**IN THE COURT OF COMMON PLEAS**
**SUMMIT COUNTY, OHIO**

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| MEMBER WILLIAMS, *et al.*,<br><br>Plaintiffs,<br>vs.<br><br>KISLING, NESTICO & REDICK, LLC, *et al.*,<br><br>Defendants. | Case No. 2016-CV-09-3928<br><br>Judge Patricia A. Cosgrove<br><br>**Plaintiffs' Memorandum in Opposition to Motion to Strike Class Allegations against Defendant Minas Floros, D.C.** |

## I. Introduction

Like the KNR Defendants before him, Defendant Minas Floros, D.C. improperly goes beyond the four corners of the Third Amended Complaint in moving to strike the class allegations brought against him. More significantly, Dr. Floros misuses the Motion to Strike as a means of precipitating a premature ruling on class certification before the Plaintiffs have even raised the issue and while discovery remains substantially incomplete.

The Plaintiffs have every right to proceed with the class allegations raised against Dr. Floros. The Court should deny his Motion to Strike.

## II. Factual Background

### A. The Plaintiffs' claims against Dr. Floros

A chiropractor, Dr. Floros owns and manages Akron Square Chiropractic ("ASC"). The Plaintiffs allege in the Third Amended Complaint ("TAC) that ASC unlawfully solicits clients for Defendant Kisling, Nestico & Redick, LLC ("KNR") in exchange for patient referrals and kickback payments. According to the Plaintiffs, KNR allegedly pressured clients to treat with ASC in exchange for ASC's commitment to channel its patients to KNR. TAC, ¶17-¶45.

The Plaintiffs assert that Dr. Floros breached his fiduciary duty to them by failing to disclose the *quid pro quo* relationship between ASC and KNR. The Plaintiffs also claim that Dr. Floros unjustly enriched himself by charging KNR clients for "narratives" prepared in connection with their cases. The "narratives" purportedly served no useful purpose, adding no value to the KNR clients' claims or the law firm's ability to resolve them. Apart from what discovery might reveal as to the value of the narratives, KNR ordered them and Dr. Floros provided them as a means of generating kickback payments pursuant to the *quid pro quo* relationship between the law firm and ASC—a secret profit that is void under Ohio law governing fiduciaries.

**B. The status of discovery**

Discovery on the claims against Dr. Floros has just begun. Discovery on the claims against the other Defendants also remains in preliminary stages, given the KNR Defendants' lack of compliance. Dr. Floros has not produced any documents in this case to date, and the KNR Defendants have only produced a tiny fraction of the documents requested by the Plaintiffs. No depositions have been taken in this lawsuit yet.

## III. Law and Argument

**A. Dr. Floros cannot prosecute his Motion to Strike under Civ. R. 12(F)(2).**

Dr. Floros does not invoke any particular Civil Rule in moving to strike the Plaintiffs' class allegations. To the extent he purported to bring it under Civ. R. 12(F)(2), it fails as a matter of law.

Civ. R. 12(F)(2) permits the court to strike "insufficient claims or defenses, or redundant, immaterial, impertinent or scandalous matter." Defendants may invoke this provision to challenge purported defects in some (but not all) of the claims alleged against them. *State ex rel. Neff v. Corrigan*, 75 Ohio St. 3d 12, 14-15, 1996-Ohio-231, 661 N.E.2d 170. Under the explicit terms of Civ. R. 12(F)(2), however, defendants must file their motion to strike "before responding to … [the] pleading" in question.

Dr. Floros filed his Answer to the TAC more than three weeks before moving to strike the Plaintiffs' class allegations. Civ. R. 12(F)(2) becomes unavailable under this chronology. Dr. Floros cannot prosecute his Motion to Strike under this provision.

**B. The prevailing standards on motions to strike class allegations are contrary to Dr. Floros's motion.**

**1. Class actions facilitate litigation involving multiple parties in a single action.**

Class actions "facilitate adjudication of disputes involving common issues between multiple parties in a single action." *Beder v. Cleveland Browns*, 129 Ohio App. 3d 188, 199, 717 N.E.2d 716 (8th Dist. 1998). The "spirit" of Civ. R. 23 is "to open the judicial system to more people through the class action mechanism." 73 OHIO JUR. 3D *PARTIES* § 46 (2017). These principles should inform any evaluation of the class allegations contained in the TAC.

**2. Only a "rare few" complaints are vulnerable to a motion to strike class claims.**

Under Civ. R. 23(D)(1)(d) and its predecessor, Civ. R. 23(D)(4), courts in a putative class action "may issue orders that … require the pleadings be amended to eliminate allegations about representation of absent persons, and the action proceed accordingly." A motion to strike becomes "appropriate" under this provision only where the plaintiff "has failed to properly plead operative facts demonstrating compliance with Civ. R. 23(A) and (B)." *Sliwinski v. Capital Props. Mgmt.*, 9th Dist. No. 25867, 2012-Ohio-1822, ¶14.

The complaint itself must establish the plaintiff's absolute inability to "prove … [any] set of facts sufficient to satisfy" the requirements for class certification. *Cubberley v. Chrysler Corp.*, 70 Ohio App. 2d 263, 267-68, 437 N.E.2d 1 (8th Dist. 1981). Only a "rare few" pleadings are deficient in this way. *Goode v. LexisNexis Risk & Info. Analytics Group*, 284 F.R.D. 238, 246 (E.D.Pa. 2012); *Black v. General Info. Servs.*, No. 1:15 CV 1731, 2016 U.S. Dist. LEXIS 26548, at *6 (N.D. Ohio Mar. 2, 2016)

("[S]triking a plaintiffs class allegations prior to discovery and a motion for class certification is a rare remedy."). [1]

**3. Courts "disfavor" motions to strike class allegations.**

Striking class allegations before plaintiffs move for class certification is a "harsh remedy." *Bellissimo v. Rana USA*, No. 16-CV-03720 (RA) (BCM), 2017 U.S. Dist. LEXIS 105400 at *37 (S.D.N.Y. July 6, 2017). Courts decidedly "disfavor[ ]" such motions. *See, e.g., Gray v. BMW*, 22 F.Supp. 3d 373, 386 (D.N.J. 2014).[2]

**4. Motions to strike class allegations improperly preempt discovery.**

Deciding whether to certify a class "generally involves considerations that are enmeshed in the factual and legal issues comprising the plaintiffs cause of action." *Gray*, 22 F.Supp. 3d at 386. "[D]iscovery is therefore integral." *Id.* Only through this means does the "shape and form of a class action evolve[ ]." *Bellissimo*, 2017 U.S. Dist. LEXIS 105400 at *30. "[M]otions to strike class allegations are generally regarded as premature" since they preempt discovery required to assess the propriety of class certification. *Brown v. Swagway, LLC*, No. 3:15-CV-588 JVB, 2017 U.S. Dist.

[1] Civ. R. 23 in general and Civ. R. 23(D)(1)(d) in particular essentially track their federal counterparts. *See* STAFF NOTES, CIV. R. 23; *cf.* FED R. CIV. P. 23. Given this fact, "federal authority is an appropriate aid to interpretation of the Ohio rule." *Hamilton v. Ohio Savings Bank*, 82 Ohio St. 3d 67, 82, 694 N.E.2d 442 (1998).

[2] *See also Cheatham v. ADT Corp.*, 161 F. Supp. 3d 815, 834 (D. Ariz. 2016) ("Motions to strike class allegations are particularly disfavored because it is rarely easy to determine before discovery whether the allegations are meritorious."); *Smith v. Washington Post Co.*, 962 F. Supp. 2d 79, 85 (D.D.C. 2013) ("[A] motion to strike is a disfavored, drastic remedy, and courts favor an adjudication on the merits ...). [C]ourts rarely grant motions to dismiss or strike class allegations before there is a chance for discovery."); *Thorpe v. Abbott Labs.*, 534 F. Supp. 2d 1120, 1125 (N.D. Cal. 2008) ("Motions to strike class allegations are disfavored because a motion for class certification is a more appropriate vehicle for the arguments [Defendant] advances herein."); *In re Horizon Organic Milk Plus DHA Omega-3 Mktg. & Sales Practice Litig.*, 955 F. Supp. 2d 1311, 1351-52 (S.D. Fla. 2013) (same);; *Calibuso v. Bank of Am.*, 893 F. Supp. 2d 374, 383 (E.D.N.Y. 2012) (same); *Mayfield v. Asta Funding*, 95 F. Supp. 3d 685, 696 (S.D.N.Y. 2015) (same); *Ironforge.com v. Paychex, Inc.*, 747 F. Supp. 2d 384, 404 (W.D.N.Y. 2010) (same); *Mazzola v. Roomster Corp.*, 849 F. Supp. 2d 395, 410 (S.D.N.Y. 2012) (same).

LEXIS 31997 at *1-*2 (N.D. Ind. Mar. 7, 2017). *See also Pry v. Health Care & Retirement Corp. of Am.*, 3d Dist. No. 3-98-11, 1998 Ohio App. LEXIS 6586, at *10-12 (Dec. 24, 1998) ("It is unclear to this court how Appellant is supposed to succeed in [certifying a suit as a class action under Civ.R. 23] without being able to discover certain critical facts about potential class members."); *Sauter*, 2014 U.S. Dist. LEXIS FN2.

**5. Motions to strike do not properly address the merits of the underlying claims.**

Class certification under Civ. R. 23 focuses exclusively on whether the case can "be properly adjudicated through the ... construct of a class action." *Dublin v. Security Union Title Ins. Co.*, 162 Ohio App. 3d 97, 2005–Ohio–3482, 832 N.E.2d 815, ¶21 (8th Dist.). It does not address the substantive aspects of the underlying lawsuit. *Ojalvo v. Board of Trustees*, 12 Ohio St. 3d 230, 233, 466 N.E.2d 875 (1984) *See also Cullen v. State Farm Mut. Auto Ins. Co.*, 137 Ohio St. 3d 373, 2013-Ohio-4733, 999 N.E.2d 614, ¶17 (merits of claims relevant "only to the extent necessary to determine" whether the plaintiff has satisfied Civ. R. 23).

Dr. Floros devotes much of his Motion to Strike to attacking the merits of the fiduciary duty and unjust enrichment claims alleged against him. Nothing prevented him from raising these arguments in a motion to dismiss under Civ. R. 12(B)(6) if he truly believed they negated the Plaintiffs' right to recovery.

The Motion to Strike serves as an inappropriate substitute for such a motion. Class certification does not turn on the merits of the plaintiffs' case. Nor, then, can the sufficiency of the plaintiffs' class allegations under Civ. R. 23(D)(1)(d).

**6. Defendants may not base motions to strike on evidence "outside the four corners" of the complaint.**

A "motion to strike class allegations is not a substitute for class determination and should not be used in the same way." *Faktor V. Lifestyle Lift*, N.D. Ohio No. 1:09-CV-511, 2009 U.S. Dist. LEXIS 47978 at *5-*6 (June 3, 2009). If the "motion is based on evidence outside of the four

corners of the pleadings," it becomes an "ill-fitting procedural vehicle" for contesting class certification. *Henderson v. Bank of N.Y. Mellon*, No.15-10599-PBS, 2017 U.S. Dist. LEXIS 156021 at *4 (D. Mass. Sept. 25, 2017). Instead, motions to strike based on extraneous evidence seek to "slip through the back door what is essentially an opposition to a motion for class certification" before its actual filing and while discovery remains ongoing. *Korman*, 503 F. Supp. 2d at 762.

Dr. Floros' Motion to Strike does not restrict its focus to the allegations contained in the TAC. He instead relies on extraneous evidence in trying to foreclose the possibility of class certification.

Specifically, Dr. Floros predicates his arguments on the following information, none of which appears in the Plaintiffs' pleading:

> The narrative 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 clients (Dr. Floros' patient), KNR would deduct the $150.00 fee for Dr. Floros' narrative report from their client's settlement proceeds.

Floros' Motion to Strike, p. 2. Since Dr. Floros went beyond the "four corners" of the Third Amended Complaint, the Motion to Strike becomes an "ill-fitting procedural vehicle" for contesting class certification. *Henderson*, 2017 U.S. Dist. LEXIS 156021 at *4

**C. No grounds exist for striking the class allegations pertaining to the claims against Dr. Floros.**

**1. There are no grounds to strike the class allegations on the breach of fiduciary duty claim against Dr. Floros.**

Dr. Floros contends that the Plaintiffs cannot prove the predominance of common issues required by Civ. R. 23(B)(3) with respect to either the fiduciary duty claim or the unjust enrichment claim alleged against him. According to him, the Court will have to decide many individualized questions to determine whether a particular class member deserves recovery.

Predominance, however, does not require plaintiffs to demonstrate that they will ultimately prevail on common issues. *Amgen, Inc. v. Connecticut Ret. Plans & Trust Funds*, 568 U.S. 455, 460

(2013). Any such rule would "put the cart before the horse" by making plaintiffs show they "will win the fray" as a precondition to class certification. *Id.*

Predominance instead requires only that "issues subject to generalized proof and applicable to the class as a whole predominate over those issues that are subject only to individualized proof." *Cullen*, 2013-Ohio-4733, ¶30. This balancing test is "qualitative, not quantitative." *Musial Offices v. Cuyahoga Cty.*, 2014-Ohio-602, 8 N.E.3d 992, ¶32 (8th Dist.).

Predominance does not turn on the "time" required to resolve "common issues" as compared to "the time that individual issues" will consume. *Hamilton v. Ohio Savings Bank*, 82 Ohio St. 3d 67, 85, 694 N.E.2d 442 (1998). Courts instead focus upon whether "one or more common issues constitute significant parts of each class members' individual cases," such that "common questions are central" to all their claims. *Westgate Ford Truck Sales v. Ford Motor Co.*, 8th Dist. No. 86596, 2007-Ohio-4013, ¶64.

More specifically, common issues predominate so long as they are "capable of resolution for all members in a single adjudication." *Cirino v. Ohio Bureau of Workers Comp.*, 2016-Ohio-8323, 75 N.E.3d 965, ¶99 (8th Dist.). Class members' claims must "prevail or fail in unison." *Musial*, 2014-Ohio-602 at ¶32. "[G]eneralized evidence … proves or disproves" the determinative points "on a simultaneous class-wide basis." *Rimedio v. SummaCare, Inc.*, 9th Dist., No. 25068, 2010-Ohio-5555, ¶68.

In such situations, the "mere existence of different facts" underlying class members' claims will not negate the predominance of common issues. *In re Consolidated Mtg. Satisfaction Cases*, 97 Ohio St. 3d 465, 2002-Ohio-6720, 780 N.E.2d 556, ¶10. Civ. R. 23(B)(3) "gives leeway in this regard." *Id.* So long as the "gravamen" of each class members' claim "is the same," common issues predominate. *Baughman v. State Farm Mut. Auto. Ins. Co.*, 88 Ohio St. 3d 480, 489, 727 N.E.2d 1265 (2000).

Common issues predominate with respect to the fiduciary duty claim alleged against Dr. Floros. Each prospective class member was a patient of his and paid a "narrative" fee. It does not matter whether the "narrative" incidentally served a useful purpose in any particular case. As set forth fully in Plaintiffs' opposition to the KNR Defendants' motion to strike class allegations (at p. 18–20), self-dealing fiduciaries face liability for forfeiture or disgorgement based on their fiduciary breaches, regardless of any proof of consequential injury. Thus, every class members' right to recovery turns upon whether the Defendants ordered this charge for illegitimate purposes, as part of an overall scheme to pay Dr. Floros a kickback. The Court can resolve this dispositive issue on a class-wide basis, and Plaintiffs are entitled to conduct discovery before class-certification is decided upon.

Dr. Floros nevertheless attempts to escape liability by offhandedly asserting that he did not owe a fiduciary duty to his patients that would bar him from engaging in a secret kickback scheme at their expense. Floros Br. at 5, 7. He relies on a single case from Erie County to support this cynical claim—*N. Ohio Med. Specialists, L.L.C. v. Huston*, 6th Dist. Erie No. E-09-13, 2009-Ohio-5880, ¶ 16 (2009)—and misrepresents this case's holding in doing so.

In *Huston*, the court merely rejected a patient's argument that "the doctor had a 'fiduciary' duty to get insurance benefits for [the patient]." *Id.* at ¶ 14. In disposing of this claim, the court correctly observed that a "fiduciary" is "[a] person having duty created by his undertaking, to act primarily for another's benefit in matters connected with such undertaking." *Id.* at ¶ 15. The court further observed (again correctly) that, "a physician undisputedly owes a fiduciary duty to his or her patient with respect to diagnosing and treating diseases and injuries," and simply found that this did not extend to a duty to obtain insurance benefits for a patient. *Id.* at ¶ 16.

Thus, *Huston* does nothing to overturn the principle that "the physician owes his patient a fiduciary duty of good faith and fair dealing," and cannot insulate Floros from the alleged self-

dealing at issue. *Estate of Leach v. Shapiro*, 13 Ohio App.3d 393, 395, 469 N.E.2d 1047 (9th Dist. 1984). *See also Biddle v. Warren Gen. Hosp.*, 11th Dist. Trumbull No. 96-T-5582, 1998 Ohio App. LEXIS 1273, at *20 (Mar. 27, 1998) ("[T]he relationship between a physician and a patient is fiduciary in nature."); *Lambert v. Shearer*, 84 Ohio App.3d 266, 284, 616 N.E.2d 965 (10th Dist. 1992) ("[C]ourts have repeatedly recognized that physicians have superior skill and knowledge which patients rely on in a context of trust and confidence, giving rise to special fiduciary duties").

Moreover, "the Supreme Court of Ohio has recognized the claim of aiding and abetting breach of fiduciary duty through its adoption of § 876(b) of the Restatement (Second) of Torts, which provides, "[f]or harm resulting to a third person from the tortious conduct of another, one is subject to liability if he . . . knows that the other's conduct constitutes a breach of duty and gives substantial assistance or encouragement to the other so to conduct himself[.]" *Liquidating Tr. of the Amcast Unsecured Creditor Liquidating Trust v. Baker (In re Amcast Indus. Corp.)*, 365 B.R. 91, 112 (Bankr. S.D. Ohio 2007) citing *Great Cent. Ins. Co. v. Tobias*, 37 Ohio St.3d 127, 524 N.E.2d 168 (1988), *Aetna Cas. & Sur. Co. v. Leahey Constr. Co.*, 219 F.3d 519 (6th Cir.2000). *See also Biddle v. Warren Gen. Hosp.*, 11th Dist. Case No. 96-T-5582, 1998 Ohio App. LEXIS 1273, at *20 (Mar. 27, 1998) ("[A] third party who induces the breach of a fiduciary's duty of loyalty, or participates in such breach, is liable to the injured party."). Thus, even if Floros could legitimately argue he did not owe a fiduciary duty that would apply to the conduct at issue here, he would still be liable for the self-dealing under this principle.

The only other response that Dr. Floros makes to escape liability for disgorgement of the narrative fees is to claim that Plaintiffs are somehow barred from seeking disgorgement because their prayer for relief requests "compensatory and rescissionary damages."' Floros Br. at 7. This proposition is contrary to law and common sense. There is no principle barring Plaintiffs from

seeking these remedies in the alternative, and Defendants do not cite any law holding to the contrary.

**2. There are no grounds to strike the class allegations on the unjust enrichment claim against Dr. Floros**

The same considerations establish why common issues predominate with respect to the unjust enrichment claim alleged against Dr. Floros. According to the Plaintiffs, the "narrative" was universally prescribed not on the basis of any legitimate need, but as one feature of the Defendants' quid pro quo relationship that unjustly enriched them. The Court need not make separate findings for each individual class member regarding this overarching allegation.

Common issues predominate on the claims alleged against Dr. Floros. His arguments to the contrary cannot resuscitate his Motion to Strike.

## IV. Conclusion

As with the KNR Defendants, Dr. Floros will have every opportunity to contest class certification at the appropriate time, after class discovery is complete. Dr. Floros has presented no viable basis for striking the class allegations raised against him. The Court should deny his Motion to Strike.

Respectfully submitted,

*/s/ Peter Pattakos*

Peter Pattakos (0082884)
Dean Williams (0079785)
Daniel Frech (0082737)
THE PATTAKOS LAW FIRM LLC
101 Ghent Road
Fairlawn, OH 44333
330.836.8533 Phone
330.836.8536 Fax
peter@pattakoslaw.com
dwilliams@pattakoslaw.com
dfrech@pattakoslaw.com

*/s/ Joshua R. Cohen*
Joshua R. Cohen (0032368)
Ellen M. Kramer (0055552)
COHEN ROSENTHAL & KRAMER LLP
3208 Clinton Avenue
1 Clinton Place
Cleveland, Ohio 44113
216.815.9500 Phone
216.815.9500 Fax
jcohen@crklaw.com

*Attorneys for Plaintiffs*

**CERTIFICATE OF SERVICE**

I certify that on January 19, 2018 a copy of the above Memorandum in Opposition was filed with the Court's electronic filing system and service will be made on all necessary parties through that system:

*/s/ Joshua R. Cohen*
Joshua R. Cohen