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 Fifth Amended Complaint**

I. Introduction

Defendants' oppose Plaintiffs' motion for leave to file a Fifth Amended Complaint on nearly identical grounds that the Court already rejected in granting leave to file the Fourth Amended Complaint only weeks ago. The proposed new claims are based on information that only came to light as a result of the recent motion to file the Fourth Amended Complaint and Plaintiffs sought leave to file them within weeks. Defendants have nevertheless again argued that the proposed amendments would be futile, and in doing so have again tried to miscast Plaintiffs' claims of fraud and breach of fiduciary duty—which are based on similar and detailed allegations of Defendants' widespread scheme of self-dealing against their clients—as individual malpractice claims pertaining to the quality of legal representation and medical care each client received. Here, the Defendants again adopt a posture of "caveat vendor" toward their clients, going so far as to compare themselves to Walmart, essentially denying the very concept of fiduciary duties, as well as well-established law that (1) recognizes the proper distinction between duties of loyalty and duties of professional care, and (2) strictly prohibits self-dealing by fiduciaries. Defendants' rewarmed claims of bad faith and undue prejudice are similarly unavailing. Thus, as explained fully below, the Court should permit Plaintiffs leave to file the proposed Fifth Amended Complaint.

II. Law and Argument

A. The proposed amendments would not be futile.

Defendants' opposition is again primarily based on the contention that the proposed amendments would be futile, and identical arguments to those that this Court already rejected with respect to Plaintiffs' motion for leave to file their fourth amended complaint. Thus, Plaintiffs must set forth again that, (1) Ohio law strictly prohibits fiduciaries from engaging in the type of undisclosed self-dealing alleged in the Fifth Amended Complaint; (2) the proposed amendments do not require individualized proof; and (3) while the proposed amendments do not assert claims for legal malpractice or "medical claims" under R.C. 2305.113, even if the Court were to construe them as such, the discovery rule would apply to these claims.

1. The new claims of fraud and breach of fiduciary duty relate to a widespread scheme by the Defendants to enrich themselves by taking advantage of their position of influence over their clients.

It is important to note at the outset that the new claims do not depend on a finding that Defendants were negligent or breached any standard of professional care, but rather that they intentionally engaged in a scheme to enrich themselves by taking advantage of their position of influence over their clients. *See 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."); *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."). The proposed Fifth Amended Complaint ("FAC") details a scheme by which the Defendants conspired to inflate their clients' medical bills and legal fees by administering as many overpriced injections as the clients would allow them to get away with. FAC ¶¶ 82–113. Here, it does not matter whether any given client happened to benefit from

the injections, because Plaintiffs will show that the injections were recommended and administered to thousands of KNR clients as part of a predetermined course that was intentionally undertaken regardless of the clients' needs, primarily for Defendants' own financial benefit. *Id.*

Plaintiffs have alleged in detail and will prove that Defendants were aware they were abusing their clients, and acted in open disregard of their rights and interests. Defendant Ghoubrial explicitly trained his employees to administer these injections against the clients' will, including by sneaking the needle into the clients' backs without warning. FAC ¶ 86. Ghoubrial was so brazen as to mock this practice by referring to trigger-point injections as "n*gger point injections," and "afro-puncture," referring to the relatively high proportion of KNR clients who were of African descent. FAC ¶ 87. And he even named the holding company for his private airplane, by which he flew across the state to treat KNR clients at chiropractors' offices, "TPI Airways," referring to the common abbreviation for trigger point injections, "TPI," confirming that his intent was to administer as many of these injections as possible regardless of the clients' needs or wants. *See* Articles of Organization for TPI Airways attached as **Exhibit 1**. The KNR Defendants were willing participants in this scheme—from which they benefited in the form of higher attorneys' fees and direct kickbacks—and continued to refer their clients to Ghoubrial by the thousands, ignoring complaints from their own attorneys and other evidence making clear that the insurance companies who paid their clients' claims viewed Ghoubrial's treatment as fraudulent. FAC ¶¶ 90–91.

2. Ohio law strictly prohibits fiduciaries from engaging in the type of undisclosed self-dealing alleged in the new claims.

The scheme alleged in the Fifth Amended Complaint is strictly prohibited by Ohio law governing the conduct of fiduciaries toward their clients. Defendants nevertheless again assume a posture of "caveat emptor" toward their clients, asking the Court to treat them like any old businessperson out to make a buck, in complete disregard of the very concept of fiduciary duties. Ghoubrial Opp. at 9 (arguing that Ohio law imposes no restrictions on doctors' ability to financially

exploit their patients in rendering medical services); KNR Opp. at 7–8, 11 (comparing KNR to Walmart).

As to doctors, the law is clear that the fiduciary nature of the physician-patient relationship bars physicians from intentionally exploiting their fiduciary status for their personal profit. *See, e.g.*, *Lownsbury v. VanBuren*, 94 Ohio St.3d 231, 235, 762 N.E.2d 354 (2002) quoting *Tracy v. Merrell Dow Pharmaceuticals Inc.*, 58 Ohio St.3d 147, 150, 569 N.E.2d 875 (1991) ("The physician-patient relationship is a fiduciary one based on trust and confidence and obligating the physician to exercise good faith. As a part of this relationship, both parties envision that the patient will rely on the judgment and expertise of the physician."); *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."); *Shadrick 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."); *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); Gail J. Povar, MD, Lois Snyder, JD, "Selling Products Out of the Office," Annals of Internal Medicine 1999; 131: 863–864 ("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.").

Attorneys, as fiduciaries, are of course similarly prohibited from abusing their position of influence to engage in self-dealing. *See, e.g.*, *Tonwe v. Harris-Miles* (*In re Harris-Miles*), 187 B.R. 178, 182 (Bankr. N.D. Ohio 1995) ("An attorney's role as to the client is fiduciary in nature."); *Costin v. Wick*, 9th Dist. Lorain, No. 95CA006133, 1996 Ohio App. LEXIS 233, *8 (Jan. 24, 1996) ("[T]he Ohio Code of Professional Responsibility acknowledges that a fiduciary relationship does exist between an attorney and a client ."); *U.S. v. Hausmann*, 345 F.3d 952, 956 (7th Cir. 2003) (finding that a personal-injury law firm's undisclosed kick-back arrangement with medical providers "clearly allege[d]" a "misuse of the fiduciary relationship" and a breach of the fiduciary duty toward clients). As explained further below, these duties, if breached, give rise to claims that are separate and distinct from legal malpractice claims. And indeed, the law is so strict in barring self-dealing by fiduciaries that Plaintiffs here are entitled to disgorgement regardless of any proof of consequential injury, as explained in Plaintiffs' briefing on their motion for leave to file their Fourth Amended Complaint and again below.

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

As he did in objecting to Plaintiffs' motion for leave to file their Fourth Amended Complaint, Ghoubrial again argues that "[t]he numerous individual sets of operative facts required for each class member to succeed against Dr. Ghoubrial demonstrate the inappropriateness of a class action to resolve this controversy" and further, that "the operative facts would include … determining the medical necessity of each medical procedure, supply, and prescription." Ghoubrial Opp. at 8-9. Here, again, Ghoubrial misrepresents the nature of the proposed amendments, which do not at all depend on the "medical necessity of each medical procedure, supply, and prescription," but rather only whether they were pushed on the class members as part of the fraudulent scheme described above. Here, again, Ghoubrial presents identical arguments that have already been considered and rejected by the Court, both in granting Plaintiffs' leave to file their Fourth Amended Complaint, and in the April 6, 2018 order denying Defendants' motion to strike the class-action claims from this lawsuit. As set forth fully in Plaintiffs' briefing on these motions, and reiterated below, Plaintiff Harbour and the class members do not have to present any evidence of reliance, causation, or injury to prevail on the new claims and obtain disgorgement of the fees Defendants wrongly took in violation of their fiduciary duties.

"[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 and lawyers, 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).

Thus, the facts alleged, if proven, are more than sufficient to establish Defendants' liability to the newly proposed classes under these controlling principles.

4. Contrary to Defendants' mischaracterization of the proposed amendments, they do not assert claims of medical or legal malpractice.

a. The new claims against Ghoubrial are not "medical claims."

As with the Fourth Amended Complaint, Defendants again oppose the new claims in the proposed Fifth Amended Complaint on grounds that they are "medical claims" under R.C. 2304.113, and that Plaintiffs failed to comply with Civ.R. 10 which requires such claims to be filed with a physician's affidavit that the Defendant breached the applicable standard of care. Ghoubrial

Opp. at 3–6; KNR Opp. at 7. Here, again, Plaintiffs claims do not depend on proving that any standard of care was violated, but rather that the Defendants engaged in unlawful self-dealing by administering injections as part of an intentional scheme that was undertaken regardless of the clients' needs, primarily for Defendants' own financial benefit.

The Supreme Court of Ohio has affirmed that under such circumstances, where the physician's conduct "was prompted not by medical concerns but by motivations unrelated and even antithetical to [the patient's] well-being," that a fraud-based claim may lie that is "separate and distinct" from a "medical claim" governed by R.C. 2304.113 even when the conduct is directly related to the medical care at issue. *Gaines v. Preterm-Cleveland, Inc.*, 33 Ohio St.3d 54, 56, 514 N.E.2d 709 (1987). In *Gaines*, the Supreme Court affirmed the plaintiff's right to proceed on a separate fraud claim where her physicians allegedly told her that a procedure to remove an intrauterine device (IUD) was successful when in fact the physicians were unable to locate or remove it. *Id.* at 54. The Court clarified that the proper inquiry in such cases is as to the physicians' motivation, holding that "the fraud action is separate and distinct from the medical malpractice action which stems from the surrounding facts where the decision to misstate [or conceal] the facts cannot be characterized as medical in nature." *Id.* at 56.

The Sixth Circuit's decision in *Newberry v. Silverman*, 789 F.3d 636, 644 (6th Cir. 2015) is similarly instructive, where 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 *Newberry* court followed *Gaines* in holding 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 [the plaintiff's] physical well-being.'" *Id.* quoting *Gaines*, 514 N.E.2d 709 at 712–713.

Here, like with the "alternative diagnosis" in *Newbury*, Ghoubrial's recommendation and administration of injections was "was prompted not by medical concerns but by motivations unrelated and even antithetical to [the patient's] well-being," namely Ghoubrial's intent to enrich himself by administering as many of these injections as possible regardless of his patients' needs. *Gaines*, 33 Ohio St.3d 54 at 56. As discussed in the preceding sections, and as confirmed by *Gaines* and its progeny,[1] Ghoubrial has a duty to avoid self-dealing in treating his patients, and that duty exists separately and distinctly from his duty to provide competent medical care. *See also Allinder v. Mt. Carmel Health*, 10th Dist. No. 93AP-156, 1994 Ohio App. LEXIS 633, *7 (Feb. 17, 1994) ("We conclude that because it is possible for a physician to violate his or her duty to protect a patient's confidentiality rights yet not violate his or her duty to provide competent diagnosis, medical care, or treatment to a patient, that these duties are independent from one another."); *Prysock v. Ohio State Univ. Med. Ctr.*, 10th Dist. Franklin No. 01AP-1131, 2002-Ohio-2811, ¶ 17–18 (June 4, 2002)

[1] As they did in opposing the Fourth Amended Complaint, the Defendants again fail to even mention the controlling precedent established by *Gaines*. Ghoubrial instead invokes a non-binding case from the 1st District, *Hensley v. Durrani*, 1st Dist. Hamilton No. C-130005, 2013-Ohio-4711, ¶ 19 (Oct. 25, 2013), to support his unexplained assertion that Plaintiffs' proposed amendments are "simply an attack on [his] medical diagnosis or treatment." Ghoubrial Opp. at 5-6. In *Hensley*, the plaintiff sued her physician for negligently performing a back surgery and later attempted to assert a fraud claim, leave for which was denied because the court found that the allegations of fraud were inseparable from the medical-malpractice claim, essentially requiring the same proof of the physician's deficient performance before, during, and after the surgery. *Id.* at 19-20. Here, unlike in *Hensley*, Plaintiffs' claims do not depend on whether Ghoubrial administered treatment negligently or breached any standard of care in providing medical services, but rather that he administered that care pursuant to Defendants' scheme to enrich themselves by herding KNR clients *en masse* to receive as many overpriced injections as possible in violation of their duty to avoid self-dealing—in other words, a predetermined course of action "prompted not by medical concerns but by motivations unrelated and even antithetical to [the patient's] well-being." *Gaines*, 514 N.E.2d 709 at 712–713.

(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 claim" where the "alleged failure to disclose the true nature of the foreign object" left inside the plaintiffs' body after a caesarian section "related to protecting the medical team that performed the [procedure]"); *Balascoe v. St. Elizabeth Hosp. Med. Ctr.*, 110 Ohio App.3d 83, 573 N.E.2d 651 (7th Dist.1996) ("[N]ot all injuries sustained by a patient" arising out of his status as patient "are 'medical claim[s]' as defined in R.C. 2305.11(D).").

b. The new claims against KNR are not legal-malpractice claims.

The KNR defendants similarly assert, without explanation or argument, that "[t]he claims against" them "arise out of the legal representation of Movants Harbour and Norris and are, therefore, legal malpractice claims" rather than claims for fraud and breach of fiduciary duty. KNR Opp. at 7. But even the case cited for KNR's unexplained proposition acknowledges the possibility that a breach of fiduciary claim can exist separately and independently from a legal-malpractice claim, such as where the fraudulent "conduct occurred apart from that forming the basis of the legal malpractice claim." *Illinois Natl. Ins. Co. v. Wiles, Boyle, Burkholder & Bringardner Co., L.P.A.*, 10th Dist. Franklin No. 10AP-290, 2010-Ohio-5872, ¶ 17.

KNR's position is contrary to the controlling precedent discussed in Section II. A. 3. above barring self-dealing by fiduciaries, and other cases holding that a separate claim for breach of fiduciary duty exists when an attorneys place their own interests above their clients.' This distinction was helpfully explained in *McInnis v. Mallia*, 2011 Tex. App. LEXIS 1634, 19-20 (Tex. App. Houston 14th Dist. 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. An attorney can commit professional negligence by giving an erroneous legal opinion or erroneous advice; failing to give any advice or opinion when legally obliged to do so;

> disobeying a client's lawful instruction; taking an action when not instructed by the client to do so; delaying or failing to handle a matter entrusted to the attorney's care by the client; or not using an attorney's ordinary care in preparing, managing, and presenting litigation that affects the client's interests. **Breach of fiduciary duty, in contrast, often involves the attorney's failure to disclose conflicts of interest; failure to deliver funds belonging to the client; improper use of client confidences; or self-dealing**.

(emphasis added; internal citations omitted). *See also Costin v. Wick*, 9th Dist. Lorain No. 95CA006133, 1996 Ohio App. LEXIS 233, at *8 (Jan. 24, 1996) ("A legal malpractice action arises out of an attorney's breach of the duty to represent his client in a professional, effective and careful manner. Such an action is based upon principles of negligence and may be contrasted to actions in which the attorney is sued on grounds of fraud or breach of fiduciary duty."); *Hicks v. Garrett*, 5th Dist. No. 2011CA00109, 2012-Ohio-3560, ¶ 110-114 (finding that statute of limitations for legal malpractice did not apply where plaintiff alleged that the attorney's misrepresentations were made "for her own personal gain."); *Dallas v. Childs*, 8th Dist. Cuyahoga No. 65150, 1994 Ohio App. LEXIS 2694, *3 (June 23, 1994) (separate and distinct claim for fraud against attorney whose alleged disclosure of client' confidences was made for the attorneys' "personal gain."); *Nelson v. Brickler & Eckler LLP*, Bankr.S.D.Ohio Nos. 09-35789, 14-3106, 2017 Bankr. LEXIS 2188, note 13 (Apr. 6, 2017) ("[I]f the attorney made a legal error which damaged the client and also misappropriated client funds, separate viable claims for malpractice and breach of fiduciary duty may exist."); *Nanologix, Inc. v. Novak*, N.D.Ohio 4:13-CV-1000, 2015 U.S. Dist. LEXIS 38551, *14 (Mar. 26, 2015) ("Even in the context of the attorney-client relationship, it is possible to allege fraud separate from malpractice."); *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.");

As with the new claims against Ghoubrial, the new claims against the KNR Defendants do not depend on a finding that they breached a duty of care, but rather their duty of loyalty by taking advantage of the Plaintiffs in the alleged scheme. *Costin,* 1996 Ohio App. LEXIS 233, at *8*; McInnis,*

2011 Tex.App. LEXIS 1634, 19–20 ("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."). Thus, these claims are not "legal malpractice claims," and are not subject to the statute of limitations governing such claims.

c. Should the Court find that the new claims are malpractice claims, the discovery rule applies, and Plaintiffs should be permitted to amend their complaint to attach an affidavit of merit.

In another attempt to mischaracterize Plaintiffs' proposed amendments, Ghoubrial asserts that the discovery rule cannot apply because "Movant Harbour plainly became aware of the amount charged for his treatments when [he] agreed to payment on April 25, 2012 and July 29, 2015." Ghoubrial Opp. at 7.

This again overlooks controlling Ohio law, including the Ohio Constitution's guarantee (Section 16, Article 1) that all persons "shall have remedy by due course of law" for their injuries. Accordingly, 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). And 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, Harbour had every reason to trust his attorneys and physician, and no reason to know that they were engaging in the self-dealing alleged. As such, in the event the Court does construe the

new claims as malprctice claims, Harbour should have the opportunity to prove them as such, as well as an opportunity to comply with Civ.R.10 by submitting an affidavit of merit. *Barksdale v. Van's Auto Sales*, 38 Ohio St.3d 127, 128 (1988); 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.").[2]

B. The proposed amendments are not deficient under Civ.R. 15.

1. Civ.R. 15 does not require that Plaintiffs make an evidentiary showing to support the proposed amendment.

The Defendants also ask the Court to deny leave to amend based on their contention that Plaintiffs failed to make a *prima facie* showing "in support of their claims regarding Dr. Ghoubrial's pain-relief injections." Ghoubrial Opp. at 10; KNR Opp. at 4. To support this contention, Defendants cite prior deposition testimony of putative Plaintiff Harbour on matters that are not relevant to the proposed amendments, are questions of fact not appropriate for resolution on a motion for leave to amend, and demonstrate the extent to which the Defendants have mischaracterized the nature of Plaintiffs' claims.

For example, KNR cites testimony from Harbour that "Dr. Auck" referred Harbour to Ghoubrial in an apparent attempt to prove that KNR played no role in such referrals. *See* KNR Opp. at 4. Plaintiffs have repeatedly alleged, however, that this case is about the ways in which KNR devised a fraudulent scheme with its preferred health-care providers—including, but not limited to, Dr. Ghoubrial—to the benefit of KNR and its chosen providers and to the detriment of KNR clients. Its selection of testimony from an out-of-context deposition transcript neither disproves

[2] Ohio law is also clear that 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.");,

KNR's involvement in the scheme nor supports its apparent position that it played no role in connecting Ghoubrial with thousands of its clients.

The Defendants also cite Harbour's testimony that the injections provided him with some relief (Ghoubrial Opp. at 10; KNR Opp at 5), which, as explained above, is irrelevant as to whether the Defendants engaged in self-dealing in recommending and administering them. Additionally, the significance of this testimony is not to be determined on a motion for leave to amend.

While court may require an evidentiary showing before granting leave to amend, this is typically only required when it is necessary to verify that the sought-after amendment "is not simply a delaying tactic, nor one which would cause prejudice to the defendant." *Wilmington Steel Products, Inc. v. Clev. Elec. Illum. Co.*, 60 Ohio St.3d 120, 122, 573 N.E.2d 622 (1991), citing *Solowitch v. Bennett*, 8 Ohio App.3d 115, 117, 456 N.E.2d 562 (8th Dist.1982). The inapplicability of this requirement here is amply demonstrated by the cases cited by Defendants. For example, in *Williams v. W. Res. Transit Auth.*, 7th Dist. Mahoning No. 06-MA-137, 2007-Ohio-4747, ¶ 40, the court affirmed a decision to deny leave to amend under Civ.R. 15(A) because the plaintiff's "motion for leave to file an amended complaint stated simply that he wanted 'to clarify his civil rights theory of relief' and "offered no argument whatsoever to show that he could support his new claim." Similarly, in *N. Ohio Chptr. & Contrs., Inc. v. Barberton City School Bd. of Edn.*, 2010-Ohio-1826, 188 Ohio App.3d 395, 935 N.E.2d 861, ¶ 31 (9th Dist.), the plaintiff sought leave to amend one month before trial, and failed to identify any basis for the new claims. *Barberton* at ¶ 31.

Here, Plaintiffs proposed amendments do not suffer from the deficiencies at issue in the *Williams* and *Barberton* cases. The proposed complaint contains detailed allegations in support of Plaintiffs' amendments and shows that they can support their claims by, for example, describing in detail Harbour's experience with Ghoubrial and the ways in which the experiences of putative class E supports the claims against Ghoubrial for fraud, breach of fiduciary duty, and undisclosed self-

dealing. *See, e.g.*, FAC ¶ 107-113. Here, particularly given the short timeline for class-discovery and imminent depositions and documentary discovery that will shed light on the fraudulent practices alleged, there is no justification for allowing Defendants any more access to Plaintiffs' counsel's legal theories, impressions, and strategies than they already have. *See Ross v. Abercrombie & Fitch, Co.*, S.D. Ohio No. 2:05-CV-0819, 2008 U.S. Dist. LEXIS 125521, *18-19 (Mar. 24, 2008) ("It ... seems beyond dispute that if an attorney has to tell opposing counsel exactly whom he or she chose to interview when preparing a pleading, and which information obtained from those interviews was deemed worthy enough to support each specific allegation within that pleading, there will be a substantial intrusion upon the attorney's 'working space.'").

2. Defendants' claims of "bad faith" and "prejudice" are unwarranted.

Finally, the Defendants again accuse the Plaintiffs of proceeding in "bad faith" and argue that they will be unduly prejudiced if the Court allows the new claims to be filed. KNR Opp. at 10–11; Ghoubrial Opp. at 11. Again, these protests ring hollow.

Defendants complain that Plaintiffs have inserted "wild" and "extremely salacious allegations of racial prejudice" "without any evidentiary support" or relevance to the claims at issue. Ghoubrial Opp. at 11; KNR Opp. at 5, 11. Unfortunately, the allegations of Defendants' racism are supported by Defendants' own documents quoted in the proposed new pleading, for which Defendants make no answer in their opposition briefs. (*See* Nov. 27, 2012 email exchange attached as **Exhibit 2.**[3] And other evidence that will soon be revealed in discovery which shows Defendants'

[3]In the attached email exchange, KNR attorney Nomiki Tsarnas emailed all KNR attorneys under the subject line, "Gotta love our clients!!!" to inform her colleagues that she just learned that a KNR client went to a pawn shop to sell a restaurant gift-certificate that the firm had provided the client (KNR, as a matter of firm policy, provides these gift certificates worth approximately $25 to its clients as a parting gift when the clients sign off on their settlement memoranda). In response to this email from Tsarnas, Nestico replied, also copying all KNR attorneys, "They don't like Macaroni Grill? Next time get Popeye's chicken," referring to the common stereotype that black people love

disregard for their clientele and the fraudulent nature of the treatment Ghoubrial provided them at KNR's direction.

The KNR Defendants also argue prejudice by way of a hypothetical comparison to Wal-Mart that shows nothing as much as the extent to which Defendants have disregarded their fiduciary duties and misrepresented Plaintiffs' claims. Defendants argue that allowing the new claims into this case would be "no different than allowing joinder of a plaintiff with a slip and fall claim against Walmart with a claim by a separate plaintiff who had an accident with a Walmart truck, and a third plaintiff who claims he was wrongfully terminated by Walmart." KNR Opp. at 11. Perhaps the fact that Defendants seek to compare themselves to Walmart—which, of course, owes no fiduciary duties to its customers—says it all. But the Walmart hypothetical's reference to accidental and isolated events further misses the point that Plaintiffs have alleged an intentional scheme by doctors and lawyers to take advantage of their clients in a series of fraudulent transactions that Defendants directed from their position of special influence.

As with Plaintiff Norris and the recently permitted Fourth Amended Complaint, Plaintiff Harbour is already a member of two of the pending classes, and the third class of claims he seeks to assert is directly related to his treatment by Dr. Ghoubrial, whose unlawful relationship with KNR is already at issue in this case. As with Ms. Norris, Mr. Harbour and the class members he seeks to represent should not be required to participate in separate lawsuits to relitigate factual and legal issues relating to a series of related fraudulent charges that all stem from the clients' representation by a single law firm that aggressively marketed its services to them. *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

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to eat fried chicken. *See* Demby, Gene, "Where Did That Fried Chicken Stereotype Come From?," NPR.org (May 22, 2013), available at https://www.npr.org/sections/codeswitch/2013/05/22/186087397/where-did-that-fried-chicken-stereotype-come-from

needlessly consume the additional resources of all the parties and of the Court.").

III. Conclusion

The Defendants have failed to make a showing of bad faith, undue delay, undue prejudice, or any reason at all to depart from Civ.R. 15's "liberal amendment policy." *State ex rel. Vindicator Printing Co. v. Wolff*, 132 Ohio St.3d 481, 487, 2012-Ohio-3328 quoting *Hoover v. Sumlin*, 12 Ohio St.3d 1, 6 (1984). The new claims have been pursued with all deliberate speed, have been pleaded in detail, are supported by controlling Ohio law, and are substantially similar to those the Court recently permitted Plaintiffs to add with the Fourth Amended Complaint. For these reasons and those discussed above, the Court should grant Plaintiffs' leave to file the Fifth Amended Complaint.

Respectfully submitted,

/s/ Peter Pattakos
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Dean Williams (0079785)
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Attorneys for Plaintiffs

Certificate of Service

The foregoing document was filed on November 13, 2018 using the Court's e-filing system, which will serve copies on all necessary parties.

/s/ Peter Pattakos
Attorney for Plaintiffs

DATE:	DOCUMENT ID	DESCRIPTION	FILING	EXPED	PENALTY	CERT	COPY
08/23/2013	201323400973	ARTICLES OF ORGNZTN/DOM. PROFIT LIM.LIAB. CO. (LCP)	125.00	100.00		.00	.00

Receipt

This is not a bill. Please do not remit payment.

CLEARWATER BILLING SERVICES LLC
ATTN DR. SAM GHOUBRIAL
PO BOX 1243
BATH, OH 44210

STATE OF OHIO
CERTIFICATE

Ohio Secretary of State, Jon Husted

2224014

It is hereby certified that the Secretary of State of Ohio has custody of the business records for

TPI AIRWAYS LLC

and, that said business records show the filing and recording of:

Document(s)	Document No(s):
ARTICLES OF ORGNZTN/DOM. PROFIT LIM.LIAB. CO.	**201323400973**

Effective Date: 08/22/2013

United States of America
State of Ohio
Office of the Secretary of State

Witness my hand and the seal of the Secretary of State at Columbus, Ohio this 23rd day of August, A.D. 2013.

Jon Husted

Ohio Secretary of State

EXHIBIT 1

Form 533A Prescribed by:
Ohio Secretary of State
JON HUSTED
Ohio Secretary of State
Central Ohio: (614) 466-3910
Toll Free: (877) SOS-FILE (767-3453)
www.OhioSecretaryofState.gov
Busserv@OhioSecretaryofState.gov

Mail this form to one of the following:

Regular Filing (non expedite)
P.O. Box 670
Columbus, OH 43216

Expedite Filing **(Two-business day processing time requires an additional $100.00).**
P.O. Box 1390
Columbus, OH 43216

2013 AUG 22 AM 11:08

Articles of Organization for a Domestic Limited Liability Company

Filing Fee: $125

CHECK ONLY ONE (1) BOX

(1) ☒ Articles of Organization for Domestic For-Profit Limited Liability Company (115-LCA)

(2) ☐ Articles of Organization for Domestic Nonprofit Limited Liability Company (115-LCA)

Name of Limited Liability Company: TPI Airways LLC

Name must include one of the following words or abbreviations: "limited liability company," "limited," "LLC," "L.L.C.," "ltd., "or "ltd"

Effective Date **(Optional)** _____ mm/dd/yyyy (The legal existence of the limited liability company begins upon the filing of the articles or on a later date specified that is not more than ninety days after filing)

This limited liability company shall exist for **(Optional)** _____ Period of Existence

Purpose **(Optional)**

****Note for Nonprofit LLCs**
The Secretary of State does not grant tax exempt status. Filing with our office is not sufficient to obtain state or federal tax exemptions. Contact the Ohio Department of Taxation and the Internal Revenue Service to ensure that the nonprofit limited liability company secures the proper state and federal tax exemptions. These agencies may require that a purpose clause be provided.

ORIGINAL APPOINTMENT OF AGENT

The undersigned authorized member(s), manager(s) or representative(s) of

TPI Airways LLC

Name of Limited Liability Company

hereby appoint the following to be Statutory Agent upon whom any process, notice or demand required or permitted by statute to be served upon the limited liability company may be served. The name and address of the agent is

Sam Ghoubrial

Name of Agent

195 Wadsworth Rd Suite 402

Mailing Address

Wadsworth	Ohio	44281
City	State	ZIP Code

ACCEPTANCE OF APPOINTMENT

The undersigned, Sam Ghoubrial named herein as the statutory agent

Statutory Agent Name

for TPI Airways LLC

Name of Limited Liability Company

hereby acknowledges and accepts the appointment of agent for said limited liability company

Statutory Agent Signature

Individual Agent's Signature / Signature on Behalf of Corporate Agent

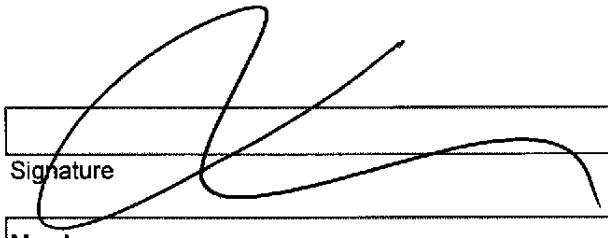
☐ **If the agent is an individual and using a P.O. Box, check this box to confirm that the agent is an Ohio resident.**

By signing and submitting this form to the Ohio Secretary of State, the undersigned hereby certifies that he or she has the requisite authority to execute this document.

Required
Articles and original appointment of agent must be signed by a member, manager or other representative.

If authorized representative is an individual, then they must sign in the "signature" box and print their name in the "Print Name" box.

If authorized representative is a business entity, not an individual, then please print the business name in the "signature" box, an authorized representative of the business entity must sign in the "By" box and print their name in the "Print Name" box.



Signature

Member

By (if applicable)

Sam Ghoubrial

Print Name

Signature

By (if applicable)

Print Name

Signature

By (if applicable)

Print Name

Subject: FW: Gotta love our clients!!!

From: gpetti@knrlegal.com
To: pettigary@yahoo.com
Date: Tuesday, November 27, 2012, 3:25:57 PM EST

Gary M. Petti
Kisling, Nestico & Redick
Attorney At Law
3412 W. Market St., Akron, Ohio 44333
Main: 330-869-9007 | Fax: 330-869-9008 | Outside Ohio: 800-978-9007

Locations: Akron, Canton, Cleveland, Cincinnati, Columbus, Dayton, Toledo & Youngstown

-----Original Message-----
From: Rob Nestico
Sent: Tuesday, November 27, 2012 3:25 PM
To: Nomiki Tsarnas
Cc: Attorneys; Brandy Lamtman
Subject: Re: Gotta love our clients!!!

They don't like macaroni grill? Next time get Popeyes chicken.

Sent from iPhone of Rob Nestico

On Nov 27, 2012, at 3:19 PM, "Nomiki Tsarnas" <Tsarnas@knrlegal.com> wrote:

> One of our clients sold our gift card to a pawn shop April's friend works at!!!! LMAO!!!!
>
> From: 3305064473@vzwpix.com [mailto:3305064473@vzwpix.com]
> Sent: Tuesday, November 27, 2012 3:17 PM
> To: Nomiki Tsarnas
> Subject:
>
>
> <IMG_6568.jpg>

EXHIBIT 2