

IN THE COURT OF COMMON PLEAS  
SUMMIT COUNTY, OHIO

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| <p>MEMBER WILLIAMS, <i>et al.</i>,</p> <p style="text-align: center;">Plaintiffs,</p> <p>vs.</p> <p>KISLING, NESTICO &amp; REDICK, LLC, <i>et al.</i>,</p> <p style="text-align: center;">Defendants.</p> | <p>Case No. 2016-CV-09-3928</p> <p>Judge James A. Brogan</p> <p><b>DEFENDANT MINAS FLOROS' BRIEF IN<br/>OPPOSITION TO PLAINTIFFS' MOTION<br/>FOR LEAVE TO FILE SIXTH AMENDED<br/>COMPLAINT</b></p> |
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Plaintiffs have requested leave to file a sixth-amended complaint. Under the approved joint motion to adopt schedule, Defendants have until July 8, 2019, to file briefs in opposition to Plaintiffs' Motion to Add Claims under R.C. 2923.34 and/or any new parties. This motion, therefore, will be limited to Plaintiffs' requested amendment to add new common law claims for fraud and price-gouging. Floros will be filing another brief in opposition on July 8<sup>th</sup> as to the other claims.

**MEMORANDUM IN SUPPORT**

While Civ.R. 15(A) generally allows for liberal amendment of a complaint, a motion for leave to amend must be made timely. *See Brown v. FirstEnergy Corp.*, 9th Dist. Summit No. 22123, 159 Ohio App. 3d 696, 2005-Ohio-712, 825 N.E.2d 206, ¶6. A motion for leave should be denied if there is a showing of "bad faith, undue delay or undue prejudice to the opposing party." *Hoover v. Sumlin*, 12 Ohio St.3d 1, 465 N.E.2d 377 (1984). "A party seeking leave to amend a pleading is required to do so in good faith, therefore there must be at least a *prima-facie* showing that the movant can marshal support for the new matters sought to be pleaded, and that

the amendment is not simply a delaying tactic or one which would cause prejudice to the defendant.” *Glazer v. Chase Home Fin. LLC*, 8th Dist. Cuyahoga Nos. 99875, 99736, 2013-Ohio-5589, ¶98; *see also Lottridge v. Gahanna-Creekside Invests., LLC*, 2015-Ohio-2168, 36 N.E.3d 744 (10th Dist.).

Courts may consider a motion for leave prejudicial if a proposed amendment alters the case’s theory and is proposed late enough that the opponent would have to engage in significant new preparation. *Wright & Miller, Federal Practice and Procedure*, §1487. Courts will also deny motions for leave to amend a complaint when the claims are futile or lack evidentiary support. *See, e.g. Hensley v. Durrani*, 1st Dist. Hamilton No. C-130005, 2013-Ohio-4711, ¶14; *State ex rel. Brewer-Garrett Co. v. MetroHealth Sys.*, 8th Dist. Cuyahoga No. 87365, 2006-Ohio-5244, ¶17.

Since filing their original complaint in September 2016, the parties have engaged in a significant amount of briefing, discovery, and depositions. This includes motions to dismiss, motions to strike class allegations, motions on the pleadings, motions for protective orders, motions to compel, and briefs related to class certification. The parties have also engaged in a significant amount of discovery, which includes several sets of interrogatories, request for admissions, and request for production of documents. Over a dozen all-day depositions have also taken place.

To date, Defendants have also incurred huge litigation costs. The parties have spent a tremendous amount of time and effort on this case. After all this effort, Plaintiffs’ now want to redo everything and add entirely new claims and parties. This is a desperate act. This should not be allowed. Plaintiffs’ request is in bad faith and an obvious attempt of furthering delaying this case.

To see the bad faith, this Court only needs to look at Plaintiffs' basis for his proposed amendment. According to Plaintiffs, the reason for this late amendment is that Floros would not make himself available for deposition until May 20, 2019. This is an outright lie. As seen in several emails attached to this motion, Floros has timely responded to every request from Plaintiffs' for a deposition date since Plaintiffs' counsel first requested his deposition in December 2018. At that time, Plaintiffs asked deposition dates from the parties in January and February.

On December 7, 2018, Floros' counsel offered multiple possible deposition dates for Floros in late January. Ex. A. Plaintiffs' counsel did not respond to this email. A week later, Floros' counsel offered additional dates, which included February 6<sup>th</sup> and February 27<sup>th</sup>. Ex. B. Plaintiffs' counsel later told Floros' counsel that he wanted to hold off on his deposition.

It was not until February 12<sup>th</sup>, that Plaintiffs requested dates again for Floros' deposition. At that time, Plaintiffs wanted to take Floros' deposition in March or April. Ex. C. Two-days later, Floros offered the dates of March 20<sup>th</sup> and April 3<sup>rd</sup>. Ex. D.

Thus, Floros has been diligent and has promptly responded to Plaintiffs' request for deposition dates. Floros has also timely responded to Plaintiffs' discovery requests.<sup>1</sup> Any delay was caused by Plaintiffs' own actions.

Plaintiffs have also failed to show what evidence came out of Floros' deposition that brought on the need for their new claims. Or why they waited three months and after the class certification deadline to amend their claims against Floros.

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<sup>1</sup> As a reminder, Plaintiffs have filed two motions to compel discovery against Floros, which were both overruled.

Allowing an amendment of Plaintiffs' complaint for a sixth time at this stage of the proceedings will also cause significant delay and will be highly prejudicial to the parties. Floros has only conducted discovery and motion practice based on the claims alleged in Plaintiffs' Fifth Amended Complaint. These claims were only related to narrative fees and only included breach of fiduciary and unjust enrichment claims. Plaintiffs' new allegations go way beyond this. Plaintiffs are now claiming that Floros is engaging in fraudulent price-gouging scheme with the other Defendants. Nowhere in Plaintiffs' Fifth Amended Complaint did they previously allege price gouging against Floros.

If this Court grants Plaintiffs' motion, then Floros will have to conduct new discovery and re-depose Plaintiffs on the new claims of fraud and price-gouging. Floros should not have to incur new litigation expenses because of Plaintiffs' untimely actions.

### CONCLUSION

For the reasons stated above, Floros requests that this Court deny Plaintiffs Motion for Leave to File a Sixth Amended Complaint because it is in bad faith, untimely, futile, unduly prejudicial to Floros.

Respectfully submitted,

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CERTIFICATE OF SERVICE

A copy of Defendant Floros' Brief in Opposition to Plaintiffs' Motion for Leave to File a Sixth Amended Complaint was served electronically on this 17th day of June 2019. Notice of this filing will be sent to all parties by operation of the Court's electronic filing system.

/s/ Shaun H. Kedir  
Shaun H. Kedir (#0082828)