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 **Plaintiffs' Memorandum in Opposition to Defendant Ghoubrial's Motion for Judgment on the Pleadings**

I. Introduction

Defendant Ghoubrial's Motion for Judgment on the Pleadings will likely leave the Court with a feeling of déjà vu. Ghoubrial's arguments largely track the ones that he and Floros have repeatedly raised in unsuccessfully petitioning the Court to bar the Plaintiffs from introducing the claims against them in the Fourth and Fifth Amended Complaints. *See* Ghoubrial briefs in opposition to Plaintiffs' motions to amend, filed Sept. 17, 2019, Nov. 5, 2019; Floros motion to dismiss, filed Dec. 12, 2018.

A fourth airing of this presentation does not make it more persuasive. Dr. Ghoubrial again contends that the Plaintiffs are asserting "medical claims" that implicate his diagnosis and treatment of their injuries. In reality, the Plaintiffs charge Dr. Ghoubrial with abusing their financial interests by serially administering unnecessary procedures at drastically inflated prices and distributing medical equipment to them at astronomical markups. Dr. Ghoubrial's conduct encompasses a violation of his fiduciary obligations to the Plaintiffs, as opposed to a "medical" mistake in providing care.

This fundamental distinction exposes the invalidity of the Motion for Judgment on the Pleadings. Dr. Ghoubrial has no basis to preempt prosecution of the Plaintiffs' claims any more than he had grounds to prevent their assertion in the first place. The Motion should be denied.

II. Standard for Judgment on the Pleadings

Civil Rule 12(C) provides that "[a]fter the pleadings are closed but within such time as not to delay the trial, any party may move for judgment on the pleadings." Judgment on the pleadings becomes appropriate where the court, after construing

> the material allegations in the complaint, with all reasonable inferences to be drawn therefrom, in favor of the nonmoving party as true, … finds beyond a doubt, that the plaintiff can prove no set of facts in support of his claim that would entitle him to relief.

Clardy v. Medina Twp. Bd. of Trustees, 9th Dist., No. 17CA0075-M, 2018-Ohio-2545, ¶8, *citing State ex rel. Midwest Pride IV v. Pontious*, 75 Ohio St. 565, 570, 1996-Ohio-459, 664 N.E.2d 931. Courts must use "caution" in granting judgment on the pleadings under Civ. R. 12(C). *Portfolio Recovery Assoc. v. VanLeeuwen*, 2nd Dist., No. 26692, 2016-Ohio-2962, ¶15.

III. Factual Background

A. The allegations against Dr. Ghoubrial

The Plaintiffs are victims of automobile accidents who went to Defendant Kisling Nestico & Redick LLC for legal representation. The KNR Defendants, with the assistance of their "preferred chiropractors," including Defendant Floros, referred thousands of their Plaintiffs to Dr. Ghoubrial for medical care in connection with the accidents at issue.

1. Trigger-point injections

The great majority of KNR clients sent to treat with Ghoubrial, including Named Plaintiff Harbour, received multiple "trigger point injections" of cortisone or comparable medications as therapy for pain. Fifth Amended Complaint ("FAC"), ¶83-¶86. While the benefits of this treatment remain in dispute, the essence of Plaintiffs' allegations are that Ghoubrial grossly overcharged for the shots—billing $880 to $1200 per injection, as much as four times what other physicians received for the same treatment—and serially administered them with the purpose of enriching himself without regard to the clients' wants or needs. *Id.*, ¶89.

2. TENS Units

Dr. Ghoubrial also regularly gave his KNR patients an electrical-nerve-stimulation device, a so-called "TENS unit," to "help [their] nerves" and "make [them] feel better." FAC, ¶93. Dr. Ghoubrial charged $500 per TENS unit, giving him a profit of more than 1800 percent in selling the device to his KNR patients. *Id.*, ¶102.

In fact, other outlets sold comparable TENS units for prices ranging from $34.99 to $150.00. FAC, ¶98. Dr. Ghoubrial did not inform KNR patients about his financial interest in selling this equipment or the extreme markup he was charging. *Id.*, ¶98, ¶102.

3. The scheme with KNR

Dr, Ghoubrial does not accept health insurance from KNR patients as payment for his services. FAC, ¶88. The charges for trigger point injections and TENS units came dollar-for-dollar out of the settlements with the insurers responsible for the automobile accidents giving rise to their claims. These expenses inflate the face value of the Plaintiffs' claims, since they add to the total required to make the Plaintiffs whole. Dr. Ghoubrial and the KNR Defendant receive all of the extra cash, however, not the Plaintiffs.

The Fifth Amended Complaint 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 set forth detailed allegations 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. 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.

In fact, the KNR clients ultimately receive less money on their claims as a result of the charges for trigger point injections and TENS units. Not only do the increased medical expenses serve to increase the amount KNR receives as its contingency fee *vis a vis* the client's takeaway—as KNR's fee is deducted from the gross total of the settlement, before deducting the amounts paid to Dr. Ghoubrial—this increase is not offset by a commensurate payment from the insurance companies, which look upon Ghoubrial's treatment with disdain. *See* FAC, ¶113. Plaintiffs need not, however, show that each client's case is impacted in this way, because the self-dealing inherent in Ghoubrial's scheme with KNR renders his transactions with the clients void as a matter of law, and also serve as a basis for class-wide unjust enrichment claims. *See* FAC, ¶¶269, 277, 279–283, 301, 310, 312–316.

B. Ghoubrial's motion for judgment on the pleadings

The Plaintiffs have asserted claims for fraud, breach of fiduciary duty, unjust enrichment, and unconscionable contract based on Dr. Ghoubrial's abusive practices involving trigger point injections and TENS units. In moving for judgment on the pleadings, Dr. Ghoubrial claims that these counts all qualify as "medical claims" under R.C. 2305.113, purportedly because they concern

his "medical diagnosis, care or treatment" of the Plaintiffs. Motion at 1. From this premise, Dr. Ghoubrial argues that the Plaintiffs' failure to comply with the requirements that govern "medical claims" mandates their dismissal.

Dr. Ghoubrial also argues that he owed no fiduciary duty to the Plaintiffs regarding his financial interest in the treatment he prescribes and renders. The alleged absence of any such duty purportedly undermines certain of the theories of liability asserted by the Plaintiffs. For instance, Dr. Ghoubrial contends that the Plaintiffs' unjust enrichment claims fail because nothing in the Fifth Amended Complaint makes it "unjust" for him "to retain payment for the medical treatment" he provided to his KNR patients. *Id.* at 13.

IV. Law and Argument

A. The Plaintiffs' claims are not "medical claims."

Revised Code § 2305.113 creates a one-year limitations period and a four-year period of repose for "medical claims." R.C. 2305.113(A), (C). Pursuant to Civ. R. 10(D)(2), complaints must include an "affidavit[ ] of merit" to verify the validity of the plaintiff's allegations. These provisions do not apply to the Plaintiffs' claims against Ghoubrial, since they do not qualify as "medical claims."

1. The Plaintiffs have not accused Dr. Ghoubrial of violating a professional standard of care.

As a preliminary matter, the Court should note that the Plaintiffs have not accused Dr. Ghoubrial of negligence or violating some professional standard of care. Instead, they allege that he exploited his position of influence as the Plaintiffs' physician to peddle trigger point injections and TENS units at exorbitant markups. The essence of their claims does not implicate the quality of the medical services he provided (although they may incidentally do so).

To the contrary, the claims speak to Ghoubrial's breach of the loyalty and trust confided in him by gouging his KNR patients on the cost of these items. *See Baruno v. Slane*, No. FST-CV-

085008010S, 2013 WL 3958359 at *2, 2013 Conn. Super. LEXIS 1578, *5 (Conn App. 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."). Dr. Ghoubrial distorts this fundamental distinction in characterizing the Plaintiffs claims as "medical claims."

2. Because Plaintiffs allege wrongdoing by Dr. Ghoubrial's that is separate and distinct from his provision of medical care, the claims against him do not qualify as "medical claims."

The Plaintiffs' claims against Dr. Ghoubrial do not constitute "medical claims" within the meaning of R.C. 2305.113. "[M]edical claim[s]" include "any claim that is asserted in any civil claim against a physician … that arises out of the medical diagnosis, care, or treatment of any person." R.C. 2305.113(E)(3). "The terms 'medical diagnosis' and 'treatment' are terms of art" under the statute and "relate to the identification and alleviation of a physical or mental illness, disease or defect." *Christian v. Kettering Med. Ctr.*, 2017-Ohio-7928, 85 N.E.3d 804, ¶19. "Care" under R.C. 2305.113 means "the prevention or alleviation of a physical or mental defect or illness." *Id.*

In *Gaines v. Preterm-Cleveland, Inc.*, 33 Ohio St.3d 54, 514 N.E.2d 709 (1987), the defendant health-care provider informed the plaintiff that it had successfully removed an intrauterine device (IUD) when it in fact had failed to do so. *Id.* at 54. The Supreme Court of Ohio held that the defendant's conduct "was prompted not by medical concerns but by motivations unrelated and even antithetical to [the plaintiff's] well-being." *Id.* at 56. Under the circumstances, the plaintiff's fraud claim remained "separate and distinct" from any "medical claim" governed by the predecessor to R.C. 2305.011. *Id.*

Similarly, the Sixth Circuit applied *Gaines* in *Newberry v. Silverman*, 789 F.3d 636, 644 (6th Cir.

2015), 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. *See also Allinder v. Mt. Carmel Health*, 10th Dist. No. 93AP-156, 1994 WL 49792 at *3 (10th Dist. 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 (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, 673 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 predecessor to R.C. 2305.113).

The Plaintiffs' claims against Dr. Ghoubrial do not relate to the identification, prevention, or alleviation of any physical or mental condition. *Christian*, 2017-Ohio-7928 at ¶19. The success of these counts does not require the Court to find malfeasance in the diagnosis, treatment, or care of

the maladies they suffered.

The allegations against Dr. Ghoubrial are instead more mercantile than "medical." The Plaintiffs challenge his practice of enriching himself at their expense through the extreme charges for trigger-point injections and TENS units. This conduct is "unrelated" and "antithetical to" the Plaintiffs' interests. *Gaines*, 33 Ohio St.3d at 56. It remains "separate and distinct" from the provision of medical care by Dr. Ghoubrial. *Id.*

Price-gouging does not equate with medical malpractice. The claims alleged against Dr. Ghoubrial are not "medical claims" pursuant to R.C. 2305.113.

3. The claims against Dr. Ghoubrial are not "derivative claims for relief that arise from [a] plan of care, medical diagnosis, or treatment."

Under R.C. 2305.113(E)(3)(a), "medical claims" may include "derivative claims for relief that arise from [a] plan of care, medical diagnosis, or treatment." Without any analysis, Dr. Ghoubrial suggests that the claims brought against him fall within this category. Motion at 4–5.

Under the explicit terms of R.C. 2305.113(E), derivative claims include "claims of a parent, guardian, custodian or spouse of an individual who was the subject of any medical diagnosis, care, or treatment … that arise from that diagnosis, care, [or] treatment … and that seek recovery of damages" under various specified theories of liability. R.C. 2305.11(E)(7). This definition would not encompass the Plaintiffs' claims against Dr. Ghoubrial. Nor are those counts "derivative" of the "care, medical diagnosis, or treatment" Dr. Ghoubrial provided to the Plaintiffs in any meaningful sense. The Plaintiffs do not focus on the quality or consequences of Dr. Ghoubrial's performance as their physician. They instead challenge the financial aspect of their relationship. This is "separate and distinct" from the medical steps taken by Dr. Ghoubrial, not "derivative" of them. *See Gaines*, 33 Ohio St.3d at 56.

4. The cases cited by Ghoubrial do not compel a different result, and reflect an misleading effort to conflate negligence standards with the intentional tort standards that apply here.

In accusing Plaintiffs of "clever pleading" to "transform ... medical claims into separate claims not governed by R.C. 2305.113," Ghoubrial primarily relies on a series of decisions out of Cincinnati that all involve the same trial judge, the same attorneys, and the same defendant physician, Abubakar Durrani. Motion at 8–10. In these cases, Dr. Durrani was accused of performing a series of allegedly unnecessary surgeries without disclosing the use of certain allegedly harmful substances in the procedures, and using these substances in violation of FDA regulations.

In relying on the *Durrani* cases to excuse himself from liability, Ghoubrial again wrongly conflates allegations regarding professional duties of care with allegations regarding a fiduciary's duty of loyalty, and again asks the Court to apply negligence standards to Plaintiffs' intentional tort claims. While none of the *Durrani* decisions are binding on this Court, it is more pertinent that none of them discuss or even consider the issue presented in The Supreme Court of Ohio's controlling decision in *Gaines*,[1] discussed above, which holds that where, as here, a physician's conduct "was 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*, 33 Ohio St.3d 54, 56.

In the *Durrani* cases, the court found that the fraud claims were "merely disguised medical claims," apparently because the alleged omission related to the physician's failure to disclose the risks of the medical procedure at issue. None of the *Durrani* decisions Ghoubrial cites in his motion provides any substantive analysis of the fraud claims, but in the *Koehler v. Durrani* case, the court explained that it dismissed the fraud claim on the basis that it was "similar to the one brought in" yet another Durrani case cited by Ghoubrial, *Young v. UC Health, W. Chester Hosp., LLC*, 2016-Ohio-

[1] Ghoubrial's motion, similarly, omits any mention of *Gaines*.

5526, 61 N.E.3d 34, ¶ 23 (1st Dist.), "which was found to constitute a medical claim." *Koehler v. Durrani*, Hamilton C.P. Case No. A1504135 (Dec. 12, 2017), at 8–9 (citing *Young*). And the other two *Durrani* cases Ghoubrial cites similarly cite *Young* in dismissing the fraud claims at issue. *Knauer v. Durrani*, Hamilton C.P. Case No. A1504130 (Dec. 12, 2017), at 8–9 (citing *Young* at ¶¶ 19–25 in concluding, without explanation, that "[a]ll of the [p]laintiff's claims against Dr. Durrani are medical claims"); *Scott v. Durrani*, Hamilton C.P. Case No. A150865 (Oct. 30, 2018), at 8–9 (citing *Young* at ¶¶ 18–25 in concluding that the fraud claims were "medical claims" because they "were asserted against a physician or hospital and arose out of the medical diagnosis, care, or treatment of [the plaintiff]").

In *Young*, the plaintiff claimed—similarly to the plaintiffs in *Koehler* (*see* pp. 1–2), *Knauer* (*see* pp. 1–2), and *Scott* (*see* p. 2)— that the defendants "concealed the use of [a certain chemical compound in a surgical procedure]" that was alleged to "cause uncontrolled bone growth around the spinal cord, which can lead to pain, spasms and paralysis," "did not disclose [the compound's] use in [plaintiff's] consent form," and "used the product 'off-label'—that is, in a way not approved by the Food and Drug Administration." *Young* at ¶ 3, 23. While the *Young* plaintiff did allege that the use of this compound was "intentionally concealed and/or misrepresented ... with the intent to defraud [p]laintiff in order to induce [p]laintiff to undergo the surgery," the court ultimately found that this "simply" constituted "an attack on Dr. Durrani's medical diagnosis and an allegation of lack of informed consent." *Id.*

Apart from the fact that none of the *Durrani* decisions considered or applied *Gaines*, these cases are different from the case at bar in several additional important ways. First, Plaintiffs here are not asserting malpractice or informed-consent claims, and unlike in the *Durrani* cases, Plaintiffs' fraud-based intentional tort claims cannot be construed as duplicative of either of these types of negligence claims. *See Greenberg v. Miami Children's Hosp. Research Inst., Inc.*, 264 F.Supp.2d 1064, 1071 (S.D.Fla. 2003) (recognizing separate breach-of-fiduciary-duty claim against doctor, despite

acknowledgement that such claims should be dismissed where they are "duplicative" of malpractice claims, where "the two claims [at issue we]re not fully congruent."). Here, the fraud-based claims do not depend on a finding that Ghoubrial breached any standard of care. Additionally, the Plaintiffs are not seeking damages resulting from Ghoubrial's failure to advise them of the risks of the trigger-point injections that he administered to them. Indeed, Plaintiffs are not seeking consequential damages at all. Rather, Plaintiffs only seek disgorgement of the fees Ghoubrial collected in intentionally exploiting his position of influence to enrich himself by a scheme to administer as many of the overpriced injections and TENS units to the captive KNR clients as he could. While evidence of less costly, less invasive, and equally effective treatments may be relevant to prove Ghoubrial's intent in administering this scheme, under Ohio law, as discussed in Section IV.A.2. above and further in Section IV.B., below, Plaintiffs need only prove that the injections were provided as part of a predetermined course that was intentionally undertaken primarily for Defendants' own financial benefit regardless of the clients' needs. Or, in other words, that the scheme "was prompted not by medical concerns but by motivations unrelated and even antithetical to [the patient's] well-being." *Gaines*, 33 Ohio St.3d 54, 56. *See also Bigler-Engler v. Breg, Inc.*, 7 Cal. App. 5th 276, 323, 213 Cal.Rptr.3d 82 (2017) ("[The patient]'s cause of action for concealment does not require proof of a standard of care. Instead, it requires proof of failure to disclose and, most critically, intent to deceive. It is not based on mere negligence. [W]e have no reason to conclude the Legislature intended to exempt intentional wrongdoers from liability by treating such conduct as though it had been nothing more than mere negligence."); *Johnson v Rose*, 2014 N.Y. Misc. LEXIS 405, *15-18, 2014 NY Slip Op 30262(U), 13-15 ("Plaintiffs' allegations that defendants intentionally deceived them into entering a transaction that defendants knew was improper, as part of a fraudulent business scheme, are entirely independent from the negligence standard applicable to a claim for ... malpractice."); *Brownell v Garber*, 199 Mich. App. 519, 532; 503 N.W.2d 81 (1993) ("[T]he

interest involved in a claim for damages arising out of a fraudulent misrepresentation differs from the interest involved in a case alleging that a professional breached the applicable standard of care. Simply put, fraud is distinct from malpractice."); *Simcuski v. Saeli*, 44 N.Y.2d 442, 453, 406 N.Y.S.2d 259, 377 N.E.2d 713 (1978) ("[T]he exposure to liability we here discuss is not based on errors of professional judgment; it is predicated on proof of the commission of an intentional tort, in this instance, fraud.").

B. Dr. Ghoubrial owed fiduciary duties to his KNR patients regarding his personal interest in the treatment he prescribes and renders.

Dr. Ghoubrial would have the Court hold that *caveat emptor* governs his dealings with patients. According to him, no fiduciary relationship existed, leaving him free to charge whatever he wanted for trigger-point injections and TENS units without disclosing his extreme pricing or his financial interest in prescribing these treatments.

This position fails as a matter of law. "The physician-patient relationship is a fiduciary one based on trust and confidence and obligating the physician to exercise good faith." *Lownsbury v. VanBuren*, 94 Ohio St.3d 231, 235, 2002-Ohio-646, 762 N.E.2d 354, *quoting Tracy v. Merrell Dow Pharma.*, 58 Ohio St.3d 147, 150, 569 N.E.2d 875 (1991). Doctors must refrain from conduct "inconsistent with the 'good faith' required of a fiduciary." *Petrillo v. Syntex Lab.*, 148 Ill.App.3d 581, 594, 499 N.E.2d 952 (1986).

A physician breaches his fiduciary duty by advancing his own financial interests ahead of the interests of his patients. *See, e.g., Pagarigan v. Greater Valley Med. Group*, No. B172642, 2006 WL 2425298 at *16 (Cal. App. Aug. 23, 2006) (physician's fiduciary obligations require disclosure of financial relationships that might impact professional judgment); *United States v. Neufeld*, 908 F. Supp. 491, 496-500 (S.D.Ohio 1995) (doctor's solicitation of fees for referral of patients constitutes fiduciary breach); *In re Odeh*, 431 B.R. 807, 815 (Bankr. N.D.Ill. 2010) (fiduciary breach occurs where doctor protects his own financial interests by altering patients' medical records to avoid malpractice

liability). *See also 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 owed to the clients).

In this regard, physicians must "disclose to patients the cost of an item sold through [their] practice at the time it is recommended" and limit pricing to the "reasonable costs incurred in making [it] available." M. GAIL & J. POVAR, M.D. AND LOIS SNYDER, J.C., "SELLING PRODUCTS OUT OF THE OFFICE," *ANNALS OF INTERNAL MEDICINE* 1999 pp. 863-64. This rule reflects the fact that "[a]buse of a relation of trust or confidence for personal aggrandizement is the cardinal sin of a fiduciary." 49 *OHIO JUR. 3D* FIDUCIARIES § 13 (1984). *See also Greenberg v. Meyer*, 50 Ohio App.2d 381, 384, 363 N.E.2d 779 (1st Dist.1977) ("[I]t is immaterial whether the principal suffered injury or damage" when "agents/fiduciaries" breach their duties of "absolute good faith and loyalty."); *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); *Bell v. McConnell*, 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"); 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.").

Dr. Ghoubrial did not have license to act secretly in charging the Plaintiffs whatever he wanted for trigger-point injections and TENS units. As a fiduciary, he could not engage in conduct that subordinated his patients' interests to his own financial concerns. Dr. Ghoubrial had to eschew astronomical markups on the treatments he prescribed and sold. He also had to inform the Plaintiffs of his personal stake in these transactions.

The Plaintiffs' claims for unjust enrichment and unconscionable contract rest on Dr.

Ghoubrial breach of fiduciary duty in concealing and charging excessive amounts for trigger-point injections and TENS units. Dr. Ghoubrial cannot obtain judgment on the pleadings with respect to these counts by disavowing the existence of his fiduciary obligations.

V. Conclusion

Dr. Ghoubrial has failed to show "beyond a doubt" that the Plaintiffs "can prove no set of facts in support of [their] claim[s]" that would entitle them to relief. *Clardy,* 2018-Ohio-2545 at ¶8. The Court should deny the Motion for Judgment on the Pleadings.

Respectfully submitted,

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Certificate of Service

The foregoing document was filed on March 4, 2019 using the Court's e-filing system, which will serve copies on all necessary parties.

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