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

PLAINTIFFS' OPPOSITION TO DEFENDANTS' MOTIONS FOR JUDGMENT ON THE PLEADINGS REGARDING THE SECOND AMENDED COMPLAINT

I. Issues Presented

1. Parties are individually liable for their own fraudulent misrepresentations, including when they fail to disclose material facts. Here, Plaintiffs have alleged, with particularity, that individual Defendants intentionally failed to disclose material facts to induce Plaintiffs into paying bogus "investigation" fees and taking loans in which Defendants retained an undisclosed financial interest. Should this Court reject individual Defendants' request for dismissal of Plaintiffs' fraud claims?

2. An unjust enrichment claim is established where a plaintiff shows that the defendant knowingly retained a benefit conferred by the plaintiff where it would be unjust to do so. Here, Plaintiffs have alleged that individual Defendants deliberately benefited from various fraudulent and deceptive practices, and it would be unjust to allow Defendants to retain these benefits without repayment. Should this Court reject individual Defendants' request for dismissal of Plaintiffs' unjust enrichment claims?

3. The attorney-client relationship is fiduciary in nature, and a fiduciary relationship is also created independently from the attorney-client relationship where one party "reposes a special trust and confidence" in another who is in "a position of superiority or influence." Here, Plaintiffs have alleged that individual Defendants owed them a fiduciary duty both due to an attorney-client relationship, and because of the special trust and confidence they placed in Defendants due to their position of superiority and influence as owners and managers of the KNR law firm. Should this Court reject individual Defendants' request for dismissal of Plaintiffs' breach of fiduciary duty claims?

4. Attorneys are only exempt from Ohio's Consumer Sales Practices Act ("CSPA") "when they are actually engaged in the practice of law." The CSPA does not give attorneys a free pass to deceive consumers with conduct that falls outside the purview of a legal malpractice claim. Here, Plaintiffs have alleged that Defendants' conduct in soliciting clients with bogus "investigators," and failing to disclose quid pro quo relationships in soliciting clients through and for chiropractors and loan companies, does not constitute "the practice of law." Should this Court reject Defendants' request for dismissal of Plaintiffs' CSPA claims?

II. Introduction

Defendants' motions for judgment on the pleadings do nothing more than, 1) rehash old arguments that this Court has already rejected as to Plaintiffs' fraud and unjust enrichment claims, 2) ask this Court to conclude that Defendants Nestico and Redick could, under no possible set of facts, owe their law firm's clients a fiduciary duty, and 3) further ask the Court to hold that Ohio's Consumer Sales Practices Act allows attorneys a free pass to deceive consumers even when the attorneys are not engaged in the practice of law.

For good reasons, as explained fully below, the law does not support any of Defendants' misinterpretations. None of Plaintiffs' claims can be resolved at the pleadings stage, thus, Defendants' motions for dismissal should be denied on all counts.

III. Law and Argument

"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." *State ex rel. Midwest Pride IV, Inc. v. Pontious*, 75 Ohio St. 3d 565, 570, 664 N.E.2d 931 (1996). This standard should be applied in consideration of the principles that "circumstantial evidence has the same probative value as direct evidence," and "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." *State ex rel. Cordray v. Evergreen*

Land Dev., Ltd., 7th Dist. Mahoning Nos. 15-MA-0115, 15-MA-0116, 2016-Ohio-7038, ¶ 17 citing *Hurt v. Charles J. Rogers Transp. Co.*, 164 Ohio St. 329, 333, 130 N.E.2d 820 (1955).

A. Plaintiffs' fraud and unjust enrichment claims are properly asserted against Defendants Nestico & Redick.

This Court has already rejected Defendants' arguments seeking dismissal of the fraud and unjust enrichment claims against Nestico in allowing Plaintiffs to submit their Second Amended Complaint, and denying Plaintiffs' motion for reconsideration of the Court's initial dismissal of the Nestico claims as moot. Yet Nestico and Redick again request dismissal based on the very same arguments. The Court should again reject these arguments, for the reasons previously explained and explained again below.

1. The Court has not "already dismissed" Member Williams' claims against Nestico and Redick in the Second Amended Complaint.

First, contrary to Defendants' misrepresentation, this Court has not "already dismissed Williams' fraud and unjust enrichment claims." Nestico and Redick's Mot. for Judgment on the Pleadings ("Defs.' Mot.") at 6. While the Court did initially grant dismissal of Williams' claims against Nestico in the First Amended Complaint by its order of March 16, 2017, Plaintiffs moved the Court to reconsider on March 22, 2017 based on legal errors contained in the March 16 Order, and also moved the court for leave to plead an second amended complaint that would, among other things, materially supplement the claims against Nestico. On June 29, the Court "denied as moot" Plaintiff's Motion to Reconsider, explaining that the motion was moot because "the Court has granted Plaintiff's Motion for Leave to Plead Second Amended Complaint." The denial of Plaintiff's Motion to Reconsider *as moot,* rather than on its merits, can mean only that the Court—consistent with its order granting leave to file the Second Amended Complaint—intended to allow the amended fraud and unjust enrichment claims against Nestico to proceed. Defendants offer no explanation for why the Motion for Reconsideration would otherwise have been "denied as moot,"

and do not even acknowledge that the motion was denied on this basis. Instead, they only rehash the same arguments that the Court already rejected in denying the Motion for Reconsideration as moot and allowing Plaintiffs to file the Second Amended Complaint. These arguments, again, must be rejected.

2. Plaintiffs have sufficiently pleaded their fraud claims against Nestico and Redick.

Defendants state that it while it "may be true" as a matter of law that "Nestico and Redick can be held personally liable in this case for fraud," "Williams and Johnson still need to prove the elements of fraud with particularity as required under Civ.R. 9(B) and that Nestico and Redick were personally involved in the fraud." Defs.' Mot. at 7. But at the pleading stage, the Plaintiffs do not need to *prove* anything. Rather they only need *allege* facts sufficient to establish Nestico and Redick's liability for fraud—with particularity as to the "who, what, and when," and only generally with respect to Defendants' intent and knowledge. Civ.R. 9(B).

Even a cursory review of the Second Amended Complaint shows that Plaintiffs have made just such allegations. Perhaps as a result, Defendants do not even try to address the substance of the Complaint in their motion, instead arguing that because Nestico and Redick didn't talk with the Plaintiffs, they could not have defrauded them. Defs.' Mot. at 7. Fortunately for Plaintiffs and Ohio consumers generally, this statement misrepresents Ohio law, which instead provides that, "[a]n action for fraud may be grounded upon failure to fully disclose facts of a material nature where there exists a duty to speak." *Layman v. Binns*, 35 Ohio St. 3d 176, 178, 519 N.E.2d 642 (1988) citing 37 American Jurisprudence 2d (1968) 196-201, Fraud and Deceit, Sections 144 and 145. *See also 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, 150, 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.").

As to the elements of a fraud claim against a corporate officer or representative, Ohio law provides that "it must be shown that he knew the statement [made to the parties seeking redress] was false, that he intended it to be acted upon by the parties seeking redress, and that it was acted upon to the injury of the party."

Contrary to Defendants' misleading contentions in their first 12(C) motion, these principles do not serve to hollow out the benefits and protections of the corporate form and do not require "piercing the veil" or otherwise showing the form was abused or disregarded. This is for good reason. Fraud is an intentional tort.[1] Business associations, such as LLCs, are designed to protect their owners and members against personal liability for acts of negligence (including their own) done in the regular course of business and certain intentional torts undertaken by their employees without their knowledge or consent. What the corporate form does not and cannot do is insulate owners and members against their own intentional torts—the definition of moral hazard. That is the unremarkable proposition the many Ohio cases[2] recognizing the "individual involvement" liability of an owner or corporate officer.

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[1] Fraud requires a certain degree of scienter and is thus, by definition, an intentional tort. *McGee v. Goodyear Atomic Corp.*, 103 Ohio App. 3d 236, 249, 659 N.E.2d 317 (4th Dist. 1995). *See also* Prosser & Keeton, Torts (5 Ed.1984) 741, Section 107.

[2] *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."); *Williams v. Farmwald*, 11th Dist. Lake No. 2015-L-140, 2016-

a. Plaintiff Williams has sufficiently pleaded fraud relating to the "investigation fee."

Applying the above standards to the fraud claims related to the so-called "investigation fee," Plaintiffs need only allege that: 1) Nestico and Redick knew the investigation fee was not a legitimate fee (such that they knew each settlement statement indicating as much was "false"); 2) Nestico and Redick intended for this fee to be added to settlement statements their clients would be expected or "required" to execute; and 3) Nestico and Redick intended that clients—specifically Member Williams and those similarly situated—would likely act upon these misrepresentations and be damaged as a result.[3]

The Second Amended Complaint ("SAC") alleges this and more. For example, paragraph 88 contains allegations with great specificity as to time, place, and manner, including by quoting an

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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.,* 7th Dist. Mahoning No. 15-MA0115, 2016-Ohio-7038, ¶ 17 ("The magistrate found the members personally liable because they personally participated in the violations").

[3] Defendants articulation of what Plaintiffs must prove is not meaningfully different:

> "Williams and Johnson still need to prove the elements of fraud with particularity as required under Civ.R. 9(B) and that Nestico and Redick were personally involved in the fraud. Williams and Johnson disregard that they must show that: (1) Nestico and Redick personally made the false statement (or withheld information), (2) they personally knew that it was a false statement, (3) they personally intended for Williams and Johnson to act in reliance upon it, and (4) Williams and Johnson in fact acted and were injured. *Cincinnati Bible Seminary v. Griffiths*, 1st Dist. No. C-830867, 1984 Ohio App. LEXIS 11028, *6 (citing *Centennial Ins. Co. v. Vic Tanny Int'l of Toledo, Inc.*, 46 Ohio App. 2d 137, 142 (6th Dist. 1975)).

Defs.' Mot. at 7. In other words, Nestico and Redick must have personally withheld information where they knew the information being provided was false—which is alleged—with the intent and effect of deceiving Williams and other members of the putative class—which is further alleged.

email showing that Redick and Nestico knew that the "investigation fee had nothing to do with investigations" and was instead "a fee to the client for having been 'signed up.'" Redick nonetheless encouraged his staff to continue aggressively charging and collecting the sham investigation fee, in an email on which Nestico was copied. *Id.*

Plaintiffs have further alleged that Nestico knew that the sham investigation fee was being charged to KNR clients in each and every instance, and that he personally approved each settlement memorandum that would have included that charge, including that to Ms. Williams. *See* SAC at ¶ 73 ("Defendant Nestico personally reviews every KNR client's Settlement Memorandum before it is submitted to the client for approval.")

The SAC also alleges that Nestico and Redick "required" Williams to sign the settlement statement in order to receive any disbursement of funds. *See Id.* ¶ 9 ("Defendants recovered a settlement on Williams's behalf and, before disbursing settlement proceeds to her, required her to execute a Settlement Memorandum."). They did not merely "intend" that the inclusion of the sham investigative fee on the settlement memoranda of Member Williams and others would result in it being collected, they *knew* that the fraudulent settlement statement effectively guaranteed that the fee would be withheld from Plaintiff's recovery and paid to KNR—an entity Nestico and Redick controlled and profited from. SAC at ¶¶ 12, 123; *see also* SAC at ¶ 3 ("Defendants charge their clients after the fact for having been solicited in this way by adding a misleadingly named 'investigation fee' to each client's settlement statement, taking advantage of their position of trust and its clients' natural eagerness to obtain settlement funds by conditioning disbursement of such funds on the clients' unwitting approval of the fee.").

In fact, the Complaint articulates Williams' and the putative class's claims of fraud against both Nestico and Redick with a high degree of particularity. The SAC alleges that:

- Redick and Nestico were aware the investigative fee was a sham and was not appropriately charged to any client. SAC at ¶ ¶ 4, 88.

- Redick and Nestico ordered their staff to engage investigation companies to provide these "sign-up" services to KNR clients. *Id.* at ¶ 88.
- Redick and Nestico required their staff to seek reimbursement from KNR clients for these fees, despite the fact they were for services that benefitted KNR, rather than the client. *Id.* at ¶ ¶ 4, 88
- Nestico maintains personal friendships with the proprietors of KNR's most often used "investigation" companies. *Id.* at ¶¶ 74–75.
- Nestico specifically approved the sham investigative fee being charged to Member Williams and each member of the putative class. *Id.* at ¶ 73.
- Nestico intended that the inclusion of that fee on Member Williams settlement memorandum would result in the fee being collected by KNR. *Id.* at ¶¶ 73, 9.
- Williams was damaged by paying $50 for a service that she did not receive and/or that was not undertaken for her benefit. *Id.* at ¶¶ 140, 145.
- Nestico and Redick were personally enriched by Williams and other putative class members paying the sham "investigative fee." *Id.* at ¶ 123[4].

These are specific allegations that Redick and Nestico knew the investigation fee was a fraud, that Nestico was directly involved in communicating that lie to their clients and that Redick was aware of the ongoing fraud and made no effort to provide truthful information, even where he had a clear duty to do so.

Nestico's fraud is plain on its face. The Complaint alleges, with good cause and particularity, that 1) he knew the investigation fee was a sham, 2) that he knew clients would feel obligated to pay the fee were it included on their settlement statement, and that 3) he reviewed every client's settlement statement and allowed the fraudulent fee to be passed on in every instance. Considering his status as KNR's managing partner, this is every bit as much a fraud of commission as omission—he specifically and personally signed off on his firm bilking almost every single firm

[4] Defendants seem to think the fact that this payment is a "pass through" payment to the investigators indemnifies them. It does not. By Defendants' own admission, they are obligated to pay these purported "investigators" regardless of the outcome of the cases to which KNR attaches those fees. That means that at the time the client is settling their case, the investigator has already been paid and/or is already assured payment from KNR without reference to the settlement and whether the fee is collected affects only the Defendants' pocketbooks. Of course, there is nothing wrong with a firm advancing and recapturing *legitimate* case expenses, but the allegation here is obviously that these are *not* legitimate.

client out of $50, much of which went directly into his pocket.

Redick's fraud is equally actionable. While it is certain that discovery will demonstrate the full extent of Redick's involvement in the creation of the fee and its incorporation into the firm's standard settlement statement, for now his obvious neglect of the interest of his firm's clients is sufficient. Like Nestico, Redick knew the investigation fee was a sham and that he knew clients would feel obligated to pay the fee were it included on their settlement statement. And he knew it was being routinely—as a matter of practice—included on client settlement statements and thereby withheld from client settlements. *See* Second Amended Complaint at ¶ 88. So while Redick was not actively soliciting the payment of the fraudulent fee in the way Nestico was, he was nonetheless failing disclose the fraudulent nature of the fee to individuals—clients of a law firm with his name on the door—to whom he had a duty to disclose. *See* Prof.Cond.R. 5.1 ("A lawyer shall be responsible for another lawyer's violation of the Ohio Rules of Professional Conduct if either of the following applies: (1) the lawyer orders or, with knowledge of the specific conduct, ratifies the conduct involved; (2) the lawyer is a partner or has comparable managerial authority in the law firm or government agency in which the other lawyer practices, or has direct supervisory authority over the other lawyer, and knows of the conduct at a time when its consequences can be avoided or mitigated but fails to take reasonable remedial action.").

b. Plaintiff Johnson has sufficiently pleaded fraud relating to Defendants' failure to disclose their relationship with Liberty Capital Funding.

Defendants' arguments regarding the fraud claims against Nestico and Redick are so terse and offhanded it is hard to determine whether they are arguing with respect to all fraud claims or only those associated with the so-called "investigation fee." In any event, applying the proper legal standards set forth above, Plaintiffs make the case for the fraud related to the Liberty Capital lending scam against Nestico and Redick with equal effect. *See*, *e.g.*, SAC at ¶¶ 101–118, 177–187 (alleging specific facts showing that Defendants retained a financial interest in Liberty Capital or its loans, and

that Defendants never disclosed this interest to Plaintiffs in recommending Liberty Capital loans). *See also In re Binder: Squire v. Emsley*, 137 Ohio St. 26, 57–58, 27 N.E.2d 939 (1940), *Myer v. Preferred Credit*, 117 Ohio Misc. 2d 8, 9, 2001-Ohio-4190, 766 N.E.2d 612 (C.P. 2001) citing 3 OHIO JURISPRUDENCE 3D (1998) 136, 134, Agency, §§ 117, 115 (holding that where a fiduciary takes a secret profit in a transaction involving his client, such dealing is fraudulent and void as a matter of law, whether or not there is a causal relation between the self-dealing and the plaintiff's loss).

Defendants have fallen far short of their burden to earn dismissal of the Plaintiffs well plead fraud claims against Nestico and Redick. Their motion to dismiss these claims should be denied.

3. Plaintiffs have sufficiently pleaded their unjust enrichment claims against Nestico and Redick.

Defendants state that, in order to maintain a claim for unjust enrichment, Plaintiffs must establish that (1) they conferred a benefit on Nestico and Redick; (2) Nestico and Redick knew of such benefit; and (3) Nestico and Redick retained the benefit under circumstances where it would be unjust to do so without payment. Defs.' Mot. at 9 citing *Metz v. Am. Elec. Power Co.*, 172 Ohio App. 3d 800, 2007- Ohio-3520, ¶ 43 (10th Dist.).

Plaintiffs have satisfied these requirements. Indeed, contrary to Defendants' claims, Plaintiffs have repeatedly alleged that funds that were intended for the Plaintiffs in this case have or will end up in the pockets of Nestico and Redick such that they received a "benefit" in each instance. Nestico and Redick "at all times relevant ***owned*** and controlled KNR." SAC at ¶ 12 (emphasis added). So they cannot claim that they did not receive any benefit from Member Williams paying KNR $50. Of course, if KNR benefited, Nestico and Redick did as well.

Defendants' half-hearted argument that the investigative fee was a mere "pass through" expense (Defs.' Mot. at 10) is equally nonsensical: Where it has suited them, Defendants have alleged that they pay their investigators $50 per case whether the cases ultimately settle or not. That means that the $50 fee was a sunk cost at the time the fee was withheld from Williams' recovery and

that the $50 was income to the firm they would not have had but for collecting the "investigaton fee" from Williams. Additionally, the SAC alleges that the "investigation fee" also serves to compensate the so-called "investigators" for performing other tasks that benefit the firm, for which the firm would otherwise have had to expend funds. SAC ¶¶ 74–75, 81, 89. Enriching KNR is enriching Nestico and Redick, who are alleged to have owned the firm at all relevant times. If the investigative fee is unjust, it is retained by Nestico and Redick and must be returned.

And while the Defendants might not agree with the assertion, Plaintiff has alleged that Defendants held an interest in Liberty Capital, such that funds unjustly paid to them are within the purview of the case and Matthew Johnson's claim for unjust enrichment.[5] Further, the Complaint specifically alleges that "Liberty Capital provided unlawful kickback payments to Defendants for every client that KNR referred for a loan." SAC at ¶ 4. Johnson also alleges that he "paid his loan back with fees and accrued interest after approximately one year," and that those fees and interest were unjust and unlawful. *Id.* at ¶107, 117. Finally, Johnson alleges that some or all of those fees and interest—an amount to be determined in discovery—have been unjustly retained by Nestico and Redick through their ownership interest in Liberty Capital or, if kickbacks were paid, through KNR. Either way, Johnson has properly pled a case for unjust enrichment.

As for Ms. Wright, KNR continues to pursue her for fees that it claims are owed. *Id.* at ¶50. Unjust enrichment does not require that the benefit unjustly received be liquid.[6] Here, KNR has a

[5] *See* SAC at ¶120. Ohio pleading rules requires plausibility, not proof. And, given the specific facts alleged in the SAC, there can be no dispute as to whether the allegation that KNR had a less-than-arms-length relation was plausible.

[6] *Blue Cross of Cent. New York, Inc. v. Wheeler*, 93 A.D.2d 995, 996, 461 N.Y.S.2d 624, 626 (N.Y. App. Div. 4th Dep't Apr. 1, 1983) ("A person may be unjustly enriched not only where he receives money or property, but also where he otherwise receives a benefit. He receives a benefit where his debt is satisfied or where he is saved expense or loss."); *St. Mary's Medical Ctr. v. United Farm Bureau Family Life Ins. Co.*, 624 N.E.2d 939, 944 (Ind. Ct. App. Dec. 6, 1993) citing *Wheeler* (same); *Prudential Ins. Co. v. Couch*, 180 W. Va. 210, 215, 376 S.E.2d 104, 109 (W. Va. Nov. 23, 1988) citing *Wheeler* (same); *Pure Power Boot Camp, Inc. v. Warrior Fitness Boot Camp, LLC*, 813 F. Supp. 2d 489, 534 (S.D.N.Y. 2011)

lien against Ms. Wright that it is seeking to enforce for the benefit of the Defendants. But the basis for KNR's lien is that she terminated them as counsel on the basis of the Defendants' unjust conduct. Defendants have asserted a lien against Ms. Wright to which they do not have a legal right. Unless and until the lien against Ms. Wright is released, KNR and its owners remain unjustly enriched.

B. Plaintiffs have sufficiently pleaded that Nestico and Redick owed them a fiduciary duty.

Defendants assert that "Plaintiffs' theory is that Nestico and Redick, as the 'sole equity partners and controlling shareholders of KNR . . . owed all KNR clients a fiduciary duty and intentionally breached that fiduciary duty.'" Defs.' Mot. at 8. While it is true that this is a basis for the claim, it is not the only one. In addition to alleging that the plaintiffs were "clients" of Nestico and Redick (i.e., that an attorney-client relationship existed)—which is sufficient to establish a fiduciary relationship under Ohio law—Plaintiffs also allege sufficient facts to support a conclusion that Nestico and Redick owed their firm's clients a fiduciary duty regardless of whether an attorney-client relationship existed between them. This includes allegations that KNR's clients placed special trust in Nestico and Redick, and that Nestico and Redick were personally involved in how individual cases—including those of the named plaintiffs—were handled. These allegations, which must be taken as true at this stage of the proceedings, are sufficient to withstand Defendants' 12(C) Motion.

1. Plaintiffs have sufficiently pleaded that Nestico and Redick owed Plaintiffs a fiduciary duty because Plaintiffs have pleaded that Nestico and Redick had an attorney-client relationship with Plaintiffs.

A "fiduciary" is "a person having a duty, created by his undertaking, to act primarily for the benefit of another in matters connected with his undertaking." *Charles Gruenspan Co. v. Thompson*, 8th Dist. Cuyahoga No. 80748, 2003-Ohio-3641, ¶ 27. There is no question that attorneys are

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citing *Wheeler* (same); *O'Donnell v. Johnson*, 209 P.3d 128, 132 (Alaska, June 5, 2009) (holding that a lien can constitute a "benefit" for purposes of an unjust enrichment claim).

fiduciaries with respect to their clients:

> A fiduciary relationship is one in which special confidence and trust is reposed in the integrity and fidelity of another and there is a resulting position of superiority or influence, acquired by virtue of this special trust. The relation between attorney and client is a fiduciary relationship of the very highest character, and bonds the attorney to most conscientious fidelity—*uberrima fides*, which is defined as the most abundant good faith; absolute and perfect candor or openness and honesty; the absence of any concealment or deception, however slight

State v. Saunders, 2nd Dist. Greene No. 2009-CA-82, 2011-Ohio-391, ¶ 34 (internal citations omitted)

While Defendants assert that Plaintiffs "readily admit" that they "retained KNR to prosecute their personal injury claims, not Nestico or Redick individually," no citation to the Second Amended Complaint is provided for this proposition, nor could it be. Defs.' Mot. at 9. Instead, the Complaint refers to the Plaintiffs—individually in some instances and collectively in others—as "clients" of the "Defendants," a term that necessarily and legally includes of Nesitco and Redick personally—no less than 10 times. *See* SAC at ¶¶ 2–4, 9–11, 36.

A fiduciary relationship with a law firm is certainly not mutually exclusive of a fiduciary relationship with attorneys working on behalf of that firm. Instead, Plaintiffs regularly proceed on claims of breach of fiduciary duty against both a law firm and individual attorneys from that firm, even where the locus of the relationship with each is the same.[7]

Because the Complaint alleges an attorney-client relationship between Nestico and Redick and the Plaintiffs, it alleges a fiduciary relationship, as "[a]n attorney's role as to the client is fiduciary in nature." *Tonwe v. Harris-Miles* (*In re Harris-Miles*), 187 B.R. 178, 182 (Bankr. N.D. Ohio 1995); *see also Costin v. Wick*, 9th Dist. Lorain, No. 95CA006133, 1996 Ohio App. LEXIS 233, *8, 1996 WL 27974 (Jan. 24, 1996) (the Ohio Code of Professional Responsibility acknowledges that a fiduciary relationship does exist between an attorney and a client).

[7] See, e.g., *Clark v. Harmon*, 2nd Dist. Montgomery, No. 25030, 2012-Ohio-6041, ¶22; *Cropper v. Teffner*, 5th Dist. Richland, No. CA-2606, 1988 Ohio App. LEXIS 5173, *2, 1988 WL 138470 (Dec. 8, 1988); *Reliance Mediaworks (USA) Inc. v. Giarmarco*, 549 Fed. Appx. 458, 459 (6th Cir. 2013)

It does not matter that the Complaint does not allege a contractual basis for an attorney-client relationship between Nestico or Redick and the Plaintiffs. An attorney-client relationship may be express or implied. *See Fox & Associates Co., L.P.A. v. Purdon* (1989), 44 Ohio St. 3d 69, 72, 541 N.E.2d 448. An attorney-client relationship is "governed by whether the putative client reasonably believed that he had entered into a confidential relationship with the attorney." *Lillback v. Metro. Life Ins. Co.* (1994), 94 Ohio App. 3d 100 at 108-109, 640 N.E.2d 250. "The ultimate issue is whether the putative client reasonably believed that the relationship existed and that the attorney would therefore advance the interests of the putative client." *Id.* at 109, quoting *Henry Filters, Inc. v. Peabody Barnes, Inc.* (1992), 82 Ohio App. 3d 255, 261, 611 N.E.2d 873.

Given the allegations in the Complaint regarding Nestico and Redick's control over the firm and the use of their names in the name of the legal corporation, it would only be reasonable for clients to assume they were represented by not only KNR but by Nestico and Redick, personally. *See* SAC at ¶¶ 12, 27, 121-123.[8] The lack of direct communications between Nestico and Redick and the Plaintiffs is also not dispositive of the existence of an attorney-client relationship. *See Mays v. Dunaway*, 2nd Dist. Montgomery, No. 20717, 2005-Ohio-1592, ¶17 (finding implied attorney-client relationship based on client's reasonable belief even where that was "neither direct communication nor a promise of representation.").

2. Plaintiffs have sufficiently pleaded that Nestico and Redick owed Plaintiffs a fiduciary duty regardless of whether Nestico and Redick had an attorney-client relationship with Plaintiffs.

Even apart from any attorney-client relationship with the Defendants, Plaintiffs have sufficiently pleaded the necessary elements of a breach of fiduciary duty claim. First, Plaintiffs have alleged that "[s]ince KNR's founding in 2005, Nestico and Redick owed all KNR clients a fiduciary

[8] Further, the Complaint specifically alleges that Nestico reviewed the settlement statement for all KNR clients, that is, he did work on all KNR client files. The fact, coupled with repeated general direction from he and Redick regarding how to handle case files, strongly suggest that they were engaged in representing all KNR clients or, at bare minimum, owed such clients a fiduciary duty.

duty." SAC at ¶ 123. While Defendants try to brush off Nestico and Redick's control over KNR as a basis for them owing a fiduciary duty to KNR clients, they do so without legal explanation or citation to authority. Defs.' Mot. at 8–9.

"The term 'fiduciary' involves the idea of trust, confidence. It refers to the integrity--the fidelity of the party trusted, rather than his credit or ability. It contemplates good faith, rather than legal obligation, as the basis of the transaction." *Myer v. Preferred Credit*, 117 Ohio Misc. 2d at 23. The determination does not depend on whether an attorney-client relationship exists, but rather, whether "special confidence and trust is reposed in the integrity and fidelity of another and there is a resulting position of superiority or influence, acquired by virtue of this special trust." *Saunders*, 2011-Ohio-391, ¶ 34. Here, Plaintiffs have specifically alleged that "KNR's clients reposed a special trust and confidence in Defendants [including the firm as well as Nestico and Redick, individually] who were in a position of superiority or influence over their clients as a result of this position of trust." SAC at ¶¶ 153, 165, 193.

Plaintiffs have further alleged that Nestico and Redick "intentionally breached that fiduciary duty…for their own personal benefit." *Id.* at ¶ 123. This is hardly an unsupported assertion. Indeed, the Complaint is robust in describing how KNR, Nestico, and Redick attract customers by creating an aura of authoritativeness and trustworthiness, controlled those client relationships with highly regimented policies and procedures, and used their domination and manipulation of information available only to them to deceive and defraud their clients.

Ohio is a "notice-pleading state, Ohio law does not ordinarily require a plaintiff to plead operative facts with particularity." *Cincinnati v. Beretta U.S.A. Corp.*, 95 Ohio St.3d 416, 2002 Ohio 2480, 768 N.E.2d 1136, ¶ 29. "[A]s long as there is a set of facts, consistent with the plaintiff's complaint, which would allow the plaintiff to recover, the court may not grant a defendant's motion to dismiss." *York v. Ohio State Hwy. Patrol*, 60 Ohio St.3d 143, 145, 573 N.E.2d 1063 (1991). This is

especially relevant in addressing assertions like the existence of a fiduciary or attorney-client relationship. Indeed, where a fiduciary relationship is clearly alleged, Ohio courts have noted that whether a particular set of facts gives rise to the existence of a fiduciary duty is ill-suited for resolution on the pleadings. *See Sacksteder v. Senney*, 2nd Dist. Mongomery, No. 24993, 2012-Ohio-4452, ¶ 89.[9]

Here, where alternative factual bases have been alleged to hold Nestico and Redick personally liable as fiduciaries to clients of the law firm that bears their name, dismissal of this count at this stage of the case would be improper. This is particularly so in light of the allegations that Nestico and Redick exerted control over every KNR representation, and did so specifically to divert client funds for KNR's own benefit. But if Nestico and Redick continue to refuse to accept a fiduciary responsibility for their firm's clients and the Court allows them to do the same, Plaintiffs should at least be permitted to amend their Complaint to name the attorneys with fiduciary responsibility for the claims of Plaintiffs and the respective class members. There can be no question

[9] See also *Zangara v. Travelers Indem. Co. of Am.*, 423 F. Supp. 2d 762, 770 (N.D. Ohio 2006) ("Plaintiffs are correct that the existence of a fiduciary duty is, in part, a factual question. [] As such, if Plaintiffs have alleged adequately that Travelers and its agents owed them a fiduciary duty, then the question of whether a duty existed in this particular case is a question that needs to be resolved later in the proceedings after discovery has occurred, not on a Rule 12(b)(6) motion); *Hilliard v. Lease*, 10th Dist. Franklin, No. 93AP-1029, 1993 Ohio App. LEXIS 6447, *3-6, 1993 WL 538312 (Dec. 23, 1993) (Where "complaint alleged the existence of an oral employment agreement between the parties" claim for fiduciary duty survive judgment on the pleadings because "[t]hese facts must be accepted as true."); *General Acquisition, Inc. v. Gencorp, Inc.,* 766 F. Supp. 1460, 1474 (S.D. Ohio 1990) (At this juncture in the proceedings, however, the Court need not determine whether under the facts at bar such a duty arises. The Court has already noted that GenCorp alleges the existence of a principal-agent relationship between the parties and that Shearson assumed the role of a defacto fiduciary. [] Such allegations are sufficient to state facts regarding the existence of a fiduciary duty.); *Ponder v. Bank of Am., N.A.,* S.D. Ohio No. 1:10-CV-00081, 2011 U.S. Dist. LEXIS 154581, *13, 2011 WL 8307207 (Mar. 8, 2011) ("[T]he Court finds it premature to rule on the existence of [a fiduciary] relationship in this case, absent further development of the evidence of dealings between the parties. Whether the evidence will establish that a fiduciary relationship existed or that Defendants were merely parties to arm's length negotiations remains to be seen. At this stage, the Amended Complaint states a claim that is plausible on its face.").

under Ohio law that for each KNR client, at least one attorney owed a fiduciary duty. *Saunders*, 2011-Ohio-391, ¶ 34.

C. The Consumer Sales Practices Act does not exempt Defendants from liability because Defendants were not "actually engaged in the practice of law" when they engaged in the alleged deceptive conduct at issue.

All three Defendants assert that Plaintiffs' claims against them under the Ohio Consumer Sales Practices Act, R.C. 1345.01 ("CSPA") cannot be properly maintained because "'[c]onsumer transaction,' as defined in the CSPA 'does not include transactions between attorneys... and their clients....'" Defs.' Mot. at 10 citing O.R.C. 1345.01(A). But, consistent with common sense, the purpose of the CSPA, and the Ohio Supreme Court's mandate that the statute "be liberally construed," this exemption only applies to attorney conduct where "the attorney [is] actually engaged in the practice of law." *Einhorn v. Ford Motor Co.*, 48 Ohio St. 3d 27, 29 (1990); *Gugliotta v. Morano*, 161 Ohio App. 3d 152, 2005-Ohio-2570, 829 N.E.2d 757, ¶ 41 (9th Dist). In other words, the CSPA's exemption of certain attorney-client transactions is intended only to "preclude[] a ... malpractice claim wrapped in the guise of consumer fraud from being asserted under a consumer-protection statute." *Elder v. Fischer*, 129 Ohio App. 3d 209, 223, 717 N.E.2d 730 (1st Dist. 1998); *Summa Health Sys. v. Viningre*, 140 Ohio App. 3d 780, 795-96, 749 N.E.2d 344 (9th Dist. 2000).[10] The CSPA does not give attorneys a free pass to deceive consumers outside of the purview of a legal malpractice claim, and there is no law or policy reason requiring a holding to the contrary.[11] *See also*,

[10] Defendants correctly note that *Elder* and *Summa Health* relate to the provision of legal services rather than medical services. But the treatment of accountants, physicians, dentists and attorneys in the text of the CSPA is the same. *See* O.R.C. 1345.01(A) (exempting from the definition of "consumer transaction" "transactions between certified public accountants or public accountants and their clients; transactions between attorneys, physicians, or dentists and their clients or patients"). There is no reason cases relating to professionals in these other fields are not equally applicable here.

[11]None of Defendants' cited cases mandate a different conclusion. The only CSPA case Defendants cite that is binding on this Court is *Patton v. Diemer*, 35 Ohio St. 3d 68, 70 (1988), which mentions

Reid v. Ayers, 138 N.C. App. 261, 267-268, 531 S.E.2d 231 (N.C. App., 2000) ("We point out that not all services performed by attorneys will fall within the exemption [for professional services]. Advertising is not an essential component to the rendering of legal services and thus would fall outside the exemption. Although no bright line exists, we think that the exemption applies anytime an attorney or law firm is acting within the scope of the traditional attorney-client role. It would not apply when the attorney or law firm is engaged in the entrepreneurial aspects of legal practice that are geared more towards their own interests, as opposed to the interests of their clients.").

Here, Plaintiffs seek recovery under the CSPA for deceptive marketing and solicitation practices that in no way constitute "the practice of law," and could not be subject to a legal malpractice claim. Nestico and Redick can be held individually responsible for those acts not because they were the Plaintiffs' attorneys, but because they, as KNR's officers and directors, "specifically directed the particular act[s] to be done." *Yates v. Mason Master, Inc.*, 11th Dist. Lake No.

R.C. 1345.01(A) only in passing. And when it does, it specifically excludes "***the attorney-client relationship***," not attorneys generally. Consistent with this holding, *Reynolds v. Kubyn*, 11th Dist. No. 96-G-1977, 1997 Ohio App. LEXIS 1784 involved accusations that an attorney improperly filed documents with the Court, an action within the scope of a malpractice claim and the "attorney-client relationship." In *Burke v. Gammarino*, 108 Ohio App. 3d 138, 142 (1st Dist. 1995) the plaintiff actually pled attorney malpractice alongside their OCSPA claim and did so only in response to the attorney suing them for non-payment. And in *Lee v. Traci*, 8th Dist. No. 65368, 1994 Ohio App. LEXIS 2384 plaintiff sued her attorneys who had settled a case on her behalf years prior and the firm, properly, "filed a motion for summary judgment on the basis that the causes of action [including the OCSPA claim] sounded in legal malpractice and were barred by the expiration of the one-year statute of limitations." These cases all overtly involve the actual practice of law and such that the allegations sound more in attorney malpractice than consumer fraud. Here, Plaintiffs are not making a legal malpractice claim. They were defrauded as consumers and that is the basis of their CSPA claims they bring before the Court. Defendants' cases involving errors made in the course of executing the ultimately goal of the attorney-client relationship, like litigating a dispute (*Lee*) or a divorce (*Reynolds*), are irrelevant.

2002-L-001, 2002-Ohio-6697, ¶ 24.[12] The section above addressing Plaintiffs' fraud claim sufficiently details Plaintiffs allegations that Nestico and Redick directed the acts in questions.

Applying this law to the facts alleged regarding the so-called "investigation fee," Defendants promised Member Williams (and all of their clients) a "free consultation." *See* Second Amended Complaint at ¶¶ 71, 81, 84, Ex. A. This representation was untrue. KNR failed to mention that Williams would be charged a $50 "investigation fee" for a member of the KNR team to come to her home and cajole her into signing a contract. *Id.* at ¶ 75. Any reasonable consumer would consider such a pre-contractual visit within the scope of a "consultation," especially where KNR marketing materials plainly state that "we will come to your house to meet with you and discuss your case." *Id.* at Ex. A. The Defendants therefore violated R.C. 1345.02(B)(1) by claiming that "the subject of a consumer transaction ha[d] performance characteristics…or benefits that it d[id] not have," to wit, a "free consultation." Additionally, by presenting the fee as compensation for an "investigation" in Williams' settlement statement, as opposed to compensation for KNR's own solicitation of her, Defendants further violated the statute. Williams can pursue this violation under the CSPA both because the misrepresentation regarding the "free consultation" occurred before Ms. Williams became a KNR client, and because fraudulently collecting a fee for "investigations" that never occurred cannot possibly be considered "the practice of law." *See Hagy v. Demers & Adams, LLC*,

[12] *See also Luckoski v. Allstate Ins. Co.*, 2013-Ohio-5460, 5 N.E.3d 73, ¶36 (2nd Dist.) citing *Garber v. STS Concrete Co., L.L.C.*, 2013-Ohio-2700, 991 N.E.2d 1225, ¶ 27 (8th Dist.)("In certain contexts, []individuals can be held to answer for the actions of the company. Violations of the CSPA offer such a context. Where officers or shareholders of a company take part in or direct the actions of others that constitute a violation of the CSPA, that person may be held individually liable."); *Mohme v. Deaton*, 12th Dist. Warren No. CA2005-12-133, 2006-Ohio-7042, ¶ 18("the OSCPA does create a tort that imposes personal liability upon corporate officers for violations of the act performed by them in their personal capacities."); *Davis v. Hawley Gen. Contr., Inc.*, 2015-Ohio-3798, 42 N.E.3d 276, 283, ¶ 27 (6th Dist.)

S.D. Ohio No. 2:11-cv-530, 2011 U.S. Dist. LEXIS 141466, *30 (Dec. 7, 2011) ("The Law Firm Defendants fail to acknowledge, however, that acts or practices can violate the OCSPA whether [they] occur[] before, during, or after the transaction.").

The same is true of Naomi Wright's claims regarding Defendants' undisclosed referral relationships with chiropractors.[13] By soliciting clients through their undisclosed relationships with chiropractors, and recommending that their clients treat with these chiropractors, as they did with Ms. Wright, Defendants intentionally convey the false impression that these recommendations are independent and free from any quid-pro-quo relationship. This violates R.C. 1345.02(B)(1)'s prohibition against deceptive representations regarding "sponsorship, approval, performance characteristics, accessories, uses, or benefits," as well as R.C. 1345.02(B)(9)'s prohibition against deceptive representations regarding "sponsorship, approval, or affiliation." As with the investigation fee, this deceptive conduct occurred before Wright ever became a KNR client, and in any event, cannot possibly be considered the practice of law.

Finally, in addressing Matthew Johnson's CSPA claim regarding referrals to Liberty Capital for loans, Plaintiffs first note that Defendants advertise, on a mocked-up dollar bill, no less, that "[KNR] can help you get a CASH ADVANCE on your settlement!" SAC at Ex. A. As if that were

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[13] While Defendants do not argue the merits of the CSPA claim, it is worth noting that failure to disclose information during the course of a solicitation can give rise to a CSPA claim. *Bellinger v. Hewlett-Packard Co.,* 9th Dist. Summit No. 20744, 2002-Ohio-1643, at ¶ 19; *Funk v. Montgomery AMC/Jeep/Renault*, 66 Ohio App. 3d 815, 824, 586 N.E.2d 1113 (1st Dist.1990) ; see also *Walker v. Dominion Homes, Inc.*, 164 Ohio App. 3d 385, 2005-Ohio-6055, 842 N.E.2d 570, ¶ 32 (1st Dist.)):

> Finally, we note that defendants argue that they did not violate any provision of the CSPA because they did not have a "duty to disclose" any information regarding financing to the Walkers. We find this argument unavailing. The duty at issue here is the duty to refrain from unfair, deceptive or unconscionable acts. R.C. 1345.02 and 1345.03. The trier of fact can certainly consider the failure to disclose information in determining whether the defendant committed an unfair, deceptive or unconscionable act.

too subtle, the top of the bill reads "GET MONEY NOW." *Id.* And beyond Defendants' print advertisements, the Second Amended Complaint quotes emails showing that Defendants, as a matter of policy, directed KNR clients to take loans with Liberty Capital, an entity that had no track record whatsoever and had only been created weeks before Defendants began recommending it to their clients. Second Amended Complaint at ¶¶ 101–118.

While the ethical rules prohibit attorneys from making or guaranteeing loans to their clients and require lawyers to carefully consider whether referrals to loan companies are in their clients' best interest,[14] the point is not that KNR was violating these principles by advertising and providing "help" in attaining cash advances. Rather, the point is that KNR was in no way "engaged in the practice of law" when they solicited clients, including Matthew Johnson, on behalf of a third-party lender (here, Liberty Capital). Lawyers can't make personal loans and advertising and soliciting them for third parties does not in any sense constitute the practice of law.

As to all three of Plaintiffs' CSPA claims, the Ninth District has held that the "question" of whether an attorney "was actually engaged in the practice of law when the conduct giving rise to the CSPA claim occurred," "is certainly best answered by a fact finder, such as a jury." *Gugliotta*, 2005-Ohio-2570 at ¶ 42. And the Supreme Court of Ohio has held that "the [CSPA] is a remedial law which is designed to compensate for traditional consumer remedies and so must be liberally construed." *Einhorn v. Ford Motor Co.*, 48 Ohio St. 3d 27, 29 (1990). Applying the above standards, dismissal of Plaintiffs' CSPA claims would be improper, as all three have sufficiently alleged that the deceptive conduct at issue did not constitute "the practice of law."

[14] *Toledo Bar Ass'n v. Pheils*, 129 Ohio St. 3d 279, 2011-Ohio-2906, 951 N.E.2d 758, ¶ 16 quoting Prof.Cond.R. 1.8(e); Supreme Court of Ohio Board of Commissioners on Grievances and Discipline Opinion No. 94-11.

IV. Conclusion

The lack of merit to Defendants' motions is underscored by their effort to have it both ways—by claiming, on one hand, that they do not owe Plaintiffs a fiduciary duty, and on the other that they are shielded from CSPA liability due to the attorney-client relationship. Ohio law provides that neither issue is amenable to resolution at the pleadings stage, and the detailed and well-documented allegations in the Second Amended Complaint further mandate this conclusion. Additionally, as this Court has effectively already held, the Complaint is more than sufficient to withstand dismissal of Plaintiffs' fraud and unjust enrichment claims. For these reasons, as explained fully above, Defendants' motions for judgment on the pleadings should be denied.

Dated: August 16, 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 August 16, 2017.

/s/ Peter Pattakos
One of the Attorneys for Plaintiff