IN THE COURT OF COMMON PLEAS
SUMMIT COUNTY, OHIO

MEMBER WILLIAMS, *et al.*	)	CASE NO.: CV-2016-09-3928
	)	
Plaintiffs,	)	JUDGE PATRICIA COSGROVE
	)	
vs.	)	**MOTION TO STRIKE CLASS**
	)	**ALLEGATIONS AGAINST MINAS**
KISLING, NESTICO & REDICK, LLC, *et al.*	)	**FLOROS, DC.**
	)	
Defendants.	)	

I. Introduction

Defendant, Minas Floros, DC ("Dr. Floros"), hereby moves this Honorable Court to strike each class allegation made against him in Plaintiffs' Third Amended Complaint ("TAC"). Plaintiffs cannot satisfy the requirements of Ohio Civil Rule 23(A) and (B). Furthermore, the unique nature of Plaintiffs' claims ensures that no amount of discovery could remedy that problem. Thus, the class allegations against Dr. Floros should be stricken.

II. Claims Against Dr. Floros

Plaintiffs have filed a putative class action lawsuit against Kisling, Nestico & Redick, LLC ("KNR"), Rob Nestico, Robert Redick, and Dr. Floros. Dr. Floros is named as a defendant to putative class claims filed on behalf of Thera Reid, who claims to represent a sub-class comprising "[a]ll current and former KNR clients who had a narrative fee deducted by KNR from their settlement proceeds to be paid to a chiropractor." TAC ¶ 138. The class claims against Dr. Floros rely on two separate theories of liability: breach of fiduciary duty (Claim 10 of the TAC) and unjust enrichment (Claim 11 of the TAC). TAC ¶¶ 218-230.

The essential background allegations for these claims mirror those addressed in co-defendants' Motion to Strike Class Allegations filed in this matter on October 26, 2017 ("Motion to Strike"). When Dr. Floros treated certain chiropractic patients who were also pursuing a lawsuit as a client of the KNR law firm, KNR would hire Dr. Floros and/or Akron Square Chiropractic to prepare a narrative report of the patient/client's injuries and care. The narrative report summarized and discussed the patient's chiropractic treatment. The report was prepared and provided with the patient's consent, to support the patient's lawsuit. KNR advanced the $150.00 fee that was paid to Dr. Floros for preparing the narrative report. In the event that KNR settled the lawsuit for its client (Dr. Floros' patient), KNR would deduct the $150.00 fee for Dr. Floros' narrative report from their client's settlement proceeds. It is undisputed that KNR's attorney/client closing statement disclosed the narrative fee to their clients, as required by the ethical rules governing KNR, and that the patient approved the narrative report fee by signing the closing statement. However, Plaintiff now alleges that the narrative reports were "worthless" and a part of a secret kickback scheme between Dr. Floros and KNR.[1]

The law cited in co-Defendants' Motion to Strike applies with equal force to Dr. Floros. In order to certify a class, Plaintiffs must satisfy the requirements of Ohio Civil Rule 23. The Supreme Court of Ohio has defined the prerequisites to class certification contained in Ohio Civ. R. 23(A) and (B) as follows:

1) an identifiable class must exist and the definition of the class must be unambiguous;
2) the named representatives must be members of the class;
3) the class must be so numerous that joinder of all members is impractical;
4) there must be questions of law or fact common to the class;

[1] Dr. Floros denies all of these allegations and asserts that they are frivolous. By here quoting the allegations to frame the procedural issues raised by this motion, he does not waive the right, if and when necessary, to disprove the outrageous allegations and seek payment of his attorney fees or other remedies for frivolous conduct.

5) the claims or defenses of the representative parties must be typical of the claims or defenses of the class;

6) the representative parties must fairly and adequately protect the interests of the class; and

7) one of the three Civ.R. 23(B) requirements must be satisfied.

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

"Certification pursuant to Civ.R. 23(B)(3) requires the trial court to make two findings: first, 'that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members' and, second, 'that a class action is superior to other available methods for the fair and efficient adjudication of the controversy.'" *Cullen v. State Farm Mut. Auto. Ins. Co.*, 137 Ohio St.3d 373, 2013-Ohio-4733, 999 N.E.2d 614, ¶ 29, quoting *Ealy v. Pinkerton Govt. Servs., Inc*., 4th Cir. No. 12–1252, 2013 WL 980035, *7 (Mar. 14, 2013). "This inquiry requires the court to balance questions common among class members with any dissimilarities between them, and if the court is satisfied that common questions predominate, it then should 'consider whether any alternative methods exist for resolving the controversy and whether the class action method is in fact superior.'" *Id.*

The law clearly provides that if Plaintiffs cannot establish any one of the required elements of Civ. R. 23, then a class cannot be certified.

Plaintiffs contend that they must be permitted to conduct full discovery. They contend that the issues raised by the Motion to Strike must be deferred until a Motion to Certify Class is filed after discovery closes. However, they misstate the law on that point. "Ohio courts have acknowledged that a Civ.R. 23(D)(4) motion to strike class allegations and claims is appropriate where the plaintiff has failed to properly plead operative facts demonstrating compliance with Civ.R. 23(A) and (B)." *Sliwinski v. Capital Properties Mgt. Ltd.*, 9th Dist. Summit No. 25867, 2012-Ohio-1822, ¶ 14 (Apr. 25, 2012), *see also Waterman v. Christy*, 10th Dist. Franklin No.

87AP–866, 1988 WL 33623, *2 (Mar. 15, 1988) ("It is well-established that a complaint is subject to a motion to strike in accordance with Civ. R. 23(D)(4) where there is a failure to properly plead operative facts."). When a motion to strike is procedurally permissible, and no amount of discovery can remedy the identified problems with the class, a motion to strike class allegations is appropriate and should be granted. *Pilgrim v. Universal Health Card, LLC,* 6th Cir. No. 5:09CV879, 2010 WL 1254849 (Mar. 25, 2010), aff'd, 660 F.3d 943 (6th Cir. 2011).

Plaintiffs' 57-page TAC, which is supported in its essence only by bombastic conclusory allegations, still sufficiently defines the issues to demonstrate conclusively that questions regarding individuals and not the class will predominate in this case. No amount of discovery will yield a different conclusion.[2]

A. Breach of Fiduciary Duty

Plaintiffs' proposed Narrative Fee Class is defined to comprise "[a]ll current and former KNR clients who had a narrative fee deducted by KNR from their settlement proceeds to be paid to a chiropractor." TAC, ¶ 138(D). Plaintiffs claim that all Defendants, including Dr. Floros, breached their fiduciary duty to the Plaintiffs by "charging and collecting a narrative fee from their clients as a kickback reward to referring chiropractors, and in failing to disclose their quid pro quo relationship with one another." TAC, ¶¶ 218-225. Plaintiffs further allege that the narratives were "worthless" and did "not make an opposing party any more likely to settle a client's case," and had "nothing to do with individual clients' needs." TAC, ¶ 58. Specifically,

[2] It is clear that Plaintiffs' discovery efforts will be as bombastic, invasive, and overreaching as the allegations of their pleadings, while revealing nothing that will cure the flaws of the pleadings. For example, they have requested from Dr. Floros detailed information about "all bank accounts that you use or have used for any purpose whatsoever since 2008, business or personal, whether or not the account is in your name, including by the name of the account holder, the type of account, the purpose of the account, the account number, and the bank name and address. This includes all accounts to which you have deposited or from which you have withdrawn funds, or to or from which anyone has done so on your behalf."

Plaintiffs claim Dr. Floros' narrative reports were "especially bad," as they merely contained information that was allegedly "readily apparent from the medical records." TAC, ¶ 67.

It should first be noted that Plaintiffs' TAC alleges that Dr. Floros owed Plaintiff and the putative class members a fiduciary obligation that the law does not recognize. Under Ohio law, while "a physician undisputedly owes a fiduciary duty to his or her patient with respect to diagnosing and treating diseases and illnesses," any claim that such duty extends beyond the clinical medical relationship fails as a matter of law. *N. Ohio Med. Specialists, L.L.C. v. Huston*, 6th Dist. Erie No. E-09-13, 2009-Ohio-5880, ¶ 16 (2009). Because Dr. Floros owed no fiduciary duties to Plaintiff or the putative class members beyond making clinical decisions about patient care, Plaintiffs' fiduciary duty claims can never succeed.

Even if the Court assumes for purposes of this motion that a fiduciary duty existed, Plaintiffs' class claims must fail because they cannot satisfy the predominance requirements of Civ. R. 23 (B)(3). To determine whether Dr. Floros breached fiduciary obligations by accepting payment for allegedly "worthless" narrative reports, the court would need to decide many peculiarly individualized factual and legal questions. As outlined in co-Defendants' Motion to Strike, Plaintiffs' claims that the narrative reports were "worthless" requires an evaluation of each narrative report drafted by Dr. Floros and a review of the particular circumstances of each patient. Each narrative would also have to be compared to each patient's medical records, in order to determine whether the information in the narrative was "readily apparent" from the medical records, as alleged. The relative role of the chiropractic care in each Plaintiff's lawsuit, and the corresponding value of the narrative report to their lawsuit, depends on countless circumstances unique to each patient's injuries and legal case (What body parts were injured? Did the patient have pre-existing medical problems that needed to be addressed? Did the patient

treat with the chiropractor for days? Months? Years? Was the patient compliant with the chiropractor's treatment suggestions? Was there a dispute about whether future chiropractic care would be required?) Similarly, the ascribed value of a narrative report in a lawsuit can differ depending on the type of defendant being sued, the insurance company paying to defend and indemnify the defendant, and even the particular insurance adjuster assigned to the claim (one adjuster may claim to find the narrative report "worthless," while another may refuse to settle a case without a narrative report from all treating clinicians). The ascribed value of a narrative report could also differ depending on the venue of the patient's lawsuit, or the judge assigned to decide the case (if not a jury trial). These and countless other individual considerations will predominate (qualitatively and quantitatively) over any common legal or factual questions.

Plaintiffs are aware of this insurmountable obstacle to class relief. That is why, after repeatedly insisting that the chiropractic narrative reports were "worthless," Plaintiffs suddenly pivot to argue that *it doesn't really matter* if the narratives were worthless, claiming that "predominance ... does not disappear because the narratives KNR charged to clients might have served a useful purpose in a given case." Plaintiffs' Memorandum in Opposition to Defendants' Motion to Strike Class Allegations, at p. 23.

Under this curious alternate theory, Plaintiffs assert that the true value of the chiropractor narrative reports (and all of the individual questions that predominate in that dispute) is irrelevant because Plaintiffs are pursuing the equitable remedy of rescission, which requires no proof of consequential damages to class members. *Id.* Plaintiffs contend that if KNR ordered narrative reports from chiropractors "not for legitimate purposes but as a means of funneling extra income to crony chiropractors," then common issues will predominate over the particularized analysis of whether the narrative reports provided value. *Id.* For this argument, Plaintiffs rely on *In re:*

Binder: Squire v. Emsley, 137 Ohio St. 26 (1940), and *Hendry v. Pelland*, 73 F.3d 397 (D.C. Cir. 1996) (applying District of Columbia law). But for several reasons those cases do not salvage Plaintiffs' class claims against Dr. Floros. First, both *In re: Binder* and *Hendry* (to the extent they properly describe applicable Ohio law) concern traditional fiduciary relationships unlike the unusual fiduciary relationship allegedly owed by Dr. Floros here. *In re: Binder* concerned duties owed by a trustee under an express testamentary trust subject to probate court supervision. *Hendry* concerned fiduciary duties of a lawyer. As discussed above, Dr. Floros is a chiropractor and Ohio law imposes on him no fiduciary duty extending beyond his clinical decisions in treating patients. Furthermore, *In re: Binder* and *Hendry* provide that a Plaintiff who seeks only the remedy of equitable rescission can obtain that remedy without proving accompanying consequential damages. *In re Binder*, 137 Ohio St. 26, 57; *Hemdry*, 73 F.3d at 402. But Plaintiffs here seek "compensatory and rescissionary damages." TAC at Prayer for Relief ¶ 4. Finally, as noted in the co-Defendants' Motion, even if *In re: Binder* is applied here, it does not dispense with the need to prove damages as an element of a breach of fiduciary duty claim and does not dispense with the need for individual proof about whether the chiropractic narrative reports provided value to a class members' case. *See* Defendants' Motion to Strike at pp. 17-19.

Plaintiffs insist that their class claims should survive until they can complete discovery. This is a hollow argument, designed only to delay a ruling that is already ripe for adjudication. Beyond asking for more time, Plaintiffs fail to specify or describe what discovery would eliminate the individual questions that predominate over the class claims they pleaded. And they fail to explain how documents or information not yet discovered would remedy this flaw. Obtaining copies of Dr. Floros' bank records, or even charts or files relating to dozens (or hundreds) of KNR clients, will not disprove what is entrenched in the court's inherent

knowledge of the justice system and personal injury litigation. In the end, Plaintiffs' lengthy TAC does not simply fail to plead operative facts showing entitlement to class relief—in its grandiloquent excess it sharply defines the issues to show that further discovery will yield nothing to salvage class claims.

B. Unjust Enrichment

Plaintiffs also plead a claim for unjust enrichment against Dr. Floros only, alleging that Plaintiffs "unwittingly" allowed Defendants to "deduct and pay a narrative fee" to Dr. Floros without knowledge of the quid pro quo relationship he had with KNR. TAC, ¶¶ 226-230. Plaintiffs characterize the narrative fee as a "substantial benefit to Defendant Floros," the retention of which would be "unjust and inequitable." TAC, ¶ 229.

A claim for unjust enrichment is wholly inapplicable to the alleged circumstances here. Unjust enrichment is a quasi-contractual claim, in which each of the following elements must be satisfied: "(1) a benefit conferred by a plaintiff upon a defendant; (2) knowledge by the defendant of the benefit; and (3) retention of the benefit by the defendant under circumstances where it would be unjust to do so without payment." *See Poston on behalf of Poston v. Shelby-Love*, 8th Dist. Cuyahoga No. 104969, 2017-Ohio-6980, ¶ 20. Notably, the Supreme Court of Ohio has held that the purpose of an unjust enrichment claim "is not to compensate the plaintiff for any loss or damage suffered by him but to compensate him for the benefit he has conferred on the defendant." *Johnson v. Microsoft Corp.*, 106 Ohio St.3d 278, 2005-Ohio-4985, 834 N.E.2d 791, ¶ 21.

Here, Plaintiffs' unjust enrichment claim against Dr. Floros fails at the first element. There is no competent (non-conclusory) allegation or evidence to support a claim that any Plaintiff or putative class member, pursuant to a quasi-contractual agreement, conferred a benefit on Dr. Floros for which they anticipated being compensated. It is undisputed that fees collected

by Dr. Floros came about because of an agreement with KNR (which agreed to pay him regardless of whether their client's case was successful), not any agreement he had with any Plaintiff or class member. In sum, Plaintiffs do not seek compensation for a benefit they conferred on Dr. Floros. They seek forfeiture of amounts paid him for his reports.

Even assuming Plaintiffs conferred a benefit on Dr. Floros for purposes of this motion, Plaintiffs would have to prove it would be "unjust" for Dr. Floros to retain such a benefit. The only "benefit" Dr. Floros arguably received was the narrative fee, which he earned by generating the report and is a product of his agreement with KNR, not with any Plaintiff or class member. Moreover, the determination of whether retention of any benefit would be "unjust" requires an analysis of each Plaintiff's particular case, further establishing that Plaintiffs cannot satisfy the predominance requirements of Civ. R. 23(B)(3).

III. Conclusion

For the reasons stated herein, and those outlined in co-Defendants' Motion to Strike Class Allegations, Dr. Floros respectfully requests that this Court issue an Order striking all class allegations against him in the TAC. There is no additional discovery that will change the facts underlying Defendant's Motion.

Respectfully submitted,

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CERTIFICATE OF SERVICE

Pursuant to Civil Rule 5(B)(2)(f), a copy of the foregoing *Motion to Strike Class Allegations Against Minas Floros, D.C.* was sent by electronic mail, this 20th day of December 2017, to:

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