IN THE COURT OF COMMON PLEAS
SUMMIT COUNTY, OHIO

MEMBER WILLIAMS, et al.,	)	Case No. 2016 09 3928
	)	
Plaintiffs,	)	Judge James Brogan
	)	
v.	)	
	)	**KNR DEFENDANTS' BRIEF IN OPPOSITION**
KISLING, NESTICO & REDICK, LLC, et al.,	)	**TO PLAINTIFFS' MOTION TO AMEND THE**
	)	**COMPLAINT TO CONFORM TO THE**
Defendants.	)	**EVIDENCE**
	)	

I. INTRODUCTION

On Nov. 27, 2018, this Court issued an Order permitting Plaintiffs to amend their complaint for a fifth time. In allowing the amendment, the Court further warned that it was "not inclined to allow any future amendments…absent a substantive showing of need to amend." Nevertheless, Plaintiffs have filed a Motion for Leave to Amend their Complaint yet again – after moving to certify three classes purportedly based upon the fifth amended complaint. The motion seeks to again add new parties and claims to this case which will necessarily require new and comprehensive discovery.

The motion should be denied for the following reasons: (1) there is no basis to amend the claims against KNR to "conform to the evidence" pursuant Civ.R. 15(B) because this Rule only applies to matters that have proceeded to trial; (2) to the extent Plaintiffs seek to add claims against new parties or KNR pursuant to Civ.R. 15(A), such amendment is futile, untimely, and unduly prejudicial to Defendants.

II. LAW AND ARGUMENT

A. Civ.R. 15(B) applies exclusively to amendments to pleadings at trial.

"Civ.R. 15(B) governs the amendment of a complaint to conform to the evidence at trial and has no application in a case where there has been no trial." *Thomas v. Res. Network*, 9th Dist. Lorain No. 10CA009886, 2011-Ohio-5857, ¶ 8, citing *Merrill Lynch Mtge. Lending, Inc. v.*

1867 West Market, L.L.C., 9th Dist. No. 23443, 2007 Ohio 2198, at ¶11. In *Carriker v. Am. Postal Workers Union*, 2d Dist. Montgomery Case No. 13900, 1993 Ohio App. LEXIS 4733, at *13 (Sep. 30, 1993), this Court sitting on the panel for the Second District concurred and noted that Staff Notes to Civ.R.15(B) specify that the Rule applies only to cases that have proceeded to trial. "Rule 15(B) moves toward the problem of amendment of the pleadings during trial in order to accommodate the pleadings to the proof." *Id.*

Here, Plaintiffs' motion states that they are seeking permission for "new claims against the existing Defendants to be added to this lawsuit under Civ.R. 15(B)" and for "claims against the new chiropractor Defendants to be added to this lawsuit under Civ.R. 15(A)." As "existing Defendants," the motion to add claims against KNR is made pursuant to Rule 15(B). Based upon controlling precedent in the Ninth District Court of Appeals, Plaintiffs' motion to amend to conform to the evidence pursuant to Civ.R. 15(B) must be denied. *Thomas*, 2011-Ohio-5857, ¶8.

B. Plaintiffs' motion is untimely, unduly prejudicial to Defendants, and is otherwise futile.

Even if Plaintiffs' motion to amend to conform to the evidence under Civ.R. 15(B) was instead analyzed as motion to amend the pleading pursuant to Civ.R. 15(A), the Motion must still be denied. It is well settled that a court may deny leave to amend pleadings resulting from the moving party's undue delay and resulting prejudice. *See, e.g. Wells v. Bowie*, 87 Ohio App.3d 730, 735, 622 N.E.2d 1170 (5th Dist. 1993) (affirming denial of leave where appellant waited "nearly two years" to seek to amend her complaint); *Leo v. Burge Wrecking, LLC*, 6th Dist. Lucas No. L-16-1163, 2017-Ohio-2690, ¶ 15, 89 N.E.3d 1268 (affirming denial of leave on account of substantial delay of moving party without explanation); *St. Marys v. Dayton Power & Light Co.*, 79 Ohio App.3d 526, 535-536, 607 N.E.2d 881 (3rd Dist. 1992) (affirming denial of leave to amend complaint due to moving party's delay and prejudice to the defendant due to upcoming hearing); *Woomer v. Kitta*, 8th Dist. Cuyahoga Nos. 70863 and 71049, 1997 Ohio

App. LEXIS 1515 (April 17, 1997) (affirming denial of leave to amend complaint for delay and potential prejudice to defendant). Further, it is proper to deny the motion where it is apparent that a proposed amendment is futile. *Current Source, Inc. v. Elyria City School Dist.*, 157 Ohio App.3d 765, 2004-Ohio-3422, 813 N.E.2d 730, ¶ 12 (9th Dist.), citing *Foman v. Davis* (1962), 371 U.S. 178, 182, 9 L. Ed. 2d 222, 83 S. Ct. 227.

1. Plaintiffs' motion is untimely and unduly prejudicial to Defendants.

Plaintiffs' counsel obviously recognized the untimeliness of a motion under Civ.R. 15(A) by attempting couch his motion under Civ.R.15(B); incorrectly believing that portion of the Rule allowed for amendment "at any time" as it relates to the existing Defendants. The case is approaching three years of age. Plaintiffs have been given five prior opportunities to amend the Complaint.[1] The Court has issued an Order stating that "[t]he Court is not inclined to allow any future amendments at this stage of the proceedings absent a substantive showing of need to amend. (Ex. A, Order of November 27, 2018).

Plaintiffs' Motion contains only a few excuses for filing this motion at this late date. None of them are plausible, much less compelling. Plaintiffs claim (1) that the "nature and extent" of the medical Defendants' pricing for goods and services[2] "only recently became apparent;" (2) that Defendant Ghoubrial only produced the bulk of his written discovery responses and document production on April 1, 2019; and (3) that the "recently discovered evidence confirms the highly coordinated nature of the scheme at issue." Undermining these vague justifications is Plaintiffs' inconsistent representation that "the new claims that Plaintiffs seek to assert, primarily under the OCPA, are all based on the very same evidence that Plaintiffs have obtained in support of their existing claims."

[1] The number of prior amendments is also a factor weighing against permitting a proposed amendment. *Foman v. Davis* (1962), 371 U.S. 178, 182, 9 L. Ed. 2d 222, 83 S. Ct. 227

[2] Plaintiffs intentionally use the label "price gouging scheme" due to the salacious nature of the term. Essentially, Plaintiffs claim that the medical Defendants' prices are too high for certain medical services and devices. There is no "scheme" to set these prices. These are the prices the medical defendants have chosen to establish for their services and the medical devices they provide to patients. As with almost all medical providers, the established price is, more often than not, reduced for purposes of payment. This is hardly a "price gouging scheme."

Plaintiffs have known the cost of the medical care provided by the medical defendants since the outset of the claims against them. Plaintiffs' counsel has long been in possession of the legal and medical files of his clients identifying all of the medical charges and the (reduced) amounts paid to satisfy those charges. Given the Court's admonishment that future amendments must be supported by a **substantive** demonstration of need, vague assertions of "new evidence" or "recently discovered" evidence should not be tolerated.

A statement, that "new evidence" had been produced, standing by itself, is insufficient to support a motion for leave to file an amended complaint. *Wright v. Nationwide Mut. Ins. Co.*, 9th Dist. Lorain C.A. No. 2363, 1976 Ohio App. LEXIS 6832, at *5 (Feb. 4, 1976). At no point do Plaintiffs identify the purported "new" information they learned from a particular deposition or document production. That is because there is no "new" information driving this motion to amend. At minimum, Plaintiffs were required to identify the **substance** of the purported "new" information and when they learned that information. They failed to do so because there is nothing "new" to identify.

Likewise, the medical providers Plaintiffs now seek to add to this case were known to Plaintiffs' counsel prior to the filing of the Fifth Amended Complaint. Brandy Gobrogge was deposed on October 16 and 17, 2018. Plaintiffs' counsel asked Ms. Gobrogge questions regarding each of these medical providers.[3] Likewise, Mr. Nestico was deposed on February 7 and 8, 2019, and questioned regarding the same doctors.[4] Plaintiffs' counsel knew to ask questions regarding these individuals because their names had previously been produced in documentary discovery. Prior to these depositions, Plaintiffs' counsel had announced to the public that he was "investigating" Town and Country Chiropractic. (Ex. B, PageVault, Facebook page of The Pattakos Law Firm LLC, dated September 29, 2018).

[3] Deposition of Brandy Gobrogge at 284-289, 340-346, 409-411 (questioning and testimony regarding each of the five proposed new defendants; Rendek, Kahn, Tassi, Cawley, and Patrice Lee-Seyon).
[4] Deposition of Alberto Nestico at pp. 339, 342-351, 669.

Plaintiffs' counsel cannot now be heard to claim that he was unaware that some KNR clients were referred to these care providers, who in turn may have referred some patients to Dr. Ghoubrial. Plaintiffs' counsel's decision to add an additional salacious label to his claims for circulation in the media does not constitute a demonstration of substantive need to amend the complaint.

Another factor weighing heavily against amendment at this late juncture is the fact that Plaintiffs have already filed their motion to certify three classes. Courts have held that motions to amend after filing of a class certification motion are untimely and unduly prejudicial. *Fowler v. Ohio Edison Co.*, 7th Dist. Jefferson No. 07-JE-21, 2008-Ohio-6587, ¶ 100. This is particularly true where granting the motion would reopen discovery.

> [P]laintiffs seek to inject a new cause of action that will undoubtedly require the reopening of discovery and additional motion practice, particularly with respect to class certification. Although plaintiffs contend that defendant would not be unduly prejudiced because the amendment would not require an extension of significant resources, the Court disagrees. Amendment to add a new claim would delay the resolution of the dispute, would require defendant to engage in new discovery or to reopen discovery, and likely require another motion for class certification and dispositive motion practice. A need to reopen discovery and therefore delay the proceedings supports a district court's finding of prejudice from a delayed motion to amend the complaint." [citations omitted].

Mireles v. Paragon Sys., S.D.Cal. No. 13cv122 L (BGS), 2014 U.S. Dist. LEXIS 81746, at *9 (June 16, 2014).

The prejudice inflicted all Defendants in this case by an amendment at this late date should be fairly obvious. First, as noted by Dr. Ghoubrial, the amendment seeks to dramatically broaden the class of individuals identified in the Fifth Amended Complaint. Instead of a class of individuals who allegedly received trigger point injections and TriTech medical devices, the amendment seeks to include all KNR clients who paid anything to Dr. Ghoubrial's office. It is highly prejudicial to the KNR defendants to be forced to defend against such a dramatically different and larger class of individuals after almost three of years of litigation and numerous prior amendments.

In addition, the addition of numerous new defendants would essentially reset the entire discovery process in this case. The new defendants would have a right to conduct discovery, including written discovery, depositions of new individuals and possibly re-deposing individuals who have already testified. Given the time and cost already committed the discovery process in this case, it is irresponsible and patently unfair to force defendants to start yet again. There is no justifiable reason to continue to allow Plaintiffs' counsel to add claims and defendants *ad infinitum*. Yet another amendment at this late juncture to add new claims and parties is severely prejudicial to Defendants.

2. The Motion is futile.

The futility of Plaintiffs' proposed amendment is evidenced by the fact that they lack standing to pursue the proposed new claims against any of the putative new Defendants and KNR. Where no plaintiff would have standing to bring the claims in a proposed amended complaint, the proposed amendment is futile. *Crawford v. United States Dept. of the Treasury*, 868 F.3d 438, 461 (6th Cir.2017); see also *Shefkiu v. Worthington Industries*, 2014-Ohio-2970, 15 N.E.3d 394, ¶ 26 (6th Dist.). Here, there is no allegation in Plaintiffs' Motion or in the proposed Sixth Amended Complaint that **any of these Plaintiffs had any interaction whatsoever with the five putative new Defendants.** The Plaintiffs in this case lack standing to pursue the proposed new claims, and the proposed amendment to add the new classes is thus futile.

Accordingly, even if the Court analyzes Plaintiffs' Motion under Civ.R. 15(A), the Motion must be denied as untimely, unduly prejudicial, and futile.

IV. CONCLUSION

Based upon the foregoing, Defendants respectfully request that the Court deny Plaintiffs' Motion for Leave to File Sixth Amended Complaint.

Respectfully submitted,

/s/ James M. Popson
James M. Popson (0072773)
Sutter O'Connell
1301 East 9th Street
3600 Erieview Tower
Cleveland, OH 44114
(216) 928-2200 phone
(216) 928-4400 facsimile
jpopson@sutter-law.com

Counsel for Defendants Kisling, Nestico & Redick, LLC, Alberto R. Nestico, and Robert Redick

CERTIFICATE OF SERVICE

Pursuant to Civ.R. 5(B)(2)(f), the undersigned certifies that a copy of the foregoing *DEFENDANTS' BRIEF IN OPPOSITION TO PLAINTIFFS' MOTION FOR LEAVE TO FILE SIXTH AMENDED COMPLAINT* was filed electronically with the Court on this 8th day of July, 2019 The parties, through counsel, may access this document through the Court's electronic docket system.

/s/ James M. Popson
James M. Popson (0072773)

IN THE COURT OF COMMON PLEAS
COUNTY OF SUMMIT

MEMBER WILLIAMS	)	CASE NO.: CV-2016-09-3928
	)	
Plaintiff	)	JUDGE JAMES A. BROGAN
-vs-	)	
	)	
KISLING NESTICO & REDICK LLC, et al.	)	**O R D E R**
	)	
	)	
Defendants		

- - -

Upon Motion for Leave to Amend Complaint, and for good cause shown, Plaintiff's Motion for Leave to File a Fifth Amended Complaint is GRANTED. The Court is not inclined to allow any future amendments at this stage of the proceedings absent a substantive showing of need to amend.

Further, the Court believes the above Order renders the KNR Defendants' November 7, 2018 Motion to Compel Plaintiff Matthew Johnson to Comply with Discovery MOOT. However, the Court reserves judgment on this issue until the KNR Defendants explain how Matthew Johnson is still considered a "material witness" as he is longer a class representative as set forth in the proposed Fifth Amended Complaint.

Finally, having read portions of Mr. Johnson's deposition testimony, the Court wants to impress upon counsel and all parties that discovery in this case is to be conducted pursuant to the Ohio Rules of Civil Procedure. Depositions are conducted pursuant to those Rules and counsel may not instruct a witness not to answer questions except when necessary to preserve a privilege or to present a motion under Civ.R. 30(D) (to terminate or limit examination).

Exhibit A

IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED that Plaintiffs' Motion for Leave to File a Fifth Amended Complaint is GRANTED.

IT IS FURTHER ORDERED that the parties have leave to file additional briefs in relation to the potential continuation of deposition for Matthew Johnson, if in fact the Motion to Compel Matthew Johnson is not rendered moot by the filing of a Fifth Amended Complaint.

IT IS SO ORDERED.

JUDGE JAMES A. BROGAN
Sitting by Assignment #18JA1214
Pursuant to Art. IV, Sec. 6
Ohio Constitution

CC: ALL PARTIES OF RECORD

Document title:	The Pattakos Law Firm LLC - Home
Capture URL:	https://www.facebook.com/pattakoslaw/
Captured site IP:	31.13.66.35
Page loaded at (UTC):	Wed, 30 Jan 2019 15:54:51 GMT
Capture timestamp (UTC):	Wed, 30 Jan 2019 16:12:39 GMT
Capture tool:	v6.9.0
Collection server IP:	52.5.8.50
Browser engine:	Chrome/62.0.3202.9
Operating system:	Microsoft Windows NT 10.0.14393.0 (10.0.14393.0)
PDF length:	40
Capture ID:	c9741e46-a210-43f8-bb8b-ecffe0c913bb
User:	sutter-aross

Exhibit B

The Pattakos Law Firm LLC
@pattakoslaw

Home
Reviews
Photos
Posts
About
Community
Info and Ads

Create a Page

Like Follow Share ···

Send Message

Like Comment Share

Write a comment...

The Pattakos Law Firm LLC
October 4, 2018 ·

This morning, we filed parallel lawsuits on behalf of thirteen PhD students in The University of Akron's School of Counseling who were misled by University officials in connection with the school's abandonment of the unique dually accredited counseling and therapy program that the students were induced to enroll in. Essentially, these students became casualties of a petty grudge that a single University official carried against his colleagues and the successful one-of-a-kind program they built that competed with his and attracted students from across the country. We look forward to working to making our clients whole for the damage caused by the University's broken promises and deceptive conduct.

More information, including links to copies of the filed complaints, is available here:

https://www.pattakoslaw.com/phd-students-sue-university-ak.../

PATTAKOSLAW.COM
PhD students sue The University of Akron for broken promises and deceptive conduct regarding School of...

12 2 Shares

Like Comment Share

Write a comment...

The Pattakos Law Firm LLC
September 29, 2018 ·

We are currently investigating fraud claims against Town and Country Chiropractic in Columbus, Ohio (Dr. Nazreen Khan and Dr. Stephen Rendeck), and the law firm of Kisling Nestico & Redick ("KNR").

If you were in a car accident, treated at Town and Country, and were represented by KNR in a related lawsuit, you might be entitled to recover fees that were illegally charged to you in settling your lawsuit. We are interested in speaking with anyone who has information about the relationship between these lawyers and chiropractors. For more information, please contact attorney Peter Pattakos at 330.836.8533 or peter@pattakoslaw.com.

More information about our pending fraud lawsuit against KNR and its affiliated doctors and chiropractors is available at the link below.

https://www.pattakoslaw.com/knr-law-firm-clients-seek-reim.../

PATTAKOSLAW.COM
KNR law firm clients seek reimbursement for fraudulent medical-supply sales by Akron...
Learn More

77 57 Comments 99 Shares

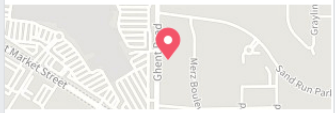
Like Comment Share

No Rating Yet

Community See All

Invite your friends to like this Page
684 people like this
695 people follow this

About See All



101 Ghent Rd
Fairlawn, Ohio 44333
Get Directions
(330) 836-8533
Typically replies within a few hours
Send Message
www.pattakoslaw.com
Lawyer & Law Firm
Price Range $$
Hours
Always Open
Suggest Edits

Team Members
Peter Pattakos

Related Pages

Cleveland 19 News
TV Channel
Like

News 5 Cleveland
Broadcasting & Media Production Company
Like

Cleveland Scene M...
Newspaper
Like

English (US) · Español · Português (Brasil) · Français (France) · Deutsch

Privacy · Terms · Advertising · Ad Choices · Cookies · More
Facebook © 2019

Chat