 8-62, 98-123.

Finally, the Second Amended Complaint provides additional detail regarding Nestico's ownership and control of KNR. Specifically, paragraphs 121–23 allege as follows:

> Since KNR's founding in 2005 until 2012, Defendants Nestico and Redick were the sole equity partners and controlling shareholders of KNR, along with their partner Gary Kisling. In 2012, when Kisling retired from the firm, Nestico purchased Kisling's and Redick's respective interests in KNR, and became the sole equity partner and sole controlling shareholder of the firm. In or around January 2016, Nestico granted "shareholder" status to four KNR attorneys, but this shareholder status only permits these attorneys to share in a

> percentage KNR's profits. It does not grant the shareholders any control over the firm. Since 2012, Nestico has retained complete control over the firm and its policies.
>
> KNR's equity partners are solely responsible for setting and enforcing the firm's policies, and have the sole discretion to retain and allocate the firm's profits and other resources. KNR did not enter any contracts or agreements and did not enact any policy without the equity partners' knowledge and approval. When KNR managers or staff, like Lamtman and Tusko, issued directives to KNR attorneys or staff, they did so with the knowledge of and at the direction of the equity partners.
>
> During their respective tenures as equity partners, Nestico and Redick were not only aware of all of the conduct alleged in this Second Amended Complaint, but directed and approved of this conduct for the purpose of enriching themselves. During their respective tenures as equity partners, Nestico and Redick personally profited from the unlawful conduct at issue in this Second Amended Complaint and intended KNR clients to rely on the misrepresentations at issue for their own personal benefit. Since KNR's founding in 2005, Nestico and Redick owed all KNR clients a fiduciary duty and intentionally breached that fiduciary duty, as alleged in this Second Amended Complaint, for their own personal benefit.

These additional allegations in the Second Amended Complaint are more than sufficient to survive Nestico's 12(C) motion, and provide an additional basis for the Court to vacate and reverse its March 16 Order.

D. The Court should vacate and reverse the portion of its March 16 Order setting a hearing on whether Plaintiff should pay Defendants' attorneys' fees because Ohio law requires a showing of bad-faith conduct before sanctions may be imposed under Civ.R.11 or R.C. 2323.51 and there is no indication that Plaintiff or her counsel have engaged in any such conduct.

Finally, regardless of whether the Court reinstates Plaintiff Williams's claims against Nestico—which it should—the Court should reverse and vacate the portion of its March 16 Order setting a hearing on whether Plaintiff should pay Defendants' attorneys' fees under R.C. 2323.51 or Civ.R. 11.

The Supreme Court of Ohio has repeatedly affirmed "the American Rule," which holds that

"an award of attorney fees must be predicated upon statutory authority." *Sturm v. Sturm*, 63 Ohio St. 3d 671, 675, 590 N.E.2d 1214 (1992). The Ohio Supreme Court has further held that, "to support a finding of an exception to the American Rule, a party seeking attorney fees must be the prevailing party in the litigation, and then must prove that his opponent acted in bad faith." *Id.* R.C. 2323.51 and Civ.R. 11 similarly require courts to find a lack of good faith before sanctions may be imposed.

R.C. 2323.51 only authorizes a sanctions award upon a finding of "frivolous conduct," *i.e.*, conduct that "is not warranted under existing law and cannot be supported by a good faith argument for an extension, modification, or reversal of existing law." R.C. 2323.51(A)(2)(a)(ii). "[T]he statute was not intended to punish mere misjudgment or tactical error." *Cooper v. Commer. Sav. Bank*, 3d Dist. Wyandot Nos. 16-14-04, 16-14-08, 2015-Ohio-4131, ¶ 19. Rather, "[t]he test … is whether no reasonable lawyer would have brought the action in light of the existing law." *Id.* "In other words, a claim is frivolous if it is absolutely clear under the existing law that no reasonable lawyer could argue the claim." *Id.* Here, as the precedent cited above conclusively shows, Williams's claims against Nestico were in fact "warranted under existing law." And in any event there is no basis for finding that these claims were unsupported by "a good faith argument for an extension, modification, or reversal of existing law," or that "it is absolutely clear … that no reasonable lawyer could argue the claim."

Similarly, Civ.R. 11—which, by its terms, only allows sanctions against "an attorney or pro se plaintiff'—requires a finding of bad faith before sanctions may be imposed, and only where a violation of the rule is found to be willful. *See also Evans v. Quest Diagnostics*, Inc., 1st Dist. Hamilton No. C-140479, 2015-Ohio-3320, ¶ 19. Thus, to impose sanctions under Rule 11, the Court would not only have to find that there was "no good ground to support" Plaintiff's claims against Nestico, but that Plaintiff's counsel *actually believed* that the claims were groundless, yet willfully filed them anyway. Civ.R. 11. Again, as set forth conclusively above, not only did good factual and legal ground

for Williams's claims against Nestico exist, but that law requires that the claims be reinstated. And there is not nor could there ever be a shred of evidence that Plaintiff's counsel has ever believed otherwise.

The calamitous policy ramifications for breaking with the American Rule and awarding fees merely because a party has prevailed on a legal argument cannot be overstated. Such a ruling not only unfairly deters Plaintiff from litigating her case, as is her right, but also signals to other parties that do not have unlimited funds (which is most Americans) that this Court is closed to them, because the risks are simply too great. *See Arndt v. P & M LTD*, 11th Dist. Portage No. 2013-P-0027, 2014-Ohio-3076, ¶ 191 ("We emphasize that courts must carefully apply R.C. 2323.51 so that legitimate claims are not chilled."); *Reddy v. Plain Dealer Publ. Co.*, 2013-Ohio-2329, 991 N.E.2d 1158, ¶ 41 (8th Dist.) ("We are mindful of the chilling effect applying the sanction remedy can have upon zealous advocacy.").[4]

IV. Conclusion

Ohio law entitles Williams to an opportunity to prove Nestico's responsibility for the investigation-fee fraud perpetrated by the law firm that he owns and completely controls. By dismissing the claims against Nestico on the pleadings, the Court has mistakenly not construed all reasonable inferences in Plaintiff's favor, as Civ.R. 12(C) requires, and has in fact done the opposite,

[4] *See also Lewis v. Powers*, 2d Dist. Montgomery No. 15461, 1997 Ohio App. LEXIS 2537, *26 ("[R.C. 2323.51] should be construed conscientiously to avoid chilling legitimate advocacy by discouraging aggressive representation by an attorney or client."); *Carr v. Riddle*, 136 Ohio App. 3d 700, 705-706, 737 N.E.2d 976 (8th Dist. 2000) ("[F]iling a pleading based on a misinterpretation of existing law or grounds for extension or modification thereof, however misguided in hindsight, does not rise to the level of willfulness necessary to warrant sanctions."); *Ceol v. Zion Industries, Inc.*, 81 Ohio App. 3d 286, 291, 610 N.E.2d 1076 (9th Dist. 1992) (filing complaint based on misinterpretation of state law did not warrant sanctions under Civ.R. 11); *State ex rel. Ward v. Lion's Den*, 4th Dist. Ross No. 1867, 1992 Ohio App. LEXIS 6012, *17 ("[T]he inclusion of appellant as a defendant in a nuisance abatement complaint based upon the language of R.C. 3767.02, although ultimately erroneous, does not in and of itself demonstrate as a legal matter that appellee violated Civ.R. 11."); *Emmert v. Emmert*, 1st Dist. Hamilton Nos. C-990119, C-990126, 2000 Ohio App. LEXIS 558, *7 ("To [sanction] one who attempts to develop the law in this state's highest court would create, in our view, a chilling effect on the right of appeal."); *Lable & Co. v. Flowers*, 104 Ohio App.3d 227, 661 N.E.2d 782 (9th Dist. 1995) (reversing trial court and finding that imposition of sanctions was unwarranted even where summary judgment was granted against the sanctioned party).

construing even *unreasonable* inferences in *Nestico's* favor. By the March 16 Order, the Court has effectively held on the pleadings, without evidence and contrary to Rule 12(C), that if Williams can prove her fraud-based claims against KNR, the fraudulent conduct could somehow have only occurred behind Nestico's back, without his knowledge or participation in the scheme.

The new details in the proposed Second Amended Complaint make especially clear that the Court should nullify its legal error by vacating and reversing its March 16 Order and reinstating Williams's claims against Nestico.

The abundant legal authority cited above should also make clear that the Court should relieve Plaintiff and her counsel from facing a sanctions hearing in the complete absence of any indiciation that the fraud and unjust-enrichment claims were filed in bad faith against Defendant Nestico. Nestico's conclusory protests of frivolity and diversionary citations to inapplicable contract and veil-piercing law should be given no weight at all, much less at the pleadings stage.

And in fact, if anyone should be sanctioned here, it is Nestico and his counsel for misleading the Court with the erroneous arguments on which the March 16 Order is wrongly predicated, and for failing to disclose to this Court the binding Ohio Supreme Court and Ninth District authority, cited above.[5]

[5] Nestico repeatedly argued in his 12(C) Motion that Plaintiff "must show that … Mr. Nestico personally made [a] false statement" to Plaintiff. Nestico 12(C) Motion at 6, 2. Experienced counsel for Defendants cannot seriously argue that they were unaware of the well-established Ohio Supreme Court and Ninth District precedent providing that "an action for fraud may be grounded upon failure to fully disclose facts of a material nature where there exists a duty to speak." *See* Section III.B.1., above, quoting, *inter alia*, *Layman v. Binns*, 35 Ohio St. 3d 176, 178, 519 N.E.2d 642 (1988). *See also* Prof.Cond.R. 3.3(a)(1) and (2) ("A lawyer shall not knowingly do any of the following: (1) make a false statement of fact or law to a tribunal or fail to correct a false statement of material fact or law previously made to the tribunal by the lawyer; (2) fail to disclose to the tribunal legal authority in the controlling jurisdiction known to the lawyer to be directly adverse to the position of the client and not disclosed by opposing counsel.").

Dated: March 22, 2017

Respectfully submitted,

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CERTIFICATE OF SERVICE

The foregoing document was served on all necessary parties by operation of the Court's e-filing system on March 22, 2017.

/s/ Peter Pattakos
One of the Attorneys for Plaintiff