IN THE COURT OF COMMON PLEAS
SUMMIT COUNTY, OHIO

MEMBER WILLIAMS, *et al.*, Plaintiffs, vs. KISLING, NESTICO & REDICK, LLC, *et al.*, Defendants.	Case No. 2016-CV-09-3928 Judge James Brogan **Plaintiffs' Opposition to Defendant Floros's Motion to Dismiss**

In seeking dismissal of Plaintiffs' well pleaded fiduciary duty and unjust enrichment claims, Defendant Minas Floros, D.C. misrepresents the allegations contained in the Fifth Amended Complaint ("FAC") and rehashes arguments that the Court already rejected in granting Plaintiffs' leave to file their amended complaints, and denying Defendants' motions to strike the class allegations. Contrary to Floros' arguments, Plaintiffs' FAC contains detailed allegations concerning how Floros participated in an unlawful quid pro quo relationship with the KNR Defendants, failed to disclose his referral relationship with the KNR clients, and then, through concealing his participation in a quid pro quo relationship with the KNR Defendants, exploited his position of influence over the KNR clients to collect kickback payments at their expense. These allegations are sufficient to state claims for breach of fiduciary duty and unjust enrichment. As such, as explained fully below, the Court should deny Floros' motion to dismiss Plaintiffs' claims because Plaintiffs have more than sufficiently alleged facts to withstand dismissal under Civ.R. 12(B)(6), and Floros has raised no legally valid arguments to warrant dismissal.

I. Law and Argument

A motion to dismiss under Civ.R. 12(B)(6) "tests only the sufficiency of the allegations." *Volbers-Klarich v. Middletown Mgt., Inc.*, 125 Ohio St.3d 494, 2010-Ohio-2057, ¶ 29, citing *Assn. for the*

Defense of the Washington Local School Dist. v. Kiger, 42 Ohio St.3d 116, 117, 537 N.E.2d 1292 (1989). In evaluating a motion to dismiss, the court "must accept as true all factual allegations in the complaint and all reasonable inferences must be drawn in favor of the nonmoving party." *City of Hudson v. City of Akron*, 2017-Ohio-7590, 97 N.E.3d 738, ¶ 9 (9th Dist.).

Before the court may grant a motion to dismiss, "it must appear beyond doubt that plaintiff can prove no set of facts warranting a recovery." *King v. Semi Valley Sound, LLC*, 9th Dist. Summit No. 23655, 2011-Ohio-3567, ¶ 8, quoting *Mitchell v. Lawson Milk Co.*, 40 Ohio St.3d 190, 192, 532 N.E.2d 753 (1988). Thus, "[a]s long as there is a set of facts, consistent with the plaintiff's complaint, which would allow the plaintiff to recover, the court may not grant a defendant's motion to dismiss." *York v. Ohio State Hwy. Patrol*, 60 Ohio St.3d 143, 145, 573 N.E.2d 1063 (1991).

a. Plaintiffs have sufficiently pleaded their fiduciary-duty claims.

Though Floros would like for the Court to conclude that Plaintiffs' fiduciary duty claims contain mere conclusory allegations, even a cursory review of the FAC shows that Plaintiffs have provided a detailed breakdown of their fiduciary duty claims against Floros, by (1) pleading the necessary elements of a fiduciary duty claim; (2) showing that Floros intentionally breached the fiduciary duty he owed to Plaintiffs; and (3) as the Court has already acknowledge in permitting Plaintiffs leave to file their amended complaints, alleged how their claims against Floros are separate and independent of any "medical claim."

i. Floros owed Plaintiffs a fiduciary duty, which he intentionally breached by exploiting his position of power over Plaintiffs to reap kickback payments at their expense.

A fiduciary relationship, and therefore a fiduciary duty, exists when "confidence and trust is reposed in the integrity and fidelity of another and there is a resulting position of superiority or influence, aspired by virtue of this special trust." *Crow v. Fred Martin Motor Co.*, 9th Dist. Summit No. CA 21128, 2003-Ohio-1293, ¶ 10. "The very existence of" a fiduciary relationship "precludes the

party in whom the trust and confidence is reposed from participating in profit or advantage resulting from the dealings of the" fiduciary relationship. *Myer v. Preferred Credit*, 117 Ohio Misc.2d 8, 23, 766 N.E.2d 612 (C.P.2001). Because the existence and scope of a fiduciary duty involves questions "of fact dependent upon the circumstances in each case," such questions are not to be resolved on a motion to dismiss. *Indermill v. United Sav.*, 5 Ohio App.3d 243, 245, 451 N.E.2d 538 (9th Dist.1982).[1]

Patients are owed a fiduciary duty from the professional who provides them with medical care, because "both parties envision that the patient will rely on the judgment and expertise of the" medical professional providing them with such care. *Tracy v. Merrell Dow Pharmaceuticals, Inc.*, 58 Ohio St.3d 147, 150, 569 N.E.2d 875 (1991). *See also Shadrick v. Coker*, 963 S.W.2d 726, 735-736 (Tenn.1998) ("[P]atients submit themselves to the skills and arts, proficiency and expertise, of hospital personnel … 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."); and *Kelley v. CVS Pharmacy, Inc.*, 23 Mass.L.Re. 87, *26-27 (2007) (if medical professionals "make a profit each time they provide medical advice …

[1] Ohio courts routinely find that questions of the fiduciary duty are not appropriately resolved under Civ.R. 12(B)(6). *See Sacksteder v. Senney*, 2d Dist. No. 24993, 2012-Ohio-4452, ¶ 89 ("Whether such a [fiduciary] relationship actually existed" involves "questions of fact not resolvable through a motion to dismiss."); *Gracetech Inc. v. Perez*, 8th Dist. No. 96913, 2012-Ohio-700, ¶ 12 ("[T]he determination of what constitutes a fiduciary relationship is a question of fact dependent on the circumstances of each case."); *Zangara v. Travelers Indem. Co. of Am.*, 423 F.Supp.2d 762, 770 (N.D. Ohio 2006) ("Plaintiffs are correct that the existence of a fiduciary duty is, in part, a factual question" that "needs to be resolved later in the proceedings after discovery has occurred, not on a Rule 12(b)(6) motion."); *Hilliard v. Lease*, 10th Dist. Franklin, No. 93AP-1029, 1993 Ohio App. LEXIS 6447, *3-6 (Dec. 23, 1993) (trial court erred in dismissing fiduciary duty claim where complaint alleged that a fiduciary "acted in his own self-interest, breaching his duty to act with utmost good faith and loyalty."); *General Acquisition, Inc. v. Gencorp, Inc.*, 766 F. Supp. 1460, 1474 (S.D. Ohio 1990) ("The Court is satisfied that the pleadings … provide a clear inference that both parties shared a special trust … It suffices to say, at this juncture in the proceedings, the allegations contained in the Counterclaims and the inferences to be drawn therefrom support the imposition of a de facto fiduciary duty."); and *Ponder v. Bank of Am., N.A.*, S.D. Ohio No. 1:10-CV-00081, 2011 U.S. Dist. LEXIS 154581, *13 (Mar. 8, 2011) ("Whether the evidence will establish that a fiduciary relationship existed … remains to be seen. At this stage, the Amended Complaint states a claim that is plausible on its face.").

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.")

As a preliminary matter, Floros suggests, citing *State v. Massien*, 125 Ohio St.3d 204, 2010-Ohio-1864, that the Ohio Supreme Court [has] refused to extend the same fiduciary duties of a licensed physician to a nurse," apparently in an attempt to show that the fiduciary duty should apply only to physicians, and not to himself, as a chiropractor. Floros MTD at 7. But Floros is incorrect. The Ohio Supreme Court has not refused to apply the fiduciary duty to medical professionals other than physicians. *Massien* held only that, in the context of criminal sentencing, "the relationship between a nurse employed by a hospital and the hospital in which he or she is employed is simply that of an employee and employer," rather than "a fiduciary relationship." *Id.* at ¶ 36. Thus, *Massien* does not support Floros' assertion that Ohio courts have refused to recognize "a blanket heightened duty between all medical professionals." Floros MTD at 7, note 2.

Plaintiffs have pleaded the necessary elements of a fiduciary duty claim. The FAC alleges that a fiduciary relationship existed between Floros and Plaintiffs because Plaintiffs "reposed a special trust and confidence" in Floros, their chiropractor, and Floros therefore occupied "a position of superiority or influence" over Plaintiffs due to that "position of trust." FAC at ¶ 219. Moreover, the FAC describes in detail how Floros expected and implored Plaintiffs to place their complete trust and confidence in him by, for example, persuading the KNR clients to refrain from treating with any chiropractor but Floros. *See Id.* at ¶ 54 ("When Ms. Norris communicated" concerns about treating with a different medical provider to Floros, he "advised her against treating with a different chiropractor claiming that it would hurt her case.").

The FAC further alleges that Floros intentionally breached the fiduciary duty he owed to Plaintiffs through intentionally engaging in self-dealing, including by alleging that:

- Floros, through his chiropractic clinic, unlawfully solicited clients for the KNR Defendants specifically to receive kickback payments, such as the narrative fee. FAC at ¶ 14, 28.

- Floros and his clinic, with the help of the KNR Defendants, kept secret at all times the existence of his quid pro quo relationship with the KNR Defendants. *Id.* at ¶ 26, 27.

- The narrative fees were deducted directly from the Plaintiffs' settlement amounts, without their knowledge, for the purpose of compensating Floros. *Id.* at ¶ 64, 79-80.

- The narrative fees functioned as kickback payments to referral sources. *Id.* at ¶ 65-66, 74, and 76.

- The quid pro quo relationship between the KNR Defendants and Floros, of which Plaintiffs were not aware, guaranteed that Floros would receive referrals and kickback payments from KNR's unwitting clients as long as they referred clients to KNR. *Id.* at ¶ 45, 50, 78-80.

- Regardless of benefit or detriment to the KNR clients, Floros refused to accept insurance payments so that he could "take a higher percentage of the KNR clients' settlements than" he "would otherwise be entitled under prevailing insurance-industry standards" and to protect the secrecy of the nature of the narrative fees. *Id.* at ¶ 52.

These factual allegations, which are a mere sample of those contained in the FAC, sufficiently allege that Floros breached his fiduciary duties to the Plaintiffs by intentionally concealing from them that he had entered into a quid pro quo relationship with the KNR Defendants to receive "narrative fees" as a kickback for referring patients to KNR. Accepting Plaintiffs' allegations as true, as the Court must, Plaintiffs have sufficiently pleaded their fiduciary duty claims against Floros.

ii. Plaintiffs have sufficiently alleged that Floros breached the fiduciary duty he owed Plaintiffs during his "medical relationship" with them.

In a further attempt to escape liability, Floros urges the Court to rule as a matter of law that Floros cannot be liable for breaching the fiduciary duties he owed to Plaintiffs based on his belief that his misconduct occurred outside of the "medical relationship." *See* Floros MTD at 8-9. For this proposition, he again invokes *N. Ohio Med. Specialists, L.L.C. v. Huston*, 6th Dist. No. Erie E-09-13, 2009-Ohio-5880, ¶ 16, and a handful of other cases that are largely inapposite to his argument.

For example, in *Otto v. Melman*, 25 Misc.3d 1235, 2009 NY Slip Op. 52421 (U), 906 N.Y.S.2d 774, a patient sued a physician for financial advice that the physician provided the patient. The court

dismissed the fiduciary duty claim because the patient did not allege that he submitted to his physician's "dominance and control in regard to financial matters," which the physician had *openly* discussed with the patient. *Id.* Moreover, the court specifically emphasized that "[t]he peculiar duty of good faith and fair dealing of the physician with the patient, which arises out of the relation of trust and confidence which exists between them … extends also to other transactions between patient and physician." *Id.*

Here, Plaintiffs *have* alleged that Floros deceived Plaintiffs with regard to matters within Floros' control, because Floros intentionally concealed from them a quid pro quo relationship with the KNR Defendants so that Floros could collect kickback payments directly out of the Plaintiffs' settlements. *See* FAC at ¶ 64-66, 80, 220-221.

In further contradiction of Floros' assertions and the irrelevant cases cited therein, Plaintiffs' claims against Floros involve misconduct that he committed while acting pursuant to the medical relationship. Indeed, Plaintiffs have alleged that Floros intentionally exploited the position of power he had over them as their healthcare provider by entering into a secret quid pro quo relationship with KNR and thereby profiting from kickback payments at the Plaintiffs' expense. *See* FAC at ¶ 64-66 ("The narrative fees are nothing more than kickback payments to referral sources" paid from Plaintiffs' "settlement funds as a matter of policy, as a secret kickback to compensate referral soruces, regardless of any benefit to the client."); ¶ 74-81 ("ASC never advised Reid or Norris that it maintained a quid pro quo referral relationship with KNR."); and ¶ 219-221 ("Defendants' conduct … was intentionally deceptive, was undertaken by standardized and routinized procedures, and constitutes a breach of Defendants' fiduciary duty"). Such misconduct violates the fiduciary character of the relationship that existed between Floros and the KNR clients as an extension of the medical relationship. *See, e.g.*, *Hammonds v. Aetna Cas. & Sur. Co.*, 243 F.Supp. 793, 802-803 (N.D. Ohio 1965) ("[T]he patient necessarily reposes a great deal of trust not only in the skill of" the

medical provider "but in his discretion as well."). Thus, Plaintiffs have sufficiently alleged, as the basis for their fiduciary duty claims against Floros, that Floros breached that duty while acting within the scope of the "medical relationship."

iii. **Plaintiffs have sufficiently alleged that their fiduciary duty claims against Floros are not "medical claims."**

As the Court has acknowledged in permitting Plaintiffs leave to file their fourth and fifth amended complaints—over the very objections Floros raises again here—Plaintiffs' claims are not foreclosed as "medical claims" under R.C. 2305.113. Instead, as explained below, Plaintiffs have alleged sufficient facts to show their fiduciary duty/self-dealing claims against Floros are separate and distinct from any purported "medical claim" and are properly characterized as claims sounding in fraud.

When a medical professional engages in conduct "prompted not by medical concerns but by motivations unrelated and even antithetical to [the patient's] well-being," a fraud-based claim may lie that is "separate and distinct" from a "medical claim." *Gaines v. Preterm-Cleveland, Inc.*, 33 Ohio St.3d 54, 56, 514 N.E.2d 709 (1987). Thus, under the Ohio Supreme Court's controlling decision in *Gaines*,[2] medical professionals may not escape liability for fraudulent conduct merely because it was precipitated by a relationship with the patient. *See also*, *Newberry v. Silverman*, 789 F.3d 636, 644 (6th Cir. 2015) ("The district court should instead have held that [the] fraud claim was a separate and independent cause of action under *Gaines* and thus exempt from Ohio's" statutes governing "medical claims"); *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

[2] Like the other Defendants, Floros has again failed to even *mention* the controlling precedent established by *Gaines*. As alleged in Plaintiffs' FAC and fully explained in Plaintiffs' briefs in support of filing their fourth and fifth amended complaints, Plaintiffs' claims are not subject to R.C. 2305.113 because they do not involve any issues concerning whether Floros breached a medical standard of care.

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); (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]'").

Here, Plaintiffs have sufficiently pleaded that Floros engaged in prohibited self-dealing as a fiduciary by entering into a quid pro quo relationship with the KNR Defendants, intentionally concealing that information from Plaintiffs, and then receiving kickback payments from his undisclosed self-dealing at Plaintiffs' expense through an illegitimate "narrative fee." *See* FAC at ¶ 14, 54, 64-66, 74-81, 217-224.

Thus, Plaintiffs have alleged sufficient facts in their FAC to show that Floros intentionally engaged in a predetermined course of action "prompted not by medical concerns but by motivations unrelated and even antithetical to [the patient's] well-being." *Gaines* at 712–713. As such, Plaintiffs' claims are not "medical claims," and the Court should deny Floros' motion to dismiss these claims.

b. Plaintiffs have sufficiently pleaded their unjust enrichment claims.

In seeking dismissal of Plaintiffs' unjust enrichment claims against him, Floros states that, to maintain such a claim, Plaintiffs must establish that (1) Plaintiffs conferred a benefit on Floros; (2) Floros possessed personal knowledge of such benefit; and (3) Floros' retaining the benefit would be

unjust. Floros MTD at 10-11, citing *Poston v. Shelby-Love*, 8th Dist. Cuyahoga No. 104969, 2017-Ohio-6980, ¶ 20.

Plaintiffs have done so here. Contrary to Floros' arguments, Plaintiffs have sufficiently alleged that the Plaintiffs conferred a benefit on Floros through financing the kickback payments Floros received for referring clients to the KNR Defendants, and that Floros possessed personal knowledge of both the scheme and the extent to which he received benefits from the Plaintiffs by virtue of the quid pro quo relationship with the KNR Defendants. For example, Plaintiffs have alleged that the KNR Defendants compensated Floros with an unearned "narrative fee" for worthless narrative reports each time Floros referred a client to KNR "and then fraudulently deduct[ed] that fee as an expense from the amounts received on each client's behalf." FAC at ¶ 64-66. The complaint alleges further that Floros knew he was receiving kickback payments at Plaintiffs' expense, because the fees were paid from the KNR "clients' settlement funds as a matter of policy, as a secret kickback to" Floros "regardless of any benefit to the client." *Id.* at ¶ 65-66. The FAC also alleges that permitting Floros to retain the benefit of the narrative fees would be "unjust and inequitable" due to his actions in accepting such fees from the KNR clients "as a kickback" for referring clients to the KNR Defendants. *Id.* at ¶ 228.[3]

The FAC also alleges specifically that the KNR Defendants and Floros maintained a secret quid pro quo relationship "under which KNR and the providers exchange benefits, including referrals and guarantees of payment on behalf of KNR's unwitting clients." *Id.* at ¶ 80. Moreover,

[3] Floros also argues, citing *Johnson v. Microsoft Corp.*, 106 Ohio St.3d 278, 2005-Ohio-4985, 834 N.E.2d 791, ¶ 21, that "Plaintiffs here cannot establish a transaction between them and Floros for the narrative fee, since Plaintiffs' agreement to pay the narrative fee was with KNR only." Floros MTD at 12. Floros is wrong for two significant reasons. First, Plaintiffs at no time agreed to finance kickback payments to Floros, and would not have authorized the narrative fees had Plaintiffs known they functioned as kickback payments to Floros. Second, Floros may not escape liability for his improper relationship with KNR on the basis that he did not physically sign the contract by which KNR fraudulently deducted from Plaintiffs' settlement the narrative fees Floros' received.

Plaintiffs in no way consented to these narrative fees because "[n]o KNR client would have agreed to have the fee deducted from their settlement had they been advised of the quid pro quo relationship between KNR and the chiropractors and the true nature of the fee." *Id.* at ¶ 221.

Notwithstanding Plaintiffs' competent factual allegations, Floros argues that Plaintiffs have not alleged sufficient facts to support their unjust enrichment claims because Plaintiffs "rely solely on the allegations of [a] former attorney for KNR" and that Floros "should not be expected to know whether his narrative reports were" valuable. Floros MTD at 12.

But neither argument can succeed. The first asks the Court to dismiss Plaintiffs' unjust enrichment claims by weighing the credibility of Plaintiffs' factual allegations, which is not a proper consideration on a motion to dismiss. *See, e.g.*, *Karmasu v. Bendolf*, 4th Dist. Scioto No. 93CA2160, 1994 Ohio App. LEXIS 4545, *18 (Sep. 28, 1994) ("[A] motion to dismiss for failure to state a claim is not the proper vehicle by which to test the quantum of evidence supporting those claims or its believability."). And Floros' second argument would require the Court to assume—despite Plaintiffs' numerous allegations to the contrary—that Floros possessed no knowledge of benefits that were conferred upon him from the KNR clients by virtue of the quid pro quo relationship Floros knowingly entered into with the KNR Defendants. *See, e.g.*, FAC at ¶ 75 ("[N]arrative fees are paid on every case that comes in from Akron Square Chiropractic" by check "made out to the chiropractor personally and sent directly to the chiropractor's house") and ¶ 79-80 ("ASC never advised Reid or Norris that it maintained a quid pro quo referral relationship with KNR … under which KNR and the providers exchange benefits, including referrals and guarantees of payment").

II. Conclusion

In seeking dismissal of Plaintiffs' well pleaded claims of fiduciary duty and unjust enrichment against him, Floros has relied on his own misinterpretations of Plaintiffs' FAC and has ignored well-settled Ohio law prohibiting courts from resoling factual issues and making credibility

determinations on a motion to dismiss. Because the FAC contains more than sufficient allegations to survive dismissal of their claims, and Floros has introduced no legal argument entitling him to dismissal, the Court should deny Floros' motion to dismiss Plaintiffs' fiduciary duty and unjust enrichment claims.

Respectfully submitted,

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Certificate of Service

The foregoing document was filed on December 21, 2018, using the Court's electronic-filing system, which will serve copies on all necessary parties.

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