IN THE COURT OF COMMON PLEAS
SUMMIT COUNTY, OHIO

MEMBER WILLIAMS, *et al.*, Plaintiff, vs. KISLING, NESTICO & REDICK, LLC, *et al.*, Defendants.	Case No. CV-2016-09-3928 Judge James A. Brogan **Reply in Support of Plaintiffs' Motion for Leave to File Fourth Amended Complaint**

I. Introduction

The KNR Defendants, Defendant Floros, and putative Defendant Ghoubrial (collectively, the "Defendants") have opposed Plaintiffs' motion to file a fourth amended complaint, accusing Plaintiffs of seeking to assert the new claims in "bad faith." The Defendants do not deny the new allegations that Dr. Ghoubrial took advantage of KNR clients by taking exorbitant undisclosed profits in selling them medical devices that the clients could have purchased for a fraction of the price elsewhere. Rather, the Defendants essentially claim that this is too bad for their clients, making various arguments as to why the proposed new claims would be futile that variously disregard controlling Ohio law providing that, 1) the discovery rule applies to breach-of-fiduciary-duty claims that sound in fraud; 2) undisclosed self-dealing by doctors against their patients is strictly prohibited; 3) fraud-based claims against doctors are not governed by Ohio's "medical claims" statute when the alleged misstatement or concealment of facts is not medical in nature; and, 4) an affidavit of merit under Civ.R.10 is only required when a plaintiffs' claims depend on a finding that a doctor breached a standard of medical care.

Contrary to Defendants' accusations that Plaintiffs are engaged in a "fishing expedition," and intentional "delay" tactics, the detailed and well-documented allegations in this lawsuit reveal a

widespread fraudulent scheme about which Plaintiffs continue to uncover additional aspects despite Defendants' extreme obstruction. The new claims all relate to the KNR law firm's unlawful relationships with health-care providers whose interests are prioritized at the expense of the firm's clients, and all of the claims in the putative Fourth Amended Complaint pertain to the single transaction of the clients' settlement of their personal-injury cases and concurrent "approval" of the various fraudulent fees at issue.

In opposing Plaintiffs' motion, Defendants essentially seek to compound the burdens inherent in prosecuting a fraud claim against parties who had all of the bargaining power in the transactions at issue and retain all of the information about them. Rule 15's policy of permissiveness regarding the amendment of pleadings applies with extra force in a case like this. Given Ghoubrial's extensive involvement in the KNR firm's practice, he cannot legitimately claim a need to "catch up" on the facts at issue in this lawsuit, particularly as to the claims on which he is exposed to liability. Thus, as explained in detail below, the Court should grant Plaintiffs leave to file the fourth amended complaint and pursue their claims jointly against the lawyers and health-care providers who colluded to defraud them.

II. Law and Argument

A. Defendants' claims that Plaintiffs have acted in "bad faith" are contradicted by the record and unsupported by any facts.

The Defendants attribute various bad faith motives to the Plaintiffs and their counsel, accusing them of engaging in a "fishing expedition," and intentional "delay" intended to postpone what the Defendants see as the inevitable "denial of class certification." KNR Opp. at 2, 5–6; Floros Opp. at 1–4; Ghoubrial Opp. at 13. Defendants all complain that putative new Plaintiff Monique Norris, who first contacted Plaintiffs' counsel last November upon learning about this lawsuit through the press, should have filed her claims against Dr. Ghoubrial sooner. KNR Opp. at 5–6;

Floros Opp. at 3; Ghoubrial Opp. at 13.

While Ms. Norris and her counsel had reason to suspect that the TENS unit charge at issue was fraudulent shortly upon first speaking last December, they were required to investigate these claims before filing them. They have done so with all deliberate speed here, including by locating representatives of the distributor of the TENS units at issue and obtaining confirmation that Ghoubrial only paid $27.50 for each one. Given the KNR Defendants' practice of countersuing all of their former clients who've come forward as Named Plaintiffs in this case, Ms. Norris had every reason to be cautious, particularly with no deadlines established in this lawsuit until less than two months ago, and with more than 140 of Plaintiffs' discovery requests pending for over a year to which Defendants' objections were only recently overruled and to which responses where only provided by Defendants last week.[1]

[1] Contrary to Defendants' accusations, Plaintiffs have not been dilatory in pursuing discovery in this case. In its April 6 order denying Defendants' motions to strike Plaintiffs' class-action claims, the Court noted that "Plaintiffs have not yet moved for [class-certification]; nor are they required to when discovery has been delayed in such fashion as present in the circumstances of this case." On July 24, 2018, the Court issued separate rulings on the parties' cross-motions to compel the production of documents that had been pending since early March, including as to numerous discovery requests served by Plaintiffs that had been pending since the summer of 2017. In these orders, the Court set the currently pending November 1 deadline for class-discovery, which was the first discovery deadline to be established in this case, and ordered the Plaintiffs to produce certain documents to the Defendants. On July 30, the Court issued another order overruling Defendants' objections to more than 140 of Plaintiffs' written discovery requests, effectively requiring Defendants to immediately respond to these requests. Defendants only finally completed their responses to these requests last week. *See* Defendants' Notice of Service filed 09/17/2018.

In the meantime, Plaintiffs have been acting on the reasonable expectations that they would, (1) receive a complete response to written discovery before being required to proceed with depositions in this case; and (2) proceed first with the deposition of Nestico—who is the only owner of the KNR law firm, who is alleged to be primarily responsible for the allegedly fraudulent conduct at issue in this case, and who should have the most knowledge about it—so that they could then assess and disprove his testimony by asking questions of other key witnesses. *See*, *e.g.*, *In re Santa Fe Natural Tobacco Co. Marketing & Sales Practices & Prods. Liab. Litigation*, D.N.M. No. MD 16-2695 JB/LF, 2018 U.S. Dist. LEXIS 140453, at *40 (Aug. 18, 2018) (requiring "plaintiffs to deliver responses to the [d]efendants' written discovery requests ... before the depositions of the [p]laintiffs' witnesses, so that the [d]efendants may make meaningful use of the responses at the depositions" and "because it would eliminate any potential need to reopen discovery to account for late-received materials")

Upon confirmation of the legitimacy of Plaintiff Norris's claims against Ghoubrial, Plaintiffs had every legitimate reason to seek to add them to this lawsuit, as explained below.

B. Joinder is warranted under Civ.R.20(A) because the new claims arise from the same transaction or occurrence as the existing claims and involve common questions of law and fact.

Dr. Ghoubrial argues that Ohio law prohibits joinder because "[t]here is no relationship between the representation of the class representative by KNR and the claims against Dr. Ghoubrial." Ghoubrial Opp. at 11. But the plain language of Civ.R.20(A) defeats Ghoubrial's position:

> All persons may be joined in one action as defendants if there is asserted against them ... any right to relief in respect of or arising out of the same transaction, occurrence, or succession or series of transactions or occurrences and if any question of law or fact common to all defendants will arise in the action.

Civ.R.20(A). A court may join tortfeasors in such an action because "[s]uccessive torts, separated and unrelated in time, place or source, constitute a 'series of occurrences'" within the meaning of the rule. *Williams v. Gragston*, 7 Ohio App.3d 369, 371, 455 N.E.2d 1075 (1st Dist.1982); *see also Galbraith v. J.J. Detweiler Ents.*, 164 Ohio App.3d 332, 2005-Ohio-6300, 842 N.E.2d 124, ¶ 16 (5th Dist.) ("It is permissible to join persons as defendants if they are involved in a succession or series of transactions or occurrences" so long as plaintiff alleges a common question of law or fact among the defendants).

(internal quotations omitted); *In re San Juan Dupont Plaza Hotel Fire Litigation*, D.P.R. MASTER FILE MDL 721, 1988 U.S. Dist. LEXIS 17332, at *84 (Dec. 2, 1988) ("In order to ensure that all parties can evaluate the benefits of attending particular depositions, and are properly prepared to participate in scheduled depositions, written discovery shall commence prior to deposition discovery ... ."); *In re Oxbow Carbon LLC Unitholder Litigation*, Ch., 2017 Del. Ch. LEXIS 135, at *8 (July 28, 2017) (explaining and endorsing the "general custom" of "giv[ing] the party with the burden of proof the ability both to determine the order of witnesses and to question first if the party wishes to exercise that option," which, "like the opportunity to present evidence first and to open and close, follow the burden of proof."); *Russo v. Burns*, 2014-0952 (La. App. 4 Cir 09/09/14), 150 So.3d 67, 71-72 (observing that a trial court's discretion "over trial proceedings and the order of witnesses" should not be "exercised in such a way that deprives a litigant of his day in court.").

Here, both the new and existing claims all pertain to the single transaction of the clients' settlement of their personal-injury cases with KNR and concurrent "approval" of the various fraudulent fees at issue. And the new claims all relate to the KNR law firm's unlawful relationships with health-care providers whose interests are prioritized at the expense of the firm's clients. Putative new Named Plaintiff Ms. Norris was a victim of all four schemes alleged in the fourth amended complaint, and she and the class members she seeks to represent should not be required to participate in separate lawsuits to relitigate factual and legal issues that are related to and connected with this action that all arise from the same set of facts. *See Sogevalor, SA v. Penn Cent. Corp.*, 137 F.R.D. 12, 14 (S.D.Ohio 1991) ("[J]udicial economy suggests that this action proceed now without the delay and waste precipitated by a second filing" because initiating a new case "would needlessly consume the additional resources of all the parties and of the Court.").

In its April 6, 2018 order denying Defendants' motion to strike Plaintiffs' class-action claims, the Court held that Plaintiffs' complaint is "well-pleaded," containing "fifty-six (56) pages of well-defined allegations, proposing four (4) separate classes." Any such motion by Defendant Ghoubrial would have to be rejected for the same reasons based on the same principles of Ohio law that strictly prohibit undisclosed self-dealing by fiduciaries, discussed further below.

C. Whether or not the Court permits the new claims against Dr. Ghoubrial to be adjudicated in this lawsuit, Plaintiff Norris should be permitted to join the case as a class representative for the three existing classes.

The KNR Defendants and Floros further object to Ms. Norris joining the case as a class representative for the three classes that are already a part of this lawsuit, claiming that "Plaintiffs provide no explanation for why an 'additional' representative is required at this late date." KNR Opp. at 7; Floros Opp. at 4. Such an explanation should however be evident to the Defendants, who have lodged personal attacks against each of the Named Plaintiffs in seeking to establish that they do not meet Civ.R. 23's "adequacy" requirement. Despite the Named Plaintiffs' clear and compelling

testimony on the events that are actually at issue in this case, the KNR Defendants, both in the Named Plaintiffs' depositions that only took place a few months ago and in related correspondence with Plaintiffs' counsel, have indicated their intent to seek to disqualify them as class-representatives by way of various personal smears regarding alleged health issues, money problems, and a previous criminal conviction for selling marijuana.

While none of the Named Plaintiffs' personal issues, real or imagined, give the Defendants a free pass to defraud them or otherwise disqualify them from representing the putative classes in this lawsuit, the involvement of Ms. Norris—who is a healthy and gainfully employed pharmacy technician with no criminal history—will affirm the typicality of the claims at issue, protect the interests of the putative classes, and help keep these proceedings from being undermined by Defendants' personal smears against their former clients. *See Spizzirri v. C.I.L. Inc.*, N.D. Ill. No. 94C1479, 1994 U.S. Dist. LEXIS 11719, 10-13 (Aug. 19, 1994) ("[C]ourts have recognized a policy freely permitting substitution of one named plaintiff for another."); *In re Thornburgh*, 276 U.S. App. D.C. 184, 869 F.2d 1503, 1509 (D.C. Cir. 1989) (collecting cases supporting same).

D. The proposed amendments would not be futile.

The remaining arguments in Defendants' opposition briefs are maintained to support their position that the requested amendments would be futile. Each of these arguments fails, as explained below.

1. The discovery rule applies to breach-of-fiduciary-duty claims that sound in fraud.

Before discussing the fiduciary duties that Ghoubrial seeks to disclaim in his opposition, it first necessary to address Defendant Floros's argument that the new claims are time-barred, and that the discovery rule does not apply to them. Floros Opp. at 5–6. This argument disregards controlling law holding that a claim for breach of fiduciary duty that sounds in fraud "do[es] not accrue 'until the fraud is discovered.'" *Orvets v. National City Bank*, 131 Ohio App.3d 180, 189, 722 N.E.2d 114

(9th Dist. 1999); *See also Investors Reit One v. Jacobs*, 46 Ohio St.3d 176, 182, 546 N.E.2d 206 (1989) (holding that R.C. 2305.09(D)'s discovery rule "is applicable to claims founded in fraud, conversion and breach of trust" by the plain language of the statute); *Monday v. Meyer*, N.D. Ohio No. 1:10-CV-1838, 2011 U.S. Dist. LEXIS 136858, *31 (Nov. 29, 2011) ("Assuming that Plaintiffs' breach of fiduciary duty claims sound in fraud and center around Defendants' misrepresentations and misleading statements, then the discovery rule would apply."); *In re Nat'l Century Fin. Enters.*, S.D. Ohio No. 2:03-MD-1565, 2006 U.S. Dist. LEXIS 16612, note 2 (Feb. 27, 2006) ("[W]hen, as here, those claims include allegations of fraud, such as a fraudulent breach of fiduciary duty, the discovery rule does apply."); *Joseph v. Joseph*, S.D. Ohio No. 1:16-CV-465, 2018 U.S. Dist. LEXIS 8854, *12 (Jan. 19, 2018) ("Courts have applied Ohio's discovery rule to claims for breaches of fiduciary duty" where "the plaintiff alleges, with specificity, that the breach was fraudulent.").

Orvets involved claims that the defendant had made misrepresentations to plaintiff, failed to disclose material information to plaintiff, and violated fiduciary duties by engaging in self-dealing. *Orvets* at 188. The trial court granted summary judgment to the defendant, finding that the discovery rule did not apply to a fiduciary-duty claim. *Id.* at 186. But the Ninth District reversed, finding that R.C. 2305.09(D)'s discovery rule applied because the plaintiff's allegations relating to the breach of fiduciary duty sounded in fraud. *Id.* at 189.

Here, just as in *Orvets*, R.C. 2305.09(D)'s discovery rule applies to the claims asserted by Norris and the class, who have alleged with the requisite specificity that Defendants breached their fiduciary duties fraudulently. The proposed amended complaint contains specific allegations describing how Defendants' actions constituted fraudulent breaches of fiduciary duty. *See, e.g.*, ¶ 247 ("Defendant Ghoubrial's conduct in inducing Plaintiff Norris and Class D to pay for medical equipment manufactured or distributed by Tritec without disclosing his financial interest in the transactions, was intentionally deceptive and constitutes a breach of Defendants' fiduciary duty to

Plaintiff Norris and Class D."). And the fiduciary-duty claims asserted against Ghoubrial and the other Defendants alleged that the primary nature of the breach was fraudulent. *See, e.g.*, ¶ 249 ("Where a fiduciary takes a secret profit … as Defendants have here … such a transaction is fraudulent and void as a matter of law…").

Floros does not and could not establish that Plaintiffs have failed to allege a claim for a breach of the fiduciary duty that sounds in fraud. *See* Floros Opp. at 5-6. And his claim that Norris and the class members were somehow on notice of their claims against Ghoubrial due to filings in an unrelated lawsuit is both absurd and contrary to controlling Supreme Court precedent. *Id. See Akers v. Alonzo*, 65 Ohio St.3d 422, 425-26, 605 N.E.2d 1 (1992) (holding that under the discovery rule a plaintiff has no "duty to ascertain the cognizable event [giving rise to a claim for relief], especially ... where the [plaintiff] had no way of knowing" that wrongful conduct had occurred). Thus, there is no legitimate question that the discovery rule applies to the new claims, as it does to all of the claims in this lawsuit.

2. Ohio law prohibits self-dealing by doctors against their patients in transactions that arise from the physician patient relationship.

Dr. Ghoubrial has asserted that the proposed amendments to the complaint are futile because Ohio law does not require a "doctor to inform patients of the amount of profit they will make" from selling medical supplies. Ghoubrial Opp. at 7–10. This disregards well-settled Ohio law providing that the doctor-patient relationship is fiduciary in nature. *Tracy v. Merrell Dow Pharmaceuticals Inc.*, 58 Ohio St.3d 147, 150, 569 N.E.2d 875. Therefore, doctors must exercise good faith toward their patients, and act with "the utmost loyalty and honesty" toward them. *Lownsbury v. VanBuren*, 94 Ohio St.3d 231, 235, 762 N.E.2d 354 (2002). *Testa v. Roberts*, 44 Ohio App.3d 161, 165, 542 N.E.2d 654 (6th Dist. 1988).

In seeking to disclaim his fiduciary duties to Ms. Norris and the class, Dr. Ghoubrial cites *N. Ohio Med. Specialists, L.L.C. v. Huston*, 6th Dist. No. Erie E-09-13, 2009-Ohio-5880, ¶ 16 (Nov. 6, 2009), for the proposition that "the fiduciary duty of a doctor in Ohio does not extend beyond the medical relationship with respect to diagnosing and treating diseases and injuries." Ghoubrial Opp. at 9. But the *Huston* decision, which is in no event binding on this Court, does not stand for this broad proposition, and rather only holds that the fiduciary duty does not extend "beyond the medical relationship." *Id.* at 16.

Here, there is no question that the medical-supply sales at issue arose from Dr. Ghoubrial's medical relationship with Ms. Norris and the class members, and that their decision to approve these charges was influenced by the fact that "the patient necessarily reposes a great deal of trust not only in the skill of the physician but in his discretion as well." *Hammonds v. Aetna Cas. & Sur. Co.*, 243 F.Supp. 793, 802-803 (N.D.Ohio 1965). *See also Magan Med. Clinic v. California State Bd. of Med. Examiners*, 249 Cal.App.2d 124, 133, 57 Cal.Rptr. 256 (1967) ("[T]here is no other profession or business where a member thereof can dictate to a consumer what brand he must buy, what amount he must buy, and how fast he must consume it and how much he must pay with the further condition to the consumer that any failure to fully comply must be at the risk of his own health."). In discussing the unique position of influence physicians hold over their patients, a leading U.S. journal on the practice of internal medicine has stated what obviously follows regarding a physician's fiduciary duties in selling medical supplies to patients:

> Physicians should also seek to avoid harm by considering the patient's financial vulnerability as well as his or her physical safety. Assuming that there is some time flexibility and that there are other convenient sources of the product, the physician should seriously consider whether the patient could obtain the same or similar products that might be sold through the office less expensively at, for instance, a local pharmacy. Such items include peak flow meters and orthopedic devices. **Physicians therefore have an obligation to disclose to patients the cost of an item sold through the practice at the time it is recommended. Charges for products sold**

> **through the office should be limited to the reasonable costs incurred in making them available.**

Gail J. Povar, MD, Lois Snyder, JD, "Selling Products Out of the Office," Annals of Internal Medicine 1999; 131: 863–864 (emphasis added). *See also Pagarigan v. Greater Valley Med. Group*, App. B172642, 2006 Cal. App. Unpub. LEXIS 7445, at *55-56 (Aug. 23, 2006) citing *Moore v. Regents of University of California* (1990) 51 Cal.3d 120, 129, 271 Cal. Rptr. 146 ("The law ... recognizes a fiduciary relationship between physician and patient such that the physician has a duty to disclose financial relationships between the physician and third parties unrelated to the patient's health that might affect the physicians' professional judgment. The failure to disclose such interests may give rise to a claim for ... breach of fiduciary duty."); *Petrillo v. Syntex Laboratories, Inc.*, 148 Ill.App.3d 581, 594, 102 Ill.Dec. 172, 499 N.E.2d 952 (1986) ("The existence of this fiduciary relationship indicates that ... when the physician begins treating the patient, that the physician will refrain from engaging in conduct that is inconsistent with the 'good faith' required of a fiduciary. The patient should, we believe, be able to trust that the physician will act in the best interests of the patient thereby protecting the sanctity of the physician-patient relationship."); *Shadrick v. Coker*, 963 S.W.2d 726, 735-736 (Tenn. 1998) ("In the common knowledge of man, patients submit themselves to the skills and arts, proficiency and expertise, of hospital personnel, once they become confined to the hospital. Indeed, most frequently, they have no real choice in the matter; they are physically and intellectually unable to do much more than submit and rely upon the medical superiority and ethical propriety of their attendants."); *Birriel v. Odeh (In re Odeh)*, 431 B.R. 807, 815 (Bankr.N.D.Ill. 2010) (finding that "the complaint clearly allege[d] a breach of [doctor's] fiduciary duty to [patient]" where it "allege[d] that [doctor] altered [patient's] medical records to protect [doctor's] personal financial interest in avoiding malpractice liability at the expense of his patient's interest"); *Hardin v. Farris*, 87 N.M. 143, 530 P.2d 407 (N.M. App. 1974) ("[I]n a confidential relationship where there exists a duty to speak, such as in a doctor-patient relationship, mere silence constitutes fraudulent concealment.");

Kelley v. CVS Pharmacy, Inc., 23 Mass.L.Rep. 87, *26-27 (2007) ("If the doctor had no duty to tell [the patient of the doctor's profit interest in dispensing certain medical advice], then the patient could not be sure whether the advice the doctor has provided to him is meant for his benefit or for the financial benefit of his physician. ... [T]he medical advice [that medical professionals] provide to patients should be based on the health and welfare of their patients, and ... if they make a profit each time they provide medical advice recommended by a drug company, they should at least inform the patient that they are profiting from the advice so the patient may better evaluate the merits of that advice."); *Biddle v. Warren Gen. Hosp.*, 11th Dist. Trumbull No. 96-T-5582, 1998 Ohio App. LEXIS 1273, *10-11 (March 27, 1998) (holding that a doctor's fiduciary duties bar the unauthorized disclosure of a patient's information, whether such disclosure occurred during or after the relationship); *United States v. Neufeld*, 908 F.Supp. 491, 496-97, 500 (S.D.Ohio 1995) (allegations that a physician solicited payment in return for patient referrals were sufficient to state claim for breach of fiduciary duty to his patients); R.C. 4731.22(B)(5) (permitting the Ohio State Medical Board to suspend a doctor for "[m]aking a false, fraudulent, deceptive, or misleading statement ... in relation to" his medical practice); R.C. 4731.22(B)(18) (subjecting a doctor to discipline for violating ethical opinions of the American Medical Association); AMA Opinion 1.1.1 ("The relationship between a patient and a physician is based on trust, which gives rise to physicians' ethical responsibility to place patients' welfare above the physician's own self-interest …"); AMA Opinion 11.2.2 ("[R]eward or financial gain is a subordinate consideration. Under no circumstances may physicians place their own financial interests above" those of their patients.).

These principles are all consistent with the well-established rule of law strictly prohibiting fiduciaries from profiting from undisclosed self-dealing against those to whom fiduciary duties are

owed. This rule also voids Ghoubrial's argument that the putative class claims against him have "zero chance of being certified," as discussed further below.

3. The new claims against Dr. Ghoubrial are viable class-action claims for the same reasons that the existing claims in this lawsuit are.

Ghoubrial argues that adding the claims against him have "zero chance of being certified" as a class action because "individualized proof" regarding the "medical necessity of each medical supply and prescription" "is required for each class member to recover." Ghoubrial Opp. at 3, 6–7. First, this argument misstates the claims against Ghoubrial, which, as explained above and below, do not at all depend on the "medical necessity of each medical supply and prescription," but rather only on Ghoubrial's duty and failure to disclose his financial interest in selling these supplies at prices exorbitantly higher than the patients could have obtained elsewhere. Further, identical arguments have already been considered and rejected by the Court in its April 6, 2018 order denying Defendants' motion to strike the class-action claims from this lawsuit. As set forth fully in Plaintiffs' briefing on the KNR Defendants' and Floros's rejected motions to strike, and reiterated below, Plaintiff Norris and the class members do not have to present any evidence of reliance, causation, or injury to prevail on their claims against Ghoubrial and obtain disgorgement of the profits he wrongly took in violation of his fiduciary duties as their doctor.

"[W]hen a party is a wrongdoer, disgorgement is an option." *Miller v. Cloud*, 7th Dist., No. 15 CO 0018, 2016-Ohio-5063, ¶92. This is a "well-established … remedial consequence when a fiduciary obtains a benefit in breach of a duty of loyalty." Deborah A. Demott, "Causation in the Fiduciary Realm," 91 BOSTON L. REV. 851, 855 (2005). Plaintiffs can assert such claims even if they have suffered no damage as a result of the defendant's misconduct. *See, e.g., Hendry v. Pelland*, 73 F.3d 397, 402 (D.C. Cir. 1996). The Supreme Court of Ohio expressly affirmed this principle in *In re Binder: Squire v. Emsley*, 137 Ohio St. 26, 57, 27 N.E.2d 939 (1940), where it countenanced equitable rescission claims against a self-dealing fiduciary "notwithstanding there may be no causal relation

between [the defendants'] self-dealing and the loss or deprecation incurred." The *Binder* Court explained that this principle is a matter of "public policy" to deter "self-dealing ... [in] relation[s] which demand[ ] strict fidelity to others," made necessary by to the natural "temptation to wrong-doing" that fiduciary relations create. *Id.* at 38, 47.

In so holding, the *Binder* Court touted the "uncompromising rigidity" needed to ensure that "the level of conduct for fiduciaries [is] kept at a level higher than that troddened by the crowd." *Id.* at 47. *See also Myer v. Preferred Credit*, 117 Ohio Misc. 2d 8, 9, 2001-Ohio-4190, ¶¶ 23, 26, 30, 33, FN 20, 38, 766 N.E.2d 612 (2001), (collecting cases, citing *Bell v. McConnel*l, 37 Ohio St. 396 (1881) ("Not many rules of law are as entrenched or honored in our system of justice in the United States as are the fiduciary's duty of full disclosure and the fiduciary's duty of good faith and loyalty"), and quoting 3 OHIO JURISPRUDENCE 3D (1998) 136, 134, Agency, §§ 117, 115 ("When agents intentionally conceal material facts or secure to themselves enrichment directly proceeding from their fiduciary position, agreements accompanying such conduct are fraudulent and may be set aside."), 49 OHIO JURISPRUDENCE 3D (1984) 191, Fiduciaries, § 94 ("The law is strict in seeing that a fiduciary shall act for the benefit of the person to whom he stands in a relation of trust and confidence and in maintaining the trust free from the pollution of self-seeking on the part of the fiduciary."), and 49 OHIO JURISPRUDENCE 3D (1984) 66, 71, Fiduciaries, § 13 ("Abuse of a relation of trust or confidence for personal aggrandizement is the cardinal sin of a fiduciary, and courts are quick to denounce, prevent, or remedy any such action."), *Greenberg v. Meyer*, 50 Ohio App.2d 381, 384, 363 N.E.2d 779 (1st Dist.1977) ("The rule [providing that "it is immaterial whether the principal suffered injury or damage" when "agents/fiduciaries" breach their duties of "absolute good faith and loyalty"] does not depend upon whether ... the principal is injured by the conduct of the agent. The wholesome rule is that the agent shall not put himself in a position where he may be tempted to betray his principal, or to serve himself at the expense of his principal. The rule ... was

intended not solely to remedy actual wrongs caused by such misconduct, but to discourage the occurrence of such misconduct altogether."), *inter alia*).

Accordingly, doctors, as any fiduciaries, face liability for forfeiture or disgorgement based on their fiduciary breaches, regardless of any proof of consequential injury. *See, e.g., Hendry*, 73 F.3d at, 402; *Burrow v. Acre*, 997 S.W.2d 229, 239-40 (Tx. 1999); *Pausell v. Gaffney*, No. 74744-4-I, 2017 Wash. App. LEXIS 2132 at *8 (Sept. 18, 2017). Consistent with *Binder*, the "central purpose" of this principle "is to protect relationships of trust by discouraging [fiduciaries'] disloyalty." *First United Pentecostal Church v. Parker*, 514 S.W.3d 214, 221 (Tx, 2017). It also vindicates the "fundamental principle of equity … that fiduciaries should not profit" from the betrayal of their duties. *Hendry*, 73 F.3d at, 402. *See also* R.C. 4731.22(B)(18) (subjecting a doctor to discipline for violating ethical opinions of the American Medical Association, including those on self-dealing); AMA Opinion 1.1.1 ("The relationship between a patient and a physician is based on trust, which gives rise to physicians' ethical responsibility to place patients' welfare above the physician's own self-interest …"); AMA Opinion 11.2.2 ("reward or financial gain is a subordinate consideration. Under no circumstances may physicians place their own financial interests above" those of their patients).

The facts alleged, if proven, are more than sufficient to establish Ghoubrial's liability to Norris and the class under these controlling principles.

4. The new claims against Dr. Ghoubrial are not barred by Ohio's "medical claims" statute, R.C. 2304.113.

Dr. Ghoubrial also opposes the proposed amendment on grounds that the claims against him are "medical claims" under R.C. 2304.113, and that Plaintiffs have failed to comply with Civ.R. 10, which requires that such claims be filed with an affidavit of merit by a qualified physician attesting that the defendant breached the applicable standard of care. Ghoubrial Opp. at 5–6. Here, Plaintiffs claims do not depend on proving that any standard of care was violated, but rather only that Ghoubrial breached legal duties in taking a secret and unconscionable profit in selling medical

supplies to his patients. Ohio law provides that fraud-based claims against doctors are not governed by R.C. 2304.113 where, as here, the alleged misstatement or concealment of facts is not medical in nature. Thus, these claims are not "medical claims" under the statute, but if the Court were to hold to the contrary, the discovery rule would apply to the applicable statute of limitations, and the Court should permit the Plaintiffs to supplement their filing with the necessary affidavit of merit.

a. The claims against Dr. Ghoubrial are not governed by R.C. 2304.113 because the alleged fraud is not medical in nature.

The Supreme Court of Ohio has confirmed that a physician's fraudulent conduct "may give rise to a cause of action in fraud independent from an action in medical malpractice." *Gaines v. Preterm-Cleveland, Inc.*, 33 Ohio St.3d 54, 514 N.E.2d 709, paragraph 1 of the syllabus (1987). Because a physician can violate a separate duty to his or her patients without "violat[ing] his or her duty to provide competent diagnosis, medical care, or treatment to a patient, ... these duties are independent from one another." *Allinder v. Mt. Carmel Health*, 10th Dist. No. 93AP-156, 1994 Ohio App. LEXIS 633, *7 (Feb. 17, 1994).

R.C. 2305.113(E)(3) provides that a "medical claim" is "any claim that is asserted in any civil action against a physician ... and that arises out of the medical diagnosis, care, or treatment of any person." Therefore, a claim cannot be a "medical claim" unless it meets both parts of the definition. *Estate of Stevic v. Bio-Med. Appliation of Ohio, Inc.*, 121 Ohio St.3d 488, 2009-Ohio-1525, ¶ 18, 905 N.E.2d 635. Under the statute, "care" is "the prevention or alleviation of a physical or mental defect or illness," and The Supreme Court of Ohio has warned that this term should not be broadly construed. *Browning v. Burt*, 66 Ohio St.3d 544, 1993 Ohio 178, 613 N.E.2d 993 (1993), paragraph one of the syllabus. Similarly, courts must limit the terms "medical diagnosis" and "treatment" to their "specific and particular meaning relating to the identification and alleviation of a physical or mental illness, disease, or defect." *McDill v. Sunbridge Care Ents.*, 4th Dist. Pickaway No. 12CA8, 2013-Ohio-1618, ¶ 16 (Apr. 11, 2013). In short, consistent with the Supreme Court's holding in

Gaines and contrary to Ghoubrial's argument, a physician's unlawful conduct does not constitute a "medical claim" merely because it bears some relation to the patient-physician relationship. *See Browning* at 557 (discussing that not every claim against a hospital constitutes a "medical claim" under the statute).

Thus, in *Gaines*, the Court held that where a physician committed fraud by lying to a patient about a procedure that he did not actually perform, his behavior "was prompted not by medical concerns but by motivations unrelated and even antithetical to" the well-being of the patient. *Id.* at 56. In such circumstances, as here, the action is properly characterized as one in fraud, not malpractice. *Id.* Similarly, in *Allinder*, the plaintiff alleged that her physician breached the duty of confidentiality by unlawfully disclosing information about the patient's chemical dependency to her employer. *Id.* at * 2-3. The court found that the complaint did not state a "medical claim" under R.C. 2305.113 because the duty of confidentiality exists separately from a physician's duty to provide the patient with competent medical services. *Id.* at *7-8. And in *Crissinger v. Christ Hosp.*, 1st Dist. Hamilton Nos. C-150796, C-160034, C-160182, C-160053, -160067, C-160087, and C-160113, 2017-Ohio-9256, ¶ 20 (Dec. 27, 2017), the court found that a claim was not a "medical claim" under R.C. 2304.113 where the complaint alleged that a physician had covered up his actions through fraudulently destroying billing records, paperwork, and other evidence, because those actions did not arise out of the physician's provision of medical services. *See also Prysock v. Ohio State Univ. Med. Ctr.*, 10th Dist. Franklin No. 01AP-1131, 2002-Ohio-2811, ¶ 18 (June 4, 2002) (finding that trial court erred in granting judgment to defendant under R.C. 2305.11 because plaintiff had "set forth an independent fraud claim separate from her medical malpractice claims…"); *Boddie v. Van Steyn*, 10th Dist. Franklin No. 11AP-263, 2011-Ohio-5660, ¶ 12-16 (Nov. 3, 2011) (finding that while plaintiffs' claims "sure[ly] ... rests on the physician-patient relationship" between the parties, they "d[id] not

arise out of the diagnosis, care, or treatment" received and thus "an affidavit of merit was unnecessary").

The Sixth Circuit has also affirmed, following *Gaines*, that under Ohio law, a plaintiff's fraud claim based on the physician's concealing information from the plaintiff is separate and distinct from a medical malpractice claim if the physician was motivated to act by concerns unrelated to the patient's medical care. In *Newberry v. Silverman*, 789 F.3d 636, 644 (6th Cir. 2015), the plaintiff patient alleged that defendant doctor "'knew he had not completed the root canal,' but provided alternative diagnoses 'to hide the fact of [his] negligent performance of the root canal procedure,'" including by stating that. "'there was no nerve in [the] tooth' that could be causing [the patient]'s pain even though, according to the complaint, [defendant] was well-aware that he had not completed the root canal." *Id.* The Court held that these allegations supported a fraud claim separate and distinct from a "medical claim" under R.C. 2305.113, because they alleged a "knowing misrepresentation of a material fact concerning a patient's condition" that "appear[ed] to have been driven by 'motivations unrelated and even antithetical to appellant's physical well-being.'" *Id.* quoting *Gaines*, 514 N.E.2d 709 at 712–713.

For the same reasons, Plaintiffs' claims are not "medical claims" under R.C. 2305.113. Plaintiffs have alleged that Ghoubrial, acting as fiduciary, breached his fiduciary duty and committed fraud by concealing from Plaintiffs the exorbitant profits he stood to gain in sending his patients home with medical supplies for which they would eventually be charged from their KNR lawsuit settlements, and which could have been easily obtained at a fraction of the price from alternative sources. Liability for such fraudulent actions is separate from Ghoubrial's duty to render competent medical diagnosis, care, or treatment. Moreover, his alleged reasons for concealing such information are completely unrelated to his duty to provide Plaintiffs with competent medical care. As Plaintiffs have repeatedly alleged, Ghoubrial was not motivated by concern for their well-being or how

disclosure might harm them, but rather his own financial well-being, a factor that is "antithetical" to Plaintiffs' well-being. *Gaines* at 713. Unlike the cases Ghoubrial cites in his opposition, Plaintiffs' claims do not depend upon a finding that Ghoubrial breached a standard of medical care, and do not arise out of Ghoubrial's role as a physician in diagnosing, caring for, or treating them.[2] Because these claims do not depend on showing that Ghoubrial provided inadequate care, but rather that he took advantage of his fiduciary position to obtain an improper financial benefit from the relationship, they are not "medical claims" under R.C. 2305.113. *Gaines* at 57 ("As a cause of action separate and distinct from medical malpractice, a claim of fraud is subject not to the medical malpractice statute ... but rather to R.C. 2305.09."). *See also Baruno v. Slane*, 2013 Conn. Super. LEXIS 1578, 5 (July 16, 2013) ("Professional negligence implicates a duty of care, while breach of fiduciary duty implicates a duty of loyalty and honesty.").[3]

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[2] In his opposition brief, Dr. Ghoubrial relies on a handful of cases for the proposition that claims sounding in fraud are "medical claims" if they relate in any way to a physician's conduct. *See* Ghoubrial Opp. at 5–6. Not only is this proposition voided by the controlling Supreme Court precedent cited above, the cases on which Ghoubrial relies to support them do not apply here because they each arise out of a physician's actual performance of medical services, such as surgery, physical examination, or follow-up care. To wit, in *Amadasu v. O'Neal*, 176 Ohio App.3d 217, 222, 2008-Ohio-1730, 891 N.E.2d 802 (1st Dist.), the patient complained of a physician's actions involving surgery, which demanded "expert testimony to prove liability." ¶ 2, 21. Because the complaints concerned actual treatment, and therefore would require expert testimony to establish breach of the standard of care, the patient's claim was a "medical claim." *Id.* at ¶ 21. Similarly, in *Hensley v. Durrani*, 1st Dist. Hamilton No. C-130005, 2013-Ohio-4711, ¶ 2 (Oct. 25, 2013), the patient's fraud claim arose out of the performance of a physical examination and surgery. The plaintiff claimed that the physician provided false assurances once the patient began suffering surgery complications. *Id.* at ¶ 2-3. Because of such complications, the patient sued for medical malpractice. It was not until later that she amended the complaint to add a fraud claim, ***in*** addition to the malpractice claim. *Id.* at ¶ 6. The court found that the fraud claim was a "medical claim" because it went "squarely to her diagnosis, care and treatment," and "simply [constituted] an attack on [the] medical diagnosis." And in *Smith v. Loeffler*, 20 Ohio App.3d 66, 67, 484 N.E.2d 185 (9th Dist. Ct. App. 1984), the plaintiff's complaints arose out of the performance of radiation treatments and follow-up care. Moreover, the *Smith* court reversed a trial court's decision that R.C. 2305.11 barred the plaintiff's claim because the appellate court found that the discovery rule applied. *Id.*

[3] Courts in Ohio and elsewhere have consistently held that fraudulent conduct does not constitute professional malpractice simply because it arises from a professional relationship. *Endicott v. Johrendt*, 10th Dist. Franklin No. 99AP-935, 2000 Ohio App. LEXIS 2697, *13-14 (June 22, 2000) ("[N]ot all fraudulent conduct will always be brought back under the umbrella of a general malpractice claim."); For example, in the context of legal malpractice, a claim is not automatically "subsumed within a claim for

b. Even if the claims against Dr. Ghoubrial are construed to be "medical claims under R.C. 2304.113, the discovery rule applies to these claims, and Plaintiffs should be permitted an opportunity to cure any failure to comply with Civ.R. 10.

Even if the Court were to construe the claims against Ghoubrial to be governed by R.C. 2304.113, that would not be a basis for dismissal with prejudice.

Section 16, Article 1, of the Ohio Constitution guarantees that all persons "shall have remedy by due course of law" for their injuries. A limitations period "cannot constitutionally bar the claims … of those plaintiffs who, in the exercise of reasonable diligence, discovered their injuries only after the" limitations period "had already passed." *Gaines* at 57-58. Whether a plaintiff acted with reasonable diligence depends on whether a "cognizable event" has occurred to put plaintiff on notice of an injury. *Allenius v. Thomas*, 42 Ohio St.3d 131, 134, 538 N.E.2d 93 (1989). Importantly, a plaintiff has no "duty to ascertain the cognizable event itself, especially ... where the patient had no way of knowing" that wrongful conduct had occurred. *Akers v. Alonzo*, 65 Ohio St.3d 422, 425-26, 605 N.E.2d 1 (1992) (finding that the "cognizable event" did not occur until after an expert witness informed her of the defendant's negligent conduct).

Here, even assuming that the claims against Ghoubrial are "medical claims" under R.C. 2305.113, the discovery rule would apply. There was no way for Plaintiff Norris to know that

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legal malpractice" simply because an attorney-client relationship existed. *Dottore v. Vorys, Sater, Seymour & Pease, L.L.P.*, 8th Dist. Cuyahoga No. 98861, 2014-Ohio-25, ¶ 37 (Jan. 9, 2014). There is an important difference between a claim alleging professional negligence and one alleging fraud or breach of fiduciary duty, especially where a plaintiff alleges that the defendant acted fraudulently for his personal gain. *Id.* at ¶ 44 (suggesting that, had plaintiff alleged that defendant lawyers' concealment was done for personal gain, their complaint would have stated "a tort separate from the malpractice itself.").

Courts outside of Ohio have helpfully explained two important differences between claims alleging malpractice and those alleging breach of fiduciary duty. The first lies in the duty implicated: "[p]rofessional negligence implicates a duty of care, while breach of fiduciary duty implicates a duty of loyalty and honesty." *Baruno v. Slane*, 2013 Conn. Super. LEXIS 1578, 5 (July 16, 2013). The second regards whether the claim sounds in the defendant's inadequate professional performance or in his taking advantage of his fiduciary position to obtain an improper benefit from the relationship. *McInnis v. Mallia*, 2011 Tex.App. LEXIS 1634, 19-20 (Mar. 8, 2011) ("A claim for professional negligence focuses on whether an attorney represented a client with the requisite skill; a breach of fiduciary duty claim encompasses whether an attorney obtained an improper benefit from the representation.").

Ghoubrial had committed fraud against them until she was advised by Plaintiffs counsel of this possibility in November 2017. Proposed Fourth Amended Complaint, ¶ 250. Moreover, as the Ohio Supreme Court affirmed in *Akers*, Norris was under no duty to seek out evidence of Ghoubrial's fraud because she lacked any knowledge that it had occurred. Defendant Floros argues in opposing Plaintiffs' amendment that the discovery rule cannot toll Plaintiffs' claims because "Plaintiffs rely on information that was available to the public for over four years." *See* Floros' Opp. at 5-6. But, as noted above, the length of time that the general public could have accessed the information is not relevant to the discovery rule's application where, as here, Plaintiffs had no notice of the need to inquire into such information.

Finally, if the Court does construe the claims against Ghoubrial as "medical claims," Plaintiffs should be permitted an opportunity to cure any failure to comply with Rule 10, because it is "a basic tenet of Ohio jurisprudence that cases should be determined on their merits and not on mere procedural technicalities." *Barksdale v. Van's Auto Sales*, 38 Ohio St.3d 127, 128 (1988). *See also* Civ.R.10(D)(2)(d) ("Any dismissal for the failure to comply with this rule shall operate as a failure otherwise than on the merits.").

III. Conclusion

Clients of a personal-injury firm who were serially defrauded by that firm and the health-care providers the firm pressured them to treat with should not be forced to maintain separate lawsuits to recover separate but related fees that were all fraudulently charged when the clients settled their underlying personal-injury suits. The putative new claims were discovered and pursued with all deliberate speed, and are well-pleaded. Any delay that would be occasioned by adjudicating them in this lawsuit would not be unduly prejudicial to any party and would further the interest of judicial economy.

Respectfully submitted,

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Certificate of Service

The foregoing document was filed on September 24, 2018 using the Court's e-filing system, which will serve copies on all necessary parties.

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