IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF KENTUCKY
_____ DIVISION

EDWARD P. GEARHART, Individually And On Behalf of All Others Similarly Situated	)	
Plaintiff	)	**Civil No. _____**
v.	)	
EXPRESS SCRIPTS, INC.	)	
Defendant	)	

DEFENDANT EXPRESS SCRIPTS, INC.'S NOTICE OF REMOVAL

Pursuant to 28 U.S.C. §§ 1332, 1441, 1446 and 1453, Defendant Express Scripts, Inc. ("ESI") hereby gives notice of the removal of this action from the Rowan County Circuit Court in the Commonwealth of Kentucky to the United States District Court for the Eastern District of Kentucky. In support of this Notice, ESI states the following facts, which show that this case may be properly removed to this Court.

1. Plaintiff Edward P. Gearhart ("Plaintiff") first filed this case on October 14, 2015 in the Rowan County Circuit Court in the Commonwealth of Kentucky, Case No. 15-CI-90250. Plaintiff's Class Action Complaint named one of ESI's affiliates as the sole defendant and did not name ESI. *See* **Exhibit A** (Copies of "all process, pleadings, and orders served" on ESI pursuant to 28 U.S.C. § 1446(a)).

2. On November 16, 2015, Plaintiff filed his First Amended Class Action Complaint instead naming ESI as defendant and deleting ESI's affiliate.

3. Plaintiff's First Amended Class Action Complaint asserted various claims against ESI, on behalf of a purported class of Kentucky citizens, for ESI's alleged practice of

overcharging customers who authorize a third party to request a copy of their prescription claims data on his or her behalf.

4. Specifically, Plaintiff alleged that ESI charged Plaintiff and members of the purported Kentucky class a "flat fee" of $75 for "data processing" in order to release a copy of Plaintiff's and the purported Kentucky class members' respective records. *See* **Exhibit A** (First Amend. Compl. ¶ 3).

5. Based on the allegations in the First Amended Class Action Complaint, the action was not removable under 28 U.S.C. §§ 1331, 1332, 1441, and 1446.

6. On February 17, 2017, Plaintiff filed a motion requesting leave to file a Second Amended Class Action Complaint. Plaintiff's Second Amended Class Action Complaint was signed and attached to the motion as an exhibit.

7. Like Plaintiff's First Amended Class Action Complaint, the Second Amended Class Action Complaint asserts various claims against ESI for allegedly overcharging customers who authorize a third party to request a copy of their prescription claims data on his or her behalf. *See id.* (Sec. Amend. Compl. at 1-2, 7-16).

8. However, the Second Amended Class Action Complaint now asserts claims against ESI on behalf of *two* purported classes: (1) a class of Kentucky citizens, which includes "[a]ll individual citizens of the State of Kentucky who were charged in excess of the statutory limit for a copy of their health records from Express Scripts"; and (2) a nationwide class, which includes "[a]ll third-parties and individuals who, themselves or on behalf of their clients, were charged and paid $75.00 to request a copy of their health information and/or health records from Express Scripts." *See id.* (Sec. Am. Compl. ¶ 12). There is no time limitation or specified class period alleged for either of the putative classes.

9. Specifically, Plaintiff's Second Amended Class Action Complaint asserts claims for (i) violation of the Kentucky Consumer Protection Act, Ky. Rev. Stat. § 367.170, *et seq.*, on behalf of the Kentucky class; (ii) fraud on behalf of both the Kentucky class and the nationwide class; (iii) unjust enrichment on behalf of both the Kentucky class and the nationwide class; (iv) violation of Kentucky's Health Records Law, Ky Rev. Stat. § 422.317(1) on behalf of the Kentucky class; and (v) declaratory judgment on behalf of both the Kentucky class and the nationwide class. *Id.* (Sec. Am. Compl. at 8-15).

10. Plaintiff seeks compensatory, consequential, statutory, exemplary, and punitive damages as well as an award of attorneys' fees on behalf of both purported classes. Plaintiff also seeks, on behalf of both purported classes, various forms of equitable or injunctive relief, including restitution of all fees paid to ESI in excess of what the law allows, and injunctive relief prohibiting ESI "from continuing to take" the alleged "unfair, deceptive, illegal and/or unlawful action" of charging a "flat fee" of $75 in order to release a copy of an individual's records. *Id.* (Sec. Am. Compl. at 15-16).

11. The parties submitted extensive briefing as to whether Plaintiff's proposed Second Amended Class Action Complaint should be permitted in light of the newly asserted claims on behalf of a purported nationwide class. *See generally id.* (Motion to File Amended Complaint; ESI's Response in Opposition to Motion; Reply in Support of Motion).

12. On May 9, 2017, Plaintiff filed a motion requesting leave to file a new version of the Second Amended Class Action Complaint under seal. Plaintiff's revised Second Amended Class Action Complaint asserted the same claims on behalf of the same two putative Kentucky and nationwide classes, but now contained some additional allegations, including allegations involving deposition testimony of ESI's corporate representative. Plaintiff sought to file the new

Second Amended Class Action Complaint under seal as it contained certain confidential materials covered by an Agreed Protective Order previously entered by the court. Along with his motion, Plaintiff simultaneously submitted a signed copy of the newly revised Second Amended Class Action Complaint to be filed under seal. *See generally id.* (Motion for Leave to File Evidence and Second Amended Complaint That Includes The Subject Evidence Under Seal; Second Amended Class Action Complaint (Filed Under Seal)).

13. On May 12, 2017, the Rowan Circuit Court ordered that the updated version of the Second Amended Class Action Complaint be filed under seal. However, the Rowan Circuit Court had yet to rule on Plaintiff's motion for leave to file an amended complaint. *See id.* (Order from May 12, 2017).

14. On December 4, 2017, the Rowan Circuit Court entered an order granting Plaintiff's motion for leave to file a Second Amended Class Action Complaint. *See id.* (Order Granting Leave).

15. Counsel for ESI received a copy of the Rowan Circuit Court's order via U.S. mail on December 6, 2017.

16. Based on the allegations contained in both versions of the Second Amended Class Action Complaint, this case is properly removed to this Court pursuant to 28 U.S.C. §§ 1441 and 1446 because ESI has satisfied the procedural requirements for removal, and this Court has subject matter jurisdiction over this action pursuant to 28 U.S.C. § 1332(d).[1]

[1] Two similar actions for alleged overcharging were filed against ESI by Plaintiff's counsel on behalf of nationwide classes in Florida and Missouri. Both actions were removed to federal court without objection. *See Harrod v. Express Scripts, Inc.*, No. 8:17-cv-1607 (M.D. Fla.) and *Burton v. Express Scripts, Inc.*, No. 4:17-cv-2279 (E.D. Mo.).

I. ESI HAS SATISFIED THE PROCEDURAL REQUIREMENTS FOR REMOVAL.

17. On December 4, 2017, the Rowan Circuit Court entered an order granting Plaintiff's motion for leave to file the Second Amended Class Action Complaint, and counsel for ESI received a copy of the Rowan Circuit Court's order via U.S. mail on December 6, 2017.

18. Upon receipt of the Rowan Circuit Court's order granting Plaintiff's motion for leave to file the Second Amended Class Action Complaint, ESI ascertained for the first time that the case, which was not previously removable, had become removable.

19. This Notice of Removal is timely, in accordance with 28 U.S.C. § 1446(b)(3), as it is filed within thirty (30) days "after receipt by [ESI], through service or otherwise, of a copy of an amended pleading, motion, order or other paper from which it may first be ascertained that the case is one which is or has become removable." *See* 28 U.S.C. § 1446(b)(3); *see also Graiser v. Visionworks of America, Inc.*, 819 F.3d 277, 283 (6th Cir. 2016) (discussing the process for removal under the Class Action Fairness Act of 2005); *Freeman v. Blue Ridge Paper Prods.*, Inc., 551 F.3d 405, 409-10 (6th Cir. 2008) (removal was timely because defendant removed action within 30 days of the state court's written order granting leave to amend); *Crump v. Wal-Mart Grp. Health Plan*, 925 F. Supp. 1214, 1219 (W.D. Ky. 1996) (30-day removal period begins to run when state court grants motion to amend).

20. As of this date, no additional pleadings and papers have been filed, and no proceedings have occurred the Rowan County Circuit Court since the court granted Plaintiff's motion for leave to file a Second Amended Class Action Complaint. *See* **Exhibit B** (docket). ESI has not filed a responsive pleading to the Second Amended Complaint. ESI hereby reserves all rights to assert any and all defenses. ESI further reserves the right to amend or supplement this Notice of Removal.

21. ESI is removing this case to the United States District Court for the Eastern District of Kentucky pursuant to 28 U.S.C. § 1441(a), because the original action was filed in the Rowan County Circuit Court in the Commonwealth of Kentucky. This Court, therefore, is the "district and division embracing the place where [the] action is pending." *See* 28 U.S.C. § 1441(a).

22. Pursuant to 28 U.S.C. § 1446(d), a copy of this Notice of Removal is being served upon counsel for Plaintiff, and a copy is being filed with the Rowan County Circuit Court in the Commonwealth of Kentucky. *See* **Exhibit C** (Notice of Removal to Plaintiff) and **Exhibit D** (Notice of Removal to State Court).

23. An appropriate civil cover sheet JS-44 form is also attached.

II. REMOVAL IS PROPER BECAUSE THE COURT HAS SUBJECT MATTER JURISDICTION PURSUANT TO 28 U.S.C. § 1332(d).

24. The Court has original jurisdiction over this action, and the action may be removed to this Court pursuant to the Class Action Fairness Act of 2005, Pub. L. No. 109-2, 119 Sta. 4 (codified in scattered sections of 28 U.S.C.) ("CAFA").

25. As set forth below, this is a putative class action in which: (1) there are 100 or more members of the alleged class; (2) ESI is a citizen of a state different than at least one member of the proposed class; and (3) based on the allegations in the Complaint, the putative class members' claims put in controversy over $5 million, exclusive of interest and costs.

26. Accordingly, this Court has subject matter jurisdiction over this action under 28 U.S.C. § 1332(d), and the action may be removed to this Court pursuant to 28 U.S.C. § 1332(d)(2).

A. The Proposed Class Consists of More Than 100 Members.

27. Plaintiff filed this case on behalf of a putative Kentucky class and a putative nationwide class, seeking to represent "[a]ll third-parties and individuals" who were charged and paid $75.00 for copies of their "health records" from ESI. *See* **Exhibit A** (Sec. Amend. Compl. ¶ 12; Sealed Sec. Amend. Compl. ¶ 14).

28. Plaintiff alleges that "it is believed the class includes thousands of members." *Id.* (Sec. Amend. Compl. ¶ 13; Sealed Sec. Amend. Compl. ¶ 15).

29. From 2011 through 2015, during the five years prior to the filing of the original Class Action Complaint at the end of 2015, ESI's records show that it received approximately 31,210 third-party requests for records. *See* **Exhibit E** (Declaration of Valerie Sancamper, ¶ 2).[2]

30. Accordingly, the aggregate number of alleged class members is greater than 100 for the purposes of 28 U.S.C. § 1332(d)(5)(B).

B. Minimal Diversity Exists.

31. Under CAFA, only minimal diversity is required to confer original federal jurisdiction. *See* 28 U.S.C. § 1332(d)(2)(A) ("The district courts shall have original jurisdiction of any civil action in which the matter in controversy exceeds the sum or value of $5,000,000, exclusive of interest and costs, and is a class action in which . . . ***any member of a class of plaintiffs is a citizen of a State different from any defendant*****[.]**") (emphasis added). This element is satisfied here.

32. ESI is, and was at the time the court granted Plaintiff's motion for leave to file a Second Amended Class Action Complaint, a corporation duly organized and validly existing

[2] The Second Amended Class Action Complaint does not purport to describe the law applicable to all of Plaintiff's claims. While ESI does not concede that Kentucky law could apply to those claims, assuming it did, Plaintiff's claims for fraud and unjust enrichment would both be governed by a five-year statute of limitations. *See* KRS

under the laws of the State of Delaware, with its principal place of business in Missouri. *Id.* (Sec. Amend. Compl. ¶ 7; Sealed Sec. Amend. Compl. ¶ 9).

33. Plaintiff alleges that he is a citizen of the state of Kentucky. *Id.* (Sec. Amend. Compl. ¶ 7; Sealed Sec. Amend. Compl. ¶ 8). Accordingly, on information and belief, Plaintiff is a citizen of Kentucky.

34. Because at least one member of the putative class is diverse from ESI, the requirements for minimal diversity under 28 U.S.C. § 1332(d)(2)(A) are satisfied.

C. The Amount-in-Controversy Exceeds $5 Million.

35. Under CAFA, federal district courts have original jurisdiction where, among other things, the "matter in controversy exceeds the sum or value of $5,000,000, exclusive of interest and costs." 28 U.S.C. § 1332(d)(2). Per the legislative history of CAFA, "if a federal court is uncertain about whether 'all matters in controversy' in a purported class action 'do not in the aggregate exceed the sum or value of $5,000,000,' the court should err in favor of exercising jurisdiction." S. Rep. No. 109-14, at 42.

36. Plaintiff alleges three claims on behalf of a putative nationwide class and requests compensatory damages, declaratory and injunctive relief, punitive damages, and attorneys' fees, thereby placing in excess of $5 million in controversy. *See id.* (Sec. Amend. Compl. at 15-16; Sealed Sec. Amend. Compl. at 16-17). Plaintiff contends that each time ESI receives a request for records, ESI charges a "flat fee" of $75. *Id.* (Sec. Amend. Compl. ¶ 4; Sealed Sec. Amend. Compl. ¶ 4, 31). Plaintiff further contends that in every instance, ESI "willfully misrepresents the nature of the fee," and this alleged $75 flat fee is "fraudulent and excessive." *Id.* (Sec. Amend. Compl. ¶ 5; Sealed Sec. Amend. Compl. ¶¶ 5-6).

413.120. Thus, as described further below, this case puts at issue, in the least, the claims of all those requesting records from ESI during that time period.

37. Plaintiff does not identify a relevant class period, but for purposes of establishing the amount in controversy in this case, all of the alleged claims of the purported class members should be considered. *See* 28 U.S.C. § 1332(d)(6) ("In any class action, the claims of the individual class members shall be aggregated to determine whether the matter in controversy exceeds the sum or value of $5,000,000, exclusive of interest and costs."); *see also Kendrick v. Standard Fire Ins. Co.*, 2007 WL 1035018, at *3 (E.D. Ky. Mar. 31, 2007) (finding that defendants satisfied the CAFA amount-in-controversy requirement where it could be reasonably deduced from the allegations that "the aggregate damages 'more likely than not' [would] exceed $5 million") (citation omitted).

38. Based on Plaintiff's asserted claims, the alleged class members would, at least, include those who submitted third-party record requests to ESI during the relevant time period. While ESI does not concede that Kentucky law could apply to all of the claims alleged in this case, assuming it did, Plaintiff's claims for fraud and unjust enrichment would both be governed by a five-year statute of limitations. *See* KRS 413.120.

39. In conducting extensive discovery, the parties produced information and documents for the five-year period spanning from January 1, 2011 through December 31, 2015

40. ESI's records show that from 2011 through 2015, ESI received approximately 31,210 third-party requests for records. *See* **Exhibit E** at 1.

41. Considering Plaintiff's challenge to all of these record requests, and its related contention that the amount ESI charges to collect records is improper for each request, Plaintiff's request for compensatory damages related to these record requests therefore potentially places approximately $2,340,750 in controversy. *Id.* (31,210 requests x $75).

42. Of course, this number reflects only the amount placed in controversy by Plaintiff's compensatory claims for the five-year period between 2011 and 2015, based on ESI's historical records.

43. In addition to compensatory damages, Plaintiff also seeks declaratory and injunctive relief, seeking to enjoin ESI from charging the $75 "flat fee" in the future. *See* **Exhibit A** (Sec. Amend. Compl. at15-16; Sealed Sec. Amend. Compl. at16-17).

44. The declaratory and injunctive relief sought by Plaintiff results in a concrete benefit to Plaintiff and the purported classes in the form of $75 per record request submitted to ESI, effectively in perpetuity. *See Petrey v. K. Petroleum, Inc.*, No. 6:07-168-DCR, 2007 WL 2068597, at *2 (E.D. Ky. July 16, 2007) ("In actions in which a plaintiff is seeking declaratory or injunctive relief, the amount in controversy is measured by the value of the object of the litigation. . . the Plaintiffs are seeking monetary damages and declaratory relief. Thus, for purposes of determining the amount in controversy, the Court must consider not only the money judgment sought but also the 'value of the object of the litigation.'") (quoting *Hunt v. Wash. St. Apple Advert. Comm'n*, 432 U.S. 333, 347 (1977) (holding that the value of declaratory relief must be included in the calculation of the amount in controversy)). Thus, the value of this declaratory and injunctive relief further adds to the amount in controversy in this case.

45. Since 2011, third-party requests for prescription claims data have been increasing. In 2015 and 2016, ESI received 9,636 and 7,641 requests from third parties, respectively. *See* **Exhibit E** at 2.

46. Assuming that the rate at which ESI will continue to receive requests is an average of the requests received in 2015 and 2016, ESI will conservatively receive 8,639 requests in each of the next five years alone. Thus, the injunction Plaintiff seeks could

potentially prohibit the collection of $3,239,625 for the next five years. *See id.* (8,639 requests x $75 x 5 years). This sum is considered in determining the amount in controversy associated with this case.

47. Considering only Plaintiff's request for monetary damages and injunctive relief, there could be $5,580,375 in controversy in this case, satisfying CAFA's $5 million jurisdictional threshold.

48. Additionally, Plaintiff seeks punitive damages, which are appropriate for consideration in determining the amount in controversy for removal under CAFA. *See Hayes v. Equitable Energy Res. Co.*, 266 F.3d 560, 572 (6th Cir. 2001) ("When determining the jurisdictional amount in diversity cases, punitive damages must be considered . . . unless it is apparent to a legal certainty that such cannot be recovered") (citation omitted); *England v. Advance Stores Co.*, No. 1:07-cv-00174, 2008 WL 4372902, at *2 (W.D. Ky. Sept. 22, 2008) (finding defendant's calculation of amount in controversy for CAFA removal reasonable when considering all relief sought, including punitive damages); *Kendrick*, 2007 WL 1035018, at *3 (noting that "[t]o the extent there remains a question [that the amount in controversy exceeds $5 million], removing Defendants also point out other damages sought . . . [including] punitive damages.") (citing *Brown v. Jackson Hewitt, Inc.*, 2007 WL 642011, at *3 (N.D. Ohio 2007) (noting punitive damages are considered in determining amount in controversy in the Sixth Circuit)).

49. Plaintiff has not indicated the amount of punitive damages he seeks. However, the amount of punitive damages in controversy can be estimated by applying the same ratio of punitive-to-compensatory damages that has been upheld in other cases. *See State Farm Mutual Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 425 (2003) (stating that "[s]ingle digit multipliers are

more likely to comport with due process . . . than awards with ratios in the range of 500 to 1"); *Clark v. Chrysler Corp.*, 436 F.3d 594, 606-07 (6th Cir. 2006) (applying *State Farm*, and concluding that a 13:1 ratio between punitive and compensatory damages was excessive, and determining that a 2:1 ratio was warranted in products liability action); *Fastenal Co. v. Crawford*, 609 F. Supp. 2d 650, 670 (E.D. Ky. 2009) (finding ratio of punitive-to-compensatory damages in the range of 1:1 to 2:1 reasonable in action based on fraud claims); *PBI Bank, Inc. v. Signature Point Condominiums LLC*, 2016 WL 7030423, at *21 (Ky. Ct. App. Dec. 2, 2016) (finding that a little more than a 3:1 ratio of punitive-to-compensatory damages was not excessive in fraud action).

50. In this case, for purposes of determining jurisdiction, even a conservative punitive damages estimate of a 1:1 ratio of compensatory damages could bring the amount in controversy over CAFA's $5 million jurisdictional threshold to $11,160,750.

51. Finally, Plaintiff seeks statutory attorneys' fees, which are also appropriate for consideration in determining the amount in controversy for removal under CAFA. *See* **Exhibit A** (Sec. Amend. Compl. at 9-10, 15; Sealed Sec. Amend. Compl. at 11, 17).*; see also Kendrick*, 2007 WL 1035018, at *3 (noting that the Sixth Circuit considers statutory attorneys' fees in calculating the amount in controversy and other jurisdictions have similarly included such fees in the CAFA context as long as they were authorized by that state's law); *Hampton v. Safeco Ins. Co. of Am.*, 2013 WL 1870434, at *1 (E.D. Ky. May 3, 2013) ("The Sixth circuit has held that reasonable attorney's fees may be included in determining the jurisdictional amount in controversy in diversity cases, assuming those fees are allowed by statute.") (citing *Charvat v. GVN Mich., Inc.*, 561 F.3d 623, 630 n.5 (6th Cir. 2009).

52. Reasonable estimates of attorneys' fees may be considered in calculating the amount in controversy. *See e.g., Carrollton Hosp., LLC v. Kentucky Insight Partners II, LP*, 2013 WL 5934638, at *4 (E.D. Ky. Oct. 31, 2013) (finding that while "[s]ome speculation is necessary when estimating legal fees," estimated attorneys' fees of less than fifty percent of the all damages claimed is "not an unreasonable estimate" for purposes of determining the amount in controversy) (citing *Pub. Funding Corp. v. Lawrence Cnty. Fiscal Court*, 892 F.2d 80 (6th Cir.1989)); *Hollon v. Consumer Plumbing Recovery Ctr.*, 417 F. Supp. 2d 849, 853 (E.D. Ky. 2006) (finding amount in controversy to be met assuming attorneys' fees in an amount of thirty percent).

53. Without even assuming any amount for attorneys' fees, Plaintiff's claims for compensatory damages, declaratory and injunctive relief, and punitive damages could conservatively bring the amount in controversy to approximately $11,160,750, which is well over the $5 million jurisdictional threshold for CAFA. *See Hollon*, 417 F. Supp. at 853 (denying motion to remand because "the amount in controversy [was] met easily by combining the Plaintiff's assessment of [compensatory damages], with a conservative 1–1 ratio of punitive damages, and attorneys [sic] fees in an amount of thirty percent.").

III. CONCLUSION

54. For all the reasons stated, this action is removable to this Court pursuant to 28 U.S.C. §§ 1441, 1446, and 1453, and this Court may exercise jurisdiction over this matter pursuant to 28 U.S.C. § 1332(d).

Based on the foregoing, ESI respectfully requests that this action be removed from the Rowan County Circuit Court in the Commonwealth of Kentucky to the United States District Court for the Eastern District of Kentucky pursuant to 28 U.S.C. §§ 1332, 1441, 1446 and 1453.

Respectfully submitted,

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ATTORNEYS FOR DEFENDANT

CERTIFICATE OF SERVICE

I hereby certify that on the 3rd day of January, 2018, a true and correct copy of the foregoing was served via electronically with the Clerk of the Court by using the CM/ECF system, which will send a notice of electronic filing to all counsel of record.

/s/ Jaron P. Blandford
JARON P. BLANDFORD

4825-6201-7114, v. 1

AOC-105 Doc. Code: CI Rev. 1-07 Page 1 of 1 Commonwealth of Kentucky Court of Justice www.courts.ky.gov CR 4.02; CR Official Form 1	**CIVIL SUMMONS**	Case No. 15-CI-90250 Court ☑ Circuit ☐ District County Rowan

PLAINTIFF

Edward P. Gearhart

499 Bearskin Road

Morehead Kentucky 40351

VS.

DEFENDANT

Express Scripts Holding Co.

1 Express Way

St. Louis Missouri 63121

Service of Process Agent for Defendant:

CSC-Lawyers Incorporating Service Co.

421 W. Main St.

Frankfort Kentucky 40601

THE COMMONWEALTH OF KENTUCKY
TO THE ABOVE-NAMED DEFENDANT(S):

You are hereby notified a **legal action has been filed against you** in this Court demanding relief as shown on the document delivered to you with this Summons. **Unless a written defense is made by you or** by **an attorney on your behalf** within **20 days** following the day this paper is delivered to you, judgment by default may be taken against you for the relief demanded in the attached Complaint.

The name(s) and address(es) of the party or parties demanding relief against you are shown on the document delivered to you with this Summons.

Date: Oct. 16, 2015

Jim Parker Clerk

By: B. [illegible] D.C.

Proof of Service

This Summons was served by delivering a true copy and the Complaint (or other initiating document) to:

_____

this _____ day of _____, 2_____.

Served by: _____

_____ Title

NO. 15-CI-90250

ROWAN CIRCUIT COURT
DIVISION I

EDWARD P. GEARHART — PLAINTIFF

v.

CLASS ACTION COMPLAINT

EXPRESS SCRIPTS HOLDING CO. — DEFENDANTS
1 Express Way
St. Louis, MO 63121

Serve:
CSC-Lawyers Incorporating Service Co.
421 W. Main St.
Frankfort, KY 40601

* * * * * * * *

Plaintiff Edward P. Gearhart, by Counsel, individually and on behalf of all others similarly situated, brings this Class Action Complaint against Defendant Express Scripts Holding Co. (hereinafter "Express Scripts"). In support thereof, Plaintiff alleges as follows:

INTRODUCTION

1. This is a civil action on behalf of Plaintiff and a Class consisting of individual citizens of the State of Kentucky who were charged in excess of the statutory limit for a copy of their healthcare provider records from Express Scripts (hereinafter the "Class").

2. Ky. Rev. Stat. § 422.317(1) provides in pertinent part:

> Upon a patient's written request, a hospital licensed under KRS Chapter 216B or a health care provider shall provide, without charge to the patient, a copy of the patient's medical record. A

> copying fee, not to exceed one dollar ($1) per page, may be charged by the health care provider for furnishing a second copy of the patient's medical record upon request either by the patient or the patient's attorney or the patient's authorized representative.

3. Express Scripts charged Plaintiff and members of the proposed Class a flat fee of $75 for "data processing" when they requested and later received a copy of their Express Scripts pharmacy records, and this charge is in violation of Ky. Rev. Stat. § 422.317(1), the Kentucky Consumer Protection Act, Ky. Rev. Stat. § 367.170, et. seq., and Kentucky common law.

PARTIES

4. Plaintiff Edward Gearhart is a citizen of the State of Kentucky, residing on Bearskin Hollow Road in Morehead, which lies in Rowan County, Kentucky.

5. Defendant Express Scripts is a Missouri corporation having its principal place of business at 1 Express Way, St. Louis, MO 63121. Defendant does business throughout the United States, including in the Commonwealth of Kentucky, and maintains a registered agent in Kentucky.

JURISDICTION AND VENUE

6. This Court has jurisdiction over both the parties and the subject matter of this class action proceeding because a substantial number of the events related to Plaintiff's claims transpired in Rowan County, Kentucky.

7. Rowan Circuit Court is the appropriate venue for this action because the events giving rise to the Complaint and the damages suffered occurred in this County.

CLASS ACTION ALLEGATIONS

8. This action may be brought and properly maintained as a class action pursuant to

the provisions of Kentucky Rule of Civil Procedure 23. Plaintiff brings this action on behalf of himself and a class of all others similarly situated.

9. Plaintiff brings this class action on behalf of the following class:

All individual citizens of the State of Kentucky who were charged in excess of the statutory limit for a copy of their health records from Express Scripts.

10. In accordance with Kentucky Rule of Civil Procedure 23, the Class is so numerous that joinder of all members is impracticable. While the exact number is not known at this time, it is generally ascertainable by appropriate discovery, and it is believed the class includes thousands of members.

11. In accordance with Kentucky Rule of Civil Procedure 23, there are questions of law and fact common to the Class and which predominate over any individual issues. Common questions of law and fact include, without limitation:

a. Whether Defendant owed a duty to the class members under the applicable statutes and law;

b. Whether Defendant violated the Kentucky Consumer Protection Act, Ky. Rev. Stat. § 367.170, et. seq. ("KCPA");

c. Whether Defendant violated Ky. Rev. Stat. § 422.317(1), by charging a flat fee for medical records that should have been free;

d. Whether Defendant committed fraud by its violation of the Kentucky Consumer Protection Act, Kentucky's medical records law, and/or other applicable Kentucky laws;

e. Whether Defendant violated the above Kentucky laws by charging a flat fee of $75.00 for the cost of handling, copying, and shipping pharmacy records;

f. Whether Defendant violated the above Kentucky laws by describing fees in an

inherently vague and ambiguous manner as to confuse Plaintiff and Class into believing that they are being charged for important services provided, when they are not;

g. Whether Defendant was unjustly enriched by overcharging for medical records;

h. Whether Plaintiff is entitled to declaratory judgment to prevent Defendant from overcharging for medical records in the future;

i. Whether the Class is entitled to notice as to the statutory overcharges;

j. The policies and procedures developed by the Defendant regarding the retrieval and reproduction of medical records requested by Putative Class Plaintiffs;

k. Defendant's vicarious liability for the actions of its employees;

l. The legal relationships among the Defendant; and/or

m. The extent of damages caused by Defendants' willful violations.

12. Plaintiff's claims are typical of the Class. As with members of the Class, Plaintiff was unfairly, deceptively and/or unlawfully overcharged for the retrieval and reproduction of medical records in violation of state statute. Plaintiff's interests coincide with, and are not antagonistic to, those of the other class members.

13. In accordance with Kentucky Rule of Civil Procedure 23, Plaintiff will fairly and adequately represent and protect the interests of the Class.

14. Plaintiff has retained counsel experienced in the prosecution of class action litigation and counsel will adequately represent the interests of the Class.

15. Plaintiff and his counsel are aware of no conflicts of interests between Plaintiff and absent Class members or otherwise;

16. Plaintiff has or can acquire adequate financial resources to assure that the interests

of the Class will not be harmed; and

17. Plaintiff is knowledgeable concerning the subject matter of this action and will assist counsel to vigorously prosecute this litigation.

18. In accordance with Kentucky Rule of Civil Procedure 23, the class litigation is an appropriate method for fair and efficient adjudication of the claims involved. Class action treatment is superior to all other available methods for the fair and efficient adjudication of the controversy alleged herein; it will permit a large number of individual citizens of the State of Kentucky to prosecute their common claims in a single forum simultaneously, efficiently, and without the unnecessary duplication of evidence, effort and expense that numerous individual actions would require. Class action treatment will also permit the adjudication of relatively small claims by certain class members, who could not individually afford to litigate a complex claim against a large corporate defendant. Further, even for those class members who could afford to litigate such a claim, it would still be economically impractical, as the cost of litigation is almost certain to exceed any recovery they would obtain.

19. Plaintiff is unaware of any difficulty likely to be encountered in the management of this case that would preclude its maintenance as a class action.

STATEMENT OF FACTS

20. Plaintiff Edward P. Gearhart requested his medical records, through his agent Jones Ward PLC, from defendant Express Scripts, and was charged by Express Scripts and paid a $75.00 flat fee for five (5) pages of his medical records on or about May 12, 2014, which was in excess of what he should have been charged at the time pursuant to Ky. Rev. Stat. § 422.317(1), and in excess of the cost of the handling, cost of copies, and actual shipping.

21. Express Scripts is one of the largest corporations in the United States, with more

than $100 billion in annual revenue. It offers pharmacy benefit management services through a network of retail pharmacies, and also provides home-delivery pharmacy services to patients.

22. The five pages of medical records received by Plaintiff through his agent reflect a mix of both retail pharmacy prescriptions and prescriptions directly filled by Express Scripts.

23. The cost of Plaintiff's Express Scripts medical records was deducted from a partial settlement of his claims in a products liability lawsuit that remains pending in federal court, and that may require additional medical records from Express Scripts and other sources before its final resolution.

24. Express Scripts refuses to comply with Ky. Rev. Stat. § 422.317(1), claiming it is not a health care provider, but instead a "pharmacy benefit management company." Express Scripts claim that its $75.00 fee is for "data processing" and not for shipping.

25. Although Plaintiff, through his agent, paid the data processing fee to Express Scripts, the payment was not voluntary because Express Scripts did not offer to waive or discount the fee if certain conditions were met.

COUNT I
VIOLATION OF KY. REV. STAT. § 422.317(1)
THE KENTUCKY CONSUMER PROTECTION ACT

Plaintiff, individually and on behalf of all others similarly situated, for this Count, alleges the following:

26. Plaintiff repeats, realleges, and incorporates by reference each of the foregoing paragraphs of this Complaint as if fully set forth herein.

27. This Count is a class action claim brought pursuant to the Kentucky Consumer Protection Act, Ky. Rev. Stat. § 367.170, et. seq. ("KCPA").

28. Pursuant to Ky. Rev. Stat. § 367.170(1), the KCPA provides that "(u)nfair, false,

misleading, or deceptive acts or practices in the conduct of any trade or commerce are hereby declared unlawful."

29. Privity existed between Plaintiff and Defendant, and between Class members and Defendant.

30. In connection with production of medical records to Plaintiff and Class, Defendant, through its employees, agents and representatives, violated KCPA by engaging in the following unfair or deceptive acts or practices:

a. overcharging for reproduction of medical records in violation of Kentucky's Health Records Law;

b. failing to disclose that Kentucky allows residents to obtain one free copy of their medical records;

c. charging a flat fee of $75.00 for the cost of "data processing," and/or handling, copying, and shipping pharmacy records, which was far in excess of the actual costs of such services; and/or

d. describing fees in an inherently vague and ambiguous manner as to confuse Plaintiff and Class into believing that they are being charged for important services provided, when they are not.

31. As a direct and proximate result of Defendant's unfair and/or deceptive acts or practices, Plaintiff and Class were damaged.

32. Defendant offered its service of copying Plaintiff's and the Putative Class members' medical records primarily for personal, family or household purposes pursuant to Ky. Rev. Stat. § 367.220.

33. Plaintiff and the class members are consumers within the meaning of the law.

34. Defendant at all times acted intentionally, maliciously, willfully, outrageously and/or knowingly in the statutory overcharging of Plaintiff and Class for the reproduction of medical records in violation of Kentucky's Health Records Law. This conduct reflects a deliberate indifference to Plaintiff and the class members' rights, entitling Plaintiff and the Putative Class to an award of punitive damages.[1]

35. In the event Plaintiff is the prevailing party, Plaintiff also seeks a reasonable attorney's fee and costs as provided under Ky. Rev. Stat. § 367.220(3).

36. Plaintiff and the Class are entitled to equitable relief, including restitutionary disgorgement of monies unfairly, deceptively and/or unlawfully collected by Defendant and an injunction prohibiting Defendants from engaging in the same or similar practices described herein in the future.

COUNT II
FRAUD

37. Plaintiff, individually and on behalf of all others similarly situated, for this Count, alleges the following:

38. Plaintiff repeats, realleges, and incorporates by reference each of the foregoing paragraphs of this Complaint as if fully set forth herein.

39. Defendant has engaged in a common scheme of fraud, through which it intentionally overcharged Plaintiff and Class for reproduction of medical records in violation of Kentucky law.

40. Defendant perpetrated the common scheme of fraud complained of herein by omitting, or failing to disclose to Plaintiff and Class, that it intentionally overcharged Plaintiff

[1] *See* Ky. Rev. Stat. § 367.220(1) ("Nothing in this subsection shall be construed to limit a person's right to seek punitive damages where appropriate.")

and Class for reproduction of medical records in violation of Kentucky law, which allows each patient to receive one free copy of his or her medical record.

41. Defendant knowingly and intentionally overcharged Plaintiff and Class for reproduction of medical records in violation of the Kentucky Consumer Protection Act and/or other applicable Kentucky laws.

42. Plaintiff and the Class are presumed to have justifiably relied on Defendant's omissions and failures to disclose.

43. As a direct and proximate result of Defendant's common scheme of fraud, Plaintiff and Class were damaged.

COUNT III
UNJUST ENRICHMENT

Plaintiff, individually and on behalf of all others similarly situated, for this Count, alleges the following:

44. Plaintiff repeats, realleges, and incorporates by reference each of the foregoing paragraphs of this Complaint as if fully set forth herein.

45. To the detriment of Plaintiff and the Class, Defendant has been, and continues to be, unjustly enriched as a result of their wrongful conduct alleged herein.

46. Plaintiff and the Class conferred a benefit on Defendant when Defendant overcharged Plaintiff and Class for reproduction of medical records in violation of Kentucky law.

47. Defendant unfairly, deceptively, unjustly and/or unlawfully accepted said benefits, which under the circumstances, would be unjust to allow Defendant to retain.

48. Plaintiff and the Class, therefore, seek disgorgement of all wrongfully obtained profits received by Defendant as a result of their inequitable conduct as more fully stated herein.

COUNT IV
VIOLATION OF KY. REV. STAT. § 422-317(1)
KENTUCKY'S HEALTH RECORDS LAW

Plaintiff, individually and on behalf of all others similarly situated, for this Count, alleges the following:

49. Plaintiff repeats, realleges, and incorporates by reference each of the foregoing paragraphs of this Complaint as if fully set forth herein.

50. Under Kentucky's Health Records Law, Ky. Rev. Stat. § 422.317(1), as stated above, a patient is entitled to one free copy of his or her medical record.

51. The provisions of Ky. Rev. Stat. § 422.317(1) apply to hospitals and health care providers, including pharmacies as defined under Ky. Rev. Stat. § 304.17A-005(23), which defines a health care provider as "any facility or service required to be licensed pursuant to KRS Chapter 216B" and any "pharmacist as defined pursuant to KRS Chapter 315."

52. The Kentucky Board of Pharmacy lists Express Scripts as an active licensed pharmacy in Kentucky, holding permit numbers including but not limited to MO617 and MO1530.[2]

53. Defendant, a pharmacy, provided prescription medication services and pharmacy benefit management services to Plaintiff and the Class.

54. Defendant is a custodian of "records" including prescription medication records under the meaning of Ky. Rev. Stat. § 422.317(1).

55. Plaintiff and the Class, by and through its authorized agents, requested in writing with accompanying authorizations copies of their pharmacy records from Defendant.

56. Plaintiff and the Class's requests for records and valid authorization for the

[2] Kentucky Board of Pharmacy, License Verification System Search Results, available at https://secure.kentucky.gov/pharmacy/licenselookup/ (last visited October 6, 2015).

release of records were delivered to the administrator or manager of the Defendant.

57. Defendant would not release records unless Plaintiff and the Class submitted reimbursement in an amount that exceeded the statutorily defined limit.

58. As such, Plaintiff and the Class, by and through their agents, paid $75.00 so that Defendant would release their pharmacy records.

59. Plaintiff's pharmacy medical records should have been free, excluding the cost of certification and/or postage.

60. As alleged herein, Express Scripts did not timely provide Plaintiff with copies of his medical records at the statutorily-allowable charge.

61. As a direct and proximate result of Defendant's violation of Ky. Rev. Stat. § 422.317(1), Plaintiff and Class were damaged.

COUNT V
DECLARATORY JUDGMENT

Plaintiff, individually and on behalf of all others similarly situated, for this Count, alleges the following:

62. Plaintiff repeats, realleges, and incorporates by reference each of the foregoing paragraphs of this Complaint as if fully set forth herein.

63. An actual and justiciable controversy exists between Defendant and Plaintiff and Class.

64. Plaintiff and Class are entitled to a declaration from this Court that Defendant's practice of charging a $75.00 flat fee for producing a copy of their pharmacy records when the handling charge, shipping charge, certification charge, postage, and cost of copies is actually a lesser amount, is unlawful and in violation of applicable Kentucky laws.

PRAYER FOR RELIEF

65. WHEREFORE, Plaintiff, on behalf of himself and the members of the Class, demands judgment as follows:

A. A determination that this action is a proper class action for compensatory, consequential, and statutory damages as alleged herein;

B. For pre-judgment interest from the date of filing this suit;

C. For reasonable attorney's fees and expenses;

D. For exemplary and punitive damages;

E. For all costs of this proceeding;

F. Restitution of all fees paid to Defendant in excess of what the law allows;

G. A preliminary injunction enjoining Defendant and all others, known and unknown, from continuing to take unfair, deceptive, illegal and/or unlawful action as set forth in this Complaint; and

H. Such other and further relief as this Honorable Court finds just and proper under the circumstances.

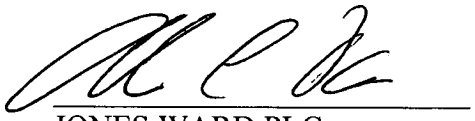
I.

JURY DEMAND

66. WHEREFORE, as to each of the foregoing matters, Plaintiff demands a trial by jury on all issues so triable as a matter of right.

Dated: October 8, 2015

Respectfully submitted,



JONES WARD PLC
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Alex C. Davis
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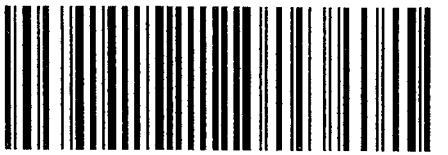
312 South Fourth Street, Sixth Floor
Louisville, Kentucky 40202
P: (502) 882- 6000
F: (502) 587-2007
jasper@jonesward.com
alex@jonesward.com
Attorneys for Plaintiff and the Class

CERTIFIED MAIL

JIM BARKER
CIRCUIT COURT CLERK
ROWAN CIRCUIT & DISTRICT COURTS
ROWAN COUNTY JUDICIAL CENTER
700 WEST MAIN STREET
MOREHEAD, KENTUCKY 40351

CI 15-CI-90250
621309

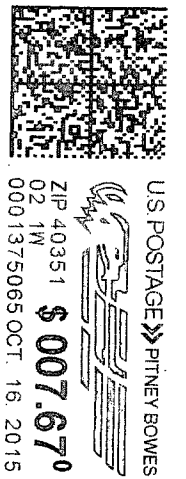
RETURN RECEIPT REQUESTED



7015 1520 0001 5238 6165

RETURN RECEIPT REQUESTED

SERVE: CSC-LAWYERS INCORPORATING SERVICE,
421 W. MAIN ST.
FRANKFORT KY 40601



NO. 15-CI-90250

ROWAN CIRCUIT COURT
DIVISION I
HON. WILLIAM E. LANE

EDWARD P. GEARHART
INDIVIDUALLY AND ON BEHALF OF
ALL OTHERS SIMILARLY SITUATED

PLAINTIFF

v.

PLAINTIFF'S FIRST AMENDED CLASS ACTION COMPLAINT

EXPRESS SCRIPTS, INC.
1 Express Way
St. Louis, MO 63121

DEFENDANT

* * * * * * * *

Plaintiff Edward P. Gearhart, by Counsel, individually and on behalf of all others similarly situated, pursuant to Kentucky Rule Civ. P. 15.01, states the following for his First Amended Class Action Complaint against Defendant Express Scripts Inc. (hereinafter "Express Scripts"):

INTRODUCTION

1. This is a civil action on behalf of Plaintiff and a Class consisting of individual citizens of the Commonwealth of Kentucky who were charged in excess of the statutory limit for a copy of their healthcare provider records from Express Scripts (hereinafter the "Class").

2. Ky. Rev. Stat. § 422.317(1) provides in pertinent part:

> Upon a patient's written request, a hospital licensed under KRS Chapter 216B or a health care provider shall provide, without charge to the patient, a copy of the patient's medical record. A

> copying fee, not to exceed one dollar ($1) per page, may be charged by the health care provider for furnishing a second copy of the patient's medical record upon request either by the patient or the patient's attorney or the patient's authorized representative.

3. Express Scripts charged Plaintiff and members of the proposed Class a flat fee of $75 for "data processing" when they requested and later received a copy of their Express Scripts pharmacy records, and this charge is in violation of Ky. Rev. Stat. § 422.317(1), the Kentucky Consumer Protection Act, Ky. Rev. Stat. § 367.170, et. seq., and Kentucky common law.

PARTIES

4. Plaintiff Edward Gearhart is a citizen of the State of Kentucky, residing on Bearskin Hollow Road in Morehead, which lies in Rowan County, Kentucky.

5. Defendant Express Scripts, Inc., is a Missouri corporation having its principal place of business at 1 Express Way, St. Louis, MO 63121. Defendant does business throughout the United States, including in the Commonwealth of Kentucky, and maintains a registered agent in Kentucky.

6. Plaintiff previously named as a Defendant in this matter a different but related corporate entity, Express Scripts Holding Co., which on information and belief and after conferring with opposing counsel, is believed to not be a proper party to this action.

JURISDICTION AND VENUE

7. This Court has jurisdiction over both the parties and the subject matter of this class action proceeding because a substantial number of the events related to Plaintiff's claims transpired in Rowan County, Kentucky.

8. Rowan Circuit Court is the appropriate venue for this action because the events

giving rise to the Complaint and the damages suffered occurred in this County.

CLASS ACTION ALLEGATIONS

9. This action may be brought and properly maintained as a class action pursuant to the provisions of Kentucky Rule of Civil Procedure 23. Plaintiff brings this action on behalf of himself and a class of all others similarly situated.

10. Plaintiff brings this class action on behalf of the following class:

All individual citizens of the State of Kentucky who were charged in excess of the statutory limit for a copy of their health records from Express Scripts.

11. In accordance with Kentucky Rule of Civil Procedure 23, the Class is so numerous that joinder of all members is impracticable. While the exact number is not known at this time, it is generally ascertainable by appropriate discovery, and it is believed the class includes thousands of members.

12. In accordance with Kentucky Rule of Civil Procedure 23, there are questions of law and fact common to the Class and which predominate over any individual issues. Common questions of law and fact include, without limitation:

a. Whether Defendant owed a duty to the class members under the applicable statutes and law;

b. Whether Defendant violated the Kentucky Consumer Protection Act, Ky. Rev. Stat. § 367.170, et. seq. ("KCPA");

c. Whether Defendant violated Ky. Rev. Stat. § 422.317(1), by charging a flat fee for medical records that should have been free;

d. Whether Defendant committed fraud by its violation of the Kentucky Consumer Protection Act, Kentucky's medical records law, and/or other applicable Kentucky laws;

e. Whether Defendant violated the above Kentucky laws by charging a flat fee of $75.00 for the cost of handling, copying, and shipping pharmacy records;

f. Whether Defendant violated the above Kentucky laws by describing fees in an inherently vague and ambiguous manner as to confuse Plaintiff and Class into believing that they are being charged for important services provided, when they are not;

g. Whether Defendant was unjustly enriched by overcharging for medical records;

h. Whether Plaintiff is entitled to declaratory judgment to prevent Defendant from overcharging for medical records in the future;

i. Whether the Class is entitled to notice as to the statutory overcharges;

j. The policies and procedures developed by the Defendant regarding the retrieval and reproduction of medical records requested by Putative Class Plaintiffs;

k. Defendant's vicarious liability for the actions of its employees;

l. The legal relationships among the Defendant; and/or

m. The extent of damages caused by Defendants' willful violations.

13. Plaintiff's claims are typical of the Class. As with members of the Class, Plaintiff was unfairly, deceptively and/or unlawfully overcharged for the retrieval and reproduction of medical records in violation of state statute. Plaintiff's interests coincide with, and are not antagonistic to, those of the other class members.

14. In accordance with Kentucky Rule of Civil Procedure 23, Plaintiff will fairly and adequately represent and protect the interests of the Class.

15. Plaintiff has retained counsel experienced in the prosecution of class action litigation and counsel will adequately represent the interests of the Class.

16. Plaintiff and his counsel are aware of no conflicts of interests between Plaintiff and absent Class members or otherwise;

17. Plaintiff has or can acquire adequate financial resources to assure that the interests of the Class will not be harmed; and

18. Plaintiff is knowledgeable concerning the subject matter of this action and will assist counsel to vigorously prosecute this litigation.

19. In accordance with Kentucky Rule of Civil Procedure 23, the class litigation is an appropriate method for fair and efficient adjudication of the claims involved. Class action treatment is superior to all other available methods for the fair and efficient adjudication of the controversy alleged herein; it will permit a large number of individual citizens of the State of Kentucky to prosecute their common claims in a single forum simultaneously, efficiently, and without the unnecessary duplication of evidence, effort and expense that numerous individual actions would require. Class action treatment will also permit the adjudication of relatively small claims by certain class members, who could not individually afford to litigate a complex claim against a large corporate defendant. Further, even for those class members who could afford to litigate such a claim, it would still be economically impractical, as the cost of litigation is almost certain to exceed any recovery they would obtain.

20. Plaintiff is unaware of any difficulty likely to be encountered in the management of this case that would preclude its maintenance as a class action.

STATEMENT OF FACTS

21. Plaintiff Edward P. Gearhart requested his medical records, through his agent Jones Ward PLC, from defendant Express Scripts, and was charged by Express Scripts and paid a $75.00 flat fee for five (5) pages of his medical records on or about May 12, 2014, which was

in excess of what he should have been charged at the time pursuant to Ky. Rev. Stat. § 422.317(1), and in excess of the cost of the handling, cost of copies, and actual shipping.

22. Express Scripts is one of the largest corporations in the United States, with more than $100 billion in annual revenue. It offers pharmacy benefit management services through a network of retail pharmacies, and also provides home-delivery pharmacy services to patients.

23. The five pages of medical records received by Plaintiff through his agent reflect a mix of both retail pharmacy prescriptions and prescriptions directly filled by Express Scripts.

24. The cost of Plaintiff's Express Scripts medical records was deducted from a partial settlement of his claims in a products liability lawsuit that remains pending in federal court, and that may require additional medical records from Express Scripts and other sources before its final resolution.

25. Express Scripts refuses to comply with Ky. Rev. Stat. § 422.317(1), claiming it is not a health care provider, but instead a "pharmacy benefit management company." Express Scripts claim that its $75.00 fee is for "data processing" and not for shipping.

26. Although Plaintiff, through his agent, paid the data processing fee to Express Scripts, the payment was not voluntary because Express Scripts did not offer to waive or discount the fee if certain conditions were met.

COUNT I
VIOLATION OF KY. REV. STAT. § 422.317(1)
THE KENTUCKY CONSUMER PROTECTION ACT

Plaintiff, individually and on behalf of all others similarly situated, for this Count, alleges the following:

27. Plaintiff repeats, realleges, and incorporates by reference each of the foregoing paragraphs of this Complaint as if fully set forth herein.

28. This Count is a class action claim brought pursuant to the Kentucky Consumer Protection Act, Ky. Rev. Stat. § 367.170, et. seq. ("KCPA").

29. Pursuant to Ky. Rev. Stat. § 367.170(1), the KCPA provides that "(u)nfair, false, misleading, or deceptive acts or practices in the conduct of any trade or commerce are hereby declared unlawful."

30. Privity existed between Plaintiff and Defendant, and between Class members and Defendant.

31. In connection with production of medical records to Plaintiff and Class, Defendant, through its employees, agents and representatives, violated KCPA by engaging in the following unfair or deceptive acts or practices:

a. overcharging for reproduction of medical records in violation of Kentucky's Health Records Law;

b. failing to disclose that Kentucky allows residents to obtain one free copy of their medical records;

c. charging a flat fee of $75.00 for the cost of "data processing," and/or handling, copying, and shipping pharmacy records, which was far in excess of the actual costs of such services; and/or

d. describing fees in an inherently vague and ambiguous manner as to confuse Plaintiff and Class into believing that they are being charged for important services provided, when they are not.

32. As a direct and proximate result of Defendant's unfair and/or deceptive acts or practices, Plaintiff and Class were damaged.

33. Defendant offered its service of copying Plaintiff's and the Putative Class members' medical records primarily for personal, family or household purposes pursuant to Ky. Rev. Stat. § 367.220.

34. Plaintiff and the class members are consumers within the meaning of the law.

35. Defendant at all times acted intentionally, maliciously, willfully, outrageously and/or knowingly in the statutory overcharging of Plaintiff and Class for the reproduction of medical records in violation of Kentucky's Health Records Law. This conduct reflects a deliberate indifference to Plaintiff and the class members' rights, entitling Plaintiff and the Putative Class to an award of punitive damages.[1]

36. In the event Plaintiff is the prevailing party, Plaintiff also seeks a reasonable attorney's fee and costs as provided under Ky. Rev. Stat. § 367.220(3).

37. Plaintiff and the Class are entitled to equitable relief, including restitutionary disgorgement of monies unfairly, deceptively and/or unlawfully collected by Defendant and an injunction prohibiting Defendants from engaging in the same or similar practices described herein in the future.

COUNT II
FRAUD

38. Plaintiff, individually and on behalf of all others similarly situated, for this Count, alleges the following:

39. Plaintiff repeats, realleges, and incorporates by reference each of the foregoing paragraphs of this Complaint as if fully set forth herein.

40. Defendant has engaged in a common scheme of fraud, through which it intentionally overcharged Plaintiff and Class for reproduction of medical records in violation of

[1] *See* Ky. Rev. Stat. § 367.220(1) ("Nothing in this subsection shall be construed to limit a person's right to seek punitive damages where appropriate.")

Kentucky law.

41. Defendant perpetrated the common scheme of fraud complained of herein by omitting, or failing to disclose to Plaintiff and Class, that it intentionally overcharged Plaintiff and Class for reproduction of medical records in violation of Kentucky law, which allows each patient to receive one free copy of his or her medical record.

42. Defendant knowingly and intentionally overcharged Plaintiff and Class for reproduction of medical records in violation of the Kentucky Consumer Protection Act and/or other applicable Kentucky laws.

43. Plaintiff and the Class are presumed to have justifiably relied on Defendant's omissions and failures to disclose.

44. As a direct and proximate result of Defendant's common scheme of fraud, Plaintiff and Class were damaged.

COUNT III
UNJUST ENRICHMENT

Plaintiff, individually and on behalf of all others similarly situated, for this Count, alleges the following:

45. Plaintiff repeats, realleges, and incorporates by reference each of the foregoing paragraphs of this Complaint as if fully set forth herein.

46. To the detriment of Plaintiff and the Class, Defendant has been, and continues to be, unjustly enriched as a result of their wrongful conduct alleged herein.

47. Plaintiff and the Class conferred a benefit on Defendant when Defendant overcharged Plaintiff and Class for reproduction of medical records in violation of Kentucky law.

48. Defendant unfairly, deceptively, unjustly and/or unlawfully accepted said

benefits, which under the circumstances, would be unjust to allow Defendant to retain.

49. Plaintiff and the Class, therefore, seek disgorgement of all wrongfully obtained profits received by Defendant as a result of their inequitable conduct as more fully stated herein.

COUNT IV
VIOLATION OF KY. REV. STAT. § 422-317(1)
KENTUCKY'S HEALTH RECORDS LAW

Plaintiff, individually and on behalf of all others similarly situated, for this Count, alleges the following:

50. Plaintiff repeats, realleges, and incorporates by reference each of the foregoing paragraphs of this Complaint as if fully set forth herein.

51. Under Kentucky's Health Records Law, Ky. Rev. Stat. § 422.317(1), as stated above, a patient is entitled to one free copy of his or her medical record.

52. The provisions of Ky. Rev. Stat. § 422.317(1) apply to hospitals and health care providers, including pharmacies as defined under Ky. Rev. Stat. § 304.17A-005(23), which defines a health care provider as "any facility or service required to be licensed pursuant to KRS Chapter 216B" and any "pharmacist as defined pursuant to KRS Chapter 315."

53. The Kentucky Board of Pharmacy lists Express Scripts as an active licensed pharmacy in Kentucky, holding permit numbers including but not limited to MO617 and MO1530.[2]

54. Defendant, a pharmacy, provided prescription medication services and pharmacy benefit management services to Plaintiff and the Class.

55. Defendant is a custodian of "records" including prescription medication records under the meaning of Ky. Rev. Stat. § 422.317(1).

[2] Kentucky Board of Pharmacy, License Verification System Search Results, available at https://secure.kentucky.gov/pharmacy/licenselookup/ (last visited October 6, 2015).

56. Plaintiff and the Class, by and through its authorized agents, requested in writing with accompanying authorizations copies of their pharmacy records from Defendant.

57. Plaintiff and the Class's requests for records and valid authorization for the release of records were delivered to the administrator or manager of the Defendant.

58. Defendant would not release records unless Plaintiff and the Class submitted reimbursement in an amount that exceeded the statutorily defined limit.

59. As such, Plaintiff and the Class, by and through their agents, paid $75.00 so that Defendant would release their pharmacy records.

60. Plaintiff's pharmacy medical records should have been free, excluding the cost of certification and/or postage.

61. As alleged herein, Express Scripts did not timely provide Plaintiff with copies of his medical records at the statutorily-allowable charge.

62. As a direct and proximate result of Defendant's violation of Ky. Rev. Stat. § 422.317(1), Plaintiff and Class were damaged.

COUNT V
DECLARATORY JUDGMENT

Plaintiff, individually and on behalf of all others similarly situated, for this Count, alleges the following:

63. Plaintiff repeats, realleges, and incorporates by reference each of the foregoing paragraphs of this Complaint as if fully set forth herein.

64. An actual and justiciable controversy exists between Defendant and Plaintiff and Class.

65. Plaintiff and Class are entitled to a declaration from this Court that Defendant's practice of charging a $75.00 flat fee for producing a copy of their pharmacy records when the

handling charge, shipping charge, certification charge, postage, and cost of copies is actually a lesser amount, is unlawful and in violation of applicable Kentucky laws.

PRAYER FOR RELIEF

66. WHEREFORE, Plaintiff, on behalf of himself and the members of the Class, demands judgment as follows:

A. A determination that this action is a proper class action for compensatory, consequential, and statutory damages as alleged herein;

B. For pre-judgment interest from the date of filing this suit;

C. For reasonable attorney's fees and expenses;

D. For exemplary and punitive damages;

E. For all costs of this proceeding;

F. Restitution of all fees paid to Defendant in excess of what the law allows;

G. A preliminary injunction enjoining Defendant and all others, known and unknown, from continuing to take unfair, deceptive, illegal and/or unlawful action as set forth in this Complaint; and

H. Such other and further relief as this Honorable Court finds just and proper under the circumstances.

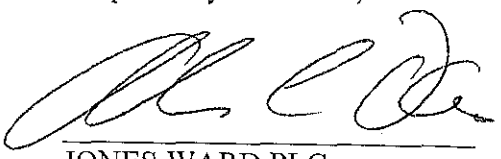
I.

JURY DEMAND

67. WHEREFORE, as to each of the foregoing matters, Plaintiff demands a trial by jury on all issues so triable as a matter of right.

Dated: November 12, 2015

Respectfully submitted,



JONES WARD PLC
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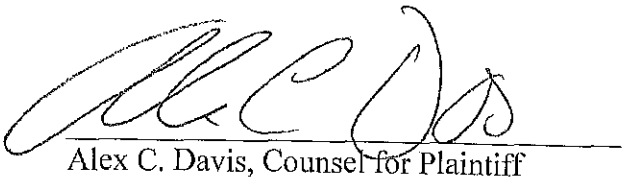
312 South Fourth Street, Sixth Floor
Louisville, Kentucky 40202
P: (502) 882- 6000
F: (502) 587-2007
jasper@jonesward.com
alex@jonesward.com
Attorneys for Plaintiff and the Class

CERTIFICATE OF SERVICE

It is hereby certified that on the 13th day of November 2014, a true copy of the above was served via electronic mail and/or facsimile to the following:

Britt K. Latham
Bass, Berry & Sims PLC
150 Third Ave. South, Suite 2800
Nashville, TN 37201
Counsel for Defendant Express Scripts, Inc.



Alex C. Davis, Counsel for Plaintiff

COMMMONWEALTH OF KENTUCKY
ROWAN CIRCUIT COURT
CIVIL BRANCH
DIVISION ONE
NO. 15-CI-90250

EDWARD P. GEARHART PLAINTIFF

v. **MOTION TO ADMIT COUNSEL, *PRO HAC VICE***

EXPRESS SCRIPTS HOLDING CO. DEFENDANT

* * * * * * * *

Comes Defendant, by and through counsel, and hereby moves for the admission, *pro hac vice,* of Britt Latham and Alison K. Grippo of the law firm Bass Berry & Sims, 150 Third Avenue South, Suite 2800, Nashville, Tennessee 37201.

Mr. Latham is a member in good standing of the bar of the States of Tennessee and Texas (inactive) and has been admitted to practice before the following Courts: all Courts in the State of Tennessee; United States District Court for the Eastern, Middle and Western Districts of Tennessee; United States District Court for the Northern, Southern, Eastern and Western Districts of Texas; United States Court of Appeals for the Fifth and Sixth Circuits; and the United States Supreme Court. Mr. Latham hereby submits to the jurisdiction and rules of the Kentucky Supreme Court governing professional conduct if this Motion is granted as evidenced by the Affidavit and the Certification from the Kentucky Bar Association, attached hereto collectively as Exhibit "A".

Ms. Grippo is a member in good standing of the bar of the States of Tennessee and Georgia and has been admitted to practice before the following Courts: all Courts in the States of Tennessee and Georgia; United States District Court for the Middle District of Tennessee; and the United States District Court for the Northern District of Georgia. Ms. Grippo hereby submits

to the jurisdiction and rules of the Kentucky Supreme Court governing professional conduct if this Motion is granted as evidenced by the Affidavit and the Certification from the Kentucky Bar Association, attached hereto collectively as Exhibit "A".

Respectfully submitted,

McBRAYER, McGINNIS, LESLIE
& KIRKLAND, PLLC
201 East Main Street, Suite 900
Lexington, Kentucky 40507
(859) 231-8780

BY: _____
WILLIAM T. FORESTER
ATTORNEYS FOR DEFENDANT

NOTICE

This matter shall come on for hearing on **Friday, the 18th day of December, 2015 at the hour of 9:00 a.m.,** or as soon thereafter as counsel may be heard in the Rowan Circuit Court.

CERTIFICATE OF SERVICE

I hereby certify that a true and accurate copy of the foregoing was served this 25th day of November, 2015, upon the following via U.S. Mail:

Hon. Alex C. Davis
Jones Ward PLC
Marion E. Taylor Building
312 South Fourth Street, 6TH Floor
Louisville, Kentucky 40202

Hon. Britt Latham
Hon. Alison Grippo
Bass Berry & Sims
150 Third Avenue, Suite 2800
Nashville, Tennessee 37201

Judge William E. Lane
Rowan Circuit Court
Courthouse Annex
44 West Main Street
Mt. Sterling, Kentucky 40353

_____
ATTORNEYS FOR DEFENDANT

KENTUCKY BAR ASSOCIATION

514 WEST MAIN STREET
FRANKFORT, KENTUCKY 40601-1812
(502) 564-3795
FAX (502) 564-3225
www.kybar.org

KENTUCKY BAR ASSOCIATION
OUT-OF-STATE CERTIFICATION FORM

COURT Rowan County Circuit Court, Division 1 **CASE NO.** 15-CI-90250

SCR 3.030 Membership, practice by nonmembers and classes of membership

(2) A person admitted to practice in another state, but not in this state, shall be permitted to practice a case in this state only if that attorney subjects himself or herself to the jurisdiction and rules of the court governing professional conduct, pays a per case fee of $270.00 to the Kentucky Bar Association and engages a member of the association as co-counsel, whose presence shall be necessary at all trials and at other times when required by the court. No motion for permission to practice in any state court in this jurisdiction shall be granted without submission to the admitting court of a certification from the Kentucky Bar Association of receipt of this fee.

The Kentucky Bar Association certifies that Britt Latham has paid the per case fee of $270.00 in the above referenced case as required in SCR 3.030(2).

Michele M Pogrotsky

Michele M. Pogrotsky, Deputy Registrar

COMMONWEALTH OF KENTUCKY
ROWAN CIRCUIT COURT
CIVIL BRANCH
NO. 15-CI-90250

EDWARD P. GEARHART PLAINTIFF

v. **AFFIDAVIT**

EXPRESS SCRIPTS HOLDING CO. DEFENDANT

* * * * *

Comes Britt K. Latham, and having been duly sworn, states as follows:

1. I am a member with the law firm of Bass Berry & Sims, 150 Third Avenue, Suite 2800, Nashville, Tennessee 37201 and have been retained as counsel for the Defendant in the above-captioned matter, together with co-counsel, William T. Forester, who practices in the Lexington, Kentucky office of McBrayer, McGinnis, Leslie & Kirkland, PLLC.

2. I am a member in good standing of the bar of the State of Tennessee and Texas (inactive) and wish to be admitted *pro hac vice* in this matter in order to represent the Defendant herein. I am admitted to practice before all Courts of the State of Tennessee; United States District Court for the Eastern, Middle and Western Districts of Tennessee; United States District Court for the Northern, Southern, Eastern and Western Districts of Texas, United States Court of Appeals for the Fifth and Sixth Circuits and the United States Supreme Court.

3. I hereby submit to the jurisdiction and rules of the Kentucky Supreme Court governing professional conduct.

4. I have paid the required fee of $270 to the Kentucky Bar Association, receipt of which was acknowledged by the certificate attached hereto.

Further the Affiant sayeth naught.

BRTT K. LATHAM

STATE OF TENNESSEE)
)
COUNTY OF Davidson)

Subscribed, sworn and acknowledged to before me by Britt K. Latham, on this the 24th day of November, 2015.

NOTARY PUBLIC, STATE OF TENNESSEE

My Commission Expires: 1/11/2017

NOTARY PUBLIC AT LARGE
DAVIDSON COUNTY, TENNESSEE

15520295.2

KENTUCKY BAR ASSOCIATION

514 WEST MAIN STREET
FRANKFORT, KENTUCKY 40601-1812
(502) 564-3795
FAX (502) 564-3225
www.kybar.org

KENTUCKY BAR ASSOCIATION
OUT-OF-STATE CERTIFICATION FORM

COURT Rowan County Circuit Court, Division 1 **CASE NO.** 15-CI-90250

SCR 3.030 Membership, practice by nonmembers and classes of membership

(2) A person admitted to practice in another state, but not in this state, shall be permitted to practice a case in this state only if that attorney subjects himself or herself to the jurisdiction and rules of the court governing professional conduct, pays a per case fee of $270.00 to the Kentucky Bar Association and engages a member of the association as co-counsel, whose presence shall be necessary at all trials and at other times when required by the court. No motion for permission to practice in any state court in this jurisdiction shall be granted without submission to the admitting court of a certification from the Kentucky Bar Association of receipt of this fee.

The Kentucky Bar Association certifies that Alison Grippo has paid the per case fee of $270.00 in the above referenced case as required in SCR 3.030(2).

Michele Pogrotsky

Michele M. Pogrotsky, Deputy Registrar

COMMONWEALTH OF KENTUCKY
ROWAN CIRCUIT COURT
CIVIL BRANCH
NO. 15-CI-90250

EDWARD P. GEARHART — PLAINTIFF

v. **AFFIDAVIT**

EXPRESS SCRIPTS HOLDING CO. — DEFENDANT

* * * * *

Comes Alison K. Grippo, and having been duly sworn, states as follows:

1. I am an associate with the law firm of Bass Berry & Sims, 150 Third Avenue, Suite 2800, Nashville, Tennessee 37201 and have been retained as counsel for the Defendant in the above-captioned matter, together with co-counsel, William T. Forester, who practices in the Lexington, Kentucky office of McBrayer, McGinnis, Leslie & Kirkland, PLLC.

2. I am a member in good standing of the bar of the States of Tennessee and Georgia and wish to be admitted *pro hac vice* in this matter in order to represent the Defendant herein. I am admitted to practice before all Courts in the States of Tennessee and Georgia, United States District Court for the Middle District of Tennessee and the United States District Court for the Northern District of Georgia.

3. I hereby submit to the jurisdiction and rules of the Kentucky Supreme Court governing professional conduct.

4. I have paid the required fee of $270 to the Kentucky Bar Association, receipt of which was acknowledged by the certificate attached hereto.

Further the Affiant sayeth naught.

ALISON K. GRIPPO

STATE OF TENNESSEE)
)
COUNTY OF Davidson)

Subscribed, sworn and acknowledged to before me by Alison K. Grippo on this the 24th day of November, 2015.

Christina Baker
NOTARY PUBLIC, STATE OF TENNESSEE
My Commission Expires: Dec 6, 2016

CHRISTINA BAKER
STATE OF TENNESSEE NOTARY PUBLIC
DAVIDSON COUNTY

15520294.2

COMMONWEALTH OF KENTUCKY
ROWAN CIRCUIT COURT
CIVIL BRANCH
NO. 15-CI-90250

EDWARD P. GEARHART, INDIVIDUALLY AND ON BEHALF OF ALL OTHERS SIMILARLY SITUATED — **PLAINTIFF**

v.

AGREED STIPULATION AND ORDER

EXPRESS SCRIPTS, INC. — **DEFENDANT**

* * * * *

Now come the Plaintiff, Edward P. Gearhart ("Plaintiff"), by counsel, Alex C. Davis, and the Defendant, Express Scripts, Inc. ("Express Scripts"), by counsel, William T. Forester, making a special appearance solely for the purpose of entering the Agreed Stipulation and Order, and hereby state as follows:

Plaintiff filed his Amended Complaint on November 16, 2016. Counsel for Express Scripts agreed to accept service of the Amended Complaint on November 16, 2016, in exchange for the extension of time to respond set forth herein. Based on the discussions by and between counsel for Plaintiff and counsel for Express Scripts, IT IS HEREBY STIPULATED AND AGREED THAT:

1. The deadline for Defendant Express Scripts to answer, move to dismiss or otherwise respond to the Amended Complaint shall be January 29, 2016;

2. Should a motion to dismiss be filed in response to the Amended Complaint, any opposition to the motion by Plaintiff shall be filed on or before February 29, 2016; and

3. Any reply in support of a motion to dismiss shall be filed on or before March 21, 2016.

HON. WILLIAM E. LANE
JUDGE, ROWAN CIRCUIT COURT

HAVE SEEN; AGREED:

McBRAYER, McGINNIS, LESLIE
& KIRKLAND, PLLC
201 East Main Street, Suite 900
Lexington, Kentucky 40507
(859) 231-8780

BY: _____
WILLIAM T. FORESTER
ATTORNEYS FOR DEFENDANT

JONES WARD PLC
Marion E. Taylor Building
312 South Fourth Street, 6TH Floor
Louisville, Kentucky 40202
(502) 882-6000

BY: Alex C. Davis by WTF with permission
ALEX C. DAVIS
ATTORNEYS FOR PLAINTIFF

CLERK'S CERTIFICATE OF SERVICE

I hereby certify that on this the 1st day of December, 2015, a true and correct copy of the foregoing has been sent via U.S. Mail, postage prepaid to:

Hon. William T. Forester
McBRAYER, McGINNIS, LESLIE
& KIRKLAND, PLLC
201 East Main Street, Suite 900
Lexington, Kentucky 40507

Hon. Alex C. Davis
JONES WARD PLC
Marion E. Taylor Building
312 South Fourth Street, 6TH Floor
Louisville, Kentucky 40202

Judge William E. Lane
Rowan Circuit Court
Courthouse Annex
44 West Main Street
Mt. Sterling, Kentucky 40353

S. Wenk, D.C.
ROWAN CIRCUIT CLERK

COMMONWEALTH OF KENTUCKY
ROWAN CIRCUIT COURT
CIVIL BRANCH
NO. 15-CI-90250

EDWARD P. GEARHART **PLAINTIFF**

v. **ORDER TO ADMIT COUNSEL, *PRO HAC VICE***

EXPRESS SCRIPTS HOLDING CO. **DEFENDANT**

* * * * *

This cause having come before the Court on motion of Defendant for the admission, *pro hac vice* of Hon. Britt Latham and Hon. Alison K. Grippo of the law firm Bass Berry & Sims, 150 Third Avenue South, Suite 2800, Nashville, Tennessee 37201 to represent the Defendant in this matter as co-counsel; the Court having considered the motion and being otherwise sufficiently advised; **IT IS HEREBY ORDERED AND ADJUDGED** that said motion be and the same hereby is **sustained** and Hon. Britt K. Latham and Hon. Alison K. Grippo are hereby admitted to practice as co-counsel for Defendant herein, *pro hac vice.*

JUDGE WILLIAM E. LANE
ROWAN CIRCUIT COURT

HAVE SEEN:

McBRAYER, McGINNIS, LESLIE
& KIRKLAND, PLLC
201 East Main Street, Suite 900
Lexington, Kentucky 40507
(859) 231-8780

BY:
WILLIAM T. FORESTER
ATTORNEYS FOR DEFENDANT

JONES WARD PLC
Marion E. Taylor Building
312 South Fourth Street, 6TH Floor
Louisville, Kentucky 40202
(502) 882-6000

BY: _____
ALEX C. DAVIS
ATTORNEYS FOR PLAINTIFF

CLERK'S CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of the above and foregoing document has been served on the following, via U.S. mail, postage pre-paid, on this 14th day of December, 2015:

Hon. William T. Forester
McBrayer, McGinnis, Leslie
& Kirkland, PLLC
201 East Main Street, Suite 900
Lexington, Kentucky 40507

Hon. Alex C. Davis
JONES WARD PLC
Marion E. Taylor Building
312 South Fourth Street, 6TH Floor
Louisville, Kentucky 40202

Judge William E. Lane
Rowan Circuit Court
Courthouse Annex
44 West Main Street
Mt. Sterling, Kentucky 40353

Hon. Britt Latham
Hon. Alison Grippo
Bass Berry & Sims
150 Third Avenue, Suite 2800
Nashville, Tennessee 37201

S. [illegible], D.C.
ROWAN CIRCUIT CLERK

COMMONWEALTH OF KENTUCKY
ROWAN CIRCUIT COURT
CIVIL BRANCH
DIVISION ONE
NO. 15-CI-90250

Electronically filed

EDWARD P. GEARHART PLAINTIFF

v. **EXPRESS SCRIPTS, INC.'S MOTION TO DISMISS**

EXPRESS SCRIPTS, INC. DEFENDANT

* * * * * * * *

Defendant Express Scripts, Inc. (hereinafter "Express Scripts"), pursuant to Kentucky Rules of Civil Procedure 9.02 and 12.02, moves this Court to dismiss Plaintiff's First Amended Class Action Complaint (the "Complaint") for failure to state a claim upon which relief can be granted.

As grounds for this motion, Express Scripts states that Plaintiff is not entitled to relief under any state of facts which could be proved in support of his claims. Specifically, Plaintiff's claims fail for at least six independent reasons:

1. KRS § 422.317 (Kentucky's "Medical Records Statute"), which serves as the basis for all of Plaintiff's claims, does not apply to Express Scripts because Express Scripts is not a "health care provider" within the meaning of the Medical Records Statute and does not maintain "medical records" within the meaning of the Medical Records Statute;

2. Plaintiff has no private right of action under Kentucky's Medical Records Statute;

3. Plaintiff has no private right of action under the Kentucky Consumer Protection Act;

4. The Complaint fails to sufficiently allege fraud because it does not satisfy the specificity requirements of Rule 9.02, and Express Scripts did not owe a duty of disclosure to Plaintiff;

5. The voluntary payment doctrine bars Plaintiff's claims; and

6. Plaintiff lacks standing to sue Express Scripts.

For the foregoing reasons, and as more fully explained in the memorandum filed contemporaneously herewith, Express Scripts respectfully requests that this Court grant its Motion to Dismiss the Complaint, with prejudice and without leave to amend, and for any further relief deemed appropriate.

Respectfully submitted,

Hon. Britt K. Latham
Hon. Alison K. Grippo
BASS, BERRY & SIMS, PLC
150 Third Avenue South, Suite 2800
Nashville, Tennessee 37201
(615) 742-6200

and

McBRAYER, McGINNIS, LESLIE
& KIRKLAND, PLLC
201 East Main Street, Suite 900
Lexington, Kentucky 40507
(859) 231-8780

BY: */s/ William T. Forester*
WILLIAM T. FORESTER
ATTORNEYS FOR DEFENDANT

CERTIFICATE OF SERVICE

I hereby certify that a true and accurate copy of the foregoing was served this the 29th day of January, 2016, upon the following via electronic mail and/or U.S. Mail:

Hon. Alex C. Davis
Jones Ward PLC
Marion E. Taylor Building
312 South Fourth Street, 6TH Floor
Louisville, Kentucky 40202

Judge William E. Lane
Rowan Circuit Court
Courthouse Annex
44 West Main Street
Mt. Sterling, Kentucky 40353

/s/ William T. Forester
ATTORNEY FOR DEFENDANT

Filed 15-CI-90250 01/29/2016 Jim Barker, Rowan Circuit Clerk

COMMONWEALTH OF KENTUCKY
ROWAN CIRCUIT COURT
CIVIL BRANCH
DIVISION ONE
NO. 15-CI-90250

Electronically filed

EDWARD P. GEARHART PLAINTIFF

v.

MEMORANDUM IN SUPPORT OF EXPRESS SCRIPTS INC.'S MOTION TO DISMISS

EXPRESS SCRIPTS, INC. DEFENDANT

* * * * * * * *

Defendant Express Scripts, Inc. ("Express Scripts") respectfully submits this memorandum in support of its Motion to Dismiss. Under Kentucky Rules of Civil Procedure 9.02 and 12.02, Plaintiff's First Amended Class Action Complaint (the "Complaint") should be dismissed as a matter of law because it fails to state a claim upon which relief can be granted.

This case attempts to fit a square peg in a round hole. Plaintiff's claims are premised on Kentucky's Medical Records Statute that requires hospitals and other health care providers to provide patients with one free copy of their medical records. However, defendant Express Scripts is a pharmacy benefit manager—*not a health care provider*—and it maintains prescription claims data for various pharmacies—*not patient medical records*. The Medical Records Statute exists to limit the cost of ongoing health care treatment and allow patients to change providers. By contrast, the prescription claims data at issue in this case was requested and voluntarily paid for by Plaintiff's law firm for use in a products liability lawsuit, not the continuance of medical care. This dispute is about expenses related to litigation, not health care. Simply put, the conduct attributed to Express Scripts in the Complaint does not fit within the scope of the Medical Records Statute that serves as the foundation for all of Plaintiff's claims.

As a matter of law, the Complaint is deficient for the following reasons, explained more fully herein:

1. The Medical Records Statute does not apply to Express Scripts;
2. Plaintiff has no private right of action under Kentucky's Medical Records Statute or the Kentucky Consumer Protection Act;
3. Plaintiff fails to sufficiently allege fraud;
4. The voluntary payment doctrine bars Plaintiff's claims; and
5. Plaintiff lacks standing to sue Express Scripts.

Accordingly, the Court should dismiss all of Plaintiff's claims with prejudice.

I. Factual Background

A. Express Scripts' Role as a Pharmacy Benefit Manager

As Plaintiff notes in the Complaint, Express Scripts is a "pharmacy benefit management company." *See* Compl. ¶ 24. A pharmacy benefit manager is a third-party administrator of prescription drug programs that acts as an intermediary between retail pharmacies and health benefits providers. *See id.* ¶ 21; Express Scripts, Inc., Annual Report (Form 10-K), at 1-2 (Feb. 22, 2012)[1], excerpt attached as Exhibit A.[2] Express Scripts offers a range of management services, such as pharmacy claims processing, to improve the cost-effectiveness of prescription drug

[1] The most recent Form 10-K for Express Scripts was filed with the United States Securities and Exchange Commission in 2012. Express Scripts became a wholly-owned subsidiary of Express Scripts Holding Company in 2012 and no longer reports a separate Form 10-K.

[2] Pursuant to Kentucky Rule of Evidence 201, the Court may take judicial notice of the Form 10-K filed by Express Scripts with the United States Securities and Exchange Commission because it is publicly available (http://phx.corporate-ir.net/phoenix.zhtml?c=69641&p=irol-SECText&TEXT=aHR0cDovL2FwaS50ZW5rd2l6YXJkLmNvbS9maWxpbmcueG1sP2lwYWdlPTgwODU3MzkmRFNFUT0wJlNFUT0wJlNRREVTQz1TRUNUSU9OX0VOVElSRSZzdWJzaWQ9NTc%3d) and the description of its services in the 10-K is "not subject to reasonable dispute." *See* Ky. R. Evid. 201. Kentucky federal courts and the Sixth Circuit have considered the contents of Form 10-Ks at the motion to dismiss stage under the virtually identical Federal Rule of Evidence 201. *See, e.g. Ashland Inc. v. Oppenheimer & Co.*, 689 F. Supp. 2d 874, 881 (E.D. Ky. 2010), *aff'd*, 648 F.3d 461 (6th Cir. 2011); *In re Omnicare, Inc. Sec. Litig.*, 769 F.3d 455, 466 (6th Cir. 2014); *Bovee v. Coopers & Lybrand C.P.A.*, 272 F.3d 356, 360-61 (6th Cir. 2001).

benefits provided by its clients, which include managed care organizations, health insurers, third-party administrators, employers, union-sponsored benefit plans, workers' compensation plans and government health programs. *See* Ex. A at 2-6. For example, Express Scripts "negotiate[s] with pharmacies to discount the price at which they will provide drugs to members and manage[s] national and regional networks that are responsive to client preferences related to cost containment..." *Id.* at 2. While Express Scripts contracts with pharmacies and establishes networks of pharmacies for the benefit of its clients, Express Scripts *does not* provide health care services to individuals.[3] *See id.* Instead, Express Scripts helps health benefit plans and health care providers better serve their members and patients by maximizing pharmaceutical benefits. *See id.*

B. Plaintiff's Law Firm Requested Pharmacy Claims Data

The present case is not the first class action lawsuit filed by Plaintiff's law firm ("Jones Ward") on his behalf. *See Compl.* ¶ 23. Jones Ward represented Plaintiff in a products liability class action pending in federal court. *See id.* In fact, this case stems from Plaintiff's participation in that class action. *See id.* In that representation and to pursue a recovery in that action, Jones Ward desired access to Plaintiff's prescription claims data. *See id.* ¶¶ 20, 23.

In May 2014, Jones Ward requested a copy of Plaintiff's prescription claims data from Express Scripts in its capacity as the pharmacy benefit manager for Plaintiff's health plan. *See id.* ¶¶ 20-22. In exchange for a $75 fee, Express Scripts compiled information from its database of claims it maintains for a "network of retail pharmacies" and provided Plaintiff's agent with a comprehensive report listing Plaintiff's various prescription claims. *See id.* This report included Plaintiff's claims for prescriptions filled for Plaintiff from a variety of retail pharmacies and

[3] ESI Mail Pharmacy Service, Inc. and Express Scripts Specialty Distribution Services, Inc., subsidiaries of Express Scripts, operate mail order pharmacies. The Complaint does not mention either of these entities, and none of their actions are at issue in this case.

specialty pharmacies. *See id.* at ¶ 22. Jones Ward, understanding that Express Scripts charged $75 for "data processing" related to preparation of the report, paid the fee. *See id.* ¶¶ 20, 24. Plaintiff did not pay Express Scripts or Jones Ward for this log of prescription pharmacy claims. *See id.* ¶¶ 20, 23.

Nearly one year later, in April 2015, Plaintiff's claims in the products liability case were dismissed with prejudice pursuant to a settlement agreement. *In re: Depuy Orthopaedics, Inc. ASR Hip Implant Products Liability Litigation*, MDL Docket No. 1:10 md 2197, Order of Dismissal with Prejudice (N.D. Ohio April 22, 2015), attached as Exhibit B. After the settlement, Jones Ward, using Mr. Gearhart as the plaintiff, initiated the present putative class action lawsuit asserting various claims against Express Scripts based on an alleged violation of the inapplicable Medical Records Statute.

II. Legal Standard for Dismissal

Under Kentucky Rule of Civil Procedure 12.02, courts must dismiss an action if the complaint fails to state a claim upon which relief can be granted. Ky. R. Civ. P. 12.02(f). When considering a motion to dismiss, courts assume the truth of the factual allegations in the complaint, although legal conclusions "are entitled to no deference whatsoever." *Griffin v. Jones*, No. 2014-CA-000402-MR, 2015 WL 4776300, at *3 (Ky. Ct. App. Aug. 14, 2015)[4]. Dismissal is appropriate when "the pleading party appears not to be entitled to relief under any state of facts which could be proved in support of his claim." *Weller v. McCauley*, 383 S.W.2d 356, 357 (Ky. 1964).

Claims involving allegations of fraud are subject to a heightened pleading standard under Kentucky Rule of Civil Procedure Rule 9.02, which requires that "the circumstances constituting fraud or mistake shall be stated *with particularity*." Ky. R. Civ. P. 12.02(f) (emphasis added). To

[4] Copies of all unreported opinions relied upon in this Memorandum are attached hereto in an Appendix as Exhibit C.

satisfy Rule 9.02, a plaintiff must "plead the time, the place, the substance of the false representations, the facts misrepresented, and the identification of what was obtained by the fraud." *Mason v. Monumental Life Ins. Co.*, No. 2006-CA-002122-MR, 2008 WL 54763, at *5 (Ky. Ct. App. Jan. 4, 2008) (affirming dismissal of fraud claim for failure to plead fraud with sufficient particularity) (citation omitted). A complaint alleging merely "general, nonspecific allegations of fraud, sham, and the like," is inadequate to survive a motion to dismiss. *Pendleton Bros. Vending v. Com. Fin. & Admin. Cabinet*, 758 S.W.2d 24, 27 (Ky. 1988).

III. Law & Argument for Dismissal

A. The Medical Records Statute Does not Apply to Express Scripts.[5]

In 1994, as part of broad health care reform legislation, the Kentucky legislature enacted KRS § 422.317 ("Medical Records Statute"), which provides in part:

> Upon a patient's written request, a ***hospital*** licensed under KRS Chapter 216B or a ***health care provider*** shall provide, without charge to the patient, a copy of the patient's ***medical record***.

KRS § 422.317(1) (emphasis added). The legislature intended the Medical Records Statute "to enable patients to obtain valuable information regarding their medical history and also to provide patients with the ability to transfer health information from one doctor to another in the event a change in insurance, or other circumstances, required a patient to change providers." Ky. Att'y Gen Op. 09-009, 09-0092009 WL 4917549, at *1 (Dec. 11, 2009). It requires a hospital or health care provider to furnish a copy of the medical record generated by the hospital or health care provider for services it provided to the requesting patient. *See* KRS § 422.317(1). Facilitation of

[5] All of Plaintiff's claims rely on the alleged violation of the Medical Records Statute. *See* Compl. ¶¶ 30 (basing KCPA claim on alleged violation of Medical Records Statute), 41 (basing fraud claim on alleged violation of Medical Records Statute), 46 (basing unjust enrichment claim on alleged violation of Medical Records Statute), 50-61 (asserting damages based on alleged violation of Medical Records Statute), 64 (requesting declaration regarding applicability of Medical Records Statute). As a result, a finding that the Medical Records Statute does not apply to Express Scripts requires dismissal of all claims.

the provision of health care, not litigation, is the aim of the statute. *See* Ky. Att'y Gen Op. 09-009, 09-0092009 WL 4917549, at *1.

While the statute does not specifically define the terms "health care provider" or "medical record," "the statute is clear on its face," and the court should construe these terms in the context of the legislative purpose for the Medical Records Statute. Ky. Att'y Gen Op. 09-009, 09-0092009 WL 4917549, at *2; *see Johnson v. Commonwealth*, 206 Ky. 594, 268 S.W. 302, 302 (1924) ("[O]ur duty is to interpret the language used in the act so as to reach the legislative purpose.") A simple review of the Medical Records Statute and its terms make evident that the statute, which is the basis for all of the plaintiff's claims, does not and cannot apply to Express Scripts.

i. Defendant Express Scripts is not a "health care provider."

The Medical Records Statute governs two types of entities: (1) a "hospital licensed under KRS Chapter 216B"; and (2) a "health care provider." Express Scripts is undoubtedly not a hospital. Moreover, there are no allegations in the Complaint that Express Scripts is a health care provider or that it provided health care services to Plaintiff, which is necessary for it to be subject to the Medical Records Statute. Regardless, under the legislative definition of "health care provider," the facts alleged in the Complaint and those judicially-noticeable facts not subject to reasonable dispute, Express Scripts is not subject to the Medical Records Statute because it is a pharmacy benefit manager, not a "health care provider."

Although the Medical Records Statute fails to define the term "health care provider," none of the definitions of "health care provider" elsewhere in the Kentucky Code apply to pharmacy benefit managers such as Express Scripts. *See, e.g.*, KRS §§ 194A.450(3); 214.450(5); 216.2920(5); 304.17A-005; 304.17C-010(3); 304.40-260(1); 311.621(10); 367.4081(1).

The Medical Records Statute was passed as part of the same 1994 health care reform legislation that established the following definition of "health care provider," codified at KRS § 304.17A-005:

> [A]ny facility or service required to be licensed pursuant to KRS Chapter 216B, pharmacist or home medical equipment and services provider as defined pursuant to KRS Chapter 315, and any of the following independent practicing practitioners:
> (a) Physicians, osteopaths, and podiatrists licensed under KRS Chapter 311;
> (b) Chiropractors licensed under KRS Chapter 312;
> (c) Dentists licensed under KRS Chapter 313;
> (d) Optometrists licensed under KRS Chapter 320;
> (e) Physician assistants regulated under KRS Chapter 311;
> (f) Advanced practice registered nurses licensed under KRS Chapter 314; and
> (g) Other health care practitioners as determined by the department by administrative regulations promulgated under KRS Chapter 13A.

The meaning of "health care provider" in the Medical Records Statute and KRS § 304.17A-005 should be construed harmoniously because the statutes are *in pari materia*.

Express Scripts does not fit within any of the categories of health care providers outlined by KRS § 304.17A-005. Specifically, pharmacy benefit managers are not licensed under KRS Chapter 216B, defined as pharmacists under KRS 315[6], or regulated as health care practitioners under KRS Chapter 13A. If the legislature intended to include pharmacy benefit managers within this comprehensive definition of "health care provider," it could have done so, but it did not.

The facilities and practitioners listed under this definition of "health care provider" are fundamentally different from a pharmacy benefit manager, which provides different services to a

[6] A "pharmacist," as defined by KRS Chapter 315, means "a natural person licensed by this state to engage in the practice of the profession of pharmacy." KRS § 315.010(15). Notably, this definition is limited to natural persons, so it could not apply to corporate entities such as Express Scripts. Furthermore, the services provided by a pharmacist or pharmacy differ from those offered by a pharmacy benefit manager. A pharmacist or pharmacy fills prescriptions for patients, whereas a pharmacy benefit manager collaborates with health benefits payors and pharmacies to administer prescription drug benefits. *See* Ex. A at 2-6. Express Scripts is not a pharmacist or pharmacy. *See id.* Regardless, to the extent Jones Ward's request could be construed as a request to a pharmacy for records, pharmacies are not included in this definition of health care providers; thus, the Medical Records Statute does not apply to pharmacies.

C. Plaintiff Fails to Sufficiently Allege Fraud.

i. The Complaint does not meet the specificity requirements of Rule 9.02.

The Complaint asserts that Express Scripts committed fraud by intentionally overcharging for pharmacy records in violation of Kentucky law. *See* Compl. ¶¶ 39-43. To support that claim, Plaintiff offers only the following barebones factual allegations: (1) Jones Ward requested and paid for Plaintiff's prescription claims data from Express Scripts around May 12, 2014 (*Id.* ¶ 20), and (2) Express Scripts charged a $75 fee for data processing (*Id.* ¶ 24).

To satisfy the requirements under Rule 9.02 for pleading a fraud claim, however, Plaintiff must state "the time, the place, the substance of the false representations, the facts misrepresented, and the identification of what was obtained by the fraud." *Mason v. Monumental Life Ins. Co.*, No. 2006-CA-002122-MR, 2008 WL 54763, at *5 (Ky. Ct. App. Jan. 4, 2008). Here, Plaintiff fails to come close to doing that. In particular, the Complaint fails to identify any individuals at Jones Ward (or other agent of Plaintiff) or Express Scripts involved in the transaction; allege any communications between Express Scripts and Plaintiff; identify any statement made by Express Scripts that was false or misleading other than the absurd and conclusory assertion that Express Scripts "fail[ed] to disclose . . . that it intentionally overcharged Plaintiff . . . in violation of Kentucky law;" (Compl. ¶ 40); identify what the invoice for the fee stated; or mention any other details of the transaction. Thus, the Complaint wholly fails to provide Express Scripts with notice of the required "substance of the false representations" or "the facts misrepresented." *Mason*, 2008 WL 54763 at *5.[10] Because the Complaint fails to plead the elements of fraud with the specificity required by Rule 9.02, Count II should be dismissed.

[10]Even assuming, *arguendo*, that the Medical Records Statute applied and Express Scripts' fee exceeded the statutory limit, a statutory violation alone does not establish all of the elements necessary for a successful fraud claim. *See Giddings & Lewis, Inc. v. Indus. Risk Insurers*, 348 S.W.3d 729, 747 (Ky. 2011).

ii. Express Scripts owed no duty of disclosure to Plaintiff.

As noted above, Plaintiff's only effort to state a fraud claim is to suggest, with no facts, that Express Scripts failed to disclose "it intentionally overcharged Plaintiff." (Compl. ¶ 40). Even ignoring the lack of required particularity that demands dismissal of Plaintiff's fraud claim, Plaintiff fails to state a valid claim of fraud by omission.

Under Kentucky law, fraud by omission requires proof of four elements: (1) the defendant had a duty to disclose a material fact to plaintiff; (2) the defendant failed to disclose the material fact; (3) the defendant's failure to disclose the material fact induced the plaintiff to act; and (4) the plaintiff suffered actual damages. *See Giddings*, 348 S.W.3d at 747 (citation omitted). Establishing a duty to disclose is thus essential to a fraud by omission claim. *See id.* (affirming dismissal of fraud claim for failure to "establish[] any grounds for a duty to disclose"). Such a duty may arise where a fiduciary relationship exists, a statute imposes a duty, one party discloses only partial information under the impression it disclosed complete information, or one party to a contract possesses superior information and is relied upon by the other party. *See id.* Notably, "**mere silence does not constitute fraud where it relates to facts open to common observation or discoverable by the exercise of ordinary diligence, or where means of information are as accessible to one party as to the other.**" *Bryant v. Troutman*, 287 S.W.2d 918, 920-21 (Ky. 1956) (holding that failure to disclose property defects in real estate transaction is not fraudulent where defects could have been discovered using ordinary care in inspecting the property).

The Complaint establishes no legal duty requiring Express Scripts to disclose information to Plaintiff. The Complaint does not allege that Express Scripts provided any services directly to Plaintiff, much less establish a fiduciary relationship that would give rise to a duty of disclosure. The Medical Records Statute clearly imposes no duty to disclose any information beyond

production of the requested records. Similarly, there is no allegation that Express Scripts disclosed only partial information relevant to Jones Ward's request for records or the data processing fee. Nor was there a disparity of knowledge between Express Scripts and the equally-sophisticated law firm that requested the prescription claims data. In fact, the axiom that "all persons are presumed to know the law" is especially true of Plaintiff's law firm that obtained the pharmacy claims data from Express Scripts with full knowledge of the Medical Records Statute. *Midwest Mut. Ins. Co. v. Wireman*, 54 S.W.3d 177, 182 (Ky. Ct. App. 2001); *see Giddings,* 348 S.W. 3d at 747 (holding that appellant "cannot establish . . . superior knowledge . . . that was not disclosed"); *see also* Compl. ¶¶ 20, 24. The facts regarding Express Scripts' fee and the Medical Records Statute were freely available to Plaintiff and Jones Ward. Even if the Medical Records Statute applies to Express Scripts, which it does not, Express Scripts' "mere silence" does not translate to fraud because Express Scripts owed no duty of disclosure to Plaintiff. Plaintiff's fraud claim, therefore, must be dismissed for this additional reason.

D. The Voluntary Payment Doctrine Bars Plaintiff's Claims.

Kentucky recognizes the well-settled voluntary payment doctrine, under which a "voluntary payment or expenditure made with full knowledge of all the facts will not be refunded without a showing that such was made under immediate and urgent necessity therefor." *Lee v. Hanna*, 253 Ky. 790, 70 S.W.2d 673, 674 (1934); *see also City of Covington v. Powell*, 59 Ky. 226, 229 (1859) ("money thus voluntarily paid by one who knows he is not bound to pay, cannot be recovered back"). This rule even applies to payment of "an illegal demand" as long as there is

no "immediate and urgent necessity" to pay. *City of Morganfield v. Wathen*, 202 Ky. 641, 261 S.W. 12, 14 (1924).

The facts alleged demonstrate that payment was made voluntarily to Express Scripts. Jones Ward requested Plaintiff's pharmacy claims data from Express Scripts and paid the associated fee. Compl. ¶ 20. Jones Ward understood that Express Scripts charged $75 for data processing to compile Plaintiff's prescription claims data from the pharmacies in its networks that served Plaintiff. *See* Compl. ¶¶ 22, 24. Aware of these facts and the Medical Records Statute it now sues under, Jones Ward chose to pay the fee. *See id.* at ¶¶ 20, 22, 24. The Complaint alleges no "urgent necessity" for the records – which it must do to overcome this bar – nor does it sufficiently allege fraud, as discussed in Section III(C)(i), *supra*. Furthermore, Plaintiff had alternative means of accessing the same prescription claims data from the retail pharmacies that filled his prescriptions, which are required by Kentucky's Board of Pharmacy to maintain patient records in a format "readily retrievable by manual or electronic means." 201 Ky. Admin. Regs. 2:210 § 1(1)(d)(1). Instead, he sought and paid for a compilation of claims data from Express Scripts, which had access to information from multiple retail pharmacies by virtue of its role as a pharmacy benefit manager for Plaintiff's health benefits provider. *See* Compl. ¶¶ 21-22, 24.

In a transparent and futile attempt to avoid the voluntary payment doctrine, Plaintiff asserts the erroneous legal conclusion that "payment was not voluntary because Express Scripts did not offer to waive or discount the fee if certain conditions were met." *Id.* ¶ 25. Plaintiff's allegations belie this legal conclusion, which warrants no deference by the court. *See Griffin*, 2015 WL 4776300, at *3. In addition to the facts discussed above that establish the payment was voluntary, there are no allegations that Plaintiff or his agent requested a waiver or discount of the fee.

Regardless, the fact that Express Scripts did not offer to waive or discount the fee under certain conditions does not make the payment any less voluntary.

Under similar circumstances, a Georgia court ruled that the voluntary payment doctrine barred claims by patients who paid fees for hospital medical records that exceeded Georgia's statutory limit. *Cotton v. Med-Cor Health Info. Sols., Inc.*, 221 Ga. App. 609, 612, 472 S.E.2d 92, 96 (1996). The court held that the payment was voluntary because "all material facts were known by them," despite the fact that the charges were imposed in contravention of a statute. *Id.* The plaintiff could not recover payment made for the records based on "unexcused ignorance of the law." *Id.* Even more so, here, where Plaintiff's law firm opted to pay Express Scripts with knowledge of Kentucky's Medical Records Statute, there is no argument that the payment falls outside the bar of the voluntary payment doctrine.

E. Plaintiff Lacks Standing to Sue Express Scripts.[11]

To have standing to sue in Kentucky courts, a plaintiff "must have a judicially recognizable interest in the subject matter of the suit." *HealthAmerica Corp. of Kentucky v. Humana Health Plan, Inc.*, 697 S.W.2d 946, 947 (Ky. 1985). A plaintiff's interest in the controversy must be "real, direct, present and substantial" to confer standing. *Winn v. First Bank of Irvington*, 581 S.W.2d 21, 23 (Ky. Ct. App. 1978) (internal quotation omitted). On the other hand, an interest that is "remote or speculative" is insufficient. *Hous. Auth. of Louisville v. Serv. Employees Int'l Union*, Local 557, 885 S.W.2d 692, 695 (Ky. 1994).

[11] Plaintiff's claim for declaratory judgment should be dismissed for the same reasons discussed herein. A declaratory judgment is only appropriate in the context of "a controversy over present rights, duties and liabilities; it does not involve a question which is merely hypothetical or an answer which is no more than an advisory opinion." *Barrett v. Reynolds*, 817 S.W.2d 439, 441 (Ky. 1991) (citing *Dravo v. Liberty Nat'l Bank & Trust Co.*, 267 S.W.2d 95 (1954)). As explained in section III(D), there is no present controversy between Plaintiff and Express Scripts.

Here, Plaintiff's detached interest in the controversy is not direct, present or substantial. Plaintiff never had any interaction with Express Scripts. *See* Compl. ¶ 20. Instead, his law firm requested his prescription claims data from Express Scripts and paid the associated fee. *See id.* The law firm later deducted the fee from a settlement obtained in a products liability case, but the Complaint does not establish that Plaintiff had any legal duty to reimburse the law firm at the time of the transaction between the law firm and Express Scripts. *See* Compl. ¶ 23. That he gratuitously agreed to forego part of his settlement in another lawsuit nearly a year later to reimburse the law firm for the expense does not create an injury as a direct result of any act by Express Scripts. Although the Complaint indicates that the underlying products liability case remains pending, which "may require additional medical records from Express Scripts and other sources before its final resolution" (Comp. ¶ 23), Plaintiff's claims were already dismissed with prejudice, so the case does not give rise to a continuing need for records. *See* Ex. B.

Several courts considering similar circumstances have held that plaintiffs do not have standing to sue over allegedly excessive fees for medical records requested and paid for by legal counsel. *See, e.g., Spiro v. Healthport Techs., LLC*, 73 F. Supp. 3d 259, 268-69 (S.D.N.Y. 2014); *McCracken v. Verisma Sys., Inc.*, No. 14-CV-6248T, 2015 WL 2374544, at *3-5 (W.D.N.Y. May 18, 2015); *Carter v. HealthPort Techs., LLC*, No. 14-CV-6275-FPG, 2015 WL 1508851, at *6 (W.D.N.Y. Mar. 31, 2015). For example, in *Spiro v. Healthport Techs., LLC,* the plaintiff lacked standing because the "discretionary decision after-the-fact to reimburse another party for a charge" did not give rise to any injury caused by the defendant. 73 F. Supp. 3d 259, 269. As in this case, dismissal was appropriate because the volitional repayment of medical records fees paid by a law firm does not confer standing on the law firm's client. *See id.*

IV. Conclusion

For the foregoing reasons, Express Scripts respectfully requests that the Court dismiss Plaintiff's claims with prejudice as the Complaint fails to state a claim upon which relief can be granted, and for any further relief deemed appropriate.

Respectfully submitted,

Hon. Britt K. Latham
Hon. Alison K. Grippo
BASS, BERRY & SIMS, PLC
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and

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BY: */s/ William T. Forester*
WILLIAM T. FORESTER
ATTORNEYS FOR DEFENDANT

CERTIFICATE OF SERVICE

I hereby certify that a true and accurate copy of the foregoing was served this 29th day of January, 2016, upon the following via electronic mail and/or U.S. Mail:

Hon. Alex C. Davis
Jones Ward PLC
Marion E. Taylor Building
312 South Fourth Street, 6TH Floor
Louisville, Kentucky 40202

Judge William E. Lane
Rowan Circuit Court
Courthouse Annex
44 West Main Street
Mt. Sterling, Kentucky 40353

/s/ William T. Forester

Filed 15-CI-90250 01/29/2016 Jim Barker, Rowan Circuit Clerk

EXHIBIT A

Filed 15-CI-90250 01/29/2016 Jim Barker, Rowan Circuit Clerk

Table of Contents

UNITED STATES
SECURITIES AND EXCHANGE COMMISSION
WASHINGTON, D.C. 20549

FORM 10-K

☒ **ANNUAL REPORT PURSUANT TO SECTION 13 OR 15(d) OF THE SECURITIES EXCHANGE ACT OF 1934 FOR THE FISCAL YEAR ENDED DECEMBER 31, 2011,**

OR

☐ **TRANSITION REPORT PURSUANT TO SECTION 13 OR 15(d) OF THE SECURITIES EXCHANGE ACT OF 1934**

FOR THE TRANSITION PERIOD FROM TO .

Commission File Number: 0-20199

EXPRESS SCRIPTS, INC.

(Exact name of registrant as specified in its charter)

Delaware	**43-1420563**
(State or other jurisdiction of incorporation or organization)	**(I.R.S. Employer Identification No.)**
One Express Way, St. Louis, MO	**63121**
(Address of principal executive offices)	**(Zip Code)**

Registrant's telephone number, including area code: (314) 996-0900

Securities registered pursuant to Section 12(b) of the Act:

Title of Class	Name of each exchange on which registered
Common Stock $0.01 par value	Nasdaq Global Select Market

Securities registered pursuant to Section 12(g) of the Act:
None

Indicate by check mark if the registrant is a well-known seasoned issuer, as defined in Rule 405 of the Securities Act. Yes ☒ No ☐

Indicate by check mark if the registrant is not required to file reports pursuant to Section 13 or Section 15(d) of the Act. Yes ☐ No ☒

Indicate by check mark whether the registrant (1) has filed all reports required to be filed by Section 13 or 15(d) of the Securities Exchange Act of 1934 during the preceding 12 months (or for such shorter period that the registrant was required to file such reports), and (2) has been subject to such filing requirements for the past 90 days. Yes ☒ No ☐

Indicate by check mark whether the registrant has submitted electronically and posted on its corporate Web site, if any, every Interactive Data File required to be submitted and posted pursuant to Rule 405 of Regulation S-T during the preceding 12 months (or for such shorter period that the registrant was required to submit and post such files). Yes ☒ No ☐

Indicate by check mark if disclosure of delinquent filers pursuant to Item 405 of Regulation of S-K is not contained herein, and will not be contained, to the best of registrant's knowledge, in definitive proxy or information statements incorporated by reference in Part III of this Form 10-K or any amendment to this Form 10-K. ☒

Indicate by check mark whether the registrant is a large accelerated filer, an accelerated filer, a non-accelerated filer, or a smaller reporting company. See the definitions of "large accelerated filer," "accelerated filer" and "smaller reporting company" in Rule 12b-2 of the Exchange Act.

Large accelerated filer	☒	Accelerated filer	☐
Non-accelerated filer	☐ (Do not check if a smaller reporting company)	Smaller reporting company	☐

Indicate by check mark whether the registrant is a shell company (as defined in Rule 12b-2 of the Exchange Act). Yes ☐ No ☒

The aggregate market value of Registrant's voting stock held by non-affiliates as of June 30, 2011, was $26,290,443,000 based on 487,040,000 such shares held on such date by non-affiliates and the average sale price for the Common Stock on such date of $53.98 as reported on the Nasdaq Global Select Market. Solely for purposes of this computation, the Registrant has assumed that all directors and executive officers of the Registrant are affiliates of the Registrant. The Registrant has no non-voting common equity.

Common stock outstanding as of January 31, 2012: 484,778,000 Shares

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DOCUMENTS INCORPORATED BY REFERENCE

Part III incorporates by reference portions of the definitive proxy statement for the Registrant's 2012 Annual Meeting of Stockholders to be filed with the Securities and Exchange Commission.

Table of Contents

TABLE OF CONTENTS

Filed 15-CI-90250 01/29/2016 Jim Barker, Rowan Circuit Clerk

Table of Contents

Information included in or incorporated by reference in this Annual Report on Form 10-K, other filings with the Securities and Exchange Commission (the "SEC") and our press releases or other public statements, contain or may contain forward looking statements. Please refer to a discussion of our forward looking statements and associated risks in "Part I—Item 1—Business—Forward Looking Statements and Associated Risks" and "Part I—Item 1A—Risk Factors" in this Annual Report on Form 10-K.

PART I
THE COMPANY

Item 1 — Business

Industry Overview

Prescription drugs play a significant role in healthcare today and constitute the first line of treatment for many medical conditions. As the average age of the American population increases and pharmaceutical research enhances the potential for even more effective drugs, demand can be expected to increase. For millions of people, prescription drugs equate to the hope of improved health and quality of life. At the same time, prescription drug costs are becoming one of the most persistent challenges to healthcare affordability. Even as pharmaceutical development opens new paths to better healthcare, we confront the possibility that high costs may limit access to these therapies.

Total medical costs for employers continue to outpace the rate of overall inflation. National health expenditures as a percentage of Gross Domestic Product are expected to increase to 19.8% in 2020 from an estimated 17.7% in 2011 according to the Centers for Medicare & Medicaid Services ("CMS") estimates. In response to cost pressures being exerted on health benefit providers such as managed care organizations, health insurers, employers and unions, we work to develop innovative strategies designed to keep medications affordable.

Pharmacy benefit management ("PBM") companies combine retail pharmacy claims processing, formulary management and home delivery pharmacy services to create an integrated product offering to manage the prescription drug benefit for payors. Some PBMs also offer specialty services to provide treatments for diseases that rely upon high-cost injectable, infused, oral or inhaled drugs which deliver a more effective solution than many retail pharmacies. PBMs have also broadened their service offerings to include compliance programs, outcomes research, drug therapy management programs, sophisticated data analysis and other distribution services.

Company Overview

We are one of the largest PBMs in North America, offering a full range of services to our clients, which include HMOs, health insurers, third-party administrators, employers, union-sponsored benefit plans, workers' compensation plans and government health programs. We help health benefit providers address access and affordability concerns resulting from rising drug costs while helping to improve healthcare outcomes. We manage the cost of the drug benefit by performing the following functions:

- evaluating drugs for price, value and efficacy in order to assist clients in selecting a cost-effective formulary
- leveraging purchasing volume to deliver discounts to health benefit providers
- promoting the use of generics and low-cost brands
- offering cost-effective home delivery pharmacy and specialty services which result in drug cost savings for plan sponsors and co-payment savings for members

We work with clients, manufacturers, pharmacists and physicians to increase efficiency in the drug distribution chain, to manage costs in the pharmacy benefit and to improve members' health outcomes and satisfaction. In an effort to deliver a superior clinical offering which targets the reduction of waste and the improvement of health outcomes, we apply a unique behavior-centric approach to changing consumer behavior which we call Consumerology® .

Plan sponsors who are more aggressive in taking advantage of our effective tools to manage drug spend have seen actual reduction in their prescription drug trend while preserving healthcare outcomes. Greater use of generic drugs and lower-cost brand drugs has resulted in significant reductions in spending for commercially insured consumers and their employers.

We have organized our operations into two business segments based on products and services offered: PBM and Emerging Markets ("EM").

Our PBM segment primarily consists of the following services:

- retail network pharmacy management and retail drug card programs
- home delivery services
- specialty benefit services
- patient care contact centers
- benefit plan design and consultation
- drug formulary management, compliance and therapy management programs
- information reporting and analysis programs
- rebate programs
- electronic claims processing and drug utilization review
- administration of a group purchasing organization
- consumer health and drug information
- bio-pharma services including reimbursement and customized logistics solutions
- improved health outcomes through personalized medicine and application of pharmacogenomics
- assistance programs for low-income patients

The EM segment primarily consists of the following services:

- distribution of pharmaceuticals and medical supplies to providers and clinics
- healthcare account administration and implementation of consumer-directed healthcare solutions

Our revenues are generated primarily from the delivery of prescription drugs through our contracted network of retail pharmacies, home delivery and specialty pharmacy services and EM services. Revenues from the delivery of prescription drugs to our members represented 99.4% of revenues in 2011, 99.4% in 2010, and 98.9% in 2009. Revenues from services, such as the fees associated with the administration of retail pharmacy networks contracted by certain clients, medication counseling services, and certain specialty distribution services, comprised the remainder of our revenues.

Prescription drugs are dispensed to members of the health plans we serve primarily through networks of retail pharmacies that are under non-exclusive contracts with us and through the home delivery fulfillment pharmacies, specialty drug pharmacies and fertility pharmacies we operated as of December 31, 2011. More than 60,000 retail pharmacies, which represent over 95% of all United States retail pharmacies, participated in one or more of our networks at December 31, 2011. The top ten retail pharmacy chains represent approximately 50% of the total number of stores in our largest network. As of January 1, 2012, Walgreen Co. ("Walgreens") was no longer part of our retail pharmacy networks, reducing the number of pharmacies participating in our networks to approximately 55,000, representing approximately 85% of all United States retail pharmacies. Excluding Walgreens, the remaining top ten retail chains represent approximately 38% of the total number of stores in our largest network.

We were incorporated in Missouri in September 1986, and were reincorporated in Delaware in March 1992. Our principal executive offices are located at One Express Way, Saint Louis, Missouri, 63121. Our telephone number is 314.996.0900 and our web site is www.express-scripts.com. Information included on our web site is not part of this annual report.

Products and Services

Pharmacy Benefit Management Services

Overview. Our PBM services involve the management of outpatient prescription drug utilization to foster high quality, cost-effective pharmaceutical care. We consult with our clients to assist them in selecting plan design features that balance clients' requirements for cost control with member choice and convenience. For example, some clients receive a smaller discount on pricing in the retail pharmacy network or home delivery pharmacy in exchange for receiving all or a larger share of pharmaceutical manufacturer rebates. Other clients receive a greater discount on pricing in the retail pharmacy network or home delivery pharmacy in exchange for a smaller share of pharmaceutical manufacturer rebates. During 2011, 97.2% of our revenue was derived by our PBM operations, compared to 97.4% and 95.6% during 2010 and 2009, respectively.

Retail Network Pharmacy Administration. We contract with retail pharmacies to provide prescription drugs to members of the pharmacy benefit plans we manage. In the United States, we negotiate with pharmacies to discount the price at which they will provide drugs to members and manage national and regional networks that are responsive to client preferences related to cost containment, convenience of access for members and network performance. We also manage

networks of pharmacies that are customized for or under direct contract with specific clients. In addition, we have contracted Medicare Part D provider networks to comply with CMS access requirements for the Medicare Part D Prescription Drug Program.

All retail pharmacies in our pharmacy networks communicate with us online and in real time to process prescription drug claims. When a member of a plan presents his or her identification card at a network pharmacy, the network pharmacist sends certain specified member and prescription information in an industry-standard format through our systems, which process the claim and send a response back to the pharmacy. The electronic processing of the claim includes, among other things, the following:

- confirming the member's eligibility for benefits under the applicable health benefit plan and any conditions or limitations on coverage
- performing a concurrent drug utilization review and alerting the pharmacist to possible drug interactions and reactions or other indications of inappropriate prescription drug usage
- updating the member's prescription drug claim record
- if the claim is accepted, confirming to the pharmacy that it will receive payment for the drug dispensed according to its provider agreement with us
- informing the pharmacy of the co-payment amount to be collected from the member based upon the client's plan design and the remaining payable amount due to the pharmacy

Home Delivery Services. As of December 31, 2011, we dispensed prescription drugs from our two home delivery fulfillment pharmacies. In addition to the order processing that occurs at these home delivery pharmacies, we also operate several non-dispensing order processing facilities and patient contact centers. We also maintain one non-dispensing home delivery fulfillment pharmacy for business continuity purposes. Our pharmacies provide patients with convenient access to maintenance medications and enable us to manage our clients' drug costs through operating efficiencies and economies of scale. Through our home delivery pharmacies, we are directly involved with the prescriber and patient and, as a result, research shows we are generally able to achieve a higher level of generic substitutions, therapeutic interventions, and better adherence than can be achieved through the retail pharmacy networks. Our direct relationship with patients also enables us to leverage the principles of Consumerology® , our proprietary application of consumer marketing sciences and behavioral psychology, to optimize health outcomes. As a result of these interactions, we believe we are able to improve patients' healthcare decision-making and satisfaction with their prescription drug benefit.

Specialty Benefit Services. We operate several specialty pharmacies throughout the United States. These locations provide patient care and direct specialty home delivery to our patients. We offer a broad range of healthcare products and services for individuals with chronic health conditions and provide comprehensive patient management services. These include services for physicians, health plan sponsors and pharmaceutical manufacturers to support the delivery of care, as well as fertility services to providers and patients.

We provide specialty distribution services, consisting of the distribution of, and creation of a database of information for, products requiring special handling or packaging, products targeted to a specific physician or patient population and products distributed to low-income patients. Our services include eligibility, fulfillment, inventory, insurance verification/authorization and payment.

Patient Care Contact Centers. Although we contract with health plans and employers, the ultimate recipients of many of our services are the members and employees of these health plans and employers. We believe client satisfaction is dependent upon patient satisfaction. Domestic patients can call us toll free, 24 hours a day, 7 days a week, to obtain information about their prescription drug plan from our trained patient care advocates and pharmacists.

Benefit Plan Design and Consultation. We offer consultation and financial modeling to assist our clients in selecting benefit plan designs that meet their needs for member satisfaction and cost control. The most common benefit design options we offer to our clients are:

- financial incentives and reimbursement limitations on the drugs covered by the plan, including drug formularies, tiered co-payments, deductibles or annual benefit maximums
- generic drug utilization incentives
- incentives or requirements to use only certain network pharmacies or to order certain maintenance drugs (e.g., therapies for diabetes, high blood pressure, etc.) only through our home delivery pharmacies
- reimbursement limitations on the amount of a drug that can be obtained in a specific period
- utilization management programs such as step therapy and prior authorization, which focus the use of medications according to clinically developed algorithms

different group of clients. As you would expect, all of the enumerated professionals render services directly to patients. By contrast, Express Scripts provides claims processing and other third-party services to health plans, insurers and government health programs. *See* Ex. A at 6. As noted, the Complaint does not allege (nor could it) that Express Scripts provides health care services to patients, much less that it provided any such services directly to Plaintiff. There is no provider-patient relationship between a pharmacy benefit manager and member of a health plan such as Plaintiff. Thus, under the doctrine of *ejusdem generis*, pharmacy benefit managers like Express Scripts do not qualify as health care providers under KRS § 304.17A-005 or the simultaneously-enacted Medical Records Statute.[7]

The Supreme Court of Pennsylvania faced a similar issue of statutory construction in *Landay v. Rite Aid of Pennsylvania, Inc.*, which involved determination of whether a pharmacy qualifies as a "health care provider" for purposes of Pennsylvania's Medical Records Act ("MRA"). 104 A.3d 1272 (Pa. 2014). Because the term "health care provider" was not defined by the MRA, the court considered other statutory definitions of the term, the plain meaning of the term, and the legislative intent behind the MRA. *See id.* at 1278-86. The court concluded that "pharmacies are not health care providers under the MRA." *Id.* at 1285. Following the same approach, this Court should conclude that a pharmacy benefit manager—which is further removed from the provision of health care than a pharmacy[8]—does not qualify as a "health care provider"

[7] It is important to note that the Kentucky Attorney General interprets "health care provider" under the Medical Records Statute to mean "physicians" or "medical providers." Ky. Att'y Gen Op. 09-009, 09-0092009 WL 4917549, at *2 (Dec. 11, 2009) ("KRS 422.317 requires hospitals and **physicians** . . .;" "KRS 422.317 states that hospitals and **other medical providers** shall . . .") (emphasis added).

[8] As noted above and discussed further below, pharmacies are also not subject to the Medical Records Statute for some of the same reasons as pharmacy benefit managers—notably, pharmacies do not qualify as "health care providers" and their records do not qualify as "medical records" under the statute.

for purposes of Kentucky's Medical Records Statute. Therefore, the statute does not apply, and the Complaint should be dismissed.

ii. Prescription claims data is not a "medical record."

The Medical Records Statute at the heart of this case only applies to requests for "medical records." KRS § 422.317(1). The report of prescription claims data provided by Express Scripts to Plaintiff's law firm does not constitute a "medical record" within the meaning of the Medical Records Statute. The Complaint inconsistently and confusingly refers to Jones Ward's request for "healthcare provider records" (¶ 1), "pharmacy records" (*e.g.*, ¶ 3), "health records" (¶ 9), and "medical records" (*e.g.*, ¶ 11), which are not interchangeable terms. The Complaint initially asserts that the law firm paid for "healthcare provider records from Express Scripts" (¶ 1), but later concedes that the report Jones Ward received contained claims from many retail pharmacies (¶ 22).

Instead of consulting the individual pharmacies that filled prescriptions for Plaintiff,[9] Jones Ward saved time and resources by commissioning Express Scripts as the pharmacy benefit manager for Plaintiff's health plan to retrieve and compile prescription claims data from the "network of retail pharmacies" for which Express Scripts manages claims. *See* Compl. ¶¶ 21-22; *see also* Ex. A at 2. Unlike a medical record generated by a health care provider regarding its patient, Express Scripts provided a complete report of prescription claims from a mix of retail and specialty pharmacies. *See* Compl. ¶¶ 21-22, 24. Thus, it is clear from the allegations alone that Express Scripts did not provide a "medical record" pursuant to a request from its patient, which is what the statute regulates.

[9] Each of those retail pharmacies is required by Kentucky's Board of Pharmacy to maintain patient records in an easily-retrievable format and provide such records to patients upon request for the same prescription claims information requested by Plaintiff. *See* 201 Ky. Admin. Regs. 2:210 §§ 1(1)(d)(1), § 3(2).

Nevertheless, an analysis of the term "medical records" confirms that. Although the Medical Records Statute fails to define the term "medical records," it is defined within the context of Kentucky's public health statutes to mean: "medical records maintained in accordance with accepted professional standards and practices as specified in the administrative regulations." KRS § 216.875. Kentucky's administrative regulations, in turn, contain three definitions of medical records, each of which are inapplicable to the prescription claims data at issue in this case:

> (1) "Medical record" means the patient's actual medical record maintained by the hospital's medical record department or by a laboratory. 902 Ky. Admin. Regs. 19:010(10);
>
> (2) "Medical record" means a single, complete record that documents all of the treatment plans developed for, and medical services received by, an individual. 907 Ky. Admin. Regs. 17:005(51); and
>
> (3) "Medical records" means records signed by a physician documenting an applicant's or recipient's traumatic brain injury including: (a) Hospital records; or (b) Diagnostic imaging reports as related to KRS 211.470(3). 910 Ky. Admin. Regs. 3:030(20).

Based on the Complaint's allegations, the pharmacy claims data requested here does not constitute the records of hospitals, laboratories or diagnostic imagers. *See* 902 Ky Admin. Regs. 19.010(10) and 910 Ky. Admin. Regs. 3.030(20). Likewise, this data does not reflect "treatment plans" or "medical services" described by the definition of medical records in 907 Ky. Admin. Regs. 17:005(51).

In addition, Kentucky courts treat pharmacy data differently from medical records. For example, the Kentucky Court of Appeals has held that pharmacy logs, containing information regarding prescription transactions, do not qualify as medical records protected under HIPAA. *Pitcock v. Com.*, 295 S.W.3d 130, 135 (Ky. Ct. App. 2009) (declining to classify pharmacy logs as medical records deserving protection because "[t]here is no doctor-patient interaction involved in receiving these medications"). Other Kentucky opinions also refer to "pharmacy records" or

"prescription records" and documents distinct from "medical records." *See Williams v. White Castle Sys., Inc.*, 173 S.W.3d 231, 233 (Ky. 2005) (including pharmacy records and medical records as separate items in a list); *Carter v. Com.*, 358 S.W.3d 4, at *6-7 (Ky. Ct. App. 2011) (discussing production of prescription records and medical records); *Calhoun v. CSX Transp., Inc.*, No. 2007-CA-001651-MR, 2009 WL 152970, at *13 (Ky. Ct. App. Jan. 23, 2009), *aff'd in part, rev'd in part,* 331 S.W.3d 236 (Ky. 2011) (mentioning pharmacy records and medical records as distinct items).

Finally, the Medical Records Statute only applies to hospitals or health care providers who receive a request from their patients for "the patient's medical record." KRS § 422.317(1). The Complaint does not allege that Mr. Gearhart was a patient of Express Scripts, nor could it. Thus, given the language of the statute, the statute is also inapplicable for this reason alone. Moreover, in this case, Express Scripts assembled records generated by multiple retail pharmacies that provided services to Plaintiff and packaged them together into a single report to be used by Jones Ward. *See* Compl. ¶ 22. Applying the Medical Records Statute to Express Scripts in this context would create a precedent that absurdly and undesirably expands its scope to burden "health care providers" with providing patients with not only their own records but the records of other health care providers as well. Because Express Scripts was not requested to provide a medical record, much less its "patient's medical record," the Medical Records Statute does not apply, and the Complaint should be dismissed.

B. Plaintiff Has No Private Right of Action under the Medical Records Statute or Kentucky Consumer Protection Act.

i. The Medical Records Statute was not intended to regulate Express Scripts nor protect Plaintiff in this context.

The Medical Records Statute does not specifically confer a private right of action. *See* KRS 422.317. There is also nothing in the statute that specifies a remedy or supports the creation of an implied private right of action. *See id.*

In trying to state a claim for violation of the Medical Records Statute, Plaintiff could only try to rely on KRS § 446.070, which enables a "person injured by the violation of any [Kentucky] statute" to recover damages sustained as a result of such statutory violation. KRS § 446.070; *see Yeager v. Dickerson*, 391 S.W.3d 388, 393 (Ky. Ct. App. 2013) (limiting the application of KRS § 446.070 to Kentucky state statutes). Importantly, however, "this statute merely codifies the common law concept of negligence *per se*. It **applies only if the alleged offender has violated a statute and the plaintiff was in the class of persons which that statute was intended to protect**." *Arnold v. Microsoft Corp.*, No. 2000-CA-002144-MR, 2001 WL 1835377, at *4 (Ky. Ct. App. Nov. 21, 2001) (emphasis added); *see also Hargis v. Baize*, 168 S.W.3d 36, 40-41 (Ky. 2005) (applying private right of action "if the person damaged is within the class of persons the statute intended to be protected"); *Handi-Van, Inc. v. The Cmty. Cab Co., Inc.*, No. 2013-CA-001106-MR, 2015 WL 865829, at *5 (Ky. Ct. App. Feb. 27, 2015) (granting summary judgment on Kentucky Consumer Protection Act claim because commercial entity was not a consumer intended to be protected by the statute). By the same token, "if the defendant was not in the class of persons whose conduct was intended to be regulated by the statute, the defendant could not violate the statute and KRS 446.070 simply would not apply." *Davidson v. Am. Freightways, Inc.*, 25 S.W.3d 94, 100 (Ky. 2000) (finding that KRS 446.070 did not apply to the defendant because it was not subject to the Kentucky statute at issue).

Here, Section 446.070 does not create a private right of action for Plaintiff under the Medical Records Statute based on the facts alleged in the Complaint. First, as discussed more

fully in Section III(A), *supra*, Express Scripts, as a pharmacy benefit manager, is not a "health care provider," which is what the Kentucky legislature intended to regulate with the Medical Records Statute. *See* KRS § 422.317(1); Ky. Att'y Gen Op. 09-009, 09-0092009 WL 4917549, at *1. The Complaint does not allege that Express Scripts provided health care services to Plaintiff or generated its own record of medical treatment as envisioned by the Medical Records Statute.

Second, Plaintiff, as a products liability claimant, is not a member of the class of persons intended to be protected by the Medical Records Statute. The Kentucky legislature enacted the Medical Records Statute to protect patients obtaining records in the context of a change of doctors or insurance. *See* Ky. Att'y Gen Op. 09-009, 09-0092009 WL 4917549, at *1 (Dec. 11, 2009) ("[T]he original intent of this statute appears to have been to provide a patient with the ability to transfer their medical records from one provider to another in the event a change of providers was necessary."). This legislative intent is inapposite to Jones Ward's desire to obtain Plaintiff's prescription claims data to support litigation it filed on his behalf. The Medical Records Statute, therefore, provides no private right of action to Plaintiff, and his claim thereunder must be dismissed. Furthermore, because all of Plaintiff's other claims depend on a violation of the Medical Records Statute, *see supra* footnote 5, the other claims should be dismissed as well.

ii. Private Actions under the Kentucky Consumer Protection Act are limited to transactions for personal, family, or household purposes.

The private right of action under the Kentucky Consumer Protection Act ("KCPA") is available only to individuals who purchase goods or services "primarily for personal, family or household purposes." KRS § 367.220(1); *see also Durbin v. Bank of Bluegrass & Trust Co.*, 2006 WL 1510479, at *3 (Ky. Ct. App. 2006) ("the Kentucky Consumer Protection Act allows only a person who purchases goods or services primarily for personal, family or household services to

bring a private action under the Act."). Kentucky courts have repeatedly held that "[t]o maintain an action alleging a violation of the [KCPA], . . . an individual must fit within the protected class of persons defined in [the KCPA]." *Skilcraft Sheetmetal, Inc. v. Kentucky Mach., Inc.*, 836 S.W.2d 907, 909 (Ky. Ct. App. 1992); *Keeton v. Lexington Truck Sales, Inc.*, 275 S.W.3d 723, 726 (Ky. Ct. App. 2008) (quoting *Skilcraft*, 836 S.W.2d at 909). An individual purchasing or leasing goods or services for a commercial purpose "does not fit within the protected class of persons who may file claims under the Act." *Keeton*, 275 S.W.3d at 726; *see also Gooch v. E.I. DuPont de Nemours & Co.*, 40 F.Supp.2d 857, 862 (W.D. Ky. 1998) (refusing to recognize private right of action under KCPA for product purchased for commercial purpose); *Aud v. Illinois Cent. R.R. Co.*, 955 F. Supp. 757, 759 (W.D. Ky. 1997) ("As noted in *Commonwealth ex rel Stephens v. North Am. Van Lines, Inc.,* Ky.App., 600 S.W.2d 459 (1979), the attorney general has broad discretionary powers to prosecute illegal business acts, however, an individual private cause of action may only be brought by 'any person who purchases or leases goods or services primarily for personal, family or household purposes.'")

As the Complaint confirms, Jones Ward requested and acquired Plaintiff's prescription claims data to pursue a products liability class action in federal court. *See* Compl. ¶ 23. This commercial transaction for pharmacy claims data that took place between two businesses—a law firm and a pharmacy benefit manager—cannot be a "personal, family or household" transaction. *See Slobin v. Henry Ford Health Care*, 469 Mich. 211, 216, 666 N.W.2d 632, 634 (2003) (construing an identical provision of the Michigan Consumer Protection Act and concluding that "obtaining medical records for the purpose of litigation is not primarily for personal, family, or household use"). Because Plaintiff cannot satisfy the statutory conditions for a private cause of action under the KCPA, Plaintiff's KCPA claim must be dismissed.

- evidence-based, behavior-centric Consumerology® programs that drive adoption of cost-effective drug mix, improved therapy adherence and increased use of home delivery

The client's choice of benefit design is entered into our electronic claims processing system, which applies the plan design parameters as claims are submitted and provides visibility to the financial performance of the plan.

Drug Formulary Management, Compliance and Therapy Management Programs. Formularies are lists of drugs to which benefit design is applied under the applicable plan. We have many years of formulary development expertise and maintain an extensive clinical pharmacy department.

Our foremost consideration in the formulary development process is the clinical appropriateness of the particular drugs. In developing formularies, we first perform a rigorous assessment of the available evidence regarding each drug's safety and clinical effectiveness. No new drug is added to the formulary until it meets standards of quality established by our National Pharmacy & Therapeutics ("P&T") Committee – a panel composed of 19 independent physicians and pharmacists in active clinical practice, representing a variety of specialties and practice settings, typically with major academic affiliations. We fully comply with the P&T Committee's clinical recommendations. In making its clinical recommendation, the P&T Committee has no information regarding the discount or rebate arrangement we might negotiate with the manufacturer. This is designed to ensure the clinical recommendation is not affected by our financial arrangements. After the clinical recommendation is made, the drugs are evaluated on an economic basis to determine optimal cost effectiveness.

We administer a number of different formularies for our clients. The use of formulary drugs is encouraged through various benefit design features. For example, historically, many clients selected a plan design that included an open formulary in which all drugs were covered by the plan. Today, a majority of our clients select formularies that are designed to be used with various financial or other incentives, such as three-tier co-payments, which drive the selection of formulary drugs over their non-formulary alternatives. Some clients select closed formularies, in which benefits are available only for drugs listed on the formulary. Use of formulary drugs can be encouraged in the following ways:

- through plan design features, such as tiered co-payments, which require the member to pay a higher amount for a non-formulary drug
- by applying the principles of Consumerology®, our proprietary approach that combines principles of behavioral economics and consumer psychology with marketing strategies to effect positive behavior change
- by educating members and physicians with respect to benefit design implications
- by promoting the use of lower-cost generic alternatives
- by implementing utilization management programs such as step therapy and prior authorization, which focus the use of medications according to clinically developed algorithms

We also provide formulary compliance services to our clients. For example, if a doctor has prescribed a drug that is not on a client's formulary, we notify the pharmacist through our claims processing system. The pharmacist may then contact the doctor to attempt to obtain the doctor's consent to change the prescription to the appropriate formulary product. The doctor has the final decision-making authority in prescribing the medication.

We also offer innovative clinically based intervention programs to assist and manage patient quality of life, client drug trend, and physician communication/education. These programs encompass comprehensive point of service and retrospective drug utilization review, physician profiling, academic detailing, prior authorization, disease care management, and clinical guideline dissemination to physicians.

Since implementing Consumerology® in 2008, we have further developed and refined the methods we use in an effort to improve how members use their pharmacy benefit, stay compliant with their medications and save money for themselves and their plan sponsors. Through Consumerology®, we believe we are enabling better health and value by driving positive clinical behavior. We use behavioral economics to develop new approaches in an effort to encourage adoption of generics and lower-cost brands, better therapy adherence and greater use of home delivery. Through our Consumerology® Advisory Board, we continue to gain insight into how patients make decisions about healthcare. We believe the interventions that have resulted from our test-and-learn process have yielded improvements for our clients and their members.

Information Reporting and Analysis Programs. Through the use of sophisticated information and reporting systems we are better able to manage the prescription drug benefit. We analyze prescription drug data to identify cost trends and budget for expected drug costs, assess the financial impact of plan design changes and assist clients in identifying costly utilization patterns through an online prescription drug decision support tool.

We offer education programs to members in managing clinical outcomes and the total healthcare costs associated with certain conditions such as asthma, diabetes and cardiovascular disease. These programs are based on the premise that better-informed patient and physician behavior can positively influence medical outcomes and reduce overall medical costs. We identify patients who may benefit from these programs through claims data analysis or self-enrollment. Using the advanced consumer marketing sciences and behavioral psychology of Consumerology®, we are able to encourage patients to engage in more health-promoting behaviors that can have sustainable, life-changing benefits.

We offer a tiered approach to member education and wellness, ranging from information provided through our Internet site, to educational mailings, to our intensive one-on-one registered nurse or pharmacist counseling. The programs include providing patient profiles directly to their physicians, as well as measurements of the clinical, personal and economic outcomes of the programs.

Rebate Programs. We develop, manage and administer programs that allow pharmaceutical manufacturers to provide rebates and administrative fees based on utilization of their products by members of our clients' benefit plans. The rebate portion that the client receives varies in accordance with each client contract. Our rebates are determined based on the characteristics of the formulary design and pharmacy benefit structure selected by the client. The amount of rebates generated by these types of programs is a function of the particular product dispensed and the level of utilization that occurs. Manufacturers participating in our rebate programs pay us administrative fees in connection with the services and systems we provide through the rebate program.

Electronic Claims Processing and Drug Utilization Review. Our electronic claims processing system enables us to implement sophisticated intervention programs to assist in managing prescription drug utilization. The system can alert the pharmacist to generic substitution and therapeutic intervention opportunities, as well as formulary compliance issues, and can also administer prior authorization and step-therapy protocol programs at the time a claim is submitted for processing. Our claims processing system also creates a database of drug utilization information that can be accessed at the time the prescription is dispensed, on a retrospective basis to analyze utilization trends and prescribing patterns for more intensive management of the drug benefit, and on a prospective basis to help support pharmacists in drug therapy management decisions.

Administration of a Group Purchasing Organization. We operate a group purchasing organization ("GPO") that provides various administrative services to participants in the GPO. Services provided include coordination, negotiation and management of contracts for group participants to purchase pharmaceuticals and related goods and services from pharmaceutical manufacturers and suppliers, as well as providing strategic analysis and advice regarding pharmacy procurement contracts for the purchase and sale of goods and services.

Consumer Health and Drug Information. We maintain a public website, www.DrugDigest.org, dedicated to helping consumers make informed decisions about using medications. Much of the information on DrugDigest.org is written by pharmacists – primarily doctors of pharmacy who are also affiliated with academic institutions. The information on DrugDigest.org includes:

- a drug interaction checker
- a drug side effect comparison tool
- tools to check for less expensive generic and alternative drugs
-
- comparisons of different drugs used to treat the same health condition
- information on health conditions and treatments
- instructional videos showing administration of specific drug dosage forms
- monographs on drugs and dietary supplements
- photographs of pills and capsules

Many features of DrugDigest.org are also available in the limited-access member website at www.express-scripts.com. The member website gives our clients' members access to personalized current and, in many cases, previous drug histories. Members can use the interactive tools from DrugDigest.org to check for drug interactions and find possible side effects for all of the drugs they take.

To facilitate communications between members and physicians, health condition information from DrugDigest.org has been compiled into "For Your Doctor Visit," which is available on the member website. Members follow a step-by-step process to create a brief, customized packet of information they can share with their doctor. Discussing the completed checklists gives both the member and the physician a better understanding of the member's true health status. Information on DrugDigest.org and www.express-scripts.com does not constitute part of this document.

Bio-Pharma Services. Each year, more specialty drugs become available and the number of patients using these drugs rises. For new biopharmaceuticals being launched, we can provide biotech manufacturers product distribution management services. Our trend management programs allow us to assist our clients in an effort to drive out wasteful spend in the specialty pharmacy benefit. We design strategies tailored to each product's needs with a focus on identifying opportunities to educate the marketplace regarding drug effectiveness, proper utilization and payor acceptance.

Personalized Medicine and Pharmacogenomics. We apply the behavioral sciences to prescription drug usage, quantifying both behavioral factors and market forces related to pharmaceutical spend. We view personalized medicine and pharmacogenomics as more than using a few genomic tests to predict the effectiveness of medications. Instead, personalized medicine requires an advanced understanding and application of medical, pharmacy, and behavioral data. A patient's age, lifestyle, overall health, and genes can all influence how the patient responds to medications. We utilize our capabilities in behavioral science principles and pharmacogenomics to offer our clients a comprehensive suite of programs.

Patient Assistance Programs. We provide fulfillment of prescriptions to low-income patients through pharmaceutical manufacturer-sponsored patient assistance programs. We offer centralized eligibility, enrollment and fulfillment services tailored to meet the needs of each client, product, practitioner and patient.

Emerging Markets Services

Overview. Through our EM segment, we operate integrated brands that service the patient through multiple paths. CuraScript Specialty Distribution provides specialty distribution of pharmaceuticals and medical supplies direct to providers and clinics and operates a Group Purchasing Organization for many of our clients. ConnectYourCare ("CYC") provides healthcare account administration and implementation of consumer-directed healthcare solutions. During 2011, 2.8% of our revenue was derived from EM services, compared to 2.6% and 4.4% during 2010 and 2009, respectively.

Payor Services. We provide a comprehensive case management approach to manage care by fully integrating pre-certification, case management and discharge planning services for patients. We assist with eligibility review, prior authorization coordination, re-pricing, utilization management, monitoring and reporting.

Provider Services. Through our CuraScript Specialty Distribution business unit we provide distribution services primarily to office and clinic-based physicians treating chronic disease patients who regularly order high dollar-value pharmaceuticals. We are able to provide competitive pricing on pharmaceuticals and medical supplies.

Segment Information

We report segments on the basis of services offered and have determined we have two reportable segments: PBM and EM. Our domestic and Canadian PBM operating segments have similar characteristics and as such have been aggregated into a single PBM reporting segment. Our EM segment primarily includes the Specialty Distribution operations of CuraScript and our CYC line of business. During the third quarter of 2011 we reorganized our FreedomFP line of business from our EM segment into our PBM segment. All related segment disclosures have been reclassified, where appropriate, to reflect the new segment structure. Information regarding our segments appears in Note 12 – Segment information of the notes to our consolidated financial statements and is incorporated by reference herein.

Suppliers

We maintain an inventory of brand name and generic pharmaceuticals in our home delivery pharmacies and biopharmaceutical products in our specialty pharmacies and distribution centers to meet the needs of our patients, whether they are being treated for rare or chronic diseases. If a drug is not in our inventory, we can generally obtain it from a supplier within one business day. We purchase pharmaceuticals either directly from manufacturers or through authorized wholesalers. Generic pharmaceuticals are generally purchased directly from manufacturers.

Clients

We are a provider of PBM services to several market segments. Our clients include HMOs, health insurers, third-party administrators, employers, union-sponsored benefit plans, workers' compensation plans and government health programs. We provide specialty services to customers who also include HMOs, health insurers, third-party administrators, employers, union-sponsored benefit plans, government health programs, office-based oncologists, renal dialysis clinics, ambulatory surgery centers, primary care physicians, retina specialists, and others.

EXHIBIT B

Filed 15-CI-90250 01/29/2016 Jim Barker, Rowan Circuit Clerk

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
WESTERN DIVISION

IN RE: DEPUY ORTHOPAEDICS, INC. ASR HIP IMPLANT PRODUCTS LIABILITY LITIGATION

This Document Relates to: 1:11 dp 21482 as to
Edward Gearhart
Nita Gillispie
Roger Amburgey
Steven Davis, Administrator of the Estate of
Tara Davis

MDL Docket No. 1:10 md 2197

HONORABLE DAVID A. KATZ

ORDER OF DISMISSAL WITH PREJUDICE

Whereas, the claims of the Plaintiffs have been resolved and the parties seek dismissal of all claims asserted against all Defendants in this Court;

Whereas, the parties consent and stipulate to the dismissal of these Plaintiffs' claims with prejudice;

IT IS HEREBY ORDERED that the claims of the Plaintiffs shall be dismissed with prejudice.

Counsel has certified that the requisite assessment is being withheld and deposited into the Common Benefit Fund.

Dated: April 22, 2015

S/ *David A. Katz*
DAVID A. KATZ
U. S. DISTRICT JUDGE

EXHIBIT C

APPENDIX OF UNREPORTED AUTHORITY

Cases

Attorney General Opinion

Filed 15-CI-90250 01/29/2016 Jim Barker, Rowan Circuit Clerk

1

Filed 15-CI-90250 01/29/2016 Jim Barker, Rowan Circuit Clerk

2001 WL 1835377

Unpublished opinion. See KY ST RCP Rule 76.28(4) before citing.

Court of Appeals of Kentucky.

NOT TO BE PUBLISHED

Carey M. ARNOLD, Individually, and on behalf of all similarly situated, and Thomas C. Hectus, Individually, and on behalf of all similarly situated, Appellants

v.

MICROSOFT CORP., Appellee.

No. 2000–CA–002144–MR.

|

Nov. 21, 2001.

Attorneys and Law Firms

For appellants: Wesley P. Adams, Jr., and Alfred J. Welsh of Adams, Hayward, Nicolas & Welsh, Louisville, Ky., and Tom Scheuneman, Corona Del Mar, Cal.

For appellee: John E. Select, Michael M. Hirn, and R. Kenyon Meyer of Dinsmore & Shohl, Louisville, Ky., and Greg Harrison of Dinsmore & Shohl, Cincinnati, Ohio.

Before: DYCHE, GUIDUGLI, and KNOPF, Judges.

OPINION

KNOPF, J.

***1** The appellants, Carey M. Arnold and Thomas C. Hectus sought to bring a class action pursuant to CR 23 against Microsoft Corporation (Microsoft) for violations of the Kentucky Consumer Protection Act. The trial court granted Microsoft's motion to dismiss, concluding that the appellants lacked standing to pursue their anti-trust claims, and that the appellants had failed to otherwise state a claim under the Act. Finding no error, we affirm.

The facts underlying this action are not in dispute. Microsoft is a corporation organized under the laws of the state of Washington. Microsoft primarily focuses on developing and licencing computer software. In particular, Microsoft developed and licences the most commonly used operating system for Intel-based personal computers in the United States: the "Windows" operating system. When this action was filed, "Windows 98" was the most current version of the operating system then in use.

Microsoft distributed Windows 98 through original equipment manufacturers (OEMs), who install the software on personal computers, and through software retailers. However, Microsoft does not "sell" its software to OEMs, retailers or to the public. Rather, the company licences the use of its software to the users. As a condition to the use of Windows 98, purchasers are required to accept Microsoft's "End User License Agreement" (EULA). In summary, the EULA prohibits end-users from copying, modifying or transferring the software, and it sets out the scope of Microsoft's warranty of the product.

The long-running Federal Court proceedings involving Microsoft, while not directly relevant to this appeal, are instructive for their discussion of the relevant issues. In summary, the United States Department of Justice filed suit against Microsoft in 1994, claiming that Microsoft unlawfully maintained a monopoly in the operating system market through anti-competitive means. Although the parties entered into a consent decree, the Justice Department brought a civil contempt action, alleging that Microsoft had violated the decree's provisions. In 1998, the Justice Department and the Attorneys General for nineteen individual states brought an action against Microsoft for violations of the Sherman Anti–Trust Act, [1] and under analogous state laws. The matter proceeded to a trifurcated trial before the United States District Court for the District of Columbia.

1 15 U.S.C. § § 1 *et. seq.* (hereafter, "the Sherman Act")

In November, 1999, the District Court entered its findings of fact. The Court found that Microsoft enjoys a monopoly position with its Windows operating system. The Court further found that Microsoft maintained its monopoly power by anti-competitive means, and further had used that position to obtain a monopoly in the internet browser market. [2] Based upon these findings, the Federal District Court thereafter concluded that Microsoft violated § § 1 and 2 of the Sherman Act. [3] To remedy these violations, the court directed Microsoft to submit a proposed plan of divestiture, with the company to be split into an operating systems business and an applications business. [4]

2 *United States v. Microsoft Corp.*, 84 F.Supp.2d 9 (D.D.C., 1999)*(Findings of Fact)*.

3 *United States v. Microsoft Corp.*, 87 F.Supp.2d 30 (D.D.C., 2000)*(Conclusions of Law)*.

4 *United States v. Microsoft Corp.*, 97 F.Supp.2d 59 (D.D.C., 2000)*(Final Judgment)*.

***2** Recently, on appeal, the United States Court of Appeals for the District of Columbia Circuit affirmed in part, reversed in part and remanded for further proceedings. [5] The Federal Circuit Court agreed that Microsoft possessed monopoly power over the relevant market and that it had engaged in certain anti-competitive conduct to preserve that monopoly. However, the Court reversed the District Court's finding that Microsoft had unlawfully attempted to extend its monopoly into the internet browser market. The Circuit Court also reversed the District Court's finding that Microsoft had unlawfully tied its "Internet Explorer" browser to its Windows 98 operating system, and the Court remanded the matter to the District Court for further findings. For substantive and procedural reasons, the Court reversed the portion of the Final Judgment directing that Microsoft be split into separate companies. Finally, the Court found that the trial judge had engaged in impermissible *ex parte* contacts with members of the media and had made public comments about Microsoft which gave rise to an appearance of partiality. Accordingly, the Circuit Court directed that the trial judge be recused from any further proceedings. The United States Supreme Court denied Microsoft's petition for a writ of certiorari. [6]

5 *United States v. Microsoft Corp.*, 253 F.3d 34 (D.C.Cir., 2001).

6 *Microsoft Corp. v. United States*, 2001 U.S. LEXIS 9509, 70 U.S.L.W. 3267 (U.S., Oct. 9, 2001). At this writing, the Justice Department and Microsoft have reached a settlement of the Federal action, and they have submitted the settlement to the trial court for approval. *See United States v. Microsoft Corp.*, No. 98–1232, Stipulation filed November 2, 2001. ___http://news. findlaw. com/cnn/docs/microsoft/msstipprpfnljd110201.pdf_ Nine states (including Kentucky) have agreed to join with the Justice Department in a revised settlement. ___http://news. findlaw.com/cnn/docs/microsoft/prpsrvsfnljdg110601.pdf_ To date, the remaining nine states and the District of Columbia have not agreed to join in the settlement and will be pursuing further remedies before the Federal District Court.

Although the present case arose separately from the Federal litigation, it is based on many of the same facts and allegations developed in those cases. In January of 2000, Arnold and Hectus brought an action against Microsoft based upon Kentucky's Consumer Protection Act, KRS 367.170, and KRS 367.175, Kentucky's version of the Sherman Act. [7] In the complaint, Arnold alleged that, in June 1998, she purchased a Windows 98 CD ROM disk from a retail outlet for $89.00. Likewise, Hectus alleged that he had purchased a new Intel-based personal computer from an OEM. Windows 98 had been installed as the operating system on that computer. They alleged that they had been damaged by Microsoft's monopolistic practices and predatory pricing schemes.

7 15 U.S.C. § § 1 & 2.

In lieu of an answer, Microsoft filed a motion to dismiss the complaint for failure to state a claim. [8] After a full briefing and argument, the trial court granted Microsoft's motion to dismiss. Based upon *Illinois Brick Co. v. Illinois,* [9] the court concluded that KRS 367.175, like the Sherman Act, does not permit indirect purchasers such as Arnold and Hectus to bring a claim for anti-trust violations. The trial court further found that the allegations in the complaint did not state a claim under the KRS 367.170. Arnold and Hectus now appeal from the trial court's order dismissing their complaint.

8 CR 12.02.

9 431 U.S. 720, 97 S.Ct. 2061, 52 L.Ed.2d 707 (1977).

On a motion to dismiss, the trial court must take every well-pleaded allegation of the complaint as true and construe each allegation in the light most favorable to the party against whom the motion is made. [10] In this case however, the issue of standing can be decided as a matter of law based upon the applicable statutes. On review, this Court will confine itself to a determination of whether the matters alleged in the complaint establish appellant's standing to bring the action or whether it is without a "substantial interest" in the subject matter of the controversy. [11]

10 *City of Louisville v. Stock Yards Bank & Trust Co.*, Ky., 843 S.W.2d 327, 328 (1992).

11 *Id.*

***3** Furthermore, because they involve questions of law, the issues of standing and the interpretation of statutes are subject to de novo review. This Court is not required to give deference

to the trial court's decision on these issues. [12] The role of the Court in construing a legislative act is to carry out the intent of the legislature. [13] A statute should be interpreted according to the plain meaning of the language, and a court is not free to add or subtract words. [14] At the same time, a statute must be read in light of the mischief to be corrected, the evil intended to be remedied, and the policy and purpose of the statute. [15]

12 *Commonwealth v. Montaque,* Ky., 23 S.W.3d 629, 631 (2000)(*quoting Floyd County Board of Education v. Ratliff,* Ky., 955 S.W.2d 921, 925 (1997)); *Bob Hook Chevrolet Isuzu, Inc. v. Commonwealth,* Ky., 983 S.W.2d 488 (1998).

13 *Magic Coal Co. v. Fox,* Ky., 19 S.W.3d 88, 94 (2000).

14 *Commonwealth v. Frodge,* Ky., 962 S.W.2d 864, 866 (1998); *Commonwealth v. Allen,* Ky., 980 S.W.2d 278, 280 (1998).

15 *Springer v. Commonwealth,* Ky., 998 S.W.2d 439, 448 (1999); *Sisters of Charity Health Systems, Inc., v. Raikes,* Ky., 984 S.W.2d 464, 469 (1998).

Arnold and Hectus first argue that the trial court erred in finding that indirect purchasers lack standing to bring an action under KRS 367.175(2). In particular, they contend that the trial court should not have applied the reasoning of *Illinois Brick Co. v. Illinois* to interpret Kentucky's version of the Sherman Act. In *Illinois Brick,* the State of Illinois brought suit on its own behalf and on behalf of a number of local governmental entities seeking treble damages under § 4 of the Clayton Act [16] for an alleged conspiracy to fix the price of concrete block in violation of § 1 of the Sherman Act. [17] The State and the local governments were all indirect purchasers of concrete block—that is, they did not purchase concrete block directly from the price-fixing defendants but rather purchased products or contracted for construction into which the concrete block was incorporated by a prior purchaser.

16 15 U.S.C. § 15(a).

17 15 U.S.C. § 1.

The United States Supreme Court held that, with limited exceptions, only overcharged direct purchasers, and not subsequent indirect purchasers, were persons "injured in business or property" within the meaning of § 4, and that therefore the State of Illinois was not entitled to recover under federal law for the portion of the overcharge passed on to it. [18] However, the Supreme Court has since held that nothing in the Sherman Act or in *Illinois Brick* precludes the states from allowing indirect purchasers to bring an anti-trust action. [19] Thus, as the trial court noted, the United States Supreme Court's interpretation of the Sherman Act is not controlling over our interpretation of KRS 367.175.

18 431 U.S. at 729, 97 S.Ct. at 2066, 52 L.Ed.2d at 729.

19 *California v. ARC America Corp.,* 490 U.S. 93, 101–02, 109 S.Ct. 1661, 1665, 104 L.Ed.2d 86, 95 (1989).

Nevertheless, we, like the trial court, find the reasoning of *Illinois Brick* to be highly persuasive. KRS 367.175 is identical to the Sherman Act except that the phrase "among the several states" was replaced by "in this Commonwealth." [20] Because there are no Kentucky cases interpreting KRS 367.175 and because that statute is based upon the Sherman Act, the interpretation of the Sherman Act given by the United States Supreme Court is highly instructive. [21]

20 The relevant portion of the statute, KRS 367.175(2), provides as follows: "It shall be unlawful for any person or persons to monopolize, or attempt to monopolize or combine or conspire with any other person or persons to monopolize any part of the trade or commerce in this Commonwealth".

21 *See e.g. Palmer v. International Association of Machinists and Aerospace Workers. AFL–CIO,* Ky., 882 S.W.2d 117 (1994); *Kreale v. Disabled American Veterans,* Ky.App. 33 S.W.3d 176 (2000).

Arnold and Hectus first note that KRS 367.175 was enacted in 1976, one year prior to the holding of the United States Supreme Court in *Illinois Brick.*Prior to *Illinois Brick,* they claim that indirect purchasers were entitled to recover under the Sherman Act. As a result, they argue that the General Assembly never intended to adopt the United States Supreme Court's interpretation of the Sherman Act. We disagree.

***4** As noted by the trial court, *Hanover Shoe, Inc. v. United Shoe Machinery Corp.,* [22] was the precedent that the Court in *Illinois Brick* relied upon and affirmed. *Hanover Shoe* predated KRS 367.175. In *Hanover Shoe,* the Supreme Court rejected the defense that indirect purchasers rather than direct purchasers were the parties injured by anti-trust violations. The Court held that the proof necessary to trace the effects of the overcharge on the purchaser's prices, sales, costs, and profits, and of showing that these variables would have behaved differently without the overcharge, would unduly

complicate such actions. [23] A second reason for barring the pass-on defense was the Court's concern that only direct purchasers would have a sufficient incentive to bring an action. [24] The Court in *Illinois Brick* applied this reasoning to the opposite situation: to bar indirect purchasers from bringing a claim under the Sherman Act. [25] The General Assembly was undoubtedly aware of this long-standing interpretation of the Sherman Act when it adopted KRS 367.175.

22 392 U.S. 481, 88 S.Ct. 2224, 20 L.Ed.2d 1231 (1968).

23 *Id.*, at 492–493, 20 L.Ed.2d at 1241.

24 *Id.*, at 494, 20 L.Ed.2d at 1241–42.

25 *See also Kansas v. Utilicorp United, Inc.*, 497 U.S. 199, 110 S.Ct. 2807, 11 L.Ed.2d 169 (1990).

Arnold and Hectus next contend that KRS 367.175, unlike the Sherman Act, permits indirect purchasers to bring an action for anti-trust violations. The Consumer Protection Act defines the words "trade" and "commerce" to mean

> the advertising, offering for sale, or distribution of any services and any property, tangible or intangible, real, personal or mixed, and any other article, commodity, or thing of value, and shall include any trade or commerce *directly or indirectly* affecting the people of this Commonwealth. (*Emphasis Added*)

In addition, KRS 466.070 permits a person injured by the violation of any statute to recover from the offender such damages as he or she sustained by reason of the violation. Based upon these two statutes, Arnold and Hectus claim that they are entitled to bring an action for damages under KRS 367.175.

The provisions cited by Arnold and Hectus do not afford the standing which they claim. First, the definition of the terms "trade" and "commerce" uses the phrase "directly or indirectly" to define the scope of the Consumer Protection Act's jurisdiction. Thus, the Act applies to any "trade or commerce" which directly or indirectly affects the people of this Commonwealth. The definition does not purport to define the class who are entitled to bring an action under the Act. [26]

26 KRS 367.175 prohibits monopolization of "trade or commerce in this Commonwealth."The trial court took the position that statute creates a cause of action only for conduct which occurs wholly within this state. We decline to reach the merits of this issue because it is not necessary to the holding of this case.

Furthermore, the Consumer Protection Act does not expressly afford civil remedies to private plaintiffs for violations of KRS 367.175. [27] Where the statute both declares the unlawful act and specifies the civil remedy available to the aggrieved party, the aggrieved party is limited to the remedy provided by the statute. [28] Civil money penalties for violations of KRS 367.175 are available, but only on petition of the Attorney General. [29]

27 In contrast, a number of states expressly allow indirect purchasers to bring an action for anti-trust violations. *See e.g.*Ala.Code § 6–5–60(a); Cal. Bus. & Prof.Code § 16750(a); D.C.Code § 28–4509(a); Haw.Rev.Stat. § 480–14(c); 740 Ill. Comp. Stat. 10/7; Kan. Stat. Ann. § 50–161(b); Md. Com. Law Code § 11–209(b)(2)(ii); Mich Comp. Laws § 445.778(8); Minn. Stat § 325D.57; Miss.Code § 75–21–9; S.D. Codified Laws § 37–1–33; Wis. Stat. § 133.18(1)(a). A number of other states have adopted statutes which allow "any person" who has been injured or damaged by an antitrust violation to bring an action for damages. *See e.g.*Colo.Rev.Stat. § 6–4–108; Mo.Rev.Stat. § 416.121; N.C. Gen. Stat § 75–16; Tenn.Code Ann. § 47–25–106; Wash. Rev.Code § 19.86.090. While these statutes do not expressly allow indirect purchasers to bring an action for damages, appellate courts in North Carolina and Tennessee have held that *Illinois Brick* does not apply to actions by indirect purchasers under their anti-trust laws. *Hyde v. Abbott Laboratories, Inc.*, 123 N.C.App. 572, 473 S.E.2d 680 (1996) and *Blake v. Abbott Laboratories, Inc.*, 1996 Tenn.App. LEXIS 184 (1996). But conversely, other state appellate courts have interpreted very similar statutes as prohibiting actions by indirect purchasers. *See Duvall v. Silvers, Asber, Sher & McLaren*, 998 S.W.2d 821 (Mo.App., 1999); *Blewett v. Abbott Laboratories*, 86 Wash.App. 782, 938 P.2d 842 (1997); and *Stifflear v. Bristol–Myers Squibb Co.*, 931 P.2d 471 (Colo.App., 1996).

28 *Grzyb v. Evans*, Ky., 700 S.W.2d 399, 401 (1985).

29 KRS 367.990(8).

KRS 446.070 provides a private right of action for anyone injured by the violation of any statute. However, this statute merely codifies the common law concept of negligence *per*

*se.*It applies only if the alleged offender has violated a statute and the plaintiff was in the class of persons which that statute was intended to protect.[30] KRS 367.175 is part of the Consumer Protection Act. As consumers, Arnold and Hectus are within the general class which the Act was designed to protect.[31] But it is not clear that they are within the class of persons which KRS 367.175 was designed to protect.

30 *Davidson v. American Freightways, Inc.*, Ky. 25 S.W.3d 94, 99–100 (2000).

31 In KRS 367.120(1), the legislative intent of the Consumer Protection Act is set out as follows:

> The General Assembly finds that the public health, welfare and interest require a strong and effective consumer protection program to protect the public interest and the well-being of both the consumer public and the ethical sellers of goods and services; toward this end, a Consumers' Advisory Council and a Division of Consumer Protection of the Department of Law are hereby created for the purpose of aiding in the development of preventive and remedial consumer protection programs and enforcing consumer protection statutes.

***5** Yet even if they are, they remain indirect purchasers. Arnold and Hectus agree that they have not been directly injured by Microsoft's conduct. KRS 446.070 does not give a right of action to every person against any one violating a statute, but only to persons suffering injury as the direct and proximate result thereof, and then only for such damage as they may sustain.[32]

32 *Shields v. Booles*, 238 Ky. 673, 38 S.W.2d 677, 681 (1931).

Arnold and Hectus contend that KRS 446.070 allows a person who has been indirectly injured to bring an action for damages based upon the violation of a statute. In *State Farm Mutual Automobile Insurance Co. v. Reeder,*[33] the Kentucky Supreme Court recognized that KRS 446.070 allows a third party to bring a cause of action based upon a violation of the Unfair Claims Settlement Practices Act (UCSPA).[34] Even though the injured third party was not in direct privity with the insured or the insurer, the Court held that the third party had standing under KRS 446.070 to bring an action based upon the UCSPA.

33 Ky. 763 S.W.2d 116 (1989).

34 KRS 304.12–230.

However, in *Reeder,* the Court held that the Insurance Code was designed to protect not only the insured party, but also persons who are entitled to recover from the insured. Under the UCSPA, an insurance company is required to deal in good faith with a claimant, whether an insured or a third-party, with respect to a claim which the insurance company is contractually obligated to pay.[35] The breach of that duty results in a direct injury to the third party. Consequently, *Reeder* does not hold that a party who has only been indirectly injured by the violation of a statute may bring an action under KRS 446.070.

35 *Davidson v. American Freightways, Inc.*, 25 S.W.3d at 100.

Arnold and Hectus also argue that they have privity with Microsoft by virtue of the EULA, and therefore are direct buyers. Thus, they assert that they have standing to bring an action against Microsoft under *Illinois Brick.*The trial court's reasoning rejecting this argument is sound, and we adopt the following portion of the trial court's opinion:

> Before analysis of this issue, a review of the purpose and effect of Microsoft's licensing scheme as postulated by Plaintiffs is warranted.
>
> 'Under the federal copyright law, the owner of a particular copy ... is entitled, without the authority of the copyright owner, to sell or otherwise dispose of the possession of that copy. This is known as the "first sale doctrine." Under that doctrine, if Microsoft were to sell copies of Windows 98 to any person or entity, those sales would terminate Microsoft's authority to restrict sale or rental of those copies.'[36] ...The consequence would be that after one copy of software were sold (as opposed to licensed) the buyer could now sell copies to anyone, (or just post it on the internet for free and legal downloading by the rest of the world).

36 *Quoting* Plaintiffs' Memorandum In Opposition to Defendant's Motion to Dismiss. Record on Appeal (ROA) at 738–777, p. 27.

> 'If Microsoft relinquished its copyright control of Windows 98 by selling copies, then Microsoft could not maintain its own monopoly pricing of Windows 98 .... As to Windows 98, Microsoft's chain of distribution culminates with its EULA that directly binds consumers who use

that software. The EULA is thus the culmination and an essential aspect of Microsoft's use of federal copyright law to prevent erosion of its monopoly pricing of Windows 98.' [37] ...

37 *Quoting Id.* at 28.

***6** Plaintiff's concede that Microsoft is entitled to copyright protection but, because they are unlawful monopolists, and because they used copyright law to protect that monopoly, their licensing scheme is subject to scrutiny. 'If Microsoft were not an unlawful monopolist, its licensing scheme would not be open to question.'

The Court is not distracted by the word 'scheme.' A scheme was once a plan or an idea. But the word has taken on a sinister overtone since its adoption in political circles. It is usually preceded by the word 'risky.'

Microsoft's licensing scheme is just a licensing agreement. It is similar to the licensing agreement all software manufacturers require and is a product of the wording of federal copyright laws as opposed to a special contractual relationship that provides some unique benefit to Microsoft. The licencing agreement is merely a reiteration that in return for using Microsoft's copyrighted intellectual property, the user is not going to infringe on Microsoft's copyright. It is a license to use the product in perpetuity, in retura for a single fixed payment. It is the functional equivalent of a sale. The license does not create a legal relationship where the parties are now in privity encompassing all of Microsoft's activities, nefarious or otherwise. Indeed, it would be hard to assess the scope of such a policy on other forms of licenses. [38]

38 *Opinion and Order,* July 21, 2000, ROA at 1402–20, pp. 7–8.

Arnold and Hectus also argue that there is no basis for applying *Illinois Brick* based upon the unique circumstances of this case. The Court in *Illinois Brick* reasoned that allowing an indirect purchaser to recover under the Sherman Act would create a risk of double liability for antitrust defendants because the direct purchaser would still be able to recover the full amount of the overcharge. [39] Arnold and Hectus contend that there is no risk of double recovery in this case because the direct purchasers (retailers and OEMs) have not brought an action against Microsoft.

39 431 U.S. 730–31, 97 S.Ct. at 2067, 52 L.Ed.2d at 715–16

In addition, the Court in *Illinois Brick* noted the difficulty of tracing the amount of the overcharge to the end user. [40] However, the Court suggested that an indirect purchaser may still recover under the Sherman Act in circumstances where the effect of the overcharge can be determined "without reference to the interaction of supply and demand that complicates the determination in the general case." [41] Arnold and Hectus assert that their claims do not present difficult problems of tracing and apportionment.

40 *Id.* at 731, 97 S.Ct. at 20675, 2 L.Ed.2d at 716.

41 *Id.* at 736, 97 S.Ct. at 20705, 2 L.Ed.2d at 719.

We find these arguments unconvincing. A recovery by indirect purchasers such as Arnold and Hectus would still leave the direct purchasers free to bring an action against Microsoft for the same anti-trust violations. Thus, Microsoft remains subject to the risk of double recovery. Likewise, we find no support for Arnold and Hectus's assertion that it will not be difficult to trace the effect of Microsoft's overcharge to the price which they paid for Windows 98. To the contrary, as noted by the trial court, Microsoft's monopolistic behavior was directed at business rivals, not at consumers. Any calculation of the damages suffered by the ultimate users of the product would entail the very sort of complex assumptions which the Court in *Illinois Brick* sought to avoid. As the trial court concluded:

***7** Plaintiffs may feel that Microsoft's behavior has inhibited others from entering the market. Maybe so. The essence of that behavior has been predatory pricing to keep potential rivals out. Plaintiffs are the beneficiaries, not the victims.

To postulate that such predatory action creates future injury is speculation, and not suitable for judicial remedy in this action.

In summary, Microsoft may have done wrong, but not to these Plaintiffs. [42]

42 *Opinion and Order,* July 21, 2000, pp. 17–18.

The trial court also dismissed the claims brought by Arnold and Hectus under KRS 367.170. That statute provides that "[u]nfair, false, misleading, or deceptive acts or practices in the conduct of any trade or commerce are hereby declared unlawful."The trial court concluded that KRS 367.170 does not apply to the monopolistic practices alleged in the complaint. Arnold and Hectus argue that they are entitled to

bring their claims against Microsoft under this section based upon the warranty provisions in the EULA. Furthermore, they contend that Microsoft's monopolistic pricing behavior constitutes the sort of conduct which KRS 367.170 was designed to prevent.

We disagree with both contentions. First, the legislature specifically provided a remedy in KRS 367.175 for monopolistic practices. As the more specific section, KRS 367.175 controls over the more general provisions of KRS 367.170.[43]

43 *Withers v. University of Kentucky,* Ky., 939 S.W.2d 340, 345 (1997).

Furthermore, KRS 367.170 does not allow a person who is not in privity with the seller or lessor to bring an action for violations of the statute.[44] The Consumer Protection Act is remedial legislation enacted to give consumers broad protection from illegal actions.[45] However, to maintain an action alleging a violation of the Act, an individual must fit within the protected class of persons defined in KRS 367.220. That section allows any person who "purchases or leases goods or services primarily for personal, family or household purposes and thereby suffers any ascertainable loss of money or property, real or personal, as a result of the use or employment by another person of a method, act or practice declared unlawful by KRS 367.170," to bring an action against the seller or lessor. A person who is not in privity with the seller is not within the class of persons which the Consumer Protection Act was designed to protect.

44 *Skilcraft Sheetmetal, Inc. v. Kentucky Machinery, Inc.,* Ky.App., 836 S.W.2d 907, 909 (1992).

45 *Stevens v. Motorists Mutual Insurance Co.,* Ky., 759 S.W.2d 819, 821 (1988).

The EULA sets out the scope of Microsoft's warranty of Windows 98 to the end user. Arnold and Hectus have not brought any claims based upon that warranty, nor do their claims arise out of the warranty. We agree with the trial court that the warranty does not create privity with Microsoft for all purposes.

In conclusion, we agree with the trial court that indirect purchasers such as Arnold and Hectus are not entitled to bring an action for anti-trust violations under KRS 367.175. Rather, the holding of *Illinois Brick* interpreting the Sherman Act is equally applicable to KRS 367.175. Similarly, Arnold and Hectus cannot bring an action under that section based upon KRS 446.070 or through the warranty provisions of the EULA. Finally, we agree with the trial court that Arnold and Hectus have failed to state a claim under KRS 367.170. Therefore, the trial court properly dismissed the complaint.

***8** Accordingly, the judgment of the Jefferson Circuit Court is affirmed.

ALL CONCUR.

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NOT TO BE PUBLISHED
Court of Appeals of Kentucky.

Mary Jane CALHOUN and Jesse Daymond Calhoun, Appellants
v.
CSX TRANSPORTATION, INC. and Paul McClintock, Jr., Appellees.

No. 2007–CA–001651–MR.
|
Jan. 23, 2009.
|
Discretionary Review Granted by Supreme Court Nov. 18, 2009.

Appeal from Bullitt Circuit Court, Action No. 02–CI–01120; Rodney Burress, Judge.

Attorneys and Law Firms

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Before ACREE and NICKELL, Judges; KNOPF,[1] Senior Judge.

1 Senior Judge William L. Knopf sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and Kentucky Revised Statutes (KRS) 21.580.

OPINION

KNOPF, Senior Judge.

*1 Mary Jane Calhoun and Jesse Daymond Calhoun (the Calhouns or the appellants) appeal from an order of the Bullitt Circuit Court awarding summary judgment to CSX Transportation, Inc., and Paul L. McClintock, Jr., in a lawsuit arising out of a railroad crossing accident in which a CSX train engineered by McClintock struck a vehicle driven by Mary. The Calhouns contend that the trial court erred in awarding the appellees summary judgment. For the reasons stated below, we affirm.

FACTUAL AND PROCEDURAL BACKGROUND

In the light most favorable to the appellants, the facts are as follows. On December 12, 2001, at about 6:30 a.m., Mary dropped off two of her sons at the Bullitt County work site of their employer, Bullitt County Sanitation (BCS), a privately owned sanitation company. She had three sons who worked at the facility and regularly dropped them off at the site. She had made the trip most weekdays for about three months.

The work-site is located on the west side of Preston Highway in Shepherdsville across the CSX railroad tracks that run through the area. The tracks run north-south. Access to the BCS site is by an unnamed road running east-west toward the tracks.[2] The road is paved for a distance, but the paved portion ends short of the crossing and continues forward as a gravel road across the tracks. At the point of termination of the paved portion, the Bullitt County Highway Garage is on the right. The paved portion of the road is maintained by the county (for convenience in reaching the garage) but the gravel portion is not.

2 The road is sometimes referred to in the record as the County Garage Road.

On the west side of the tracks are two tracts of property, one owned by Kerrin Hester and the other by Charles Burris. Hester's son operated the BCS facility on the Hester tract.[3] As further discussed below, the record discloses that the unpaved portion of the road is not part of the public or county highway system and is not a part of the highway system of, nor maintained by, the state, Bullitt County, or any other local government. Because CSX believed the crossing to be a private crossing (as opposed to a public crossing), it did not maintain the crossing pursuant to the standards required for a public crossing. One of the consequences of this is

that there is extensive vegetation growing along the west side of the crossing. The Calhouns allege that the vegetation unreasonably blocked the sitelines up and down the tracks.

3 The facility is now out of business.

Mary had dropped her sons off at the facility many times, had traversed the track regularly in both directions, and was familiar with the crossing. She had stopped for passing trains on several occasions. After dropping off her sons on this occasion, she was proceeding east back across the crossing toward Preston Highway. In the meantime, a CSX train operated by Paul McClintock was traveling northbound toward the crossing at fifty-two miles per hour, and accelerating to fifty-three miles per hour. It was foggy and dark.

McClintock and the train's conductor, Ed Harris, observed Mary's vehicle approaching the crossing through the treeline along the west side of the tracks. McClintock and Harris testified in their depositions that the train sounded its horn to warn Mary of its approach. However, according to the train's data recorder, the train's whistle was not sounded during the seven seconds prior to the train's reaching the crossing—a distance of 500 feet,[4] and thus there is a factual dispute concerning this issue. For whatever reason, Mary failed to realize the train was bearing down on the crossing and proceeded over the tracks.[5] She almost made it (and thus a second, or a fraction thereof, could have made the difference); however, the train clipped the back of her vehicle and spun it around. Mary was ejected from the vehicle and sustained severe injuries. She has no recollection of the incident.

4 There was testimony to the effect that the data recorder's recording of horn usage was subject to error. However, for purposes of our review we will presume the recorder data to be correct.

5 One of Mary's sons, Paul, testified that he witnessed the accident and that it did not appear that Mary stopped at the crossing.

*2 As a result of the foregoing events, on December 10, 2002, the Calhouns filed a complaint against CSX and McClintock in Bullitt Circuit Court. The complaint alleged negligence by these defendants in causing the accident. More specifically, they alleged that CSX violated its duties by keeping and maintaining the railroad crossing in a highly dangerous and unsafe condition; operating the train at an excessive speed; failing to keep a proper lookout for crossing vehicles; and failing to adequately warn by horn or otherwise. BCS, Hester, and Burris were later added as defendants.

Following extensive discovery, both CSX and McClintock filed motions for summary judgment. On March 21, 2007, the trial court granted CSX and McClintock summary judgment.[6] The trial court reasoned that these defendants had not breached any duty owed to Mary principally because: (1) the crossing was a private crossing and a railroad company's only duty under such circumstances is to warn a member of the public when he is observed in actual peril of being struck by the train; (2) because the crossing was a private crossing CSX had no duty to clear the vegetation which allegedly blocked the sitelines; and (3) that the crossing was not an ultrahazardous crossing, was not used pervasively by the public, and Mary did not rely upon the train signaling so as to alter CSX's duties from the general rule applicable to private crossings. The Calhouns' motion to alter, amend, or vacate was denied. This appeal followed.

6 By agreement of the parties BCS, Hester, and Burris were dismissed from the lawsuit.

STANDARD OF REVIEW—SUMMARY JUDGMENT

The standard of review on appeal when a trial court grants a motion for summary judgment is "whether the trial court correctly found that there were no genuine issues as to any material fact and that the moving party was entitled to judgment as a matter of law."*Scifres v. Kraft,* 916 S.W.2d 779, 781 (Ky.App.1996); CR[7] 56.03. "The trial court must view the evidence in the light most favorable to the nonmoving party, and summary judgment should be granted only if it appears impossible that the nonmoving party will be able to produce evidence at trial warranting a judgment in his favor."*Lewis v. B & R Corp.,* 56 S.W.3d 432, 436 (Ky.App.2001), *citing Steelvest v. Scansteel Serv. Ctr., Inc.,* 807 S.W.2d 476, 480–82 (Ky.1991).

7 Kentucky Rules of Civil Procedure.

"The moving party bears the initial burden of showing that no genuine issue of material fact exists, and then the burden shifts to the party opposing summary judgment to present 'at least some affirmative evidence showing that there is a genuine issue of material fact for trial.' " *Lewis,* 56 S.W.3d at 436, citing *Steelvest,* 807 S.W.2d at 482.The trial court "must examine the evidence, not to decide any issue of

fact, but to discover if a real issue exists." *Steelvest,* 807 S.W.2d at 480.The Kentucky Supreme Court has held that the word "impossible," as set forth in the standard for summary judgment, is meant to be "used in a practical sense, not in an absolute sense." *Lewis,* 56 S.W.3d at 436."Because summary judgment involves only legal questions and the existence of any disputed material issues of fact, an appellate court need not defer to the trial court's decision and will review the issue de novo." *Id.*

PRIVATE/PUBLIC CROSSING ISSUES

***3** The duties a railroad owes to those traversing its tracks are considerably different depending upon whether the crossing is public or private. The appellees contend that the crossing is a private crossing and subject to the lesser duties applicable thereto. Accordingly, we must first consider whether the subject crossing is public or private. The trial court determined the crossing to be a private crossing. We believe its conclusion is correct.

KRS Chapter 177 addresses, among other things, state and federal highway matters. In turn, KRS 177.120 to KRS 177.210 address railroad crossings in relation to the highway system. KRS 177.010(5) provides a definition for a public railroad crossing applicable to Chapter 177:

> (5) "Public grade crossing" means the at-grade intersection of a railroad track or tracks and a road or highway that has been dedicated to public use and incorporated into either the state primary road system or the highway or road system of a county or municipality[.]

The appellants argue that the foregoing definition is not applicable in a railroad negligence case because the definition is intended to be limited to its usage in Chapter 177. However, case authority mirroring KRS 177.010(5) confirms that this statutory definition is appropriate for application in determining whether a crossing is public or private in a railroad crossing negligence case such as the present one. *See Deitz' Adm'x v. Cincinnati, N.O. & T.P. Ry. Co.,* 296 Ky. 279, 176 S.W.2d 699, 701 (1943) ("For a crossing to be a public one the road or street on which it is situated must be a public road or street established either in the manner prescribed by statute or by dedication, and if in the latter manner there must be an acceptance.") As such, we disagree with the appellants that the statutory definition has no applicability in the present case.

In summary, to be classified as a public railroad crossing, the road traversing the crossing must: (1) have been dedicated to public use and (2) have been incorporated into either the state primary road system or the highway or road system of a county or municipality. It follows that a crossing that does not meet the foregoing criteria is a private crossing. The record is replete with evidence that the unnamed road at issue in this case does not meet the foregoing standards.

Carroll Samuels was employed at the time of his deposition as a supervisor for the Bullitt County Road Department. He had been employed there for 26 years. Samuels provided a deposition on behalf of the appellees addressing the status of the unnamed road leading to the crossing. He testified that the road was maintained by the county up to where the garage was located, but that the gravel portion that heads west from there across the tracks was not. Samuels testified that the road has not been dedicated to public use, and that it has not been incorporated into the state or county road system. He testified that the road would be more accurately described as a driveway leading to the Burris and Hester property on the west side of the track than a road.

***4** There is no evidence contained in the record that any other governmental unit maintained the gravel portion of the road. Burris and Hester testified that they maintain the gravel portion of the road by replacing gravel as needed. Further the Kentucky Transportation Cabinet's listing of the public roads in Bullitt County does not include the road. Nor do the City of Shepherdsville or Bullitt County road listings include the road as part of their road systems. Finally, the U.S. Department of Transportation railroad crossing listing catalogs the crossing as a private crossing.

On the other hand, the appellants cite us to no evidence in the record which would indicate that that the road has been dedicated to public use and incorporated into either the federal, state, county, or municipality road system. It follows that there is a total failure of evidence in their favor upon this point.

The appellants argue to the effect that the crossing should be deemed a public crossing because there is signage there consistent with a public crossing; because CSX does not have a private crossing agreement with Hester and Burris though

it generally is its policy to have such agreements with private crossing owners; and because Hester and Burris were not aware that it was not a public crossing. However, these factors do not supersede the rather straight-forward statutory and case law definitional requirements for classification as a public crossing, and we are thus unpersuaded that they are sufficient to transform the crossing into a public one.

In summary, the record discloses that the road leading to the crossing is a private road, and, it follows, that the crossing is, as a matter of law, a private crossing. We accordingly base the remainder of our review upon this premise.

DUTIES OWED AT PRIVATE CROSSING

In light of our conclusion that the crossing is a private crossing, we next consider the duty the appellees owed to Mary to maintain the crossing for safe passage and warn her of the approaching train.

A negligence action requires proof of: (1) a duty on the part of the defendant; (2) a breach of that duty; (3) a consequent injury, which consists of actual injury or harm; and (4) legal causation linking the defendant's breach with the plaintiff's injury. *Pathways, Inc. v. Hammons,* 113 S.W.3d 85, 88–89 (Ky.2003). Thus to prevail in her lawsuit the appellants must show, first of all, that the appellees owed a duty to Mary and, if so, that they breached that duty. Duty presents a question of law, and thus is reviewed *de novo. Id.* at 90.

The duties owed to a motorist or pedestrian crossing the tracks at a private crossing are minimal.

> ...KRS 277.190 requires that each locomotive give a signal of its approach at each public crossing, while the general rule has been established that a railway company owes no duty of lookout or warning at private crossings. *Louisville & N.R. Co. v. Survant, Ky.,* 19 Ky.L.Rptr. 1576, 44 S.W. 88 (1898); *Deitz' Adm'x v. Cincinnati, N.O. & T.P. Ry. Co.,* 296 Ky. 279, 176 S.W.2d 699 (1943). Operators of a train at or near a private crossing are not liable for injuries to a traveler at that crossing unless after discovery of his peril, they fail to use all means to avoid the accident.*Stull's Adm'x v. Kentucky Traction & Terminal Co.,* 172 Ky. 650, 189 S.W. 721 (1916); *Chesapeake and Ohio Railway Company v. Hunter's Adm'r,* 170 Ky. 4, 185 S.W. 140 (1916).

*5 *Hunt's Adm'r v. Chesapeake & O. Ry. Co.,* 254 S.W.2d 705, 706–07 (Ky.1952) (citations modified).

> At a private crossing the only duty of a railroad is to exercise ordinary care to save a person from injury after his peril is discovered by those in charge of the train. The person crossing the track must exercise ordinary care for his own safety." Chesapeake and *Ohio Railroad Company v. Hunter's Adm'r.,* 170 Ky. 4, 185 S.W. 140 (1916).

Maggard v. Louisville & N.R. Co., 568 S.W.2d 508, 509 (Ky.App.1977).

Nor does a railroad, contrary to the contentions of the appellants, have a duty to clear away vegetation at a private crossing which may obstruct the public's sitelines up and down the track. This issue was addressed in *Spalding v. Louisville & N.R. Co.,* 281 Ky. 357, 136 S.W.2d 1 (1940). In that case, Spalding was crossing the tracks by automobile at a private crossing located on a farm owned by John Barber which, like the crossing in the present case, had vegetation blocking the sitelines. *Spalding* addressed the issue as follows:

> ... the precise question was before this Court in the case of *Gividen's Adm'r v. Louisville & Nashville Railroad Co.,* 17 Ky .Law Rep. 789, 32 S.W. 612, 613 (1895). The owner of a private passway (regardless of how it was acquired), crossing the railroad track from her residence to a portion of the home premises on the other side of the track, was killed by a train colliding with her, and to recover the damages sustained by her estate, her administrator filed the action against the defendant charging as negligence on its part "The failure of the defendant to cut the bushes and other undergrowth near its road, so as that one on the track might be seen, and such injuries in this way avoided," also that such permissible growth "obstructed the view of the decedent as she approached the crossing, and, in attempting to pass over the track, she was run over and killed."

> The Court held that the crossing was strictly a private one, and "therefore a signal was not necessary or required to be given of the approach of the train," which latter is thoroughly established in this jurisdiction and is conceded by counsel for plaintiffs. *It was furthermore held in that case that it was not the duty of the railroad company (the servient owner at that point) to keep its right of way clear of obstructing growths for the benefit of the dominant owner, and which is the precise point involved in this case. That opinion has never been overruled, and it appears to be in accord with the generally declared rule on the subject* [.]

Spalding, 136 S.W.2d at 3 (emphasis added; citation modified).

Thus, the general rule is that at a private crossing, the railroad has no duty to warn a person unless he is observed in immediate peril, nor does it have the duty to clear away vegetation which may obstruct the traversing public's line of sight at the crossing. Accordingly, absent an exception, the foregoing defines the duties the appellees owed to Mary in the present case.

***6** There are three principal exceptions to the general private crossing duties as set forth above: (1) the assumed duty exception; (2) the ultrahazardous crossing exception; and (3) the habitual use exception. Mary contends that each applies in the present case. We consider these exceptions in the following sections.

ASSUMED DUTY EXCEPTION

The first exception concerns instances where the railroad has by custom adopted the practice of signaling at a private crossing and thus accustoming the public into depending upon signal to warn of an approaching train.

The rule is stated as follows:

> The rule of customary practice and the right to rely upon it in a case of this kind is like that relating to the approach of a train to a private crossing. Thus, a train may approach and run over a private crossing without signals unless it has been customary to give reasonable and timely signals and persons using the crossing were accustomed to rely upon them. Where it had been customary to do that *and the traveler relied upon receiving such warning,* the failure to give it is negligence.

Illinois Central R. Co. v. Maxwell, 292 Ky. 660, 167 S.W.2d 841, 843 (Ky.1943) (citing *Chesapeake & O. Ry. Co. v. Young's Adm'r,* 146 Ky. 317, 142 S.W. 709 (1912); *Kentucky Traction & Terminal Co. v. Brawner,* 208 Ky. 310, 270 S.W. 825 (1925); *Illinois Cent. R. Co. v. Applegate's Adm'x,* 268 Ky. 458, 105 S.W.2d 153 (1937)) (emphasis added).

McClintock testified that he customarily gave a signal at this crossing, and CSX concedes that it had adopted this as its policy. As such, the first prong of the test is met—CSX had adopted the custom and practice of giving a signal at this private crossing.[8] However, a crucial element of this exception is that the plaintiff "*relied upon receiving such warning.*" Mary Calhoun's deposition testimony indicates that although she had dropped off her sons many times at the BCS worksite and had had to stop for trains to pass on several occasions, she had never heard a train signal at the crossing:

8 While CSX concedes this point, Burris and Hester (those in the best position to know) testified that trains did not always signal at the crossing.

> Q. When you had been to this sanitation place before and had encountered trains there, we talked about that earlier, had you—do you have a memory of hearing the horns being sounded?
>
> A. Never did hear a whistle. All the time I took 'em, I never did hear one.
>
> Q. How many times do you think you encountered—I think you told me between one and ten?
>
> A. Uh-huh.
>
> Q. And I'm not gonna—
>
> A. If you're talking about crossing the railroad?
>
> Q. Yes.
>
> A. Yeah. But like I say, I'd be setting there when I let my sons out and I'd see trains passing, and I never did hear a whistle. Never did hear a whistle.

....

Q. And—and your belief is that when those trains would go by, they would just go by silently?

A. Never heard a whistle.

Because Mary had not come to rely upon the giving of a horn warning at the crossing, the exception does not apply. Accordingly, the appellants may not avail themselves of this exception to alter the general duties applicable to a private crossing.

ULTRAHAZARDOUS CROSSING EXCEPTION

*7 An exception to the ordinary duties imposed upon a railroad at a public crossing arises in cases concerning an "ultrahazardous" crossing. An ultrahazardous crossing generally refers to a crossing where the terrain layout is such that someone crossing the tracks at that location is unable to readily observe an approaching train. The requisites for a crossing to qualify under this exception have been stated as follows:

> [T]he crossing must be so exceptionally dangerous on account of a natural or habitual artificial obstruction, or of other immediate surroundings, that a jury could say that one exercising ordinary care and prudence in traveling the highway can not see an oncoming train or become aware of its near approach until he is practically in immediate danger and unable by the exercise of ordinary care to avoid being struck by the train.

Cincinnati, N.O. & T.P. Ry. Co. v. Hare's Adm'x, 297 Ky. 5, 178 S.W.2d 835, 837 (Ky.1944). [9]

9 The appellants rely upon the following quote from *Louisville & N.R. Co. v. Quisenberry,* 338 S.W.2d 409, 411 (Ky.1960): "However, there is a well recognized exception to the general rule where there exist peculiar or extraordinary circumstances surrounding a crossing and the facts are known to trainmen. In such cases reasonable care may require that an alarm or signal be given by the approaching train and the question of whether circumstances are such that require a signal is for the jury to determine" to argue that the rule as stated in *Hare's Adm'x* has been abrogated. However the rule as stated in *Hare's Adm'x* has not been specifically overruled and, accordingly, we are bound by its holding.SCR 1.030(8)(a); *City of Louisville v. Slack,* 39 S.W.3d 809, 811 (Ky.2001).

The appellants contend that the ultrahazardous crossing doctrine is applicable based upon the vegetation and treeline in the area of the crossing that obscures the view of a person crossing over the tracks from the west and looking south. As previously noted, CSX had no duty to clear the vegetation. Moreover, the above requisites to qualify as an ultrahazardous crossing include natural obstructions, and thus obstructive vegetation could bring a crossing into the category.

We begin by noting Mary's deposition testimony concerning the problem of the obstructive vegetation:

Q..... Let me ask you another question. Do you agree that at this crossing, based upon your past experience there, it is possible to pull up to the tracks close enough that you can see up the tracks without anything blocking your view of the tracks?

A. Best I can remember, yeah.

Q. And that's what you would customarily do there, you would pull up to the tracks coming out?

A. Yes.

Q. You would stop your vehicle at a position where you could see up the tracks to our right?

A. Both ways, yes.

Q. Without anything blocking your view, correct?

A. Best of my ability, yes.

Q. And although you do not remember, obviously from what you've told me, what happened on this day, you believe, based upon your habit there, that is exactly what you would have done on this day?

A. Yes.

Q. You would have—

A. Stopped.

Q. —pulled up and stopped—

A. Yes.

Q. —at a position where you would have no obstructions to your view looking up the tracks?

A. The best I can remember, yes.

....

Q. You were aware, obviously, that there were obstructions to your view, namely those trees?

A. Yes.

Q. And that you had to get past those trees in order to have that unblocked view of the tracks?

A. Yes.

Q. And you were aware that because of that you had to pull past the trees and stop in order to have that unobstructed view of the tracks.

A. Yes.

***8** Thus Mary testified that it was possible to pull up past the treeline and have an unobstructed view up and down the tracks. Nevertheless, the appellants cite us to the testimony and "forensic mapping" of Dr. Jerry Cusick and his opinions as to the minimal sight distances available to a motorist in close proximity to the crossing. They note that it is his opinion that at a distance of 22 feet from the crossing heading east, the sight distance to the north is only 263 feet, at which point a train would be only 3.38 seconds from the crossing. [10]

10 Dr. Cusick's calculations are based upon the positioning of a tree (since cut down) nearest the crossing in a location strongly contested by the appellees.

As previously noted, under our summary judgment standards, in the usual case we are required to view the evidence in the light most favorable to the appellant. *Steelvest, supra.*The testimony and forensic modeling of Dr. Cusick would, therefore, despite Mary's testimony, normally be sufficient to create a genuine issue of material fact concerning whether this was an ultrahazardous crossing. *See Louisville & N.R. Co. v. Quisenberry,* 338 S.W.2d 409 (Ky.1960) (siteline of 300 feet created extrahazardous crossing). [11] However, "the mere existence of some alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment; the requirement is that there be no genuine issue of material fact."*Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 247–48, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986)."When opposing parties tell two different stories, one of which is blatantly contradicted by the record, so that no reasonable jury could believe it, a court should not adopt that version of the facts for purposes of ruling on a motion for summary judgment."*Scott v. Harris,* 550 U.S. 372, 127 S.Ct. 1769, 1776, 167 L.Ed.2d 686 (2007) (Video tape of police chase discrediting 42 U.S.C. § 1983 plaintiff's depiction of the chase).

11 The ultrahazardous crossing in *Quisenberry* is described in the opinion as follows: "The railroad tracks which bisect this road, run, as we have indicated, from north to south. The southbound track is on the west side of the road's right-of-way and the northbound track is on the east side. About 300 feet north of the crossing is a sharp curve in the track and on the west, or concave side of the curve, is a bluff or cut which obscures the vision of an operator proceeding south. There is some testimony to the effect that a person approaching within 34 feet of the crossing would be able to see the track for about 500 feet north of the crossing, but when getting closer, he could see only 300 feet in that direction. It is not explained why this is so and we surmise that at the former point one might be able to see behind the bluff and further up the track. To the south of the crossing in the direction the automobile was carried is a stretch of relatively straight track. This too ends in a curve."338 S.W.2d at 410.

In this case, Dr. Cusick's testimony and forensic mapping is blatantly contradicted by the record by way of the photographic evidence made near the time of the accident. This contradiction is well illustrated by the photographs included at tab 4 [12] and tab 5 [13] of the appellees' brief.

12 Contained in the record as Exhibit 1 (top photograph) of Mary Calhoun's deposition.

13 Contained in the record as Exhibit D1 of Kerrin Hester's deposition.

The photographs depict the view heading east across the tracks looking to the south—the route Mary was traveling when she was hit. Clearly visible in the pictures is a railroad crossing sign, which is described in the appellants' own exhibits as being 18 feet from the center of the track (*see,* e.g., appellants' brief, appendix 15). There is a wide gravel shoulder west of the tracks that extends well beyond the crossing sign. The pictures are taken from behind the crossing sign, and it is obvious that a vehicle could have safely pulled to that position, or forward of it, and stopped prior to crossing the tracks. From this position a vehicle is beyond the treeline and vegetation, and has a clear view down the tracks to the

south. The tracks are unwaveringly straight at this point, and the view is virtually to the horizon. In summary, these photographs contradict the allegation that this crossing is ultrahazardous.

***9** As a matter of law the circumstances are not such "that a jury could say that one exercising ordinary care and prudence in traveling the highway can not see an oncoming train or become aware of its near approach until he is practically in immediate danger and unable by the exercise of ordinary care to avoid being struck by the train."*Hare's Adm'x,* 178 S.W.2d at 837.Accordingly, the ultrahazardous crossing doctrine is inapplicable to the present case.

HABITUAL USE EXCEPTION

The final exception involves a private crossing that is heavily used by the public such that it takes on the character of a public crossing. The rule is described as follows:

> [W]hen a private crossing is used by the public generally with the consent of the railroad company, a duty devolves to give warning of the approach of trains; in other words, if a crossing is a public one, there is no doubt about the duty to give warning or signal; if the crossing is a private one and sufficient evidence is introduced to show habitual use of the crossing by the public, then this use may impose the duty of lookout and warning.*Louisville & N.R. Co. v. Arrowood's Adm'r,* 280 Ky. 658, 134 S.W.2d 224 (1939); *Louisville & N.R. Co. v. Foust,* 274 Ky. 435, 118 S.W.2d 771 (1938). However, this court has never, so far as we have been able to find, established a definite rule as to the number of people who must use a crossing each day before it may be said that it is a public crossing. In *Louisville & N.R. Co. v. Arrowood's Adm'r,* 280 Ky. 658, 134 S.W.2d 224, 226 (1939), we said:
>
> > 'In the *Stidham case [Louisville & N.R. Co. v. Stidham's, Adm'x,* 194 Ky. 220, 238 S.W. 756 (1922)], the precedents were reviewed and it was held that the duty of trainmen to anticipate the presence of persons upon the track, and to exercise ordinary care to discover and avoid injuring them, does not arise where the greatest number of persons using the track, according to the largest estimate of many of the witnesses, was 150 persons each 24 hours, and the place of the accident was in the country, although the track connected two incorporated towns located about 3 miles apart. We have held insufficient to establish those duties estimates of the use of the track in such places by as many as 60, 75, or 100, or 125 persons every day.'
>
> It seems that in such cases the effect of the use in the particular case is a matter of law for the court to determine.

Hunt's Adm'r v. Chesapeake & O. Ry. Co., 254 S.W.2d at 707 (citations modified).

Thus it would appear that at least 150 crossings per day would be required for this exception to apply. There is no evidence of record which would indicate that the number of crossings at the subject site is anywhere near this level. While it appears that BCS had a total of 12 trucks, according to Paul Calhoun the company normally ran only 4 to 6 at a time, and that each truck made 3 to 4 trips in and out daily. Based upon 6 trucks and 4 trips, this would be 48 crossings in and out daily by the trucks. Assuming two men to each truck, these 12 employees made 24 crossings daily coming to and leaving work (or 36 crossings assuming 3 men per truck). In addition, a few occasional customers crossed the tracks to pay their bills, and of course Hester and Burris used the crossing daily. This number of crossings, however, is well under the level required for the exception to apply. Accordingly, the exception is not applicable.

COMMON LAW DUTY TO WARN

***10** The appellants argue that failing all else, the common law duties owed to travelers by a railroad imposed a duty upon CSX and McClintock to have provided a warning to Mary as she approached the crossing. "The common law embraces the duty of giving adequate warning of the approach of a train, of keeping a lookout ahead, and of operating the train at a speed commensurate with the care required under the circumstances."*Illinois Cent. R. Co. v. Arms,* 361 S.W.2d 506, 509 (Ky.1962) (citing *Piersall's Adm'r v. Chesapeake & O. Ry. Co.,* 180 Ky. 659, 203 S.W. 551 (1918)).

However, the case law we have cited herein *is* the common law applicable to a railroad's duty as it has developed in

Kentucky in the area of private railroad crossings. The appellants may not avoid the general rules concerning private crossings discussed herein simply by invoking a cause of action based upon common law principles. As such, the cases cited in the preceding sections are the controlling authorities in this action, and this argument is without merit.

BREACH OF DUTY

Having determined that the duty owed by the appellees are those applicable to a private crossing as set forth above, we next consider whether there is a genuine issue of material fact concerning whether that duty was breached.

First, because this was a private crossing, CSX breached no duty owed to Mary by failing to clear the vegetation in the area so as to provide her with a better siteline down the tracks to the south. Moreover, as previously noted, when the tracks are properly approached and crossed, an unobstructed view down the tracks is available. The vegetation issue does not defeat summary judgment.

Second, while the engineer and conductor both observed Mary's vehicle heading toward the crossing while she was still on the west side of the treeline, she was not yet in immediate peril. She was still a considerable distance from the crossing and the general rule that the train had no duty to give warning was at that point operative. We believe that application of the private crossing rule as stated above did not require the train to sound its horn merely because Mary was observed heading toward the crossing, but not at the time in peril.

Third, we note that Mary's car would have appeared into view as it came from behind the treeline, approached the crossing, and started over the tracks. It stands to reason that she would have at this time have been in immediate peril and the private crossing rules would have required the train to sound a warning. However, the appellants do not make the argument that had the train sounded a warning at that point the accident could have been avoided. While the appellants received leave to file a 40–page brief, they do not have an argument section addressing whether the appellees breached their duty under the standards applicable to a private crossing; that is, by failing to warn as Mary came into immediate peril when she began to traverse the tracks as the train sped toward her.

***11** The only references we can find alluding to this are in the appellants' Statement of the Case where they state "[a]ny warning before arrival could have prevented the crash because Ms. Calhoun almost made it through the crossing. This collision almost did not happen," Appellants' Brief, pg. 1, and in their argument heading "McClintock Failed to Act as a Reasonably Prudent Railroad Engineer" where they state "[a]lternatively, he [McClintock] knew or should have known that if she were in the zone of danger and he sounded the horn she may have been able to take emergency evasive action to get through the crossing faster."Appellants' Brief, pg. 37.

While as Mary began to traverse the tracks and came into immediate peril under the private crossing rules the railroad had a duty to sound a warning, they cite us to no testimony or other evidence of record alleging that if the train sounded its horn the accident could have been avoided. Moreover, the record discloses that application of the train's brakes by the time Mary began her approach over the tracks would have had no impact on its speed prior to making contact with Mary's vehicle.

While it seems superficially plausible that if the train had sounded a warning as Mary started over the tracks then she could have avoided the accident by, for example, "flooring it", in the absence of the appellants' development of the issue in the proceedings below, and proper briefing before us, we are constrained to conclude that our speculation that the accident may have been avoided is insufficient for us to determine that there is a jury issue. We could just as well speculate that by the time Mary started across the tracks it was too late for a warning to have done any good. Simply put, the appellants failed to develop the issue—either below or before us—as a ground for avoiding summary judgment.

As such, we are constrained to agree with the trial court that the appellees are entitled to summary judgment.

TIMELINESS OF MCCLINTOCK'S MOTION

In filing the original motion for summary judgment, counsel for the appellees neglected to include McClintock as a party to the motion. Upon realizing the error, at the hearing on the motion counsel moved to include McClintock as a party to the motion. Counsel for the appellees represented that the same arguments contained in the original motion were likewise applicable to McClintock. Counsel for the appellants objected.

Because of the scheduled trial date, it was too late to file a new motion for McClintock and still provide the appellants with the 10 days' notice provided in CR 56.03. This was discussed and it was agreed (though still over the appellants' objection) that counsel for the appellees would file a motion applicable to McClintock that day, and the appellants would be given a week to respond.

CR 56.03 provides as follows:

> *The motion [for summary judgment] shall be served at least 10 days before the time fixed for the hearing.*The adverse party prior to the day of hearing may serve opposing affidavits. The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, stipulations, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages. (Emphasis added).

***12** In *Perkins v. Hausladen,* 828 S.W.2d 652 (1992), Justice Leibson addressed the CR 56.03 10–day notice requirement, and its importance, as follows:

> The only Kentucky case squarely addressing this issue [of compliance with CR 56.03's 10–day notice requirement] is *Rexing v. Doug Evans Auto Sales, Inc.,* Ky.App., 703 S.W.2d 491 (1986). In *Rexing* the court viewed it as error to force a hearing on summary judgment short of the ten days notice requirement, stating:
>
> "We see no reason to permit appellee to circumvent the notice requirements of our Civil Rules by ambushing appellants with last minute motions and early morning hearings. The trial court erred in refusing to grant appellants a continuance.["] *Id.* at 494.
>
> The treatise on *Kentucky Practice* by Bertelsman and Philipps, 4th ed. Civil Rule 56.03, Comment 3, states:
>
> > "As the annotations following the sub-rule demonstrate, the 10–day lead time provided before hearing the motion is extremely important and, although not jurisdictional, may not be lightly disregarded.... [R]equests for extension of time to respond to such motions are usually freely granted, and it may be an abuse of discretion for the trial court to refuse to grant reasonable extensions."
>
> We need not decide whether there is an inflexible rule that violation of the ten day notice requirement requires automatic reversal. There may be unusual situations where no possible prejudice could have resulted from a premature hearing. But this case is not one of them. As pointed out in their Brief, the [nonmovants] were put at a "disadvantage by not being able to put on any affidavits, additional legal research, nor other evidence to contradict the motion."

Perkins, 828 S.W.2d at 656–57.

The above discussion suggests that a violation of the CR 56.03 notice provisions requires "automatic reversal" except in "unusual situations where no possible prejudice could have resulted from a premature hearing."We believe that this is a situation where no reversal is required. The arguments applicable to McClintock were identical to those applicable to CSX, so the appellants had timely notice of the applicable arguments. Moreover, since trial was scheduled to begin in less than 10 days, there was no way the notice requirement could have been met and the motion ruled upon without rescheduling the trial. Further, if McClintock was indeed entitled to summary judgment (which is how it turned out), it would have made no sense to proceed with the trial simply because his motion could not be timely addressed for procedural reasons. Under these circumstances we find no prejudice to the appellants in preparing for the late-filed motion, and accordingly find no abuse of discretion in the trial court's permitting of the late-filed motion.

MCCLINTOCK'S PRESCRIPTION DRUG USE

The record discloses that McClintock suffers from migraine headaches and recurrences of sickness related to malaria he contracted while serving in the military. As a result he takes a variety of prescription drugs, including valium, oxycontin, and hydrocodone. The appellants' argument is stated in their brief, in total, as follows:

> ***13** Dr. William Smock is an expert in emergency medicine. He reviewed Mr. McClintock's pharmacy and medical records and concluded Mr. McClintock would have been impaired in his operation of the train by the type, amount and combination of narcotics shown in those

records. CSX has in place a drug screening program that can—at best—be likened to a voluntary "honor" system whereby the employees are expected to fill out an "MD3" form if they miss over seven days of work. The employee is expected to list in the form any medical problems they have. According to Dr. Thomas Nielson, CSX Chief Medical Officer, this along with a drug screening program that tests only 25% of employees, is the extent of CSX's policies to ensure train crew are not impaired while operating trains in Kentucky.

Appellants respectfully submit that reasonable care and railway safety in Kentucky require much more than such minimal effort to ensure safe train operations.

In *Deutsch v. Shein,* 597 S.W.2d 141, 143–44 (Ky.1980), the Supreme Court adopted the substantial factor test for causation as set forth in § 431 of the Restatement (Second) of Torts, which is entitled "What Constitutes Legal Cause." This section states in pertinent part that the "actor's negligent conduct is a legal cause of harm to another if his conduct is a substantial factor in bringing about the harm."Comment (a) to § 431 explains what is meant by "substantial factor":

> In order to be a legal cause of another's harm, it is not enough that the harm would not have occurred had the actor not been negligent.... [T]his is necessary, but it is not of itself sufficient. The negligence must also be a substantial factor in bringing about the plaintiff's harm. The word "substantial" is used to denote the fact that the defendant's conduct has such an effect in producing the harm as to lead reasonable men to regard it as a cause, using that word in the popular sense, in which there always lurks the idea of responsibility, rather than in the so-called "philosophic sense," which includes every one of the great number of events without which any happening would not have occurred. Each of these events is a cause in the so-called "philosophic sense," yet the effect of many of them is so insignificant that no ordinary mind would think of them as causes.

Section 434 of the Restatement (Second) of Torts addresses the issues of when legal causation is a question of law for the court and when it is a question of fact for the jury. The court has the duty to determine "whether the evidence as to the facts makes an issue upon which the jury may reasonably differ as to whether the conduct of the defendant has been a substantial factor in causing the harm to the plaintiff." § 431(1)(a). This standard is consistent with Kentucky law. *See, e.g., McCoy v. Carter,* 323 S.W.2d 210, 215 (Ky.1959) (Legal causation presents a question of law when "there is no dispute about the essential facts and [only] one conclusion may reasonably be drawn from the evidence.") *See also*57A Am.Jur.2d, Negligence § 446 (1989); *Pathways, Inc. v. Hammons,* 113 S.W.3d 85, 92 (Ky.2003).

***14** Here, upon viewing the evidence of McClintock's prescription drug use in the light most favorably to the appellants, we do not believe there is a genuine issue of material fact upon the issue of whether his prescription drug use was a substantial factor in causing the present accident.

We first note that McClintock had taken his prescription narcotics for a long period of time, had developed a tolerance for them, and thus took them in greater quantities than someone not accustomed to the substances. All of his prescriptions were authorized by his physician. At the time of the accident, McClintock was at the concluding stage of his return run from Nashville, which had been traversed without incident. There was no testimony that subsequent to the accident he appeared over-medicated.

Further, owing to the circumstances of the accident, the only plausible theory that the drugs could have had an impact would be that they caused him to quit signaling the train horn in the seven seconds (500 feet) prior to the crash. [14] However, immediately south of the subject crossing were two public crossings and the recorder box indicates that the train did signal at those crossings and continued to do so until 500 feet from the private crossing where the accident occurred. McClintock and the conductor testified that they saw Mary approaching from the west side of the tree line. It defies reason to suppose that his medications would have been the explanation for McClintock having stopped signaling (if he did) those seven seconds prior to the crash.

14 Again, McClintock testified that he did signal, but the recorder box indicates he did not.

Moreover, the appellants' expert on the drug issue merely extrapolates from the quantity of prescriptions McClintock had filled to speculate the levels he had ingested the day of the accident. There is no direct evidence supporting the appellants' theory that McClintock was impaired by his medications at the time of the accident.

In summary, we do not believe the evidence adduced during discovery linking McClintock's prescription drug use to the accident is sufficient to defeat summary judgment.

EVIDENTIARY RULINGS

Finally, the appellants argue that two evidentiary rulings made by the trial court should be reversed in the event we reverse the trial court's summary judgment issue and remand the cause for trial. They contend that the trial court erroneously excluded evidence concerning a February 2005 accident at the crossing which resulted in a fatality and two injuries. They allege that evidence concerning this accident is admissible as relevant to punitive damages as the second accident reflects upon CSX's failure to remedy the unsafe condition of the crossing following the present accident.

The appellants also contend that the trial court erroneously denied its motion to exclude the testimony of the appellees' accident reconstructionist insofar as he intended to testify regarding the injuries that would have been prevented if Mary had been wearing her seatbelt. [15]

15 The appellants contend that Mary was wearing her seat belt; the appellees contend that she was not and, accordingly, suffered additional injuries by her failure to do so.

Based upon our disposition herein, these evidentiary issues are moot, and we will accordingly not discuss them on the merits.

CONCLUSION

***15** For the foregoing reasons the judgment of the Bullitt Circuit Court is affirmed.

ALL CONCUR.

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Marissa CARTER, Evelyn Grys, Bruce Currier, Sharon Koning, SUE Beehler, Marsha Mancuso, and Jaclyn Cuthbertson, as individuals and as representative s of the classes, Plaintiffs,
v.
HEALTHPORT TECHNOLOGIES, LLC, the Rochester General Hospital, the Unity Hospital of Rochester, and F.F. Thompson Hospital, Inc., Defendants.

No. 14–CV–6275–FPG.
|
Signed March 31, 2015.

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DECISION AND ORDER

FRANK P. GERACI, JR., Chief Judge.

INTRODUCTION

***1** This case is a putative class action lawsuit filed on behalf of individuals in New York State who requested copies of their medical records from HealthPort Technologies, LLC ("HealthPort"), Rochester General Hospital ("RGH"), Unity Hospital of Rochester ("Unity"), and F.F. Thompson Hospital, Inc. ("FFT") (collectively, "Defendants"). Plaintiffs allege that Defendants overcharged them for making copies of the requested records, and bring claims for money damages under New York Public Health Law § 18, which sets a ceiling on such fees; under New York General Business Law § 349, which prohibits deceptive trade practices; and for unjust enrichment.

On June 19, 2014 and July 21, 2014, Defendants moved, in separate motions, to dismiss the Complaint (ECF Nos. 9, 20, 21) under Federal Rules of Civil Procedure 12(b)(1) and 12(b)(6), arguing that the Plaintiffs lack standing to bring this action, and further, that the Complaint fails to state a claim upon which relief may be granted. For the following reasons, the Motions are granted, and the Complaint is dismissed.

BACKGROUND

The named Plaintiffs in this case—Marissa Carter, Evelyn Grys, Bruce Currier, Sharon Koning, Sue Beehler, Marsha Mancuso, and Jaclyn Cuthbertson—seek to represent a class of similarly situated individuals who, according to the Complaint, were overcharged for copies of medical records from the named Defendants. In short, the Plaintiffs allege that the Defendants charged a blanket rate of $0.75 per page for copies of their medical records, when New York Law requires them to only charge their actual expenses, but in no event can those expenses be more than $0.75 per page. Plaintiffs further allege that certain unauthorized "delivery charges" were added on top of the copying costs, and allege that all of these excessive costs were devised and charged as part of a scheme between the Defendants to artificially generate profits.

The requests for medical records by the Plaintiffs from the Defendants and the payment for these records are at the heart of the Complaint, and the allegations regarding those requests and payments take the same form for each of the seven Plaintiffs. For example, regarding Plaintiff Carter, the Complaint alleges that:

> Plaintiff Carter was a patient at RGH. ECF No. 1, ¶ 33. On or about September 5, 2013, Carter requested medical records from RGH through her counsel. ECF No. 1, ¶ 34. On or about October 1, 2013, HealthPort, acting on behalf of RGH, sent an invoice, which indicated that Carter would be charged $77.00 for 100 pages of medical records ($0.75 per

> page, plus a $2.00 "Electronic Dlvry Fee"). ECF No. 1, ¶ 35. On or about October 7, 2013, Carter paid the $77.00 charge through her counsel in order to obtain copies of the requested medical records. ECF No. 1, ¶ 36.

Regarding Plaintiff Mancuso, the Complaint similarly alleges that:

> Plaintiff Mancuso was a patient at Unity. ECF No. 1, ¶ 77. On or about January 17.2013, Mancuso requested medical records from Unity through her counsel. ECF No. 1, ¶ 78. On or about January 28, 2013, HealthPort, acting on behalf of Unity, sent an invoice, which indicated that Mancuso would be charged $544.25 for 723 pages of medical records ($0.75 per page, plus a $2.00 "Electronic Dlvry Fee"). ECF No. 1, ¶ 79. On or about February 5, 2013, Mancuso paid the $544.25 charge through her counsel in order to obtain copies of the requested medical records. ECF No. 1, ¶ 80.

***2** The Complaint makes the same allegations for each of the seven named Defendants, although the dates and overall amounts are unique to each Defendant. Further, while each Plaintiff makes claims against HealthPort for ultimately providing the records, Plaintiffs Carter, Grys, and Currier make claims against RGH, whom they made their requests through, Plaintiffs Koning, Beehler, and Mancuso make claims against Unity, whom they made their requests through, and Plaintiff Cuthbertson make her claim against FFT, whom she made her request through. ECF No. 1. Based upon these record requests and the resultant charges, each Plaintiff alleges that the fees charged "exceeded the cost to produce these medical records, and included a built-in kickback from HealthPort to [the relevant hospital]." ECF No. 1, ¶¶ 39, 46, 53, 59, 64, 69, 76, 83, 90. As such, they claim to have suffered damages from paying amounts in excess of the actual cost to produce the requested medical records. ECF No. 1, ¶¶ 107, 109.

In lieu of answering the Complaint, each of the Defendants has filed a Motion to Dismiss. ECF Nos. 9, 20, 21. The Plaintiffs have responded to each of the Motions (ECF Nos. 26, 27, 28), and the Defendants have filed their replies. ECF Nos. 33, 34, 35. In addition, the Court received a letter brief from Plaintiffs' counsel on September 3, 2014, which I have filed on the public docket. ECF No. 36. As such, the Motions are fully briefed and ripe for decision.

DISCUSSION

Because it is jurisdictional, I must first consider the Defendants' argument that the Plaintiffs lack standing to bring this case. *See Rhulen Agency, Inc. v. Ala. Ins. Guar. Ass'n,* 896 F.2d 674, 678 (2d Cir.1990) ("[T]he court should consider the Rule 12(b)(1) challenge first since if it must dismiss the complaint for lack of subject matter jurisdiction, the accompanying defenses and objections become moot and do not need to be determined.") (citation omitted).

"[A] claim is 'properly dismissed for lack of subject matter jurisdiction under Rule 12(b)(1) when the district court lacks the statutory or constitutional power to adjudicate it.' " *Arar v. Ashcroft,* 532 F.3d 157, 168 (2d Cir.2008) (quoting *Makarova v. United States,* 201 F.3d 110, 113 (2d Cir.2000)). "If plaintiffs lack Article III standing, a court has no subject matter jurisdiction to hear their claim." *Mahon v. Ticor Title Ins. Co.,* 683 F.3d 59, 62 (2d Cir.2012) (citing *Cent. States Se. & Sw. Areas Health & Welfare Fund v. Merck—Medco Managed Care, L.L.C.,* 433 F.3d 181, 198 (2d Cir.2005)); *see also Cacchillo v. Insmed, Inc.,* 638 F.3d 401, 404 (2d Cir.2011) ("Generally, '[s]tanding is a federal jurisdictional question determining the power of the court to entertain the suit.' ") (quoting *Carver v. City of New York,* 621 F.3d 221, 225 (2d Cir.2010)). "[A] plaintiff must demonstrate standing for each claim and form of relief sought." *Mahon,* 683 F.3d at 62 (citation omitted).

***3** "Article III standing consists of three 'irreducible' elements: (1) *injury-in-fact,* which is a 'concrete and particularized' harm to a 'legally protected interest'; (2) *causation* in the form of a 'fairly traceable' connection between the asserted injury-in-fact and the alleged actions of the defendant; and (3) *redressability,* or a non-speculative likelihood that the injury can be remedied by the requested relief." *W.R. Huff Asset Mgmt. Co., LLC v. Deloitte & Touche LLP,* 549 F.3d 100, 106–07 (2d Cir.2008) (citing *Lujan v. Defenders of Wildlife,* 504 U.S. 555, 560–61, 112 S.Ct. 2130, 119 L.Ed.2d 351 (1992)) (emphasis in original).

"A plaintiff asserting subject matter jurisdiction has the burden of proving by a preponderance of the evidence that jurisdiction exists."*Giammatteo v. Newton,* 452 F. App'x 24, 27 (2d Cir.2011) (citing *Makarova,* 201 F.3d at 113). In resolving a motion to dismiss for lack of subject matter jurisdiction, "the court must take all facts alleged in the complaint as true and draw all reasonable inferences in favor of plaintiff,"*Natural Res. Def. Council v. Johnson,* 461 F.3d 164, 171 (2d Cir.2006), but "jurisdiction must be shown affirmatively, and that showing is not made by drawing from the pleadings inferences favorable to the party asserting it,"*Shipping Fin. Servs. Corp. v. Drakos,* 140 F.3d 129, 131 (2d Cir.1998); *see also APWU v. Potter,* 343 F.3d 619, 623 (2d Cir.2003); *Amidax Trading Group v. S.W.I.F.T. SCRL,* 671 F.3d 140, 145 (2d Cir.2011). On such a motion, a court may consider evidence outside the pleadings, such as affidavits and exhibits. *See Makarova,* 201 F.3d at 113.

Here, the Defendants argue that the Plaintiffs lack standing to bring the claims they have alleged in their Complaint. When standing is put at issue, "[e]ach element [of standing] must be supported in the same way as any other matter on which the plaintiff bears the burden of proof, *i.e.,* with the manner and degree of evidence required at the successive stages of the litigation."*Carver,* 621 F.3d at 225 (alterations in original) (citing *Lujan,* 504 U.S. at 561)."Because standing is challenged [here] on the basis of the pleadings, we [therefore] accept as true all material allegations of the complaint, and must construe the complaint in favor of the complaining party."*Id.* at 225 (alterations in original) (quoting *W.R. Huff,* 549 F.3d at 106).

More specifically, the Defendants argue that the Plaintiffs have failed to plead a cognizable injury-in-fact, because it was their lawyers who ordered, were charged for, and paid for the copies of the medical records at issue. As such, the Defendants contend that any overcharging—if there was any —did not cause any injury-in-fact to the individual Plaintiffs.

In response, the Plaintiffs claim that who exactly ordered and paid for their clients records is irrelevant. Specifically, they argue that "[f]or purposes of the claims at issue, it makes no difference whether Plaintiffs requested their records themselves or through counsel. In either case, the client-patient is the real party in interest."ECF No. 26, at 15.

***4** In my view, the Plaintiffs have failed to establish standing to bring this suit. In making this determination, I find persuasive Judge Engelmayer's recent decision in *Spiro v. HealthPort Technologies, LLC,* ——F.Supp.3d ——, No. 14 Civ. 2921(PAE), 2014 WL 4277608 (S.D.N.Y. Aug, 29, 2014). The basic facts and premise of the claims in *Spiro* are virtually identical to the present case. In *Spiro,* a group of individual plaintiffs brought a potential class action suit against HealthPort (the same entity named in the present case) and three hospitals in the New York City area, alleging that the hospitals and HealthPort overcharged them for their medical records. The *Spiro* plaintiffs alleged that the defendants charged $0.75 per page for copies of their medical records, as opposed to charging their actual costs, which was allegedly in violation of New York Public Health Law Section 18. The *Spiro* Plaintiffs additionally alleged that the defendants engaged in deceptive trade practices, and brought a claim for unjust enrichment. The defendants moved to dismiss the complaint on several bases, including lack of standing. More specifically, the defendants argued that because the records at issue were requested by and paid for the plaintiffs' attorneys, the named plaintiffs had alleged no injury-in-fact, and therefore lacked standing.

In granting the defendants' motion to dismiss, Judge Engelmayer wrote:

> On the facts pled in the [Complaint], defendants are correct. The [Complaint] does not plead that any plaintiff was obligated to reimburse [their counsel] for the copying costs he incurred. Instead, on the facts as pled, the decision by plaintiffs to reimburse [their counsel], after the fact, for the copying costs he had paid was a volitional act—an act of grace. As pled, plaintiffs never dealt directly with Healthport. Nor, based on the [Complaint], had they any obligation to reimburse [their counsel] for his outlay at the time he ordered the photocopies. On these facts, any legal right to challenge defendants' ostensible overcharging would belong exclusively to [their counsel], as it was [their counsel], and [their counsel] alone, who suffered an injury *caused* by defendants' overcharging. Plaintiffs' later decision to reimburse their lawyer, and [counsel's] decision to accept such reimbursement, must be taken as independent, volitional, discretionary acts, breaking the chain of causation necessary to establish Article III standing. *See Lujan,* 504 U.S. at 560–61 ("[T]here must be a causal connection between the injury and the conduct complained of—the injury has to be fairly traceable to the challenged action of the defendant, and *not the result of the independent action of some third party* not before the court.") (internal quotation marks and alterations omitted) (emphasis added).

Indeed, plaintiffs' theory that a discretionary decision after-the-fact to reimburse another party for a charge confers standing on the reimbursing entity would vastly broaden Article III standing. Imagine, for example, a person who took a taxi home one night, and was overcharged for the taxi ride in violation of local law. If the person was later voluntarily reimbursed for that cost—by a friend, parent, employer, stranger, or Good Samaritan—that reimbursing entity would then, on plaintiff's theory, have the legal right to sue the cab driver for overcharging. There is no authority for this claim. Absent assignment of a legal right to sue for such relief, which is not alleged here, the mere act of making a third-party whole for an expense incurred and already paid does not entitle the paying party to the right to challenge that expense.

***5** To be sure, the analysis would be different if plaintiffs had been obligated at the time that [their counsel] incurred the copying expenses to reimburse [him] for the expenses he incurred in connection with representing them. In that circumstance, whether plaintiffs' reimbursement duty was absolute or conditioned on a settlement or verdict in their favor, *then* Healthport's charge to [counsel] for copying and [counsel's] payment of that charge would have given rise to a liability (or a contingent liability) on plaintiffs' part. That liability, to repay [counsel] for the copying expenses, would have given plaintiffs standing to challenge the copying cost as excessive, because plaintiffs would then have suffered an injury-in-fact (a legal duty to pay these excessive costs) traceable to the defendants responsible for the charges. *See Roman Catholic Archdiocese of N.Y. v. Sebelius,* 907 F.Supp.2d 310, 329 (E.D.N.Y.2012) ("[N]umerous cases have also recognized that uncertain future harms can have present effects that are sufficient for standing purposes.") (collecting cases); *see also Clinton v. City of N.Y.,* 524 U.S. 417, 431, 118 S.Ct. 2091, 141 L.Ed.2d 393 (1998) (New York had standing to challenge the line item veto, even though a pending administrative action could waive the contingent liability, because "[t]he revival of a substantial contingent liability immediately and directly affects the borrowing power, financial strength, and fiscal planning of the potential obligor"); *Lac Du Flambeau Band of Lake Superior Chippewa Indians v. Norton,* 422 F.3d 490, 498 (7th Cir.2005) (plaintiff had standing to bring suit because "the present impact of a future, though uncertain harm may establish injury for standing purposes"). The [Complaint], however, does not allege that there was any such agreement in place between plaintiffs and [their counsel] at the time [counsel] incurred the copying expense under which plaintiffs would reimburse [counsel] for the costs it incurred in the course of representing plaintiffs in their lawsuits. The [Complaint] is silent on that point.

This pleading deficiency should be easily corrected, if the facts so permit. In New York State, an attorney is required to "provide to the client a written letter of engagement before commencing the representation, or within a reasonable time thereafter[.]"*See*N.Y. Comp.Codes R. & Regs. tit. 22, § 1215.1. The engagement letter must explain (1) the scope of the legal services to be provided; and (2) the "attorney's fees to be charged, expenses and billing practices."*Id.* It follows that, if plaintiffs were obligated to reimburse [counsel] for expense outlays, including in obtaining plaintiffs' medical records, then [counsel's] engagement letter with each plaintiff should reflect such a term.

Each of Counts One, Two, and Three turns on the claim that defendants overcharged [counsel] for copies of plaintiffs' medical records. Because the [Complaint] does not assert facts on which plaintiffs have standing to pursue such a claim, the Court dismisses these three damages claims for lack of subject matter jurisdiction.

***6** *Spiro,* 2014 WL 4277608, at *5–6. (Footnotes omitted).

For those same reasons, I find that the Complaint in this action fails to establish the Plaintiffs' standing to bring this suit. There is no plausible allegation in the Complaint to establish that it was Plaintiffs—as opposed to their counsel—who requested the copies or paid the resulting bill and therefore bore the alleged injuries in this case, and without such an allegation in the Complaint, the Plaintiffs have failed to establish their standing to sue.

Plaintiffs' letter to the Court of September 2, 2014 correctly stated that the *Spiro* litigation was "discussed at length in HealthPort's motion to dismiss and Plaintiffs' response to HealthPort's motion."ECF No. 36. Indeed, that letter acknowledged that "[t]he ***only*** reason that the plaintiffs' claims against HealthPort were dismissed in *Spiro*... was because the court concluded that the plaintiffs had not pled that they were ultimately responsible for the charges, which were paid by their attorneys, at the time such charges were incurred."*Id.* (emphasis in original).

While Plaintiffs' counsel argues that *Spiro* was wrongly decided, they also informed this Court that "there is no reason

to dismiss Plaintiffs' claims for lack of standing, and *it would be a waste of time to require them to plead their claims in further detail.*" *Id.* (emphasis added). While this Court is not required to offer counseled Plaintiffs the opportunity to amend their Complaint—indeed, it is counsel's job to determine whether to seek leave to amend or not, and to make such a request, if counsel deems it appropriate—in this case, I see even less reason to offer the Plaintiffs, *sua sponte,* the opportunity to amend their Complaint, since they have informed the Court in writing that doing so would "be a waste of time."

CONCLUSION

For all of the foregoing reasons, the Plaintiffs have failed to establish their standing to sue in this case, and the Defendants' Motions to Dismiss (ECF Nos. 9, 20, 21), are GRANTED. This matter is dismissed with prejudice, and the Clerk of the Court is directed to close this case.

IT IS SO ORDERED.

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Court of Appeals of Kentucky.

Gary R. DURBIN and Lynne M. Durbin, Appellants
v.
BANK OF the BLUEGRASS & TRUST COMPANY, Appellee.

No. 2005–CA–001292–MR.
|
June 2, 2006.
|
Rehearing Denied Aug. 9, 2006.

Appeal from Fayette Circuit Court, Action No. 04–CI–01398; James D. Ishmael, Jr.

Attorneys and Law Firms

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Before BARBER, KNOPF, and MINTON, Judges.

OPINION

KNOPF, Judge.

***1** Gary R. Durbin and Lynne Durbin (the Durbins) appeal from a summary judgment entered by the Fayette Circuit Court dismissing their counterclaims against Bank of the Bluegrass and Trust Company (the Bank). The Durbins argue that their counterclaims stated proper causes of actions and they are entitled to proceed on those claims notwithstanding their settlement of the Bank's primary claim. Although we disagree with some of the trial court's reasoning, we conclude that summary judgment was appropriate on all of the Durbins' counterclaims. Hence, we affirm.

On May 6, 2000, the Durbins and Edward Madon executed a promissory note with the Bank in the amount of $50,000.00. The stated purpose of the note was to establish a line of credit for Madon's car business. As security for the note, the Durbins gave the Bank a second mortgage on their residence.

At some point after the promissory note and mortgage were executed, Madon died. Madon's estate was insolvent, and included several large debts to the Bank. The Durbins ceased making payments on the note in December 2003. Thereafter, the Bank declared the note in default and brought this action to collect the balance and to foreclose on the property. In their answer, the Durbins asserted various defenses and counterclaims, including: fraud in the inducement; breach of fiduciary duty; breach of covenant of good faith and fair dealing; unjust enrichment; and violation of the Truth–in–Lending Act (TILA) as amended by the Home Owner Equity Protection Act (HOEPA), [1] the Real Estate Settlement Procedures Act (RESPA), [2] and the Kentucky Consumer Protection Act. [3]

1 15 U.S.C. §§ 1601 *et seq.*

2 12 U.S.C. § 2601.

3 KRS 367.110 *et seq.*

The Bank filed a motion for summary judgment on its claims relating to the note, asserting that there was no genuine issue of material fact concerning the Durbins' liability on the note or that the note was in default. The Durbins and the Bank reached an agreement regarding the Durbins' liability on the note, and the trial court granted summary judgment for the Bank on August 26, 2004. Thereafter, the Bank filed a motion for summary judgment, seeking to dismiss the Durbins' counterclaims. In an opinion and order entered on May 23, 2005, the court granted the Bank's summary judgment motion and dismissed the Durbins' counterclaims. This appeal followed.

The standard of review governing an appeal of a summary judgment is well-settled. We must determine whether the trial court erred in concluding that there was no genuine issue as to any material fact and that the moving party was entitled to a judgment as a matter of law. [4] Summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories, stipulations, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." [5] In *Paintsville Hospital Co. v. Rose,* [6] the Supreme Court of Kentucky held that for

summary judgment to be proper, the movant must show that the adverse party cannot prevail under any circumstances. The Court has also stated that "the proper function of summary judgment is to terminate litigation when, as a matter of law, it appears that it would be impossible for the respondent to produce evidence at the trial warranting a judgment in his favor." [7] Because factual findings are not at issue, [8] there is no requirement that the appellate court defer to the trial court. "The record must be viewed in a light most favorable to the party opposing the motion for summary judgment and all doubts are to be resolved in his favor." [9]

4 *Scifres v. Kraft*, 916 S.W.2d 779, 781 (Ky.App.1996).

5 CR 56.03.

6 683 S.W.2d 255, 256 (Ky.1985).

7 *Steelvest, Inc. v. Scansteel Service Center, Inc.*, 807 S.W.2d 476, 480 (Ky.1991).

8 *Goldsmith v. Allied Building Components, Inc.*, 833 S.W.2d 378, 381 (Ky.1992).

9 *Steelvest*, 807 S.W.2d at 480.

***2** The Bank argues that the Durbins' agreement to summary judgment on the note constituted a waiver of their counterclaims. The Bank asserts that the Durbins should not be permitted to benefit from their settlement of the note with the Bank while continuing to pursue their counterclaims. However, we agree with the trial court that the parties' settlement of the Bank's claim on the note did not expressly waive the counterclaims. Furthermore, the judgment on the primary claim does not necessarily affect the viability of the Durbins' counterclaims. [10] However, the Durbins' concession of liability on the note does implicate the counterclaims, at least to a certain extent. Therefore, the trial court properly looked to the merits of the Durbins' separate claims.

10 As a general rule, the pendency of a counterclaim or similar opposing claim does not bar entry of summary judgment on the primary claim in action. However, execution of the summary judgment may be inappropriate due to the pending counterclaim. See "Proceeding for summary judgment as affected by presentation of counterclaim."8 A .L.R.3d 1361 (1966 & 2006 Supp).

The Durbins first allege that the Bank fraudulently induced them to co-sign on the note by representing to them that Madon was financially sound and there would be little risk to them as co-signors. The trial court found, as a matter of law, that a party may not rely on oral representations that conflict with the written language of the contract. [11]

11 *Citing Mario's Pizzeria, Inc. v. Federal Sign & Signal Corp.*, 379 S.W.2d 736, 740 (1964).

We agree with the Bank that a party may not rely on oral representations that conflict with written disclaimers to the contrary which the complaining party earlier specifically acknowledged in writing. [12] Clearly, any oral representations by the Bank stating that the Durbins would not be liable on the note would have directly conflicted with the express written language of the note. However, the gravamen of the Durbins' fraud claim is that the Bank made affirmative misrepresentations regarding Madon's financial condition, thus fraudulently inducing them into executing the note. The note does not expressly disclaim such representations. Consequently, the allegedly fraudulent representations were not merged into the contract and parol evidence would be admissible to show that the making of the contract was procured by fraud. [13]

12 *Rivermont Inn, Inc. v. Bass Hotels & Resorts, Inc.*, 113 S.W.3d 636, 640 (Ky.App.2003).

13 *Hanson v. American National Bank & Trust Co.*, 865 S.W.2d 302, (Ky.1993)

Where an individual is induced to enter into the contract in reliance upon false representations, the person may maintain an action for a rescission of the contract, or may affirm the contract and maintain an action for damages suffered on account of the fraud and deceit. [14] In this case, the Durbins have pursued the latter remedy. However, a party alleging fraud must show, among other things, that the misrepresentations caused the harm. [15] The Durbins conceded their liability to the Bank—the party which allegedly made the false representations—and they have not pleaded or sought any damages other than their liability on the note. In the absence of a showing of any other damages, the Durbins' settlement of their liability on the note precludes them from recovering damages on their fraud claim. Hence, the trial court properly dismissed this count.

14 *Adams v. Fada Realty Co.*, 305 Ky. 195, 202 S.W.2d 439, 440 (Ky.1947).*See also Bryant v. Troutman*, 287 S.W.2d 918, 920 (Ky.1956), and *Faulkner Drilling Co., Inc. v. Gross*, 943 S.W.2d 634, 638–39 (Ky.App.1997).

15 *See United Parcel Service Co. v. Rickert,* 996 S.W.2d 464, 468 (Ky.1999).

We also disagree with the trial court's reasoning dismissing the Durbins' claim of breach of fiduciary duty. But as with the fraud claim, we likewise conclude that the settlement on the note precluded the Durbins from any recovery on that claim as well. In dismissing the Durbins' claim for breach of fiduciary duty, the trial court relied upon *Layne v. Bank One, Ky., N.A.,* [16] in which the Sixth Circuit, interpreting Kentucky law, held that banks generally do not have a fiduciary relationship with their borrowers. [17]

16 395 F.3d 271 (6th Cir.2005).

17 *Id.* at 281,*citing Sallee v. Fort Knox National Bank, N.A.,* 286 F.3d 878, 893 (6th Cir.2002).

***3** But in *Steelvest, Inc. v. Scansteel Service Center, Inc.,* [18] the Kentucky Supreme Court held that a bank's services to borrowers "may support a finding that a bank, in taking a borrower's note and collateral, falls under a fiduciary duty to disclose material facts affecting the loan transaction. In view of changes in the nature of commercial transactions bankers may sometimes be placed in a position of trust with respect to their customer." [19] More recently, in *Morton v. Bank of the Bluegrass,* [20] this Court recognized that a bank may have a fiduciary duty to disclose material facts affecting the loan transaction such as the borrower's eligibility for credit life insurance. [21] And subsequently, in *Presnell Construction Managers, Inc. v. EH Const., LLC,* [22] the Kentucky Supreme Court recognized the tort of negligent misrepresentation as set forth in the Restatement (Second) of Torts § 552. [23] Based on this authority, the Durbins have presented at least colorable claims against the Bank for breach of fiduciary duty and negligent misrepresentation.

18 *Supra.*

19 *Id.* at 485;*citing Henkin, Inc. v. Berea Bank and Trust Co.,* 566 S.W.2d 420 (Ky.App.1978).

20 18 S.W.3d 353 (Ky.App.1999).

21 *Id.* at 359.

22 134 S.W.3d 575 (Ky.2004).

23 *Id.* at 580–82.

Nevertheless, the Durbins' only measure of damages on a claim for breach of fiduciary duty or negligent misrepresentation would be their liability on the note. [24] Since they have settled with the Bank, they could not prove damages even if they establish that the Bank owed and breached a duty to them. Consequently, the trial court properly dismissed this claim as well.

24 *Morton v. Bank of the Bluegrass and Trust Co.,supra* at 358.

We agree with the trial court's reasoning dismissing the Durbins' remaining common-law claims. In *Ranier v. Mount Sterling National Bank,* [25] the Court observed that "[i]n every contract, there is an implied covenant of good faith and fair dealing."The covenant imposes a duty on the parties to do everything necessary to carry out the purposes and provisions of the contract. [26] However, the covenant of good faith and fair dealing does not prevent a party from exercising its contractual rights. [27] Furthermore, the alleged conduct by the Bank involved the formation of the contract, not the performance of the contract. Hence, the covenant of good faith and fair dealing is not implicated.

25 812 S.W.2d 154, 156 (Ky.1991).

26 *Id., citing Beech Creek Coal Co. v. Jones,* 262 S.W.2d 174 (Ky.1953).

27 *Farmers Bank and Trust Co. of Georgetown, Kentucky v. Willmott Hardwoods, Inc.,* 171 S.W.3d 4, 11 (Ky.2005).

Similarly, the Durbins' claim for unjust enrichment must also fail. "Unjust enrichment" is based upon an implied contract, creating an obligation from the recipient of the benefits received to the one bestowing them, to compensate him for whatever outlay he has made in bestowing them. [28] This doctrine applies as a basis of restitution to prevent one person from keeping money or benefits belonging to another. [29] In this case, the Durbins do not allege that they advanced any money for the Bank's benefit. Rather, their actions were solely for Madon's benefit. Consequently, they have failed to state a claim against the Bank for unjust enrichment.

28 *Sullivan's Adm'r v. Sullivan,* 248 Ky. 744, 59 S.W.2d 999, 1001 (1933).

29 *Haeberle v. St. Paul Fire and Marine Ins. Co.,* 769 S.W.2d 64, 67 (Ky.App.1989).

Finally, the trial court properly dismissed the statutory claims. As the trial court noted, the statutory provisions apply only to consumer claims. The TILA and the HOEPA specifically exclude credit transactions involving extensions of credit primarily for business or commercial purposes. [30] Similarly, the RESPA does not apply to business loans. [31] And the Kentucky Consumer Protection Act allows only a person who purchases goods or services primarily for personal, family or household services to bring a private action under the Act. [32]

30 15 U.S.C. § 1603.

31 12 U.S.C. § 2606.

32 KRS 367.220.

***4** The Durbins assert that their purpose in co-signing on the loan was personal—they were co-signing the note for their friend Madon and they had no involvement with his business. They cite a number of cases holding that a transaction need not be entirely personal to fall within the protection of the federal acts. Rather, courts must examine the transaction as a whole and the purpose for which the credit was extended in order to determine whether this transaction was primarily consumer or commercial in nature. Consequently, the Durbins assert that there is a genuine issue of material fact concerning the nature of the loan.

But in those cases, the contracts or notes did not specify that the loans were for personal or business purposes and the uses of the loan proceeds were not clearly or primarily for business purposes. As a result, the nature of those loans constituted issues of fact. [33] In this case, the note clearly states that the loan was to establish a business line of credit. The fact that the credit transaction was secured by a mortgage on the Durbins' personal residence does not transform the business or commercial loan into a personal or consumer loan. [34] Moreover, the Durbins do not suggest that any of the loan proceeds were not used for business purposes. [35] In the absence of any affirmative evidence that the loan proceeds were primarily used for other than business purposes, we agree with the trial court that summary judgment was appropriate on these claims.

33 *See Thorns v. Sundance Properties,* 726 F.2d 1417 (9th Cir.1984) (Purchase of a limited partnership interest for investment purposes can be for personal since certain securities transactions can fall within the scope of the TILA.); *Tower v. Moss,* 625 F.2d 1161 (5th Cir.1980) (Borrower used loan proceeds to repair residence, then rented out residence while she lived and worked in another city); *Gallegos v. Stokes,* 593 F.2d 372 (10th Cir.1979) (Purchase of pick-up truck which buyer had intended to use for business purposes, but lender never knew of that intent); *Cantrell v. First National Bank of Euless,* 560 S.W.2d 721 (Tex.Civ.App.1977) (Although borrowers used motor home as living quarters while they traveled on business, the purpose of the loan to purchase the motor home remained primarily personal).

34 *Sherrill v. Verde Capital Corp.* 719 F.2d 364, 367 (11th Cir.1983).

35 *See Bokros v. Associates Finance, Inc.,* 607 F.Supp. 869 (N.D.Ill.1984), and *Sims v. First National Bank, Harrison,* 267 Ark. 253, 590 S.W.2d 270 (1979).

In conclusion, we disagree with the trial court's reasoning dismissing the Durbins' fraud and breach-of-fiduciary duty claims. Had they not conceded liability on the note, they would have been entitled to pursue those claims. Nonetheless, the Durbins' settlement with the Bank precludes them from seeking any damages based on their liability on the note, and they have not alleged any other damages arising from the Bank's conduct. We agree with the trial court that the Durbins' remaining common-law and statutory claims fail to state viable causes of action. Consequently, the trial court properly entered summary judgment for the Bank.

Accordingly, the judgment of the Fayette Circuit Court is affirmed.

ALL CONCUR.

All Citations

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Filed 15-CI-90250 01/29/2016 Jim Barker, Rowan Circuit Clerk

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THIS OPINION IS NOT FINAL AND SHALL NOT BE CITED AS AUTHORITY IN ANY COURTS OF THE COMMONWEALTH OF KENTUCKY.

Court of Appeals of Kentucky.

David Griffin, Appellant
v.
Sarah C. Jones, Appellee

NO. 2014–CA–000402–MR
|
RENDERED: AUGUST 14, 2015; 10:00 A.M.

Synopsis

Background: Shareholder filed claims alleging breach of fiduciary duty, fraud by omission, misappropriation, and unjust enrichment against corporate secretary, who was also the president of a limited liability company (LLC) shareholder had invested in. The Circuit Court, Calloway County, Dennis R. Foust, J., dismissed claims. Shareholder appealed.

Holdings: The Court of Appeals, Kramer, J., held that:

[1] shareholder lacked standing to bring a breach of fiduciary duty claim against secretary;

[2] shareholder failed to establish secretary caused actual damages to shareholder, or that secretary had a duty to disclose that was owed to shareholder individually, as required to establish a claim for fraud by omission; and

[3] shareholder failed to state a claim for misappropriation of corporate assets against secretary.

Affirmed.

APPEAL FROM CALLOWAY CIRCUIT COURT, HONORABLE DENNIS R. FOUST, JUDGE, ACTION NO. 13–CI–00420

Attorneys and Law Firms

Brief for Appellant: Griffin Terry Sumner (argued), J. Kendrick Wells, IV, Lousiville, Kentucky, Robert V. Sartin, Joseph Al Kelly, Nashville, Tenessee.

Brief for Appellee: Kent Wicker, Nicole S. Elver (argued), Louisville, Kentucky.

BEFORE: CLAYTON, DIXON, AND KRAMER, JUDGES.

OPINION

KRAMER, JUDGE:

***1** David Griffin appeals an order of the Calloway Circuit Court dismissing, pursuant to Kentucky Rules of Civil Procedure (CR) 12.02(f), various causes of action he asserted against Sarah C. Jones. After careful review, we affirm.

[1] **[2]** Our standard of review is as follows:

> The court should not grant the motion unless it appears the pleading party would not be entitled to relief under any set of facts which could be proved in support of his claim. In making this decision, the circuit court is not required to make any factual determinations; rather, the question is purely a matter of law. Stated another way, the court must ask if the facts alleged in the complaint can be proved, would the plaintiff be entitled to relief?

James v. Wilson, 95 S.W.3d 875, 883–84 (Ky. App. 2002) (internal quotations and footnote omitted). With this standard in mind, we now turn to the facts of this case as alleged in Griffin's complaint.

In early 2008, Charles Jones (Sarah's husband) approached Griffin about investing in Integrated Computer Solutions, Inc. (ICS). Griffin paid $2 million for 50% of ICS's outstanding shares—making Griffin a 50% shareholder, with Mr. Jones owning the other 50%. Sarah Jones was the Secretary of ICS. Charles also formed Blackrock Investments, LLC (BRI), in March 2008. Griffin invested $100,000 in BRI in exchange for a 50% membership interest. BRI, in turn, formed SE Book Company, LLC (SEB)—a member-managed limited liability

company—with BRI as its sole member. In July 2008, SEB's operating agreement was amended to add ICS as an 8% member of SEB. Thereafter, Charles formed College Book Rental Company, LLC (CBR), in March 2009. BRI has a 92% interest in CBR, and ICS has an 8% interest in CBR.

In June 2008, Charles also formed CA Jones Management Group, LLC (CJM); he was its sole member (Griffin had no ownership interest in this entity), and Sarah was its President. CJM was formed to manage the day-to-day operations of ICS, BRI, SEB, and CBR, which included providing human resources, marketing, accounting, technology, and other services. CJM entered into management services contracts to that effect with each of the aforementioned entities, with Charles signing all of the agreements on behalf of all of these entities.

The majority of the business operations among these entities occurred in CBR and SEB. For his part, Griffin's involvement with those entities was limited to being a passive investor. Between 2008 and 2011, Griffin loaned to or invested in these companies approximately $29 million. While Griffin was doing so, however, Charles and Sarah, in their roles as officers of these entities, caused the entities to commingle assets between SEB, CBR, ICS and BRI, and ultimately transfer much of those loaned or invested funds to CJM. While these transfers were ostensibly described as "management fees," CJM provided little or no consideration to the entities in exchange; nor did Charles or Sarah inform Griffin about these transfers. Thereafter, Charles and Sarah caused CJM to pay these funds to themselves for their own personal use.

***2** With that said, this appeal arises from the decision of the circuit court to dismiss four claims Griffin ultimately asserted against Sarah based upon the foregoing. Those claims were: (1) breach of a fiduciary duty owed to him, personally; (2) fraud by omission; (3) misappropriation; and (4) unjust enrichment.

Initially, Griffin takes umbrage with the fact that the circuit court's order dismissed all of his claims against Sarah without explanation. In the absence of any further specificity we must presume that the circuit court's order was based upon each of the grounds Sarah asserted in her CR 12.02 motion (which are the same grounds that she continues to argue in her appellee brief) and that the circuit court considered and rejected each of the opposing arguments Griffin offered in response. *See, e.g.,Sword v. Scott,* 293 Ky. 630, 169 S.W.2d 825, 827 (1943) ("In the absence of the court's specifying the ground or grounds for his dismissal of the petition, it will be assumed that it was upon any or all of the grounds which the proof sufficiently established."); *see alsoSparks v. Trustguard Ins. Co.,* 389 S.W.3d 121, 125 (Ky. App. 2012). Thus, if Sarah's CR 12.02 motion asserted any proper grounds for dismissing the claims presented, we must affirm. *SeeMilby v. Mears,* 580 S.W.2d 724, 727 (Ky. App. 1979) ("[W]hen a judgment is based upon alternative grounds, the judgment must be affirmed on appeal unless both grounds are erroneous.").

And, as discussed below, a proper ground for dismissing the balance of Griffin's claims was his lack of standing.

[3] **[4]** **[5]** **[6]** In general, to invoke the jurisdiction of the court to enforce a claim, a plaintiff must show he has standing to do so. *J.N.R. v. O'Reilly,* 264 S.W.3d 587 (Ky. 2008). Standing to bring an action requires a personal interest, often referred to as a "substantial" interest in the subject matter of the litigation as distinguished from a "mere expectancy." *Housing Authority of Louisville v. Service Employees International Union Local 557,* 885 S.W.2d 692, 695 (Ky. 1994). The issue of standing is concerned only with the question of who is entitled to mount a legal challenge rather than with the merits of the subject matter of the controversy. *Flast v. Cohen,* 392 U.S. 83, 88 S.Ct. 1942, 20 L.Ed.2d 947 (1968). It is a concept utilized to determine whether a party has shown a personal stake in the outcome sufficient to insure that a justiciable controversy is adequately presented to the court. BLACK'S LAW DICTIONARY 1413 (7th ed. 1999). Courts apply the concept of standing as a matter of self-restraint to avoid rendering advisory opinions on matters instigated by parties who are merely "intermeddlers." 59 Am. Jur. 2d *Parties* § 36 (2002). Because the jurisdiction of the court is a prerequisite to commencement of any action, standing must exist at the time the action is filed. *Id.* at § 37. With this in mind, we now turn to each of Griffin's four claims.

1. Breach of fiduciary duty

[7] **[8]** "[T]he basic elements of a breach-of-fiduciary-duty cause of action [are]: (1) the existence of a fiduciary duty; (2) the breach of that duty; (3) injury; and (4) causation." *Baptist Physicians Lexington, Inc. v. New Lexington Clinic, P.S.C.,* 436 S.W.3d 189, 193 (Ky. 2013). Griffin based his "breach of fiduciary duty" cause of action against Sarah upon Sarah's roles as Secretary of ICS and President of CJM. Regarding her former role, Griffin's argument is in relevant part as follows:

> *3 As Secretary of ICS, Sarah Jones owed fiduciary duties to ICS and its shareholders—including Griffin. It is black letter law that corporate officers owe to the corporation and to its shareholders fundamental duties of care and loyalty....
>
> Ms. Jones may try to argue, as she did in the circuit court, that she was not actively involved in the management of ICS (or [CJM])—but such factual disputes may not be considered at the motion to dismiss stage. Focusing solely on the Complaint and taking the alleged facts as true—as this Court must—Griffin has sufficiently alleged the existence of a fiduciary duty. Moreover, any purported failure to uphold the legal duties of a corporate officer does not negate the existence of those duties. To the extent Ms. Jones tries to argue that her husband was the sole actor behind everything that occurred here, she cannot escape her responsibilities as President of Management and as an officer of ICS (which is also a member of SEB and CBR) —especially given her alleged knowledge (and intentional concealment from Griffin) of the transactions at issue and her personal benefit from those transactions, at Griffin's expense.

(Internal quotations and citations omitted.)

Regarding Sarah's role as the President of CJM, Griffin's argument is:

> As President of [CJM], Sarah Jones also owed fiduciary duties to the managed companies and their members/shareholders—including Griffin. Officers in limited liability companies owe common law fiduciary duties similar to those imposed upon officers in corporations.... In this case, Ms. Jones' fiduciary capacity extended beyond [CJM] because of her role, through [CJM], as an agent for ICS, BRI, SEB and CBR.
>
> ...
>
> A special agency relationship existed between Management and the Jones Companies. Management was formed solely for the purpose of managing the day-to-day operations of those companies. Management's only revenue came in the form of management fees collected from those companies.
>
> Management's—and likewise Ms. Jones'—right to control is evident from the nature of the alleged breach. The Complaint alleges that Ms. Jones commingled funds and assets between SEB, CBR, ICS and BRI, and transferred those funds to [CJM], assets and entities owned and/or managed by C. Jones, S. Jones and Management, and family members of C. Jones and S. Jones, without consideration and with the intent to defraud Griffin. In other words, Sarah Jones, through her role with [CJM], had actual control over the entities and the assets at issue. In exercising such control, Ms. Jones necessarily undertook fiduciary duties of good faith and loyalty to the managed entities and their members/shareholders.

(Internal quotations and citations omitted.)

At the onset, it appears Griffin is arguing the circuit court was required to believe Sarah owed him direct fiduciary duties in the contexts he describes above because his complaint alleged that she did, and because factual allegations in a complaint must be taken as true whenever a court considers the propriety of granting a CR 12.02 motion to dismiss. However, a statement to the effect that some form of legal duty exists under a given set of circumstances is not a factual allegation; it is a legal conclusion. *Bartley v. Commonwealth,* 400 S.W.3d 714, 726 (Ky. 2013) ("[W]hether a legal duty exists is purely a question of law[.]"). Accordingly, any statements in Griffin's complaint regarding legal duties Sarah may have owed him under the facts of this case are entitled to no deference whatsoever. *SeeRosser v. City of Russellville,* 306 Ky. 462, 208 S.W.2d 322, 324 (1948) ("It is the duty of courts to declare conclusions, and of the parties to state the facts from which legal conclusions may be drawn.").

*4 [9] [10] Furthermore, Kentucky law does not support that Sarah owed Griffin fiduciary duties under the facts alleged in his complaint. As described by Griffin, the fiduciary duties Sarah allegedly breached required her to inform him personally if she had reason to know that assets would be (or were being) misappropriated from SEB and CBR. Griffin's claims in this respect were based upon the notion that Sarah owed him such direct fiduciary duties because she was an officer of both a corporation and a limited liability company, and he was a shareholder of the corporation and member of the limited liability company. But, it is generally understood that the common-law fiduciary duty owed by members of the board of directors or officers of a corporation runs directly to the corporation and the shareholders/members *as a whole.* 18B Am. Jur. 2d *Corporations* § 1462 (2011). Hence, a board member or officer owes no common-law fiduciary duty directly to an individual shareholder/member. *Id.* Likewise, the statutory duties respectively imposed upon a board member, corporate officer, or even a managing member of a limited liability

company under Kentucky Revised Statutes (KRS) 271B.8–300, KRS 271B.8–420, and KRS 275.170 run directly to the corporation or limited liability company, not the members or shareholders individually.[1] Griffin also cites no authority, and we have found none, supporting that an officer of one corporation (*i.e.*, Sarah, in her role as President of CJM) generally owes any kind of direct fiduciary duty to an individual shareholder or member of a different entity.

1 In particular, *see*KRS 271B.8–300(6) and KRS 271B.8–420(6) (requiring a person bringing an action for monetary damages under either section to prove the director's or officer's "breach or failure to perform was the legal cause of *damages suffered by the corporation.*" (Emphasis added)). Similarly, the statute governing the duty of loyalty to members of a limited liability company instructs that the duty is to "account to ... the company." *See*KRS 275.170(2). *See alsoBallard v. 1400 Willow Council of Co–Owners, Inc.*, 430 S.W.3d 229, 241 (Ky. 2013) (holding, in the related context of non-profit corporations, "the officers and directors that have a fiduciary duty, and that duty is to the nonprofit corporation." (Citing KRS 273.215)).

Stated differently, ICS, SEB and CBR were the parties that were owed fiduciary duties and were directly injured by Sarah under the facts alleged in Griffin's complaint. As such these entities, not Griffin, were the real parties in interest regarding the subject matter of Griffin's breach of fiduciary duty claims.

2. Fraud by omission

[11] [12] [13] [14] As stated by the Kentucky Supreme Court in *Giddings & Lewis, Inc. v. Industrial Risk Insurers,* 348 S.W.3d 729, 747–48 (Ky. 2011):

> [A] fraud by omission claim is grounded in a duty to disclose. *Republic Bank* [*& Trust Co. v. Bear, Stearns & Co.*], 707 F.Supp.2d [702] at 710 [(W.D. Ky. 2010)] ("The gravamen of the tort is breach of a duty to disclose....") To prevail, a plaintiff must prove: (1) the defendant had a duty to disclose the material fact at issue; (2) the defendant failed to disclose the fact; (3) the defendant's failure to disclose the material fact induced the plaintiff to act; and (4) the plaintiff suffered actual damages as a consequence. *Rivermont Inn,* [*Inc. v. Bass Hotels Resorts, Inc.,*] 113 S.W.3d [636] at 641 [(Ky. App. 2003)]. The existence of a duty to disclose is a matter of law for the court. *SeeSmith v. General Motors Corp.*, 979 S.W.2d 127, 129 (Ky. App. 1998). *See also*Restatement (Second) of Torts § 551 cmt. m (1977) ("whether there is a duty to the other to disclose the fact in question is always a matter for the determination of the court.")

....

> Kentucky recognizes a duty to disclose in four circumstances. *Smith,* 979 S.W.2d at 129–30. The first two [are] the duty arising from a confidential or fiduciary relationship or a duty provided by statute[.] ... The two other circumstances where a duty may arise are "when a defendant has partially disclosed material facts to the plaintiff but created the impression of full disclosure", *Rivermont Inn,* 113 S.W.3d at 641, or "where one party to a contract has superior knowledge and is relied upon to disclose same,"*Smith,* 979 S.W.2d at 129.

[15] Here, Griffin's fraud by omission claims are a repackaging of his previously discussed breach of fiduciary duty claims; indeed, Griffin uses the terms "fraud" and "breach of fiduciary duty" interchangeably while summarizing his fraud by omission claims in his brief:

> ***5** "[W]here the shareholder suffers an injury separate and distinct from that suffered by other shareholders, or the corporation as an entity, the shareholder may maintain an individual action in his own right." *2815 Grand Realty Corp. v. Goose Creek Energy, Inc.,* 656 F.Supp.2d 707, 715 (E.D. Ky. 2009) (citations and internal punctuation omitted). A shareholder's ability to maintain a direct action against a corporate officer for breach of fiduciary duty turns solely on two questions: (1) Who suffered the alleged harm—the corporation or the plaintiff stockholder? And (2) Who would receive the benefit of any recovery? *Id.* (following *Tooley v. Donaldson, Lufkin & Jenrette, Inc.,* 845 A.2d 1031, 1033 (Del. 2004)).[2]

The damages Griffin seeks to recover are uniquely his. Griffin's claims are not based on the injury to his shareholder/membership interests in the Jones Companies (which are now all but worthless). Rather, they arise out of the nearly $30 million Griffin paid (and lost) because of the Joneses' fraudulent scheme. Had Griffin known that the Joneses were funneling his investments into the Joneses' own pockets, Griffin would not have continued to fund the enterprise.

....

> As President of [CJM], Ms. Jones owed Griffin the duties of a fiduciary with respect to [CJM's] operation of the Jones Companies. Indeed, the Complaint explicitly alleges

that "[a]s an officer of ICS and [CJM], S. Jones had a duty to provide material facts to Griffin." Coupled with the allegations of Ms. Jones' superior knowledge of the facts and transactions at issue, the Complaint sufficiently establishes—at least for purposes of overcoming a motion to dismiss—that Ms. Jones owed Griffin a duty to disclose and that she breached that duty.

2 Griffin's argument accurately quotes a rule that was the primary focus of the Delaware Supreme Court's opinion in *Tooley v. Donaldson, Lufkin, & Jenrette, Inc.*, 845 A.2d 1031 (Del. 2004). To reiterate, the Delaware Supreme Court held the analysis used to distinguish between a derivative and direct action "must be based solely on the following questions: Who suffered the alleged harm—the corporation or the suing stockholder individually—and who would receive the benefit of the recovery or other remedy?" *Id.* at 1035. "An action in which the holder can prevail without showing an injury or breach of duty to the corporation should be treated as a direct action...." *Id.* at 1036.

As detailed below, Delaware law on this point is consistent with Kentucky's requirement for an injury independent of the corporation's injury. We further observe that in *In re Syncor International Corporation Shareholders Litigation,* 857 A.2d 994 (Del. Ch. 2004), it was reasoned that "under *Tooley,* the duty of the court is to look at the nature of the wrong alleged, not merely at the form of the words used in the complaint. As this court recently said, '[e]ven after *Tooley,* a claim is not "direct" simply because it is pleaded that way.... Instead the court must look to all the facts of the complaint and determine for itself whether a direct claim exists.' " *Id.* at p. 997, citing *Dieterich v. Harrer,* 857 A.2d 1017, 1027 (Del. Ch. 2004). This latter point is also consistent with Kentucky law and is the guiding principle of our resolution of this matter.

With that said, there are at least two flaws in Griffin's reasoning. First, he appears to assume that he has a direct interest to assert through a fraud by omission claim because the money he either invested in or loaned to ICS, SEB, and CBR remained his money. But it did not remain his money. Rather, it became an asset of those entities. *SeeOwens v. C.I.R.*, 568 F.2d 1233, 1238 (6th Cir. 1977) ("[S]tock in a corporation represents an ownership interest in a going business organization; the stockholders do not own the corporation's property.").

***6** Second, Griffin has premised the first element of his fraud by omission claims, once again, upon the notion that Sarah owed him a direct fiduciary duty of disclosure by virtue of her status as an officer and by virtue of his status as a shareholder, member, or creditor of those entities.[3] As previously discussed, however, she did not. Indeed, a corporate officer's self-dealing, theft or embezzlement of corporate funds, or breach of fiduciary duty otherwise resulting in the depletion of corporate assets or the corporation's insolvency (the essence of Griffin's claims) are considered classic bases for derivative actions—that is, actions that derive from a duty owed to the corporate entity, rather than a duty owed to a shareholder or creditor.[4] *See, e.g.,Shearin v. E.F. Hutton Group, Inc.*, 652 A.2d 578, 591 (Del. Ch. 1994) ("A claim for corporate waste is classically derivative."); *Big Lots Stores, Inc. v. Bain Capital Fund VII, LLC,* 922 A.2d 1169, 1180 (Del. Ch. 2006) (claims alleging that a defendant caused a corporation to become insolvent through what amounted to breaches of fiduciary duty "are classically derivative," and "do not become direct simply because they are raised by a creditor, who alleges that the breaches of fiduciary duty caused it specific harm by preventing it from recovering a debt outside of bankruptcy."); *see alsoIn re Ionosphere Clubs, Inc.*, 17 F.3d 600, 605 (2nd Cir. 1994), explaining:

> In some cases, where a wrong has been committed by a third party against a corporation, shareholder intervention is necessary to cause the corporation to sue for rectification of the wrong. The classic case occurs where officers or directors of the corporation appropriate for themselves (or their friends) an opportunity of the corporation, or embezzle its funds. Because the managers of the corporation responsible for causing it to bring suit are the very ones who wrongfully took from the corporation, shareholder initiative is likely to be necessary to cause suit to be brought. Such an action brought by the shareholder is derivative; it is brought in the name of the corporation for the benefit of the corporation—not for the shareholder's direct benefit. Return of the stolen funds to the corporation would rectify the injury; payment of damages directly to the plaintiff-stockholders for the diminution in

> the value of their stock would be inappropriate.

3 Griffin also indicated that Sarah had "superior knowledge of the facts and transactions at issue." However, he has not alleged that he and Sarah were also parties to a contract; thus, his argument only implicates the third circumstance discussed in *Giddings*, 348 S.W.3d at 747–48, in which a duty of disclosure would arise (*i.e.*, a fiduciary duty of disclosure), and not the fourth (*i.e.*,"where one party to a contract has superior knowledge and is relied upon to disclose same[.]").

4 Standing for shareholders of private business corporations in derivative actions evolved from equitable principles. 19 Am. Jur. 2d *Corporations* § 1948 (2004). Where a corporation possessed a cause of action that it either refused or was unable to assert, equity permitted a stockholder to sue in his own name for the benefit of the corporation. *Id.* at § 1946. The shareholder was authorized to pursue the action for the purpose of preventing injustice when it was apparent that the corporation's rights would not be protected otherwise. *Id.* The General Assembly expressly provided in KRS Chapter 271B for derivative proceedings by shareholders against their for-profit corporations. KRS 271B.7–400(1) underscores that the right asserted in a shareholder derivative action belongs to the corporation, not an individual shareholder. It provides:

> A person shall not commence a proceeding in the right of a domestic or foreign corporation unless he was a shareholder of the corporation when the transaction complained of occurred or unless he became a shareholder through transfer by operation of law from one who was a shareholder at that time. The derivative proceeding shall not be maintained if it appears that the person commencing the proceeding does not fairly and adequately represent the interests of the shareholders in enforcing the right of the corporation.

3. Misappropriation

***7 [16]** Griffin's argument with respect to his misappropriation claim is as follows:

> The Complaint alleges that Ms. Jones "misappropriated company assets" and funds injected by Griffin "for her own benefit." "The fiduciary relationship of the corporate directors and officers to the corporation and its stockholders as a whole imposes upon them the obligation to serve the purpose of their trust with fidelity, and forbids any act by them that wrongfully diverts the corporate assets from corporate purposes." 3A Fletcher Cyclopedia of the Law of Corporations, § 1102.
>
> As President of [CJM], Ms. Jones owed a fiduciary duty of loyalty not only to [CJM], but also to the Jones Companies and their shareholders/members, including Griffin. As described in the Complaint, Ms. Jones breached that duty when [CJM] diverted assets of SEB and CBR—and Griffin's funds—for other self-interested purposes, including the construction of her house and cash transfers to members of her immediate family. Accordingly, Griffin has stated a claim for misappropriation.

This claim suffers from the same defects as Griffin's claims of breach of fiduciary duty and fraud by omission. It incorrectly characterizes the funds allegedly misappropriated as "Griffin's funds," as opposed to assets belonging to the entities themselves. Moreover, no legal authority is cited supporting that a fiduciary duty was owed to Griffin directly. To the contrary, the treatise cited by Griffin as his sole authority regarding this particular claim undermines that proposition by further explaining that "Funds of a corporation can be lawfully used for corporate purposes only, and if *misappropriated* by the directors, they and whoever with notice participates with them are jointly and severally liable *to the corporation* for the loss and damage." 3A Fletcher Cyclopedia of the Law of Corporations § 1102 (West 2011) (emphasis added).

4. Unjust enrichment

Griffin's argument regarding his unjust enrichment claim is, in relevant part, as follows:

> "The equitable doctrine of unjust enrichment is applicable as a basis for restitution to prevent one person from keeping money or benefits belonging to another." *Rose v. Ackerson*, 374 S.W.3d 339, 343 (Ky. App. 2012) (citation and internal quotation omitted). To prevail on an unjust enrichment claim under Kentucky law, a plaintiff must establish three elements: (1) that a benefit was conferred on the defendant at the plaintiff's expense; (2) a resulting appreciation of that benefit by the defendant; and (3) an inequitable retention of that benefit without payment for its value. *Jones v. Sparks*, 297 S.W.3d 73, 78 (Ky. App. 2009).
>
> Griffin's Complaint sufficiently asserts all three elements. Ms. Jones obtained benefits at Griffin's expense when [CJM] siphoned funds from the Jones Companies—funds largely provided by Griffin—for the Joneses' own self-

> interested use, including construction of their personal residence and cash transfers to family members. Under the circumstances, it would be unjust for Ms. Jones to retain those benefits without payment.

What Griffin acknowledges in his argument, however, is that his unjust enrichment claim is based upon the fact that "funds" were "siphoned" from ICS, SEB, and CBR. Thus, Griffin (an investor and shareholder) is asserting that he has a direct cause of action against Sarah (a corporate officer) because Sarah *indirectly benefitted at his expense* by misappropriating corporate assets. Laid bare, this is simply an impermissible attempt to convert a derivative claim into a direct claim through nothing more than an exercise in semantics; it is another way of asserting that Sarah, in her role of corporate officer, *indirectly injured him* (an investor and shareholder) by misappropriating corporate assets. *See2815 Grand Realty Corp. v. Goose Creek Energy, Inc.*, 656 F.Supp.2d 707, 716 (E.D. Ky. 2009) ("a diminution in the value of corporate stock resulting from some depletion of or injury to corporate assets is a direct injury only to the corporation; it is merely an indirect or incidental injury to an individual shareholder." (Citations omitted.))

CONCLUSION

***8** For the reasons discussed, Griffin lacked standing to assert his claims of breach of fiduciary duty, fraud by omission, misappropriation, and unjust enrichment against Sarah; at best, those claims were entirely derivative in nature. We therefore AFFIRM.

ALL CONCUR.

All Citations

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NOT TO BE PUBLISHED
Court of Appeals of Kentucky.

Handi–Van, Inc., Appellant
v.
The Community Cab Company, Inc., Appellee
and
Handi–Van, Inc., Appellant
v.
Leslie, Knott, Letcher, Perry Community Action Council, Inc., Appellee
and
Leslie, Knott, Letcher, Perry Community Action Council, Inc., Cross–Appellant
v.
The Community Cab Company, Inc.; and Handi–Van, Inc., Cross–appellees

NO. 2013–CA–001106–MR, NO. 2013–CA–001107–MR, NO. 2013–CA–001257–MR
|
RENDERED: FEBRUARY 27, 2015; 10:00 A.M.

APPEAL FROM BOONE CIRCUIT COURT, HONORABLE JAMES R. SCHRAND, JUDGE, ACTION NO. 06–CI–02268
CROSS–APPEAL FROM BOONE CIRCUIT COURT, HONORABLE JAMES R. SCHRAND, JUDGE, ACTION NO. 06–CI–02268

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BEFORE: MAZE, NICKELL, AND STUMBO, JUDGES.

OPINION

NICKELL, JUDGE:

INTRODUCTION

***1** The singular focus of this case is the transport of Medicaid clients to and from healthcare appointments—a highly competitive, but seldom lucrative market, unless the carrier can accept only profitable runs—a practice Leslie, Knott, Letcher, Perry Community Action Council, Inc. (LKLP) referred to as "cherry picking." At the heart of this litigation is Kentucky's implementation of Title XIX of the Social Security Act[1] whereby the state's Finance and Administration Cabinet contracts with brokers to dispatch carriers to transport Medicaid clients and the brokers in turn subcontract with individual carriers. The program is funded entirely with government dollars. To qualify as a subcontractor, an entity must possess a certificate from the Kentucky Transportation Cabinet (KTC) to operate the appropriate vehicle for a specific category of rider, and possess Medicaid authority to receive payment.

1 42 U.S.C.A. § 1396.

This case combines two appeals brought by Handi–Van, Inc., a for-profit motor carrier licensed to operate Disabled Persons Vehicles (DPV) in Boone, Campbell, Gallatin, Grant and Kenton Counties, claiming it was denied the opportunity to transport Medicaid clients in Northern Kentucky. One appeal is brought against Community Cab Company, Inc. (Community),[2] a for-profit competitor of Handi–Van operating in Boone, Campbell and Kenton Counties. The other appeal is brought against the Leslie, Knott, Letcher, Perry Community Action Council, Inc.[3]—KTC's contracted broker for the Human Services Transportation Delivery (HSTD) Program in Region 13 in Kentucky.[4] Without specifically alleging a conspiracy, Handi–Van argued to the trial court that Community conspired with LKLP to wrongfully exclude Handi–Van from transporting Medicaid

patients by committing unfair trade practices, restraining trade, monopolizing or attempting to monopolize trade or commerce, intentionally interfering with prospective contractual relations, and committing unspecified statutory violations in the context of Kentucky's Consumer Protection Act (the Act) and Kentucky's statutes as a whole.[5] On appeal, Handi–Van refined its argument to challenge the Boone Circuit Court's award of summary judgment to both Community and LKLP—abandoning an argument about the Act having been violated—claiming instead that the trial court ignored the existence of common law causes of action for business torts with statutory recovery. In reality, Handi–Van appears to argue LKLP enjoys an inappropriately close relationship with KTC and, as a non-profit entity, LKLP should not be exempt from requirements making it tougher for for-profit entities to compete. Handi–Van apparently desires to transport Medicaid clients, but under its own terms, not terms dictated by LKLP. Handi–Van also challenges an order denying its motion for leave to file a second amended complaint more than six years after litigation was initiated. Having reviewed the sizable record, the briefs and the law, we affirm the trial court's award of summary judgment to both Community and LKLP.

2 Handi–Van asserts it would have named another competitor, A Hilltop Taxi, LLC (Hilltop), as an appellee, had Hilltop not filed for bankruptcy. *In reA Hilltop Taxi, LLC,* Case No. 09–21138, Eastern District of Kentucky. In an amended complaint filed December 22, 2009, Handi–Van listed Hilltop, KTC, and Medicab of Kentucky, Inc. as "other entities not parties at this time."

3 A community action *agency* (CAA) is defined in Kentucky Revised Statutes (KRS) 273.410(2) as "a corporation organized for the purpose of alleviating poverty within a community or area by developing employment opportunities; by bettering the conditions under which people live, learn, and work; and by conducting, administering, and coordinating similar programs." A CAA may be created by one or more counties. KRS 273.435(1)(a). Duties of a CAA include reducing poverty, "closing service gaps, focusing resources on the most needy, [and] ... providing central or common services that can be drawn upon by a variety of related programs...." KRS 273.441(1).

4 KRS 218.014(6) and (8). Under the brokerage contract, LKLP was serving Medicaid recipients in Boone, Campbell, Gallatin, Grant and Kenton Counties—outside its statutorily created boundary of Leslie, Knott, Letcher and Perry Counties.

5 KRS 367.110 through 367.300.

***2** Additionally, LKLP cross-appeals claiming it is a governmental agency performing a governmental function and is, therefore, immune from suit. Because we affirm the award of summary judgment, the cross-appeal is rendered moot and will not be addressed.

FACTS

In 2000, the Kentucky legislature created the HSTD System under which KTC selects a broker through a bidding process.[6] The federal government pays the broker a *per capita* rate based on the number of Medicaid clients within the region.[7] The broker assigns trips to a subcontractor[8] possessing either taxi or DPV authority and coordinates payment for services provided to Medicaid recipients. From the money received, the broker pays its subcontractors, as well as administrative expenses and salaries. The broker may retain any funds not paid to subcontractors.

6 A brokerage contract spans one year with four one-year extensions.

7 This litigation pertains to Region 13 servicing Boone, Campbell, Kenton, Gallatin and Grant Counties.

8 A "subcontractor" is "a person who has signed a contract with a broker to provide human service transportation delivery within a specific delivery area and who meets human service transportation delivery requirements, including proper operating authority[.]" KRS 281.014(9).

DPV riders are classified into one of three categories depending on physical and mental state, and subcontractors may charge different rates for each category of rider: "02" riders are defined as nonemergency, ambulatory and oriented and can be transported in a regular taxi; "07" riders are nonemergency, ambulatory and disoriented; and, "08" riders are nonemergency and non-ambulatory, requiring lift-equipped vehicles. Subcontractors must hold the proper DPV certificate from KTC, and—to receive payment—have a Medicaid provider number and a contract with the region's HSTD broker.

Between 1994 and 2000—*before* HSTD existed—Handi–Van transported Medicaid clients. Between 2000 and 2005,

a private, for-profit entity named "R9T" [9] was KTC's HSTD broker in Region 13 and Handi–Van was one of its two subcontractors—the other being Community.

9 The principals of R9T are also the principals of Community Cab Company, Inc.

In 2005, LKLP submitted the winning bid to become KTC's HSTD broker in Region 13. As the new broker, LKLP adopted a new policy—requiring all subcontractors to be authorized, willing and able to transport all three categories of nonemergency Medicaid clients. [10] When deposed, Vickie Bourne, Executive Director of KTC's Office for Transportation Delivery, testified determining who qualifies as an eligible subcontractor is left to the broker's discretion. In its capacity as HSTD broker, LKLP identified only two eligible subcontractors—Community [11] and Hilltop [12]—neither of which was authorized by KTC's Department of Vehicle Regulation (DVR) to transport all three categories of Medicaid clients. LKLP informed Handi–Van via memorandum it could resume being a subcontractor if it did three things—obtain taxi-cab authority to transport "02" riders; obtain a Medicaid provider number for "02" riders; and, be able to transport all three categories of riders. Unwilling and/or unable [13] to secure taxi-cab authority and an "02" Medicaid provider number, Handi–Van has not been a subcontractor during LKLP's tenure as KTC's broker. Community is not a provider either—its request [14] for authority to transport "07" and "08" riders was rejected by KTC's DVR.

10 When asked at oral argument, LKLP's counsel explained that many brokers require subcontractors to be able to transport all three categories of riders to avoid "cherry picking." As LKLP's counsel explained, while a carrier can turn a profit on transporting "07" and "08" riders, it is difficult to find carriers who will accept "02" riders because tips are a rarity.

11 In the amended complaint for monetary damages, Handi–Van alleged LKLP and Community "conspired to split the relevant 07 and 08 transportation business to the detriment and harm of to (sic) Handi–Van" by soliciting Community as a subcontractor and meeting with Community before LKLP submitted the winning 2005 bid to serve as HSTD broker. As proof, Handi–Van alleged Community's principals initially objected to LKLP winning the brokerage contract but either withdrew that objection or lost it. Handi–Van further maintained that even though Community lacked authority to transport "07" and "08" Medicaid clients, it knew as early as June 20, 2005, it would be a subcontractor for LKLP.

12 After meeting with LKLP management, Jay Austin, a long-time taxi driver for Community, joined with others to launch Hilltop on April 1, 2006. Austin's goal was to provide "07" and "08" services in Region 13.

13 Handi–Van's owner and operator, Don Story, stated he had no desire to operate a taxi-cab company, preferring not to compete with other taxi-cab companies serving Northern Kentucky. However, in deference to LKLP's demand that taxi-cab authority was necessary to participate as a HSTD subcontractor, Handi–Van applied for such authority in June 2008 for Boone, Campbell and Kenton Counties. Community opposed the three applications which were denied because there was no need for additional taxi-cabs in the region. LKLP's counsel suggested at oral argument that Handi–Van could have received the authority needed directly through Medicaid, but the authority would have been limited to transporting Medicaid clients and could not have been used to transport private fares.

14 Handi–Van protested the request arguing need did not exist—the same reason Handi–Van maintained prevented it from obtaining taxi-cab authority for "02" riders. According to Handi–Van, Community sought additional authority at LKLP's request. A hearing was held on Community's applications on January 18, 2006, after which a KTC hearing officer found need did not exist for additional services—a ruling confirmed by the KTC Commissioner. Community's appeal of that ruling was dismissed.

PROCEDURAL BACKGROUND

***3** On November 7, 2006, Handi–Van filed a complaint solely against Community seeking a five-year injunction for violation of KRS Chapter 281; disgorgement of any compensation received by Community pursuant to KRS 466.070; punitive damages; and a jury trial. Community answered the complaint asserting ten defenses.

On December 9, 2009, Handi–Van moved to amend its complaint and name LKLP as a defendant. On December 22, 2009, the motion was granted and Handi–Van's amended complaint was filed alleging: unfair trade practices forbidden by KRS 367.170(1) (adopting subcontractor requirements that contravene state law to exclude Handi–Van from transporting Medicaid clients,

and, influencing and misleading state officials by filing fabricated applications for more vehicle authority); restraint of trade as forbidden by KRS 367.175(1); monopolizing or attempting to monopolize trade or commerce as forbidden by KRS 367.175(2); intentional interference with prospective contractual relations (between Handi–Van and Medicaid recipients); and, unspecified "statutory violations." Handi–Van demanded an injunction, joint and several damages, costs, treble damages, attorneys' fees and a jury trial. Importantly, Handi–Van did not allege conspiracy or unfair competition as causes of action in its complaint or amended complaint.

LKLP answered the amended complaint on February 11, 2010, asserting twenty-three defenses, including immunity from all liability. On March 11, 2011, LKLP answered interrogatories characterizing itself as a "quasi public agency created by county fiscal courts," claiming it was entitled to qualified and/or absolute immunity, and contending any claim should be submitted to the Kentucky Board of Claims.

On September 10, 2012, LKLP moved for summary judgment.[15] In its accompanying memorandum of law, LKLP recited the testimony of the five witnesses it had deposed; stated a strong case for immunity; and, argued Handi–Van could not seek money damages under the Act because it was not a "purchaser or lessee of goods or services" used primarily for "personal, family or household purposes." LKLP further argued: Handi–Van lacked standing to allege Medicaid fraud, statutory violations or other criminal activity; Handi–Van failed to establish LKLP had unfairly administered the HSTD program such that it amounted to unfair trade practices and/or unfair trade competition; and, while Handi–Van had never had a contract with LKLP with which there could have been tortious interference, LKLP was willing to contract with Handi–Van if it satisfied LKLP's requirements to become a qualified subcontractor.

15 Without citing to the record, Handi–Van states in its brief, "competing summary judgment motions were filed." At oral argument in this Court, counsel for Handi–Van stated he moved for summary judgment to bring the immunity issue to a head and avoid delaying trial for an interlocutory appeal. Our search of the record has revealed no pleading filed by Handi–Van styled "Motion for Summary Judgment." We did find summary judgment motions filed by LKLP and Community in mid–September 2012,—*after* Handi–Van's filing of a pleading styled "Motion to Strike Affirmative Immunity Defenses" on July 24, 2012. Handi–Van's motion to strike does not reference Kentucky Rules of Civil Procedure (CR) 56.03, and seeks only to prevent LKLP from alleging immunity at trial. In its order granting LKLP summary judgment, the trial court denied Handi–Van's motion to strike affirmative defenses as moot.

*4 Community answered the amended complaint on February 16, 2010, asserting thirteen defenses. On September 11, 2012, Community moved for summary judgment. Its accompanying memorandum of law argued the theme of Handi–Van's amended complaint was a conspiracy between Community, LKLP and unnamed others; specifically, that they conspired to violate the Act. Community maintained Handi–Van's three claims under the Act[16] were time-barred because a conspiracy must be alleged within one year of the date of discovery. KRS 413.130. During a deposition, Don Story, Handi–Van's president, had admitted being certain of the claims around July 1, 2005, but not filing the original complaint until November 7, 2006—well outside the one-year statutory window. Moreover, Community noted Handi–Van's original complaint was filed solely against Community and made no mention of any conspiracy. It was not until December 22, 2009, that Handi–Van filed the amended complaint and for the first time mentioned—repeatedly—the word "conspiracy."

16 Unfair trade practices under KRS 367.170(1); restraint of trade or commerce under KRS 367.175(1); and monopoly of trade or commerce under KRS 367.175(2).

In addition to the missed statute of limitations, Community argued Handi–Van offered no proof Community and LKLP had conspired or even communicated during the relevant timeframe. Community also argued Handi–Van could not prevail on the three claims alleged under the Act because Tom Nicolaus, Community's president, had testified his only communication with LKLP was to say "Hi," and he had no contact with any transportation competitors in Northern Kentucky—testimony Handi–Van never contradicted. Additionally, Community argued the Act is inapplicable because Handi–Van's claims do not arise from a consumer transaction—the genesis of the claims being the stifling of *commercial* interests—and, Handi–Van lacked privity with Community. Next, Community argued Handi–Van's claim of statutory violations under KRS 446.070 was doomed because Handi–Van is not a consumer protected by the Act. Finally, Community claimed Handi–Van could not prevail on its claim that Community had tortiously interfered with Handi–Van's contracts, or prospective contracts with

Medicaid recipients, because HSTD subcontractors do not contract with individual Medicaid clients. Instead, they contract with an HSTD broker—in this case, LKLP—which arranges for a subcontractor to pick up and transport a Medicaid recipient. Because Handi–Van lacked "02" authority and a Medicaid provider number, LKLP did not deem Handi–Van to be a qualified provider, and, therefore, Handi–Van had no contract with LKLP with which Community could have interfered. As a result, Handi–Van had no expectancy of a contract with any individual Medicaid recipient. Existence of a contract being just one of six elements that must be proved to establish a claim of tortious interference, *Snow Pallet, Inc. v. Monticello Banking Co.*, 367 S.W.3d 1, 6 (Ky.App.2012) (internal citations omitted), Community argued Handi–Van could not prevail.

Community stated it played no role in LKLP's decision about who was a qualified subcontractor; never tried to exclude Handi–Van from the HSTD program; and never exhibited any motive—improper or otherwise; all points Handi–Van failed to contradict. Furthermore, since Community withdrew from the HSTD program in November 2006, it noted it did not benefit from Handi–Van's absence from the HSTD market. Community also pointed out that either the subcontractor or the broker may cancel an agreement on thirty-day's notice, thereby defeating Handi–Van's argument that it was entitled to participate in the HSTD program.

The summary judgment motions were heard February 26, 2013, and April 11, 2013, with a major point of discussion being whether the majority of Handi–Van's claims were common law causes of action or alleged violations under the Act. Thereafter, on April 16, 2013, Handi–Van filed a "Notice of Withdrawal of Statutory Damage Claim and/or Statutory Causes of Action" acknowledging its reference to the Act in the amended complaint had caused confusion rather than merely demonstrating Kentucky's "public policy" as set forth by the Legislature, as counsel had intended. Handi–Van's counsel indicated in the Notice that it was filed for purposes of clarification only and did not constitute withdrawal of the three "common law claims" (unfair trade practices, restraint of trade and monopolizing or attempting to monopolize trade or commerce). Community's counsel objected, seeing the maneuver as an improper means of removing the issue from the trial court's consideration, and forbidden by CR 41.01(1) which prohibits a plaintiff from unilaterally dismissing claims after an answer and/or motion for summary judgment has been filed. LKLP filed a similar objection on April 19, 2013. This flurry of activity was followed by Handi–Van's filing of a motion seeking leave to file a *second* amended complaint, to which both Community and LKLP rapidly objected.

***5** On June 3, 2013, the trial court entered four orders—two denied Handi–Van's motions to file a second amended complaint (one in the case against Community and one in the case against LKLP); two awarded summary judgment to LKLP and Community. Citing CR 56.03 and *Steelvest, Inc. v. Scansteel Service Center, Inc.*, 807 S.W.2d 476 (Ky.1991), the trial court stated summary judgment is appropriate in the absence of any genuine issues of material fact, and the record must be viewed in the light most favorable to the non-moving party in whose favor all doubt must be resolved. In conducting its immunity analysis, the trial court found LKLP qualified as a special district under KRS 65.060 in light of the service it was providing, but ultimately denied LKLP's assertion of immunity because it could find no proof the counties in which those services were being offered (Boone, Campbell, Grant, Gallatin and Kenton) had ever adopted LKLP as a special district. The trial court rejected LKLP's argument that it was similarly situated to a water district created by a county government under KRS Chapter 74.

The trial court further found LKLP was not insulated by sovereign immunity because "the brokering of the contract for the transportation of Medicaid patients to medical appointments is not an integral government function." *Kentucky Center for the Arts Corp. v. Berns*, 801 S.W.2d 327, 332 (Ky.1990). Furthermore, because LKLP was performing a proprietary function rather than an integral government function, it could not claim protection under CALGA. [17]

17 Claims Against Local Government Act. KRS 65.200 *et. seq.*

Regarding the substantive claims, the trial court noted actions for conspiracy must be brought within one year of the accrual of the claim. KRS 413.140(1)(c). Because Don Story had testified he knew of the alleged conspiracy involving LKLP more than four years before the amended complaint was filed adding LKLP as a defendant, the claim was deemed untimely. Furthermore, the trial court noted the claim of a conspiracy was refuted by uncontroverted testimony from Community's President. Moreover, the trial court held because Handi–Van did not conduct its own discovery, it developed no proof supporting the conspiracy claims.

The trial court found the first three counts of the complaint could only be reasonably read to allege violations of

the Act, with no notice of alleged violations of public policy.[18] Contrary to Handi–Van's assertion, the claims were not cognizable under the Act—particularly since in this context, Handi–Van was not a consumer but, rather, was a provider. The trial court was troubled by Handi–Van's failure to cite any common law authority supporting private causes of action for unfair trade practices, restraint of trade, and monopolizing or attempting to monopolize trade or commerce. In distinguishing *Jackson v. Sullivan,* 276 Ky. 666, 124 S.W.2d 1019 (1939), the trial court noted an agreement that violates public policy would be an unreasonable restraint on trade and, therefore, would be void. Here, however, the trial court found there was no contract between LKLP and Handi–Van that could have constituted an unreasonable restraint on trade.

18 Since Handi–Van acknowledged it was not alleging fraud or Medicaid fraud, the trial court did not comment on those arguments.

Similarly, since there was no contract between Handi–Van and LKLP, the trial court found there was no intentional interference with contractual relations—either existing or prospective. *Snow Pallet, Inc.* 367 S.W.3d at 6; *National Collegiate Athletic Association v. Hornung,* 754 S.W.2d 855 (Ky.1988). Based on testimony recounted by the trial court, there was no proof Community intentionally interfered with any potential contract between LKLP and Handi–Van. Moreover, had LKLP selected Handi–Van as a subcontractor, its contract would have been with LKLP—not with any individual Medicaid client it transported.

Handi–Van's last claim was for damages from various asserted violations arising under the Act. In addition, Handi–Van generally demanded damages related to unspecified "statutory violations."[19] Because the Act was not created for the benefit of commercial entities, but rather was intended for the benefit of consumers, the trial court found four of the five claims were brought improperly under the Act and rejected them. *SeeAlderman v. Bradley,* 957 S.W.2d 264 (Ky.App.1997); *Michals v. William T. Watkins Memorial United Methodist Church,* 873 S.W.2d 216 (Ky.App.1994). The trial court stated damages are available under the Act only for persons and events the Act was designed to protect. Under the facts of this case, Handi–Van was not a "consumer," but rather was a *hopeful* provider. Thus, it appears the trial court deemed the Act inapplicable to the allegations and denied recovery.

19 The amended complaint charged, "[t]he Defendants, and each of them, and Hilltop, by violating the statues (sic) of the Commonwealth of Kentucky, are liable, jointly and severally, to Handi–Van for all damages sustained by reason thereof under KRS 446.070." KRS 446.070 reads: "A person injured by the violation of any statute may recover from the offender such damages as sustained by reason of the violation, although a penalty or forfeiture is imposed for such violation."

***6** Finding the existence of no genuine issues of material fact, the trial court granted LKLP's motion for summary judgment and dismissed with prejudice all claims alleged against LKLP in the amended complaint. The trial court also denied Handi–Van's motion to strike LKLP's affirmative defenses as moot. In a separate order, also entered on June 3, 2013, the trial court granted Community's motion for summary judgment and dismissed with prejudice all claims alleged against it in the amended complaint. This appeal followed.

ANALYSIS

Trial courts use summary judgment to expedite litigation. *Ross v. Powell,* 206 S.W.3d 327, 330 (Ky.2006). It is a "delicate matter" because it "takes the case away from the trier of fact before the evidence is actually heard." *Steelvest,* 807 S.W.2d at 482. In Kentucky, the movant must prove no genuine issue of material fact exists, and "should not succeed unless his right to judgment is shown with such clarity that there is no room left for controversy." *Id.* Importantly, the non-moving party must present "at least some affirmative evidence showing the existence of a genuine issue of material fact[.]" *City of Florence v. Chipman,* 38 S.W.3d 387, 390 (Ky.2001).

On appeal, our standard of review is "whether the trial court correctly found that there were no genuine issues as to any material fact and that the moving party was entitled to judgment as a matter of law." *Scifres v. Kraft,* 916 S.W.2d 779, 781 (Ky.App.1996). Furthermore, because summary judgments do not involve fact-finding, our review is *de novo. Pinkston v. Audubon Area Community Services, Inc.,* 210 S.W.3d 188, 189 (Ky.App.2006). With these standards in mind, we determine whether the trial court erred in awarding summary judgment.

Here, Handi–Van participated in discovery initiated by LKLP and Community, but initiated no depositions on its own.

At oral argument, counsel for Handi–Van boldly stated he did not have to take discovery because he participated in cross-examination and document production. Unfortunately, his cross-examination was ineffectual because none of the witnesses called by the appellees provided useful testimony to establish Handi–Van's claims. *LaFleur v. Shoney's, Inc.*, 83 S.W.3d 474 (Ky.2002), explains the purpose of discovery:

> [p]retrial discovery simplifies and clarifies the issues in a case; eliminates or significantly reduces the element of surprise; helps to achieve a balanced search for the truth, which in turn helps to ensure that trials are fair; and it encourages the settlement of cases. *See, e.g.,Elkins v. Syken,* 672 So.2d 517, 522 (Fla.1996). And, of course, the settlement of cases serves the dual and valuable purposes of reducing the strain on scarce judicial resources and preventing the parties from incurring significant litigation costs.

Id. at 478. Clearly, Handi–Van was counting on going to trial, but did nothing to ensure trial occurred. At oral argument, Handi–Van's counsel couched his comments in terms of, "we believe the evidence will show," indicating to us no affirmative evidence of a genuine issue of material fact existed in the case to which he could specifically cite. *Chipman,* 38 S.W.3d at 390. Any such affirmative evidence supporting Handi–Van's asserted claims should have been developed during discovery. Here, however, Handi–Van failed to introduce any affirmative proof and hoped a case materialized at trial.

At oral argument, when specifically asked to detail evidence establishing Handi–Van's claims, counsel cited a report from a hearing involving *different parties* in which a hearing officer from the Office of the Attorney General reached a resolution that would have benefitted Handi–Van had it been a party to that matter. Not only was Handi–Van *not* a party to the cited litigation, LKLP—the entity taken to task by the hearing officer in the report—was *not* a party to the litigation and was never afforded the opportunity to respond on the record to the hearing officer's concerns. Furthermore, the KTC Commissioner subsequently rejected a significant portion of the hearing officer's report.

***7** Counsel for Handi–Van proceeded to discuss the referenced report and urged this Court to study it, but even he would not go so far as to characterize it as evidence. Handi–Van placed the referenced report in the record of this case, but we are unconvinced it was credible evidence sufficient to refute the motions for summary judgment filed by LKLP and Community. Moreover, the trial court did not address whether the report was evidence worthy of consideration. Without a ruling by the trial court, we—as a Court of review—have nothing to review. "It is an unvarying rule that a question not raised or adjudicated in the court below cannot be considered when raised for the first time in this court." *Combs v. Knott County Fiscal Court,* 283 Ky. 456, 141 S.W.2d 859, 860 (1940) (citing *Benefit Association of Ry. Employees v. Secrest,* 239 Ky. 400, 39 S.W.2d 682, 685 (1931)). The questionable value of this report was no match for the extensive, relevant and probative evidence mustered by LKLP and Community.

Additionally, while *en route* to this Court, Handi–Van transformed its theory of the case. In the trial court, Handi–Van maintained its claims were brought under the Act. At page 18 of its brief, without giving specifics, Handi–Van mentions "violation of Medicaid statutes and regulations, federal and State, but also public policy for a competitive market as well as violations of KRS 367.175 (Kentucky unfair trade legislation)." Then, at page 19, Handi–Van refers to "common law claims" and "business torts." At oral argument, counsel consistently argued the claims were common law claims. Handi–Van cannot have it both ways, and more importantly, cannot "feed one can of worms to the trial judge" and a different can of worms to us. *Kennedy v. Commonwealth,* 544 S.W.2d 219, 222 (Ky.1976), *overruled on other grounds byWilburn v. Commonwealth,* 312 S.W.3d 321 (Ky.2010).

This case involves a voluminous record which thoroughly supports the trial court's resolution. While summary judgment should not be granted lightly, in this case it was entirely appropriate. We affirm.

ALL CONCUR.

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NOT TO BE PUBLISHED
Court of Appeals of Kentucky.

Anna Ruth MASON, Appellant
v.
MONUMENTAL LIFE INSURANCE CO., INC.; U.S. Bank; Ronnie Taylor, Appellees.

No. 2006-CA-002122-MR.
|
Jan. 4, 2008.

Appeal from Logan Circuit Court, Action No. 05-CI-00153; Tyler L. Gill, Judge.

Attorneys and Law Firms

Nancy Oliver Roberts, Bowling Green, KY, for appellant.

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Robert Shannon Morgan, Jason K. Murrie, Bowling Green, KY, for appellee, U.S. Bank.

Before STUMBO and WINE, Judges; GUIDUGLI,[1] Senior Judge.

1 Senior Judge Daniel T. Guidugli sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and KRS 21.580.

OPINION

WINE, Judge.

***1** Anna Ruth Mason appeals from an order of the Logan Circuit Court dismissing her claims against Monumental Life Insurance Company and U.S. Bank, and denying her motion to file an amended complaint. We agree with the trial court that Mason's damages under the initial complaint would not exceed the jurisdictional threshold for the circuit court. We also agree that the amended complaint fails to plead fraud with sufficient particularity. Hence, we affirm.

For purposes of this appeal, the underlying facts of this action are not in dispute. On August 28, 1990, Commonwealth Life Insurance Company issued a life insurance policy to Mason. The policy insured Mason's life for $40,000.00, and the lives of her two children for $5,000.00. The policy provided for a ten-year renewable term, with a monthly premium during the first term of $25.25. Thereafter, on June 1, 1997, Commonwealth issued a second policy to Mason, insuring her life for $30,000.00. Like the first policy, the second policy was for a ten-year renewable term, and provided for a monthly premium of $29.70. Under both policies, the primary beneficiaries were Mason's children, Cynthia and Troy Mason. Monumental acquired responsibility for the policies after it merged with Commonwealth.

The insurance agents for Commonwealth and Monumental, respectively, normally collected the premiums from Mason at her home each month. Beginning in July 1997, the total premium for both policies was $54.95. But beginning in March 1998, Monumental's agent, Ronnie Taylor began collecting $48.00 per month on the $30,000.00 policy, for a total premium of $73.25 per month.

On August 1, 1999, Monumental canceled the $30,000.00 policy due to nonpayment of premiums. Taylor approached Mason about reinstating the policy. Mason declined to sign the reinstatement form, maintaining that her premiums were current and her policy had not lapsed.

Taylor ceased working for Monumental in April 2000, and the account was assigned to David Smallwood. On April 20, 2000, Smallwood went to Mason's home to collect the premium for the $40,000.00 policy. He also informed her that the $30,000.00 policy had been canceled on August 1, 1999. Mason again maintained that her premiums were current and her policy had not lapsed. She also refused to pay Smallwood the premium on the $40,000.00 policy. As a result, Monumental canceled the $40,000.00 policy in May 2000. Mason admits that she made no premium payments after February 2000.

Shortly after meeting with Smallwood, Mason confronted Taylor at his home and questioned him about the lapse of the $30,000.00 policy. According to Mason, Taylor admitted to taking her money and promised to pay her back. Taylor denies making such a confession.

In June 2000, Mason requested the Kentucky Department of Insurance to investigate whether Monumental had given her proper credit for all her premium payments. After auditing its payment records against Mason's checks, Monumental determined that it had received but failed to credit Mason with $123.73. Monumental also found that it had over-collected $18.30 per month on the $30,000.00 policy for seventeen months, resulting in an overpayment of $434.83.

***2** On April 7, 2005, Mason filed a complaint against Monumental and Taylor. She alleged that Monumental had breached its contract by wrongfully terminating the insurance policies and she asserted that Taylor had converted her premium payments. As damages, Mason claimed that she was entitled to recover the death benefits payable under the policies. Mason also asserted a claim against U.S. Bank, alleging that U.S. Bank had wrongfully allowed Taylor to make withdrawals from her account.

The claim against Taylor was stayed after he filed for bankruptcy, but discovery proceeded on Mason's claims against Monumental and U.S. Bank. On June 23, 2006, Monumental filed a motion for summary judgment, arguing that Mason would not be entitled to recover the death benefit under the policies and consequently, her claim failed to meet the minimum jurisdictional amount for circuit court. The trial court denied the motion on July 7, 2006. But on August 10, 2006, Monumental renewed its summary judgment motion on the same grounds. Mason responded to the motion and filed a separate motion to file an amended complaint asserting fraud claims against Monumental and U.S. Bank.

On September 6, 2006, the trial court entered a calendar order granting Monumental's motion for summary judgment. Thereafter, Mason filed a motion to set aside the order, stating that she had not received timely notice of its entry. She also renewed her motion to file an amended complaint. On September 27, 2006, the trial court entered an opinion and order again granting Monumental's motion for summary judgment. The court agreed with Monumental that the allegations in Mason's complaint would only support recovery of premiums which she paid but were not credited to her account. Since this amount would not exceed $4,000.00, the trial court concluded that it lacked subject-matter jurisdiction over the claim. The court also denied Mason's motion to file an amended complaint, finding that she had failed to plead the alleged fraud with particularity. Although the trial court's order did not specifically address Mason's claims against U.S. Bank, the parties agree that those claims were dismissed as well. This appeal followed. [2]

2 Due to Taylor's pending bankruptcy, Mason did not name him as a party to this appeal.

The primary question in this case is whether Mason has asserted claims against Monumental and U.S. Bank which are within the circuit court's jurisdiction. The circuit court has jurisdiction over all civil matters not exclusively vested in some other court. KRS 23A.010(1). Since the district court has exclusive jurisdiction over civil matters in which the amount in controversy does not exceed $4,000.00, KRS 24A.120(1), the circuit court has jurisdiction of amounts in controversy exceeding $4,000.00. *City of Somerset v.. Bell,* 156 S.W.3d 321, 331 (Ky.App.2005)

Monumental argues that Mason's damages for breach of the life insurance contracts would be limited to any amounts which she paid but were not applied toward her policy. At most, Mason claims that Monumental failed to credit her for $800.00 to $900.00 in premium payments. On the other hand, Mason contends that Monumental's wrongful termination of the policies would entitle her to recover the death benefits under the policies, $70,000.00. She also contends that she would be entitled to punitive damages.

***3** There is little Kentucky case law which directly addresses the remedies for breach of a life insurance contract. But there is considerable authority from other jurisdictions on the subject. *See* Annotation, "Remedies and Measure of Damages for Wrongful Cancellation of Life, Health, and Accident Insurance, 34 A.L.R.3d § 3, 245, 269-72 (1970 & 2007 Supp.). Where an insurer wrongfully cancels, repudiates or terminates a contract of insurance, the insured may pursue any of three courses: (1) she may elect to consider the policy at an end and recover the just value of the policy or such measure of damages the court in its particular jurisdiction approves; (2) she may institute proceedings in equity to have the policy adjudged to be in force; or (3) she may tender the premiums and, if acceptance is refused, wait until the policy by its terms becomes payable and test the forfeiture in a proper action on the policy.*Id.* at 269.*See also Viles v. Prudential Insurance Company of America,* 124 F.2d 78, 80 (10th Cir.1941). These remedies are mutually exclusive, and a wrongfully-terminated insured must elect one remedy. 34 A.L.R.3d § 4, 272-73. *See also Armstrong v. Illinois Bankers Life Association,* 217 Ind. 601, 29 N .E.2d 415, 421-22 (1940). In her initial and first amended complaints,

Mason only asserted claims against Monumental and Taylor for breach of contract. Furthermore, Mason concedes that she has not tendered any payments since 2000, and she is not seeking reinstatement of the policies. Consequently, she has elected the first remedy.

"Damages for breach of a contract are normally that sum which would put an injured party into the same position [she] would have been in had the contract been performed."*University of Louisville v. RAM Engineering & Construction, Inc.,* 199 S.W.3d 746, 748 (Ky.App.2005), *citing Hogan v. Long,* 922 S.W.2d 368, 371 (Ky.1995). In the case of a wrongfully-terminated life insurance policy, the insured may recover the cash value of the policy or recovery of premiums paid by the insured. 34 A.L.R.3d § 17, 309. *See also People's Mutual Insurance Fund v. Bricken,* 13 Ky. L. Rptr. 586, 17 S.W. 625 (Ky.1891). There are cases suggesting that a wrongfully-terminated insured who is no longer an insurable risk may be entitled to recover the present value of the policy, which is the cash value of the policy less the amount of the unpaid premiums. *Vicars v. Mutual Benefit Health & Accident Association of Omaha,* 259 Ky. 13, 81 S.W.2d 874 (1935), *citing American Insurance Union v. Woodard,* 118 Okl. 248, 247 P. 398, 401 (1926).

However, the policies at issue are term policies and have no cash value. Mason has clearly lost the benefit of her bargain-the right to continuing and renewable coverage under the policies. But she has not suggested a measure of such damages, nor has she even claimed such damages in this action. And we find no authority which allows an insured who has elected this remedy to recover the full death benefits payable under the policy.

***4** Therefore, the only measure of damages would be for the amount of the premiums which Mason paid but for which Monumental did not provide coverage. At most, Mason's claimed damages for breach of the insurance contract would be around $900.00. Consequently, her claims for breach of contract fail to meet the minimum jurisdictional amount for circuit court.

Likewise, Mason's claims against U.S. Bank arise from two allegedly improper withdrawals from her account in 1997, totaling $59.40. She also suggests that U.S. Bank is liable for Taylor's conversion of other premium payment checks, but she does not identify any other specific improper withdrawals. Consequently, Mason's claims against U.S. Bank also fail to meet the jurisdictional threshold for circuit court.

On appeal, Mason focuses on her fraud claim which she attempted to assert against Monumental and Taylor in her third amended complaint. She asserts that Taylor, while acting as Monumental's agent, fraudulently increased her insurance premium, retained her premium payments, and removed funds from her bank account. Mason contends that, had the trial court allowed her to amend the complaint, she would have been able to recover the full benefit of her bargain with Monumental, which would be the death benefits payable under the policies. In addition, the fraud claims would support an award of punitive damages. She concludes that such damages would be more than sufficient to meet the jurisdictional limit of circuit court.

In support of her position, Mason notes the long-standing rule that a person who is "induced by fraudulent representations to enter into a contract is entitled to recover as damages, not only what he actually parted with, but benefits of the bargain."*Investors Heritage Life Ins. Co. v. Colson,* 717 S.W.2d 840, 842 (Ky.App.1986), *citing Dempsey v. Marshall,* 344 S.W.2d 606 (Ky.1961). In *Colson,* the insured purchased credit life insurance as part of an installment credit contract. During the transaction, the insured informed the agent of his health problems, but the agent assured the insured that coverage would still be provided. After the insured's death, however, the insurance company denied the claim on the grounds that the "sound health" provision precluded coverage and because the agent did not have the authority to waive the provision. The agent argued, among other things, that no damages were proven because the insurance company refunded the premium. This Court rejected the argument, concluding that the amount of the premiums was not the proper measure of damages. Rather, the insured's estate was entitled to the benefit of the bargain, which would be coverage under the policy. *Colson,* 717 S.W.2d at 842.

Unlike in *Colson,* Mason does not allege that there was any fraud by Monumental or Taylor in inducing her to sign the insurance contract. The alleged fraud concerns Monumental's and Taylor's performance of the contract. While every contract includes an implied covenant of good faith and fair dealing, *Ranier v. Mount Sterling National Bank,* 812 S.W.2d 154, 156 (Ky.1991), the elements for such a claim are different than a claim alleging fraud.

***5** Moreover, the benefit of Mason's bargain was coverage for the term of the policies. Even if Taylor fraudulently converted Mason's premium payments, causing the $30,000.00 policy to lapse, Mason has never become entitled to receive the benefits payable under the policies. At most, she was deprived of the opportunity to continue coverage, which she herself precluded when she refused to tender any additional payments. Consequently, even under her tendered fraud claims, Mason's damages would be limited to the coverage period of which Taylor's alleged fraud deprived her.

Of course, the fraud claim could support an additional award of punitive damages. However, we agree with the trial court that Mason failed to plead the alleged fraud with particularity, as required by CR 9.02. To be sufficient, "it is enough to plead the time, the place, the substance of the false representations, the facts misrepresented, and the identification of what was obtained by the fraud."*Scott v. Farmers State Bank,* 410 S.W.2d 717, 722 (Ky.1966). In her third amended complaint, Mason alleged that Taylor retained her premium payments for his own benefit and made unauthorized withdrawals from her account at U.S. Bank.

But at the time Mason attempted to file this complaint, the parties had already conducted extensive discovery. Monumental's records showed that Taylor deposited all of Mason's premium payments into Monumental's bank account. While some of those deposits may not have been timely, Mason did not identify any payments which were not properly credited to her apart from the two electronic fund transfers charged to Mason's account in 1997. Likewise, Mason did not plead that U.S. Bank would have had reason to know that any of the electronic fund transfers or other withdrawals were improper.

CR 15.01 allows a trial court to amend pleadings when justice so requires. But while amendments should be freely allowed, the trial court has wide discretion and may consider such factors as the failure to cure deficiencies by amendment or the futility of the amendment itself. *First National Bank of Cincinnati v. Hartman,* 747 S.W.2d 614, 616 (Ky.App.1988), *citing*CR 15.01; Bertelsman and Philipps, 6 *Ky. Practice,* at 310 (1984). Under the circumstances, Mason failed to plead fraud against Monumental and U.S. Bank with sufficient particularity as would support a claim for damages in excess of the minimum jurisdictional amount for circuit court. Therefore, the trial court did not abuse its discretion in denying her motion to file the amended complaint.

Given this holding, the remaining issues in Mason's appeal are moot. Mason makes no showing that the information which she sought to discover from Monumental and U.S. Bank would have allowed her to recover damages of more than $4,000.00. Since the circuit court lacked subject-matter jurisdiction, the court did not err by denying her motion to compel further discovery without a hearing.

***6** Finally, Mason contends that the trial court violated her due process rights by granting Monumental's summary judgment motion by use of a calendar order entered on September 6, 2006. But even if this practice was error, Mason does not show that she suffered any prejudice as a result. The trial court did not designate its September 6, 2006, calendar order as final and appealable. And upon her motion, the trial court entered a memorandum opinion and order on September 27, 2006, formally dismissing the action. Since Mason properly brought her appeal from this order, any due process violation was harmless.

Accordingly, the summary judgment of the Logan Circuit Court dismissing Mason's claims against Monumental and U.S. Bank is affirmed.

ALL CONCUR.

All Citations

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8

Filed 15-CI-90250 01/29/2016 Jim Barker, Rowan Circuit Clerk

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United States District Court,
W.D. New York.

Ann McCRACKEN, Joan Ferrell, Sarah Stilson, Kevin McCloskey, Christopher Trapatsos, and Kimberly Bailey, as individuals and as representatives of the classes, Plaintiffs,
v.
VERISMA SYSTEMS, INC., Strong Memorial Hospital, Highland Hospital, and University of Rochester, Defendants.

No. 14–CV–6248T.
|
Signed May 18, 2015.

Attorneys and Law Firms

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Eric J. Ward, Abigail L. Giarrusso, Ward Greenberg Heller & Reidy LLP, Rochester, NY, for Defendants.

DECISION and ORDER

MICHAEL A. TELESCA, District Judge.

INTRODUCTION

***1** Ann McCracken ("McCracken"), Joan Ferrell ("Ferrell"), Sarah Stilson ("Stilson"), Kevin McCloskey ("McCloskey"), Christopher Trapatsos ("Trapatsos"), and Kimberly Bailey ("Bailey") (collectively, "Plaintiffs"), bring this action on behalf of themselves and others against Verisma Systems, Inc. ("Verisma"), Strong Memorial Hospital ("Strong"), Highland Hospital ("Highland"), and the University of Rochester ("U of R") (collectively, "Defendants"), claiming that Defendants charged inflated prices for medical records in violation of New York State law. Verisma contracts with Strong, Highland and the U of R (collectively, the "Healthcare Defendants") to provide medical records to patients of those entities. Plaintiffs, all of whom are patients who received medical treatment at the Healthcare Defendants, claim that Defendants charged them excessively for copies of their medical records, in violation of New York Public Health Law ("NYPHL") § 18. Plaintiffs also assert causes of action for unjust enrichment and for a deceptive trade practices under New York General Business Law ("NYGBL") § 349.

FACTUAL BACKGROUND

The following factual summary is based on the allegations in the Amended Complaint, which are deemed to be true for purposes of deciding Defendants' motions to dismiss. Verisma is a private corporation that contracts with doctors and hospitals nationwide to provide medical records to patients, or other authorized entities, who request such records. Verisma entered into contracts with the Healthcare Defendants to provide copies of medical records generated by the Healthcare Defendants to patients who requested those records. Plaintiffs allege that Verisma obtained these contracts by offering financial and other types of incentives to the Healthcare Defendants. According to Plaintiffs, these incentives, which Plaintiffs characterize as "kickbacks", are a central component of Verisma's marketing strategy. Plaintiffs cite to information publicly available on Verisma's website and third-party websites on which Verisma maintains a business profile. *See, e.g.,* Amended Complaint ("Am.Compl.") (Dkt # 4) ¶ 27 & Exhibit ("Ex.") 4 (quoting websiteIndeed.com which states that Verisma helps health care providers "capture available revenue in their Release of Information processes").

All Plaintiffs reside in the Greater Rochester area and, through their attorneys, requested copies of their medical records from the Healthcare Defendants. Upon receiving a request for records from a Plaintiff, the Healthcare Defendants forwarded the request to Verisma, which fulfilled the request for records and sent an invoice to Plaintiffs' attorneys. Sometimes, rather than actually send Plaintiffs hard copies of the requested records, Verisma simply made the records available to Plaintiffs via an online portal. Regardless of how the copies of records were provided (in paper form or electronically), Verisma charged $0.75 per page without regard to, and without disclosing, the actual costs of producing copies of the records. Each Plaintiff paid the amount charged by Verisma through their counsel. Plaintiffs allege that the cost to produce each medical record was substantially less than $0.75 per page and that the amounts

charged were inflated as a result of Defendants' alleged "kickback scheme."

PROCEDURAL STATUS

***2** Verisma has moved to dismiss the Amended Complaint pursuant to Federal Rule of Civil Procedure 12(b)(6) ("Rule 12(b)(6)") on the basis that Plaintiffs have failed to state a claim upon which relief can be granted. According to Verisma, Plaintiffs have failed to establish any actual injury since the charges Verisma imposed on them for copies of medical records are expressly deemed reasonable under New York law. The Healthcare Defendants have moved to dismiss the Amended Complaint pursuant to Federal Rule of Civil Procedure 12(b)(1) ("Rule 12(b)(1)") on the ground that Plaintiffs lack constitutional standing, and pursuant to Rule 12(b)(6) for failure to state claims for unjust enrichment and for violations of NYPHL § 18 and NYGBL § 349.

RULE 12(b) (1) STANDARD

"A case is properly dismissed for lack of subject matter jurisdiction ... when the district court lacks the statutory or constitutional power to adjudicate it."*Makarova v. United States,* 201 F.3d 110, 113 (2d Cir.2000) (citing FED. R. CIV. P. 12(b)(1)). The party seeking to establish jurisdiction bears the burden of "showing by a preponderance of the evidence that [it] exists."*Lunney v. United States,* 319 F.3d 550, 554 (2d Cir.2003) (citation omitted). In resolving subject matter jurisdiction under Rule 12(b)(1), a district court may refer to evidence outside the pleadings. *Id.* (citing *Kamen v. American Telephone & Telegraph Co.,* 791 F.2d 1006, 1011 (2d Cir.1986) ("[W]hen ... subject matter jurisdiction is challenged under Rule 12(b) (1), evidentiary matter may be presented by affidavit or otherwise.") (citation omitted)).

DISCUSSION

I. Standing and the Rule 12(b)(1) Motion by the Healthcare Defendants

A. General Legal Principles

Because standing is jurisdictional, the Court first considers the Healthcare Defendants' motion pursuant to FRCP 12(b) (1) to dismiss based on Plaintiffs' lack of standing to bring this lawsuit. *See Rhulen Agency, Inc. v. Alabama Ins. Guar. Ass'n,* 896 F.2d 674, 678 (2d Cir.1990) (stating that when a party moves for dismissal both for failure to state a claim and lack of jurisdiction, "the court should consider the Rule (12)(b)(1) challenge first since if it must dismiss the complaint for lack of subject matter jurisdiction, the accompanying defenses and objections become moot and do not need to be determined").

The standing requirements of Article III, Section 2 of the United States Constitution"are not mere pleadings requirements but rather [are] an indispensable part of the plaintiff's case."*Lujan v. Defenders of Wildlife,* 504 U.S. 555, 561, 112 S.Ct. 2130, 119 L.Ed.2d 351 (1992) (citations omitted). To establish standing, a plaintiff must show

> (1) it has suffered an 'injury in fact' that is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical; (2) the injury is fairly traceable to the challenged action of the defendant; and 3) it is likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision.

***3** *Friends of the Earth Inc. v. Laidlaw Environmental Servs. (TOC), Inc.,* 528 U.S. 167, 180–81, 120 S.Ct. 693, 145 L.Ed.2d 610 (2000). The Healthcare Defendants argue that Plaintiffs have failed to sufficiently allege "injury-in-fact" and causation, but they do not challenge the redressability requirement.

B. Injury–In–Fact

With respect to the "injury-in-fact" requirement, "[e]ven a small financial loss is an injury for purposes of Article III standing."*Natural Res. Def. Council, Inc. v. United States Food & Drug Admin.,* 710 F.3d 71, 85 (2d Cir.2013). The Healthcare Defendants argue that Plaintiffs have failed to plead that they incurred a financial loss due to the purported overcharges for their medical records, because Plaintiffs allege only that their attorneys paid Verisma for the requested copies; Plaintiffs do not allege that they personally paid Verisma for the records or that they reimbursed their attorneys for the amounts paid by the attorneys to Verisma. *See* Healthcare Defendants' Memorandum of Law in Support of Motion to Dismiss ("Healthcare Defs' Mem.") (Dkt # 214) at 6. Plaintiffs, in their opposition brief, assert that they are not required to "plead the obvious", i.e., that their legal services agreement with their attorneys dictates that they must reimburse the attorneys for all costs, including those

associated with obtaining copies of their medical records. *See* Plaintiffs' Opposition Memorandum of Law ("Pls' Opp.") (Dkt #) at 18.

However, as the Second Circuit has repeatedly observed, "jurisdiction must be shown affirmatively, and that showing is not made by drawing from the pleadings inferences favorable to the party asserting it."*Shipping Fin. Servs. Corp. v. Drakos,* 140 F.3d 129, 131 (2d Cir.1998) (citing *Norton v. Larney,* 266 U.S. 511, 515–16, 45 S.Ct. 145, 69 L.Ed. 413 (1925)); *see also J.S. ex rel. N.S. v. Attica Cent. Schs.,* 386 F.3d 107, 110 (2d Cir.2004) (stating that in resolving jurisdiction, the court must accept as true all factual allegations in the complaint "but [is] not to draw inferences from the complaint favorable to [the party asserting jurisdiction].") (citation omitted). As the parties seeking to establish jurisdiction, Plaintiffs bear the burden of proof, *see Lunney,* 319 F.3d at 554, and thus may be required to "plead the obvious."

Two district court cases from this Circuit have recently considered, in essentially identical factual circumstances, the sufficiency of a plaintiff's allegations of injury-in-fact. *See Spiro v. Healthport Technologies,* LLC, No. 14 CIV. 2921 PAE, —— F.Supp.2d ——, 2014 WL 4277608, at *5 (S.D.N.Y. Aug.29, 2014) (Englemayer, J.); *accord Carter v. Healthport Technologies, LLC,* No. 14–CV–6275–FPG, 2015 WL 1508851, at * (W.D.N.Y.31, 2015) (Geraci, C.J.). As discussed further below, review of these cases supports this Court's conclusion that Plaintiffs are required to "plead the obvious," should they wish to proceed with this litigation.

In *Spiro,* as in the present case, the plaintiffs were clients of a law firm prosecuting personal injury causes of action on their behalf. In connection with these lawsuits, the law firm made requests for the plaintiffs' medical records to the defendant hospitals and their billing agent, who allegedly charged inflated rates for producing the records. The plaintiffs in *Spiro* brought suit against the hospitals and the billing agent to recover for unjust enrichment and violations of NYGBL § 349 and NYPHL § 18. The defendants asserted a standing challenge, arguing that the plaintiffs had failed to plead a cognizable injury-in-fact because it was the plaintiffs' law firm, and not plaintiffs themselves, which was charged, and which paid, for the copies of the medical records at issue. *Spiro,* 2014 WL 4277608, at *4.

***4** In *Spiro,* the district court found the complaint insufficient even though the plaintiffs also alleged that each plaintiff later reimbursed the law firm for the cost of the copies, after the lawsuit in question settled. 2014 WL 4277608, at *4. Because the copying costs were passed along to the client, the plaintiffs in *Spiro* argued that they each suffered an out-of-pocket monetary loss, and it was irrelevant that the law firm advanced the payments for them. The district court in *Spiro* disagreed, explaining that the complaint did not plead that any plaintiff was obligated to reimburse the law firm for the copying costs he or she incurred; instead, on the facts as pled, the decision by the plaintiffs to reimburse their lawyers after the fact, for the copying costs they had paid, "was a volitional act-an act of grace."*Spiro,* 2014 WL 42776087, at *5. The district court in *Spiro* found that on the facts alleged, absent any allegation that the plaintiffs had an obligation to their attorney for reimbursement, any legal right to challenge the overcharging would belong exclusively to the law firm, as it was the law firm alone that suffered an injury caused by the defendants' overcharging. *Id.* On the facts alleged in the complaint, the plaintiffs' later decision to reimburse their lawyers, and the law firm's decision to accept such reimbursement, were "independent, volitional, discretionary acts, breaking the chain of causation necessary to establish Article III standing."*Id.* (citing *Lujan,* 504 U.S. at 560–61)).

Here, the Amended Complaint does not even contain an allegation that Plaintiffs actually reimbursed their attorneys for the costs of the medical records, much less that they had any legal obligation to reimburse their attorney for their monetary outlay at the time they ordered the copies. Plaintiffs state that these allegations are unnecessary and urge that their allegation that they paid for their medical records "through ... counsel" are sufficient. The Court disagrees. The plaintiffs' complaint in *Spiro* contained allegations that were essentially the same as the allegations set forth by Plaintiffs here,[1] e.g., that "Plaintiff, through his attorneys, ... paid said $74.00 bill...."*Spiro,* 2014 WL 4277608, at *14 n. 4 (citations to record omitted). Observing that it was undisputed that the law firm, in fact, paid these bills, the district court in *Spiro* found that the plaintiffs' complaint did "not explain what is meant by the statement that plaintiffs thereby paid these bills."2014 WL 4277608, at *14 n. 4. The district court declined to "treat this conclusory and elliptical statement as equivalent to a concrete factual allegation that the legal duty to pay these bills, or to reimburse [the law firm] for doing so, fell upon plaintiffs as of the time that [law firm] incurred the charge."*Id.* Likewise, Plaintiffs' Amended Complaint here fails to explain what is meant by the rather "conclusory and elliptical statement" that the copying costs were "paid through counsel." The Court

cannot find any basis on which to distinguish *Spiro* from the present case; indeed, the pleadings in *Spiro* contained more detail on the issue of injury-in-fact but still were insufficient to carry the plaintiffs' burden.

1 For instance, Plaintiff McCracken alleges in the Amended Complaint that she "requested medical records from Highland through her counsel"; that "Verisma, acting on behalf of Highland, sent an Invoice for Medical Record Request. The invoice indicated that McCracken would be charged $198.75 for 265 pages of medical records ($0.75 per page)"; that she "paid the $198.75 for her medical records through her counsel in order to obtain copies of the requested medical records"; and that the "fee charged to, and paid by, McCracken, exceeded the cost to produce these records, and included a built-in kickback from Verisma to UR and Highland."Am. Compl. ¶¶ 34–36, 39. The other Plaintiffs' claims are couched in similar language. *See id.* 9[9[43, 46 (Ferrell); ¶ 50 (Stilson); ¶¶ 55, 57 (McCloskey); ¶¶ 62, 63 (Trapatsos); ¶¶ 69, 70 (Bailey).

***5** All of Plaintiffs' causes of action hinge upon their claim that Verisma, acting in collusion with the Healthcare Defendants, overcharged Plaintiffs' attorneys for copies of Plaintiffs' medical records. Because the Amended Complaint does not contain sufficient facts establishing, by a preponderance of the evidence, that Plaintiffs have suffered an injury-in-fact,[2] the Court must find that standing is lacking. *See Spiro,* 2014 WL 4277608, at *4–*5.

2 In *Spiro,* the analysis would have been different if the plaintiffs had been obligated, at the time their attorney incurred the copying expenses, to reimburse the attorney for expenses incurred in connection with representing them. *Spiro,* 2014 WL 4277608, at *5. As the district court in *Spiro* explained, if the plaintiffs owed a duty of reimbursement to their attorney (be it absolute or conditional), then the records provider's charge to the attorney and the attorney's payment of that charge would have give rise to a liability (or a contingent liability) on the plaintiffs' part. *Id.* (citations omitted).

In keeping with the district court's decision in *Spiro,* the Court elects to permit Plaintiffs here to amend the Amended Complaint to add facts relating to the terms of engagement[3] between Plaintiff and their attorneys, if those terms reflect that, at the time the attorneys incurred the copying expense, Plaintiffs would reimburse the attorneys for the costs they incurred in the course of representing Plaintiffs in their lawsuits. The Court anticipates that a newly amended complaint "would recite the date and specific relevant terms of the engagement between the plaintiff and the [law] firm and attach the engagement letter between the plaintiff and the firm."*Spiro,* 2014 WL 4227608, at *6.

3 In New York State, an attorney is required to "provide to the client a written letter of engagement before commencing the representation, or within a reasonable time thereafter[.]"N.Y. COMP.CODES R. & REGS. tit. 22, § 1215.1. The engagement letter must explain the scope of the legal services to be provided; and the "attorney's fees to be charged, expenses and billing practices."*Id.*

C. Causation

The Healthcare Defendants further contend that Plaintiffs lack standing because Plaintiffs do not allege that Healthcare Defendants "directly overcharged them or collected ... fees."Dkt # 21–4 at 4. Instead, the Healthcare Defendants note, Plaintiffs "allege that Verisma sent invoices to their counsel for charges for processing the [records] requests, received the payment from their counsel, and provided the records...."*Id.* at 5. Thus, the Healthcare Defendants argue, Plaintiffs did not plead that any conduct on the part of the Healthcare Defendants "caused or contributed to their purported financial injury."*Id.* Stated another way, the Healthcare Defendants argue that even assuming pecuniary injuries were suffered by Plaintiffs, such injuries are not "fairly traceable" to any acts or omissions by Healthcare Defendants.

It bears noting that the "fairly traceable" requirement imposes a "lesser burden" than the showing required for proximate cause. *Rothstein v. UBS AG,* 708 F.3d 82, 92 (2d Cir.2013). Plaintiffs point out they allege that the Hospital Defendants contracted with Verisma to respond to requests for medical records, and that Verisma was "acting on behalf of [the Healthcare Defendants]" when it sent invoices for the costs of copying Plaintiffs' medical records. *See* Am. Compl. ¶¶ 35, 42, 49, 56, 63, 70. Plaintiffs thus have alleged that Verisma was acting as the Healthcare Defendants' agent, and that any injury they suffered was "fairly traceable" to the Healthcare Defendants, by virtue of the alleged agency relationship. *See Spiro,* 2014 WL 4277608, at *14 n. 7 (rejecting hospitals' challenge to standing on the grounds that any injury suffered by plaintiffs was caused, not by them, but by Healthport, the company that responded to requests for records and billed for copying records; the complaint alleged that "Healthport was the hospitals' agent for the purpose of responding to patients'

requests for medical records held by the hospitals") (citation to record omitted; citing, *inter alia, Amusement Indus., Inc. v. Stern,* 693 F.Supp.2d 327, 344 (S.D.N.Y.2010) (Under New York law, "the principal will be liable to third parties for the acts of its agent that were within the scope of the agent's actual or apparent authority."). Plaintiffs also allege that the Healthcare Defendants participated directly with Verisma in a scheme to turn a profit in connection with supplying copies of medical records to patients. The Supreme Court has noted that for standing purposes, a plaintiff's burden of alleging that an injury is "fairly traceable" to a defendant's conduct is "relatively modest".*Bennett v. Spear,* 520 U.S. 154, 169, 117 S.Ct. 1154, 137 L.Ed.2d 281 (1997). The Court finds that, at this early stage in the proceedings, Plaintiffs have met their modest burden on the element of causation.

CONCLUSION

***6** For the reasons set forth above, the Healthcare Defendants' Rule 12(b)(1) to dismiss is granted to the extent that the Court dismisses, without prejudice, the Amended Complaint for lack of subject matter jurisdiction, with leave to replead in accordance with the Court's instructions, *supra.*The Court defers ruling on the Healthcare Defendants' Rule 12(b)(6) motion and Verisma's Rule 12(b)(6) until after such time that Plaintiffs file a Second Amended Complaint as directed, *supra,* in this Decision and Order. Plaintiffs' Second Amended Complaint is to be filed thirty (30) days from the date of entry of this Decision and Order.

SO ORDERED.

All Citations

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Filed 15-CI-90250 01/29/2016 Jim Barker, Rowan Circuit Clerk

2009 WL 4917549 (Ky.A.G.)

Office of the Attorney General

Commonwealth of Kentucky
OAG 09-009
December 11, 2009

Subject: **Entitlement of a patient to copies of his or her medical records; ability to assign right to copies; appropriate charges levied by medical providers.**

Requested by: **Senator Ray S. Jones II**

Written by: **Tad Thomas, Assistant Deputy Attorney General**

Syllabus: **A patient is entitled to require a medical provider to produce one free copy of their medical records without charge. While an insurance company, acting as a reparations obligor, cannot require a patient to assign their free copy to the insurance company, a patient may make this assignment to a party of their choosing.**

Statutes construed: **KRS 422.317**

OAGs cited:

Opinion of the Attorney General

***1** Senator Ray S. Jones, II, has requested an opinion of this office "describing and setting forth those charges permissible under KRS 422.317, if any." In addition to this question, the Senator has also requested that we clarify other issues pertaining to the statute which were previously addressed by this office in informal guidance as opposed to a formal opinion.

KRS 422.317 was originally enacted as part of the General Assembly's 1994 Health Care Reform legislation and appears to have been intended to enable patients to obtain valuable information regarding their medical history and also to provide patients with the ability to transfer health information from one doctor to another in the event a change in insurance, or other circumstances, required a patient to change providers. The statute states in relevant part:
(1) Upon a patient's written request, a hospital licensed under KRS Chapter 216B or a health care provider shall provide, without charge to the patient, a copy of the patient's medical record. A copying fee, not to exceed one dollar ())1) per page, may be charged by the health care provider for furnishing a second copy of the patient's medical record upon request either by the patient or the patient's attorney or the patient's authorized representative.

In his request, he asserts that since the enactment of this statute "health care providers, or for-profit companies providing records management and copying services for the providers, have continually tried to circumvent the statute by requiring the payment of additional fees and charges while claiming to provide copies free of charge or for 1 per page."

In support of this assertion the Senator has included redacted copies of invoices purportedly sent to patients who had requested records pursuant to KRS 422.317. In one invoice the healthcare provider, providing the "copying" free of charge, also included a 250.00 "certification fee" as well as a fee of 9.15 for postage. In another invoice a family practitioner wrote, "I will be more than happy to provide you the free copy of [redacted] medical records, but it is the policy of this office to first obtain reimbursement for my time in complying with this request." The letter then included an itemized list of charges for "research and review of KRS 422.317," "Review of records," "Preparation of letter," and "Postage and handling," all at a rate of 150.00 per hour. Other

invoices furnished to this office included charges for a "Certification form," "Notary charge/Certification," "Retrieval fees," and postage charges. Still other invoices included charges for records of more than 1.00 per page. We are of the opinion that most of these charges violate the statute.

***2** Like all advisory opinions of the Attorney General, this opinion attempts to determine what a court might do when presented with the same legal issues. While not binding on the courts, opinions of the Attorney General are generally given great weight. *York v. Com.*, 815 S.W.2d 415, 417 (Ky.App. 1991) ("An Attorney General's opinion is highly persuasive, but not binding on the recipient.") Like a court, we must construe statutes to ascertain and give effect to the intent of the General Assembly. *Beckham v. Board of Education* 873 S.W.2d 575, 577 (Ky. 1994).

There are no published opinions interpreting KRS 422.317, however the statute is clear on its face. It contemplates two scenarios when a patient might request a copy of their medical records. The first scenario arises when a patient requests copies for the first time and has not yet received his or her free copy. The second scenario arises when the patient requests an additional copy of records and a free copy has already been provided.

Under the first scenario, KRS 422.317 states that hospitals and other medical providers *shall* provide at least one copy of a patient's medical records *without* charge. The use of the term "shall" indicates the requirement to provide medical records without charge is mandatory. *Combs v. Hubb Coal Corp.*, 934 S.W.2d 250 (1996). Therefore, in a situation where a patient is requesting their one free copy allowed under KRS 422.317, providers must make a complete copy of the records available in some manner without requiring additional payments of *any* type.

While KRS 422.317 requires hospitals and physicians to "provide" one copy of the records to the patient without charge, it does not set forth the manner in which records are to be delivered. In our view, a provider must make some arrangement for a patient to receive copies of their medical records without cost, whether that is to make them available for pickup, mailing, faxing or some other form of delivery. However, it does appear that the statute may allow a provider to charge additional fees for mailing, faxing or otherwise delivering the records to a patient if the patient is afforded some alternative method of delivery which does not include charges. For example, if a provider allows the patient an opportunity to pick up a copy of the records at the place where the treatment was rendered, but the patient or requesting party asks for those copies to be mailed or faxed, the provider could charge for that additional service.

It is also our opinion that the statute assumes a medical provider will produce a *complete* copy of a patient's medical record unless otherwise requested by the patient. Therefore, a provider may be required by the patient to certify that the records being provided are indeed a *complete* copy of those records kept in the regular course of business. Additional charges for ensuring that the records are indeed complete, such as those charges identified in invoices provided to this office which list charges for a "Certification fee," "Certification form," or "Notary charge/Certification," are not permitted under the statute when a patient is requesting their free copy to which they are entitled. [1]

***3** Furthermore, a provider is also prohibited from charging a patient for records that are kept in electronic format if those records have not been previously provided to the patient free of charge. Providers would be required to absorb the cost of reproducing a CD just as they would the cost of paper copies.

The second situation contemplated by the statute is a request for a copy of medical records *after* a free copy has already been obtained by the patient. Under this scenario providers are limited to charges which would equate to a maximum charge of 1.00 per page, regardless of the nomenclature used to describe the charge. For example, if a provider copies 100 pages of records and makes them available to the patient or other requesting party, the maximum charge would be 100.00. In that case, a health care provider is not permitted to charge additional fees for certification of records, notary or retrieval charges, *if* the total charges would exceed 1.00 per page. If the provider wanted to charge 25.00 for a certification fee, the maximum copy charge would be 75.00 so that the total *per page* charge does not exceed 1.00 as set forth in the statute. KRS 422.317 is explicit in this requirement. Here again though, because the statute does not require a particular method of delivery, a provider could include

additional charges for postage or faxing, so long as one method of delivery is made available that would not exceed the 1.00 per page maximum allowed under the statute.

Before moving on, we would bring to the Senator's attention the matter of *Hardin County v. Valentine*, 894 S.W.2d 151 (Ky.App. 1995). There, the Court first addressed the issue of whether medical records were "public records" under the Open Records Act. After finding that they are not, the Court addressed the issue of the reasonable copying charges allowed under KRS 422.305 to KRS 422.330. The Court provided some guidance on its position regarding the maximum allowable charge.
[O]ne should not lose sight of the fact that what might be a reasonable copying fee for copying one or two pages may be totally unreasonable when applied to a 500-page single record. Except for the actual time it takes to make the duplicates, all other charge items listed by the hospital are one-time costs.

We offer no other advice to Judge Cooper as to the manner in which he determines, on remand, the amount the Hospital may charge for this expense. We would, however, note that since this appeal was filed, the legislature enacted KRS 422.317 in which it is stated that '[a] copying fee, *not to exceed* one dollar ())1) per page, may be charged by the health care provider for furnishing a second copy of the patient's medical record upon request either by the patient or the patient's attorney....' We reiterate, however, that while 1.00 may be reasonable for one of a few pages, other considerations become relevant for copying large records.

Id. at 153.

Many of the charges included in the invoices provided in Senator Jones' request include charges which are clearly in violation of the KRS 422.317. It is simply impermissible to require a patient to pay for time a physician spends preparing a letter or reviewing the statute before that patient can obtain the free copy of the records he or she is clearly entitled to by that same statute.

***4** As stated above, Senator Jones has also requested that this office issue as formal opinions, guidance related to KRS 422.317 previously issued in informal correspondence. We have done so here.

On June 30, 2008, we were presented with the question of whether an insurance company, serving as a reparations obligor under Kentucky's No-Fault statutes, could obtain the free copy of medical records belonging to the patient under KRS 422.317. We held that it could not.

KRS 304.39-280(1)(b) requires an insurance claimant to deliver to a reparations obligor a copy of any medical report he or she obtains at any time. A reparations obligor is an insurance company providing benefits to an insured individual under Kentucky's "no-fault" insurance statutes. However, in *Kentucky Farm Bureau Mutual Insurance Company v. Roberts*, 603 S.W.2d 498 (Ky.App. 1980), the court held that the injured party had no duty to "search out" the reports or have them prepared. Furthermore, KRS 304.39-280(2) states, "any person other than the claimant providing information under this section may charge the person requesting the information for the reasonable cost of providing it."

As we stated in our June 30, 2008 correspondence, Courts will examine the policy reasons behind the enactment of a statute when interpreting its meaning. *Hiler v. Brown*, 177 F.3d 542 (1999). When examining these statutes, the policy reasons behind the General Assembly's enactment of those statutes and the holding in *Roberts*, we found that an insurer "cannot require a claimant to use their free copy for the purpose of having their claims paid under the reparations act since the court has ruled it is not the responsibility of the injured party and that was not the intent of the General Assembly when enacting the statute."

We reiterate that opinion here. If a claimant obtains a copy of their medical records under KRS 422.317 or a report from their medical provider, a reparations obligor could require the patient to provide a copy of those records to it pursuant to KRS 304.39-280(1)(b). However, the reparations obligor cannot require the patient to request the records or compel the patient to assign, to the carrier, his or her right to a free copy under KRS 422.317.

We further expanded upon that statement in our February 17, 2009, correspondence when we were asked if the previously issued letter was intended to mean that attorneys were not permitted to request a free copy of medical records on behalf of their clients. We clarified our previous statements by saying;
Our informal opinion of June 30, 2008, should not be construed as a bar preventing attorneys from obtaining a free copy of medical records on behalf of their clients pursuant to KRS 422.317.

As you are aware, the statute provides that upon a patient's written request, a hospital or health care provider is required to provide one free copy of the patient's medical record. Our June 30, 2008, informal opinion merely suggested that an insurance carrier, without the written consent of the insured, is not entitled to a free copy of the medical records.

*5 We are of the opinion that there is nothing precluding a patient from making a written request to a hospital or health care provider directing that the statutorily required free copy be directed to the patient's attorney or other representative. We are also of the opinion that a free copy could be directed to the insurance carrier upon written request by the patient; however, the insurance carrier cannot require the patient to make this assignment as discussed in our June 30, 2008, letter.

In short, KRS 422.317 directs a hospital or health care provider to provide a free copy of the patient's medical records to the patient. The patient may, by written request, direct release of this information to his or her attorney or authorized representative.

Again, we reiterate the opinions of this prior informal guidance here. KRS 422.317 clearly provides a patient the right to obtain a free copy of their medical records. It does not preclude someone, acting as the agent for a patient, from asserting that patient's rights under the statute, provided they have the consent of the patient or, in some cases, a court order. For instance, in some cases a patient may be incapacitated and unable to make a request for records on his own behalf. It would be contrary to public policy and common sense to say that individuals acting as powers of attorney, attorneys-at-law or attorneys-in-fact, could not request a copy of medical records in the course and scope of their responsibilities to that patient.

Again, the original intent of this statute appears to have been to provide a patient with the ability to transfer their medical records from one provider to another in the event a change of providers was necessary. Because the statute does not limit who may act on the patient's behalf, we conclude that any agent of the patient, acting with the patient's consent, or in some cases by order of a court, could request a free copy of the records under KRS 422.317 regardless of whether the requesting agent is an attorney, an insurance company, someone acting as power of attorney, or even in some cases, another medical provider.

Jack Conway
Attorney General
Tad Thomas
Assistant Deputy Attorney General

1 We would also note that KRS 64.300 provides for the maximum amount charged by notaries public. It states: The fees of notaries public for the following services shall be not more than set out in the following schedule: Every attestation, protestation, or taking acknowledgment of any instrument of writing, and certifying the same under seal including, but not limited to, the notarization of votes of absentee voters - 0.50; Recording same in book to be kept for that purpose - 0.75; Each notice of protest - 0.25; Administering oath and certificate thereof - 0.20. KRS 64.300.

2009 WL 4917549 (Ky.A.G.)

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COMMONWEALTH OF KENTUCKY
ROWAN CIRCUIT COURT
CIVIL BRANCH
DIVISION ONE
NO. 15-CI-90250

EDWARD P. GEARHART PLAINTIFF

v. **ORDER GRANTING EXPRESS SCRIPTS, INC.'S MOTION TO DISMISS**

EXPRESS SCRIPTS, INC. DEFENDANT

* * * * * * * *

Before the Court is Defendant Express Scripts, Inc.'s Motion to Dismiss Plaintiff's First Amended Class Action Complaint. Having considered the pleadings and the motion, and being otherwise sufficiently advised, the Court finds that the Complaint fails to state a claim upon which relief can be granted. Accordingly, Defendant's Motion to Dismiss is **GRANTED**.

IT IS HEREBY ORDERED AND ADJUDICATED that Plaintiff's First Amended Class Action Complaint is **DISMISSED** in its entirety, *with prejudice* and without leave to amend.

JUDGE WILLIAM E. LANE
ROWAN CIRCUIT COURT

HAVE SEEN:

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Hon. Alison K. Grippo
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CLERK'S CERTIFICATE OF SERVICE

I hereby certify that a true and accurate copy of the foregoing was served this ___ day of January, 2016, upon the following via U.S. Mail:

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_____
ROWAN CIRCUIT COURT

Tendered 15-CI-90250 01/29/2016 Jim Barker, Rowan Circuit Clerk

2-23-16

COMMONWEALTH OF KENTUCKY
ROWAN CIRCUIT COURT
CIVIL DIVISION ONE
15-CI-90250

EDWARD P. GEARHART, on Behalf of Himself and a Class of Similarly Situated Individuals — PLAINTIFF

v.

PLAINTIFF'S RESPONSE IN OPPOSITION TO DEFENDANT'S MOTION TO DISMISS PLAINTIFF'S FIRST AMENDED CLASS ACTION COMPLAINT

EXPRESS SCRIPTS, INC. — DEFENDANT

** ** ** ** **

Plaintiff, Edward P. Gearhart, individually and on behalf of all others similarly situated, by counsel, states the following for his Response in Opposition to Defendant Express Scripts' Motion to Dismiss Plaintiff's Class Action Complaint ("Complaint"):

I. Introduction

Kentucky law requires health care providers to give patients one free copy of their medical records. KRS 422.317 was enacted to "enable patients to obtain valuable information regarding their medical history." Ky. Att'y Gen Op. 09-009, 09-0092009 WL 4917549, at *7 (Dec. 11, 2009). This basic right of the patient to inspect his or her own medical history may be assigned to an agent of the patient, including the patient's attorney. *See e.g., William C. Eriksen, P.S.C. v. Gruner & Simms,* 400 S.W.3d 290, 293 (Ky. Ct. App. 2013) ("We agree with the circuit court and with the opinion of the Attorney General that the first, free copy of the records must be made available to an agent of the patient if the patient expressly so requests."). "All hospitals and health care providers are subject to the terms of the statute; **no group or individual is exempt from its requirements**." *Eriksen* at 294 (emphasis added).

The vast majority of hospitals, doctors, and pharmacies in Kentucky follow the provisions of KRS 422.317. Express Scripts, a Fortune 100 company based in St. Louis with more than $100 billion in annual revenue, takes the position that it is immune from Kentucky law. Express Scripts violated KRS 422.317 by charging a flat rate of $75.00 to Plaintiff when his authorized agent requested Plaintiff's medical records. Complaint ¶ 21. This charge is a statutory violation because Express Scripts is a licensed pharmacy in Kentucky that provides health care services to patients. This Court must deny Express Scripts' Motion to Dismiss because Kentucky law is clear that Express Scripts cannot charge Plaintiff or his agent for Plaintiff's first copy of his medical records.

II. Factual Background

Plaintiff, through his authorized agent, requested his medical records from Defendant Express Scripts, and was charged by Express Scripts and paid a $75.00 flat fee for five (5) pages of medical records on or about May 12, 2014. Complaint ¶ 21. This amount is in excess of any amount permitted by KRS 422.317(1), and in excess of the cost of the handling, cost of copies, and actual shipping. *Id.* At most, Express Scripts should have charged Plaintiff the cost of mailing the records.

The cost of Plaintiff's Express Scripts medical records was deducted from a partial settlement of Plaintiff's claims in a product liability lawsuit that may require additional medical records from Express Scripts and other sources before resolution. *Id.* at 24. Express Scripts alleges that the $75.00 flat fee for five (5) pages of medical records is for "data processing." *Id.* at 25.

Plaintiff filed this case on October 27, 2015, alleging that Express Scripts' flat fee for "data processing" violates Ky. Rev. Stat. 422.317 as to Plaintiff and every other Kentucky citizen similarly charged. KRS 422.317 states:

> Upon a patient's written request, a hospital licensed under KRS Chapter 216B or a health care provider shall provide, without charge

> to the patient, a copy of the patient's medical record. A copying fee, not to exceed one dollar ($1) per page, may be charged by the health care provider for furnishing a second copy of the patient's medical record upon request either by the patient or the patient's attorney or the patient's authorized representative.

Despite this legal requirement, Defendant Express Scripts implemented a blanket policy wherein it knowingly and intentionally charged Kentucky patients a flat fee of $75.00 for the first copy of their medical records. As stated above, most providers in Kentucky follow the state's medical records law. On information and belief, the only other major health care provider that does not follow Kentucky law is Walgreens, which also faces a class action lawsuit prosecuted by the undersigned counsel. The facts in the matter *sub judice* are similar to the Walgreens case, which is pending in Jefferson Circuit Court, Div. 4, in front of Hon. Charles L. Cunningham, Jr.[1]

III. Applicable Legal Standards

A motion to dismiss is governed by a rigorous and sweeping standard which dictates that it should be granted only where it appears the pleading party would not be entitled to relief under any set of facts which could be proved in support of his claim. *Pari-Mutuel Clerks' Union v. Kentucky Jockey Club,* 551 S.W.2d 801 (Ky. 1977). When analyzing Express Scripts' Motion to Dismiss, the Court must liberally construe the pleadings in a light most favorable to the Plaintiff, with all allegations in the Complaint taken to be true. *Mims v. Western-Southern Agency, Inc.*, 226 S.W.3d 833, 835 (Ky. App. 2007). It is well established that Kentucky is a notice pleading state, and that a Complaint need only set forth sufficient facts to apprise the defendant of the charges against it. *Denzik v. Denzik,* 197 S.W.3d 108, 110 (Ky. 2006). This Court cannot grant Express Scripts' Motion to Dismiss unless "it appears that the plaintiff would not be entitled to relief under

[1] This companion case, styled *Larry G. Taylor v. Walgreen Co.*, 14-CI-6027, was filed Nov. 20, 2014. A motion to dismiss was fully briefed by both parties in early 2015, followed by oral argument. The court has not issued a ruling, but a status conference with Judge Cunningham is set for March 4, 2016.

any set of facts that could be used to support the claim." *James v. Wilson,* 95 S.W.3d 857 (Ky. App. 2002). Plaintiff also makes a claim for fraud. The standard for pleading a claim of fraud is heightened, however, courts reviewing such claims consider them in light of the spirit of modern pleading, which emphasizes short, concise and direct pleadings. *Denzik v. Denzik,* 197 S.W.3d at 110. The plaintiff need only provide enough information for the defendant to prepare an answer. *Id.*

Plaintiff's fraud claim is plead with sufficient particularity as to give Defendant adequate notice of claims against it. Viewing the material allegations in the Complaint in Plaintiff's favor and accepting all facts as true, Defendant's Motion to Dismiss must be denied.

IV. Argument

A. Express Scripts is a Health Care Provider and as such, KRS 422.317 Applies to Express Scripts.

KRS 422.317 was passed in 1994 as part of broad health care reform legislation, and is intended to govern "hospital[s] licensed under KRS Chapter 216B" and "health care provider[s]." The term "health care provider" is defined as follows:

> Health care provider" or "provider" means any facility or service required to be licensed pursuant to KRS Chapter 216B, pharmacist or home medical equipment and **services provider as defined pursuant to KRS Chapter 315 . . .**

KRs 304.17A-005 (emphasis added).

Thus, the term "health care provider" includes service providers identified by KRS Chapter 315. KRS Chapter 315 requires all health care providers, including pharmacies, to hold a current, active pharmacy permit. KRS 315.0351 states in pertinent part:

> Every person or pharmacy located outside this Commonwealth which does business, physically or by means of the Internet, facsimile, phone, mail, or any other means, inside this Commonwealth within the meaning of KRS Chapter 315, shall hold

> a current pharmacy permit as provided in KRS 315(1) and (4) issued by the Kentucky Board of Pharmacy. The pharmacy shall be designated as an 'out-of-state pharmacy' and the permit shall be designated an 'out-of-state pharmacy permit.'

The Kentucky Board of Pharmacy identifies Express Scripts as an active licensed pharmacy holding seven (7) Kentucky out-of-state pharmacy permits. Complaint ¶ 53. Defendant Express Scripts currently holds the following seven (7) active out-of-state pharmacy permits:

Permit Number MO617, ESI Mail Pharmacy Service Inc., d/b/a Express Scripts;

Permit Number AZ882, ESI Mail Pharmacy Service Inc., d/b/a Express Scripts;

Permit Number IN1735, Express Scripts Pharmacy Inc., d/b/a Express Scripts;

Permit Number OH1737, Express Scripts Pharmacy Inc., d/b/a Express Scripts;

Permit Number AZ1387, ESI Mail Pharmacy Service Inc., d/b/a Express Scripts;

Permit Number NJ1832, Express Scripts Pharmacy Inc., d/b/a Express Scripts; and

Permit Number MO1530, Express Scripts Specialty Distribution Services Inc.[2]

Defendant fails to acknowledge its role as a pharmacy – a role not only acknowledged but advertised on its website [3] and further confirmed by the fact that it holds seven (7) active out-of-state pharmacy permits. Moreover, pursuant to Defendant's Form 10-K, Exhibit A to its Motion to Dismiss, Defendant's revenues are generated primarily from the delivery of prescription drugs.[4] As an active, licensed pharmacy, Kentucky law requires Express Scripts to maintain prescription medication records within the meaning of KRS 422.317.[5] Complaint ¶ 54, 55.

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[2] Kentucky Board of Pharmacy, License Verification System Search Results, available at https://secure.kentucky.gov/pharmacy/licenselookup/ (last visited February 14, 2016).
[3] Express Scripts' identifies itself as an "accredited mail service pharmacy." *See* https://www.express-scripts.com.
[4] Defendant's Motion to Dismiss, Exhibit A, Form 10-K, "Revenues from the delivery of prescription drugs to our members represented 99.4% of revenues in 2011, 99.4% in 2010, and 98.9% in 2009.
[5] Kentucky Board of Pharmacy requires licensed pharmacies to maintain patient records. *See* KRS § 315.0351(5) and 201 Ky. Admin. Regs. 2:210 § 1(1)(d)(1), § 3(2).

Plaintiff sufficiently alleged that Express Scripts provided pharmacy services to him. Complaint ¶ 23. Moreover, Defendant's Form 10-K, Exhibit A to its Motion to Dismiss, confirms that it provides "retail pharmacy claims processing" and "home delivery pharmacy services" as well as "patient care contact centers," "consumer health and drug information," and "assistance programs for our low-income patients." Plaintiff has sufficiently alleged that there is a direct provider-patient relationship between Express Scripts and Plaintiff and members of the proposed class, by virtue of the health care services provided by Defendant and more fully described in Defendant's Form 10-K, Exhibit A to its Motion to Dismiss. The Form 10-K describes health care services provided by Defendant as follows: "As of December 31, 2011, we dispensed prescription drugs from our two home delivery fulfillment pharmacies . . ." "Our pharmacies provide patients with convenient access to maintenance medication," and **"through our home delivery pharmacies, we are directly involved with the patient . . ."** "We operate specialty pharmacies . . . These locations provide patient care and direct specialty home delivery to our patients." (Emphasis added.) Aside from acknowledging its pharmacy role and direct relationship with patients, Defendant's Form 10-K further identifies patient services it provides, specifically stating, **"We offer a broad range of healthcare products and services for individuals** . . . domestic patients can call us toll free, 24 hours a day, 7 days a week." (Emphasis added.) Express Scripts has a direct relationship with patients and provides health care services to them. Accordingly, Express Scripts is subject to KRS 422.317.

Pitcock v. Commonwealth, 295 S.W.3d 130 (Ky. Ct. App. 2009) does not support dismissal. In *Pitcock*, the court held that pharmacy records related to the purchase of **over-the-counter medication** are not health information intended to remain protected under HIPAA. Specifically, the court reasoned, "Over-the-counter medications are dispensed in clearly-marked

boxes indicating their contents to the public. **Prescription medications, on the other hand, are dispensed in closed bags hiding their contents.**" (Emphasis added.) Kentucky law draws a distinction between over-the-counter medication and prescription medication, finding prescription medication records do qualify for protection under HIPAA. Here, unlike in *Pitcock*, Express Scripts provided **prescription medication** to Plaintiff via its mail service pharmacy. Complaint ¶ 23.

Defendant's contention that Plaintiff or his agent could have "consult[ed] the individual pharmacies that filled prescriptions for Plaintiff' is an attempt to mislead the Court. Plaintiff has adequately plead that Express Scripts provided direct pharmacy services to Plaintiff. Complaint ¶ 23. Thus, the records kept by Express Scripts are only obtainable via Express Scripts, and pursuant to KRS 422.317, Express Scripts must provide a complete copy of those records as kept in the regular course of business.[6]

i. Defendant's Violation of Kentucky Law Provides Plaintiff with a Private Right of Action Under KRS 446.070.

"A person injured by the violation of any statute may recover from the offender such damages as he sustained by reason of the violation, although a penalty or forfeiture is imposed for such violation." KRS 446.070. Kentucky courts have long interpreted this to apply when the statute "does not prescribe the remedy for its violation." *Gryzb v. Evans,* 700 S.W.2d 399, 401 (Ky. 1985) (citing *Hackney v. Fordson Coal Co.*, 19 S.W.2d 989 (Ky. 1929)). KRS 422.317 does not prescribe a remedy for violation.

[6] *See* Ky. Att'y Gen Op. 09-009, "It is also our opinion that the statute assumes a medical provider will produce a *complete* copy of a patient's medical record . . . Therefore a provider may be required by the patient to certify that the records being provided are indeed a *complete* copy of those records kept in the regular course of business." (Emphasis in original.)

KRS 422.317 is "intended to enable patients to obtain valuable information regarding their medical history . . ." Ky. Att'y Gen Op. 09-009, 09-0092009 WL 4917549, at *2 (Dec. 11, 2009). "The intent of the statute is to ensure that a patient may obtain one copy of his or her medical records without charge." *Eriksen* at 293. "Placing this minimal burden on health care providers is rationally related to the legislature's objective of ensuring that all patients, including the economically disadvantaged, have free access to one copy of their medical records." *Id.* at 294.

KRS 422.317 was intended to place a minimal burden on health care providers (the cost of producing one copy) in order to protect Plaintiff's right and access to a copy of his medical records. Plaintiff unequivocally falls within the persons intended to be protected by the statute because he requested a copy of his medical records as maintained by Defendant. Defendant's refusal to comply with the statute created a private right of action pursuant to KRS 446.070. *See Gryzb* at 401 ("Under KRS 446.070, a person injured by the violation of any statute may recover from the offender such damages as he sustained by reason of the violation. But this is limited to where the statute is penal in nature, or where by its terms the statute does not prescribe the remedy for its violation."); *Hackney* at 990 (KRS 446.070 "was passed to remove any doubt that might arise as to the right of a person for whose protection a statute was passed to recover for a violation of that statute, where the statute was penal in its nature, or where by its terms the statute did not prescribe the remedy for its enforcement or violation"); *see also Vanhook v. Somerset Health Facilities, LP,* 2014 U.S. Dist. LEXIS 173721 at *10 (E.D. Ky. Dec. 14, 2014)(*citing Hargis v. Baize,* 168 S.W.3d 36, 40 (Ky. 2005) for the requirement that the "statute in question must be penal in nature ***or*** provide 'no inclusive civil remedy.'")(emphasis in original).

Kentucky law provides that a statute can create liability when "the statute was specifically intended to prevent the type of occurrence which has taken place." *Lewis v. B & R Corp.,* 56

S.W.3d 432, 438 (Ky. App. 2001). Liability attaches when the conduct is "a substantial factor in causing the injury" and the specific type of occurrence the statute intends to prevent. *Id.* at 438. It is without question that KRS 422.317 was intended to regulate health care providers such as the Defendant Express Scripts, and to prevent providers from "requiring additional payments of *any* type." Ky. Att'y Gen Op. 09-009, 09-0092009 WL 4917549, at *3 (Dec. 11, 2009) (emphasis in original).

In *Eriksen*, the plaintiff doctor argued that KRS 422.317 "enslaves health care providers by requiring them to expend time, money and property in replicating a copy of their patients' records without compensation." The Court confirmed that the burden for the first copy of medical records is to be placed on the health care provider, holding, "[T]he state interest in providing medical records to patients outweighs any minor inconvenience to the providers. . . [S]tate government often passes laws that increase the cost doing business. Whether health care providers factor into their pricing the possibility of incurring expenses associated with statutory compliance is a business decision the government usually does not make."

Here, Plaintiff suffered monetary damages because Express Scripts violated KRS 422.317 and charged him money for something it should have provided him for free. Complaint ¶ 60. Plaintiff was injured by the type of occurrence that KRS 422.317 sought to prevent. Construing these allegations in a light most favorable to Plaintiff, the Complaint states a claim for which relief can be granted and therefore this Court must deny Express Scripts' Motion to Dismiss.

B. Plaintiff Properly Plead a KCPA Claim.

The Kentucky Consumer Protection Act was designed to give Kentucky consumers the broadest possible protection from illegal acts. *Stevens v. Motorists Mut. Ins. Co.*, 759 S.W.2d 819, 821 (Ky. 1988). At this early stage of litigation, Plaintiff has adequately plead the elements of a

KCPA claim. To assert a KCPA cause of action, Plaintiff must allege "unfair, false, misleading or deceptive acts or practices in the conduct of any trade or commerce" KRS 367.170(a), that such practices caused Plaintiff harm, and that Plaintiff is in privity of contract with the defendant. *Id.*

Plaintiff, still a patient of Defendant Express Scripts, is in privity with Defendant. Complaint ¶ 30. Plaintiff has alleged that Express Scripts deceived patients by charging a flat fee of $75.00 for the cost of "data processing," and/or handling, copying and shipping pharmacy records, far in excess of the actual costs of such services, by describing fees in an inherently vague and ambiguous manner as to charge Plaintiff and members of the proposed class an unconscionable fee for services they are not receiving, and for overcharging for reproduction of medical records in violation of Kentucky's Health Records Law. Complaint ¶ 31, 32. Express Scripts also improperly exempted itself from compliance with the statute, and failed to disclose that Kentucky allows residents to obtain one free copy of their medical records. *Id.* Thus, Plaintiff has sufficiently plead a KCPA claim, and nothing more is required at this stage of litigation. Whether any particular actions alleged by Plaintiff are unfair, false, misleading, or deceptive is a fact issue to be decided by a jury. *See M.T. v. Saum,* 7 F.Supp.3d 701, 705 (W.D.K.Y. 2014) (*citing Stevens v. Motorists Mut. Ins. Co.,* 759 S.W.2d 819, 8210 (Ky. 1988)).

As more fully discussed below, it is irrelevant that Plaintiff's authorized agent, Jones Ward PLC, requested his records on Plaintiff's behalf, and that the records were used for ongoing litigation. These facts do not create a commercial transaction "between two businesses – a law firm and a pharmacy benefit manager" as Defendant argues. (Deft's Memorandum at 14.) In fact, Kentucky courts recognize that the patient's right to his medical record is often for purposes of litigation, "KRS 422.300 *et seq*. deals with **medical records to be used in litigation**." *Woodward, Hobson & Fulton, LLP v. Revenue Cabinet*, 69 S.W.3d 476 (Ky. Ct. App. 2002) (emphasis added).

The basic right of a patient to inspect his or her own medical history may be assigned to an agent of the patient, **including the patient's attorney**. *Eriksen* at 293 ("Any other interpretation would mean that an incapacitated patient could face insurmountable obstacles to obtaining his or her medical records.")(emphasis added). Accordingly, Defendant's labeling of Plaintiff's agent, Jones Ward PLC, as a "commercial entity not intended to be protected by the statute" can be given no merit.

C. Plaintiff has Plead Fraud with Sufficient Particularity.

Plaintiff's Complaint contains sufficient information and detail to allow the fraud claim to survive. The required degree of particularity for a claim of fraud must be viewed in light of the entire spirit of modern pleading, which lays emphasis on short, concise, and direct pleadings. *United States v. Dittrich,* 3 F.R.D. 475, 477 (D. Ky. 1943). Put simply, the fraud claim must provide enough information to allow the defendant to prepare a response. *Id.* The "modern spirit" described in *Dittrich* in 1943 still applies today. For example, in a 2006 case involving fraudulent child support payments, the Supreme Court of Kentucky held that the facts in a pleading alleging fraud are sufficient if they allow the defendant to prepare an adequate answer from the allegations. *Denzik v. Denzik,* 197 S.W.3d 108, 110 (Ky. 2006).

Here, Plaintiff's Complaint meets the level of detail required for Express Scripts to prepare an adequate answer. On or about May 12, 2014, Defendant Express Scripts charged a flat fee of $75.00 for the cost of "data processing" Plaintiff's medical records. Complaint ¶ 31. Express Scripts did so intentionally and as a matter of practice to all Kentucky citizens who requested medical records. Complaint ¶ 21, 42. Express Scripts affirmatively misstated material terms and purposefully used an inherently vague and ambiguous term ("data processing") as to confuse Plaintiff and members of the proposed class into believing that they are being charged for

important services, when they are not. Complaint ¶ 31. This type of inherently vague description is an attempt to circumvent the requirements of KRS 422.317 and is violative of the statute. *See* Ky. Att'y Gen Op. 09-009, 09-0092009 WL 4917549, at *2 (Dec. 11, 2009) (Opining that generic fees unrelated to postage, such as "certification fee" or "retrieval fee," as well as charges for "research and review" or "preparation of letter" violate KRS 422.317).

Express Scripts' intentional failure to follow the law, and its refusal to provide the records without payment, are a sufficient basis for Plaintiff's fraud claim to survive. Accordingly, this Court must deny Express Scripts Motion to Dismiss, or, in the alternative, grant Plaintiff leave to amend his Complaint to plead facts with more specificity to provide whatever information Express Scripts claims that it lacks to be able to defend itself from Plaintiff's allegations.

D. The Voluntary Payment Doctrine Does Not Bar Plaintiff's Claims.

The voluntary payment doctrine does not bar Plaintiff's claims because, first and foremost, Plaintiff's payment was not voluntary. Express Scripts charged the $75.00 flat fee to all Kentucky patients who requested records through an attorney or other third party. Express Scripts did not offer to waive the fee or discount the cost if certain conditions were met. Complaint ¶ 26. In fact, Express Scripts very well may have charged the flat fee directly to patients who did not have an authorized agent. Robust discovery will be necessary to determine the full scope of the flat-fee practice and how Express Scripts handled those who objected to the payment or refused to pay. In addition, Express Scripts cannot establish that Plaintiff had "full knowledge of all the facts" here because while Plaintiff is entitled to one free copy, Express Scripts can charge for subsequent copies. *See* KRS 422.317. Thus, an invoice for medical records that should be free could indicate that the free copy has already been requested by someone or that Express Scripts has already provided one free copy to another person.

Second, Plaintiff has plainly alleged fraud in his class action complaint, and for the reasons articulated herein, that fraud is cognizable. *See Scott v. Fairbanks Capital Corp.*, 284 F. Supp. 2d 880, 894 (S.D. Ohio 2003) ("The rule by which the law denies one a recovery for a voluntary payment is subject to an exception where the payment has been procured by a fraud."). In *American National Assurance Co. v. Ricketts,* 230 Ky. 398 (Ky. 1929), which involved payments made by a life insurance company to an agent, the Court quoted the following well-settled rule:

> Except where otherwise provided by statute, a party cannot, by direct action or by way of set-off or counterclaim, recover money voluntarily paid with a full knowledge of all the facts, and without any fraud, duress, or extortion, although no obligation to make such payment existed. This rule is an elementary one and in applying it the courts have held that it makes no difference that the debt paid was that of a third person.

The voluntary payment doctrine thus does not bar Plaintiff's claims because Defendant engaged in fraud and extortion as part of its nationwide flat-fee policy. Put simply, Plaintiff had no choice but to pay the flat fee, through his agent, if he wanted to obtain his own medical records. Express Scripts, a licensed pharmacy and major retailer with vast financial and legal resources, intentionally charged the flat-fee despite knowledge that the flat-fee violated Kentucky law.

Lee v. Hanna, 70 S.W.2d 673 (Ky. 1934) does not support dismissal. In *Lee*, the plaintiffs, owners of a boarding house who took in the infant children of a World War I veteran who died, sued the bank appointed as guardian to receive the children's death benefits for back payment of rent. *Id.* The Trial Court dismissed their claims and the dismissal was affirmed. The court held that the owners took the parentless children into their house voluntarily and without any urgent necessity. ("A voluntary payment or expenditure made with full knowledge of all the facts will not be refunded without a showing that such was made under immediate and urgent necessity therefor."). Plaintiff's efforts to obtain his health record from Express Scripts are plainly different

than the voluntary actions of the boarding house owners in *Lee* who later sought payment for services rendered voluntarily.

Taking the facts alleged in the Complaint as true and viewing them in a light most favorable to the Plaintiff, Express Scripts cannot show that Plaintiff's payment was voluntary, was made without fraud, extortion, or with full knowledge of all the facts. Indeed, Plaintiff's payment was induced by fraud under time-sensitive conditions. Complaint ¶ 24, 41. The voluntary payment doctrine therefore does not apply and the Court must deny Express Scripts' Motion to Dismiss. In the alternative, Plaintiff requests leave to file an Amended Complaint.

E. Plaintiff Has Standing to Sue Despite Agent Ordering Records for Him.

Plaintiff's use of an authorized agent to obtain his Kentucky health records does not affect his standing to sue Express Scripts. *See William C. Eriksen, P.S.C. v. Gruner & Simms,* 400 S.W.3d 290 (Ky. Ct. App. 2013). In *Eriksen,* a chiropractor in Louisville refused to provide a free copy of medical records to the law firm hired by one of his patients. *Id.* The chiropractor told the law firm that it provided the records free of charge only to patients, and that attorneys and other authorized representatives had to pay $1 per page. The chiropractor further required a patient's representative to sign a letter promising to pay the fees before the records were released. *Id.* The Court of Appeals echoed the opinion of the Attorney General,[7] holding that the free copy of records ". . .must be made available to an agent of the patient if the patient expressly so requests." *Id.* at 293.

Spiro v. Healthport Techs., LLC, 14 Civ. 2921 (PAE), 2014 U.S. Dist. LEXIS 12134 (S.D.N.Y. Aug 29, 2014), an unpublished New York decision, does not follow established Kentucky precedent and does not support dismissal. Because Plaintiff has alleged that he was

[7] "It would be contrary to public policy and common sense to say that individuals acting as powers of attorney, attorneys-at-law or attorneys-in-fact, could not request a copy of medical records in the course and scope of their responsibilities to that patient." Ky. Att'y Gen Op. 09-009, 09-0092009 WL 4917549, at *7 (Dec. 11, 2009).

damaged and that Express Scripts charged a fee for his records that should have been free, he has a "judicially recognizable interest in the subject matter of the suit and a present or substantial interest therein." *Housing Authority v. Serv. Emps. Int'l Union, Local 557,* 885 S.W.2d 692, 695 (Ky. 1994). Additionally, Defendant's conclusion that Plaintiff "gratuitously agreed to forego part of his settlement . . . to reimburse the law firm," is misplaced and incorrect. Indeed, the plaintiff in *Eriksen* made a similar argument[8], and the Court found this unpersuasive, holding that "the state interest in providing medical records to patients outweighs any minor inconvenience to the providers." *Eriksen* at 294.

Under *Eriksen,* the fact that Plaintiff's agent formally requested the records on Plaintiff's behalf and made the initial payment for the records is immaterial to Express Script's violation of Kentucky law. Therefore, under the facts alleged in the Complaint, Plaintiff has standing to bring claims against Express Scripts for being illegally charged, through his agent, a flat fee of $75.00 for five (5) pages of his medical records that should have been free. Further, Plaintiff has standing to seek declaratory judgment to avoid the same harm for future requests, particularly so since he remains a customer of Express Scripts. This Court must deny Express Scripts' Motion to Dismiss on these grounds, or in the alternative, allow Plaintiff leave to file an Amended Complaint.

V. Conclusion

For the foregoing reasons, Plaintiff and members of the proposed Class request that this Court deny Express Scripts' Motion to Dismiss in its entirety, or in the alternative, allow Plaintiff leave to amend his Complaint to address any technical deficiencies in the Complaint.

[8] The plaintiff doctor in *Eriksen* argued that "most if not all patients, attorneys, insurers, and other third parties are easily capable of providing reimbursement for the records to the provider." The Court found this unpersuasive as to a patient's right to access his medical record, noting providers may seek reimbursement for charges incurred in mailing, faxing or scanning.

Respectfully submitted,

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CERTIFICATE OF SERVICE

It is hereby certified that on the 23rd day of February 2016, a true and accurate copy of the above was served via electronic mail and/or facsimile and/or U.S. Postal Service to the following:

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COMMONWEALTH OF KENTUCKY
ROWAN CIRCUIT COURT CIVIL
BRANCH
DIVISION ONE
NO. 15-CI-90250

Electronically Filed

EDWARD P. GEARHART PLAINTIFF

v. **CORRECTED MEMORANDUM IN SUPPORT OF EXPRESS SCRIPTS INC.'S MOTION TO DISMISS**

EXPRESS SCRIPTS, INC. DEFENDANT

* * * * * * * *

Defendant Express Scripts, Inc. ("Express Scripts") respectfully submits this memorandum in support of its Motion to Dismiss. Under Kentucky Rules of Civil Procedure 9.02 and 12.02, Plaintiff's First Amended Class Action Complaint (the "Complaint") should be dismissed as a matter of law because it fails to state a claim upon which relief can be granted.

This case attempts to fit a square peg in a round hole. Plaintiff's claims are premised on Kentucky's Medical Records Statute that requires hospitals and other health care providers to provide patients with one free copy of their medical records. However, defendant Express Scripts is a pharmacy benefit manager—*not a health care provider*—and it maintains prescription claims data for various pharmacies—*not patient medical records*. The Medical Records Statute exists to limit the cost of ongoing health care treatment and allow patients to change providers. By contrast, the prescription claims data at issue in this case was requested and voluntarily paid for by Plaintiff's law firm for use in a products liability lawsuit, not the continuance of medical care. This dispute is about expenses related to litigation, not health care. Simply put, the conduct attributed to Express Scripts in the Complaint does not fit within the scope of the Medical Records Statute that serves as the foundation for all of Plaintiff's claims.

As a matter of law, the Complaint is deficient for the following reasons, explained more fully herein:

1. The Medical Records Statute does not apply to Express Scripts;
2. Plaintiff has no private right of action under Kentucky's Medical Records Statute or the Kentucky Consumer Protection Act;
3. Plaintiff fails to sufficiently allege fraud;
4. The voluntary payment doctrine bars Plaintiff's claims; and
5. Plaintiff lacks standing to sue Express Scripts.

Accordingly, the Court should dismiss all of Plaintiff's claims with prejudice.

I. Factual Background

A. Express Scripts' Role as a Pharmacy Benefit Manager

As Plaintiff notes in the Complaint, Express Scripts is a "pharmacy benefit management company." *See* Compl. ¶ 25. A pharmacy benefit manager is a third-party administrator of prescription drug programs that acts as an intermediary between retail pharmacies and health benefits providers. *See id.* ¶ 22; Express Scripts, Inc., Annual Report (Form 10-K), at 1-2 (Feb. 22, 2012)[1], excerpt attached as Exhibit A.[2] Express Scripts offers a range of management services, such as pharmacy claims processing, to improve the cost-effectiveness of prescription drug

[1] The most recent Form 10-K for Express Scripts was filed with the United States Securities and Exchange Commission in 2012. Express Scripts became a wholly-owned subsidiary of Express Scripts Holding Company in 2012 and no longer reports a separate Form 10-K.

[2] Pursuant to Kentucky Rule of Evidence 201, the Court may take judicial notice of the Form 10-K filed by Express Scripts with the United States Securities and Exchange Commission because it is publicly available (http://phx.corporate-ir.net/phoenix.zhtml?c=69641&p=irol-SECText&TEXT=aHR0cDovL2FwaS50ZW5rd2l6YXJkLmNvbS9maWxpbmcueG1sP2lwYWdlPTgwODU3MzkmRFNFUT0wJlNFUT0wJlNRREVTQz1TRUNUSU9OX0VOVElSRSZzdWJzaWQ9NTc%3d) and the description of its services in the 10-K is "not subject to reasonable dispute." *See* Ky. R. Evid. 201. Kentucky federal courts and the Sixth Circuit have considered the contents of Form 10-Ks at the motion to dismiss stage under the virtually identical Federal Rule of Evidence 201. *See, e.g. Ashland Inc. v. Oppenheimer & Co.*, 689 F. Supp. 2d 874, 881 (E.D. Ky. 2010), *aff'd*, 648 F.3d 461 (6th Cir. 2011); *In re Omnicare, Inc. Sec. Litig.*, 769 F.3d 455, 466 (6th Cir. 2014); *Bovee v. Coopers & Lybrand C.P.A.*, 272 F.3d 356, 360-61 (6th Cir. 2001).

benefits provided by its clients, which include managed care organizations, health insurers, third-party administrators, employers, union-sponsored benefit plans, workers' compensation plans and government health programs. *See* Ex. A at 2-6. For example, Express Scripts "negotiate[s] with pharmacies to discount the price at which they will provide drugs to members and manage[s] national and regional networks that are responsive to client preferences related to cost containment..." *Id.* at 2. While Express Scripts contracts with pharmacies and establishes networks of pharmacies for the benefit of its clients, Express Scripts *does not* provide health care services to individuals.[3] *See id.* Instead, Express Scripts helps health benefit plans and health care providers better serve their members and patients by maximizing pharmaceutical benefits. *See id.*

B. Plaintiff's Law Firm Requested Pharmacy Claims Data

The present case is not the first class action lawsuit filed by Plaintiff's law firm ("Jones Ward") on his behalf. *See Compl.* ¶ 24. Jones Ward represented Plaintiff in a products liability class action pending in federal court. *See id.* In fact, this case stems from Plaintiff's participation in that class action. *See id.* In that representation and to pursue a recovery in that action, Jones Ward desired access to Plaintiff's prescription claims data. *See id.* ¶¶ 21, 24.

In May 2014, Jones Ward requested a copy of Plaintiff's prescription claims data from Express Scripts in its capacity as the pharmacy benefit manager for Plaintiff's health plan. *See id.* ¶¶ 21-23. In exchange for a $75 fee, Express Scripts compiled information from its database of claims it maintains for a "network of retail pharmacies" and provided Plaintiff's agent with a comprehensive report listing Plaintiff's various prescription claims. *See id.* This report included Plaintiff's claims for prescriptions filled for Plaintiff from a variety of retail pharmacies and

[3] ESI Mail Pharmacy Service, Inc. and Express Scripts Specialty Distribution Services, Inc., subsidiaries of Express Scripts, operate mail order pharmacies. The Complaint does not mention either of these entities, and none of their actions are at issue in this case.

specialty pharmacies. *See id.* at ¶ 23. Jones Ward, understanding that Express Scripts charged $75 for "data processing" related to preparation of the report, paid the fee. *See id.* ¶¶ 21, 25. Plaintiff did not pay Express Scripts or Jones Ward for this log of prescription pharmacy claims. *See id.* ¶¶ 21, 24.

Nearly one year later, in April 2015, Plaintiff's claims in the products liability case were dismissed with prejudice pursuant to a settlement agreement. *In re: Depuy Orthopaedics, Inc. ASR Hip Implant Products Liability Litigation*, MDL Docket No. 1:10 md 2197, Order of Dismissal with Prejudice (N.D. Ohio April 22, 2015), attached as Exhibit B. After the settlement, Jones Ward, using Mr. Gearhart as the plaintiff, initiated the present putative class action lawsuit asserting various claims against Express Scripts based on an alleged violation of the inapplicable Medical Records Statute.

II. Legal Standard for Dismissal

Under Kentucky Rule of Civil Procedure 12.02, courts must dismiss an action if the complaint fails to state a claim upon which relief can be granted. Ky. R. Civ. P. 12.02(f). When considering a motion to dismiss, courts assume the truth of the factual allegations in the complaint, although legal conclusions "are entitled to no deference whatsoever." *Griffin v. Jones*, No. 2014-CA-000402-MR, 2015 WL 4776300, at *3 (Ky. Ct. App. Aug. 14, 2015)[4]. Dismissal is appropriate when "the pleading party appears not to be entitled to relief under any state of facts which could be proved in support of his claim." *Weller v. McCauley*, 383 S.W.2d 356, 357 (Ky. 1964).

Claims involving allegations of fraud are subject to a heightened pleading standard under Kentucky Rule of Civil Procedure Rule 9.02, which requires that "the circumstances constituting fraud or mistake shall be stated *with particularity*." Ky. R. Civ. P. 12.02(f) (emphasis added). To

[4] Copies of all unreported opinions relied upon in this Memorandum are attached hereto in an Appendix as Exhibit C.

satisfy Rule 9.02, a plaintiff must "plead the time, the place, the substance of the false representations, the facts misrepresented, and the identification of what was obtained by the fraud." *Mason v. Monumental Life Ins. Co.*, No. 2006-CA-002122-MR, 2008 WL 54763, at *5 (Ky. Ct. App. Jan. 4, 2008) (affirming dismissal of fraud claim for failure to plead fraud with sufficient particularity) (citation omitted). A complaint alleging merely "general, nonspecific allegations of fraud, sham, and the like," is inadequate to survive a motion to dismiss. *Pendleton Bros. Vending v. Com. Fin. & Admin. Cabinet*, 758 S.W.2d 24, 27 (Ky. 1988).

III. Law & Argument for Dismissal

A. The Medical Records Statute Does not Apply to Express Scripts.[5]

In 1994, as part of broad health care reform legislation, the Kentucky legislature enacted KRS § 422.317 ("Medical Records Statute"), which provides in part:

> Upon a patient's written request, a ***hospital*** licensed under KRS Chapter 216B or a ***health care provider*** shall provide, without charge to the patient, a copy of the patient's ***medical record***.

KRS § 422.317(1) (emphasis added). The legislature intended the Medical Records Statute "to enable patients to obtain valuable information regarding their medical history and also to provide patients with the ability to transfer health information from one doctor to another in the event a change in insurance, or other circumstances, required a patient to change providers." Ky. Att'y Gen Op. 09-009, 09-0092009 WL 4917549, at *1 (Dec. 11, 2009). It requires a hospital or health care provider to furnish a copy of the medical record generated by the hospital or health care provider for services it provided to the requesting patient. *See* KRS § 422.317(1). Facilitation of

[5] All of Plaintiff's claims rely on the alleged violation of the Medical Records Statute. *See* Compl. ¶¶ 31 (basing KCPA claim on alleged violation of Medical Records Statute), 42 (basing fraud claim on alleged violation of Medical Records Statute), 47 (basing unjust enrichment claim on alleged violation of Medical Records Statute), 51-62 (asserting damages based on alleged violation of Medical Records Statute), 65 (requesting declaration regarding applicability of Medical Records Statute). As a result, a finding that the Medical Records Statute does not apply to Express Scripts requires dismissal of all claims.

the provision of health care, not litigation, is the aim of the statute. *See* Ky. Att'y Gen Op. 09-009, 09-0092009 WL 4917549, at *1.

While the statute does not specifically define the terms "health care provider" or "medical record," "the statute is clear on its face," and the court should construe these terms in the context of the legislative purpose for the Medical Records Statute. Ky. Att'y Gen Op. 09-009, 09-0092009 WL 4917549, at *2; *see Johnson v. Commonwealth*, 206 Ky. 594, 268 S.W. 302, 302 (1924) ("[O]ur duty is to interpret the language used in the act so as to reach the legislative purpose.") A simple review of the Medical Records Statute and its terms make evident that the statute, which is the basis for all of the plaintiff's claims, does not and cannot apply to Express Scripts.

i. Defendant Express Scripts is not a "health care provider."

The Medical Records Statute governs two types of entities: (1) a "hospital licensed under KRS Chapter 216B"; and (2) a "health care provider." Express Scripts is undoubtedly not a hospital. Moreover, there are no allegations in the Complaint that Express Scripts is a health care provider or that it provided health care services to Plaintiff, which is necessary for it to be subject to the Medical Records Statute. Regardless, under the legislative definition of "health care provider," the facts alleged in the Complaint and those judicially-noticeable facts not subject to reasonable dispute, Express Scripts is not subject to the Medical Records Statute because it is a pharmacy benefit manager, not a "health care provider."

Although the Medical Records Statute fails to define the term "health care provider," none of the definitions of "health care provider" elsewhere in the Kentucky Code apply to pharmacy benefit managers such as Express Scripts. *See, e.g.*, KRS §§ 194A.450(3); 214.450(5); 216.2920(5); 304.17A-005; 304.17C-010(3); 304.40-260(1); 311.621(10); 367.4081(1).

The Medical Records Statute was passed as part of the same 1994 health care reform legislation that established the following definition of "health care provider," codified at KRS § 304.17A-005:

> [A]ny facility or service required to be licensed pursuant to KRS Chapter 216B, pharmacist or home medical equipment and services provider as defined pursuant to KRS Chapter 315, and any of the following independent practicing practitioners:
> (a) Physicians, osteopaths, and podiatrists licensed under KRS Chapter 311;
> (b) Chiropractors licensed under KRS Chapter 312;
> (c) Dentists licensed under KRS Chapter 313;
> (d) Optometrists licensed under KRS Chapter 320;
> (e) Physician assistants regulated under KRS Chapter 311;
> (f) Advanced practice registered nurses licensed under KRS Chapter 314; and
> (g) Other health care practitioners as determined by the department by administrative regulations promulgated under KRS Chapter 13A.

The meaning of "health care provider" in the Medical Records Statute and KRS § 304.17A-005 should be construed harmoniously because the statutes are *in pari materia*.

Express Scripts does not fit within any of the categories of health care providers outlined by KRS § 304.17A-005. Specifically, pharmacy benefit managers are not licensed under KRS Chapter 216B, defined as pharmacists under KRS 315[6], or regulated as health care practitioners under KRS Chapter 13A. If the legislature intended to include pharmacy benefit managers within this comprehensive definition of "health care provider," it could have done so, but it did not.

The facilities and practitioners listed under this definition of "health care provider" are fundamentally different from a pharmacy benefit manager, which provides different services to a

[6] A "pharmacist," as defined by KRS Chapter 315, means "a natural person licensed by this state to engage in the practice of the profession of pharmacy." KRS § 315.010(15). Notably, this definition is limited to natural persons, so it could not apply to corporate entities such as Express Scripts. Furthermore, the services provided by a pharmacist or pharmacy differ from those offered by a pharmacy benefit manager. A pharmacist or pharmacy fills prescriptions for patients, whereas a pharmacy benefit manager collaborates with health benefits payors and pharmacies to administer prescription drug benefits. *See* Ex. A at 2-6. Express Scripts is not a pharmacist or pharmacy. *See id.* Regardless, to the extent Jones Ward's request could be construed as a request to a pharmacy for records, pharmacies are not included in this definition of health care providers; thus, the Medical Records Statute does not apply to pharmacies.

different group of clients. As you would expect, all of the enumerated professionals render services directly to patients. By contrast, Express Scripts provides claims processing and other third-party services to health plans, insurers and government health programs. *See* Ex. A at 6. As noted, the Complaint does not allege (nor could it) that Express Scripts provides health care services to patients, much less that it provided any such services directly to Plaintiff. There is no provider-patient relationship between a pharmacy benefit manager and member of a health plan such as Plaintiff. Thus, under the doctrine of *ejusdem generis*, pharmacy benefit managers like Express Scripts do not qualify as health care providers under KRS § 304.17A-005 or the simultaneously-enacted Medical Records Statute.[7]

The Supreme Court of Pennsylvania faced a similar issue of statutory construction in *Landay v. Rite Aid of Pennsylvania, Inc.*, which involved determination of whether a pharmacy qualifies as a "health care provider" for purposes of Pennsylvania's Medical Records Act ("MRA"). 104 A.3d 1272 (Pa. 2014). Because the term "health care provider" was not defined by the MRA, the court considered other statutory definitions of the term, the plain meaning of the term, and the legislative intent behind the MRA. *See id.* at 1278-86. The court concluded that "pharmacies are not health care providers under the MRA." *Id.* at 1285. Following the same approach, this Court should conclude that a pharmacy benefit manager—which is further removed from the provision of health care than a pharmacy[8]—does not qualify as a "health care provider"

[7] It is important to note that the Kentucky Attorney General interprets "health care provider" under the Medical Records Statute to mean "physicians" or "medical providers." Ky. Att'y Gen Op. 09-009, 09-0092009 WL 4917549, at *2 (Dec. 11, 2009) ("KRS 422.317 requires hospitals and **physicians** . . .;" "KRS 422.317 states that hospitals and **other medical providers** shall . . .") (emphasis added).

[8] As noted above and discussed further below, pharmacies are also not subject to the Medical Records Statute for some of the same reasons as pharmacy benefit managers—notably, pharmacies do not qualify as "health care providers" and their records do not qualify as "medical records" under the statute.

for purposes of Kentucky's Medical Records Statute. Therefore, the statute does not apply, and the Complaint should be dismissed.

ii. Prescription claims data is not a "medical record."

The Medical Records Statute at the heart of this case only applies to requests for "medical records." KRS § 422.317(1). The report of prescription claims data provided by Express Scripts to Plaintiff's law firm does not constitute a "medical record" within the meaning of the Medical Records Statute. The Complaint inconsistently and confusingly refers to Jones Ward's request for "healthcare provider records" (¶ 1), "pharmacy records" (*e.g.*, ¶ 3), "health records" (¶ 10), and "medical records" (*e.g.*, ¶ 12), which are not interchangeable terms. The Complaint initially asserts that the law firm paid for "healthcare provider records from Express Scripts" (¶ 1), but later concedes that the report Jones Ward received contained claims from many retail pharmacies (¶ 23).

Instead of consulting the individual pharmacies that filled prescriptions for Plaintiff,[9] Jones Ward saved time and resources by commissioning Express Scripts as the pharmacy benefit manager for Plaintiff's health plan to retrieve and compile prescription claims data from the "network of retail pharmacies" for which Express Scripts manages claims. *See* Compl. ¶¶ 22-23; *see also* Ex. A at 2. Unlike a medical record generated by a health care provider regarding its patient, Express Scripts provided a complete report of prescription claims from a mix of retail and specialty pharmacies. *See* Compl. ¶¶ 22-23, 25. Thus, it is clear from the allegations alone that Express Scripts did not provide a "medical record" pursuant to a request from its patient, which is what the statute regulates.

[9] Each of those retail pharmacies is required by Kentucky's Board of Pharmacy to maintain patient records in an easily-retrievable format and provide such records to patients upon request for the same prescription claims information requested by Plaintiff. *See* 201 Ky. Admin. Regs. 2:210 §§ 1(1)(d)(1), § 3(2).

Nevertheless, an analysis of the term "medical records" confirms that. Although the Medical Records Statute fails to define the term "medical records," it is defined within the context of Kentucky's public health statutes to mean: "medical records maintained in accordance with accepted professional standards and practices as specified in the administrative regulations." KRS § 216.875. Kentucky's administrative regulations, in turn, contain three definitions of medical records, each of which are inapplicable to the prescription claims data at issue in this case:

> (1) "Medical record" means the patient's actual medical record maintained by the hospital's medical record department or by a laboratory. 902 Ky. Admin. Regs. 19:010(10);
>
> (2) "Medical record" means a single, complete record that documents all of the treatment plans developed for, and medical services received by, an individual. 907 Ky. Admin. Regs. 17:005(51); and
>
> (3) "Medical records" means records signed by a physician documenting an applicant's or recipient's traumatic brain injury including: (a) Hospital records; or (b) Diagnostic imaging reports as related to KRS 211.470(3). 910 Ky. Admin. Regs. 3:030(20).

Based on the Complaint's allegations, the pharmacy claims data requested here does not constitute the records of hospitals, laboratories or diagnostic imagers. *See* 902 Ky Admin. Regs. 19.010(10) and 910 Ky. Admin. Regs. 3.030(20). Likewise, this data does not reflect "treatment plans" or "medical services" described by the definition of medical records in 907 Ky. Admin. Regs. 17:005(51).

In addition, Kentucky courts treat pharmacy data differently from medical records. For example, the Kentucky Court of Appeals has held that pharmacy logs, containing information regarding prescription transactions, do not qualify as medical records protected under HIPAA. *Pitcock v. Com.*, 295 S.W.3d 130, 135 (Ky. Ct. App. 2009) (declining to classify pharmacy logs as medical records deserving protection because "[t]here is no doctor-patient interaction involved in receiving these medications"). Other Kentucky opinions also refer to "pharmacy records" or

"prescription records" and documents distinct from "medical records." *See Williams v. White Castle Sys., Inc.*, 173 S.W.3d 231, 233 (Ky. 2005) (including pharmacy records and medical records as separate items in a list); *Carter v. Com.*, 358 S.W.3d 4, at *6-7 (Ky. Ct. App. 2011) (discussing production of prescription records and medical records); *Calhoun v. CSX Transp., Inc.*, No. 2007-CA-001651-MR, 2009 WL 152970, at *13 (Ky. Ct. App. Jan. 23, 2009), *aff'd in part, rev'd in part,* 331 S.W.3d 236 (Ky. 2011) (mentioning pharmacy records and medical records as distinct items).

Finally, the Medical Records Statute only applies to hospitals or health care providers who receive a request from their patients for "the patient's medical record." KRS § 422.317(1). The Complaint does not allege that Mr. Gearhart was a patient of Express Scripts, nor could it. Thus, given the language of the statute, the statute is also inapplicable for this reason alone. Moreover, in this case, Express Scripts assembled records generated by multiple retail pharmacies that provided services to Plaintiff and packaged them together into a single report to be used by Jones Ward. *See* Compl. ¶ 23. Applying the Medical Records Statute to Express Scripts in this context would create a precedent that absurdly and undesirably expands its scope to burden "health care providers" with providing patients with not only their own records but the records of other health care providers as well. Because Express Scripts was not requested to provide a medical record, much less its "patient's medical record," the Medical Records Statute does not apply, and the Complaint should be dismissed.

B. Plaintiff Has No Private Right of Action under the Medical Records Statute or Kentucky Consumer Protection Act.

i. The Medical Records Statute was not intended to regulate Express Scripts nor protect Plaintiff in this context.

The Medical Records Statute does not specifically confer a private right of action. *See* KRS 422.317. There is also nothing in the statute that specifies a remedy or supports the creation of an implied private right of action. *See id.*

In trying to state a claim for violation of the Medical Records Statute, Plaintiff could only try to rely on KRS § 446.070, which enables a "person injured by the violation of any [Kentucky] statute" to recover damages sustained as a result of such statutory violation. KRS § 446.070; s*ee Yeager v. Dickerson*, 391 S.W.3d 388, 393 (Ky. Ct. App. 2013) (limiting the application of KRS § 446.070 to Kentucky state statutes). Importantly, however, "this statute merely codifies the common law concept of negligence *per se.* It **applies only if the alleged offender has violated a statute and the plaintiff was in the class of persons which that statute was intended to protect**." *Arnold v. Microsoft Corp.*, No. 2000-CA-002144-MR, 2001 WL 1835377, at *4 (Ky. Ct. App. Nov. 21, 2001) (emphasis added); *see also Hargis v. Baize*, 168 S.W.3d 36, 40-41 (Ky. 2005) (applying private right of action "if the person damaged is within the class of persons the statute intended to be protected"); *Handi-Van, Inc. v. The Cmty. Cab Co., Inc.*, No. 2013-CA-001106-MR, 2015 WL 865829, at *5 (Ky. Ct. App. Feb. 27, 2015) (granting summary judgment on Kentucky Consumer Protection Act claim because commercial entity was not a consumer intended to be protected by the statute). By the same token, "if the defendant was not in the class of persons whose conduct was intended to be regulated by the statute, the defendant could not violate the statute and KRS 446.070 simply would not apply." *Davidson v. Am. Freightways, Inc.*, 25 S.W.3d 94, 100 (Ky. 2000) (finding that KRS 446.070 did not apply to the defendant because it was not subject to the Kentucky statute at issue).

Here, Section 446.070 does not create a private right of action for Plaintiff under the Medical Records Statute based on the facts alleged in the Complaint. First, as discussed more

fully in Section III(A), *supra*, Express Scripts, as a pharmacy benefit manager, is not a "health care provider," which is what the Kentucky legislature intended to regulate with the Medical Records Statute. *See* KRS § 422.317(1); Ky. Att'y Gen Op. 09-009, 09-0092009 WL 4917549, at *1. The Complaint does not allege that Express Scripts provided health care services to Plaintiff or generated its own record of medical treatment as envisioned by the Medical Records Statute.

Second, Plaintiff, as a products liability claimant, is not a member of the class of persons intended to be protected by the Medical Records Statute. The Kentucky legislature enacted the Medical Records Statute to protect patients obtaining records in the context of a change of doctors or insurance. *See* Ky. Att'y Gen Op. 09-009, 09-0092009 WL 4917549, at *1 (Dec. 11, 2009) ("[T]he original intent of this statute appears to have been to provide a patient with the ability to transfer their medical records from one provider to another in the event a change of providers was necessary."). This legislative intent is inapposite to Jones Ward's desire to obtain Plaintiff's prescription claims data to support litigation it filed on his behalf. The Medical Records Statute, therefore, provides no private right of action to Plaintiff, and his claim thereunder must be dismissed. Furthermore, because all of Plaintiff's other claims depend on a violation of the Medical Records Statute, *see supra* footnote 5, the other claims should be dismissed as well.

ii. Private Actions under the Kentucky Consumer Protection Act are limited to transactions for personal, family, or household purposes.

The private right of action under the Kentucky Consumer Protection Act ("KCPA") is available only to individuals who purchase goods or services "primarily for personal, family or household purposes." KRS § 367.220(1); *see also Durbin v. Bank of Bluegrass & Trust Co.*, 2006 WL 1510479, at *3 (Ky. Ct. App. 2006) ("the Kentucky Consumer Protection Act allows only a person who purchases goods or services primarily for personal, family or household services to

bring a private action under the Act."). Kentucky courts have repeatedly held that "[t]o maintain an action alleging a violation of the [KCPA], . . . an individual must fit within the protected class of persons defined in [the KCPA]." *Skilcraft Sheetmetal, Inc. v. Kentucky Mach., Inc.*, 836 S.W.2d 907, 909 (Ky. Ct. App. 1992); *Keeton v. Lexington Truck Sales, Inc.*, 275 S.W.3d 723, 726 (Ky. Ct. App. 2008) (quoting *Skilcraft*, 836 S.W.2d at 909). An individual purchasing or leasing goods or services for a commercial purpose "does not fit within the protected class of persons who may file claims under the Act." *Keeton*, 275 S.W.3d at 726; *see also Gooch v. E.I. DuPont de Nemours & Co.*, 40 F.Supp.2d 857, 862 (W.D. Ky. 1998) (refusing to recognize private right of action under KCPA for product purchased for commercial purpose); *Aud v. Illinois Cent. R.R. Co.*, 955 F. Supp. 757, 759 (W.D. Ky. 1997) ("As noted in *Commonwealth ex rel Stephens v. North Am. Van Lines, Inc.*, Ky.App., 600 S.W.2d 459 (1979), the attorney general has broad discretionary powers to prosecute illegal business acts, however, an individual private cause of action may only be brought by 'any person who purchases or leases goods or services primarily for personal, family or household purposes.'")

As the Complaint confirms, Jones Ward requested and acquired Plaintiff's prescription claims data to pursue a products liability class action in federal court. *See* Compl. ¶ 24. This commercial transaction for pharmacy claims data that took place between two businesses—a law firm and a pharmacy benefit manager—cannot be a "personal, family or household" transaction. *See Slobin v. Henry Ford Health Care*, 469 Mich. 211, 216, 666 N.W.2d 632, 634 (2003) (construing an identical provision of the Michigan Consumer Protection Act and concluding that "obtaining medical records for the purpose of litigation is not primarily for personal, family, or household use"). Because Plaintiff cannot satisfy the statutory conditions for a private cause of action under the KCPA, Plaintiff's KCPA claim must be dismissed.

C. Plaintiff Fails to Sufficiently Allege Fraud.

i. The Complaint does not meet the specificity requirements of Rule 9.02.

The Complaint asserts that Express Scripts committed fraud by intentionally overcharging for pharmacy records in violation of Kentucky law. *See* Compl. ¶¶ 40-44. To support that claim, Plaintiff offers only the following barebones factual allegations: (1) Jones Ward requested and paid for Plaintiff's prescription claims data from Express Scripts around May 12, 2014 (*Id.* ¶ 21), and (2) Express Scripts charged a $75 fee for data processing (*Id.* ¶ 25).

To satisfy the requirements under Rule 9.02 for pleading a fraud claim, however, Plaintiff must state "the time, the place, the substance of the false representations, the facts misrepresented, and the identification of what was obtained by the fraud." *Mason v. Monumental Life Ins. Co.*, No. 2006-CA-002122-MR, 2008 WL 54763, at *5 (Ky. Ct. App. Jan. 4, 2008). Here, Plaintiff fails to come close to doing that. In particular, the Complaint fails to identify any individuals at Jones Ward (or other agent of Plaintiff) or Express Scripts involved in the transaction; allege any communications between Express Scripts and Plaintiff; identify any statement made by Express Scripts that was false or misleading other than the absurd and conclusory assertion that Express Scripts "fail[ed] to disclose . . . that it intentionally overcharged Plaintiff . . . in violation of Kentucky law;" (Compl. ¶ 41); identify what the invoice for the fee stated; or mention any other details of the transaction. Thus, the Complaint wholly fails to provide Express Scripts with notice of the required "substance of the false representations" or "the facts misrepresented." *Mason*, 2008 WL 54763 at *5.[10] Because the Complaint fails to plead the elements of fraud with the specificity required by Rule 9.02, Count II should be dismissed.

[10]Even assuming, *arguendo*, that the Medical Records Statute applied and Express Scripts' fee exceeded the statutory limit, a statutory violation alone does not establish all of the elements necessary for a successful fraud claim. *See Giddings & Lewis, Inc. v. Indus. Risk Insurers*, 348 S.W.3d 729, 747 (Ky. 2011).

ii. Express Scripts owed no duty of disclosure to Plaintiff.

As noted above, Plaintiff's only effort to state a fraud claim is to suggest, with no facts, that Express Scripts failed to disclose "it intentionally overcharged Plaintiff." (Compl. ¶ 41). Even ignoring the lack of required particularity that demands dismissal of Plaintiff's fraud claim, Plaintiff fails to state a valid claim of fraud by omission.

Under Kentucky law, fraud by omission requires proof of four elements: (1) the defendant had a duty to disclose a material fact to plaintiff; (2) the defendant failed to disclose the material fact; (3) the defendant's failure to disclose the material fact induced the plaintiff to act; and (4) the plaintiff suffered actual damages. *See Giddings*, 348 S.W.3d at 747 (citation omitted). Establishing a duty to disclose is thus essential to a fraud by omission claim. *See id.* (affirming dismissal of fraud claim for failure to "establish[] any grounds for a duty to disclose"). Such a duty may arise where a fiduciary relationship exists, a statute imposes a duty, one party discloses only partial information under the impression it disclosed complete information, or one party to a contract possesses superior information and is relied upon by the other party. *See id.* Notably, "**mere silence does not constitute fraud where it relates to facts open to common observation or discoverable by the exercise of ordinary diligence, or where means of information are as accessible to one party as to the other**." *Bryant v. Troutman*, 287 S.W.2d 918, 920-21 (Ky. 1956) (holding that failure to disclose property defects in real estate transaction is not fraudulent where defects could have been discovered using ordinary care in inspecting the property).

The Complaint establishes no legal duty requiring Express Scripts to disclose information to Plaintiff. The Complaint does not allege that Express Scripts provided any services directly to Plaintiff, much less establish a fiduciary relationship that would give rise to a duty of disclosure. The Medical Records Statute clearly imposes no duty to disclose any information beyond

production of the requested records. Similarly, there is no allegation that Express Scripts disclosed only partial information relevant to Jones Ward's request for records or the data processing fee. Nor was there a disparity of knowledge between Express Scripts and the equally-sophisticated law firm that requested the prescription claims data. In fact, the axiom that "all persons are presumed to know the law" is especially true of Plaintiff's law firm that obtained the pharmacy claims data from Express Scripts with full knowledge of the Medical Records Statute. *Midwest Mut. Ins. Co. v. Wireman*, 54 S.W.3d 177, 182 (Ky. Ct. App. 2001); *see Giddings*, 348 S.W. 3d at 747 (holding that appellant "cannot establish . . . superior knowledge . . . that was not disclosed"); *see also* Compl. ¶¶ 21, 25. The facts regarding Express Scripts' fee and the Medical Records Statute were freely available to Plaintiff and Jones Ward. Even if the Medical Records Statute applies to Express Scripts, which it does not, Express Scripts' "mere silence" does not translate to fraud because Express Scripts owed no duty of disclosure to Plaintiff. Plaintiff's fraud claim, therefore, must be dismissed for this additional reason.

D. The Voluntary Payment Doctrine Bars Plaintiff's Claims.

Kentucky recognizes the well-settled voluntary payment doctrine, under which a "voluntary payment or expenditure made with full knowledge of all the facts will not be refunded without a showing that such was made under immediate and urgent necessity therefor." *Lee v. Hanna*, 253 Ky. 790, 70 S.W.2d 673, 674 (1934); *see also City of Covington v. Powell*, 59 Ky. 226, 229 (1859) ("money thus voluntarily paid by one who knows he is not bound to pay, cannot be recovered back"). This rule even applies to payment of "an illegal demand" as long as there is

no "immediate and urgent necessity" to pay. *City of Morganfield v. Wathen*, 202 Ky. 641, 261 S.W. 12, 14 (1924).

The facts alleged demonstrate that payment was made voluntarily to Express Scripts. Jones Ward requested Plaintiff's pharmacy claims data from Express Scripts and paid the associated fee. Compl. ¶ 21. Jones Ward understood that Express Scripts charged $75 for data processing to compile Plaintiff's prescription claims data from the pharmacies in its networks that served Plaintiff. *See* Compl. ¶¶ 23, 25. Aware of these facts and the Medical Records Statute it now sues under, Jones Ward chose to pay the fee. *See id.* at ¶¶ 21, 23, 25. The Complaint alleges no "urgent necessity" for the records – which it must do to overcome this bar – nor does it sufficiently allege fraud, as discussed in Section III(C)(i), *supra*. Furthermore, Plaintiff had alternative means of accessing the same prescription claims data from the retail pharmacies that filled his prescriptions, which are required by Kentucky's Board of Pharmacy to maintain patient records in a format "readily retrievable by manual or electronic means." 201 Ky. Admin. Regs. 2:210 § 1(1)(d)(1). Instead, he sought and paid for a compilation of claims data from Express Scripts, which had access to information from multiple retail pharmacies by virtue of its role as a pharmacy benefit manager for Plaintiff's health benefits provider. *See* Compl. ¶¶ 22-23, 25.

In a transparent and futile attempt to avoid the voluntary payment doctrine, Plaintiff asserts the erroneous legal conclusion that "payment was not voluntary because Express Scripts did not offer to waive or discount the fee if certain conditions were met." *Id.* ¶ 26. Plaintiff's allegations belie this legal conclusion, which warrants no deference by the court. *See Griffin*, 2015 WL 4776300, at *3. In addition to the facts discussed above that establish the payment was voluntary, there are no allegations that Plaintiff or his agent requested a waiver or discount of the fee.

Regardless, the fact that Express Scripts did not offer to waive or discount the fee under certain conditions does not make the payment any less voluntary.

Under similar circumstances, a Georgia court ruled that the voluntary payment doctrine barred claims by patients who paid fees for hospital medical records that exceeded Georgia's statutory limit. *Cotton v. Med-Cor Health Info. Sols., Inc.*, 221 Ga. App. 609, 612, 472 S.E.2d 92, 96 (1996). The court held that the payment was voluntary because "all material facts were known by them," despite the fact that the charges were imposed in contravention of a statute. *Id.* The plaintiff could not recover payment made for the records based on "unexcused ignorance of the law." *Id.* Even more so, here, where Plaintiff's law firm opted to pay Express Scripts with knowledge of Kentucky's Medical Records Statute, there is no argument that the payment falls outside the bar of the voluntary payment doctrine.

E. Plaintiff Lacks Standing to Sue Express Scripts.[11]

To have standing to sue in Kentucky courts, a plaintiff "must have a judicially recognizable interest in the subject matter of the suit." *HealthAmerica Corp. of Kentucky v. Humana Health Plan, Inc.*, 697 S.W.2d 946, 947 (Ky. 1985). A plaintiff's interest in the controversy must be "real, direct, present and substantial" to confer standing. *Winn v. First Bank of Irvington*, 581 S.W.2d 21, 23 (Ky. Ct. App. 1978) (internal quotation omitted). On the other hand, an interest that is "remote or speculative" is insufficient. *Hous. Auth. of Louisville v. Serv. Employees Int'l Union*, Local 557, 885 S.W.2d 692, 695 (Ky. 1994).

[11] Plaintiff's claim for declaratory judgment should be dismissed for the same reasons discussed herein. A declaratory judgment is only appropriate in the context of "a controversy over present rights, duties and liabilities; it does not involve a question which is merely hypothetical or an answer which is no more than an advisory opinion." *Barrett v. Reynolds*, 817 S.W.2d 439, 441 (Ky. 1991) (citing *Dravo v. Liberty Nat'l Bank & Trust Co.*, 267 S.W.2d 95 (1954)). As explained in section III(D), there is no present controversy between Plaintiff and Express Scripts.

Here, Plaintiff's detached interest in the controversy is not direct, present or substantial. Plaintiff never had any interaction with Express Scripts. *See* Compl. ¶ 21. Instead, his law firm requested his prescription claims data from Express Scripts and paid the associated fee. *See id.* The law firm later deducted the fee from a settlement obtained in a products liability case, but the Complaint does not establish that Plaintiff had any legal duty to reimburse the law firm at the time of the transaction between the law firm and Express Scripts. *See* Compl. ¶ 24. That he gratuitously agreed to forego part of his settlement in another lawsuit nearly a year later to reimburse the law firm for the expense does not create an injury as a direct result of any act by Express Scripts. Although the Complaint indicates that the underlying products liability case remains pending, which "may require additional medical records from Express Scripts and other sources before its final resolution" (Comp. ¶ 24), Plaintiff's claims were already dismissed with prejudice, so the case does not give rise to a continuing need for records. *See* Ex. B.

Several courts considering similar circumstances have held that plaintiffs do not have standing to sue over allegedly excessive fees for medical records requested and paid for by legal counsel. *See, e.g.*, *Spiro v. Healthport Techs., LLC*, 73 F. Supp. 3d 259, 268-69 (S.D.N.Y. 2014); *McCracken v. Verisma Sys., Inc.*, No. 14-CV-6248T, 2015 WL 2374544, at *3-5 (W.D.N.Y. May 18, 2015); *Carter v. HealthPort Techs., LLC*, No. 14-CV-6275-FPG, 2015 WL 1508851, at *6 (W.D.N.Y. Mar. 31, 2015). For example, in *Spiro v. Healthport Techs., LLC*, the plaintiff lacked standing because the "discretionary decision after-the-fact to reimburse another party for a charge" did not give rise to any injury caused by the defendant. 73 F. Supp. 3d 259, 269. As in this case, dismissal was appropriate because the volitional repayment of medical records fees paid by a law firm does not confer standing on the law firm's client. *See id.*

IV. Conclusion

For the foregoing reasons, Express Scripts respectfully requests that the Court dismiss Plaintiff's claims with prejudice as the Complaint fails to state a claim upon which relief can be granted, and for any further relief deemed appropriate.

Respectfully submitted,

Hon. Britt K. Latham
Hon. Alison K. Grippo
BASS, BERRY & SIMS, PLC
150 Third Avenue South, Suite 2800
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and

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(859) 231-8780

BY: */s/ William T. Forester*
WILLIAM T. FORESTER
ATTORNEYS FOR DEFENDANT

CERTIFICATE OF SERVICE

I hereby certify that a true and accurate copy of the foregoing was served this 8th day of March 2016, upon the following via electronic mail and/or U.S. Mail:

Hon. Alex C. Davis
Jones Ward PLC
Marion E. Taylor Building
312 South Fourth Street, 6TH Floor
Louisville, Kentucky 40202

Judge William E. Lane
Rowan Circuit Court
Courthouse Annex
44 West Main Street
Mt. Sterling, Kentucky 40353

/s/ William T. Forrester

EXHIBIT A

Table of Contents

UNITED STATES
SECURITIES AND EXCHANGE COMMISSION
WASHINGTON, D.C. 20549

FORM 10-K

☒ **ANNUAL REPORT PURSUANT TO SECTION 13 OR 15(d) OF THE SECURITIES EXCHANGE ACT OF 1934 FOR THE FISCAL YEAR ENDED DECEMBER 31, 2011,**

OR

☐ **TRANSITION REPORT PURSUANT TO SECTION 13 OR 15(d) OF THE SECURITIES EXCHANGE ACT OF 1934**

FOR THE TRANSITION PERIOD FROM TO .

Commission File Number: 0-20199

EXPRESS SCRIPTS, INC.

(Exact name of registrant as specified in its charter)

Delaware	**43-1420563**
(State or other jurisdiction of incorporation or organization)	**(I.R.S. Employer Identification No.)**
One Express Way, St. Louis, MO	**63121**
(Address of principal executive offices)	**(Zip Code)**

Registrant's telephone number, including area code: (314) 996-0900

Securities registered pursuant to Section 12(b) of the Act:

Title of Class	**Name of each exchange on which registered**
Common Stock $0.01 par value	Nasdaq Global Select Market

Securities registered pursuant to Section 12(g) of the Act:
None

Indicate by check mark if the registrant is a well-known seasoned issuer, as defined in Rule 405 of the Securities Act. Yes ☒ No ☐

Indicate by check mark if the registrant is not required to file reports pursuant to Section 13 or Section 15(d) of the Act. Yes ☐ No ☒

Indicate by check mark whether the registrant (1) has filed all reports required to be filed by Section 13 or 15(d) of the Securities Exchange Act of 1934 during the preceding 12 months (or for such shorter period that the registrant was required to file such reports), and (2) has been subject to such filing requirements for the past 90 days. Yes ☒ No ☐

Indicate by check mark whether the registrant has submitted electronically and posted on its corporate Web site, if any, every Interactive Data File required to be submitted and posted pursuant to Rule 405 of Regulation S-T during the preceding 12 months (or for such shorter period that the registrant was required to submit and post such files). Yes ☒ No ☐

Indicate by check mark if disclosure of delinquent filers pursuant to Item 405 of Regulation of S-K is not contained herein, and will not be contained, to the best of registrant's knowledge, in definitive proxy or information statements incorporated by reference in Part III of this Form 10-K or any amendment to this Form 10-K. ☒

Indicate by check mark whether the registrant is a large accelerated filer, an accelerated filer, a non-accelerated filer, or a smaller reporting company. See the definitions of "large accelerated filer," "accelerated filer" and "smaller reporting company" in Rule 12b-2 of the Exchange Act.

Large accelerated filer	☒	Accelerated filer	☐
Non-accelerated filer	☐ (Do not check if a smaller reporting company)	Smaller reporting company	☐

Indicate by check mark whether the registrant is a shell company (as defined in Rule 12b-2 of the Exchange Act). Yes ☐ No ☒

The aggregate market value of Registrant's voting stock held by non-affiliates as of June 30, 2011, was $26,290,443,000 based on 487,040,000 such shares held on such date by non-affiliates and the average sale price for the Common Stock on such date of $53.98 as reported on the Nasdaq Global Select Market. Solely for purposes of this computation, the Registrant has assumed that all directors and executive officers of the Registrant are affiliates of the Registrant. The Registrant has no non-voting common equity.

Common stock outstanding as of January 31, 2012: 484,778,000 Shares

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DOCUMENTS INCORPORATED BY REFERENCE

Part III incorporates by reference portions of the definitive proxy statement for the Registrant's 2012 Annual Meeting of Stockholders to be filed with the Securities and Exchange Commission.

Table of Contents

TABLE OF CONTENTS

Information included in or incorporated by reference in this Annual Report on Form 10-K, other filings with the Securities and Exchange Commission (the "SEC") and our press releases or other public statements, contain or may contain forward looking statements. Please refer to a discussion of our forward looking statements and associated risks in "Part I—Item 1—Business—Forward Looking Statements and Associated Risks" and "Part I—Item 1A—Risk Factors" in this Annual Report on Form 10-K.

PART I
THE COMPANY

Item 1 — Business

Industry Overview

Prescription drugs play a significant role in healthcare today and constitute the first line of treatment for many medical conditions. As the average age of the American population increases and pharmaceutical research enhances the potential for even more effective drugs, demand can be expected to increase. For millions of people, prescription drugs equate to the hope of improved health and quality of life. At the same time, prescription drug costs are becoming one of the most persistent challenges to healthcare affordability. Even as pharmaceutical development opens new paths to better healthcare, we confront the possibility that high costs may limit access to these therapies.

Total medical costs for employers continue to outpace the rate of overall inflation. National health expenditures as a percentage of Gross Domestic Product are expected to increase to 19.8% in 2020 from an estimated 17.7% in 2011 according to the Centers for Medicare & Medicaid Services ("CMS") estimates. In response to cost pressures being exerted on health benefit providers such as managed care organizations, health insurers, employers and unions, we work to develop innovative strategies designed to keep medications affordable.

Pharmacy benefit management ("PBM") companies combine retail pharmacy claims processing, formulary management and home delivery pharmacy services to create an integrated product offering to manage the prescription drug benefit for payors. Some PBMs also offer specialty services to provide treatments for diseases that rely upon high-cost injectable, infused, oral or inhaled drugs which deliver a more effective solution than many retail pharmacies. PBMs have also broadened their service offerings to include compliance programs, outcomes research, drug therapy management programs, sophisticated data analysis and other distribution services.

Company Overview

We are one of the largest PBMs in North America, offering a full range of services to our clients, which include HMOs, health insurers, third-party administrators, employers, union-sponsored benefit plans, workers' compensation plans and government health programs. We help health benefit providers address access and affordability concerns resulting from rising drug costs while helping to improve healthcare outcomes. We manage the cost of the drug benefit by performing the following functions:

- evaluating drugs for price, value and efficacy in order to assist clients in selecting a cost-effective formulary
- leveraging purchasing volume to deliver discounts to health benefit providers
- promoting the use of generics and low-cost brands
- offering cost-effective home delivery pharmacy and specialty services which result in drug cost savings for plan sponsors and co-payment savings for members

We work with clients, manufacturers, pharmacists and physicians to increase efficiency in the drug distribution chain, to manage costs in the pharmacy benefit and to improve members' health outcomes and satisfaction. In an effort to deliver a superior clinical offering which targets the reduction of waste and the improvement of health outcomes, we apply a unique behavior-centric approach to changing consumer behavior which we call Consumerology®.

Plan sponsors who are more aggressive in taking advantage of our effective tools to manage drug spend have seen actual reduction in their prescription drug trend while preserving healthcare outcomes. Greater use of generic drugs and lower-cost brand drugs has resulted in significant reductions in spending for commercially insured consumers and their employers.

We have organized our operations into two business segments based on products and services offered: PBM and Emerging Markets ("EM").

Our PBM segment primarily consists of the following services:

- retail network pharmacy management and retail drug card programs
- home delivery services
- specialty benefit services
- patient care contact centers
- benefit plan design and consultation
- drug formulary management, compliance and therapy management programs
- information reporting and analysis programs
- rebate programs
- electronic claims processing and drug utilization review
- administration of a group purchasing organization
- consumer health and drug information
- bio-pharma services including reimbursement and customized logistics solutions
- improved health outcomes through personalized medicine and application of pharmacogenomics
- assistance programs for low-income patients

The EM segment primarily consists of the following services:

- distribution of pharmaceuticals and medical supplies to providers and clinics
- healthcare account administration and implementation of consumer-directed healthcare solutions

Our revenues are generated primarily from the delivery of prescription drugs through our contracted network of retail pharmacies, home delivery and specialty pharmacy services and EM services. Revenues from the delivery of prescription drugs to our members represented 99.4% of revenues in 2011, 99.4% in 2010, and 98.9% in 2009. Revenues from services, such as the fees associated with the administration of retail pharmacy networks contracted by certain clients, medication counseling services, and certain specialty distribution services, comprised the remainder of our revenues.

Prescription drugs are dispensed to members of the health plans we serve primarily through networks of retail pharmacies that are under non-exclusive contracts with us and through the home delivery fulfillment pharmacies, specialty drug pharmacies and fertility pharmacies we operated as of December 31, 2011. More than 60,000 retail pharmacies, which represent over 95% of all United States retail pharmacies, participated in one or more of our networks at December 31, 2011. The top ten retail pharmacy chains represent approximately 50% of the total number of stores in our largest network. As of January 1, 2012, Walgreen Co. (“Walgreens”) was no longer part of our retail pharmacy networks, reducing the number of pharmacies participating in our networks to approximately 55,000, representing approximately 85% of all United States retail pharmacies. Excluding Walgreens, the remaining top ten retail chains represent approximately 38% of the total number of stores in our largest network.

We were incorporated in Missouri in September 1986, and were reincorporated in Delaware in March 1992. Our principal executive offices are located at One Express Way, Saint Louis, Missouri, 63121. Our telephone number is 314.996.0900 and our web site is www.express-scripts.com. Information included on our web site is not part of this annual report.

Products and Services

Pharmacy Benefit Management Services

Overview. Our PBM services involve the management of outpatient prescription drug utilization to foster high quality, cost-effective pharmaceutical care. We consult with our clients to assist them in selecting plan design features that balance clients’ requirements for cost control with member choice and convenience. For example, some clients receive a smaller discount on pricing in the retail pharmacy network or home delivery pharmacy in exchange for receiving all or a larger share of pharmaceutical manufacturer rebates. Other clients receive a greater discount on pricing in the retail pharmacy network or home delivery pharmacy in exchange for a smaller share of pharmaceutical manufacturer rebates. During 2011, 97.2% of our revenue was derived by our PBM operations, compared to 97.4% and 95.6% during 2010 and 2009, respectively.

Retail Network Pharmacy Administration. We contract with retail pharmacies to provide prescription drugs to members of the pharmacy benefit plans we manage. In the United States, we negotiate with pharmacies to discount the price at which they will provide drugs to members and manage national and regional networks that are responsive to client preferences related to cost containment, convenience of access for members and network performance. We also manage

networks of pharmacies that are customized for or under direct contract with specific clients. In addition, we have contracted Medicare Part D provider networks to comply with CMS access requirements for the Medicare Part D Prescription Drug Program.

All retail pharmacies in our pharmacy networks communicate with us online and in real time to process prescription drug claims. When a member of a plan presents his or her identification card at a network pharmacy, the network pharmacist sends certain specified member and prescription information in an industry-standard format through our systems, which process the claim and send a response back to the pharmacy. The electronic processing of the claim includes, among other things, the following:

- confirming the member's eligibility for benefits under the applicable health benefit plan and any conditions or limitations on coverage
- performing a concurrent drug utilization review and alerting the pharmacist to possible drug interactions and reactions or other indications of inappropriate prescription drug usage
- updating the member's prescription drug claim record
- if the claim is accepted, confirming to the pharmacy that it will receive payment for the drug dispensed according to its provider agreement with us
- informing the pharmacy of the co-payment amount to be collected from the member based upon the client's plan design and the remaining payable amount due to the pharmacy

Home Delivery Services. As of December 31, 2011, we dispensed prescription drugs from our two home delivery fulfillment pharmacies. In addition to the order processing that occurs at these home delivery pharmacies, we also operate several non-dispensing order processing facilities and patient contact centers. We also maintain one non-dispensing home delivery fulfillment pharmacy for business continuity purposes. Our pharmacies provide patients with convenient access to maintenance medications and enable us to manage our clients' drug costs through operating efficiencies and economies of scale. Through our home delivery pharmacies, we are directly involved with the prescriber and patient and, as a result, research shows we are generally able to achieve a higher level of generic substitutions, therapeutic interventions, and better adherence than can be achieved through the retail pharmacy networks. Our direct relationship with patients also enables us to leverage the principles of Consumerology®, our proprietary application of consumer marketing sciences and behavioral psychology, to optimize health outcomes. As a result of these interactions, we believe we are able to improve patients' healthcare decision-making and satisfaction with their prescription drug benefit.

Specialty Benefit Services. We operate several specialty pharmacies throughout the United States. These locations provide patient care and direct specialty home delivery to our patients. We offer a broad range of healthcare products and services for individuals with chronic health conditions and provide comprehensive patient management services. These include services for physicians, health plan sponsors and pharmaceutical manufacturers to support the delivery of care, as well as fertility services to providers and patients.

We provide specialty distribution services, consisting of the distribution of, and creation of a database of information for, products requiring special handling or packaging, products targeted to a specific physician or patient population and products distributed to low-income patients. Our services include eligibility, fulfillment, inventory, insurance verification/authorization and payment.

Patient Care Contact Centers. Although we contract with health plans and employers, the ultimate recipients of many of our services are the members and employees of these health plans and employers. We believe client satisfaction is dependent upon patient satisfaction. Domestic patients can call us toll free, 24 hours a day, 7 days a week, to obtain information about their prescription drug plan from our trained patient care advocates and pharmacists.

Benefit Plan Design and Consultation. We offer consultation and financial modeling to assist our clients in selecting benefit plan designs that meet their needs for member satisfaction and cost control. The most common benefit design options we offer to our clients are:

- financial incentives and reimbursement limitations on the drugs covered by the plan, including drug formularies, tiered co-payments, deductibles or annual benefit maximums
- generic drug utilization incentives
- incentives or requirements to use only certain network pharmacies or to order certain maintenance drugs (e.g., therapies for diabetes, high blood pressure, etc.) only through our home delivery pharmacies
- reimbursement limitations on the amount of a drug that can be obtained in a specific period
- utilization management programs such as step therapy and prior authorization, which focus the use of medications according to clinically developed algorithms

- evidence-based, behavior-centric Consumerology® programs that drive adoption of cost-effective drug mix, improved therapy adherence and increased use of home delivery

The client's choice of benefit design is entered into our electronic claims processing system, which applies the plan design parameters as claims are submitted and provides visibility to the financial performance of the plan.

Drug Formulary Management, Compliance and Therapy Management Programs. Formularies are lists of drugs to which benefit design is applied under the applicable plan. We have many years of formulary development expertise and maintain an extensive clinical pharmacy department.

Our foremost consideration in the formulary development process is the clinical appropriateness of the particular drugs. In developing formularies, we first perform a rigorous assessment of the available evidence regarding each drug's safety and clinical effectiveness. No new drug is added to the formulary until it meets standards of quality established by our National Pharmacy & Therapeutics ("P&T") Committee – a panel composed of 19 independent physicians and pharmacists in active clinical practice, representing a variety of specialties and practice settings, typically with major academic affiliations. We fully comply with the P&T Committee's clinical recommendations. In making its clinical recommendation, the P&T Committee has no information regarding the discount or rebate arrangement we might negotiate with the manufacturer. This is designed to ensure the clinical recommendation is not affected by our financial arrangements. After the clinical recommendation is made, the drugs are evaluated on an economic basis to determine optimal cost effectiveness.

We administer a number of different formularies for our clients. The use of formulary drugs is encouraged through various benefit design features. For example, historically, many clients selected a plan design that included an open formulary in which all drugs were covered by the plan. Today, a majority of our clients select formularies that are designed to be used with various financial or other incentives, such as three-tier co-payments, which drive the selection of formulary drugs over their non-formulary alternatives. Some clients select closed formularies, in which benefits are available only for drugs listed on the formulary. Use of formulary drugs can be encouraged in the following ways:

- through plan design features, such as tiered co-payments, which require the member to pay a higher amount for a non-formulary drug
- by applying the principles of Consumerology®, our proprietary approach that combines principles of behavioral economics and consumer psychology with marketing strategies to effect positive behavior change
- by educating members and physicians with respect to benefit design implications
- by promoting the use of lower-cost generic alternatives
- by implementing utilization management programs such as step therapy and prior authorization, which focus the use of medications according to clinically developed algorithms

We also provide formulary compliance services to our clients. For example, if a doctor has prescribed a drug that is not on a client's formulary, we notify the pharmacist through our claims processing system. The pharmacist may then contact the doctor to attempt to obtain the doctor's consent to change the prescription to the appropriate formulary product. The doctor has the final decision-making authority in prescribing the medication.

We also offer innovative clinically based intervention programs to assist and manage patient quality of life, client drug trend, and physician communication/education. These programs encompass comprehensive point of service and retrospective drug utilization review, physician profiling, academic detailing, prior authorization, disease care management, and clinical guideline dissemination to physicians.

Since implementing Consumerology® in 2008, we have further developed and refined the methods we use in an effort to improve how members use their pharmacy benefit, stay compliant with their medications and save money for themselves and their plan sponsors. Through Consumerology® , we believe we are enabling better health and value by driving positive clinical behavior. We use behavioral economics to develop new approaches in an effort to encourage adoption of generics and lower-cost brands, better therapy adherence and greater use of home delivery. Through our Consumerology® Advisory Board, we continue to gain insight into how patients make decisions about healthcare. We believe the interventions that have resulted from our test-and-learn process have yielded improvements for our clients and their members.

Information Reporting and Analysis Programs. Through the use of sophisticated information and reporting systems we are better able to manage the prescription drug benefit. We analyze prescription drug data to identify cost trends and budget for expected drug costs, assess the financial impact of plan design changes and assist clients in identifying costly utilization patterns through an online prescription drug decision support tool.

We offer education programs to members in managing clinical outcomes and the total healthcare costs associated with certain conditions such as asthma, diabetes and cardiovascular disease. These programs are based on the premise that better-informed patient and physician behavior can positively influence medical outcomes and reduce overall medical costs. We identify patients who may benefit from these programs through claims data analysis or self-enrollment. Using the advanced consumer marketing sciences and behavioral psychology of Consumerology® , we are able to encourage patients to engage in more health-promoting behaviors that can have sustainable, life-changing benefits.

We offer a tiered approach to member education and wellness, ranging from information provided through our Internet site, to educational mailings, to our intensive one-on-one registered nurse or pharmacist counseling. The programs include providing patient profiles directly to their physicians, as well as measurements of the clinical, personal and economic outcomes of the programs.

Rebate Programs. We develop, manage and administer programs that allow pharmaceutical manufacturers to provide rebates and administrative fees based on utilization of their products by members of our clients' benefit plans. The rebate portion that the client receives varies in accordance with each client contract. Our rebates are determined based on the characteristics of the formulary design and pharmacy benefit structure selected by the client. The amount of rebates generated by these types of programs is a function of the particular product dispensed and the level of utilization that occurs. Manufacturers participating in our rebate programs pay us administrative fees in connection with the services and systems we provide through the rebate program.

Electronic Claims Processing and Drug Utilization Review. Our electronic claims processing system enables us to implement sophisticated intervention programs to assist in managing prescription drug utilization. The system can alert the pharmacist to generic substitution and therapeutic intervention opportunities, as well as formulary compliance issues, and can also administer prior authorization and step-therapy protocol programs at the time a claim is submitted for processing. Our claims processing system also creates a database of drug utilization information that can be accessed at the time the prescription is dispensed, on a retrospective basis to analyze utilization trends and prescribing patterns for more intensive management of the drug benefit, and on a prospective basis to help support pharmacists in drug therapy management decisions.

Administration of a Group Purchasing Organization. We operate a group purchasing organization ("GPO") that provides various administrative services to participants in the GPO. Services provided include coordination, negotiation and management of contracts for group participants to purchase pharmaceuticals and related goods and services from pharmaceutical manufacturers and suppliers, as well as providing strategic analysis and advice regarding pharmacy procurement contracts for the purchase and sale of goods and services.

Consumer Health and Drug Information. We maintain a public website, www.DrugDigest.org, dedicated to helping consumers make informed decisions about using medications. Much of the information on DrugDigest.org is written by pharmacists – primarily doctors of pharmacy who are also affiliated with academic institutions. The information on DrugDigest.org includes:

- a drug interaction checker
- a drug side effect comparison tool
- tools to check for less expensive generic and alternative drugs
-
- comparisons of different drugs used to treat the same health condition
- information on health conditions and treatments
- instructional videos showing administration of specific drug dosage forms
- monographs on drugs and dietary supplements
- photographs of pills and capsules

Many features of DrugDigest.org are also available in the limited-access member website at www.express-scripts.com. The member website gives our clients' members access to personalized current and, in many cases, previous drug histories. Members can use the interactive tools from DrugDigest.org to check for drug interactions and find possible side effects for all of the drugs they take.

To facilitate communications between members and physicians, health condition information from DrugDigest.org has been compiled into "For Your Doctor Visit," which is available on the member website. Members follow a step-by-step process to create a brief, customized packet of information they can share with their doctor. Discussing the completed checklists gives both the member and the physician a better understanding of the member's true health status. Information on DrugDigest.org and www.express-scripts.com does not constitute part of this document.

Bio-Pharma Services. Each year, more specialty drugs become available and the number of patients using these drugs rises. For new biopharmaceuticals being launched, we can provide biotech manufacturers product distribution management services. Our trend management programs allow us to assist our clients in an effort to drive out wasteful spend in the specialty pharmacy benefit. We design strategies tailored to each product's needs with a focus on identifying opportunities to educate the marketplace regarding drug effectiveness, proper utilization and payor acceptance.

Personalized Medicine and Pharmacogenomics. We apply the behavioral sciences to prescription drug usage, quantifying both behavioral factors and market forces related to pharmaceutical spend. We view personalized medicine and pharmacogenomics as more than using a few genomic tests to predict the effectiveness of medications. Instead, personalized medicine requires an advanced understanding and application of medical, pharmacy, and behavioral data. A patient's age, lifestyle, overall health, and genes can all influence how the patient responds to medications. We utilize our capabilities in behavioral science principles and pharmacogenomics to offer our clients a comprehensive suite of programs.

Patient Assistance Programs. We provide fulfillment of prescriptions to low-income patients through pharmaceutical manufacturer-sponsored patient assistance programs. We offer centralized eligibility, enrollment and fulfillment services tailored to meet the needs of each client, product, practitioner and patient.

Emerging Markets Services

Overview. Through our EM segment, we operate integrated brands that service the patient through multiple paths. CuraScript Specialty Distribution provides specialty distribution of pharmaceuticals and medical supplies direct to providers and clinics and operates a Group Purchasing Organization for many of our clients. ConnectYourCare ("CYC") provides healthcare account administration and implementation of consumer-directed healthcare solutions. During 2011, 2.8% of our revenue was derived from EM services, compared to 2.6% and 4.4% during 2010 and 2009, respectively.

Payor Services. We provide a comprehensive case management approach to manage care by fully integrating pre-certification, case management and discharge planning services for patients. We assist with eligibility review, prior authorization coordination, re-pricing, utilization management, monitoring and reporting.

Provider Services. Through our CuraScript Specialty Distribution business unit we provide distribution services primarily to office and clinic-based physicians treating chronic disease patients who regularly order high dollar-value pharmaceuticals. We are able to provide competitive pricing on pharmaceuticals and medical supplies.

Segment Information

We report segments on the basis of services offered and have determined we have two reportable segments: PBM and EM. Our domestic and Canadian PBM operating segments have similar characteristics and as such have been aggregated into a single PBM reporting segment. Our EM segment primarily includes the Specialty Distribution operations of CuraScript and our CYC line of business. During the third quarter of 2011 we reorganized our FreedomFP line of business from our EM segment into our PBM segment. All related segment disclosures have been reclassified, where appropriate, to reflect the new segment structure. Information regarding our segments appears in Note 12 – Segment information of the notes to our consolidated financial statements and is incorporated by reference herein.

Suppliers

We maintain an inventory of brand name and generic pharmaceuticals in our home delivery pharmacies and biopharmaceutical products in our specialty pharmacies and distribution centers to meet the needs of our patients, whether they are being treated for rare or chronic diseases. If a drug is not in our inventory, we can generally obtain it from a supplier within one business day. We purchase pharmaceuticals either directly from manufacturers or through authorized wholesalers. Generic pharmaceuticals are generally purchased directly from manufacturers.

Clients

We are a provider of PBM services to several market segments. Our clients include HMOs, health insurers, third-party administrators, employers, union-sponsored benefit plans, workers' compensation plans and government health programs. We provide specialty services to customers who also include HMOs, health insurers, third-party administrators, employers, union-sponsored benefit plans, government health programs, office-based oncologists, renal dialysis clinics, ambulatory surgery centers, primary care physicians, retina specialists, and others.

EXHIBIT B

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
WESTERN DIVISION

IN RE: DEPUY ORTHOPAEDICS, INC. ASR HIP IMPLANT PRODUCTS LIABILITY LITIGATION

This Document Relates to: 1:11 dp 21482 as to
Edward Gearhart
Nita Gillispie
Roger Amburgey
Steven Davis, Administrator of the Estate of Tara Davis

MDL Docket No. 1:10 md 2197

HONORABLE DAVID A. KATZ

ORDER OF DISMISSAL WITH PREJUDICE

Whereas, the claims of the Plaintiffs have been resolved and the parties seek dismissal of all claims asserted against all Defendants in this Court;

Whereas, the parties consent and stipulate to the dismissal of these Plaintiffs' claims with prejudice;

IT IS HEREBY ORDERED that the claims of the Plaintiffs shall be dismissed with prejudice.

Counsel has certified that the requisite assessment is being withheld and deposited into the Common Benefit Fund.

Dated: April 22, 2015

S/ *David A. Katz*
DAVID A. KATZ
U. S. DISTRICT JUDGE

EXHIBIT C

APPENDIX OF UNREPORTED AUTHORITY

Cases

Attorney General Opinion

1

2001 WL 1835377

Unpublished opinion. See KY ST RCP Rule 76.28(4) before citing.

Court of Appeals of Kentucky.

NOT TO BE PUBLISHED

Carey M. ARNOLD, Individually, and on behalf of all similarly situated, and Thomas C. Hectus, Individually, and on behalf of all similarly situated, Appellants

v.

MICROSOFT CORP., Appellee.

No. 2000–CA–002144–MR.

|

Nov. 21, 2001.

Attorneys and Law Firms

For appellants: Wesley P. Adams, Jr., and Alfred J. Welsh of Adams, Hayward, Nicolas & Welsh, Louisville, Ky., and Tom Scheuneman, Corona Del Mar, Cal.

For appellee: John E. Select, Michael M. Hirn, and R. Kenyon Meyer of Dinsmore & Shohl, Louisville, Ky., and Greg Harrison of Dinsmore & Shohl, Cincinnati, Ohio.

Before: DYCHE, GUIDUGLI, and KNOPF, Judges.

OPINION

KNOPF, J.

***1** The appellants, Carey M. Arnold and Thomas C. Hectus sought to bring a class action pursuant to CR 23 against Microsoft Corporation (Microsoft) for violations of the Kentucky Consumer Protection Act. The trial court granted Microsoft's motion to dismiss, concluding that the appellants lacked standing to pursue their anti-trust claims, and that the appellants had failed to otherwise state a claim under the Act. Finding no error, we affirm.

The facts underlying this action are not in dispute. Microsoft is a corporation organized under the laws of the state of Washington. Microsoft primarily focuses on developing and licencing computer software. In particular, Microsoft developed and licences the most commonly used operating system for Intel-based personal computers in the United States: the "Windows" operating system. When this action was filed, "Windows 98" was the most current version of the operating system then in use.

Microsoft distributed Windows 98 through original equipment manufacturers (OEMs), who install the software on personal computers, and through software retailers. However, Microsoft does not "sell" its software to OEMs, retailers or to the public. Rather, the company licences the use of its software to the users. As a condition to the use of Windows 98, purchasers are required to accept Microsoft's "End User License Agreement" (EULA). In summary, the EULA prohibits end-users from copying, modifying or transferring the software, and it sets out the scope of Microsoft's warranty of the product.

The long-running Federal Court proceedings involving Microsoft, while not directly relevant to this appeal, are instructive for their discussion of the relevant issues. In summary, the United States Department of Justice filed suit against Microsoft in 1994, claiming that Microsoft unlawfully maintained a monopoly in the operating system market through anti-competitive means. Although the parties entered into a consent decree, the Justice Department brought a civil contempt action, alleging that Microsoft had violated the decree's provisions. In 1998, the Justice Department and the Attorneys General for nineteen individual states brought an action against Microsoft for violations of the Sherman Anti–Trust Act, [1] and under analogous state laws. The matter proceeded to a trifurcated trial before the United States District Court for the District of Columbia.

[1] 15 U.S.C. § § 1 *et. seq.* (hereafter, "the Sherman Act")

In November, 1999, the District Court entered its findings of fact. The Court found that Microsoft enjoys a monopoly position with its Windows operating system. The Court further found that Microsoft maintained its monopoly power by anti-competitive means, and further had used that position to obtain a monopoly in the internet browser market. [2] Based upon these findings, the Federal District Court thereafter concluded that Microsoft violated § § 1 and 2 of the Sherman Act. [3] To remedy these violations, the court directed Microsoft to submit a proposed plan of divestiture, with the company to be split into an operating systems business and an applications business. [4]

2 *United States v. Microsoft Corp.*, 84 F.Supp.2d 9 (D.D.C., 1999)*(Findings of Fact).*

3 *United States v. Microsoft Corp.*, 87 F.Supp.2d 30 (D.D.C., 2000)*(Conclusions of Law).*

4 *United States v. Microsoft Corp.*, 97 F.Supp.2d 59 (D.D.C., 2000)*(Final Judgment).*

***2** Recently, on appeal, the United States Court of Appeals for the District of Columbia Circuit affirmed in part, reversed in part and remanded for further proceedings. [5] The Federal Circuit Court agreed that Microsoft possessed monopoly power over the relevant market and that it had engaged in certain anti-competitive conduct to preserve that monopoly. However, the Court reversed the District Court's finding that Microsoft had unlawfully attempted to extend its monopoly into the internet browser market. The Circuit Court also reversed the District Court's finding that Microsoft had unlawfully tied its "Internet Explorer" browser to its Windows 98 operating system, and the Court remanded the matter to the District Court for further findings. For substantive and procedural reasons, the Court reversed the portion of the Final Judgment directing that Microsoft be split into separate companies. Finally, the Court found that the trial judge had engaged in impermissible *ex parte* contacts with members of the media and had made public comments about Microsoft which gave rise to an appearance of partiality. Accordingly, the Circuit Court directed that the trial judge be recused from any further proceedings. The United States Supreme Court denied Microsoft's petition for a writ of certiorari. [6]

5 *United States v. Microsoft Corp.*, 253 F.3d 34 (D.C.Cir., 2001).

6 *Microsoft Corp. v. United States*, 2001 U.S. LEXIS 9509, 70 U.S.L.W. 3267 (U.S., Oct. 9, 2001). At this writing, the Justice Department and Microsoft have reached a settlement of the Federal action, and they have submitted the settlement to the trial court for approval. *See United States v. Microsoft Corp.*, No. 98–1232, Stipulation filed November 2, 2001. ___http://news. findlaw. com/cnn/docs/microsoft/msstipprpfnljd110201.pdf_ Nine states (including Kentucky) have agreed to join with the Justice Department in a revised settlement. ___http://news. findlaw.com/cnn/docs/microsoft/prpsrvsfnljdg110601.pdf_ To date, the remaining nine states and the District of Columbia have not agreed to join in the settlement and will be pursuing further remedies before the Federal District Court.

Although the present case arose separately from the Federal litigation, it is based on many of the same facts and allegations developed in those cases. In January of 2000, Arnold and Hectus brought an action against Microsoft based upon Kentucky's Consumer Protection Act, KRS 367.170, and KRS 367.175, Kentucky's version of the Sherman Act. [7] In the complaint, Arnold alleged that, in June 1998, she purchased a Windows 98 CD ROM disk from a retail outlet for $89.00. Likewise, Hectus alleged that he had purchased a new Intel-based personal computer from an OEM. Windows 98 had been installed as the operating system on that computer. They alleged that they had been damaged by Microsoft's monopolistic practices and predatory pricing schemes.

7 15 U.S.C. § § 1 & 2.

In lieu of an answer, Microsoft filed a motion to dismiss the complaint for failure to state a claim. [8] After a full briefing and argument, the trial court granted Microsoft's motion to dismiss. Based upon *Illinois Brick Co. v. Illinois*, [9] the court concluded that KRS 367.175, like the Sherman Act, does not permit indirect purchasers such as Arnold and Hectus to bring a claim for anti-trust violations. The trial court further found that the allegations in the complaint did not state a claim under the KRS 367.170. Arnold and Hectus now appeal from the trial court's order dismissing their complaint.

8 CR 12.02.

9 431 U.S. 720, 97 S.Ct. 2061, 52 L.Ed.2d 707 (1977).

On a motion to dismiss, the trial court must take every well-pleaded allegation of the complaint as true and construe each allegation in the light most favorable to the party against whom the motion is made. [10] In this case however, the issue of standing can be decided as a matter of law based upon the applicable statutes. On review, this Court will confine itself to a determination of whether the matters alleged in the complaint establish appellant's standing to bring the action or whether it is without a "substantial interest" in the subject matter of the controversy. [11]

10 *City of Louisville v. Stock Yards Bank & Trust Co.*, Ky., 843 S.W.2d 327, 328 (1992).

11 *Id.*

***3** Furthermore, because they involve questions of law, the issues of standing and the interpretation of statutes are subject to de novo review. This Court is not required to give deference

to the trial court's decision on these issues. [12] The role of the Court in construing a legislative act is to carry out the intent of the legislature. [13] A statute should be interpreted according to the plain meaning of the language, and a court is not free to add or subtract words. [14] At the same time, a statute must be read in light of the mischief to be corrected, the evil intended to be remedied, and the policy and purpose of the statute. [15]

12 *Commonwealth v. Montaque*, Ky., 23 S.W.3d 629, 631 (2000)(*quoting Floyd County Board of Education v. Ratliff*, Ky., 955 S.W.2d 921, 925 (1997)); *Bob Hook Chevrolet Isuzu, Inc. v. Commonwealth*, Ky., 983 S.W.2d 488 (1998).

13 *Magic Coal Co. v. Fox*, Ky., 19 S.W.3d 88, 94 (2000).

14 *Commonwealth v. Frodge*, Ky., 962 S.W.2d 864, 866 (1998); *Commonwealth v. Allen*, Ky., 980 S.W.2d 278, 280 (1998).

15 *Springer v. Commonwealth*, Ky., 998 S.W.2d 439, 448 (1999); *Sisters of Charity Health Systems, Inc., v. Raikes*, Ky., 984 S.W.2d 464, 469 (1998).

Arnold and Hectus first argue that the trial court erred in finding that indirect purchasers lack standing to bring an action under KRS 367.175(2). In particular, they contend that the trial court should not have applied the reasoning of *Illinois Brick Co. v. Illinois* to interpret Kentucky's version of the Sherman Act. In *Illinois Brick*, the State of Illinois brought suit on its own behalf and on behalf of a number of local governmental entities seeking treble damages under § 4 of the Clayton Act [16] for an alleged conspiracy to fix the price of concrete block in violation of § 1 of the Sherman Act. [17] The State and the local governments were all indirect purchasers of concrete block—that is, they did not purchase concrete block directly from the price-fixing defendants but rather purchased products or contracted for construction into which the concrete block was incorporated by a prior purchaser.

16 15 U.S.C. § 15(a).

17 15 U.S.C. § 1.

The United States Supreme Court held that, with limited exceptions, only overcharged direct purchasers, and not subsequent indirect purchasers, were persons "injured in business or property" within the meaning of § 4, and that therefore the State of Illinois was not entitled to recover under federal law for the portion of the overcharge passed on to it. [18] However, the Supreme Court has since held that nothing in the Sherman Act or in *Illinois Brick* precludes the states from allowing indirect purchasers to bring an anti-trust action. [19] Thus, as the trial court noted, the United States Supreme Court's interpretation of the Sherman Act is not controlling over our interpretation of KRS 367.175.

18 431 U.S. at 729, 97 S.Ct. at 2066, 52 L.Ed.2d at 729.

19 *California v. ARC America Corp.*, 490 U.S. 93, 101–02, 109 S.Ct. 1661, 1665, 104 L.Ed.2d 86, 95 (1989).

Nevertheless, we, like the trial court, find the reasoning of *Illinois Brick* to be highly persuasive. KRS 367.175 is identical to the Sherman Act except that the phrase "among the several states" was replaced by "in this Commonwealth." [20] Because there are no Kentucky cases interpreting KRS 367.175 and because that statute is based upon the Sherman Act, the interpretation of the Sherman Act given by the United States Supreme Court is highly instructive. [21]

20 The relevant portion of the statute, KRS 367.175(2), provides as follows: "It shall be unlawful for any person or persons to monopolize, or attempt to monopolize or combine or conspire with any other person or persons to monopolize any part of the trade or commerce in this Commonwealth".

21 *See e.g. Palmer v. International Association of Machinists and Aerospace Workers. AFL–CIO*, Ky., 882 S.W.2d 117 (1994); *Kreale v. Disabled American Veterans*, Ky.App. 33 S.W.3d 176 (2000).

Arnold and Hectus first note that KRS 367.175 was enacted in 1976, one year prior to the holding of the United States Supreme Court in *Illinois Brick*.Prior to *Illinois Brick*, they claim that indirect purchasers were entitled to recover under the Sherman Act. As a result, they argue that the General Assembly never intended to adopt the United States Supreme Court's interpretation of the Sherman Act. We disagree.

***4** As noted by the trial court, *Hanover Shoe, Inc. v. United Shoe Machinery Corp.*, [22] was the precedent that the Court in *Illinois Brick* relied upon and affirmed. *Hanover Shoe* predated KRS 367.175. In *Hanover Shoe*, the Supreme Court rejected the defense that indirect purchasers rather than direct purchasers were the parties injured by anti-trust violations. The Court held that the proof necessary to trace the effects of the overcharge on the purchaser's prices, sales, costs, and profits, and of showing that these variables would have behaved differently without the overcharge, would unduly

complicate such actions. [23] A second reason for barring the pass-on defense was the Court's concern that only direct purchasers would have a sufficient incentive to bring an action. [24] The Court in *Illinois Brick* applied this reasoning to the opposite situation: to bar indirect purchasers from bringing a claim under the Sherman Act. [25] The General Assembly was undoubtedly aware of this long-standing interpretation of the Sherman Act when it adopted KRS 367.175.

22 392 U.S. 481, 88 S.Ct. 2224, 20 L.Ed.2d 1231 (1968).

23 *Id.*, at 492–493, 20 L.Ed.2d at 1241.

24 *Id.*, at 494, 20 L.Ed.2d at 1241–42.

25 *See also Kansas v. Utilicorp United, Inc.*, 497 U.S. 199, 110 S.Ct. 2807, 11 L.Ed.2d 169 (1990).

Arnold and Hectus next contend that KRS 367.175, unlike the Sherman Act, permits indirect purchasers to bring an action for anti-trust violations. The Consumer Protection Act defines the words "trade" and "commerce" to mean

> the advertising, offering for sale, or distribution of any services and any property, tangible or intangible, real, personal or mixed, and any other article, commodity, or thing of value, and shall include any trade or commerce *directly or indirectly* affecting the people of this Commonwealth. (*Emphasis Added*)

In addition, KRS 466.070 permits a person injured by the violation of any statute to recover from the offender such damages as he or she sustained by reason of the violation. Based upon these two statutes, Arnold and Hectus claim that they are entitled to bring an action for damages under KRS 367.175.

The provisions cited by Arnold and Hectus do not afford the standing which they claim. First, the definition of the terms "trade" and "commerce" uses the phrase "directly or indirectly" to define the scope of the Consumer Protection Act's jurisdiction. Thus, the Act applies to any "trade or commerce" which directly or indirectly affects the people of this Commonwealth. The definition does not purport to define the class who are entitled to bring an action under the Act. [26]

26 KRS 367.175 prohibits monopolization of "trade or commerce in this Commonwealth."The trial court took the position that statute creates a cause of action only for conduct which occurs wholly within this state. We decline to reach the merits of this issue because it is not necessary to the holding of this case.

Furthermore, the Consumer Protection Act does not expressly afford civil remedies to private plaintiffs for violations of KRS 367.175. [27] Where the statute both declares the unlawful act and specifies the civil remedy available to the aggrieved party, the aggrieved party is limited to the remedy provided by the statute. [28] Civil money penalties for violations of KRS 367.175 are available, but only on petition of the Attorney General. [29]

27 In contrast, a number of states expressly allow indirect purchasers to bring an action for anti-trust violations. *See e.g*Ala.Code § 6–5–60(a); Cal. Bus. & Prof.Code § 16750(a); D.C.Code § 28–4509(a); Haw.Rev.Stat. § 480–14(c); 740 Ill. Comp. Stat. 10/7; Kan. Stat. Ann. § 50–161(b); Md. Com. Law Code § 11–209(b)(2)(ii); Mich Comp. Laws § 445.778(8); Minn. Stat § 325D.57; Miss.Code § 75–21–9; S.D. Codified Laws § 37–1–33; Wis. Stat. § 133.18(1)(a). A number of other states have adopted statutes which allow "any person" who has been injured or damaged by an antitrust violation to bring an action for damages. *See e.g.*Colo.Rev.Stat. § 6–4–108; Mo.Rev.Stat. § 416.121; N.C. Gen. Stat § 75–16; Tenn.Code Ann. § 47–25–106; Wash. Rev.Code § 19.86.090. While these statutes do not expressly allow indirect purchasers to bring an action for damages, appellate courts in North Carolina and Tennessee have held that *Illinois Brick* does not apply to actions by indirect purchasers under their anti-trust laws. *Hyde v. Abbott Laboratories, Inc.*, 123 N.C.App. 572, 473 S.E.2d 680 (1996) and *Blake v. Abbott Laboratories, Inc.*, 1996 Tenn.App. LEXIS 184 (1996). But conversely, other state appellate courts have interpreted very similar statutes as prohibiting actions by indirect purchasers. *See Duvall v. Silvers, Asber, Sher & McLaren*, 998 S.W.2d 821 (Mo.App., 1999); *Blewett v. Abbott Laboratories*, 86 Wash.App. 782, 938 P.2d 842 (1997); and *Stifflear v. Bristol–Myers Squibb Co.*, 931 P.2d 471 (Colo.App., 1996).

28 *Grzyb v. Evans*, Ky., 700 S.W.2d 399, 401 (1985).

29 KRS 367.990(8).

KRS 446.070 provides a private right of action for anyone injured by the violation of any statute. However, this statute merely codifies the common law concept of negligence *per*

*se.*It applies only if the alleged offender has violated a statute and the plaintiff was in the class of persons which that statute was intended to protect. [30] KRS 367.175 is part of the Consumer Protection Act. As consumers, Arnold and Hectus are within the general class which the Act was designed to protect. [31] But it is not clear that they are within the class of persons which KRS 367.175 was designed to protect.

30 *Davidson v. American Freightways, Inc.*, Ky. 25 S.W.3d 94, 99–100 (2000).

31 In KRS 367.120(1), the legislative intent of the Consumer Protection Act is set out as follows:

> The General Assembly finds that the public health, welfare and interest require a strong and effective consumer protection program to protect the public interest and the well-being of both the consumer public and the ethical sellers of goods and services; toward this end, a Consumers' Advisory Council and a Division of Consumer Protection of the Department of Law are hereby created for the purpose of aiding in the development of preventive and remedial consumer protection programs and enforcing consumer protection statutes.

***5** Yet even if they are, they remain indirect purchasers. Arnold and Hectus agree that they have not been directly injured by Microsoft's conduct. KRS 446.070 does not give a right of action to every person against any one violating a statute, but only to persons suffering injury as the direct and proximate result thereof, and then only for such damage as they may sustain. [32]

32 *Shields v. Booles*, 238 Ky. 673, 38 S.W.2d 677, 681 (1931).

Arnold and Hectus contend that KRS 446.070 allows a person who has been indirectly injured to bring an action for damages based upon the violation of a statute. In *State Farm Mutual Automobile Insurance Co. v. Reeder*, [33] the Kentucky Supreme Court recognized that KRS 446.070 allows a third party to bring a cause of action based upon a violation of the Unfair Claims Settlement Practices Act (UCSPA). [34] Even though the injured third party was not in direct privity with the insured or the insurer, the Court held that the third party had standing under KRS 446.070 to bring an action based upon the UCSPA.

33 Ky. 763 S.W.2d 116 (1989).

34 KRS 304.12–230.

However, in *Reeder*, the Court held that the Insurance Code was designed to protect not only the insured party, but also persons who are entitled to recover from the insured. Under the UCSPA, an insurance company is required to deal in good faith with a claimant, whether an insured or a third-party, with respect to a claim which the insurance company is contractually obligated to pay. [35] The breach of that duty results in a direct injury to the third party. Consequently, *Reeder* does not hold that a party who has only been indirectly injured by the violation of a statute may bring an action under KRS 446.070.

35 *Davidson v. American Freightways, Inc.*, 25 S.W.3d at 100.

Arnold and Hectus also argue that they have privity with Microsoft by virtue of the EULA, and therefore are direct buyers. Thus, they assert that they have standing to bring an action against Microsoft under *Illinois Brick.*The trial court's reasoning rejecting this argument is sound, and we adopt the following portion of the trial court's opinion:

> Before analysis of this issue, a review of the purpose and effect of Microsoft's licensing scheme as postulated by Plaintiffs is warranted.
>
> 'Under the federal copyright law, the owner of a particular copy ... is entitled, without the authority of the copyright owner, to sell or otherwise dispose of the possession of that copy. This is known as the "first sale doctrine." Under that doctrine, if Microsoft were to sell copies of Windows 98 to any person or entity, those sales would terminate Microsoft's authority to restrict sale or rental of those copies.' [36] ...The consequence would be that after one copy of software were sold (as opposed to licensed) the buyer could now sell copies to anyone, (or just post it on the internet for free and legal downloading by the rest of the world).

36 *Quoting* Plaintiffs' Memorandum In Opposition to Defendant's Motion to Dismiss. Record on Appeal (ROA) at 738–777, p. 27.

> 'If Microsoft relinquished its copyright control of Windows 98 by selling copies, then Microsoft could not maintain its own monopoly pricing of Windows 98 .... As to Windows 98, Microsoft's chain of distribution culminates with its EULA that directly binds consumers who use

that software. The EULA is thus the culmination and an essential aspect of Microsoft's use of federal copyright law to prevent erosion of its monopoly pricing of Windows 98.' [37] ...

37 *Quoting Id.* at 28.

***6** Plaintiff's concede that Microsoft is entitled to copyright protection but, because they are unlawful monopolists, and because they used copyright law to protect that monopoly, their licensing scheme is subject to scrutiny. 'If Microsoft were not an unlawful monopolist, its licensing scheme would not be open to question.'

> The Court is not distracted by the word 'scheme.' A scheme was once a plan or an idea. But the word has taken on a sinister overtone since its adoption in political circles. It is usually preceded by the word 'risky.'
>
> Microsoft's licensing scheme is just a licensing agreement. It is similar to the licensing agreement all software manufacturers require and is a product of the wording of federal copyright laws as opposed to a special contractual relationship that provides some unique benefit to Microsoft. The licencing agreement is merely a reiteration that in return for using Microsoft's copyrighted intellectual property, the user is not going to infringe on Microsoft's copyright. It is a license to use the product in perpetuity, in retura for a single fixed payment. It is the functional equivalent of a sale. The license does not create a legal relationship where the parties are now in privity encompassing all of Microsoft's activities, nefarious or otherwise. Indeed, it would be hard to assess the scope of such a policy on other forms of licenses. [38]

38 *Opinion and Order*, July 21, 2000, ROA at 1402–20, pp. 7–8.

Arnold and Hectus also argue that there is no basis for applying *Illinois Brick* based upon the unique circumstances of this case. The Court in *Illinois Brick* reasoned that allowing an indirect purchaser to recover under the Sherman Act would create a risk of double liability for antitrust defendants because the direct purchaser would still be able to recover the full amount of the overcharge. [39] Arnold and Hectus contend that there is no risk of double recovery in this case because the direct purchasers (retailers and OEMs) have not brought an action against Microsoft.

39 431 U.S. 730–31, 97 S.Ct. at 2067, 52 L.Ed.2d at 715–16

In addition, the Court in *Illinois Brick* noted the difficulty of tracing the amount of the overcharge to the end user. [40] However, the Court suggested that an indirect purchaser may still recover under the Sherman Act in circumstances where the effect of the overcharge can be determined "without reference to the interaction of supply and demand that complicates the determination in the general case." [41] Arnold and Hectus assert that their claims do not present difficult problems of tracing and apportionment.

40 *Id.* at 731, 97 S.Ct. at 20675, 2 L.Ed.2d at 716.

41 *Id.* at 736, 97 S.Ct. at 20705, 2 L.Ed.2d at 719.

We find these arguments unconvincing. A recovery by indirect purchasers such as Arnold and Hectus would still leave the direct purchasers free to bring an action against Microsoft for the same anti-trust violations. Thus, Microsoft remains subject to the risk of double recovery. Likewise, we find no support for Arnold and Hectus's assertion that it will not be difficult to trace the effect of Microsoft's overcharge to the price which they paid for Windows 98. To the contrary, as noted by the trial court, Microsoft's monopolistic behavior was directed at business rivals, not at consumers. Any calculation of the damages suffered by the ultimate users of the product would entail the very sort of complex assumptions which the Court in *Illinois Brick* sought to avoid. As the trial court concluded:

> ***7** Plaintiffs may feel that Microsoft's behavior has inhibited others from entering the market. Maybe so. The essence of that behavior has been predatory pricing to keep potential rivals out. Plaintiffs are the beneficiaries, not the victims.
>
> To postulate that such predatory action creates future injury is speculation, and not suitable for judicial remedy in this action.
>
> In summary, Microsoft may have done wrong, but not to these Plaintiffs. [42]

42 *Opinion and Order*, July 21, 2000, pp. 17–18.

The trial court also dismissed the claims brought by Arnold and Hectus under KRS 367.170. That statute provides that "[u]nfair, false, misleading, or deceptive acts or practices in the conduct of any trade or commerce are hereby declared unlawful."The trial court concluded that KRS 367.170 does not apply to the monopolistic practices alleged in the complaint. Arnold and Hectus argue that they are entitled to

bring their claims against Microsoft under this section based upon the warranty provisions in the EULA. Furthermore, they contend that Microsoft's monopolistic pricing behavior constitutes the sort of conduct which KRS 367.170 was designed to prevent.

We disagree with both contentions. First, the legislature specifically provided a remedy in KRS 367.175 for monopolistic practices. As the more specific section, KRS 367.175 controls over the more general provisions of KRS 367.170. [43]

43 *Withers v. University of Kentucky*, Ky., 939 S.W.2d 340, 345 (1997).

Furthermore, KRS 367.170 does not allow a person who is not in privity with the seller or lessor to bring an action for violations of the statute. [44] The Consumer Protection Act is remedial legislation enacted to give consumers broad protection from illegal actions. [45] However, to maintain an action alleging a violation of the Act, an individual must fit within the protected class of persons defined in KRS 367.220. That section allows any person who "purchases or leases goods or services primarily for personal, family or household purposes and thereby suffers any ascertainable loss of money or property, real or personal, as a result of the use or employment by another person of a method, act or practice declared unlawful by KRS 367.170," to bring an action against the seller or lessor. A person who is not in privity with the seller is not within the class of persons which the Consumer Protection Act was designed to protect.

44 *Skilcraft Sheetmetal, Inc. v. Kentucky Machinery, Inc.*, Ky.App., 836 S.W.2d 907, 909 (1992).

45 *Stevens v. Motorists Mutual Insurance Co.*, Ky., 759 S.W.2d 819, 821 (1988).

The EULA sets out the scope of Microsoft's warranty of Windows 98 to the end user. Arnold and Hectus have not brought any claims based upon that warranty, nor do their claims arise out of the warranty. We agree with the trial court that the warranty does not create privity with Microsoft for all purposes.

In conclusion, we agree with the trial court that indirect purchasers such as Arnold and Hectus are not entitled to bring an action for anti-trust violations under KRS 367.175. Rather, the holding of *Illinois Brick* interpreting the Sherman Act is equally applicable to KRS 367.175. Similarly, Arnold and Hectus cannot bring an action under that section based upon KRS 446.070 or through the warranty provisions of the EULA. Finally, we agree with the trial court that Arnold and Hectus have failed to state a claim under KRS 367.170. Therefore, the trial court properly dismissed the complaint.

***8** Accordingly, the judgment of the Jefferson Circuit Court is affirmed.

ALL CONCUR.

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NOT TO BE PUBLISHED
Court of Appeals of Kentucky.

Mary Jane CALHOUN and Jesse Daymond Calhoun, Appellants
v.
CSX TRANSPORTATION, INC. and Paul McClintock, Jr., Appellees.

No. 2007–CA–001651–MR.
|
Jan. 23, 2009.
|
Discretionary Review Granted by Supreme Court Nov. 18, 2009.

Appeal from Bullitt Circuit Court, Action No. 02–CI–01120; Rodney Burress, Judge.

Attorneys and Law Firms

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Before ACREE and NICKELL, Judges; KNOPF,[1] Senior Judge.

1 Senior Judge William L. Knopf sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and Kentucky Revised Statutes (KRS) 21.580.

OPINION

KNOPF, Senior Judge.

***1** Mary Jane Calhoun and Jesse Daymond Calhoun (the Calhouns or the appellants) appeal from an order of the Bullitt Circuit Court awarding summary judgment to CSX Transportation, Inc., and Paul L. McClintock, Jr., in a lawsuit arising out of a railroad crossing accident in which a CSX train engineered by McClintock struck a vehicle driven by Mary. The Calhouns contend that the trial court erred in awarding the appellees summary judgment. For the reasons stated below, we affirm.

FACTUAL AND PROCEDURAL BACKGROUND

In the light most favorable to the appellants, the facts are as follows. On December 12, 2001, at about 6:30 a.m., Mary dropped off two of her sons at the Bullitt County work site of their employer, Bullitt County Sanitation (BCS), a privately owned sanitation company. She had three sons who worked at the facility and regularly dropped them off at the site. She had made the trip most weekdays for about three months.

The work-site is located on the west side of Preston Highway in Shepherdsville across the CSX railroad tracks that run through the area. The tracks run north-south. Access to the BCS site is by an unnamed road running east-west toward the tracks.[2] The road is paved for a distance, but the paved portion ends short of the crossing and continues forward as a gravel road across the tracks. At the point of termination of the paved portion, the Bullitt County Highway Garage is on the right. The paved portion of the road is maintained by the county (for convenience in reaching the garage) but the gravel portion is not.

2 The road is sometimes referred to in the record as the County Garage Road.

On the west side of the tracks are two tracts of property, one owned by Kerrin Hester and the other by Charles Burris. Hester's son operated the BCS facility on the Hester tract.[3] As further discussed below, the record discloses that the unpaved portion of the road is not part of the public or county highway system and is not a part of the highway system of, nor maintained by, the state, Bullitt County, or any other local government. Because CSX believed the crossing to be a private crossing (as opposed to a public crossing), it did not maintain the crossing pursuant to the standards required for a public crossing. One of the consequences of this is

that there is extensive vegetation growing along the west side of the crossing. The Calhouns allege that the vegetation unreasonably blocked the sitelines up and down the tracks.

3 The facility is now out of business.

Mary had dropped her sons off at the facility many times, had traversed the track regularly in both directions, and was familiar with the crossing. She had stopped for passing trains on several occasions. After dropping off her sons on this occasion, she was proceeding east back across the crossing toward Preston Highway. In the meantime, a CSX train operated by Paul McClintock was traveling northbound toward the crossing at fifty-two miles per hour, and accelerating to fifty-three miles per hour. It was foggy and dark.

McClintock and the train's conductor, Ed Harris, observed Mary's vehicle approaching the crossing through the treeline along the west side of the tracks. McClintock and Harris testified in their depositions that the train sounded its horn to warn Mary of its approach. However, according to the train's data recorder, the train's whistle was not sounded during the seven seconds prior to the train's reaching the crossing—a distance of 500 feet,[4] and thus there is a factual dispute concerning this issue. For whatever reason, Mary failed to realize the train was bearing down on the crossing and proceeded over the tracks.[5] She almost made it (and thus a second, or a fraction thereof, could have made the difference); however, the train clipped the back of her vehicle and spun it around. Mary was ejected from the vehicle and sustained severe injuries. She has no recollection of the incident.

4 There was testimony to the effect that the data recorder's recording of horn usage was subject to error. However, for purposes of our review we will presume the recorder data to be correct.

5 One of Mary's sons, Paul, testified that he witnessed the accident and that it did not appear that Mary stopped at the crossing.

***2** As a result of the foregoing events, on December 10, 2002, the Calhouns filed a complaint against CSX and McClintock in Bullitt Circuit Court. The complaint alleged negligence by these defendants in causing the accident. More specifically, they alleged that CSX violated its duties by keeping and maintaining the railroad crossing in a highly dangerous and unsafe condition; operating the train at an excessive speed; failing to keep a proper lookout for crossing vehicles; and failing to adequately warn by horn or otherwise. BCS, Hester, and Burris were later added as defendants.

Following extensive discovery, both CSX and McClintock filed motions for summary judgment. On March 21, 2007, the trial court granted CSX and McClintock summary judgment.[6] The trial court reasoned that these defendants had not breached any duty owed to Mary principally because: (1) the crossing was a private crossing and a railroad company's only duty under such circumstances is to warn a member of the public when he is observed in actual peril of being struck by the train; (2) because the crossing was a private crossing CSX had no duty to clear the vegetation which allegedly blocked the sitelines; and (3) that the crossing was not an ultrahazardous crossing, was not used pervasively by the public, and Mary did not rely upon the train signaling so as to alter CSX's duties from the general rule applicable to private crossings. The Calhouns' motion to alter, amend, or vacate was denied. This appeal followed.

6 By agreement of the parties BCS, Hester, and Burris were dismissed from the lawsuit.

STANDARD OF REVIEW—SUMMARY JUDGMENT

The standard of review on appeal when a trial court grants a motion for summary judgment is "whether the trial court correctly found that there were no genuine issues as to any material fact and that the moving party was entitled to judgment as a matter of law."*Scifres v. Kraft*, 916 S.W.2d 779, 781 (Ky.App.1996); CR[7] 56.03. "The trial court must view the evidence in the light most favorable to the nonmoving party, and summary judgment should be granted only if it appears impossible that the nonmoving party will be able to produce evidence at trial warranting a judgment in his favor."*Lewis v. B & R Corp.*, 56 S.W.3d 432, 436 (Ky.App.2001), *citing Steelvest v. Scansteel Serv. Ctr., Inc.*, 807 S.W.2d 476, 480–82 (Ky.1991).

7 Kentucky Rules of Civil Procedure.

"The moving party bears the initial burden of showing that no genuine issue of material fact exists, and then the burden shifts to the party opposing summary judgment to present 'at least some affirmative evidence showing that there is a genuine issue of material fact for trial.' " *Lewis*, 56 S.W.3d at 436, citing *Steelvest*, 807 S.W.2d at 482.The trial court "must examine the evidence, not to decide any issue of

fact, but to discover if a real issue exists." *Steelvest,* 807 S.W.2d at 480.The Kentucky Supreme Court has held that the word "impossible," as set forth in the standard for summary judgment, is meant to be "used in a practical sense, not in an absolute sense." *Lewis,* 56 S.W.3d at 436."Because summary judgment involves only legal questions and the existence of any disputed material issues of fact, an appellate court need not defer to the trial court's decision and will review the issue de novo." *Id.*

PRIVATE/PUBLIC CROSSING ISSUES

***3** The duties a railroad owes to those traversing its tracks are considerably different depending upon whether the crossing is public or private. The appellees contend that the crossing is a private crossing and subject to the lesser duties applicable thereto. Accordingly, we must first consider whether the subject crossing is public or private. The trial court determined the crossing to be a private crossing. We believe its conclusion is correct.

KRS Chapter 177 addresses, among other things, state and federal highway matters. In turn, KRS 177.120 to KRS 177.210 address railroad crossings in relation to the highway system. KRS 177.010(5) provides a definition for a public railroad crossing applicable to Chapter 177:

> (5) "Public grade crossing" means the at-grade intersection of a railroad track or tracks and a road or highway that has been dedicated to public use and incorporated into either the state primary road system or the highway or road system of a county or municipality[.]

The appellants argue that the foregoing definition is not applicable in a railroad negligence case because the definition is intended to be limited to its usage in Chapter 177. However, case authority mirroring KRS 177.010(5) confirms that this statutory definition is appropriate for application in determining whether a crossing is public or private in a railroad crossing negligence case such as the present one. *See Deitz' Adm'x v. Cincinnati, N.O. & T.P. Ry. Co.*, 296 Ky. 279, 176 S.W.2d 699, 701 (1943) ("For a crossing to be a public one the road or street on which it is situated must be a public road or street established either in the manner prescribed by statute or by dedication, and if in the latter manner there must be an acceptance.") As such, we disagree with the appellants that the statutory definition has no applicability in the present case.

In summary, to be classified as a public railroad crossing, the road traversing the crossing must: (1) have been dedicated to public use and (2) have been incorporated into either the state primary road system or the highway or road system of a county or municipality. It follows that a crossing that does not meet the foregoing criteria is a private crossing. The record is replete with evidence that the unnamed road at issue in this case does not meet the foregoing standards.

Carroll Samuels was employed at the time of his deposition as a supervisor for the Bullitt County Road Department. He had been employed there for 26 years. Samuels provided a deposition on behalf of the appellees addressing the status of the unnamed road leading to the crossing. He testified that the road was maintained by the county up to where the garage was located, but that the gravel portion that heads west from there across the tracks was not. Samuels testified that the road has not been dedicated to public use, and that it has not been incorporated into the state or county road system. He testified that the road would be more accurately described as a driveway leading to the Burris and Hester property on the west side of the track than a road.

***4** There is no evidence contained in the record that any other governmental unit maintained the gravel portion of the road. Burris and Hester testified that they maintain the gravel portion of the road by replacing gravel as needed. Further the Kentucky Transportation Cabinet's listing of the public roads in Bullitt County does not include the road. Nor do the City of Shepherdsville or Bullitt County road listings include the road as part of their road systems. Finally, the U.S. Department of Transportation railroad crossing listing catalogs the crossing as a private crossing.

On the other hand, the appellants cite us to no evidence in the record which would indicate that that the road has been dedicated to public use and incorporated into either the federal, state, county, or municipality road system. It follows that there is a total failure of evidence in their favor upon this point.

The appellants argue to the effect that the crossing should be deemed a public crossing because there is signage there consistent with a public crossing; because CSX does not have a private crossing agreement with Hester and Burris though

it generally is its policy to have such agreements with private crossing owners; and because Hester and Burris were not aware that it was not a public crossing. However, these factors do not supersede the rather straight-forward statutory and case law definitional requirements for classification as a public crossing, and we are thus unpersuaded that they are sufficient to transform the crossing into a public one.

In summary, the record discloses that the road leading to the crossing is a private road, and, it follows, that the crossing is, as a matter of law, a private crossing. We accordingly base the remainder of our review upon this premise.

DUTIES OWED AT PRIVATE CROSSING

In light of our conclusion that the crossing is a private crossing, we next consider the duty the appellees owed to Mary to maintain the crossing for safe passage and warn her of the approaching train.

A negligence action requires proof of: (1) a duty on the part of the defendant; (2) a breach of that duty; (3) a consequent injury, which consists of actual injury or harm; and (4) legal causation linking the defendant's breach with the plaintiff's injury. *Pathways, Inc. v. Hammons*, 113 S.W.3d 85, 88–89 (Ky.2003). Thus to prevail in her lawsuit the appellants must show, first of all, that the appellees owed a duty to Mary and, if so, that they breached that duty. Duty presents a question of law, and thus is reviewed *de novo. Id.* at 90.

The duties owed to a motorist or pedestrian crossing the tracks at a private crossing are minimal.

> ...KRS 277.190 requires that each locomotive give a signal of its approach at each public crossing, while the general rule has been established that a railway company owes no duty of lookout or warning at private crossings. *Louisville & N.R. Co. v. Survant, Ky.*, 19 Ky.L.Rptr. 1576, 44 S.W. 88 (1898); *Deitz' Adm'x v. Cincinnati, N.O. & T.P. Ry. Co.*, 296 Ky. 279, 176 S.W.2d 699 (1943). Operators of a train at or near a private crossing are not liable for injuries to a traveler at that crossing unless after discovery of his peril, they fail to use all means to avoid the accident.*Stull's Adm'x v. Kentucky Traction & Terminal Co.*, 172 Ky. 650, 189 S.W. 721 (1916); *Chesapeake and Ohio Railway Company v. Hunter's Adm'r*, 170 Ky. 4, 185 S.W. 140 (1916).

***5** *Hunt's Adm'r v. Chesapeake & O. Ry. Co.*, 254 S.W.2d 705, 706–07 (Ky.1952) (citations modified).

> At a private crossing the only duty of a railroad is to exercise ordinary care to save a person from injury after his peril is discovered by those in charge of the train. The person crossing the track must exercise ordinary care for his own safety." Chesapeake and *Ohio Railroad Company v. Hunter's Adm'r.*, 170 Ky. 4, 185 S.W. 140 (1916).

Maggard v. Louisville & N.R. Co., 568 S.W.2d 508, 509 (Ky.App.1977).

Nor does a railroad, contrary to the contentions of the appellants, have a duty to clear away vegetation at a private crossing which may obstruct the public's sitelines up and down the track. This issue was addressed in *Spalding v. Louisville & N.R. Co.*, 281 Ky. 357, 136 S.W.2d 1 (1940). In that case, Spalding was crossing the tracks by automobile at a private crossing located on a farm owned by John Barber which, like the crossing in the present case, had vegetation blocking the sitelines. *Spalding* addressed the issue as follows:

> ... the precise question was before this Court in the case of *Gividen's Adm'r v. Louisville & Nashville Railroad Co.*, 17 Ky .Law Rep. 789, 32 S.W. 612, 613 (1895). The owner of a private passway (regardless of how it was acquired), crossing the railroad track from her residence to a portion of the home premises on the other side of the track, was killed by a train colliding with her, and to recover the damages sustained by her estate, her administrator filed the action against the defendant charging as negligence on its part "The failure of the defendant to cut the bushes and other undergrowth near its road, so as that one on the track might be seen, and such injuries in this way avoided," also that such permissible growth "obstructed the view of the decedent as she approached the crossing, and, in attempting to pass over the track, she was run over and killed."

> The Court held that the crossing was strictly a private one, and "therefore a signal was not necessary or required to be given of the approach of the train," which latter is thoroughly established in this jurisdiction and is conceded by counsel for plaintiffs. *It was furthermore held in that case that it was not the duty of the railroad company (the servient owner at that point) to keep its right of way clear of obstructing growths for the benefit of the dominant owner, and which is the precise point involved in this case. That opinion has never been overruled, and it appears to be in accord with the generally declared rule on the subject* [.]

Spalding, 136 S.W.2d at 3 (emphasis added; citation modified).

Thus, the general rule is that at a private crossing, the railroad has no duty to warn a person unless he is observed in immediate peril, nor does it have the duty to clear away vegetation which may obstruct the traversing public's line of sight at the crossing. Accordingly, absent an exception, the foregoing defines the duties the appellees owed to Mary in the present case.

***6** There are three principal exceptions to the general private crossing duties as set forth above: (1) the assumed duty exception; (2) the ultrahazardous crossing exception; and (3) the habitual use exception. Mary contends that each applies in the present case. We consider these exceptions in the following sections.

ASSUMED DUTY EXCEPTION

The first exception concerns instances where the railroad has by custom adopted the practice of signaling at a private crossing and thus accustoming the public into depending upon signal to warn of an approaching train.

The rule is stated as follows:

> The rule of customary practice and the right to rely upon it in a case of this kind is like that relating to the approach of a train to a private crossing. Thus, a train may approach and run over a private crossing without signals unless it has been customary to give reasonable and timely signals and persons using the crossing were accustomed to rely upon them. Where it had been customary to do that *and the traveler relied upon receiving such warning*, the failure to give it is negligence.

Illinois Central R. Co. v. Maxwell, 292 Ky. 660, 167 S.W.2d 841, 843 (Ky.1943) (citing *Chesapeake & O. Ry. Co. v. Young's Adm'r*, 146 Ky. 317, 142 S.W. 709 (1912); *Kentucky Traction & Terminal Co. v. Brawner*, 208 Ky. 310, 270 S.W. 825 (1925); *Illinois Cent. R. Co. v. Applegate's Adm'x*, 268 Ky. 458, 105 S.W.2d 153 (1937)) (emphasis added).

McClintock testified that he customarily gave a signal at this crossing, and CSX concedes that it had adopted this as its policy. As such, the first prong of the test is met—CSX had adopted the custom and practice of giving a signal at this private crossing.[8] However, a crucial element of this exception is that the plaintiff "*relied upon receiving such warning*." Mary Calhoun's deposition testimony indicates that although she had dropped off her sons many times at the BCS worksite and had had to stop for trains to pass on several occasions, she had never heard a train signal at the crossing:

8 While CSX concedes this point, Burris and Hester (those in the best position to know) testified that trains did not always signal at the crossing.

> Q. When you had been to this sanitation place before and had encountered trains there, we talked about that earlier, had you—do you have a memory of hearing the horns being sounded?
>
> A. Never did hear a whistle. All the time I took 'em, I never did hear one.
>
> Q. How many times do you think you encountered—I think you told me between one and ten?
>
> A. Uh-huh.
>
> Q. And I'm not gonna—
>
> A. If you're talking about crossing the railroad?
>
> Q. Yes.
>
> A. Yeah. But like I say, I'd be setting there when I let my sons out and I'd see trains passing, and I never did hear a whistle. Never did hear a whistle.

....

Q. And—and your belief is that when those trains would go by, they would just go by silently?

A. Never heard a whistle.

Because Mary had not come to rely upon the giving of a horn warning at the crossing, the exception does not apply. Accordingly, the appellants may not avail themselves of this exception to alter the general duties applicable to a private crossing.

ULTRAHAZARDOUS CROSSING EXCEPTION

***7** An exception to the ordinary duties imposed upon a railroad at a public crossing arises in cases concerning an "ultrahazardous" crossing. An ultrahazardous crossing generally refers to a crossing where the terrain layout is such that someone crossing the tracks at that location is unable to readily observe an approaching train. The requisites for a crossing to qualify under this exception have been stated as follows:

> [T]he crossing must be so exceptionally dangerous on account of a natural or habitual artificial obstruction, or of other immediate surroundings, that a jury could say that one exercising ordinary care and prudence in traveling the highway can not see an oncoming train or become aware of its near approach until he is practically in immediate danger and unable by the exercise of ordinary care to avoid being struck by the train.

Cincinnati, N.O. & T.P. Ry. Co. v. Hare's Adm'x, 297 Ky. 5, 178 S.W.2d 835, 837 (Ky.1944). [9]

9 The appellants rely upon the following quote from *Louisville & N.R. Co. v. Quisenberry*, 338 S.W.2d 409, 411 (Ky.1960): "However, there is a well recognized exception to the general rule where there exist peculiar or extraordinary circumstances surrounding a crossing and the facts are known to trainmen. In such cases reasonable care may require that an alarm or signal be given by the approaching train and the question of whether circumstances are such that require a signal is for the jury to determine" to argue that the rule as stated in *Hare's Adm'x* has been abrogated. However the rule as stated in *Hare's Adm'x* has not been specifically overruled and, accordingly, we are bound by its holding.SCR 1.030(8)(a); *City of Louisville v. Slack*, 39 S.W.3d 809, 811 (Ky.2001).

The appellants contend that the ultrahazardous crossing doctrine is applicable based upon the vegetation and treeline in the area of the crossing that obscures the view of a person crossing over the tracks from the west and looking south. As previously noted, CSX had no duty to clear the vegetation. Moreover, the above requisites to qualify as an ultrahazardous crossing include natural obstructions, and thus obstructive vegetation could bring a crossing into the category.

We begin by noting Mary's deposition testimony concerning the problem of the obstructive vegetation:

Q..... Let me ask you another question. Do you agree that at this crossing, based upon your past experience there, it is possible to pull up to the tracks close enough that you can see up the tracks without anything blocking your view of the tracks?

A. Best I can remember, yeah.

Q. And that's what you would customarily do there, you would pull up to the tracks coming out?

A. Yes.

Q. You would stop your vehicle at a position where you could see up the tracks to our right?

A. Both ways, yes.

Q. Without anything blocking your view, correct?

A. Best of my ability, yes.

Q. And although you do not remember, obviously from what you've told me, what happened on this day, you believe, based upon your habit there, that is exactly what you would have done on this day?

A. Yes.

Q. You would have—

A. Stopped.

Q. —pulled up and stopped—

A. Yes.

Q. —at a position where you would have no obstructions to your view looking up the tracks?

A. The best I can remember, yes.

....

Q. You were aware, obviously, that there were obstructions to your view, namely those trees?

A. Yes.

Q. And that you had to get past those trees in order to have that unblocked view of the tracks?

A. Yes.

Q. And you were aware that because of that you had to pull past the trees and stop in order to have that unobstructed view of the tracks.

A. Yes.

***8** Thus Mary testified that it was possible to pull up past the treeline and have an unobstructed view up and down the tracks. Nevertheless, the appellants cite us to the testimony and "forensic mapping" of Dr. Jerry Cusick and his opinions as to the minimal sight distances available to a motorist in close proximity to the crossing. They note that it is his opinion that at a distance of 22 feet from the crossing heading east, the sight distance to the north is only 263 feet, at which point a train would be only 3.38 seconds from the crossing. [10]

10 Dr. Cusick's calculations are based upon the positioning of a tree (since cut down) nearest the crossing in a location strongly contested by the appellees.

As previously noted, under our summary judgment standards, in the usual case we are required to view the evidence in the light most favorable to the appellant. *Steelvest, supra.*The testimony and forensic modeling of Dr. Cusick would, therefore, despite Mary's testimony, normally be sufficient to create a genuine issue of material fact concerning whether this was an ultrahazardous crossing. *See Louisville & N.R. Co. v. Quisenberry,* 338 S.W.2d 409 (Ky.1960) (siteline of 300 feet created extrahazardous crossing). [11] However, "the mere existence of some alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment; the requirement is that there be no genuine issue of material fact."*Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247–48, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986)."When opposing parties tell two different stories, one of which is blatantly contradicted by the record, so that no reasonable jury could believe it, a court should not adopt that version of the facts for purposes of ruling on a motion for summary judgment."*Scott v. Harris,* 550 U.S. 372, 127 S.Ct. 1769, 1776, 167 L.Ed.2d 686 (2007) (Video tape of police chase discrediting 42 U.S.C. § 1983 plaintiff's depiction of the chase).

11 The ultrahazardous crossing in *Quisenberry* is described in the opinion as follows: "The railroad tracks which bisect this road, run, as we have indicated, from north to south. The southbound track is on the west side of the road's right-of-way and the northbound track is on the east side. About 300 feet north of the crossing is a sharp curve in the track and on the west, or concave side of the curve, is a bluff or cut which obscures the vision of an operator proceeding south. There is some testimony to the effect that a person approaching within 34 feet of the crossing would be able to see the track for about 500 feet north of the crossing, but when getting closer, he could see only 300 feet in that direction. It is not explained why this is so and we surmise that at the former point one might be able to see behind the bluff and further up the track. To the south of the crossing in the direction the automobile was carried is a stretch of relatively straight track. This too ends in a curve."338 S.W.2d at 410.

In this case, Dr. Cusick's testimony and forensic mapping is blatantly contradicted by the record by way of the photographic evidence made near the time of the accident. This contradiction is well illustrated by the photographs included at tab 4 [12] and tab 5 [13] of the appellees' brief.

12 Contained in the record as Exhibit 1 (top photograph) of Mary Calhoun's deposition.

13 Contained in the record as Exhibit D1 of Kerrin Hester's deposition.

The photographs depict the view heading east across the tracks looking to the south—the route Mary was traveling when she was hit. Clearly visible in the pictures is a railroad crossing sign, which is described in the appellants' own exhibits as being 18 feet from the center of the track (*see*, e.g., appellants' brief, appendix 15). There is a wide gravel shoulder west of the tracks that extends well beyond the crossing sign. The pictures are taken from behind the crossing sign, and it is obvious that a vehicle could have safely pulled to that position, or forward of it, and stopped prior to crossing the tracks. From this position a vehicle is beyond the treeline and vegetation, and has a clear view down the tracks to the

south. The tracks are unwaveringly straight at this point, and the view is virtually to the horizon. In summary, these photographs contradict the allegation that this crossing is ultrahazardous.

***9** As a matter of law the circumstances are not such "that a jury could say that one exercising ordinary care and prudence in traveling the highway can not see an oncoming train or become aware of its near approach until he is practically in immediate danger and unable by the exercise of ordinary care to avoid being struck by the train."*Hare's Adm'x,* 178 S.W.2d at 837.Accordingly, the ultrahazardous crossing doctrine is inapplicable to the present case.

HABITUAL USE EXCEPTION

The final exception involves a private crossing that is heavily used by the public such that it takes on the character of a public crossing. The rule is described as follows:

> [W]hen a private crossing is used by the public generally with the consent of the railroad company, a duty devolves to give warning of the approach of trains; in other words, if a crossing is a public one, there is no doubt about the duty to give warning or signal; if the crossing is a private one and sufficient evidence is introduced to show habitual use of the crossing by the public, then this use may impose the duty of lookout and warning.*Louisville & N.R. Co. v. Arrowood's Adm'r,* 280 Ky. 658, 134 S.W.2d 224 (1939); *Louisville & N.R. Co. v. Foust,* 274 Ky. 435, 118 S.W.2d 771 (1938). However, this court has never, so far as we have been able to find, established a definite rule as to the number of people who must use a crossing each day before it may be said that it is a public crossing. In *Louisville & N.R. Co. v. Arrowood's Adm'r,* 280 Ky. 658, 134 S.W.2d 224, 226 (1939), we said:
>
> > 'In the *Stidham case [Louisville & N.R. Co. v. Stidham's, Adm'x,* 194 Ky. 220, 238 S.W. 756 (1922)], the precedents were reviewed and it was held that the duty of trainmen to anticipate the presence of persons upon the track, and to exercise ordinary care to discover and avoid injuring them, does not arise where the greatest number of persons using the track, according to the largest estimate of many of the witnesses, was 150 persons each 24 hours, and the place of the accident was in the country, although the track connected two incorporated towns located about 3 miles apart. We have held insufficient to establish those duties estimates of the use of the track in such places by as many as 60, 75, or 100, or 125 persons every day.'
>
> It seems that in such cases the effect of the use in the particular case is a matter of law for the court to determine.

Hunt's Adm'r v. Chesapeake & O. Ry. Co., 254 S.W.2d at 707 (citations modified).

Thus it would appear that at least 150 crossings per day would be required for this exception to apply. There is no evidence of record which would indicate that the number of crossings at the subject site is anywhere near this level. While it appears that BCS had a total of 12 trucks, according to Paul Calhoun the company normally ran only 4 to 6 at a time, and that each truck made 3 to 4 trips in and out daily. Based upon 6 trucks and 4 trips, this would be 48 crossings in and out daily by the trucks. Assuming two men to each truck, these 12 employees made 24 crossings daily coming to and leaving work (or 36 crossings assuming 3 men per truck). In addition, a few occasional customers crossed the tracks to pay their bills, and of course Hester and Burris used the crossing daily. This number of crossings, however, is well under the level required for the exception to apply. Accordingly, the exception is not applicable.

COMMON LAW DUTY TO WARN

***10** The appellants argue that failing all else, the common law duties owed to travelers by a railroad imposed a duty upon CSX and McClintock to have provided a warning to Mary as she approached the crossing. "The common law embraces the duty of giving adequate warning of the approach of a train, of keeping a lookout ahead, and of operating the train at a speed commensurate with the care required under the circumstances."*Illinois Cent. R. Co. v. Arms,* 361 S.W.2d 506, 509 (Ky.1962) (citing *Piersall's Adm'r v. Chesapeake & O. Ry. Co.,* 180 Ky. 659, 203 S.W. 551 (1918)).

However, the case law we have cited herein *is* the common law applicable to a railroad's duty as it has developed in

Kentucky in the area of private railroad crossings. The appellants may not avoid the general rules concerning private crossings discussed herein simply by invoking a cause of action based upon common law principles. As such, the cases cited in the preceding sections are the controlling authorities in this action, and this argument is without merit.

BREACH OF DUTY

Having determined that the duty owed by the appellees are those applicable to a private crossing as set forth above, we next consider whether there is a genuine issue of material fact concerning whether that duty was breached.

First, because this was a private crossing, CSX breached no duty owed to Mary by failing to clear the vegetation in the area so as to provide her with a better siteline down the tracks to the south. Moreover, as previously noted, when the tracks are properly approached and crossed, an unobstructed view down the tracks is available. The vegetation issue does not defeat summary judgment.

Second, while the engineer and conductor both observed Mary's vehicle heading toward the crossing while she was still on the west side of the treeline, she was not yet in immediate peril. She was still a considerable distance from the crossing and the general rule that the train had no duty to give warning was at that point operative. We believe that application of the private crossing rule as stated above did not require the train to sound its horn merely because Mary was observed heading toward the crossing, but not at the time in peril.

Third, we note that Mary's car would have appeared into view as it came from behind the treeline, approached the crossing, and started over the tracks. It stands to reason that she would have at this time have been in immediate peril and the private crossing rules would have required the train to sound a warning. However, the appellants do not make the argument that had the train sounded a warning at that point the accident could have been avoided. While the appellants received leave to file a 40–page brief, they do not have an argument section addressing whether the appellees breached their duty under the standards applicable to a private crossing; that is, by failing to warn as Mary came into immediate peril when she began to traverse the tracks as the train sped toward her.

***11** The only references we can find alluding to this are in the appellants' Statement of the Case where they state "[a]ny warning before arrival could have prevented the crash because Ms. Calhoun almost made it through the crossing. This collision almost did not happen," Appellants' Brief, pg. 1, and in their argument heading "McClintock Failed to Act as a Reasonably Prudent Railroad Engineer" where they state "[a]lternatively, he [McClintock] knew or should have known that if she were in the zone of danger and he sounded the horn she may have been able to take emergency evasive action to get through the crossing faster."Appellants' Brief, pg. 37.

While as Mary began to traverse the tracks and came into immediate peril under the private crossing rules the railroad had a duty to sound a warning, they cite us to no testimony or other evidence of record alleging that if the train sounded its horn the accident could have been avoided. Moreover, the record discloses that application of the train's brakes by the time Mary began her approach over the tracks would have had no impact on its speed prior to making contact with Mary's vehicle.

While it seems superficially plausible that if the train had sounded a warning as Mary started over the tracks then she could have avoided the accident by, for example, "flooring it", in the absence of the appellants' development of the issue in the proceedings below, and proper briefing before us, we are constrained to conclude that our speculation that the accident may have been avoided is insufficient for us to determine that there is a jury issue. We could just as well speculate that by the time Mary started across the tracks it was too late for a warning to have done any good. Simply put, the appellants failed to develop the issue—either below or before us—as a ground for avoiding summary judgment.

As such, we are constrained to agree with the trial court that the appellees are entitled to summary judgment.

TIMELINESS OF MCCLINTOCK'S MOTION

In filing the original motion for summary judgment, counsel for the appellees neglected to include McClintock as a party to the motion. Upon realizing the error, at the hearing on the motion counsel moved to include McClintock as a party to the motion. Counsel for the appellees represented that the same arguments contained in the original motion were likewise applicable to McClintock. Counsel for the appellants objected.

Because of the scheduled trial date, it was too late to file a new motion for McClintock and still provide the appellants with the 10 days' notice provided in CR 56.03. This was discussed and it was agreed (though still over the appellants' objection) that counsel for the appellees would file a motion applicable to McClintock that day, and the appellants would be given a week to respond.

CR 56.03 provides as follows:

> *The motion [for summary judgment] shall be served at least 10 days before the time fixed for the hearing.*The adverse party prior to the day of hearing may serve opposing affidavits. The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, stipulations, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages. (Emphasis added).

***12** In *Perkins v. Hausladen*, 828 S.W.2d 652 (1992), Justice Leibson addressed the CR 56.03 10–day notice requirement, and its importance, as follows:

> The only Kentucky case squarely addressing this issue [of compliance with CR 56.03's 10–day notice requirement] is *Rexing v. Doug Evans Auto Sales, Inc.*, Ky.App., 703 S.W.2d 491 (1986). In *Rexing* the court viewed it as error to force a hearing on summary judgment short of the ten days notice requirement, stating:
>
> "We see no reason to permit appellee to circumvent the notice requirements of our Civil Rules by ambushing appellants with last minute motions and early morning hearings. The trial court erred in refusing to grant appellants a continuance.["] *Id.* at 494.
>
> The treatise on *Kentucky Practice* by Bertelsman and Philipps, 4th ed. Civil Rule 56.03, Comment 3, states:
>
> > "As the annotations following the sub-rule demonstrate, the 10–day lead time provided before hearing the motion is extremely important and, although not jurisdictional, may not be lightly disregarded.... [R]equests for extension of time to respond to such motions are usually freely granted, and it may be an abuse of discretion for the trial court to refuse to grant reasonable extensions."
>
> We need not decide whether there is an inflexible rule that violation of the ten day notice requirement requires automatic reversal. There may be unusual situations where no possible prejudice could have resulted from a premature hearing. But this case is not one of them. As pointed out in their Brief, the [nonmovants] were put at a "disadvantage by not being able to put on any affidavits, additional legal research, nor other evidence to contradict the motion."

Perkins, 828 S.W.2d at 656–57.

The above discussion suggests that a violation of the CR 56.03 notice provisions requires "automatic reversal" except in "unusual situations where no possible prejudice could have resulted from a premature hearing."We believe that this is a situation where no reversal is required. The arguments applicable to McClintock were identical to those applicable to CSX, so the appellants had timely notice of the applicable arguments. Moreover, since trial was scheduled to begin in less than 10 days, there was no way the notice requirement could have been met and the motion ruled upon without rescheduling the trial. Further, if McClintock was indeed entitled to summary judgment (which is how it turned out), it would have made no sense to proceed with the trial simply because his motion could not be timely addressed for procedural reasons. Under these circumstances we find no prejudice to the appellants in preparing for the late-filed motion, and accordingly find no abuse of discretion in the trial court's permitting of the late-filed motion.

MCCLINTOCK'S PRESCRIPTION DRUG USE

The record discloses that McClintock suffers from migraine headaches and recurrences of sickness related to malaria he contracted while serving in the military. As a result he takes a variety of prescription drugs, including valium, oxycontin, and hydrocodone. The appellants' argument is stated in their brief, in total, as follows:

> ***13** Dr. William Smock is an expert in emergency medicine. He reviewed Mr. McClintock's pharmacy and medical records and concluded Mr. McClintock would have been impaired in his operation of the train by the type, amount and combination of narcotics shown in those

records. CSX has in place a drug screening program that can—at best—be likened to a voluntary "honor" system whereby the employees are expected to fill out an "MD3" form if they miss over seven days of work. The employee is expected to list in the form any medical problems they have. According to Dr. Thomas Nielson, CSX Chief Medical Officer, this along with a drug screening program that tests only 25% of employees, is the extent of CSX's policies to ensure train crew are not impaired while operating trains in Kentucky.

Appellants respectfully submit that reasonable care and railway safety in Kentucky require much more than such minimal effort to ensure safe train operations.

In *Deutsch v. Shein*, 597 S.W.2d 141, 143–44 (Ky.1980), the Supreme Court adopted the substantial factor test for causation as set forth in § 431 of the Restatement (Second) of Torts, which is entitled "What Constitutes Legal Cause." This section states in pertinent part that the "actor's negligent conduct is a legal cause of harm to another if his conduct is a substantial factor in bringing about the harm."Comment (a) to § 431 explains what is meant by "substantial factor":

> In order to be a legal cause of another's harm, it is not enough that the harm would not have occurred had the actor not been negligent.... [T]his is necessary, but it is not of itself sufficient. The negligence must also be a substantial factor in bringing about the plaintiff's harm. The word "substantial" is used to denote the fact that the defendant's conduct has such an effect in producing the harm as to lead reasonable men to regard it as a cause, using that word in the popular sense, in which there always lurks the idea of responsibility, rather than in the so-called "philosophic sense," which includes every one of the great number of events without which any happening would not have occurred. Each of these events is a cause in the so-called "philosophic sense," yet the effect of many of them is so insignificant that no ordinary mind would think of them as causes.

Section 434 of the Restatement (Second) of Torts addresses the issues of when legal causation is a question of law for the court and when it is a question of fact for the jury. The court has the duty to determine "whether the evidence as to the facts makes an issue upon which the jury may reasonably differ as to whether the conduct of the defendant has been a substantial factor in causing the harm to the plaintiff." § 431(1)(a). This standard is consistent with Kentucky law. *See, e.g.*, *McCoy v. Carter*, 323 S.W.2d 210, 215 (Ky.1959) (Legal causation presents a question of law when "there is no dispute about the essential facts and [only] one conclusion may reasonably be drawn from the evidence.") *See also*57A Am.Jur.2d, Negligence § 446 (1989); *Pathways, Inc. v. Hammons*, 113 S.W.3d 85, 92 (Ky.2003).

***14** Here, upon viewing the evidence of McClintock's prescription drug use in the light most favorably to the appellants, we do not believe there is a genuine issue of material fact upon the issue of whether his prescription drug use was a substantial factor in causing the present accident.

We first note that McClintock had taken his prescription narcotics for a long period of time, had developed a tolerance for them, and thus took them in greater quantities than someone not accustomed to the substances. All of his prescriptions were authorized by his physician. At the time of the accident, McClintock was at the concluding stage of his return run from Nashville, which had been traversed without incident. There was no testimony that subsequent to the accident he appeared over-medicated.

Further, owing to the circumstances of the accident, the only plausible theory that the drugs could have had an impact would be that they caused him to quit signaling the train horn in the seven seconds (500 feet) prior to the crash. [14] However, immediately south of the subject crossing were two public crossings and the recorder box indicates that the train did signal at those crossings and continued to do so until 500 feet from the private crossing where the accident occurred. McClintock and the conductor testified that they saw Mary approaching from the west side of the tree line. It defies reason to suppose that his medications would have been the explanation for McClintock having stopped signaling (if he did) those seven seconds prior to the crash.

14 Again, McClintock testified that he did signal, but the recorder box indicates he did not.

Moreover, the appellants' expert on the drug issue merely extrapolates from the quantity of prescriptions McClintock had filled to speculate the levels he had ingested the day of the accident. There is no direct evidence supporting the appellants' theory that McClintock was impaired by his medications at the time of the accident.

In summary, we do not believe the evidence adduced during discovery linking McClintock's prescription drug use to the accident is sufficient to defeat summary judgment.

EVIDENTIARY RULINGS

Finally, the appellants argue that two evidentiary rulings made by the trial court should be reversed in the event we reverse the trial court's summary judgment issue and remand the cause for trial. They contend that the trial court erroneously excluded evidence concerning a February 2005 accident at the crossing which resulted in a fatality and two injuries. They allege that evidence concerning this accident is admissible as relevant to punitive damages as the second accident reflects upon CSX's failure to remedy the unsafe condition of the crossing following the present accident.

The appellants also contend that the trial court erroneously denied its motion to exclude the testimony of the appellees' accident reconstructionist insofar as he intended to testify regarding the injuries that would have been prevented if Mary had been wearing her seatbelt. [15]

15 The appellants contend that Mary was wearing her seat belt; the appellees contend that she was not and, accordingly, suffered additional injuries by her failure to do so.

Based upon our disposition herein, these evidentiary issues are moot, and we will accordingly not discuss them on the merits.

CONCLUSION

***15** For the foregoing reasons the judgment of the Bullitt Circuit Court is affirmed.

ALL CONCUR.

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United States District Court,
W.D. New York.

Marissa CARTER, Evelyn Grys, Bruce Currier, Sharon Koning, SUE Beehler, Marsha Mancuso, and Jaclyn Cuthbertson, as individuals and as representative s of the classes, Plaintiffs,
v.
HEALTHPORT TECHNOLOGIES, LLC, the Rochester General Hospital, the Unity Hospital of Rochester, and F.F. Thompson Hospital, Inc., Defendants.

No. 14–CV–6275–FPG.
|
Signed March 31, 2015.

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DECISION AND ORDER

FRANK P. GERACI, JR., Chief Judge.

INTRODUCTION

***1** This case is a putative class action lawsuit filed on behalf of individuals in New York State who requested copies of their medical records from HealthPort Technologies, LLC ("HealthPort"), Rochester General Hospital ("RGH"), Unity Hospital of Rochester ("Unity"), and F.F. Thompson Hospital, Inc. ("FFT") (collectively, "Defendants"). Plaintiffs allege that Defendants overcharged them for making copies of the requested records, and bring claims for money damages under New York Public Health Law § 18, which sets a ceiling on such fees; under New York General Business Law § 349, which prohibits deceptive trade practices; and for unjust enrichment.

On June 19, 2014 and July 21, 2014, Defendants moved, in separate motions, to dismiss the Complaint (ECF Nos. 9, 20, 21) under Federal Rules of Civil Procedure 12(b)(1) and 12(b)(6), arguing that the Plaintiffs lack standing to bring this action, and further, that the Complaint fails to state a claim upon which relief may be granted. For the following reasons, the Motions are granted, and the Complaint is dismissed.

BACKGROUND

The named Plaintiffs in this case—Marissa Carter, Evelyn Grys, Bruce Currier, Sharon Koning, Sue Beehler, Marsha Mancuso, and Jaclyn Cuthbertson—seek to represent a class of similarly situated individuals who, according to the Complaint, were overcharged for copies of medical records from the named Defendants. In short, the Plaintiffs allege that the Defendants charged a blanket rate of $0.75 per page for copies of their medical records, when New York Law requires them to only charge their actual expenses, but in no event can those expenses be more than $0.75 per page. Plaintiffs further allege that certain unauthorized "delivery charges" were added on top of the copying costs, and allege that all of these excessive costs were devised and charged as part of a scheme between the Defendants to artificially generate profits.

The requests for medical records by the Plaintiffs from the Defendants and the payment for these records are at the heart of the Complaint, and the allegations regarding those requests and payments take the same form for each of the seven Plaintiffs. For example, regarding Plaintiff Carter, the Complaint alleges that:

> Plaintiff Carter was a patient at RGH. ECF No. 1, ¶ 33. On or about September 5, 2013, Carter requested medical records from RGH through her counsel. ECF No. 1, ¶ 34. On or about October 1, 2013, HealthPort, acting on behalf of RGH, sent an invoice, which indicated that Carter would be charged $77.00 for 100 pages of medical records ($0.75 per

> page, plus a $2.00 "Electronic Dlvry Fee"). ECF No. 1, ¶ 35. On or about October 7, 2013, Carter paid the $77.00 charge through her counsel in order to obtain copies of the requested medical records. ECF No. 1, ¶ 36.

Regarding Plaintiff Mancuso, the Complaint similarly alleges that:

> Plaintiff Mancuso was a patient at Unity. ECF No. 1, ¶ 77. On or about January 17.2013, Mancuso requested medical records from Unity through her counsel. ECF No. 1, ¶ 78. On or about January 28, 2013, HealthPort, acting on behalf of Unity, sent an invoice, which indicated that Mancuso would be charged $544.25 for 723 pages of medical records ($0.75 per page, plus a $2.00 "Electronic Dlvry Fee"). ECF No. 1, ¶ 79. On or about February 5, 2013, Mancuso paid the $544.25 charge through her counsel in order to obtain copies of the requested medical records. ECF No. 1, ¶ 80.

***2** The Complaint makes the same allegations for each of the seven named Defendants, although the dates and overall amounts are unique to each Defendant. Further, while each Plaintiff makes claims against HealthPort for ultimately providing the records, Plaintiffs Carter, Grys, and Currier make claims against RGH, whom they made their requests through, Plaintiffs Koning, Beehler, and Mancuso make claims against Unity, whom they made their requests through, and Plaintiff Cuthbertson make her claim against FFT, whom she made her request through. ECF No. 1. Based upon these record requests and the resultant charges, each Plaintiff alleges that the fees charged "exceeded the cost to produce these medical records, and included a built-in kickback from HealthPort to [the relevant hospital]." ECF No. 1, ¶¶ 39, 46, 53, 59, 64, 69, 76, 83, 90. As such, they claim to have suffered damages from paying amounts in excess of the actual cost to produce the requested medical records. ECF No. 1, ¶¶ 107, 109.

In lieu of answering the Complaint, each of the Defendants has filed a Motion to Dismiss. ECF Nos. 9, 20, 21. The Plaintiffs have responded to each of the Motions (ECF Nos. 26, 27, 28), and the Defendants have filed their replies. ECF Nos. 33, 34, 35. In addition, the Court received a letter brief from Plaintiffs' counsel on September 3, 2014, which I have filed on the public docket. ECF No. 36. As such, the Motions are fully briefed and ripe for decision.

DISCUSSION

Because it is jurisdictional, I must first consider the Defendants' argument that the Plaintiffs lack standing to bring this case. *See Rhulen Agency, Inc. v. Ala. Ins. Guar. Ass'n,* 896 F.2d 674, 678 (2d Cir.1990) ("[T]he court should consider the Rule 12(b)(1) challenge first since if it must dismiss the complaint for lack of subject matter jurisdiction, the accompanying defenses and objections become moot and do not need to be determined.") (citation omitted).

"[A] claim is 'properly dismissed for lack of subject matter jurisdiction under Rule 12(b)(1) when the district court lacks the statutory or constitutional power to adjudicate it.' " *Arar v. Ashcroft,* 532 F.3d 157, 168 (2d Cir.2008) (quoting *Makarova v. United States,* 201 F.3d 110, 113 (2d Cir.2000)). "If plaintiffs lack Article III standing, a court has no subject matter jurisdiction to hear their claim." *Mahon v. Ticor Title Ins. Co.,* 683 F.3d 59, 62 (2d Cir.2012) (citing *Cent. States Se. & Sw. Areas Health & Welfare Fund v. Merck—Medco Managed Care, L.L.C.,* 433 F.3d 181, 198 (2d Cir.2005)); *see also Cacchillo v. Insmed, Inc.,* 638 F.3d 401, 404 (2d Cir.2011) ("Generally, '[s]tanding is a federal jurisdictional question determining the power of the court to entertain the suit.' ") (quoting *Carver v. City of New York,* 621 F.3d 221, 225 (2d Cir.2010)). "[A] plaintiff must demonstrate standing for each claim and form of relief sought." *Mahon,* 683 F.3d at 62 (citation omitted).

***3** "Article III standing consists of three 'irreducible' elements: (1) *injury-in-fact,* which is a 'concrete and particularized' harm to a 'legally protected interest'; (2) *causation* in the form of a 'fairly traceable' connection between the asserted injury-in-fact and the alleged actions of the defendant; and (3) *redressability,* or a non-speculative likelihood that the injury can be remedied by the requested relief."*W.R. Huff Asset Mgmt. Co., LLC v. Deloitte & Touche LLP,* 549 F.3d 100, 106–07 (2d Cir.2008) (citing *Lujan v. Defenders of Wildlife,* 504 U.S. 555, 560–61, 112 S.Ct. 2130, 119 L.Ed.2d 351 (1992)) (emphasis in original).

"A plaintiff asserting subject matter jurisdiction has the burden of proving by a preponderance of the evidence that jurisdiction exists."*Giammatteo v. Newton*, 452 F. App'x 24, 27 (2d Cir.2011) (citing *Makarova*, 201 F.3d at 113). In resolving a motion to dismiss for lack of subject matter jurisdiction, "the court must take all facts alleged in the complaint as true and draw all reasonable inferences in favor of plaintiff,"*Natural Res. Def. Council v. Johnson*, 461 F.3d 164, 171 (2d Cir.2006), but "jurisdiction must be shown affirmatively, and that showing is not made by drawing from the pleadings inferences favorable to the party asserting it,"*Shipping Fin. Servs. Corp. v. Drakos*, 140 F.3d 129, 131 (2d Cir.1998); *see also APWU v. Potter*, 343 F.3d 619, 623 (2d Cir.2003); *Amidax Trading Group v. S.W.I.F.T. SCRL*, 671 F.3d 140, 145 (2d Cir.2011). On such a motion, a court may consider evidence outside the pleadings, such as affidavits and exhibits. *See Makarova*, 201 F.3d at 113.

Here, the Defendants argue that the Plaintiffs lack standing to bring the claims they have alleged in their Complaint. When standing is put at issue, "[e]ach element [of standing] must be supported in the same way as any other matter on which the plaintiff bears the burden of proof, *i.e.*, with the manner and degree of evidence required at the successive stages of the litigation."*Carver*, 621 F.3d at 225 (alterations in original) (citing *Lujan*, 504 U.S. at 561)."Because standing is challenged [here] on the basis of the pleadings, we [therefore] accept as true all material allegations of the complaint, and must construe the complaint in favor of the complaining party."*Id.* at 225 (alterations in original) (quoting *W.R. Huff*, 549 F.3d at 106).

More specifically, the Defendants argue that the Plaintiffs have failed to plead a cognizable injury-in-fact, because it was their lawyers who ordered, were charged for, and paid for the copies of the medical records at issue. As such, the Defendants contend that any overcharging—if there was any—did not cause any injury-in-fact to the individual Plaintiffs.

In response, the Plaintiffs claim that who exactly ordered and paid for their clients records is irrelevant. Specifically, they argue that "[f]or purposes of the claims at issue, it makes no difference whether Plaintiffs requested their records themselves or through counsel. In either case, the client-patient is the real party in interest."ECF No. 26, at 15.

***4** In my view, the Plaintiffs have failed to establish standing to bring this suit. In making this determination, I find persuasive Judge Engelmayer's recent decision in *Spiro v. HealthPort Technologies, LLC*, ——F.Supp.3d ——, No. 14 Civ. 2921(PAE), 2014 WL 4277608 (S.D.N.Y. Aug. 29, 2014). The basic facts and premise of the claims in *Spiro* are virtually identical to the present case. In *Spiro*, a group of individual plaintiffs brought a potential class action suit against HealthPort (the same entity named in the present case) and three hospitals in the New York City area, alleging that the hospitals and HealthPort overcharged them for their medical records. The *Spiro* plaintiffs alleged that the defendants charged $0.75 per page for copies of their medical records, as opposed to charging their actual costs, which was allegedly in violation of New York Public Health Law Section 18. The *Spiro* Plaintiffs additionally alleged that the defendants engaged in deceptive trade practices, and brought a claim for unjust enrichment. The defendants moved to dismiss the complaint on several bases, including lack of standing. More specifically, the defendants argued that because the records at issue were requested by and paid for the plaintiffs' attorneys, the named plaintiffs had alleged no injury-in-fact, and therefore lacked standing.

In granting the defendants' motion to dismiss, Judge Engelmayer wrote:

> On the facts pled in the [Complaint], defendants are correct. The [Complaint] does not plead that any plaintiff was obligated to reimburse [their counsel] for the copying costs he incurred. Instead, on the facts as pled, the decision by plaintiffs to reimburse [their counsel], after the fact, for the copying costs he had paid was a volitional act—an act of grace. As pled, plaintiffs never dealt directly with Healthport. Nor, based on the [Complaint], had they any obligation to reimburse [their counsel] for his outlay at the time he ordered the photocopies. On these facts, any legal right to challenge defendants' ostensible overcharging would belong exclusively to [their counsel], as it was [their counsel], and [their counsel] alone, who suffered an injury *caused* by defendants' overcharging. Plaintiffs' later decision to reimburse their lawyer, and [counsel's] decision to accept such reimbursement, must be taken as independent, volitional, discretionary acts, breaking the chain of causation necessary to establish Article III standing. *See Lujan*, 504 U.S. at 560–61 ("[T]here must be a causal connection between the injury and the conduct complained of—the injury has to be fairly traceable to the challenged action of the defendant, and *not the result of the independent action of some third party* not before the court.") (internal quotation marks and alterations omitted) (emphasis added).

Indeed, plaintiffs' theory that a discretionary decision after-the-fact to reimburse another party for a charge confers standing on the reimbursing entity would vastly broaden Article III standing. Imagine, for example, a person who took a taxi home one night, and was overcharged for the taxi ride in violation of local law. If the person was later voluntarily reimbursed for that cost—by a friend, parent, employer, stranger, or Good Samaritan—that reimbursing entity would then, on plaintiff's theory, have the legal right to sue the cab driver for overcharging. There is no authority for this claim. Absent assignment of a legal right to sue for such relief, which is not alleged here, the mere act of making a third-party whole for an expense incurred and already paid does not entitle the paying party to the right to challenge that expense.

***5** To be sure, the analysis would be different if plaintiffs had been obligated at the time that [their counsel] incurred the copying expenses to reimburse [him] for the expenses he incurred in connection with representing them. In that circumstance, whether plaintiffs' reimbursement duty was absolute or conditioned on a settlement or verdict in their favor, *then* Healthport's charge to [counsel] for copying and [counsel's] payment of that charge would have given rise to a liability (or a contingent liability) on plaintiffs' part. That liability, to repay [counsel] for the copying expenses, would have given plaintiffs standing to challenge the copying cost as excessive, because plaintiffs would then have suffered an injury-in-fact (a legal duty to pay these excessive costs) traceable to the defendants responsible for the charges. *See Roman Catholic Archdiocese of N.Y. v. Sebelius,* 907 F.Supp.2d 310, 329 (E.D.N.Y.2012) ("[N]umerous cases have also recognized that uncertain future harms can have present effects that are sufficient for standing purposes.") (collecting cases); *see also Clinton v. City of N.Y.,* 524 U.S. 417, 431, 118 S.Ct. 2091, 141 L.Ed.2d 393 (1998) (New York had standing to challenge the line item veto, even though a pending administrative action could waive the contingent liability, because "[t]he revival of a substantial contingent liability immediately and directly affects the borrowing power, financial strength, and fiscal planning of the potential obligor"); *Lac Du Flambeau Band of Lake Superior Chippewa Indians v. Norton,* 422 F.3d 490, 498 (7th Cir.2005) (plaintiff had standing to bring suit because "the present impact of a future, though uncertain harm may establish injury for standing purposes"). The [Complaint], however, does not allege that there was any such agreement in place between plaintiffs and [their counsel] at the time [counsel] incurred the copying expense under which plaintiffs would reimburse [counsel] for the costs it incurred in the course of representing plaintiffs in their lawsuits. The [Complaint] is silent on that point.

This pleading deficiency should be easily corrected, if the facts so permit. In New York State, an attorney is required to "provide to the client a written letter of engagement before commencing the representation, or within a reasonable time thereafter[.]"*See*N.Y. Comp.Codes R. & Regs. tit. 22, § 1215.1. The engagement letter must explain (1) the scope of the legal services to be provided; and (2) the "attorney's fees to be charged, expenses and billing practices."*Id.* It follows that, if plaintiffs were obligated to reimburse [counsel] for expense outlays, including in obtaining plaintiffs' medical records, then [counsel's] engagement letter with each plaintiff should reflect such a term.

Each of Counts One, Two, and Three turns on the claim that defendants overcharged [counsel] for copies of plaintiffs' medical records. Because the [Complaint] does not assert facts on which plaintiffs have standing to pursue such a claim, the Court dismisses these three damages claims for lack of subject matter jurisdiction.

***6** *Spiro,* 2014 WL 4277608, at *5–6. (Footnotes omitted).

For those same reasons, I find that the Complaint in this action fails to establish the Plaintiffs' standing to bring this suit. There is no plausible allegation in the Complaint to establish that it was Plaintiffs—as opposed to their counsel—who requested the copies or paid the resulting bill and therefore bore the alleged injuries in this case, and without such an allegation in the Complaint, the Plaintiffs have failed to establish their standing to sue.

Plaintiffs' letter to the Court of September 2, 2014 correctly stated that the *Spiro* litigation was "discussed at length in HealthPort's motion to dismiss and Plaintiffs' response to HealthPort's motion."ECF No. 36. Indeed, that letter acknowledged that "[t]he ***only*** reason that the plaintiffs' claims against HealthPort were dismissed in *Spiro*... was because the court concluded that the plaintiffs had not pled that they were ultimately responsible for the charges, which were paid by their attorneys, at the time such charges were incurred."*Id.* (emphasis in original).

While Plaintiffs' counsel argues that *Spiro* was wrongly decided, they also informed this Court that "there is no reason

to dismiss Plaintiffs' claims for lack of standing, and *it would be a waste of time to require them to plead their claims in further detail*." *Id.* (emphasis added). While this Court is not required to offer counseled Plaintiffs the opportunity to amend their Complaint—indeed, it is counsel's job to determine whether to seek leave to amend or not, and to make such a request, if counsel deems it appropriate—in this case, I see even less reason to offer the Plaintiffs, *sua sponte*, the opportunity to amend their Complaint, since they have informed the Court in writing that doing so would "be a waste of time."

CONCLUSION

For all of the foregoing reasons, the Plaintiffs have failed to establish their standing to sue in this case, and the Defendants' Motions to Dismiss (ECF Nos. 9, 20, 21), are GRANTED. This matter is dismissed with prejudice, and the Clerk of the Court is directed to close this case.

IT IS SO ORDERED.

All Citations

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Unpublished opinion. See KY ST RCP Rule 76.28(4) before citing.

Court of Appeals of Kentucky.

Gary R. DURBIN and Lynne M. Durbin, Appellants
v.
BANK OF the BLUEGRASS & TRUST COMPANY, Appellee.

No. 2005–CA–001292–MR.
|
June 2, 2006.
|
Rehearing Denied Aug. 9, 2006.

Appeal from Fayette Circuit Court, Action No. 04–CI–01398; James D. Ishmael, Jr.

Attorneys and Law Firms

Don A. Pisacano, Rambicure, Miller & Pisacano, Lexington, KY, for appellants.

Phillip D. Scott, Anne A. Chesnut, Greenebaum, Doll & McDonald, PLLC, Lexington, KY, for appellee.

Before BARBER, KNOPF, and MINTON, Judges.

OPINION

KNOPF, Judge.

***1** Gary R. Durbin and Lynne Durbin (the Durbins) appeal from a summary judgment entered by the Fayette Circuit Court dismissing their counterclaims against Bank of the Bluegrass and Trust Company (the Bank). The Durbins argue that their counterclaims stated proper causes of actions and they are entitled to proceed on those claims notwithstanding their settlement of the Bank's primary claim. Although we disagree with some of the trial court's reasoning, we conclude that summary judgment was appropriate on all of the Durbins' counterclaims. Hence, we affirm.

On May 6, 2000, the Durbins and Edward Madon executed a promissory note with the Bank in the amount of $50,000.00. The stated purpose of the note was to establish a line of credit for Madon's car business. As security for the note, the Durbins gave the Bank a second mortgage on their residence.

At some point after the promissory note and mortgage were executed, Madon died. Madon's estate was insolvent, and included several large debts to the Bank. The Durbins ceased making payments on the note in December 2003. Thereafter, the Bank declared the note in default and brought this action to collect the balance and to foreclose on the property. In their answer, the Durbins asserted various defenses and counterclaims, including: fraud in the inducement; breach of fiduciary duty; breach of covenant of good faith and fair dealing; unjust enrichment; and violation of the Truth–in–Lending Act (TILA) as amended by the Home Owner Equity Protection Act (HOEPA), [1] the Real Estate Settlement Procedures Act (RESPA), [2] and the Kentucky Consumer Protection Act. [3]

1 15 U.S.C. §§ 1601 *et seq.*

2 12 U.S.C. § 2601.

3 KRS 367.110 *et seq.*

The Bank filed a motion for summary judgment on its claims relating to the note, asserting that there was no genuine issue of material fact concerning the Durbins' liability on the note or that the note was in default. The Durbins and the Bank reached an agreement regarding the Durbins' liability on the note, and the trial court granted summary judgment for the Bank on August 26, 2004. Thereafter, the Bank filed a motion for summary judgment, seeking to dismiss the Durbins' counterclaims. In an opinion and order entered on May 23, 2005, the court granted the Bank's summary judgment motion and dismissed the Durbins' counterclaims. This appeal followed.

The standard of review governing an appeal of a summary judgment is well-settled. We must determine whether the trial court erred in concluding that there was no genuine issue as to any material fact and that the moving party was entitled to a judgment as a matter of law. [4] Summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories, stipulations, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." [5] In *Paintsville Hospital Co. v. Rose,* [6] the Supreme Court of Kentucky held that for

summary judgment to be proper, the movant must show that the adverse party cannot prevail under any circumstances. The Court has also stated that "the proper function of summary judgment is to terminate litigation when, as a matter of law, it appears that it would be impossible for the respondent to produce evidence at the trial warranting a judgment in his favor." [7] Because factual findings are not at issue, [8] there is no requirement that the appellate court defer to the trial court. "The record must be viewed in a light most favorable to the party opposing the motion for summary judgment and all doubts are to be resolved in his favor." [9]

4 *Scifres v. Kraft*, 916 S.W.2d 779, 781 (Ky.App.1996).

5 CR 56.03.

6 683 S.W.2d 255, 256 (Ky.1985).

7 *Steelvest, Inc. v. Scansteel Service Center, Inc.*, 807 S.W.2d 476, 480 (Ky.1991).

8 *Goldsmith v. Allied Building Components, Inc.*, 833 S.W.2d 378, 381 (Ky.1992).

9 *Steelvest*, 807 S.W.2d at 480.

***2** The Bank argues that the Durbins' agreement to summary judgment on the note constituted a waiver of their counterclaims. The Bank asserts that the Durbins should not be permitted to benefit from their settlement of the note with the Bank while continuing to pursue their counterclaims. However, we agree with the trial court that the parties' settlement of the Bank's claim on the note did not expressly waive the counterclaims. Furthermore, the judgment on the primary claim does not necessarily affect the viability of the Durbins' counterclaims. [10] However, the Durbins' concession of liability on the note does implicate the counterclaims, at least to a certain extent. Therefore, the trial court properly looked to the merits of the Durbins' separate claims.

10 As a general rule, the pendency of a counterclaim or similar opposing claim does not bar entry of summary judgment on the primary claim in action. However, execution of the summary judgment may be inappropriate due to the pending counterclaim. See "Proceeding for summary judgment as affected by presentation of counterclaim."8 A .L.R.3d 1361 (1966 & 2006 Supp).

The Durbins first allege that the Bank fraudulently induced them to co-sign on the note by representing to them that Madon was financially sound and there would be little risk to them as co-signors. The trial court found, as a matter of law, that a party may not rely on oral representations that conflict with the written language of the contract. [11]

11 *Citing Mario's Pizzeria, Inc. v. Federal Sign & Signal Corp.*, 379 S.W.2d 736, 740 (1964).

We agree with the Bank that a party may not rely on oral representations that conflict with written disclaimers to the contrary which the complaining party earlier specifically acknowledged in writing. [12] Clearly, any oral representations by the Bank stating that the Durbins would not be liable on the note would have directly conflicted with the express written language of the note. However, the gravamen of the Durbins' fraud claim is that the Bank made affirmative misrepresentations regarding Madon's financial condition, thus fraudulently inducing them into executing the note. The note does not expressly disclaim such representations. Consequently, the allegedly fraudulent representations were not merged into the contract and parol evidence would be admissible to show that the making of the contract was procured by fraud. [13]

12 *Rivermont Inn, Inc. v. Bass Hotels & Resorts, Inc.*, 113 S.W.3d 636, 640 (Ky.App.2003).

13 *Hanson v. American National Bank & Trust Co.*, 865 S.W.2d 302, (Ky.1993)

Where an individual is induced to enter into the contract in reliance upon false representations, the person may maintain an action for a rescission of the contract, or may affirm the contract and maintain an action for damages suffered on account of the fraud and deceit. [14] In this case, the Durbins have pursued the latter remedy. However, a party alleging fraud must show, among other things, that the misrepresentations caused the harm. [15] The Durbins conceded their liability to the Bank—the party which allegedly made the false representations—and they have not pleaded or sought any damages other than their liability on the note. In the absence of a showing of any other damages, the Durbins' settlement of their liability on the note precludes them from recovering damages on their fraud claim. Hence, the trial court properly dismissed this count.

14 *Adams v. Fada Realty Co.*, 305 Ky. 195, 202 S.W.2d 439, 440 (Ky.1947).*See also Bryant v. Troutman*, 287 S.W.2d 918, 920 (Ky.1956), and *Faulkner Drilling Co., Inc. v. Gross*, 943 S.W.2d 634, 638–39 (Ky.App.1997).

15 *See United Parcel Service Co. v. Rickert,* 996 S.W.2d 464, 468 (Ky.1999).

We also disagree with the trial court's reasoning dismissing the Durbins' claim of breach of fiduciary duty. But as with the fraud claim, we likewise conclude that the settlement on the note precluded the Durbins from any recovery on that claim as well. In dismissing the Durbins' claim for breach of fiduciary duty, the trial court relied upon *Layne v. Bank One, Ky., N.A.,* [16] in which the Sixth Circuit, interpreting Kentucky law, held that banks generally do not have a fiduciary relationship with their borrowers. [17]

16 395 F.3d 271 (6th Cir.2005).

17 *Id.* at 281,*citing Sallee v. Fort Knox National Bank, N.A.,* 286 F.3d 878, 893 (6th Cir.2002).

***3** But in *Steelvest, Inc. v. Scansteel Service Center, Inc.,* [18] the Kentucky Supreme Court held that a bank's services to borrowers "may support a finding that a bank, in taking a borrower's note and collateral, falls under a fiduciary duty to disclose material facts affecting the loan transaction. In view of changes in the nature of commercial transactions bankers may sometimes be placed in a position of trust with respect to their customer." [19] More recently, in *Morton v. Bank of the Bluegrass,* [20] this Court recognized that a bank may have a fiduciary duty to disclose material facts affecting the loan transaction such as the borrower's eligibility for credit life insurance. [21] And subsequently, in *Presnell Construction Managers, Inc. v. EH Const., LLC,* [22] the Kentucky Supreme Court recognized the tort of negligent misrepresentation as set forth in the Restatement (Second) of Torts § 552. [23] Based on this authority, the Durbins have presented at least colorable claims against the Bank for breach of fiduciary duty and negligent misrepresentation.

18 *Supra.*

19 *Id.* at 485;*citing Henkin, Inc. v. Berea Bank and Trust Co.,* 566 S.W.2d 420 (Ky.App.1978).

20 18 S.W.3d 353 (Ky.App.1999).

21 *Id.* at 359.

22 134 S.W.3d 575 (Ky.2004).

23 *Id.* at 580–82.

Nevertheless, the Durbins' only measure of damages on a claim for breach of fiduciary duty or negligent misrepresentation would be their liability on the note. [24] Since they have settled with the Bank, they could not prove damages even if they establish that the Bank owed and breached a duty to them. Consequently, the trial court properly dismissed this claim as well.

24 *Morton v. Bank of the Bluegrass and Trust Co.,supra* at 358.

We agree with the trial court's reasoning dismissing the Durbins' remaining common-law claims. In *Ranier v. Mount Sterling National Bank,* [25] the Court observed that "[i]n every contract, there is an implied covenant of good faith and fair dealing."The covenant imposes a duty on the parties to do everything necessary to carry out the purposes and provisions of the contract. [26] However, the covenant of good faith and fair dealing does not prevent a party from exercising its contractual rights. [27] Furthermore, the alleged conduct by the Bank involved the formation of the contract, not the performance of the contract. Hence, the covenant of good faith and fair dealing is not implicated.

25 812 S.W.2d 154, 156 (Ky.1991).

26 *Id., citing Beech Creek Coal Co. v. Jones,* 262 S.W.2d 174 (Ky.1953).

27 *Farmers Bank and Trust Co. of Georgetown, Kentucky v. Willmott Hardwoods, Inc.,* 171 S.W.3d 4, 11 (Ky.2005).

Similarly, the Durbins' claim for unjust enrichment must also fail. "Unjust enrichment" is based upon an implied contract, creating an obligation from the recipient of the benefits received to the one bestowing them, to compensate him for whatever outlay he has made in bestowing them. [28] This doctrine applies as a basis of restitution to prevent one person from keeping money or benefits belonging to another. [29] In this case, the Durbins do not allege that they advanced any money for the Bank's benefit. Rather, their actions were solely for Madon's benefit. Consequently, they have failed to state a claim against the Bank for unjust enrichment.

28 *Sullivan's Adm'r v. Sullivan,* 248 Ky. 744, 59 S.W.2d 999, 1001 (1933).

29 *Haeberle v. St. Paul Fire and Marine Ins. Co.,* 769 S.W.2d 64, 67 (Ky.App.1989).

Finally, the trial court properly dismissed the statutory claims. As the trial court noted, the statutory provisions apply only to consumer claims. The TILA and the HOEPA specifically exclude credit transactions involving extensions of credit primarily for business or commercial purposes. [30] Similarly, the RESPA does not apply to business loans. [31] And the Kentucky Consumer Protection Act allows only a person who purchases goods or services primarily for personal, family or household services to bring a private action under the Act. [32]

30 15 U.S.C. § 1603.

31 12 U.S.C. § 2606.

32 KRS 367.220.

***4** The Durbins assert that their purpose in co-signing on the loan was personal—they were co-signing the note for their friend Madon and they had no involvement with his business. They cite a number of cases holding that a transaction need not be entirely personal to fall within the protection of the federal acts. Rather, courts must examine the transaction as a whole and the purpose for which the credit was extended in order to determine whether this transaction was primarily consumer or commercial in nature. Consequently, the Durbins assert that there is a genuine issue of material fact concerning the nature of the loan.

But in those cases, the contracts or notes did not specify that the loans were for personal or business purposes and the uses of the loan proceeds were not clearly or primarily for business purposes. As a result, the nature of those loans constituted issues of fact. [33] In this case, the note clearly states that the loan was to establish a business line of credit. The fact that the credit transaction was secured by a mortgage on the Durbins' personal residence does not transform the business or commercial loan into a personal or consumer loan. [34] Moreover, the Durbins do not suggest that any of the loan proceeds were not used for business purposes. [35] In the absence of any affirmative evidence that the loan proceeds were primarily used for other than business purposes, we agree with the trial court that summary judgment was appropriate on these claims.

33 *See Thorns v. Sundance Properties,* 726 F.2d 1417 (9th Cir.1984) (Purchase of a limited partnership interest for investment purposes can be for personal since certain securities transactions can fall within the scope of the TILA.); *Tower v. Moss,* 625 F.2d 1161 (5th Cir.1980) (Borrower used loan proceeds to repair residence, then rented out residence while she lived and worked in another city); *Gallegos v. Stokes,* 593 F.2d 372 (10th Cir.1979) (Purchase of pick-up truck which buyer had intended to use for business purposes, but lender never knew of that intent); *Cantrell v. First National Bank of Euless,* 560 S.W.2d 721 (Tex.Civ.App.1977) (Although borrowers used motor home as living quarters while they traveled on business, the purpose of the loan to purchase the motor home remained primarily personal).

34 *Sherrill v. Verde Capital Corp.* 719 F.2d 364, 367 (11th Cir.1983).

35 *See Bokros v. Associates Finance, Inc.,* 607 F.Supp. 869 (N.D.Ill.1984), and *Sims v. First National Bank, Harrison,* 267 Ark. 253, 590 S.W.2d 270 (1979).

In conclusion, we disagree with the trial court's reasoning dismissing the Durbins' fraud and breach-of-fiduciary duty claims. Had they not conceded liability on the note, they would have been entitled to pursue those claims. Nonetheless, the Durbins' settlement with the Bank precludes them from seeking any damages based on their liability on the note, and they have not alleged any other damages arising from the Bank's conduct. We agree with the trial court that the Durbins' remaining common-law and statutory claims fail to state viable causes of action. Consequently, the trial court properly entered summary judgment for the Bank.

Accordingly, the judgment of the Fayette Circuit Court is affirmed.

ALL CONCUR.

All Citations

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2015 WL 4776300
Only the Westlaw citation is currently available.

THIS OPINION IS NOT FINAL AND SHALL NOT BE CITED AS AUTHORITY IN ANY COURTS OF THE COMMONWEALTH OF KENTUCKY.

Court of Appeals of Kentucky.

David Griffin, Appellant
v.
Sarah C. Jones, Appellee

NO. 2014–CA–000402–MR
|
RENDERED: AUGUST 14, 2015; 10:00 A.M.

Synopsis

Background: Shareholder filed claims alleging breach of fiduciary duty, fraud by omission, misappropriation, and unjust enrichment against corporate secretary, who was also the president of a limited liability company (LLC) shareholder had invested in. The Circuit Court, Calloway County, Dennis R. Foust, J., dismissed claims. Shareholder appealed.

Holdings: The Court of Appeals, Kramer, J., held that:

[1] shareholder lacked standing to bring a breach of fiduciary duty claim against secretary;

[2] shareholder failed to establish secretary caused actual damages to shareholder, or that secretary had a duty to disclose that was owed to shareholder individually, as required to establish a claim for fraud by omission; and

[3] shareholder failed to state a claim for misappropriation of corporate assets against secretary.

Affirmed.

APPEAL FROM CALLOWAY CIRCUIT COURT, HONORABLE DENNIS R. FOUST, JUDGE, ACTION NO. 13–CI–00420

Attorneys and Law Firms

Brief for Appellant: Griffin Terry Sumner (argued), J. Kendrick Wells, IV, Lousiville, Kentucky, Robert V. Sartin, Joseph Al Kelly, Nashville, Tenessee.

Brief for Appellee: Kent Wicker, Nicole S. Elver (argued), Louisville, Kentucky.

BEFORE: CLAYTON, DIXON, AND KRAMER, JUDGES.

OPINION

KRAMER, JUDGE:

***1** David Griffin appeals an order of the Calloway Circuit Court dismissing, pursuant to Kentucky Rules of Civil Procedure (CR) 12.02(f), various causes of action he asserted against Sarah C. Jones. After careful review, we affirm.

[1] **[2]** Our standard of review is as follows:

> The court should not grant the motion unless it appears the pleading party would not be entitled to relief under any set of facts which could be proved in support of his claim. In making this decision, the circuit court is not required to make any factual determinations; rather, the question is purely a matter of law. Stated another way, the court must ask if the facts alleged in the complaint can be proved, would the plaintiff be entitled to relief?

James v. Wilson, 95 S.W.3d 875, 883–84 (Ky. App. 2002) (internal quotations and footnote omitted). With this standard in mind, we now turn to the facts of this case as alleged in Griffin's complaint.

In early 2008, Charles Jones (Sarah's husband) approached Griffin about investing in Integrated Computer Solutions, Inc. (ICS). Griffin paid $2 million for 50% of ICS's outstanding shares—making Griffin a 50% shareholder, with Mr. Jones owning the other 50%. Sarah Jones was the Secretary of ICS. Charles also formed Blackrock Investments, LLC (BRI), in March 2008. Griffin invested $100,000 in BRI in exchange for a 50% membership interest. BRI, in turn, formed SE Book Company, LLC (SEB)—a member-managed limited liability

company—with BRI as its sole member. In July 2008, SEB's operating agreement was amended to add ICS as an 8% member of SEB. Thereafter, Charles formed College Book Rental Company, LLC (CBR), in March 2009. BRI has a 92% interest in CBR, and ICS has an 8% interest in CBR.

In June 2008, Charles also formed CA Jones Management Group, LLC (CJM); he was its sole member (Griffin had no ownership interest in this entity), and Sarah was its President. CJM was formed to manage the day-to-day operations of ICS, BRI, SEB, and CBR, which included providing human resources, marketing, accounting, technology, and other services. CJM entered into management services contracts to that effect with each of the aforementioned entities, with Charles signing all of the agreements on behalf of all of these entities.

The majority of the business operations among these entities occurred in CBR and SEB. For his part, Griffin's involvement with those entities was limited to being a passive investor. Between 2008 and 2011, Griffin loaned to or invested in these companies approximately $29 million. While Griffin was doing so, however, Charles and Sarah, in their roles as officers of these entities, caused the entities to commingle assets between SEB, CBR, ICS and BRI, and ultimately transfer much of those loaned or invested funds to CJM. While these transfers were ostensibly described as "management fees," CJM provided little or no consideration to the entities in exchange; nor did Charles or Sarah inform Griffin about these transfers. Thereafter, Charles and Sarah caused CJM to pay these funds to themselves for their own personal use.

***2** With that said, this appeal arises from the decision of the circuit court to dismiss four claims Griffin ultimately asserted against Sarah based upon the foregoing. Those claims were: (1) breach of a fiduciary duty owed to him, personally; (2) fraud by omission; (3) misappropriation; and (4) unjust enrichment.

Initially, Griffin takes umbrage with the fact that the circuit court's order dismissed all of his claims against Sarah without explanation. In the absence of any further specificity we must presume that the circuit court's order was based upon each of the grounds Sarah asserted in her CR 12.02 motion (which are the same grounds that she continues to argue in her appellee brief) and that the circuit court considered and rejected each of the opposing arguments Griffin offered in response. *See, e.g.*,*Sword v. Scott*, 293 Ky. 630, 169 S.W.2d 825, 827 (1943) ("In the absence of the court's specifying the ground or grounds for his dismissal of the petition, it will be assumed that it was upon any or all of the grounds which the proof sufficiently established."); *see also*[*Sparks v. Trustguard Ins. Co.*, 389 S.W.3d 121, 125 (Ky. App. 2012)]. Thus, if Sarah's CR 12.02 motion asserted any proper grounds for dismissing the claims presented, we must affirm. *See*[*Milby v. Mears*, 580 S.W.2d 724, 727 (Ky. App. 1979)] ("[W]hen a judgment is based upon alternative grounds, the judgment must be affirmed on appeal unless both grounds are erroneous.").

And, as discussed below, a proper ground for dismissing the balance of Griffin's claims was his lack of standing.

[3] [4] [5] [6] In general, to invoke the jurisdiction of the court to enforce a claim, a plaintiff must show he has standing to do so. *J.N.R. v. O'Reilly*, 264 S.W.3d 587 (Ky. 2008). Standing to bring an action requires a personal interest, often referred to as a "substantial" interest in the subject matter of the litigation as distinguished from a "mere expectancy." *Housing Authority of Louisville v. Service Employees International Union Local 557*, 885 S.W.2d 692, 695 (Ky. 1994). The issue of standing is concerned only with the question of who is entitled to mount a legal challenge rather than with the merits of the subject matter of the controversy. *Flast v. Cohen*, 392 U.S. 83, 88 S.Ct. 1942, 20 L.Ed.2d 947 (1968). It is a concept utilized to determine whether a party has shown a personal stake in the outcome sufficient to insure that a justiciable controversy is adequately presented to the court. BLACK'S LAW DICTIONARY 1413 (7th ed. 1999). Courts apply the concept of standing as a matter of self-restraint to avoid rendering advisory opinions on matters instigated by parties who are merely "intermeddlers." 59 Am. Jur. 2d *Parties* § 36 (2002). Because the jurisdiction of the court is a prerequisite to commencement of any action, standing must exist at the time the action is filed. *Id.* at § 37. With this in mind, we now turn to each of Griffin's four claims.

1. Breach of fiduciary duty

[7] [8] "[T]he basic elements of a breach-of-fiduciary-duty cause of action [are]: (1) the existence of a fiduciary duty; (2) the breach of that duty; (3) injury; and (4) causation." *Baptist Physicians Lexington, Inc. v. New Lexington Clinic, P.S.C.*, 436 S.W.3d 189, 193 (Ky. 2013). Griffin based his "breach of fiduciary duty" cause of action against Sarah upon Sarah's roles as Secretary of ICS and President of CJM. Regarding her former role, Griffin's argument is in relevant part as follows:

***3** As Secretary of ICS, Sarah Jones owed fiduciary duties to ICS and its shareholders—including Griffin. It is black letter law that corporate officers owe to the corporation and to its shareholders fundamental duties of care and loyalty....

Ms. Jones may try to argue, as she did in the circuit court, that she was not actively involved in the management of ICS (or [CJM])—but such factual disputes may not be considered at the motion to dismiss stage. Focusing solely on the Complaint and taking the alleged facts as true—as this Court must—Griffin has sufficiently alleged the existence of a fiduciary duty. Moreover, any purported failure to uphold the legal duties of a corporate officer does not negate the existence of those duties. To the extent Ms. Jones tries to argue that her husband was the sole actor behind everything that occurred here, she cannot escape her responsibilities as President of Management and as an officer of ICS (which is also a member of SEB and CBR)—especially given her alleged knowledge (and intentional concealment from Griffin) of the transactions at issue and her personal benefit from those transactions, at Griffin's expense.

(Internal quotations and citations omitted.)

Regarding Sarah's role as the President of CJM, Griffin's argument is:

As President of [CJM], Sarah Jones also owed fiduciary duties to the managed companies and their members/shareholders—including Griffin. Officers in limited liability companies owe common law fiduciary duties similar to those imposed upon officers in corporations.... In this case, Ms. Jones' fiduciary capacity extended beyond [CJM] because of her role, through [CJM], as an agent for ICS, BRI, SEB and CBR.

...

A special agency relationship existed between Management and the Jones Companies. Management was formed solely for the purpose of managing the day-to-day operations of those companies. Management's only revenue came in the form of management fees collected from those companies.

Management's—and likewise Ms. Jones'—right to control is evident from the nature of the alleged breach. The Complaint alleges that Ms. Jones commingled funds and assets between SEB, CBR, ICS and BRI, and transferred those funds to [CJM], assets and entities owned and/or managed by C. Jones, S. Jones and Management, and family members of C. Jones and S. Jones, without consideration and with the intent to defraud Griffin. In other words, Sarah Jones, through her role with [CJM], had actual control over the entities and the assets at issue. In exercising such control, Ms. Jones necessarily undertook fiduciary duties of good faith and loyalty to the managed entities and their members/shareholders.

(Internal quotations and citations omitted.)

At the onset, it appears Griffin is arguing the circuit court was required to believe Sarah owed him direct fiduciary duties in the contexts he describes above because his complaint alleged that she did, and because factual allegations in a complaint must be taken as true whenever a court considers the propriety of granting a CR 12.02 motion to dismiss. However, a statement to the effect that some form of legal duty exists under a given set of circumstances is not a factual allegation; it is a legal conclusion. *Bartley v. Commonwealth*, 400 S.W.3d 714, 726 (Ky. 2013) ("[W]hether a legal duty exists is purely a question of law[.]"). Accordingly, any statements in Griffin's complaint regarding legal duties Sarah may have owed him under the facts of this case are entitled to no deference whatsoever. *See* *Rosser v. City of Russellville*, 306 Ky. 462, 208 S.W.2d 322, 324 (1948) ("It is the duty of courts to declare conclusions, and of the parties to state the facts from which legal conclusions may be drawn.").

***4** **[9]** **[10]** Furthermore, Kentucky law does not support that Sarah owed Griffin fiduciary duties under the facts alleged in his complaint. As described by Griffin, the fiduciary duties Sarah allegedly breached required her to inform him personally if she had reason to know that assets would be (or were being) misappropriated from SEB and CBR. Griffin's claims in this respect were based upon the notion that Sarah owed him such direct fiduciary duties because she was an officer of both a corporation and a limited liability company, and he was a shareholder of the corporation and member of the limited liability company. But, it is generally understood that the common-law fiduciary duty owed by members of the board of directors or officers of a corporation runs directly to the corporation and the shareholders/members *as a whole*. 18B Am. Jur. 2d *Corporations* § 1462 (2011). Hence, a board member or officer owes no common-law fiduciary duty directly to an individual shareholder/member. *Id.* Likewise, the statutory duties respectively imposed upon a board member, corporate officer, or even a managing member of a limited liability

company under Kentucky Revised Statutes (KRS) 271B.8–300, KRS 271B.8–420, and KRS 275.170 run directly to the corporation or limited liability company, not the members or shareholders individually. [1] Griffin also cites no authority, and we have found none, supporting that an officer of one corporation (*i.e.*, Sarah, in her role as President of CJM) generally owes any kind of direct fiduciary duty to an individual shareholder or member of a different entity.

[1] In particular, *see*KRS 271B.8–300(6) and KRS 271B.8–420(6) (requiring a person bringing an action for monetary damages under either section to prove the director's or officer's "breach or failure to perform was the legal cause of *damages suffered by the corporation*." (Emphasis added)). Similarly, the statute governing the duty of loyalty to members of a limited liability company instructs that the duty is to "account to ... the company." *See*KRS 275.170(2). *See also*Ballard v. 1400 Willow Council of Co–Owners, Inc., 430 S.W.3d 229, 241 (Ky. 2013) (holding, in the related context of non-profit corporations, "the officers and directors that have a fiduciary duty, and that duty is to the nonprofit corporation." (Citing KRS 273.215)).

Stated differently, ICS, SEB and CBR were the parties that were owed fiduciary duties and were directly injured by Sarah under the facts alleged in Griffin's complaint. As such these entities, not Griffin, were the real parties in interest regarding the subject matter of Griffin's breach of fiduciary duty claims.

2. Fraud by omission

[11] **[12]** **[13]** **[14]** As stated by the Kentucky Supreme Court in *Giddings & Lewis, Inc. v. Industrial Risk Insurers*, 348 S.W.3d 729, 747–48 (Ky. 2011):

> [A] fraud by omission claim is grounded in a duty to disclose. *Republic Bank [& Trust Co. v. Bear, Stearns & Co.]*, 707 F.Supp.2d [702] at 710 [(W.D. Ky. 2010)] ("The gravamen of the tort is breach of a duty to disclose....") To prevail, a plaintiff must prove: (1) the defendant had a duty to disclose the material fact at issue; (2) the defendant failed to disclose the fact; (3) the defendant's failure to disclose the material fact induced the plaintiff to act; and (4) the plaintiff suffered actual damages as a consequence. *Rivermont Inn, [Inc. v. Bass Hotels Resorts, Inc.,]* 113 S.W.3d [636] at 641 [(Ky. App. 2003)]. The existence of a duty to disclose is a matter of law for the court. *See*Smith v. General Motors Corp., 979 S.W.2d 127, 129 (Ky. App. 1998). *See also*Restatement (Second) of Torts § 551 cmt. m (1977) ("whether there is a duty to the other to disclose the fact in question is always a matter for the determination of the court.")
>
> ....
>
> Kentucky recognizes a duty to disclose in four circumstances. *Smith*, 979 S.W.2d at 129–30. The first two [are] the duty arising from a confidential or fiduciary relationship or a duty provided by statute[.] ... The two other circumstances where a duty may arise are "when a defendant has partially disclosed material facts to the plaintiff but created the impression of full disclosure", *Rivermont Inn*, 113 S.W.3d at 641, or "where one party to a contract has superior knowledge and is relied upon to disclose same,"*Smith*, 979 S.W.2d at 129.

[15] Here, Griffin's fraud by omission claims are a repackaging of his previously discussed breach of fiduciary duty claims; indeed, Griffin uses the terms "fraud" and "breach of fiduciary duty" interchangeably while summarizing his fraud by omission claims in his brief:

> ***5** "[W]here the shareholder suffers an injury separate and distinct from that suffered by other shareholders, or the corporation as an entity, the shareholder may maintain an individual action in his own right." *2815 Grand Realty Corp. v. Goose Creek Energy, Inc.*, 656 F.Supp.2d 707, 715 (E.D. Ky. 2009) (citations and internal punctuation omitted). A shareholder's ability to maintain a direct action against a corporate officer for breach of fiduciary duty turns solely on two questions: (1) Who suffered the alleged harm—the corporation or the plaintiff stockholder? And (2) Who would receive the benefit of any recovery? *Id.* (following *Tooley v. Donaldson, Lufkin & Jenrette, Inc.*, 845 A.2d 1031, 1033 (Del. 2004)). [2]
>
> The damages Griffin seeks to recover are uniquely his. Griffin's claims are not based on the injury to his shareholder/membership interests in the Jones Companies (which are now all but worthless). Rather, they arise out of the nearly $30 million Griffin paid (and lost) because of the Joneses' fraudulent scheme. Had Griffin known that the Joneses were funneling his investments into the Joneses' own pockets, Griffin would not have continued to fund the enterprise.
>
> ...
>
> As President of [CJM], Ms. Jones owed Griffin the duties of a fiduciary with respect to [CJM's] operation of the Jones Companies. Indeed, the Complaint explicitly alleges

that "[a]s an officer of ICS and [CJM], S. Jones had a duty to provide material facts to Griffin." Coupled with the allegations of Ms. Jones' superior knowledge of the facts and transactions at issue, the Complaint sufficiently establishes—at least for purposes of overcoming a motion to dismiss—that Ms. Jones owed Griffin a duty to disclose and that she breached that duty.

[2] Griffin's argument accurately quotes a rule that was the primary focus of the Delaware Supreme Court's opinion in *Tooley v. Donaldson, Lufkin, & Jenrette, Inc.*, 845 A.2d 1031 (Del. 2004). To reiterate, the Delaware Supreme Court held the analysis used to distinguish between a derivative and direct action "must be based solely on the following questions: Who suffered the alleged harm—the corporation or the suing stockholder individually—and who would receive the benefit of the recovery or other remedy?" *Id.* at 1035. "An action in which the holder can prevail without showing an injury or breach of duty to the corporation should be treated as a direct action...." *Id.* at 1036.

As detailed below, Delaware law on this point is consistent with Kentucky's requirement for an injury independent of the corporation's injury. We further observe that in *In re Syncor International Corporation Shareholders Litigation*, 857 A.2d 994 (Del. Ch. 2004), it was reasoned that "under *Tooley*, the duty of the court is to look at the nature of the wrong alleged, not merely at the form of the words used in the complaint. As this court recently said, '[e]ven after *Tooley*, a claim is not "direct" simply because it is pleaded that way.... Instead the court must look to all the facts of the complaint and determine for itself whether a direct claim exists.' " *Id.* at p. 997, citing *Dieterich v. Harrer*, 857 A.2d 1017, 1027 (Del. Ch. 2004). This latter point is also consistent with Kentucky law and is the guiding principle of our resolution of this matter.

With that said, there are at least two flaws in Griffin's reasoning. First, he appears to assume that he has a direct interest to assert through a fraud by omission claim because the money he either invested in or loaned to ICS, SEB, and CBR remained his money. But it did not remain his money. Rather, it became an asset of those entities. *See Owens v. C.I.R.*, 568 F.2d 1233, 1238 (6th Cir. 1977) ("[S]tock in a corporation represents an ownership interest in a going business organization; the stockholders do not own the corporation's property.").

***6** Second, Griffin has premised the first element of his fraud by omission claims, once again, upon the notion that Sarah owed him a direct fiduciary duty of disclosure by virtue of her status as an officer and by virtue of his status as a shareholder, member, or creditor of those entities.[3] As previously discussed, however, she did not. Indeed, a corporate officer's self-dealing, theft or embezzlement of corporate funds, or breach of fiduciary duty otherwise resulting in the depletion of corporate assets or the corporation's insolvency (the essence of Griffin's claims) are considered classic bases for derivative actions—that is, actions that derive from a duty owed to the corporate entity, rather than a duty owed to a shareholder or creditor.[4] *See, e.g.*, *Shearin v. E.F. Hutton Group, Inc.*, 652 A.2d 578, 591 (Del. Ch. 1994) ("A claim for corporate waste is classically derivative."); *Big Lots Stores, Inc. v. Bain Capital Fund VII, LLC*, 922 A.2d 1169, 1180 (Del. Ch. 2006) (claims alleging that a defendant caused a corporation to become insolvent through what amounted to breaches of fiduciary duty "are classically derivative," and "do not become direct simply because they are raised by a creditor, who alleges that the breaches of fiduciary duty caused it specific harm by preventing it from recovering a debt outside of bankruptcy."); *see also In re Ionosphere Clubs, Inc.*, 17 F.3d 600, 605 (2nd Cir. 1994), explaining:

> In some cases, where a wrong has been committed by a third party against a corporation, shareholder intervention is necessary to cause the corporation to sue for rectification of the wrong. The classic case occurs where officers or directors of the corporation appropriate for themselves (or their friends) an opportunity of the corporation, or embezzle its funds. Because the managers of the corporation responsible for causing it to bring suit are the very ones who wrongfully took from the corporation, shareholder initiative is likely to be necessary to cause suit to be brought. Such an action brought by the shareholder is derivative; it is brought in the name of the corporation for the benefit of the corporation—not for the shareholder's direct benefit. Return of the stolen funds to the corporation would rectify the injury; payment of damages directly to the plaintiff-stockholders for the diminution in

> the value of their stock would be inappropriate.

[3] Griffin also indicated that Sarah had "superior knowledge of the facts and transactions at issue." However, he has not alleged that he and Sarah were also parties to a contract; thus, his argument only implicates the third circumstance discussed in *Giddings*, 348 S.W.3d at 747–48, in which a duty of disclosure would arise (*i.e.*, a fiduciary duty of disclosure), and not the fourth (*i.e.*,"where one party to a contract has superior knowledge and is relied upon to disclose same[.]").

[4] Standing for shareholders of private business corporations in derivative actions evolved from equitable principles. 19 Am. Jur. 2d *Corporations* § 1948 (2004). Where a corporation possessed a cause of action that it either refused or was unable to assert, equity permitted a stockholder to sue in his own name for the benefit of the corporation. *Id.* at § 1946. The shareholder was authorized to pursue the action for the purpose of preventing injustice when it was apparent that the corporation's rights would not be protected otherwise. *Id.* The General Assembly expressly provided in KRS Chapter 271B for derivative proceedings by shareholders against their for-profit corporations. KRS 271B.7–400(1) underscores that the right asserted in a shareholder derivative action belongs to the corporation, not an individual shareholder. It provides:

> A person shall not commence a proceeding in the right of a domestic or foreign corporation unless he was a shareholder of the corporation when the transaction complained of occurred or unless he became a shareholder through transfer by operation of law from one who was a shareholder at that time. The derivative proceeding shall not be maintained if it appears that the person commencing the proceeding does not fairly and adequately represent the interests of the shareholders in enforcing the right of the corporation.

3. Misappropriation

***7 [16]** Griffin's argument with respect to his misappropriation claim is as follows:

> The Complaint alleges that Ms. Jones "misappropriated company assets" and funds injected by Griffin "for her own benefit." "The fiduciary relationship of the corporate directors and officers to the corporation and its stockholders as a whole imposes upon them the obligation to serve the purpose of their trust with fidelity, and forbids any act by them that wrongfully diverts the corporate assets from corporate purposes." 3A Fletcher Cyclopedia of the Law of Corporations, § 1102.
>
> As President of [CJM], Ms. Jones owed a fiduciary duty of loyalty not only to [CJM], but also to the Jones Companies and their shareholders/members, including Griffin. As described in the Complaint, Ms. Jones breached that duty when [CJM] diverted assets of SEB and CBR—and Griffin's funds—for other self-interested purposes, including the construction of her house and cash transfers to members of her immediate family. Accordingly, Griffin has stated a claim for misappropriation.

This claim suffers from the same defects as Griffin's claims of breach of fiduciary duty and fraud by omission. It incorrectly characterizes the funds allegedly misappropriated as "Griffin's funds," as opposed to assets belonging to the entities themselves. Moreover, no legal authority is cited supporting that a fiduciary duty was owed to Griffin directly. To the contrary, the treatise cited by Griffin as his sole authority regarding this particular claim undermines that proposition by further explaining that "Funds of a corporation can be lawfully used for corporate purposes only, and if *misappropriated* by the directors, they and whoever with notice participates with them are jointly and severally liable *to the corporation* for the loss and damage." 3A Fletcher Cyclopedia of the Law of Corporations § 1102 (West 2011) (emphasis added).

4. Unjust enrichment

Griffin's argument regarding his unjust enrichment claim is, in relevant part, as follows:

> "The equitable doctrine of unjust enrichment is applicable as a basis for restitution to prevent one person from keeping money or benefits belonging to another." *Rose v. Ackerson*, 374 S.W.3d 339, 343 (Ky. App. 2012) (citation and internal quotation omitted). To prevail on an unjust enrichment claim under Kentucky law, a plaintiff must establish three elements: (1) that a benefit was conferred on the defendant at the plaintiff's expense; (2) a resulting appreciation of that benefit by the defendant; and (3) an inequitable retention of that benefit without payment for its value. *Jones v. Sparks*, 297 S.W.3d 73, 78 (Ky. App. 2009).
>
> Griffin's Complaint sufficiently asserts all three elements. Ms. Jones obtained benefits at Griffin's expense when [CJM] siphoned funds from the Jones Companies—funds largely provided by Griffin—for the Joneses' own self-

> interested use, including construction of their personal residence and cash transfers to family members. Under the circumstances, it would be unjust for Ms. Jones to retain those benefits without payment.

What Griffin acknowledges in his argument, however, is that his unjust enrichment claim is based upon the fact that "funds" were "siphoned" from ICS, SEB, and CBR. Thus, Griffin (an investor and shareholder) is asserting that he has a direct cause of action against Sarah (a corporate officer) because Sarah *indirectly benefitted at his expense* by misappropriating corporate assets. Laid bare, this is simply an impermissible attempt to convert a derivative claim into a direct claim through nothing more than an exercise in semantics; it is another way of asserting that Sarah, in her role of corporate officer, *indirectly injured him* (an investor and shareholder) by misappropriating corporate assets. *See2815 Grand Realty Corp. v. Goose Creek Energy, Inc.*, 656 F.Supp.2d 707, 716 (E.D. Ky. 2009) ("a diminution in the value of corporate stock resulting from some depletion of or injury to corporate assets is a direct injury only to the corporation; it is merely an indirect or incidental injury to an individual shareholder." (Citations omitted.))

CONCLUSION

***8** For the reasons discussed, Griffin lacked standing to assert his claims of breach of fiduciary duty, fraud by omission, misappropriation, and unjust enrichment against Sarah; at best, those claims were entirely derivative in nature. We therefore AFFIRM.

ALL CONCUR.

All Citations

--- S.W.3d ----, 2015 WL 4776300

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NOT TO BE PUBLISHED
Court of Appeals of Kentucky.

Handi–Van, Inc., Appellant
v.
The Community Cab Company, Inc., Appellee
and
Handi–Van, Inc., Appellant
v.
Leslie, Knott, Letcher, Perry Community Action Council, Inc., Appellee
and
Leslie, Knott, Letcher, Perry Community Action Council, Inc., Cross–Appellant
v.
The Community Cab Company, Inc.; and Handi–Van, Inc., Cross–appellees

NO. 2013–CA–001106–MR, NO. 2013–CA–001107–MR, NO. 2013–CA–001257–MR
|
RENDERED: FEBRUARY 27, 2015; 10:00 A.M.

APPEAL FROM BOONE CIRCUIT COURT, HONORABLE JAMES R. SCHRAND, JUDGE, ACTION NO. 06–CI–02268
CROSS–APPEAL FROM BOONE CIRCUIT COURT, HONORABLE JAMES R. SCHRAND, JUDGE, ACTION NO. 06–CI–02268

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BEFORE: MAZE, NICKELL, AND STUMBO, JUDGES.

OPINION

NICKELL, JUDGE:

INTRODUCTION

***1** The singular focus of this case is the transport of Medicaid clients to and from healthcare appointments—a highly competitive, but seldom lucrative market, unless the carrier can accept only profitable runs—a practice Leslie, Knott, Letcher, Perry Community Action Council, Inc. (LKLP) referred to as "cherry picking." At the heart of this litigation is Kentucky's implementation of Title XIX of the Social Security Act [1] whereby the state's Finance and Administration Cabinet contracts with brokers to dispatch carriers to transport Medicaid clients and the brokers in turn subcontract with individual carriers. The program is funded entirely with government dollars. To qualify as a subcontractor, an entity must possess a certificate from the Kentucky Transportation Cabinet (KTC) to operate the appropriate vehicle for a specific category of rider, and possess Medicaid authority to receive payment.

1 42 U.S.C.A. § 1396.

This case combines two appeals brought by Handi–Van, Inc., a for-profit motor carrier licensed to operate Disabled Persons Vehicles (DPV) in Boone, Campbell, Gallatin, Grant and Kenton Counties, claiming it was denied the opportunity to transport Medicaid clients in Northern Kentucky. One appeal is brought against Community Cab Company, Inc. (Community), [2] a for-profit competitor of Handi–Van operating in Boone, Campbell and Kenton Counties. The other appeal is brought against the Leslie, Knott, Letcher, Perry Community Action Council, Inc. [3] —KTC's contracted broker for the Human Services Transportation Delivery (HSTD) Program in Region 13 in Kentucky. [4] Without specifically alleging a conspiracy, Handi–Van argued to the trial court that Community conspired with LKLP to wrongfully exclude Handi–Van from transporting Medicaid

patients by committing unfair trade practices, restraining trade, monopolizing or attempting to monopolize trade or commerce, intentionally interfering with prospective contractual relations, and committing unspecified statutory violations in the context of Kentucky's Consumer Protection Act (the Act) and Kentucky's statutes as a whole.[5] On appeal, Handi–Van refined its argument to challenge the Boone Circuit Court's award of summary judgment to both Community and LKLP—abandoning an argument about the Act having been violated—claiming instead that the trial court ignored the existence of common law causes of action for business torts with statutory recovery. In reality, Handi–Van appears to argue LKLP enjoys an inappropriately close relationship with KTC and, as a non-profit entity, LKLP should not be exempt from requirements making it tougher for for-profit entities to compete. Handi–Van apparently desires to transport Medicaid clients, but under its own terms, not terms dictated by LKLP. Handi–Van also challenges an order denying its motion for leave to file a second amended complaint more than six years after litigation was initiated. Having reviewed the sizable record, the briefs and the law, we affirm the trial court's award of summary judgment to both Community and LKLP.

2 Handi–Van asserts it would have named another competitor, A Hilltop Taxi, LLC (Hilltop), as an appellee, had Hilltop not filed for bankruptcy. *In reA Hilltop Taxi, LLC*, Case No. 09–21138, Eastern District of Kentucky. In an amended complaint filed December 22, 2009, Handi–Van listed Hilltop, KTC, and Medicab of Kentucky, Inc. as "other entities not parties at this time."

3 A community action *agency* (CAA) is defined in Kentucky Revised Statutes (KRS) 273.410(2) as "a corporation organized for the purpose of alleviating poverty within a community or area by developing employment opportunities; by bettering the conditions under which people live, learn, and work; and by conducting, administering, and coordinating similar programs." A CAA may be created by one or more counties. KRS 273.435(1)(a). Duties of a CAA include reducing poverty, "closing service gaps, focusing resources on the most needy, [and] ... providing central or common services that can be drawn upon by a variety of related programs...." KRS 273.441(1).

4 KRS 218.014(6) and (8). Under the brokerage contract, LKLP was serving Medicaid recipients in Boone, Campbell, Gallatin, Grant and Kenton Counties—outside its statutorily created boundary of Leslie, Knott, Letcher and Perry Counties.

5 KRS 367.110 through 367.300.

***2** Additionally, LKLP cross-appeals claiming it is a governmental agency performing a governmental function and is, therefore, immune from suit. Because we affirm the award of summary judgment, the cross-appeal is rendered moot and will not be addressed.

FACTS

In 2000, the Kentucky legislature created the HSTD System under which KTC selects a broker through a bidding process.[6] The federal government pays the broker a *per capita* rate based on the number of Medicaid clients within the region.[7] The broker assigns trips to a subcontractor[8] possessing either taxi or DPV authority and coordinates payment for services provided to Medicaid recipients. From the money received, the broker pays its subcontractors, as well as administrative expenses and salaries. The broker may retain any funds not paid to subcontractors.

6 A brokerage contract spans one year with four one-year extensions.

7 This litigation pertains to Region 13 servicing Boone, Campbell, Kenton, Gallatin and Grant Counties.

8 A "subcontractor" is "a person who has signed a contract with a broker to provide human service transportation delivery within a specific delivery area and who meets human service transportation delivery requirements, including proper operating authority[.]" KRS 281.014(9).

DPV riders are classified into one of three categories depending on physical and mental state, and subcontractors may charge different rates for each category of rider: "02" riders are defined as nonemergency, ambulatory and oriented and can be transported in a regular taxi; "07" riders are nonemergency, ambulatory and disoriented; and, "08" riders are nonemergency and non-ambulatory, requiring lift-equipped vehicles. Subcontractors must hold the proper DPV certificate from KTC, and—to receive payment—have a Medicaid provider number and a contract with the region's HSTD broker.

Between 1994 and 2000—*before* HSTD existed—Handi–Van transported Medicaid clients. Between 2000 and 2005,

a private, for-profit entity named "R9T" [9] was KTC's HSTD broker in Region 13 and Handi–Van was one of its two subcontractors—the other being Community.

9 The principals of R9T are also the principals of Community Cab Company, Inc.

In 2005, LKLP submitted the winning bid to become KTC's HSTD broker in Region 13. As the new broker, LKLP adopted a new policy—requiring all subcontractors to be authorized, willing and able to transport all three categories of nonemergency Medicaid clients. [10] When deposed, Vickie Bourne, Executive Director of KTC's Office for Transportation Delivery, testified determining who qualifies as an eligible subcontractor is left to the broker's discretion. In its capacity as HSTD broker, LKLP identified only two eligible subcontractors—Community [11] and Hilltop [12] —neither of which was authorized by KTC's Department of Vehicle Regulation (DVR) to transport all three categories of Medicaid clients. LKLP informed Handi–Van via memorandum it could resume being a subcontractor if it did three things—obtain taxi-cab authority to transport "02" riders; obtain a Medicaid provider number for "02" riders; and, be able to transport all three categories of riders. Unwilling and/or unable [13] to secure taxi-cab authority and an "02" Medicaid provider number, Handi–Van has not been a subcontractor during LKLP's tenure as KTC's broker. Community is not a provider either—its request [14] for authority to transport "07" and "08" riders was rejected by KTC's DVR.

10 When asked at oral argument, LKLP's counsel explained that many brokers require subcontractors to be able to transport all three categories of riders to avoid "cherry picking." As LKLP's counsel explained, while a carrier can turn a profit on transporting "07" and "08" riders, it is difficult to find carriers who will accept "02" riders because tips are a rarity.

11 In the amended complaint for monetary damages, Handi–Van alleged LKLP and Community "conspired to split the relevant 07 and 08 transportation business to the detriment and harm of to (sic) Handi–Van" by soliciting Community as a subcontractor and meeting with Community before LKLP submitted the winning 2005 bid to serve as HSTD broker. As proof, Handi–Van alleged Community's principals initially objected to LKLP winning the brokerage contract but either withdrew that objection or lost it. Handi–Van further maintained that even though Community lacked authority to transport "07" and "08" Medicaid clients, it knew as early as June 20, 2005, it would be a subcontractor for LKLP.

12 After meeting with LKLP management, Jay Austin, a long-time taxi driver for Community, joined with others to launch Hilltop on April 1, 2006. Austin's goal was to provide "07" and "08" services in Region 13.

13 Handi–Van's owner and operator, Don Story, stated he had no desire to operate a taxi-cab company, preferring not to compete with other taxi-cab companies serving Northern Kentucky. However, in deference to LKLP's demand that taxi-cab authority was necessary to participate as a HSTD subcontractor, Handi–Van applied for such authority in June 2008 for Boone, Campbell and Kenton Counties. Community opposed the three applications which were denied because there was no need for additional taxi-cabs in the region. LKLP's counsel suggested at oral argument that Handi–Van could have received the authority needed directly through Medicaid, but the authority would have been limited to transporting Medicaid clients and could not have been used to transport private fares.

14 Handi–Van protested the request arguing need did not exist—the same reason Handi–Van maintained prevented it from obtaining taxi-cab authority for "02" riders. According to Handi–Van, Community sought additional authority at LKLP's request. A hearing was held on Community's applications on January 18, 2006, after which a KTC hearing officer found need did not exist for additional services—a ruling confirmed by the KTC Commissioner. Community's appeal of that ruling was dismissed.

PROCEDURAL BACKGROUND

***3** On November 7, 2006, Handi–Van filed a complaint solely against Community seeking a five-year injunction for violation of KRS Chapter 281; disgorgement of any compensation received by Community pursuant to KRS 466.070; punitive damages; and a jury trial. Community answered the complaint asserting ten defenses.

On December 9, 2009, Handi–Van moved to amend its complaint and name LKLP as a defendant. On December 22, 2009, the motion was granted and Handi–Van's amended complaint was filed alleging: unfair trade practices forbidden by KRS 367.170(1) (adopting subcontractor requirements that contravene state law to exclude Handi–Van from transporting Medicaid clients,

and, influencing and misleading state officials by filing fabricated applications for more vehicle authority); restraint of trade as forbidden by KRS 367.175(1); monopolizing or attempting to monopolize trade or commerce as forbidden by KRS 367.175(2); intentional interference with prospective contractual relations (between Handi–Van and Medicaid recipients); and, unspecified "statutory violations." Handi–Van demanded an injunction, joint and several damages, costs, treble damages, attorneys' fees and a jury trial. Importantly, Handi–Van did not allege conspiracy or unfair competition as causes of action in its complaint or amended complaint.

LKLP answered the amended complaint on February 11, 2010, asserting twenty-three defenses, including immunity from all liability. On March 11, 2011, LKLP answered interrogatories characterizing itself as a "quasi public agency created by county fiscal courts," claiming it was entitled to qualified and/or absolute immunity, and contending any claim should be submitted to the Kentucky Board of Claims.

On September 10, 2012, LKLP moved for summary judgment.[15] In its accompanying memorandum of law, LKLP recited the testimony of the five witnesses it had deposed; stated a strong case for immunity; and, argued Handi–Van could not seek money damages under the Act because it was not a "purchaser or lessee of goods or services" used primarily for "personal, family or household purposes." LKLP further argued: Handi–Van lacked standing to allege Medicaid fraud, statutory violations or other criminal activity; Handi–Van failed to establish LKLP had unfairly administered the HSTD program such that it amounted to unfair trade practices and/or unfair trade competition; and, while Handi–Van had never had a contract with LKLP with which there could have been tortious interference, LKLP was willing to contract with Handi–Van if it satisfied LKLP's requirements to become a qualified subcontractor.

15 Without citing to the record, Handi–Van states in its brief, "competing summary judgment motions were filed." At oral argument in this Court, counsel for Handi–Van stated he moved for summary judgment to bring the immunity issue to a head and avoid delaying trial for an interlocutory appeal. Our search of the record has revealed no pleading filed by Handi–Van styled "Motion for Summary Judgment." We did find summary judgment motions filed by LKLP and Community in mid–September 2012,—*after* Handi–Van's filing of a pleading styled "Motion to Strike Affirmative Immunity Defenses" on July 24, 2012. Handi–Van's motion to strike does not reference Kentucky Rules of Civil Procedure (CR) 56.03, and seeks only to prevent LKLP from alleging immunity at trial. In its order granting LKLP summary judgment, the trial court denied Handi–Van's motion to strike affirmative defenses as moot.

***4** Community answered the amended complaint on February 16, 2010, asserting thirteen defenses. On September 11, 2012, Community moved for summary judgment. Its accompanying memorandum of law argued the theme of Handi–Van's amended complaint was a conspiracy between Community, LKLP and unnamed others; specifically, that they conspired to violate the Act. Community maintained Handi–Van's three claims under the Act[16] were time-barred because a conspiracy must be alleged within one year of the date of discovery. KRS 413.130. During a deposition, Don Story, Handi–Van's president, had admitted being certain of the claims around July 1, 2005, but not filing the original complaint until November 7, 2006—well outside the one-year statutory window. Moreover, Community noted Handi–Van's original complaint was filed solely against Community and made no mention of any conspiracy. It was not until December 22, 2009, that Handi–Van filed the amended complaint and for the first time mentioned—repeatedly—the word "conspiracy."

16 Unfair trade practices under KRS 367.170(1); restraint of trade or commerce under KRS 367.175(1); and monopoly of trade or commerce under KRS 367.175(2).

In addition to the missed statute of limitations, Community argued Handi–Van offered no proof Community and LKLP had conspired or even communicated during the relevant timeframe. Community also argued Handi–Van could not prevail on the three claims alleged under the Act because Tom Nicolaus, Community's president, had testified his only communication with LKLP was to say "Hi," and he had no contact with any transportation competitors in Northern Kentucky—testimony Handi–Van never contradicted. Additionally, Community argued the Act is inapplicable because Handi–Van's claims do not arise from a consumer transaction—the genesis of the claims being the stifling of *commercial* interests—and, Handi–Van lacked privity with Community. Next, Community argued Handi–Van's claim of statutory violations under KRS 446.070 was doomed because Handi–Van is not a consumer protected by the Act. Finally, Community claimed Handi–Van could not prevail on its claim that Community had tortiously interfered with Handi–Van's contracts, or prospective contracts with

Medicaid recipients, because HSTD subcontractors do not contract with individual Medicaid clients. Instead, they contract with an HSTD broker—in this case, LKLP—which arranges for a subcontractor to pick up and transport a Medicaid recipient. Because Handi–Van lacked "02" authority and a Medicaid provider number, LKLP did not deem Handi–Van to be a qualified provider, and, therefore, Handi–Van had no contract with LKLP with which Community could have interfered. As a result, Handi–Van had no expectancy of a contract with any individual Medicaid recipient. Existence of a contract being just one of six elements that must be proved to establish a claim of tortious interference, *Snow Pallet, Inc. v. Monticello Banking Co.*, 367 S.W.3d 1, 6 (Ky.App.2012) (internal citations omitted), Community argued Handi–Van could not prevail.

Community stated it played no role in LKLP's decision about who was a qualified subcontractor; never tried to exclude Handi–Van from the HSTD program; and never exhibited any motive—improper or otherwise; all points Handi–Van failed to contradict. Furthermore, since Community withdrew from the HSTD program in November 2006, it noted it did not benefit from Handi–Van's absence from the HSTD market. Community also pointed out that either the subcontractor or the broker may cancel an agreement on thirty-day's notice, thereby defeating Handi–Van's argument that it was entitled to participate in the HSTD program.

The summary judgment motions were heard February 26, 2013, and April 11, 2013, with a major point of discussion being whether the majority of Handi–Van's claims were common law causes of action or alleged violations under the Act. Thereafter, on April 16, 2013, Handi–Van filed a "Notice of Withdrawal of Statutory Damage Claim and/or Statutory Causes of Action" acknowledging its reference to the Act in the amended complaint had caused confusion rather than merely demonstrating Kentucky's "public policy" as set forth by the Legislature, as counsel had intended. Handi–Van's counsel indicated in the Notice that it was filed for purposes of clarification only and did not constitute withdrawal of the three "common law claims" (unfair trade practices, restraint of trade and monopolizing or attempting to monopolize trade or commerce). Community's counsel objected, seeing the maneuver as an improper means of removing the issue from the trial court's consideration, and forbidden by CR 41.01(1) which prohibits a plaintiff from unilaterally dismissing claims after an answer and/or motion for summary judgment has been filed. LKLP filed a similar objection on April 19, 2013. This flurry of activity was followed by Handi–Van's filing of a motion seeking leave to file a *second* amended complaint, to which both Community and LKLP rapidly objected.

***5** On June 3, 2013, the trial court entered four orders—two denied Handi–Van's motions to file a second amended complaint (one in the case against Community and one in the case against LKLP); two awarded summary judgment to LKLP and Community. Citing CR 56.03 and *Steelvest, Inc. v. Scansteel Service Center, Inc.*, 807 S.W.2d 476 (Ky.1991), the trial court stated summary judgment is appropriate in the absence of any genuine issues of material fact, and the record must be viewed in the light most favorable to the non-moving party in whose favor all doubt must be resolved. In conducting its immunity analysis, the trial court found LKLP qualified as a special district under KRS 65.060 in light of the service it was providing, but ultimately denied LKLP's assertion of immunity because it could find no proof the counties in which those services were being offered (Boone, Campbell, Grant, Gallatin and Kenton) had ever adopted LKLP as a special district. The trial court rejected LKLP's argument that it was similarly situated to a water district created by a county government under KRS Chapter 74.

The trial court further found LKLP was not insulated by sovereign immunity because "the brokering of the contract for the transportation of Medicaid patients to medical appointments is not an integral government function." *Kentucky Center for the Arts Corp. v. Berns*, 801 S.W.2d 327, 332 (Ky.1990). Furthermore, because LKLP was performing a proprietary function rather than an integral government function, it could not claim protection under CALGA. [17]

17 Claims Against Local Government Act. KRS 65.200 *et. seq.*

Regarding the substantive claims, the trial court noted actions for conspiracy must be brought within one year of the accrual of the claim. KRS 413.140(1)(c). Because Don Story had testified he knew of the alleged conspiracy involving LKLP more than four years before the amended complaint was filed adding LKLP as a defendant, the claim was deemed untimely. Furthermore, the trial court noted the claim of a conspiracy was refuted by uncontroverted testimony from Community's President. Moreover, the trial court held because Handi–Van did not conduct its own discovery, it developed no proof supporting the conspiracy claims.

The trial court found the first three counts of the complaint could only be reasonably read to allege violations of

the Act, with no notice of alleged violations of public policy.[18] Contrary to Handi–Van's assertion, the claims were not cognizable under the Act—particularly since in this context, Handi–Van was not a consumer but, rather, was a provider. The trial court was troubled by Handi–Van's failure to cite any common law authority supporting private causes of action for unfair trade practices, restraint of trade, and monopolizing or attempting to monopolize trade or commerce. In distinguishing *Jackson v. Sullivan*, 276 Ky. 666, 124 S.W.2d 1019 (1939), the trial court noted an agreement that violates public policy would be an unreasonable restraint on trade and, therefore, would be void. Here, however, the trial court found there was no contract between LKLP and Handi–Van that could have constituted an unreasonable restraint on trade.

18 Since Handi–Van acknowledged it was not alleging fraud or Medicaid fraud, the trial court did not comment on those arguments.

Similarly, since there was no contract between Handi–Van and LKLP, the trial court found there was no intentional interference with contractual relations—either existing or prospective. *Snow Pallet, Inc.* 367 S.W.3d at 6; *National Collegiate Athletic Association v. Hornung*, 754 S.W.2d 855 (Ky.1988). Based on testimony recounted by the trial court, there was no proof Community intentionally interfered with any potential contract between LKLP and Handi–Van. Moreover, had LKLP selected Handi–Van as a subcontractor, its contract would have been with LKLP—not with any individual Medicaid client it transported.

Handi–Van's last claim was for damages from various asserted violations arising under the Act. In addition, Handi–Van generally demanded damages related to unspecified "statutory violations."[19] Because the Act was not created for the benefit of commercial entities, but rather was intended for the benefit of consumers, the trial court found four of the five claims were brought improperly under the Act and rejected them. *See Alderman v. Bradley*, 957 S.W.2d 264 (Ky.App.1997); *Michals v. William T. Watkins Memorial United Methodist Church*, 873 S.W.2d 216 (Ky.App.1994). The trial court stated damages are available under the Act only for persons and events the Act was designed to protect. Under the facts of this case, Handi–Van was not a "consumer," but rather was a *hopeful* provider. Thus, it appears the trial court deemed the Act inapplicable to the allegations and denied recovery.

19 The amended complaint charged, "[t]he Defendants, and each of them, and Hilltop, by violating the statues (sic) of the Commonwealth of Kentucky, are liable, jointly and severally, to Handi–Van for all damages sustained by reason thereof under KRS 446.070." KRS 446.070 reads: "A person injured by the violation of any statute may recover from the offender such damages as sustained by reason of the violation, although a penalty or forfeiture is imposed for such violation."

***6** Finding the existence of no genuine issues of material fact, the trial court granted LKLP's motion for summary judgment and dismissed with prejudice all claims alleged against LKLP in the amended complaint. The trial court also denied Handi–Van's motion to strike LKLP's affirmative defenses as moot. In a separate order, also entered on June 3, 2013, the trial court granted Community's motion for summary judgment and dismissed with prejudice all claims alleged against it in the amended complaint. This appeal followed.

ANALYSIS

Trial courts use summary judgment to expedite litigation. *Ross v. Powell*, 206 S.W.3d 327, 330 (Ky.2006). It is a "delicate matter" because it "takes the case away from the trier of fact before the evidence is actually heard." *Steelvest*, 807 S.W.2d at 482. In Kentucky, the movant must prove no genuine issue of material fact exists, and "should not succeed unless his right to judgment is shown with such clarity that there is no room left for controversy." *Id.* Importantly, the non-moving party must present "at least some affirmative evidence showing the existence of a genuine issue of material fact[.]" *City of Florence v. Chipman*, 38 S.W.3d 387, 390 (Ky.2001).

On appeal, our standard of review is "whether the trial court correctly found that there were no genuine issues as to any material fact and that the moving party was entitled to judgment as a matter of law." *Scifres v. Kraft*, 916 S.W.2d 779, 781 (Ky.App.1996). Furthermore, because summary judgments do not involve fact-finding, our review is *de novo*. *Pinkston v. Audubon Area Community Services, Inc.*, 210 S.W.3d 188, 189 (Ky.App.2006). With these standards in mind, we determine whether the trial court erred in awarding summary judgment.

Here, Handi–Van participated in discovery initiated by LKLP and Community, but initiated no depositions on its own.

At oral argument, counsel for Handi–Van boldly stated he did not have to take discovery because he participated in cross-examination and document production. Unfortunately, his cross-examination was ineffectual because none of the witnesses called by the appellees provided useful testimony to establish Handi–Van's claims. *LaFleur v. Shoney's, Inc.*, 83 S.W.3d 474 (Ky.2002), explains the purpose of discovery:

> [p]retrial discovery simplifies and clarifies the issues in a case; eliminates or significantly reduces the element of surprise; helps to achieve a balanced search for the truth, which in turn helps to ensure that trials are fair; and it encourages the settlement of cases. *See, e.g.*,*Elkins v. Syken*, 672 So.2d 517, 522 (Fla.1996). And, of course, the settlement of cases serves the dual and valuable purposes of reducing the strain on scarce judicial resources and preventing the parties from incurring significant litigation costs.

Id. at 478. Clearly, Handi–Van was counting on going to trial, but did nothing to ensure trial occurred. At oral argument, Handi–Van's counsel couched his comments in terms of, "we believe the evidence will show," indicating to us no affirmative evidence of a genuine issue of material fact existed in the case to which he could specifically cite. *Chipman*, 38 S.W.3d at 390. Any such affirmative evidence supporting Handi–Van's asserted claims should have been developed during discovery. Here, however, Handi–Van failed to introduce any affirmative proof and hoped a case materialized at trial.

At oral argument, when specifically asked to detail evidence establishing Handi–Van's claims, counsel cited a report from a hearing involving *different parties* in which a hearing officer from the Office of the Attorney General reached a resolution that would have benefitted Handi–Van had it been a party to that matter. Not only was Handi–Van *not* a party to the cited litigation, LKLP—the entity taken to task by the hearing officer in the report—was *not* a party to the litigation and was never afforded the opportunity to respond on the record to the hearing officer's concerns. Furthermore, the KTC Commissioner subsequently rejected a significant portion of the hearing officer's report.

***7** Counsel for Handi–Van proceeded to discuss the referenced report and urged this Court to study it, but even he would not go so far as to characterize it as evidence. Handi–Van placed the referenced report in the record of this case, but we are unconvinced it was credible evidence sufficient to refute the motions for summary judgment filed by LKLP and Community. Moreover, the trial court did not address whether the report was evidence worthy of consideration. Without a ruling by the trial court, we—as a Court of review—have nothing to review. "It is an unvarying rule that a question not raised or adjudicated in the court below cannot be considered when raised for the first time in this court." *Combs v. Knott County Fiscal Court*, 283 Ky. 456, 141 S.W.2d 859, 860 (1940) (citing *Benefit Association of Ry. Employees v. Secrest*, 239 Ky. 400, 39 S.W.2d 682, 685 (1931)). The questionable value of this report was no match for the extensive, relevant and probative evidence mustered by LKLP and Community.

Additionally, while *en route* to this Court, Handi–Van transformed its theory of the case. In the trial court, Handi–Van maintained its claims were brought under the Act. At page 18 of its brief, without giving specifics, Handi–Van mentions "violation of Medicaid statutes and regulations, federal and State, but also public policy for a competitive market as well as violations of KRS 367.175 (Kentucky unfair trade legislation)." Then, at page 19, Handi–Van refers to "common law claims" and "business torts." At oral argument, counsel consistently argued the claims were common law claims. Handi–Van cannot have it both ways, and more importantly, cannot "feed one can of worms to the trial judge" and a different can of worms to us. *Kennedy v. Commonwealth*, 544 S.W.2d 219, 222 (Ky.1976), *overruled on other grounds by**Wilburn v. Commonwealth*, 312 S.W.3d 321 (Ky.2010).

This case involves a voluminous record which thoroughly supports the trial court's resolution. While summary judgment should not be granted lightly, in this case it was entirely appropriate. We affirm.

ALL CONCUR.

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NOT TO BE PUBLISHED
Court of Appeals of Kentucky.

Anna Ruth MASON, Appellant
v.
MONUMENTAL LIFE INSURANCE CO., INC.; U.S. Bank; Ronnie Taylor, Appellees.

No. 2006-CA-002122-MR.
|
Jan. 4, 2008.

Appeal from Logan Circuit Court, Action No. 05-CI-00153; Tyler L. Gill, Judge.

Attorneys and Law Firms

Nancy Oliver Roberts, Bowling Green, KY, for appellant.

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Robert Shannon Morgan, Jason K. Murrie, Bowling Green, KY, for appellee, U.S. Bank.

Before STUMBO and WINE, Judges; GUIDUGLI,[1] Senior Judge.

1 Senior Judge Daniel T. Guidugli sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and KRS 21.580.

OPINION

WINE, Judge.

***1** Anna Ruth Mason appeals from an order of the Logan Circuit Court dismissing her claims against Monumental Life Insurance Company and U.S. Bank, and denying her motion to file an amended complaint. We agree with the trial court that Mason's damages under the initial complaint would not exceed the jurisdictional threshold for the circuit court. We also agree that the amended complaint fails to plead fraud with sufficient particularity. Hence, we affirm.

For purposes of this appeal, the underlying facts of this action are not in dispute. On August 28, 1990, Commonwealth Life Insurance Company issued a life insurance policy to Mason. The policy insured Mason's life for $40,000.00, and the lives of her two children for $5,000.00. The policy provided for a ten-year renewable term, with a monthly premium during the first term of $25.25. Thereafter, on June 1, 1997, Commonwealth issued a second policy to Mason, insuring her life for $30,000.00. Like the first policy, the second policy was for a ten-year renewable term, and provided for a monthly premium of $29.70. Under both policies, the primary beneficiaries were Mason's children, Cynthia and Troy Mason. Monumental acquired responsibility for the policies after it merged with Commonwealth.

The insurance agents for Commonwealth and Monumental, respectively, normally collected the premiums from Mason at her home each month. Beginning in July 1997, the total premium for both policies was $54.95. But beginning in March 1998, Monumental's agent, Ronnie Taylor began collecting $48.00 per month on the $30,000.00 policy, for a total premium of $73.25 per month.

On August 1, 1999, Monumental canceled the $30,000.00 policy due to nonpayment of premiums. Taylor approached Mason about reinstating the policy. Mason declined to sign the reinstatement form, maintaining that her premiums were current and her policy had not lapsed.

Taylor ceased working for Monumental in April 2000, and the account was assigned to David Smallwood. On April 20, 2000, Smallwood went to Mason's home to collect the premium for the $40,000.00 policy. He also informed her that the $30,000.00 policy had been canceled on August 1, 1999. Mason again maintained that her premiums were current and her policy had not lapsed. She also refused to pay Smallwood the premium on the $40,000.00 policy. As a result, Monumental canceled the $40,000.00 policy in May 2000. Mason admits that she made no premium payments after February 2000.

Shortly after meeting with Smallwood, Mason confronted Taylor at his home and questioned him about the lapse of the $30,000.00 policy. According to Mason, Taylor admitted to taking her money and promised to pay her back. Taylor denies making such a confession.

In June 2000, Mason requested the Kentucky Department of Insurance to investigate whether Monumental had given her proper credit for all her premium payments. After auditing its payment records against Mason's checks, Monumental determined that it had received but failed to credit Mason with $123.73. Monumental also found that it had over-collected $18.30 per month on the $30,000.00 policy for seventeen months, resulting in an overpayment of $434.83.

***2** On April 7, 2005, Mason filed a complaint against Monumental and Taylor. She alleged that Monumental had breached its contract by wrongfully terminating the insurance policies and she asserted that Taylor had converted her premium payments. As damages, Mason claimed that she was entitled to recover the death benefits payable under the policies. Mason also asserted a claim against U.S. Bank, alleging that U.S. Bank had wrongfully allowed Taylor to make withdrawals from her account.

The claim against Taylor was stayed after he filed for bankruptcy, but discovery proceeded on Mason's claims against Monumental and U.S. Bank. On June 23, 2006, Monumental filed a motion for summary judgment, arguing that Mason would not be entitled to recover the death benefit under the policies and consequently, her claim failed to meet the minimum jurisdictional amount for circuit court. The trial court denied the motion on July 7, 2006. But on August 10, 2006, Monumental renewed its summary judgment motion on the same grounds. Mason responded to the motion and filed a separate motion to file an amended complaint asserting fraud claims against Monumental and U.S. Bank.

On September 6, 2006, the trial court entered a calendar order granting Monumental's motion for summary judgment. Thereafter, Mason filed a motion to set aside the order, stating that she had not received timely notice of its entry. She also renewed her motion to file an amended complaint. On September 27, 2006, the trial court entered an opinion and order again granting Monumental's motion for summary judgment. The court agreed with Monumental that the allegations in Mason's complaint would only support recovery of premiums which she paid but were not credited to her account. Since this amount would not exceed $4,000.00, the trial court concluded that it lacked subject-matter jurisdiction over the claim. The court also denied Mason's motion to file an amended complaint, finding that she had failed to plead the alleged fraud with particularity. Although the trial court's order did not specifically address Mason's claims against U.S. Bank, the parties agree that those claims were dismissed as well. This appeal followed. [2]

2 Due to Taylor's pending bankruptcy, Mason did not name him as a party to this appeal.

The primary question in this case is whether Mason has asserted claims against Monumental and U.S. Bank which are within the circuit court's jurisdiction. The circuit court has jurisdiction over all civil matters not exclusively vested in some other court. KRS 23A.010(1). Since the district court has exclusive jurisdiction over civil matters in which the amount in controversy does not exceed $4,000.00, KRS 24A.120(1), the circuit court has jurisdiction of amounts in controversy exceeding $4,000.00. *City of Somerset v.. Bell*, 156 S.W.3d 321, 331 (Ky.App.2005)

Monumental argues that Mason's damages for breach of the life insurance contracts would be limited to any amounts which she paid but were not applied toward her policy. At most, Mason claims that Monumental failed to credit her for $800.00 to $900.00 in premium payments. On the other hand, Mason contends that Monumental's wrongful termination of the policies would entitle her to recover the death benefits under the policies, $70,000.00. She also contends that she would be entitled to punitive damages.

***3** There is little Kentucky case law which directly addresses the remedies for breach of a life insurance contract. But there is considerable authority from other jurisdictions on the subject. *See* Annotation, "Remedies and Measure of Damages for Wrongful Cancellation of Life, Health, and Accident Insurance, 34 A.L.R.3d § 3, 245, 269-72 (1970 & 2007 Supp.). Where an insurer wrongfully cancels, repudiates or terminates a contract of insurance, the insured may pursue any of three courses: (1) she may elect to consider the policy at an end and recover the just value of the policy or such measure of damages the court in its particular jurisdiction approves; (2) she may institute proceedings in equity to have the policy adjudged to be in force; or (3) she may tender the premiums and, if acceptance is refused, wait until the policy by its terms becomes payable and test the forfeiture in a proper action on the policy.*Id.* at 269.*See also Viles v. Prudential Insurance Company of America*, 124 F.2d 78, 80 (10th Cir.1941). These remedies are mutually exclusive, and a wrongfully-terminated insured must elect one remedy. 34 A.L.R.3d § 4, 272-73. *See also Armstrong v. Illinois Bankers Life Association*, 217 Ind. 601, 29 N .E.2d 415, 421-22 (1940). In her initial and first amended complaints,

Mason only asserted claims against Monumental and Taylor for breach of contract. Furthermore, Mason concedes that she has not tendered any payments since 2000, and she is not seeking reinstatement of the policies. Consequently, she has elected the first remedy.

"Damages for breach of a contract are normally that sum which would put an injured party into the same position [she] would have been in had the contract been performed."*University of Louisville v. RAM Engineering & Construction, Inc.*, 199 S.W.3d 746, 748 (Ky.App.2005), *citing Hogan v. Long*, 922 S.W.2d 368, 371 (Ky.1995). In the case of a wrongfully-terminated life insurance policy, the insured may recover the cash value of the policy or recovery of premiums paid by the insured. 34 A.L.R.3d § 17, 309. *See also People's Mutual Insurance Fund v. Bricken*, 13 Ky. L. Rptr. 586, 17 S.W. 625 (Ky.1891). There are cases suggesting that a wrongfully-terminated insured who is no longer an insurable risk may be entitled to recover the present value of the policy, which is the cash value of the policy less the amount of the unpaid premiums. *Vicars v. Mutual Benefit Health & Accident Association of Omaha*, 259 Ky. 13, 81 S.W.2d 874 (1935), *citing American Insurance Union v. Woodard*, 118 Okl. 248, 247 P. 398, 401 (1926).

However, the policies at issue are term policies and have no cash value. Mason has clearly lost the benefit of her bargain-the right to continuing and renewable coverage under the policies. But she has not suggested a measure of such damages, nor has she even claimed such damages in this action. And we find no authority which allows an insured who has elected this remedy to recover the full death benefits payable under the policy.

***4** Therefore, the only measure of damages would be for the amount of the premiums which Mason paid but for which Monumental did not provide coverage. At most, Mason's claimed damages for breach of the insurance contract would be around $900.00. Consequently, her claims for breach of contract fail to meet the minimum jurisdictional amount for circuit court.

Likewise, Mason's claims against U.S. Bank arise from two allegedly improper withdrawals from her account in 1997, totaling $59.40. She also suggests that U.S. Bank is liable for Taylor's conversion of other premium payment checks, but she does not identify any other specific improper withdrawals. Consequently, Mason's claims against U.S. Bank also fail to meet the jurisdictional threshold for circuit court.

On appeal, Mason focuses on her fraud claim which she attempted to assert against Monumental and Taylor in her third amended complaint. She asserts that Taylor, while acting as Monumental's agent, fraudulently increased her insurance premium, retained her premium payments, and removed funds from her bank account. Mason contends that, had the trial court allowed her to amend the complaint, she would have been able to recover the full benefit of her bargain with Monumental, which would be the death benefits payable under the policies. In addition, the fraud claims would support an award of punitive damages. She concludes that such damages would be more than sufficient to meet the jurisdictional limit of circuit court.

In support of her position, Mason notes the long-standing rule that a person who is "induced by fraudulent representations to enter into a contract is entitled to recover as damages, not only what he actually parted with, but benefits of the bargain."*Investors Heritage Life Ins. Co. v. Colson*, 717 S.W.2d 840, 842 (Ky.App.1986), *citing Dempsey v. Marshall*, 344 S.W.2d 606 (Ky.1961). In *Colson*, the insured purchased credit life insurance as part of an installment credit contract. During the transaction, the insured informed the agent of his health problems, but the agent assured the insured that coverage would still be provided. After the insured's death, however, the insurance company denied the claim on the grounds that the "sound health" provision precluded coverage and because the agent did not have the authority to waive the provision. The agent argued, among other things, that no damages were proven because the insurance company refunded the premium. This Court rejected the argument, concluding that the amount of the premiums was not the proper measure of damages. Rather, the insured's estate was entitled to the benefit of the bargain, which would be coverage under the policy. *Colson*, 717 S.W.2d at 842.

Unlike in *Colson*, Mason does not allege that there was any fraud by Monumental or Taylor in inducing her to sign the insurance contract. The alleged fraud concerns Monumental's and Taylor's performance of the contract. While every contract includes an implied covenant of good faith and fair dealing, *Ranier v. Mount Sterling National Bank*, 812 S.W.2d 154, 156 (Ky.1991), the elements for such a claim are different than a claim alleging fraud.

***5** Moreover, the benefit of Mason's bargain was coverage for the term of the policies. Even if Taylor fraudulently converted Mason's premium payments, causing the $30,000.00 policy to lapse, Mason has never become entitled to receive the benefits payable under the policies. At most, she was deprived of the opportunity to continue coverage, which she herself precluded when she refused to tender any additional payments. Consequently, even under her tendered fraud claims, Mason's damages would be limited to the coverage period of which Taylor's alleged fraud deprived her.

Of course, the fraud claim could support an additional award of punitive damages. However, we agree with the trial court that Mason failed to plead the alleged fraud with particularity, as required by CR 9.02. To be sufficient, "it is enough to plead the time, the place, the substance of the false representations, the facts misrepresented, and the identification of what was obtained by the fraud."*Scott v. Farmers State Bank,* 410 S.W.2d 717, 722 (Ky.1966). In her third amended complaint, Mason alleged that Taylor retained her premium payments for his own benefit and made unauthorized withdrawals from her account at U.S. Bank.

But at the time Mason attempted to file this complaint, the parties had already conducted extensive discovery. Monumental's records showed that Taylor deposited all of Mason's premium payments into Monumental's bank account. While some of those deposits may not have been timely, Mason did not identify any payments which were not properly credited to her apart from the two electronic fund transfers charged to Mason's account in 1997. Likewise, Mason did not plead that U.S. Bank would have had reason to know that any of the electronic fund transfers or other withdrawals were improper.

CR 15.01 allows a trial court to amend pleadings when justice so requires. But while amendments should be freely allowed, the trial court has wide discretion and may consider such factors as the failure to cure deficiencies by amendment or the futility of the amendment itself. *First National Bank of Cincinnati v. Hartman,* 747 S.W.2d 614, 616 (Ky.App.1988), *citing*CR 15.01; Bertelsman and Philipps, 6 *Ky. Practice,* at 310 (1984). Under the circumstances, Mason failed to plead fraud against Monumental and U.S. Bank with sufficient particularity as would support a claim for damages in excess of the minimum jurisdictional amount for circuit court. Therefore, the trial court did not abuse its discretion in denying her motion to file the amended complaint.

Given this holding, the remaining issues in Mason's appeal are moot. Mason makes no showing that the information which she sought to discover from Monumental and U.S. Bank would have allowed her to recover damages of more than $4,000.00. Since the circuit court lacked subject-matter jurisdiction, the court did not err by denying her motion to compel further discovery without a hearing.

***6** Finally, Mason contends that the trial court violated her due process rights by granting Monumental's summary judgment motion by use of a calendar order entered on September 6, 2006. But even if this practice was error, Mason does not show that she suffered any prejudice as a result. The trial court did not designate its September 6, 2006, calendar order as final and appealable. And upon her motion, the trial court entered a memorandum opinion and order on September 27, 2006, formally dismissing the action. Since Mason properly brought her appeal from this order, any due process violation was harmless.

Accordingly, the summary judgment of the Logan Circuit Court dismissing Mason's claims against Monumental and U.S. Bank is affirmed.

ALL CONCUR.

All Citations

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8

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Only the Westlaw citation is currently available.
United States District Court,
W.D. New York.

Ann McCRACKEN, Joan Ferrell, Sarah Stilson, Kevin McCloskey, Christopher Trapatsos, and Kimberly Bailey, as individuals and as representatives of the classes, Plaintiffs,
v.
VERISMA SYSTEMS, INC., Strong Memorial Hospital, Highland Hospital, and University of Rochester, Defendants.

No. 14–CV–6248T.
|
Signed May 18, 2015.

Attorneys and Law Firms

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Eric J. Ward, Abigail L. Giarrusso, Ward Greenberg Heller & Reidy LLP, Rochester, NY, for Defendants.

DECISION and ORDER

MICHAEL A. TELESCA, District Judge.

INTRODUCTION

***1** Ann McCracken ("McCracken"), Joan Ferrell ("Ferrell"), Sarah Stilson ("Stilson"), Kevin McCloskey ("McCloskey"), Christopher Trapatsos ("Trapatsos"), and Kimberly Bailey ("Bailey") (collectively, "Plaintiffs"), bring this action on behalf of themselves and others against Verisma Systems, Inc. ("Verisma"), Strong Memorial Hospital ("Strong"), Highland Hospital ("Highland"), and the University of Rochester ("U of R") (collectively, "Defendants"), claiming that Defendants charged inflated prices for medical records in violation of New York State law. Verisma contracts with Strong, Highland and the U of R (collectively, the "Healthcare Defendants") to provide medical records to patients of those entities. Plaintiffs, all of whom are patients who received medical treatment at the Healthcare Defendants, claim that Defendants charged them excessively for copies of their medical records, in violation of New York Public Health Law ("NYPHL") § 18. Plaintiffs also assert causes of action for unjust enrichment and for a deceptive trade practices under New York General Business Law ("NYGBL") § 349.

FACTUAL BACKGROUND

The following factual summary is based on the allegations in the Amended Complaint, which are deemed to be true for purposes of deciding Defendants' motions to dismiss. Verisma is a private corporation that contracts with doctors and hospitals nationwide to provide medical records to patients, or other authorized entities, who request such records. Verisma entered into contracts with the Healthcare Defendants to provide copies of medical records generated by the Healthcare Defendants to patients who requested those records. Plaintiffs allege that Verisma obtained these contracts by offering financial and other types of incentives to the Healthcare Defendants. According to Plaintiffs, these incentives, which Plaintiffs characterize as "kickbacks", are a central component of Verisma's marketing strategy. Plaintiffs cite to information publicly available on Verisma's website and third-party websites on which Verisma maintains a business profile. *See, e.g.*, Amended Complaint ("Am.Compl.") (Dkt # 4) ¶ 27 & Exhibit ("Ex.") 4 (quoting websiteIndeed.com which states that Verisma helps health care providers "capture available revenue in their Release of Information processes").

All Plaintiffs reside in the Greater Rochester area and, through their attorneys, requested copies of their medical records from the Healthcare Defendants. Upon receiving a request for records from a Plaintiff, the Healthcare Defendants forwarded the request to Verisma, which fulfilled the request for records and sent an invoice to Plaintiffs' attorneys. Sometimes, rather than actually send Plaintiffs hard copies of the requested records, Verisma simply made the records available to Plaintiffs via an online portal. Regardless of how the copies of records were provided (in paper form or electronically), Verisma charged $0.75 per page without regard to, and without disclosing, the actual costs of producing copies of the records. Each Plaintiff paid the amount charged by Verisma through their counsel. Plaintiffs allege that the cost to produce each medical record was substantially less than $0.75 per page and that the amounts

charged were inflated as a result of Defendants' alleged "kickback scheme."

PROCEDURAL STATUS

***2** Verisma has moved to dismiss the Amended Complaint pursuant to Federal Rule of Civil Procedure 12(b)(6) ("Rule 12(b)(6)") on the basis that Plaintiffs have failed to state a claim upon which relief can be granted. According to Verisma, Plaintiffs have failed to establish any actual injury since the charges Verisma imposed on them for copies of medical records are expressly deemed reasonable under New York law. The Healthcare Defendants have moved to dismiss the Amended Complaint pursuant to Federal Rule of Civil Procedure 12(b)(1) ("Rule 12(b)(1)") on the ground that Plaintiffs lack constitutional standing, and pursuant to Rule 12(b)(6) for failure to state claims for unjust enrichment and for violations of NYPHL § 18 and NYGBL § 349.

RULE 12(b) (1) STANDARD

"A case is properly dismissed for lack of subject matter jurisdiction ... when the district court lacks the statutory or constitutional power to adjudicate it."*Makarova v. United States*, 201 F.3d 110, 113 (2d Cir.2000) (citing FED. R. CIV. P. 12(b)(1)). The party seeking to establish jurisdiction bears the burden of "showing by a preponderance of the evidence that [it] exists."*Lunney v. United States*, 319 F.3d 550, 554 (2d Cir.2003) (citation omitted). In resolving subject matter jurisdiction under Rule 12(b)(1), a district court may refer to evidence outside the pleadings. *Id.* (citing *Kamen v. American Telephone & Telegraph Co.*, 791 F.2d 1006, 1011 (2d Cir.1986) ("[W]hen ... subject matter jurisdiction is challenged under Rule 12(b) (1), evidentiary matter may be presented by affidavit or otherwise.") (citation omitted)).

DISCUSSION

I. Standing and the Rule 12(b)(1) Motion by the Healthcare Defendants

A. General Legal Principles

Because standing is jurisdictional, the Court first considers the Healthcare Defendants' motion pursuant to FRCP 12(b)(1) to dismiss based on Plaintiffs' lack of standing to bring this lawsuit. *See Rhulen Agency, Inc. v. Alabama Ins. Guar. Ass'n*, 896 F.2d 674, 678 (2d Cir.1990) (stating that when a party moves for dismissal both for failure to state a claim and lack of jurisdiction, "the court should consider the Rule (12)(b)(1) challenge first since if it must dismiss the complaint for lack of subject matter jurisdiction, the accompanying defenses and objections become moot and do not need to be determined").

The standing requirements of Article III, Section 2 of the United States Constitution"are not mere pleadings requirements but rather [are] an indispensable part of the plaintiff's case."*Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561, 112 S.Ct. 2130, 119 L.Ed.2d 351 (1992) (citations omitted). To establish standing, a plaintiff must show

> (1) it has suffered an 'injury in fact' that is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical; (2) the injury is fairly traceable to the challenged action of the defendant; and 3) it is likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision.

***3** *Friends of the Earth Inc. v. Laidlaw Environmental Servs. (TOC), Inc.*, 528 U.S. 167, 180–81, 120 S.Ct. 693, 145 L.Ed.2d 610 (2000). The Healthcare Defendants argue that Plaintiffs have failed to sufficiently allege "injury-in-fact" and causation, but they do not challenge the redressability requirement.

B. Injury–In–Fact

With respect to the "injury-in-fact" requirement, "[e]ven a small financial loss is an injury for purposes of Article III standing."*Natural Res. Def. Council, Inc. v. United States Food & Drug Admin.*, 710 F.3d 71, 85 (2d Cir.2013). The Healthcare Defendants argue that Plaintiffs have failed to plead that they incurred a financial loss due to the purported overcharges for their medical records, because Plaintiffs allege only that their attorneys paid Verisma for the requested copies; Plaintiffs do not allege that they personally paid Verisma for the records or that they reimbursed their attorneys for the amounts paid by the attorneys to Verisma. *See* Healthcare Defendants' Memorandum of Law in Support of Motion to Dismiss ("Healthcare Defs' Mem.") (Dkt # 214) at 6. Plaintiffs, in their opposition brief, assert that they are not required to "plead the obvious", i.e., that their legal services agreement with their attorneys dictates that they must reimburse the attorneys for all costs, including those

associated with obtaining copies of their medical records. *See* Plaintiffs' Opposition Memorandum of Law ("Pls' Opp.") (Dkt #) at 18.

However, as the Second Circuit has repeatedly observed, "jurisdiction must be shown affirmatively, and that showing is not made by drawing from the pleadings inferences favorable to the party asserting it."*Shipping Fin. Servs. Corp. v. Drakos*, 140 F.3d 129, 131 (2d Cir.1998) (citing *Norton v. Larney*, 266 U.S. 511, 515–16, 45 S.Ct. 145, 69 L.Ed. 413 (1925)); *see also J.S. ex rel. N.S. v. Attica Cent. Schs.*, 386 F.3d 107, 110 (2d Cir.2004) (stating that in resolving jurisdiction, the court must accept as true all factual allegations in the complaint "but [is] not to draw inferences from the complaint favorable to [the party asserting jurisdiction].") (citation omitted). As the parties seeking to establish jurisdiction, Plaintiffs bear the burden of proof, *see Lunney*, 319 F.3d at 554, and thus may be required to "plead the obvious."

Two district court cases from this Circuit have recently considered, in essentially identical factual circumstances, the sufficiency of a plaintiff's allegations of injury-in-fact. *See Spiro v. Healthport Technologies*, LLC, No. 14 CIV. 2921 PAE, —— F.Supp.2d ——, 2014 WL 4277608, at *5 (S.D.N.Y. Aug.29, 2014) (Englemayer, J.); *accord Carter v. Healthport Technologies, LLC*, No. 14–CV–6275–FPG, 2015 WL 1508851, at * (W.D.N.Y.31, 2015) (Geraci, C.J.). As discussed further below, review of these cases supports this Court's conclusion that Plaintiffs are required to "plead the obvious," should they wish to proceed with this litigation.

In *Spiro*, as in the present case, the plaintiffs were clients of a law firm prosecuting personal injury causes of action on their behalf. In connection with these lawsuits, the law firm made requests for the plaintiffs' medical records to the defendant hospitals and their billing agent, who allegedly charged inflated rates for producing the records. The plaintiffs in *Spiro* brought suit against the hospitals and the billing agent to recover for unjust enrichment and violations of NYGBL § 349 and NYPHL § 18. The defendants asserted a standing challenge, arguing that the plaintiffs had failed to plead a cognizable injury-in-fact because it was the plaintiffs' law firm, and not plaintiffs themselves, which was charged, and which paid, for the copies of the medical records at issue. *Spiro*, 2014 WL 4277608, at *4.

***4** In *Spiro*, the district court found the complaint insufficient even though the plaintiffs also alleged that each plaintiff later reimbursed the law firm for the cost of the copies, after the lawsuit in question settled. 2014 WL 4277608, at *4. Because the copying costs were passed along to the client, the plaintiffs in *Spiro* argued that they each suffered an out-of-pocket monetary loss, and it was irrelevant that the law firm advanced the payments for them. The district court in *Spiro* disagreed, explaining that the complaint did not plead that any plaintiff was obligated to reimburse the law firm for the copying costs he or she incurred; instead, on the facts as pled, the decision by the plaintiffs to reimburse their lawyers after the fact, for the copying costs they had paid, "was a volitional act-an act of grace."*Spiro*, 2014 WL 42776087, at *5. The district court in *Spiro* found that on the facts alleged, absent any allegation that the plaintiffs had an obligation to their attorney for reimbursement, any legal right to challenge the overcharging would belong exclusively to the law firm, as it was the law firm alone that suffered an injury caused by the defendants' overcharging. *Id.* On the facts alleged in the complaint, the plaintiffs' later decision to reimburse their lawyers, and the law firm's decision to accept such reimbursement, were "independent, volitional, discretionary acts, breaking the chain of causation necessary to establish Article III standing."*Id.* (citing *Lujan*, 504 U.S. at 560–61)).

Here, the Amended Complaint does not even contain an allegation that Plaintiffs actually reimbursed their attorneys for the costs of the medical records, much less that they had any legal obligation to reimburse their attorney for their monetary outlay at the time they ordered the copies. Plaintiffs state that these allegations are unnecessary and urge that their allegation that they paid for their medical records "through ... counsel" are sufficient. The Court disagrees. The plaintiffs' complaint in *Spiro* contained allegations that were essentially the same as the allegations set forth by Plaintiffs here,[1] e.g., that "Plaintiff, through his attorneys, ... paid said $74.00 bill...."*Spiro*, 2014 WL 4277608, at *14 n. 4 (citations to record omitted). Observing that it was undisputed that the law firm, in fact, paid these bills, the district court in *Spiro* found that the plaintiffs' complaint did "not explain what is meant by the statement that plaintiffs thereby paid these bills."2014 WL 4277608, at *14 n. 4. The district court declined to "treat this conclusory and elliptical statement as equivalent to a concrete factual allegation that the legal duty to pay these bills, or to reimburse [the law firm] for doing so, fell upon plaintiffs as of the time that [law firm] incurred the charge."*Id.* Likewise, Plaintiffs' Amended Complaint here fails to explain what is meant by the rather "conclusory and elliptical statement" that the copying costs were "paid through counsel." The Court

cannot find any basis on which to distinguish *Spiro* from the present case; indeed, the pleadings in *Spiro* contained more detail on the issue of injury-in-fact but still were insufficient to carry the plaintiffs' burden.

[1] For instance, Plaintiff McCracken alleges in the Amended Complaint that she "requested medical records from Highland through her counsel"; that "Verisma, acting on behalf of Highland, sent an Invoice for Medical Record Request. The invoice indicated that McCracken would be charged $198.75 for 265 pages of medical records ($0.75 per page)"; that she "paid the $198.75 for her medical records through her counsel in order to obtain copies of the requested medical records"; and that the "fee charged to, and paid by, McCracken, exceeded the cost to produce these records, and included a built-in kickback from Verisma to UR and Highland."Am. Compl. ¶¶ 34–36, 39. The other Plaintiffs' claims are couched in similar language. *See id.* 9[9[43, 46 (Ferrell); ¶ 50 (Stilson); ¶¶ 55, 57 (McCloskey); ¶¶ 62, 63 (Trapatsos); ¶¶ 69, 70 (Bailey).

***5** All of Plaintiffs' causes of action hinge upon their claim that Verisma, acting in collusion with the Healthcare Defendants, overcharged Plaintiffs' attorneys for copies of Plaintiffs' medical records. Because the Amended Complaint does not contain sufficient facts establishing, by a preponderance of the evidence, that Plaintiffs have suffered an injury-in-fact,[2] the Court must find that standing is lacking. *See Spiro*, 2014 WL 4277608, at *4–*5.

[2] In *Spiro*, the analysis would have been different if the plaintiffs had been obligated, at the time their attorney incurred the copying expenses, to reimburse the attorney for expenses incurred in connection with representing them. *Spiro*, 2014 WL 4277608, at *5. As the district court in *Spiro* explained, if the plaintiffs owed a duty of reimbursement to their attorney (be it absolute or conditional), then the records provider's charge to the attorney and the attorney's payment of that charge would have give rise to a liability (or a contingent liability) on the plaintiffs' part. *Id.* (citations omitted).

In keeping with the district court's decision in *Spiro*, the Court elects to permit Plaintiffs here to amend the Amended Complaint to add facts relating to the terms of engagement[3] between Plaintiff and their attorneys, if those terms reflect that, at the time the attorneys incurred the copying expense, Plaintiffs would reimburse the attorneys for the costs they incurred in the course of representing Plaintiffs in their lawsuits. The Court anticipates that a newly amended complaint "would recite the date and specific relevant terms of the engagement between the plaintiff and the [law] firm and attach the engagement letter between the plaintiff and the firm."*Spiro*, 2014 WL 4227608, at *6.

[3] In New York State, an attorney is required to "provide to the client a written letter of engagement before commencing the representation, or within a reasonable time thereafter[.]"N.Y. COMP.CODES R. & REGS. tit. 22, § 1215.1. The engagement letter must explain the scope of the legal services to be provided; and the "attorney's fees to be charged, expenses and billing practices."*Id.*

C. Causation

The Healthcare Defendants further contend that Plaintiffs lack standing because Plaintiffs do not allege that Healthcare Defendants "directly overcharged them or collected ... fees."Dkt # 21–4 at 4. Instead, the Healthcare Defendants note, Plaintiffs "allege that Verisma sent invoices to their counsel for charges for processing the [records] requests, received the payment from their counsel, and provided the records...."*Id.* at 5. Thus, the Healthcare Defendants argue, Plaintiffs did not plead that any conduct on the part of the Healthcare Defendants "caused or contributed to their purported financial injury."*Id.* Stated another way, the Healthcare Defendants argue that even assuming pecuniary injuries were suffered by Plaintiffs, such injuries are not "fairly traceable" to any acts or omissions by Healthcare Defendants.

It bears noting that the "fairly traceable" requirement imposes a "lesser burden" than the showing required for proximate cause. *Rothstein v. UBS AG*, 708 F.3d 82, 92 (2d Cir.2013). Plaintiffs point out they allege that the Hospital Defendants contracted with Verisma to respond to requests for medical records, and that Verisma was "acting on behalf of [the Healthcare Defendants]" when it sent invoices for the costs of copying Plaintiffs' medical records. *See* Am. Compl. ¶¶ 35, 42, 49, 56, 63, 70. Plaintiffs thus have alleged that Verisma was acting as the Healthcare Defendants' agent, and that any injury they suffered was "fairly traceable" to the Healthcare Defendants, by virtue of the alleged agency relationship. *See Spiro*, 2014 WL 4277608, at *14 n. 7 (rejecting hospitals' challenge to standing on the grounds that any injury suffered by plaintiffs was caused, not by them, but by Healthport, the company that responded to requests for records and billed for copying records; the complaint alleged that "Healthport was the hospitals' agent for the purpose of responding to patients'

requests for medical records held by the hospitals") (citation to record omitted; citing, *inter alia*, *Amusement Indus., Inc. v. Stern*, 693 F.Supp.2d 327, 344 (S.D.N.Y.2010) (Under New York law, "the principal will be liable to third parties for the acts of its agent that were within the scope of the agent's actual or apparent authority."). Plaintiffs also allege that the Healthcare Defendants participated directly with Verisma in a scheme to turn a profit in connection with supplying copies of medical records to patients. The Supreme Court has noted that for standing purposes, a plaintiff's burden of alleging that an injury is "fairly traceable" to a defendant's conduct is "relatively modest".*Bennett v. Spear*, 520 U.S. 154, 169, 117 S.Ct. 1154, 137 L.Ed.2d 281 (1997). The Court finds that, at this early stage in the proceedings, Plaintiffs have met their modest burden on the element of causation.

CONCLUSION

***6** For the reasons set forth above, the Healthcare Defendants' Rule 12(b)(1) to dismiss is granted to the extent that the Court dismisses, without prejudice, the Amended Complaint for lack of subject matter jurisdiction, with leave to replead in accordance with the Court's instructions, *supra*.The Court defers ruling on the Healthcare Defendants' Rule 12(b)(6) motion and Verisma's Rule 12(b)(6) until after such time that Plaintiffs file a Second Amended Complaint as directed, *supra*, in this Decision and Order. Plaintiffs' Second Amended Complaint is to be filed thirty (30) days from the date of entry of this Decision and Order.

SO ORDERED.

All Citations

Slip Copy, 2015 WL 2374544

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9

2009 WL 4917549 (Ky.A.G.)

Office of the Attorney General

Commonwealth of Kentucky
OAG 09-009
December 11, 2009

Subject: **Entitlement of a patient to copies of his or her medical records; ability to assign right to copies; appropriate charges levied by medical providers.**

Requested by: **Senator Ray S. Jones II**

Written by: **Tad Thomas, Assistant Deputy Attorney General**

Syllabus: **A patient is entitled to require a medical provider to produce one free copy of their medical records without charge. While an insurance company, acting as a reparations obligor, cannot require a patient to assign their free copy to the insurance company, a patient may make this assignment to a party of their choosing.**

Statutes construed: **KRS 422.317**

OAGs cited:

Opinion of the Attorney General

***1** Senator Ray S. Jones, II, has requested an opinion of this office "describing and setting forth those charges permissible under KRS 422.317, if any." In addition to this question, the Senator has also requested that we clarify other issues pertaining to the statute which were previously addressed by this office in informal guidance as opposed to a formal opinion.

KRS 422.317 was originally enacted as part of the General Assembly's 1994 Health Care Reform legislation and appears to have been intended to enable patients to obtain valuable information regarding their medical history and also to provide patients with the ability to transfer health information from one doctor to another in the event a change in insurance, or other circumstances, required a patient to change providers. The statute states in relevant part:
(1) Upon a patient's written request, a hospital licensed under KRS Chapter 216B or a health care provider shall provide, without charge to the patient, a copy of the patient's medical record. A copying fee, not to exceed one dollar ())1) per page, may be charged by the health care provider for furnishing a second copy of the patient's medical record upon request either by the patient or the patient's attorney or the patient's authorized representative.

In his request, he asserts that since the enactment of this statute "health care providers, or for-profit companies providing records management and copying services for the providers, have continually tried to circumvent the statute by requiring the payment of additional fees and charges while claiming to provide copies free of charge or for 1 per page."

In support of this assertion the Senator has included redacted copies of invoices purportedly sent to patients who had requested records pursuant to KRS 422.317. In one invoice the healthcare provider, providing the "copying" free of charge, also included a 250.00 "certification fee" as well as a fee of 9.15 for postage. In another invoice a family practitioner wrote, "I will be more than happy to provide you the free copy of [redacted] medical records, but it is the policy of this office to first obtain reimbursement for my time in complying with this request." The letter then included an itemized list of charges for "research and review of KRS 422.317," "Review of records," "Preparation of letter," and "Postage and handling," all at a rate of 150.00 per hour. Other

invoices furnished to this office included charges for a "Certification form," "Notary charge/Certification," "Retrieval fees," and postage charges. Still other invoices included charges for records of more than 1.00 per page. We are of the opinion that most of these charges violate the statute.

***2** Like all advisory opinions of the Attorney General, this opinion attempts to determine what a court might do when presented with the same legal issues. While not binding on the courts, opinions of the Attorney General are generally given great weight. *York v. Com.*, 815 S.W.2d 415, 417 (Ky.App. 1991) ("An Attorney General's opinion is highly persuasive, but not binding on the recipient.") Like a court, we must construe statutes to ascertain and give effect to the intent of the General Assembly. *Beckham v. Board of Education* 873 S.W.2d 575, 577 (Ky. 1994).

There are no published opinions interpreting KRS 422.317, however the statute is clear on its face. It contemplates two scenarios when a patient might request a copy of their medical records. The first scenario arises when a patient requests copies for the first time and has not yet received his or her free copy. The second scenario arises when the patient requests an additional copy of records and a free copy has already been provided.

Under the first scenario, KRS 422.317 states that hospitals and other medical providers *shall* provide at least one copy of a patient's medical records *without* charge. The use of the term "shall" indicates the requirement to provide medical records without charge is mandatory. *Combs v. Hubb Coal Corp.*, 934 S.W.2d 250 (1996). Therefore, in a situation where a patient is requesting their one free copy allowed under KRS 422.317, providers must make a complete copy of the records available in some manner without requiring additional payments of *any* type.

While KRS 422.317 requires hospitals and physicians to "provide" one copy of the records to the patient without charge, it does not set forth the manner in which records are to be delivered. In our view, a provider must make some arrangement for a patient to receive copies of their medical records without cost, whether that is to make them available for pickup, mailing, faxing or some other form of delivery. However, it does appear that the statute may allow a provider to charge additional fees for mailing, faxing or otherwise delivering the records to a patient if the patient is afforded some alternative method of delivery which does not include charges. For example, if a provider allows the patient an opportunity to pick up a copy of the records at the place where the treatment was rendered, but the patient or requesting party asks for those copies to be mailed or faxed, the provider could charge for that additional service.

It is also our opinion that the statute assumes a medical provider will produce a *complete* copy of a patient's medical record unless otherwise requested by the patient. Therefore, a provider may be required by the patient to certify that the records being provided are indeed a *complete* copy of those records kept in the regular course of business. Additional charges for ensuring that the records are indeed complete, such as those charges identified in invoices provided to this office which list charges for a "Certification fee," "Certification form," or "Notary charge/Certification," are not permitted under the statute when a patient is requesting their free copy to which they are entitled. [1]

***3** Furthermore, a provider is also prohibited from charging a patient for records that are kept in electronic format if those records have not been previously provided to the patient free of charge. Providers would be required to absorb the cost of reproducing a CD just as they would the cost of paper copies.

The second situation contemplated by the statute is a request for a copy of medical records *after* a free copy has already been obtained by the patient. Under this scenario providers are limited to charges which would equate to a maximum charge of 1.00 per page, regardless of the nomenclature used to describe the charge. For example, if a provider copies 100 pages of records and makes them available to the patient or other requesting party, the maximum charge would be 100.00. In that case, a health care provider is not permitted to charge additional fees for certification of records, notary or retrieval charges, *if* the total charges would exceed 1.00 per page. If the provider wanted to charge 25.00 for a certification fee, the maximum copy charge would be 75.00 so that the total *per page* charge does not exceed 1.00 as set forth in the statute. KRS 422.317 is explicit in this requirement. Here again though, because the statute does not require a particular method of delivery, a provider could include

additional charges for postage or faxing, so long as one method of delivery is made available that would not exceed the 1.00 per page maximum allowed under the statute.

Before moving on, we would bring to the Senator's attention the matter of *Hardin County v. Valentine*, 894 S.W.2d 151 (Ky.App. 1995). There, the Court first addressed the issue of whether medical records were "public records" under the Open Records Act. After finding that they are not, the Court addressed the issue of the reasonable copying charges allowed under KRS 422.305 to KRS 422.330. The Court provided some guidance on its position regarding the maximum allowable charge.
[O]ne should not lose sight of the fact that what might be a reasonable copying fee for copying one or two pages may be totally unreasonable when applied to a 500-page single record. Except for the actual time it takes to make the duplicates, all other charge items listed by the hospital are one-time costs.

We offer no other advice to Judge Cooper as to the manner in which he determines, on remand, the amount the Hospital may charge for this expense. We would, however, note that since this appeal was filed, the legislature enacted KRS 422.317 in which it is stated that '[a] copying fee, *not to exceed* one dollar ())1) per page, may be charged by the health care provider for furnishing a second copy of the patient's medical record upon request either by the patient or the patient's attorney....' We reiterate, however, that while 1.00 may be reasonable for one of a few pages, other considerations become relevant for copying large records.

Id. at 153.

Many of the charges included in the invoices provided in Senator Jones' request include charges which are clearly in violation of the KRS 422.317. It is simply impermissible to require a patient to pay for time a physician spends preparing a letter or reviewing the statute before that patient can obtain the free copy of the records he or she is clearly entitled to by that same statute.

***4** As stated above, Senator Jones has also requested that this office issue as formal opinions, guidance related to KRS 422.317 previously issued in informal correspondence. We have done so here.

On June 30, 2008, we were presented with the question of whether an insurance company, serving as a reparations obligor under Kentucky's No-Fault statutes, could obtain the free copy of medical records belonging to the patient under KRS 422.317. We held that it could not.

KRS 304.39-280(1)(b) requires an insurance claimant to deliver to a reparations obligor a copy of any medical report he or she obtains at any time. A reparations obligor is an insurance company providing benefits to an insured individual under Kentucky's "no-fault" insurance statutes. However, in *Kentucky Farm Bureau Mutual Insurance Company v. Roberts*, 603 S.W.2d 498 (Ky.App. 1980), the court held that the injured party had no duty to "search out" the reports or have them prepared. Furthermore, KRS 304.39-280(2) states, "any person other than the claimant providing information under this section may charge the person requesting the information for the reasonable cost of providing it."

As we stated in our June 30, 2008 correspondence, Courts will examine the policy reasons behind the enactment of a statute when interpreting its meaning. *Hiler v. Brown*, 177 F.3d 542 (1999). When examining these statutes, the policy reasons behind the General Assembly's enactment of those statutes and the holding in *Roberts*, we found that an insurer "cannot require a claimant to use their free copy for the purpose of having their claims paid under the reparations act since the court has ruled it is not the responsibility of the injured party and that was not the intent of the General Assembly when enacting the statute."

We reiterate that opinion here. If a claimant obtains a copy of their medical records under KRS 422.317 or a report from their medical provider, a reparations obligor could require the patient to provide a copy of those records to it pursuant to KRS 304.39-280(1)(b). However, the reparations obligor cannot require the patient to request the records or compel the patient to assign, to the carrier, his or her right to a free copy under KRS 422.317.

We further expanded upon that statement in our February 17, 2009, correspondence when we were asked if the previously issued letter was intended to mean that attorneys were not permitted to request a free copy of medical records on behalf of their clients. We clarified our previous statements by saying;
Our informal opinion of June 30, 2008, should not be construed as a bar preventing attorneys from obtaining a free copy of medical records on behalf of their clients pursuant to KRS 422.317.

As you are aware, the statute provides that upon a patient's written request, a hospital or health care provider is required to provide one free copy of the patient's medical record. Our June 30, 2008, informal opinion merely suggested that an insurance carrier, without the written consent of the insured, is not entitled to a free copy of the medical records.

***5** We are of the opinion that there is nothing precluding a patient from making a written request to a hospital or health care provider directing that the statutorily required free copy be directed to the patient's attorney or other representative. We are also of the opinion that a free copy could be directed to the insurance carrier upon written request by the patient; however, the insurance carrier cannot require the patient to make this assignment as discussed in our June 30, 2008, letter.

In short, KRS 422.317 directs a hospital or health care provider to provide a free copy of the patient's medical records to the patient. The patient may, by written request, direct release of this information to his or her attorney or authorized representative.

Again, we reiterate the opinions of this prior informal guidance here. KRS 422.317 clearly provides a patient the right to obtain a free copy of their medical records. It does not preclude someone, acting as the agent for a patient, from asserting that patient's rights under the statute, provided they have the consent of the patient or, in some cases, a court order. For instance, in some cases a patient may be incapacitated and unable to make a request for records on his own behalf. It would be contrary to public policy and common sense to say that individuals acting as powers of attorney, attorneys-at-law or attorneys-in-fact, could not request a copy of medical records in the course and scope of their responsibilities to that patient.

Again, the original intent of this statute appears to have been to provide a patient with the ability to transfer their medical records from one provider to another in the event a change of providers was necessary. Because the statute does not limit who may act on the patient's behalf, we conclude that any agent of the patient, acting with the patient's consent, or in some cases by order of a court, could request a free copy of the records under KRS 422.317 regardless of whether the requesting agent is an attorney, an insurance company, someone acting as power of attorney, or even in some cases, another medical provider.

Jack Conway
Attorney General
Tad Thomas
Assistant Deputy Attorney General

1 We would also note that KRS 64.300 provides for the maximum amount charged by notaries public. It states: The fees of notaries public for the following services shall be not more than set out in the following schedule: Every attestation, protestation, or taking acknowledgment of any instrument of writing, and certifying the same under seal including, but not limited to, the notarization of votes of absentee voters - 0.50; Recording same in book to be kept for that purpose - 0.75; Each notice of protest - 0.25; Administering oath and certificate thereof - 0.20. KRS 64.300.

2009 WL 4917549 (Ky.A.G.)

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COMMONWEALTH OF KENTUCKY
ROWAN CIRCUIT COURT
DIVISION ONE
CIVIL NO. 15-CI-90250

FILED ELECTRONICALLY

EDWARD P. GEARHART PLAINTIFF

v.

REPLY IN SUPPORT OF EXPRESS SCRIPTS INC.'S MOTION TO DISMISS

EXPRESS SCRIPTS, INC. DEFENDANT

* * * * * * * *

Plaintiff's Response in Opposition to Defendant's Express Scripts, Inc.'s ("Express Scripts") Motion to Dismiss fails to refute the fundamental flaw with Plaintiff's First Amended Class Action Complaint ("Complaint"): KRS § 422.317 (the "Medical Records Statute") does not apply to Express Scripts. The Medical Records Statute specifically regulates only healthcare providers and specifically governs only requests for medical records; it does not apply to pharmacy benefit managers or prescription claims data. Because all claims in the Complaint depend on an alleged violation of the inapplicable Medical Records Statute, the Complaint fails to state a claim upon which relief can be granted.

In an apparent effort to obscure the facts as set forth in the Complaint and the judicially-noticeable public filings, Plaintiff relies on several misleading or inaccurate statements about the identity of Express Scripts and the services it provides as a pharmacy benefit manager, which is an intermediary between retail pharmacies and health benefit providers. *See* Express Scripts, Inc., Annual Report (Form 10-K), at 1-2 (Feb. 22, 2012), Corrected Memorandum In Support of Express Scripts Inc.'s Motion to Dismiss ("Opening Brief"), Ex. A at 1-2 (describing Express

Scripts' role as a pharmacy benefit manager). The more egregious misstatements and overstatements in the Response warrant explicit correction:

- The Response disingenuously calls Express Scripts a "major retailer" (Response at 13); however, Express Scripts offers no retail services (*see* Opening Brief, Ex. A at 1 (describing Express Scripts' clients and role as a pharmacy benefit manager)).

- The Response erroneously refers to Express Scripts as a "licensed pharmacy" (Response at 2, 5 & 13); however, Express Scripts holds no Kentucky pharmacy license (*see* Response at 5 (listing pharmacy licenses issued to corporate entities not named or even mentioned in the Complaint)).

- The Response misleadingly states that "[t]he Kentucky Board of Pharmacy identifies Express Scripts as an active licensed pharmacy" (Response at 5); however, Plaintiff acknowledges in the next breath that none of the pharmacy permits it relies on are licensed in the name of defendant Express Scripts, Inc. (*Id.*).[1]

- The Response, in attempting to argue that Express Scripts is a pharmacy, states that "Defendant's revenues are generated primarily from the delivery of prescription drugs" (Response at 5) and selectively quotes Express Scripts' Form 10-K for that proposition (Response at 5, n. 4); however, the full context of the Form 10-K quotation clarifies that Express Scripts' revenue derives from processing prescription drug claims for benefit plans, insurers and other clients (*see* Opening Brief, Ex. A at 2 ("Our revenues are generated primarily from the delivery of prescription drugs *through our contracted network of retail pharmacies*….") (emphasis added)).

- The Response mistakenly states that Plaintiff is "still a patient of Defendant Express Scripts" (Response at 10); however, the Complaint contains no allegations – nor could it – that Plaintiff is or ever was a "patient" of Express Scripts; in fact, Paragraph 30 of the Complaint, on which Plaintiff relies for this proposition, merely asserts the legal conclusion that "[p]rivity existed between Plaintiff and Defendant" because of Plaintiff's request for data. Compl. ¶ 30.

- The Response attempts to suggest to the Court that Express Scripts "takes the position it is immune from Kentucky law" (Response at 2); however, Express Scripts claims no such immunity and merely contends the Medical Records Statute does not apply.

[1] As discussed in Section 1(b), *infra*, Plaintiff's efforts to conflate Express Scripts with these subsidiaries is unavailing. Also, while the Kentucky Board of Pharmacy website Plaintiff cites includes a chart that states that the mail order pharmacy subsidiaries are "d/b/a Express Scripts," the actual permits linked on the website do not say "d/b/a Express Scripts." *See* Response at 5, n. 2.

Moreover, these misleading statements ignore or are inconsistent with the allegations in the Complaint. Despite his efforts, Plaintiff wholly fails to rebut the clear fact that, as a matter of law and clear statutory interpretation, the Medical Records Statute and the provisions therein that serve as the bedrock for all of Plaintiff's claims do not apply to defendant Express Scripts. Nonetheless, even if the Medical Records Statute applied here, there are independent grounds for dismissing each of Plaintiff's claims, some of which Plaintiff's Response entirely neglects to address, as discussed more fully below.

I. The Medical Records Statute Does Not Apply to Express Scripts.

A. Express Scripts is Not a Healthcare Provider.

The Complaint acknowledges that Express Scripts is a pharmacy benefit manager. *See* Compl. ¶ 22. Kentucky law defines a pharmacy benefit manager as "an entity that contracts with pharmacies on behalf of a health benefit plan, state agency, insurer, managed care organization, or other third-party payor to provide pharmacy health benefit services or administration." KRS § 304.17A-161. Notably, the only references to pharmacy benefit managers in the Kentucky Code are within the context of laws focused on insurers and health benefit plans—not healthcare providers. *See* KRS § 304.17A *et seq*.

As explained in Express Scripts' Opening Brief, a pharmacy benefit manager is not a healthcare provider. *See* Opening Brief at 2-3, 6-9. Plaintiff's Response fails to rebut this important point, which by definition renders the Medical Records Statute inapplicable to Express Scripts. Instead, Plaintiff, ignoring his own Complaint, attempts to argue that Express Scripts is a healthcare provider because it is a pharmacy, which it is not.

B. Plaintiff Inappropriately Conflates Express Scripts with its Subsidiaries.

As noted in Express Scripts' Opening Brief, it has two subsidiaries that offer home-delivery pharmacy services: ESI Mail Pharmacy Service, Inc. and Express Scripts Specialty Distribution Services, Inc. Opening Brief at 3, n. 3. In his Response, Plaintiff argues that Express Scripts' corporate relationship with these home-delivery pharmacy subsidiaries somehow converts Express Scripts from a pharmacy benefit manager into a pharmacy.[2] *See* Response at 5-6. But Express Scripts is a separate corporate entity with separate operations. Plaintiff's efforts to conflate what Express Scripts does with what these subsidiaries do is akin to asking the Court to disregard the "general principle of corporate law deeply 'ingrained in our economic and legal systems' that a parent corporation (so-called because of control through ownership of another corporation's stock) is not liable for the acts of its subsidiaries." *United States v. Bestfoods*, 524 U.S. 51, 61 (1998) (citation omitted); *see also* G.C.M. 35,246 at 3 (I.R.S. Feb. 20, 1973) ("The mere fact that one corporation owns all the stock of another corporation is not sufficient to attribute the business activities of the subsidiary to the parent corporation."). Plaintiff has not alleged or even suggested any circumstances that would make it appropriate to pierce the corporate veil and attribute to Express Scripts the acts of its subsidiaries. The business of Express Scripts' subsidiaries, therefore, is irrelevant to the determination of whether the Medical Records Statute applies to defendant Express Scripts.

Furthermore, even if the acts of Express Scripts' subsidiaries were relevant to determining Express Scripts' liability, the Complaint makes no mention whatsoever of any Express Scripts subsidiary. Nowhere in the Complaint does Plaintiff allege that an Express Scripts subsidiary

[2] KRS § 304.17A-162, which regulates contracts between pharmacy benefit managers and pharmacies, underscores the distinction between these two types of entities. *See* KRS § 304.17A-162.

provided services to him or that he requested records from an Express Scripts subsidiary. Thus, based on the Complaint itself, the acts of Express Scripts' subsidiaries are not at issue.

Finally, Plaintiff's own allegations contradict Plaintiff's attempt to paint Express Scripts as a pharmacy. For instance, Plaintiff argues that "Express Scripts provided direct pharmacy services to Plaintiff." Response at 7. Yet, the Complaint contains no such allegations. In fact, the sole paragraph relied upon by Plaintiff for this proposition confirms Express Scripts' role as a pharmacy benefit manager that maintains claims data for prescriptions filled through contracted pharmacies. *See* Compl. ¶ 23 ("The five pages of medical records received by Plaintiff through his agent reflect a mix of both retail pharmacy prescriptions and prescriptions filled directly by Express Scripts."). In his Response, Plaintiff also confirms that the "prescriptions filled directly by Express Scripts" were actually filled by a mail service pharmacy subsidiary. *See* Response at 7 ("Express Scripts provided **prescription medication** to Plaintiff via its mail service pharmacy.") (citing Compl. ¶ 23) (emphasis in original). Paragraph 23 of the Complaint also highlights the disingenuous nature of Plaintiff's statement that "the records kept by Express Scripts are only obtainable via Express Scripts" (Response at 7) given that Plaintiff could have, but chose not to, request data from one of these "retail pharmac[ies]." (Compl. ¶ 23) Thus, Plaintiff's Complaint fails to include any allegation to support the notion that Express Scripts is a pharmacy and, in fact, the Complaint and Express Scripts' Form 10-K confirm it is not.

C. Regardless, the Medical Records Statute Does Not Apply to Pharmacies.

Setting aside that Express Scripts is not a pharmacy and cannot be considered a pharmacy based only on its pharmacy subsidiaries, the Medical Records Statute does not apply to pharmacies. Plaintiff misconstrues the definition of healthcare provider in KRS § 304.17A-005 to include pharmacies based on the reference to "pharmacist . . . as defined pursuant to KRS Chapter

315." *See* Response at 4-5; KRS § 304.17A-005. However, the definition of "pharmacist" in KRS Chapter 315 is limited to "a ***natural person*** licensed by this state to engage in the practice of the profession of pharmacy." KRS § 315.010(15) (emphasis added). This definition does not include corporate entities such as pharmacies.

Kentucky's pharmacy regulations[3] further demonstrate that pharmacy claims data does not constitute a medical record. The pharmacy regulations do not use the term "medical record" to refer to information maintained by pharmacies; instead, they use the terms "patient record" and "prescription record." *See, e.g.*, 201 Ky. Admin. Regs. 2:210; 201 Ky. Admin. Regs. 2:330. In fact, the regulation governing records kept by pharmacies requires that a patient record "shall be communicated or released: (a) To the patient; (b) As the patient directs; or (c) As prudent, professional discretion dictates." 201 Ky. Admin. Regs. 2:210 § 3(2). It does not limit or otherwise mention a fee associated with releasing pharmacy patient records. 201 Ky. Admin. Regs. 2:210 § 1(1)(d)(1). In fact, a separate pharmacy regulation governs transfer of prescription information between pharmacies to allow coordination of treatment among pharmacies, similar to the intent of the Medical Records Statute to allow coordination of care among healthcare providers. *Compare* 201 Ky. Admin. Regs. 2:165 *with* Ky. Att'y Gen Op. 09-009, 09-0092009 WL 4917549, at *1 (Dec. 11, 2009). These pharmacy regulations would be surplusage if the Medical Records Statute were interpreted to apply to pharmacies or prescription claims data.

D. Plaintiff Apparently Concedes Prescription Claims Data is not a "Medical Record."

As demonstrated in Express Scripts' Opening Brief, the data requested by and provided to Plaintiff consists of a compilation of prescription claims filled by a "network of retail pharmacies"

[3] As a pharmacy benefit manager, Express Scripts is not a pharmacy regulated or licensed by the Kentucky Board of Pharmacy.

(Compl. ¶ 22), which does not fit within any statutory definition of "medical records." *See* Opening Brief at 7-10. *Tellingly, Plaintiff's Response fails to even attempt to address Express Scripts' argument that the Medical Records Statute does not apply because the data at issue does not constitute a "medical record" within the meaning of the Medical Records Statute.* The entire Complaint should be dismissed upon this basis alone.

II. Plaintiff's Response Fails to Rebut Express Scripts' Independent Grounds for Dismissal.

A. Legal Authority Cited by Plaintiff does not Support a Private Right of Action.

The authority Plaintiff cites to support his private right of action under the Medical Records Statute only reinforces that the Complaint does not align with the intent of the Medical Records Statute. The Kentucky Attorney General opinion cited by Plaintiff explains that "the original intent of this statute appears to have been to provide a *patient* with the ability to transfer their medical records from one *provider* to another in the event a *change of providers* was necessary." Ky. Att'y Gen Op. 09-009, 09-0092009 WL 4917549, at *5 (Dec. 11, 2009) (emphasis added). This case involves none of the key elements of this scenario (a patient, healthcare provider, or change of healthcare providers) that the Kentucky legislature intended to address with the Medical Records Statute.

Similarly, Plaintiff's reliance upon *Eriksen v. Grunner & Simms, PLLC* is misplaced. Unlike this case, *Eriksen* involved a request for "medical records" by a patient to his doctor. The doctor fits squarely within the definition of "healthcare provider" and was obviously subject to the Medical Records Statute, unlike Express Scripts. *See* 400 S.W.3d 290, 291 (Ky. Ct. App. 2013) (summarizing dispute between chiropractor and law firm involving records of patient treated by chiropractor). As described above, there are no allegations in the Complaint – nor could there be

– that Plaintiff is a patient of Express Scripts. Because Plaintiff is not a member of the class of persons intended to be protected by the Medical Records Statute, he has no private right of action. *See Puckett v. Salyersville Healthcare Ctr.*, No. 2013-CA-001263-MR, 2015 WL 3643437, at *2 (Ky. Ct. App. June 12, 2015) (affirming no private right of action and limiting private right of action to "the class of persons the statute is intended to protect").

B. Use of Plaintiff's Prescription Claims Data For Litigation Is Not Actionable Under the Kentucky Consumer Protection Act.

The Complaint does not satisfy the prerequisites for a KCPA claim because the underlying transaction must be one for "personal, family or household purposes." KRS § 367.220(1); *see* Opening Brief at 13-14. The Response focuses on the alleged privity of contract between Plaintiff (or his law firm) and Express Scripts, which not only ignores the requirement that there must be a personal, family or household use but also confirms that this request was for a commercial use for litigation.

C. The Complaint Does Not Allege A Fraudulent Statement or Omission.

The Complaint fails to satisfy the elements of fraud because it identifies no fraudulent statement or omission by Express Scripts. *See* Opening Brief at 15-17. Plaintiff's Response attempts to compensate for this shortcoming by introducing the theory that Express Scripts "misstated material terms and purposefully used an inherently vague and ambiguous term ('data processing')…," which allegedly violates the Medical Records Statute. Response at 11-12. The Complaint, however, contains no facts to support this proposition, much less facts that meet the requirements of Kentucky Rule of Civil Procedure 9.02 for pleading fraud. More specifically, the Complaint includes no details regarding the identity of any individual at Express Scripts who made a false statement, when it was communicated to Plaintiff, how it was communicated, or why it was

false as opposed to "inherently vague" (Response at 11).[4] *See Mason v. Monumental Life Ins. Co.*, No. 2006-CA-002122-MR, 2008 WL 54763, at *5 (Ky. Ct. App. Jan. 4, 2008) (holding that plaintiff failed to plead fraud with the required particularity). Finally, while Plaintiff argues that an alleged violation of the Medical Records Statute supports a claim for fraud, a mere violation of a statute without a fraudulent misrepresentation or omission does not give rise to fraud. *See* Opening Brief at 15, n. 10.

D. Plaintiff's Allegations Do Not Satisfy Any Exception to the Voluntary Payment Doctrine.

To survive, the Complaint must articulate an "immediate and urgent necessity" that could justify an exception to the voluntary payment doctrine. *City of Morganfield v. Wathen*, 261 S.W. 12, 14 (Ky. Ct. App. 1924). Plaintiffs' Response fails to identify any such "immediate and urgent necessity." Plaintiff cites paragraphs 24 and 41 of the Complaint for the proposition that Plaintiff's payment was made "under time-sensitive conditions" (Response at 14) but neither paragraph supports that assertion. *See* Compl. ¶¶ 24, 41.[5]

Moreover, Plaintiff incorrectly states that he had "no choice" but to pay the fee to Express Scripts to obtain his prescription claims data. *See* Response at 13. In fact, as discussed in Section I(B), *supra*, he or his law firm could have sought the same prescription claims data directly from the various retail pharmacies that filled his prescriptions. His law firm opted to obtain the data from Express Scripts, a pharmacy benefit manager, and paid the associated fee—an entirely voluntary transaction that is the essence of the voluntary payment doctrine.

[4] As pointed out in footnote 5, *infra*, the Court should not allow Plaintiff to amend the Complaint to add these allegations because any such amendment would be futile since the Medical Records Statute does not apply to Express Scripts.

[5] The Complaint also fails to sufficiently plead fraud (as discussed in Section II(C), *supra*), so Plaintiff cannot claim that the voluntary payment doctrine does not apply on the basis of fraud.

E. Plaintiff's Attenuated Interest Is Insufficient for Standing.

The Response relies primarily on *Eriksen* to support Plaintiff's argument for standing; however, the *Eriksen* opinion does not even address standing. *Eriksen* involved a dispute between a healthcare provider and a law firm—the patient was not a party to the litigation, and his standing to sue was not at issue. While *Eriksen* established the authority of an agent to seek medical records on behalf of a patient, it does not confer standing on an individual to sue based on a transaction between third parties. This is especially true where, as here, the Complaint does not allege that Plaintiff interacted with Express Scripts, paid Express Scripts, or had any obligation to reimburse his law firm for its payment to Express Scripts. Thus, Plaintiff lacks the "real, direct, present and substantial" interest required for standing to sue Express Scripts. *See Winn v. First Bank of Irvington*, 581 S.W.2d 21, 23 (Ky. Ct. App. 1978) (internal quotation omitted).

III. Conclusion

For the foregoing reasons, and those stated in Express Scripts' Opening Brief, Express Scripts respectfully requests that this Court grant its Motion to Dismiss with prejudice and without leave to amend.[6]

[6] Because all of Plaintiff's claims hinge on the applicability of the Medical Records Statute, amendment of the Complaint would be futile. In light of the futility of amendment, the Court should dismiss the Complaint with prejudice and without leave to amend. *See First Nat. Bank of Cincinnati v. Hartman*, 747 S.W.2d 614, 616 (Ky. Ct. App. 1988) (observing the trial court's "wide discretion" to prohibit amendment where it would be futile).

Respectfully submitted,

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and

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(859) 231-8780

/s/ Jaron P. Blandford
JARON P. BLANDFORD
ATTORNEYS FOR DEFENDANT

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of this pleading was filed electronically with the Rowan Circuit Court and copies were served via U.S. mail, postage pre-paid, this 21st day of March, 2016, upon the following:

Alex C. Davis, Esq.
Jones Ward PLC
312 South Fourth Street, 6th Floor
Louisville, Kentucky 40202

Hon. William E. Lane
Judge, Rowan Circuit Court
44 West Main Street
Mt. Sterling, Kentucky 40353

/s/ Jaron P. Blandford
JARON P. BLANDFORD

COMMONWEALTH OF KENTUCKY
ROWAN CIRCUIT COURT
DIVISION ONE
CIVIL ACTION NO. 15-CI-90250

ELECTRONICALLY FILED

EDWARD P. GEARHART PLAINTIFF

v. **UNOPPOSED MOTION FOR ORAL ARGUMENT AND REQUEST TO SET HEARING DATE**

EXPRESS SCRIPTS, INC. DEFENDANT

* * * * * * * *

Comes the Defendant, Express Scripts, Inc., and for its Unopposed Motion for Oral Argument and Request to Set Hearing Date, states as follows:

Pursuant to the Local Rules of the 21st Judicial Circuit, Rule 7 R21c-705, the Defendant respectfully requests this Court schedule an oral argument in regard to the Motion to Dismiss filed herein. The Defendant's Motion to Dismiss has been fully briefed by the parties and is ripe for oral argument. The Defendant believes that oral argument will help clarify on the key issues and provide opportunity for counsel to respond to any remaining questions from the Court.

The undersigned counsel has contacted the attorneys for the Plaintiff and has been advised that they do not oppose oral argument on this matter.

Respectfully submitted,

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/s/ Jaron P. Blandford
JARON P. BLANDFORD
ATTORNEYS FOR DEFENDANT

NOTICE

PLEASE TAKE NOTICE that this matter shall come on for hearing before this honorable Court, on the 15th day of April, 2016, at the hour of 9:00 a.m., or as soon thereafter as counsel may be heard.

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of this pleading was filed electronically with the Rowan Circuit Court and copies were served via U.S. mail, postage pre-paid, this 23rd day of March, 2016, upon the following:

Alex C. Davis, Esq.
Jones Ward PLC
312 South Fourth Street, 6th Floor
Louisville, Kentucky 40202

Hon. William E. Lane
Judge, Rowan Circuit Court
44 West Main Street
Mt. Sterling, Kentucky 40353

/s/ Jaron P. Blandford
JARON P. BLANDFORD

COMMONWEALTH OF KENTUCKY
ROWAN CIRCUIT COURT
DIVISION ONE
CIVIL ACTION NO. 15-CI-90250

FILED ELECTRONICALLY

EDWARD P. GEARHART PLAINTIFF

NOTICE OF SERVICE

EXPRESS SCRIPTS, INC. DEFENDANT

* * * * * * * *

Comes the Defendant Express Scripts, by and through counsel, and hereby gives the Court and the parties notice of the service of Responses and Objections to Plaintiff's First Set of Requests for Admission, Interrogatories, and Requests for Production of Documents on the 29th day of March, 2016.

Respectfully submitted,

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/s/ Jaron P. Blandford
JARON P. BLANDFORD
ATTORNEYS FOR DEFENDANT

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of this pleading was filed electronically with the Rowan Circuit Court and copies were served via U.S. mail, postage pre-paid, this 29th day of March, 2016, upon the following:

Alex C. Davis, Esq.
Jones Ward PLC
312 South Fourth Street, 6th Floor
Louisville, Kentucky 40202

Hon. William E. Lane
Judge, Rowan Circuit Court
44 West Main Street
Mt. Sterling, Kentucky 40353

/s/ Jaron P. Blandford
JARON P. BLANDFORD

COMMONWEALTH OF KENTUCKY
ROWAN CIRCUIT COURT
CIVIL BRANCH
DIVISION ONE
NO. 15-CI-90250

EDWARD P. GEARHART PLAINTIFF

v. **EXPRESS SCRIPTS INC.'S RESPONSES AND OBJECTIONS TO PLAINTIFF'S FIRST SET OF REQUESTS FOR ADMISSION, INTERROGATORIES, AND REQUESTS FOR PRODUCTION OF DOCUMENTS**

EXPRESS SCRIPTS, INC. DEFENDANT

* * * * * * * *

Pursuant to Rules 33, 34 and 37 of the Kentucky Rules of Civil Procedure, Defendant Express Scripts, Inc. ("Express Scripts") responds to the discovery requests of Plaintiff, as follows:

GENERAL OBJECTIONS AND STATEMENTS

1. Express Scripts objects to each discovery request that seeks information or documents that are not relevant to the claims or defenses of any party to this litigation nor reasonably calculated to lead to the discovery of admissible evidence.

2. Express Scripts objects to all discovery requests that seek information protected by the attorney-client privilege and/or the work product doctrine and/or some other strategy or common law protection.

3. Express Scripts objects to each discovery request that does not contain a date restriction as overly broad, unduly burdensome, and on the grounds that the request seeks information not relevant to the claims or defenses of any party to the litigation.

4. Express Scripts objects to each discovery request to the extent that it seeks information that is covered by a confidentiality agreement; that is proprietary, trade secret, or

otherwise confidential business information; that is subject to a third party's right to privacy, including but not limited to, under HIPPA; and/or that is otherwise protected or confidential pursuant to any applicable doctrine, statute or rule.

5. Express Scripts objects to each discovery request to the extent it seeks information in the possession, custody, or control of, or otherwise equally available to, Plaintiff.

6. Express Scripts objects to each discovery request to the extent it is vague, ambiguous, or unintelligible.

7. Express Scripts objects to each discovery request to the extent it calls for the production of documents or information that is not reasonably accessible.

8. Express Scripts objects to the definition of "Express Scripts" as overly broad, unduly burdensome, and seeking information that is neither relevant nor reasonably calculated to lead to the discovery of admissible evidence.

9. Express Scripts objects to each discovery request as overly broad and unduly burdensome to the extent that it purports to require Express Scripts to identify or produce "all" or "every" document(s) or communication(s) relating to a given subject matter.

10. Express Scripts objects to Plaintiff's use of the terms "member" or "members" as vague and overly broad.

11. Express Scripts objects to Plaintiff's use of the terms "customer" or "customers" as vague and overly broad. Express Scripts denies that individuals are "customers" of Express Scripts and states that its clients include entities such as managed care organizations, health insurers, third-party administrators, employers, union-sponsored benefit plans, workers' compensation plans and government health programs.

12. Express Scripts has not completed its (a) investigation of the facts relating to this case, (b) discovery in this action, or (c) preparation for trial. The specific responses set forth below are based upon information now available to Express Scripts, and Express Scripts reserves the right at any time to revise, correct, add to or clarify the objections or responses set forth herein. Failure to object herein shall not constitute a waiver of any objection that Express Scripts may interpose as to future supplemental responses.

13. Express Scripts' responses are made without in any way waiving: (a) the right to object, on the grounds of competency, relevancy, materiality, privilege, or admissibility of evidence for any purpose in any subsequent proceeding in this action or any other action; and (b) the right to object on any ground to other discovery requests involving or relating to the subject matter of these requests.

14. The objections and statements set forth in paragraphs 1-13 above are incorporated in each response set forth below, and qualify any response, whether explicitly or implicitly. The absence of a reference to a General Objection in response to a particular request does not constitute a waiver of any General Objection with respect to that request. Reference to a General Objection in response to a particular request does not constitute a waiver of any other General Objection with respect to that request.

REQUESTS FOR ADMISSION

1. Admit Defendant Express Scripts maintains medical and pharmacy records related to members of the proposed class as described in Plaintiff's Complaint.

RESPONSE:

Express Scripts incorporates by reference its General Objections and Statements. Express Scripts further objects to the term "medical record" in this request and denies that the

prescription claims data at issue in the above-captioned case constitutes a "medical record." Express Scripts also objects to the definition of the class in the Amended Complaint to the extent it calls for a legal conclusion.

Subject to and without waiver of these objections, Express Scripts denies that it maintains "medical and pharmacy records." Express Scripts states that, as a pharmacy benefits manager, it has access to prescription claims data from pharmacies that have contracted to be part of Express Scripts' network of pharmacies for the benefit of Express Scripts' clients, including managed care organizations, health insurers, third-party administrators, employers, union-sponsored benefit plans, workers' compensation plans and government health programs.

2. Admit Defendant Express Scripts provides home-delivery pharmacy services to members of the proposed class.

RESPONSE:

Express Scripts incorporates by reference its General Objections and Statements. Express Scripts also objects to the definition of the class in the Amended Complaint to the extent it calls for a legal conclusion.

Subject to and without waiver of these objections, Express Scripts denies this request. Express Scripts further states that ESI Mail Pharmacy Service, Inc. and Express Scripts Specialty Distribution Services, Inc., subsidiaries of Express Scripts, operate mail order pharmacies. The Complaint does not mention either of these entities, and none of their actions are at issue in this case.

3. Admit Defendant Express Scripts manages prescription drug benefit plans for members of the proposed class.

RESPONSE:

Express Scripts incorporates by reference its General Objections and Statements. Express Scripts also objects to the definition of the class in the Amended Complaint to the extent it calls for a legal conclusion.

Subject to and without waiver of these objections, Express Scripts denies that it manages prescription drug benefit plans "for members of the proposed class." Express Scripts further states that it manages prescription drug benefit plans for its clients, which consist of entities such as managed care organizations, health insurers, third-party administrators, employers, union-sponsored benefit plans, workers' compensation plans and government health programs that are not members of the proposed class.

4. Admit Defendant Express Scripts charges its members of the proposed class a flat fee of $75.00 for one (1) copy of a member's medical record. If not, specify the circumstances under which Express Scripts does not charge a $75.00 flat fee.

RESPONSE:

Express Scripts incorporates by reference its General Objections and Statements. Express Scripts further objects to the term "medical record" in this request and denies that the prescription claims data at issue in the above-captioned case constitutes a "medical record." Express Scripts also objects to Plaintiff's use of the term "member" in this request as vague and overly broad. Express Scripts also objects to the definition of the class in the Amended Complaint to the extent it calls for a legal conclusion.

Subject to and without waiver of these objections, Express Scripts denies that it charges members of the proposed class a flat fee of $75.00 for a copy of their prescription claims data. Express Scripts further states that it provides prescription claims data free of charge to

individuals who request it directly from Express Scripts and provide HIPAA-compliant identification, whereas Express Scripts typically charges $75.00 for most third party requests for prescription claims data, with some exceptions consistent with Express Scripts' policies.

5. Admit Defendant Express Scripts charges members of the proposed class a flat fee of $75.00 for one (1) copy of the member's medical record regardless of the number of pages of which the member's medical record consists.

RESPONSE:

Express Scripts incorporates by reference its General Objections and Statements. Express Scripts further objects to the term "medical record" in this request and denies that the prescription claims data at issue in the above-captioned case constitutes a "medical record." Express Scripts also objects to Plaintiff's latter use of the term "member" in this request as vague and overly broad. Express Scripts also objects to the definition of the class in the Amended Complaint to the extent it calls for a legal conclusion.

Subject to and without waiver of these objections, Express Scripts denies that it charges members of the proposed class a flat fee of $75.00 for a copy of their prescription claims data. Express Scripts further states that the fees associated with third party requests for prescription claims data do not depend on the number of pages provided.

6. Admit Defendant Express Scripts charges members of the proposed class the $75.00 flat fee for what it terms "data processing."

RESPONSE:

Express Scripts incorporates by reference its General Objections and Statements. Express Scripts also objects to the definition of the class in the Amended Complaint to the extent it calls

for a legal conclusion. Express Scripts also objects to Plaintiff's use of the term "member" in this request as vague and overly broad.

Subject to and without waiver of these objections, Express Scripts denies that it charges members of the proposed class a flat fee of $75.00 for a copy of their prescription claims data. Express Scripts further states that it typically charges $75.00 for most third party requests for prescription claims data, with some exceptions consistent with Express Scripts' policies.

7. Admit the $75.00 flat fee does not include costs of shipping the records to members of the proposed class or their agents.

RESPONSE:

Express Scripts incorporates by reference its General Objections and Statements. Express Scripts also objects to the definition of the class in the Amended Complaint to the extent it calls for a legal conclusion. Express Scripts also objects to Plaintiff's use of the term "member" in this request as vague and overly broad.

Subject to and without waiver of these objections, Express Scripts denies this request.

8. Admit the $75.00 flat fee is not related to the costs of shipping the records.

RESPONSE:

Express Scripts incorporates by reference its General Objections and Statements. Express Scripts further objects to the term "related" in this request as vague and overly broad.

Subject to and without waiver of these objections, Express Scripts denies this request.

9. Admit "data processing" is nothing more than retrieving and copying a member's medical record.

RESPONSE:

Express Scripts incorporates by reference its General Objections and Statements. Express Scripts further objects to the terms "nothing more than" and "member" as vague and overly broad.

Subject to and without waiver of these objections, Express Scripts denies this request.

10. Admit Defendant Express Scripts will not provide one (1) free copy of a member's medical record upon request pursuant to K.R.S. § 422.317(1).

RESPONSE:

Express Scripts incorporates by reference its General Objections and Statements. Express Scripts further objects to the term "medical record" in this request and denies that the prescription claims data at issue in the above-captioned case constitutes a "medical record." Express Scripts also objects to Plaintiff's use of the term "member" as vague and overly broad. Express Scripts also objects to the reference to K.R.S. § 422.317(1) in this request and implication that it applies to Express Scripts. Express Scripts also objects to this request to the extent it calls for a legal conclusion.

Subject to and without waiver of these objections, Express Scripts states that K.R.S. § 422.317(1) does not apply to Express Scripts. To the extent a response is required, Express Scripts denies this request.

11. Admit that Plaintiff Edward Gearhart through his agent requested a free copy of his medical record pursuant to K.R.S. § 422.317(1) on or about May 12, 2014.

RESPONSE:

Express Scripts incorporates by reference its General Objections and Statements. Express Scripts further objects to the term "medical record" in this request and denies that the

prescription claims data at issue in the above-captioned case constitutes a "medical record." Express Scripts also objects to the reference to K.R.S. § 422.317(1) in this request and implication that it applies to Express Scripts. Express Scripts also objects to this request to the extent it calls for a legal conclusion.

Subject to and without waiver of these objections, Express Scripts states that K.R.S. § 422.317(1) does not apply to Express Scripts. To the extent a response is required, Express Scripts denies this request. Express Scripts further states that Express Medical Records, LLC ("Express Medical Records") requested prescription claims data and related documents related to Plaintiff on or around March 25, 2014.

12. Admit Defendant Express Scripts refused to provide Plaintiff Edward Gearhart one (1) free copy of his medical record pursuant to K.R.S. § 422.317(1).

RESPONSE:

Express Scripts incorporates by reference its General Objections and Statements. Express Scripts further objects to the term "medical record" in this request and denies that the prescription claims data at issue in the above-captioned case constitutes a "medical record." Express Scripts also objects to the reference to K.R.S. § 422.317(1) in this request and implication that it applies to Express Scripts. Express Scripts also objects to this request to the extent it calls for a legal conclusion.

Subject to and without waiver of these objections, Express Scripts states that K.R.S. § 422.317(1) does not apply to Express Scripts. To the extent a response is required, Express Scripts denies this request.

13. Admit Defendant Express Scripts refused to provide Plaintiff Edward Gearhart a copy of his medical record until Plaintiff, through his agent, paid the $75.00 "data processing" fee to Defendant Express Scripts.

RESPONSE:

Express Scripts incorporates by reference its General Objections and Statements. Express Scripts further objects to the term "medical record" in this request and denies that the prescription claims data at issue in the above-captioned case constitutes a "medical record." Express Scripts also objects to this request to the extent it implies Express Scripts communicated directly with Plaintiff or refused to provide prescription claims data directly to Plaintiff.

Subject to and without waiver of these objections, Express Scripts admits that it provided Plaintiff's prescription claims data, along with an affidavit, to Express Medical Records after Express Medical Records paid $75.00 to Express Scripts. All other parts of this request are denied.

14. Admit Plaintiff through his agent paid the $75.00 "data processing" fee to Express Scripts.

RESPONSE:

Express Scripts incorporates by reference its General Objections and Statements.

Subject to and without waiver of these objections, Express Scripts denies that Plaintiff made any payment to Express Scripts. Express Scripts further states that Express Medical Records paid $75.00 to Express Scripts to obtain Plaintiff's prescription claims data along with an affidavit.

15. Admit Plaintiff Edward Gearhart's medical record consisted of five (5) pages.

RESPONSE:

Express Scripts incorporates by reference its General Objections and Statements. Express Scripts further objects to the term "medical record" in this request and denies that the prescription claims data at issue in the above-captioned case constitutes a "medical record."

Subject to and without waiver of these objections, Express Scripts admits that it provided to Express Medical Records a report containing Plaintiff's prescription claims data that consisted of five pages. All other parts of this request are denied.

16. Admit that shipping Plaintiff Edward Gearhart's medical record cost less than $75.00.

RESPONSE:

Express Scripts incorporates by reference its General Objections and Statements. Express Scripts further objects to the term "medical record" in this request and denies that the prescription claims data at issue in the above-captioned case constitutes a "medical record."

Subject to and without waiver of these objections, Express Scripts denies that is shipped Plaintiff's "medical record" but admits that the cost of shipping Plaintiff's prescription claims data and the accompanying affidavit to Express Medical Records cost less than $75.00. All other parts of this request are denied.

17. Admit Defendant Express Scripts would not waive nor discount the fee for the first copy of Plaintiff's medical record.

RESPONSE:

Express Scripts incorporates by reference its General Objections and Statements. Express Scripts further objects to the term "medical record" in this request and denies that the prescription claims data at issue in the above-captioned case constitutes a "medical record."

Subject to and without waiver of these objections, Express Scripts denies this request. Express Scripts further states that it is unaware of any fee waiver or discount request from Plaintiff or Express Medical Records.

INTERROGATORIES

1. Identify every person who provided information or documents in response to this set of discovery requests, providing such person's name, address, and job title, and stating the identification of each specific interrogatory(ies) and/or request(s) within this set of discovery for which such person supplied responsive information.

ANSWER:

Express Scripts incorporates by reference its General Objections and Statements.

Subject to and without waiver of these objections, Express Scripts states that, in addition to in-house counsel for Express Scripts, the following individuals provided information that was used or considered in responding to these interrogatories:

1. Mary Anne Cameron (Supervisor-Manual Claims, Commercial)
2. Heather Brooks (Third Party Patient Prescription History Team)

The above individuals are employed by Express Scripts and may be contacted through counsel for Express Scripts.

2. State the name, address, telephone number, and place of employment of each such person known by you or your counsel who may have any knowledge of the facts of this matter, without regard to whether you intend to call any such person as a witness at trial. In your answer, specifically identify any and all persons who may have knowledge with regard to any of the issues involved in this matter, including, but without limitation, the following:

a. Any and all persons who have knowledge of the policies and procedures developed and used by Defendant Express Scripts when responding to a medical record request in Kentucky; and

b. Any and all persons who are responsible for "data processing" in response to a medical record request from a Kentucky customer.

ANSWER:

Express Scripts incorporates by reference its General Objections and Statements. Express Scripts also objects to this interrogatory as overly broad and unduly burdensome. Express Scripts further objects to the term "medical record" in this interrogatory and denies that the prescription claims data at issue in the above-captioned case constitutes a "medical record." Express Scripts also objects to the use of the terms "customer" and "any and all persons" as overly broad and unduly burdensome.

Subject to and without waiver of these objections, Express Scripts states that the following individuals have knowledge of Express Scripts' policies and procedures related to processing requests for prescription claims data:

1. Mary Anne Cameron (Supervisor-Manual Claims, Commercial)
2. Heather Brooks (Third Party Patient Prescription History Team)

The above individuals are employed by Express Scripts and may be contacted through counsel for Express Scripts.

3. Please state the amount of the fee charged by Express Scripts for one copy of an Express Scripts member's medical record in Kentucky.

ANSWER:

Express Scripts incorporates by reference its General Objections and Statements. Express Scripts further objects to the term "medical record" in this interrogatory and denies that the prescription claims data at issue in the above-captioned case constitutes a "medical record."

Subject to and without waiver of these objections, Express Scripts states that it provides prescription claims data free of charge to individuals who request it directly from Express Scripts and provide HIPAA-compliant identification, whereas Express Scripts typically charges $75.00 for most third party requests for prescription claims data, with some exceptions consistent with Express Scripts' policies, given the additional expenses involved in responding to third party requests as described in response to Interrogatory No. 5 below.

4. Please state whether or not the $75.00 fee paid by Plaintiff Edward Gearhart is the same flat fee charged to all members for one (1) copy of a member's medical record, and state the basis for said charge.

ANSWER:

Express Scripts incorporates by reference its General Objections and Statements. Express Scripts also objects to this interrogatory as overly broad and unduly burdensome in asking about "all members." Express Scripts further objects to the term "medical record" in this interrogatory and denies that the prescription claims data at issue in the above-captioned case constitutes a "medical record." Express Scripts also objects to this interrogatory to the extent it implies that Plaintiff made any payment to or otherwise interacted directly with Express Scripts.

Subject to and without waiver of these objections, Express Scripts states that the fee for Mr. Gearhart's prescription claims data was paid by Express Medical Records, not Mr. Gearhart. Express Scripts further states that it provides prescription claims data free of charge

to all individuals who request it directly from Express Scripts and provide HIPAA-compliant identification, whereas Express Scripts typically charges $75.00 for most third party requests for prescription claims data, with some exceptions consistent with Express Scripts' policies, given the additional expenses involved in responding to third party requests as described in response to Interrogatory No. 5 below.

5. Please describe the method by which Express Scripts determines the appropriate or applicable cost for one (1) copy of a member's medical record.

ANSWER:

Express Scripts incorporates by reference its General Objections and Statements. Express Scripts also objects to this interrogatory as overly broad and unduly burdensome. Express Scripts further objects to the term "medical record" in this interrogatory and denies that the prescription claims data at issue in the above-captioned case constitutes a "medical record." Express Scripts objects to Plaintiff's use of the terms "method," "appropriate" and "cost" as vague and ambiguous.

Subject to and without waiver of these objections, Express Scripts states that it provides prescription claims data free of charge to all individuals who request it directly from Express Scripts and provide HIPAA-compliant identification. Express Scripts further states that the data processing fee for third party requests for prescription claims data is based on the resources, including employees sufficient to handle requests, and time spent and expenses incurred by Express Scripts in processing these requests, including but not limited to obtaining HIPAA-compliant and other authorizations or releases, gathering information from multiple databases, extracting archived data, executing an affidavit, and shipping the documents.

6. Please state whether or not Express Scripts provides to its Kentucky customers an itemized invoice or billing statement related to its "data processing" of a customer's medical record request. If yes, please state with specificity the each and every service and corresponding cost for which the customer is billed.

ANSWER:

Express Scripts incorporates by reference its General Objections and Statements. Express Scripts also objects to this interrogatory as overly broad and unduly burdensome. Express Scripts further objects to the term "medical record" in this interrogatory and denies that the prescription claims data at issue in the above-captioned case constitutes a "medical record." Express Scripts objects to Plaintiff's use of the terms "customer" and "Kentucky customers" as vague and overly broad. Express Scripts denies that an individual is a "customer" of Express Scripts and states that its clients include entities such as managed care organizations, health insurers, third-party administrators, employers, union-sponsored benefit plans, workers' compensation plans and government health programs.

Subject to and without waiver of these objections, Express Scripts states that it does not provide individuals or third parties with an itemized invoice or billing statement related to requests for prescription claims data.

7. Please provide a detailed explanation as to the facts you intend to rely on if you claim that Express Scripts is not a health care provider in Kentucky pursuant to K.R.S. § 422.317(1), including any and all supportive legal or statutory authority.

ANSWER:

Express Scripts incorporates by reference its General Objections and Statements. Express Scripts further objects to this interrogatory because it calls for a legal conclusion.

Subject to and without waiver of these objections, Express Scripts, without limiting its ability to provide facts in an appropriate pleading related to this request for a legal conclusion, incorporates by reference Section III(A)(i) of the Memorandum in Support of Express Scripts' Motion to Dismiss and its Reply in Further Support of Express Scripts' Motion to Dismiss, and also refers Plaintiff to Express Scripts' filings with the Securities and Exchange Commission.

8. Please provide a detailed explanation as to why you believe Express Scripts is not a pharmacy in Kentucky pursuant to K.R.S. § 422.317(1), including any and all relevant facts, and any and all supportive legal or statutory authority.

ANSWER:

Express Scripts incorporates by reference its General Objections and Statements. Express Scripts further objects to this interrogatory because it calls for a legal conclusion. Express Scripts also objects to this interrogatory to the extent that it implies that K.R.S. § 422.317(1) mentions or applies to pharmacies.

Subject to and without waiver of these objections, Express Scripts, without limiting its ability to provide facts in an appropriate pleading related to this request for a legal conclusion, incorporates by reference Section III(A)(i) of the Memorandum in Support of Express Scripts' Motion to Dismiss and its Reply in Further Support of Express Scripts' Motion to Dismiss.

9. Please provide a detailed explanation as to why you believe Express Scripts is exempted from compliance with K.R.S. § 422.317(1), including any and all supportive legal or statutory authority.

ANSWER:

Express Scripts incorporates by reference its General Objections and Statements. Express Scripts further objects to this interrogatory because it calls for a legal conclusion.

Express Scripts further objects to the term "exempt from compliance" in this interrogatory as vague and misleading because K.R.S. § 422.317(1) does not apply to Express Scripts.

Subject to and without waiver of these objections, Express Scripts, without limiting its ability to provide facts in an appropriate pleading related to this request for a legal conclusion, incorporates by reference Section III(A) of the Memorandum in Support of Express Scripts' Motion to Dismiss and its Reply in Further Support of Express Scripts' Motion to Dismiss.

10. Please provide a detailed explanation distinguishing a pharmacy from a "pharmacy benefit management company," and provide any and all supportive legal or statutory authority.

ANSWER:

Express Scripts incorporates by reference its General Objections and Statements. Express Scripts further objects to this interrogatory because it calls for a legal conclusion.

Subject to and without waiver of these objections, Express Scripts, without limiting its ability to provide facts in an appropriate pleading related to this request for a legal conclusion, incorporates by reference Sections I(A) and III(A)(i) of the Memorandum in Support of Express Scripts' Motion to Dismiss and its Reply in Further Support of Express Scripts' Motion to Dismiss.

11. Please provide the number of medical record requests received and responded to annually by defendant Express Scripts, for the past five (5) years in the Commonwealth of Kentucky.

ANSWER:

Express Scripts incorporates by reference its General Objections and Statements. Express Scripts further objects to the term "medical record" in this interrogatory and denies that the

prescription claims data at issue in the above-captioned case constitutes a "medical record." Express Scripts also objects to the term "in the Commonwealth of Kentucky" in this interrogatory as vague and ambiguous. Express Scripts further objects to this interrogatory because it seeks information that is neither relevant nor reasonably calculated to lead to the discovery of admissible evidence to the extent it pertains to information unrelated to the putative class. Express Scripts also objects to this interrogatory as unduly burdensome because the records of third party requests for prescription claims data are not kept in electronic format. Identifying requests made on behalf of Kentucky citizens would require extensive, time-consuming and impractical manual review of a large volume of paper documents that are not filed by state. Additionally, in many instances, the third party requesting prescription claims data is not located in the same state as the individual who is the subject of the request, which complicates the process for determining which requests pertain to Kentucky citizens. Express Scripts is diligently attempting to identify the documents that might allow it to respond to this interrogatory and will supplement this response after those efforts are complete.

12. Please state the total of amount of money paid to defendant Express Scripts by its members in the Commonwealth of Kentucky for copies of medical records for each of the following years: 2010, 2011, 2012, 2013, 2014, and 2015. Please specify how much of this revenue was obtained from the first copy of medical records for each Kentucky patient, and separately for any subsequent additional copies.

ANSWER:

Express Scripts incorporates by reference its General Objections and Statements. Express Scripts further objects to the term "medical record" in this interrogatory and denies that the prescription claims data at issue in the above-captioned case constitutes a "medical record."

Express Scripts also objects to this interrogatory because its scope is overly broad in requesting information for a full six (6) years. Express Scripts further objects to this interrogatory because it seeks information that is neither relevant nor reasonably calculated to lead to the discovery of admissible evidence to the extent it pertains to information unrelated to the putative class. Express Scripts also objects to this interrogatory as unduly burdensome because the records of third party requests for prescription claims data are not kept in electronic format. Identifying requests made on behalf of Kentucky citizens would require extensive, time-consuming and impractical manual review of a large volume of paper documents that are not filed by state. Additionally, in many instances, the third party requesting prescription claims data is not located in the same state as the individual who is the subject of the request, which complicates the process for determining which requests pertain to Kentucky citizens. Express Scripts is diligently attempting to identify the documents that might allow it to respond to this interrogatory and will supplement this response after those efforts are complete.

13. Please identify each and every lawsuit in which Express Scripts (and any predecessor in interest) has been a defendant within the last five (5) years regarding its pricing structure for medical records and for each, please include: the court where the lawsuit was filed, the complete name and number of the case, the names of the attorneys involved, a brief description of the events precipitating the lawsuit, and the disposition of the case.

ANSWER:

Express Scripts incorporates by reference its General Objections and Statements. Express Scripts further objects to this interrogatory because it seeks information that is neither relevant nor reasonably calculated to lead to the discovery of admissible evidence.

Subject to and without waiver of these objections, Express Scripts states that it has not been a defendant in any such lawsuit.

14. State whether Express Scripts (and any predecessor in interest), in the last ten (10) years, has ever been subjected to or had levied against it fines pursuant to a violation of statute or regulations in any state within which it operates regarding its pricing structure for medical records. If yes, state the statute or regulation Defendant was subject to, the date of the levy, the governing body which levied the fine, and the disposition of each levy, and the identification of all documents evidencing the fine levied and/or offense in issue.

ANSWER:

Express Scripts incorporates by reference its General Objections and Statements. Express Scripts further objects to this interrogatory because it seeks information that is neither relevant nor reasonably calculated to lead to the discovery of admissible evidence. Express Scripts also objects to this interrogatory as overly broad in seeking information over a ten (10) year period.

Subject to and without waiver of these objections, Express Scripts states that it is not aware of any instance in which it has been subject to any such statutory or regulatory violations.

15. State whether Express Scripts has been sued under its proper name. If not, please state the proper name under which suit should be made and service of process may be had, and list the name, address, and telephone number of the proper agent for service of process.

ANSWER:

Express Scripts incorporates by reference its General Objections and Statements. Express Scripts further objects to the term "proper" in this interrogatory as vague and ambiguous.

Subject to and without waiver of these objections, Express Scripts states that there is no "proper name under which suit should be made" because there is no basis for liability to Plaintiff. Notwithstanding that, Express Scripts acknowledges that the request for prescription claims data described in the Amended Complaint was sent to Express Scripts, Inc.

16. For any Request for Admission served simultaneously herewith that was responded to with other than an unqualified admission, state the facts and circumstances that you claim support your denial or qualified admission.

ANSWER:

Express Scripts incorporates by reference its General Objections and Statements. Express Scripts further objects to this interrogatory to the extent it seeks information related to requests for admission that call for a legal conclusion. Express Scripts also objects to this interrogatory to the extent it seeks attorney-client privileged and work-product protected information. Express Scripts further objects to this interrogatory as vague and overly broad.

Subject to and without waiver of these objections, Express Scripts incorporates its Responses to Requests for Admission Nos. 1-17 and pursuant to Kentucky Rule of Civil Procedure 33.03, refers Plaintiff to the documents to be produced by Express Scripts in response to Plaintiff's requests for production.

17. State the name, address, telephone number, and place of employment of each person known by your counsel who you intend to call as a witness at trial.

ANSWER:

Express Scripts incorporates by reference its General Objections and Statements. Express Scripts further objects to this interrogatory as premature because Express Scripts does not yet know who it will call at trial.

Subject to and without waiver of these objections, Express Scripts will provide this information as required by the Kentucky Rules of Civil Procedure and by any scheduling or pretrial orders to be entered in this case.

18. State the name, address, and telephone number, and expert qualifications of each expert witness whom you intend to call at trial.

ANSWER:

Express Scripts incorporates by reference its General Objections and Statements. Express Scripts further objects to this interrogatory as premature because Express Scripts does not yet know who it will call at trial.

Subject to and without waiver of these objections, Express Scripts will provide this information as required by the Kentucky Rules of Civil Procedure and by any scheduling or pretrial orders to be entered in this case.

19. With regard to any expert witness you intend to call at trial:

a. State separately for each the subject matter upon which the expert is expected to testify;

b. State the substance of the facts and opinions as to which the expert is expected to testify; and

c. Give a summary of the grounds for each such opinion.

ANSWER:

Express Scripts incorporates by reference its General Objections and Statements. Express Scripts also objects to this interrogatory to the extent it seeks attorney-client privileged and work-product protected information. Express Scripts further objects to this interrogatory as premature because Express Scripts does not yet know who it will call at trial.

Subject to and without waiver of these objections, Express Scripts will provide this information as required by the Kentucky Rules of Civil Procedure and by any scheduling or pretrial orders to be entered in this case.

REQUESTS FOR PRODUCTION

1. Please produce a copy of defendant Express Scripts' policies and procedures regarding the retrieval and reproduction of medical records requested by members of the proposed class in the Commonwealth of Kentucky.

RESPONSE:

Express Scripts incorporates by reference its General Objections and Statements. Express Scripts further objects to the term "medical records" in this request and denies that the prescription claims data at issue in the above-captioned case constitutes "medical records."

Subject to and without waiver of these objections, Express Scripts responds that it will conduct a good-faith and reasonable search for documents and will produce any such responsive, non-privileged documents related to requests for prescription claims data that exist in Express Scripts' possession, custody, or control.

2. Please produce documents showing the number of Kentucky customers of Express Scripts who have requested copies of their medical or pharmacy records for the last five (5) years, including the number of pages on average for Kentucky customers, the year the records were requested, and the amount paid.

RESPONSE:

Express Scripts incorporates by reference its General Objections and Statements. Express Scripts further objects to the term "medical records" in this request and denies that the prescription claims data at issue in the above-captioned case constitutes "medical records."

Express Scripts also objects to the terms "customers" or "Kentucky customers" in this request as vague and overly broad. Express Scripts further objects to this request because it seeks information that is neither relevant nor reasonably calculated to lead to the discovery of admissible evidence to the extent it pertains to information unrelated to the putative class. Express Scripts also objects to this request as unduly burdensome because the records of third party requests for prescription claims data are not kept in electronic format. Identifying requests made on behalf of Kentucky citizens would require extensive, time-consuming and impractical manual review of a large volume of paper documents that are not filed by state. Additionally, in many instances, the third party requesting prescription claims data is not located in the same state as the individual who is the subject of the request, which complicates the process for determining which requests pertain to Kentucky citizens. Express Scripts is diligently attempting to identify the documents that might allow it to respond to this interrogatory and will supplement this response after those efforts are complete.

3. Please produce documents showing all of the entities, subsidiaries, and agents of Express Scripts that do business in Kentucky.

RESPONSE:

Express Scripts incorporates by reference its General Objections and Statements. Express Scripts further objects to this request because it seeks information that is neither relevant nor reasonably calculated to lead to the discovery of admissible evidence. Express Scripts also objects to this request because it seeks information that is equally available to Plaintiff.

Subject to and without waiver of these objections, Express Scripts responds that it will produce documents reflecting the subsidiaries and affiliates of Express Scripts that conduct business in Kentucky.

4. Please produce documents showing the name and address of all pharmacies and other medical providers with whom Express Scripts contracts for services in Kentucky, including the number of patients at each such provider.

RESPONSE:

Express Scripts incorporates by reference its General Objections and Statements. Express Scripts further objects to this request because it seeks information that is neither relevant nor reasonably calculated to lead to the discovery of admissible evidence. Express Scripts also objects to this request as overly broad and unduly burdensome in requesting information regarding all pharmacies and other medical providers in Kentucky. Express Scripts also objects to this request to the extent that it seeks information that is proprietary, trade secret, or otherwise confidential business information.

5. Please produce copies of all documents in the possession of Express Scripts related to the establishment of its pharmacy and/or medical record pricing structure, including any revisions to the structure over the last five years, the basis for creating the pricing structure, and any and all correspondence with regulatory entities in the Commonwealth of Kentucky about the pricing structure.

RESPONSE:

Express Scripts incorporates by reference its General Objections and Statements. Express Scripts further objects to the term "medical record" in this request and denies that the prescription claims data at issue in the above-captioned case constitutes a "medical record." Express Scripts also objects to the use of the phrase "pharmacy and/or medical record pricing structure" as vague and ambiguous. Express Scripts also objects to this request on the basis that it seeks attorney-client privileged and work-product protected information.

Subject to and without waiver of these objections, Express Scripts responds that it will conduct a good-faith and reasonable search for documents and will produce any such responsive, non-privileged documents that exist in Express Scripts' possession, custody, or control.

6. Please produce all documents in your possession related to Plaintiff Edward Gearhart's medical and pharmacy treatment, and the charges for his records.

RESPONSE:

Express Scripts incorporates by reference its General Objections and Statements. Express Scripts further objects to this interrogatory on the grounds that it is vague, overly broad, and unduly burdensome. Express Scripts also objects to the extent this request seeks the production of documents already within Plaintiff's possession, custody or control. Express Scripts further objects to this interrogatory because it seeks information that is neither relevant nor reasonably calculated to lead to the discovery of admissible evidence.

Subject to and without waiver of these objections, Express Scripts responds that it will conduct a good-faith and reasonable search for documents and will produce any such responsive, non-privileged documents that exist in Express Scripts' possession, custody, or control.

Respectfully submitted,

Britt K. Latham (Admitted *Pro Hac Vice*)
Alison K. Grippo (Admitted *Pro Hac Vice*)
BASS, BERRY & SIMS, PLC
150 Third Avenue South, Suite 2800
Nashville, TN 37201
(615) 742-6200

McBRAYER, McGINNIS, LESLIE
& KIRKLAND, PLLC
201 East Main Street, Suite 900
Lexington, Kentucky 40507
(859) 231-8780

ATTORNEYS FOR DEFENDANT

CERTIFICATE OF SERVICE

I hereby certify that a true and accurate copy of the foregoing was served this 29th day of March, 2016, upon the following via U.S. Mail:

Hon. Alex C. Davis
Jones Ward PLC
Marion E. Taylor Building
312 South Fourth Street, 6TH Floor
Louisville, Kentucky 40202

ATTORNEY FOR DEFENDANT

VERIFICATION

I, Heather Brooks, Research Analyst – 3rd Party, make this verification on behalf of defendant Express Scripts, Inc. I have read the foregoing Express Scripts Inc.'s Responses and Objections to Plaintiff's First Set of Requests for Admission, Interrogatories, and Requests for Production of Documents and know its contents. Some of the matters stated in the foregoing Responses are not within my personal knowledge, but I am informed and believe the facts stated in the foregoing Responses are true, and on those grounds certify or declare that the same are true and correct.

By: HBrooks

Title: RA - 3rd Party

Subscribed and sworn to before me this 29 day of March, 2016.

Notary Public

My Commission expires: 11/29/17

16318069.2

MARY ANNE CAMERON NOTARY PUBLIC NOTARY SEAL #13441058 COMMISSION EXPIRES JAN. 29, 2017 ST. CHARLES COUNTY STATE OF MISSOURI

COMMONWEALTH OF KENTUCKY
ROWAN CIRCUIT COURT
CIVIL BRANCH
NO. 15-CI-90250

EDWARD P. GEARHART — **PLAINTIFF**

v. — **ORDER**

EXPRESS SCRIPTS, INC. — **DEFENDANT**

* * * * *

This matter came before the Court on April 15, 2016 upon Defendant, Express Scripts, Inc.'s, Motion for Oral Argument. After reviewing the record, and otherwise being duly and sufficiently advised; **IT IS HEREBY ORDERED AND ADJUDGED** that Defendant, Express Scripts Inc.'s, Motion to Dismiss is hereby scheduled for oral agreement before the Rowan Circuit Court on June 14, 2016 at 9:00 a.m.

HON. WILLIAM E. LANE 04/22/2016
JUDGE, ROWAN CIRCUIT COURT

PREPARED BY:

JARON P. BLANDFORD
McBRAYER, McGINNIS, LESLIE
& KIRKLAND, PLLC
201 East Main Street, Suite 900
Lexington, Kentucky 40507
(859) 231-8780
(859) 231-1175 facsimile
jblandford@mmlk.com
ATTORNEY FOR DEFENDANT

CLERK'S CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing has been sent via U.S. Mail, postage pre-paid, on this the 25 day of April, 2016, to the following:

Jaron P. Blandford, Esq.
McBrayer, McGinnis, Leslie
& Kirkland, PLLC
201 East Main Street, Suite 900
Lexington, Kentucky 40507

Hon. William E. Lane, Judge
Rowan Circuit Court
Courthouse Annex
44 West Main Street
Mt. Sterling, Kentucky 40353

Alex C. Davis, Esq.
Jones Ward, PLC
Marion E. Taylor Building
312 South Fourth Street, 6TH Floor
Louisville, Kentucky 40202

Britt Latham, Esq.
Alison Grippo, Esq.
Bass Berry & Sims
150 Third Avenue, Suite 2800
Nashville, Tennessee 37201

S. Hunt, D.C.
ROWAN CIRCUIT CLERK

COMMONWEALTH OF KENTUCKY
ROWAN CIRCUIT COURT
DIVISION ONE
CIVIL ACTION NO. 15-CI-90250

EDWARD P. GEARHART — PLAINTIFF

v.

AGREED PROTECTIVE ORDER

EXPRESS SCRIPTS, INC. — DEFENDANT

* * * * * * * *

The parties, being in agreement; the parties and the Court having reviewed the Agreed Protective Order submitted pursuant to Kentucky Rule of Civil Procedure 26.03; and the Court being otherwise sufficiently advised; it is hereby ORDERED as follows:

1. The following shall apply to information, documents, excerpts from documents, and other materials produced in this action pursuant to the Kentucky Rules of Civil Procedure governing disclosure and discovery.

2. Until such time as this Protective Order has been entered by the Court, the parties agree that, upon execution by the parties, it will be treated as effective as if approved and, specifically, that any violation of its terms shall be subject to the same sanctions and penalties, including those under Kentucky Rule of Civil Procedure 37, as if the Order had been approved by the Court.

3. Information, documents, testimony and other materials may be designated by the producing party in the manner permitted ("the Designating Party"). All such information, documents, excerpts from documents, testimony and other materials will constitute "Designated Material" under this Order. The designation shall be either (a) "CONFIDENTIAL," (b) "HIGHLY CONFIDENTIAL – ATTORNEYS' EYES ONLY." This order shall apply to Designated Material produced by any party in this action.

4. "CONFIDENTIAL" information means information, documents, or things that have not been made public by the Designating Party and that the Designating Party reasonably and in good faith believes contains or comprises (a) trade secrets, (b) proprietary business information, and/or (c) information implicating an individual's legitimate expectation of privacy.

5. "HIGHLY CONFIDENTIAL – ATTORNEYS' EYES ONLY" means CONFIDENTIAL, non-public information that the Designating Party reasonably and in good faith believes is so highly sensitive or of a proprietary nature that disclosure of such information justifies imposing the requirement that only the legal counsel for the parties may view the information, and for which the disclosure can be reasonably expected to result in injury to the producing party. Such information may include but is not limited to competitive business information, highly sensitive strategic business planning information, highly sensitive research or business analysis, customer information, pricing information, or information that could expose the Designating Party's clients to a competitive disadvantage.

6. "HIGHLY CONFIDENTIAL – ATTORNEYS' EYES ONLY" also includes individually identifiable health information and protected health information as defined at 45 CFR 160.103 (which includes but is not limited to health information that is connected to an individual's name, address, Social Security number or other identifying number or information). Wherever practical, the Designating Party shall redact all individually identifiable health information and protected health information as defined at 45 CFR 160.103, in which case the information may be designated as "CONFIDENTIAL," if the Designating Party redacts all information that would qualify as "HIGHLY CONFIDENTIAL – ATTORNEYS' EYES ONLY."

7. Designated Material and any summary, description, analysis or report containing, summarizing, describing or otherwise communicating Designated Material shall not be used or

disclosed for any purpose other than the litigation of this action and may be disclosed only as follows:

A. ***Parties***: Material designated "CONFIDENTIAL" may be disclosed to parties to this action or directors, officers and employees of parties to this action, who have a legitimate need to see the information in connection with their responsibilities for overseeing the litigation or assisting counsel in preparing the action for trial or settlement.

B. ***Witnesses***: Designated Material, including material designated "CONFIDENTIAL" or "HIGHLY CONFIDENTIAL – ATTORNEYS' EYES ONLY," may be disclosed to a witness in this action, but only for purposes of testimony or preparation of testimony in this case, whether at trial, hearing, or deposition, but it may not be retained by the witness. Before Designated Material is disclosed for this purpose, each such person must agree to be bound by this Order, by signing a document substantially in the form of Exhibit A.

C. ***Outside Experts and/or Consultants***: Designated Material, including material designated "CONFIDENTIAL" or "HIGHLY CONFIDENTIAL – ATTORNEYS' EYES ONLY," may be disclosed to an outside expert and/or consultant (and the secretarial and clerical staffs of such experts or consultants) for the purpose of obtaining the expert's or consultant's assistance in the litigation. Before Designated Material is disclosed for this purpose, each such person (for themselves and their staff members) must agree to be bound by this Order, by signing a document substantially in the form of Exhibit A.

D. ***Counsel***: Designated Material, including material designated "CONFIDENTIAL" or "HIGHLY CONFIDENTIAL – ATTORNEYS' EYES ONLY," may be disclosed to counsel of record and in-house counsel for parties to this action and their associates, paralegals, and office staff.

E. ***Other Persons***: Designated Material may be provided as necessary to copying services, translators, and litigation support firms. Before Designated Material is disclosed to such third parties, each such person must agree to be bound by this Order by signing a document substantially in the form of Exhibit A. Designated Material may also be provided as necessary and in conjunction with the terms of this Order to the Court and court personnel and to any court reporter, typist or videographer transcribing testimony or argument in this matter.

8. Prior to disclosing or displaying any Designated Material to any person, counsel shall:

A. Inform the person of the confidential nature of the Designated Material; and

B. Inform the person that this Court has enjoined the use of the Designated Material by him/her for any purpose other than this litigation and has enjoined the disclosure of that information or documents to any other person.

9. A person having custody of Designated Material shall maintain it in a manner that limits access to the Designated Material to only those persons permitted such access under this Order.

10. Counsel shall maintain all signed agreements by which persons have consented to be bound by this Order.

11. Designated Material shall be designated by prominently stamping or otherwise marking the documents with the words "CONFIDENTIAL" or "HIGHLY CONFIDENTIAL – ATTORNEYS' EYES ONLY," thus clearly identifying the category of Designated Material for which protection is sought under the terms of this Order. Designated Material not reduced to documentary form shall be designated by the Designating Party in a reasonably equivalent way.

12. The Designating Party will only designate materials as "CONFIDENTIAL" or "HIGHLY CONFIDENTIAL – ATTORNEYS' EYES ONLY" if the party believes in good faith that the materials contain confidential information. A party may designate as "CONFIDENTIAL" or "HIGHLY CONFIDENTIAL – ATTORNEYS' EYES ONLY" any information contained in documents that are in the possession of a third party if the documents contain the party's Confidential or Highly Confidential Information.

13. If a receiving party learns that Designated Materials produced to it have been disclosed to any party or person(s) other than in the manner authorized by this Protective Order, the receiving party responsible for the disclosure must immediately inform the Designating Party of such disclosure and shall make a good faith effort to retrieve any Designated Materials so disclosed and to prevent disclosure by each unauthorized person who received such information.

14. A party may submit a request in writing to the Designating Party that the designation be modified or withdrawn. If the Designating Party does not agree to the redesignation within fifteen (15) business days, the objecting party may apply to the Court for relief. Unless and until the Court grants the objecting party's requested relief, the Designated Materials shall be treated as designated. Upon any such application, the burden shall be on the Designating Party to show why the designation is proper. Before serving a written challenge, the objecting party must attempt in good faith to meet and confer with the Designating Party in an effort to resolve the

matter. The Court may award sanctions if it finds that a party's position was taken without substantial justification.

15. Deposition transcripts, or portions thereof, may be designated either (a) when the testimony is recorded, or (b) by written notice to all counsel of record, given within thirty (30) business days after the Designating Party's receipt of the transcript, in which case all counsel receiving such notice shall be responsible for marking all copies of the designated transcript or portion thereof in their possession or control as directed by the Designating Party. Pending expiration of the thirty (30) business days, the deposition transcript shall be treated as Designated Material. When testimony is designated at a deposition, the Designating Party may exclude from the deposition all persons other than those to whom the Designated Material may be disclosed under Paragraph 7 of this Order. Any party may mark Designated Material as a deposition exhibit, provided the deposition witness is one to whom the Designated Material may be disclosed under Paragraph 7 of this Order and the exhibit and related transcript pages receive the same confidentiality designation as the original Designated Material.

16. A receiving party shall not file any document with the Court containing any Designated Material without either obtaining the Designating Party's consent to filing the document on the public record or seeking leave of Court to file the document under seal.

17. This Protective Order does not provide for the automatic sealing of Designated Material that becomes part of an official judicial proceeding or which is filed with the Court. Such Designated Material (and all briefs containing, quoting, summarizing or otherwise disclosing any Designated Material) will be sealed by the Court only upon motion and in accordance with applicable law. If it becomes necessary to file Designated Material with the Court, any motion for leave to file under seal shall specify the party's grounds for seeking the requested relief.

18. Filing pleadings or other papers disclosing or containing Designated Material does not waive the designated status of the material. The Court will determine how Designated Material will be treated during trial and other proceedings as it deems appropriate.

19. Upon final termination of this action, all Designated Material and copies thereof shall be returned promptly (and in no event later than forty-five (45) days after entry of final judgment) to the Designating Party, or certified as destroyed to counsel of record for the Designating Party. A receiving party who has disclosed Designated Materials to other parties or person(s) as permitted by this Protective Order is responsible for using reasonable efforts to ensure that such parties or person(s) return all Designated Materials to the Designating Party, or to obtain from those parties or person(s) written certification that the Designated Materials have been destroyed. Notwithstanding the foregoing, counsel to whom Designated Material is disclosed under Paragraph 7(D) of this Order may retain Designated Material where it is technically infeasible to return or destroy that material at the conclusion of the litigation, but counsel must apply the same degree of confidentiality protection to such Designated Material as it applies to its own confidential client files and records.

20. Inadvertent production of confidential material prior to its designation as such in accordance with this Order shall not be deemed a waiver of a claim of confidentiality. Any such error shall be corrected within a reasonable time. The party receiving such notice of an inadvertent production of confidential material shall make a reasonable, good faith effort to ensure that any analyses, memoranda, notes or other such materials generated based upon such newly designated information are immediately treated as containing Designated Material.

21. Nothing in this Order shall require disclosure of information protected by the attorney-client privilege, or other privilege or immunity, and the inadvertent production of such

information shall not operate as a waiver. If a Designating Party becomes aware that it has inadvertently produced information protected by the attorney-client privilege, or other privilege or immunity, the Designating Party will promptly notify each receiving party in writing of the inadvertent production.

When a party receives notice of such inadvertent production, it shall return all copies of inadvertently produced material within three (3) business days. Any notes or summaries referring or relating to any such inadvertently produced material subject to claim of privilege or immunity shall be destroyed forthwith. Nothing herein shall prevent the receiving party from challenging the propriety of the attorney-client privilege or work product immunity or other applicable privilege designation with the Court. Upon such a challenge, the Designating Party bears the burden of establishing the privileged or protected nature of any inadvertently produced information or material. Each receiving party shall refrain from distributing or otherwise using the inadvertently disclosed information or material for any purpose until any issue of privilege or protection is resolved by agreement of the parties or by the Court. Notwithstanding the foregoing, a receiving party may use the inadvertently produced information or materials to challenge the propriety of the asserted privilege or immunity.

If a receiving party becomes aware that it is in receipt of information or materials which it knows or reasonably should know is privileged or protected, counsel for the receiving party shall immediately take steps to (i) stop reading such information or materials, (ii) notify counsel for the Designating Party of such information or materials, (iii) collect all copies of such information or materials in its possession or control, (iv) return such information or materials to the Designating Party, and (v) otherwise comport themselves with the applicable provisions of the Rules of Professional Conduct.

22. In the event that Designated Material disclosed during the course of this action is sought by any person or entity not a party to this action, whether by subpoena in another action or service with any legal process, the party receiving such subpoena or service shall immediately notify in writing counsel of record for the Designating Party if such subpoena or service demands the production of Designated Materials of such Designating Party. It is the Designating Party's burden to intervene if it desires to quash all or portions of the subpoena or request based on confidentiality concerns. Any such person or entity seeking such Designated Materials by attempting to enforce such subpoena or other legal process shall be apprised of this Protective Order by counsel of record for the party upon whom the subpoena or process was served.

23. The restrictions on disclosure of Designated Materials set forth in this Protective Order shall not apply to Designated Materials that: (a) at or prior to disclosure thereof in this action, are or were a matter of public knowledge or were independently obtained by the receiving party from a third party having the right to disclose the same; (b) after disclosure thereof, become public knowledge other than by act or omission of the receiving party or its agents, experts, and attorneys; (c) are disclosed by the Designating Party to a third party who is not subject to this Protective Order and who does not have an obligation to maintain the confidentiality of Designated Materials; or (d) were obtained outside of this action by the receiving party from the Designating Party without it having been designated as confidential or without any other attendant obligation of confidentiality.

24. The foregoing is entirely without prejudice to the right of any party to apply to the Court for any further Protective Order relating to Designated Material; or to object to the production of Designated Material; or to apply to the Court for an order compelling production of Designated Material; or for modification of this Order; or to seek any other relief from the Court.

25. In the event anyone shall violate or threaten to violate the terms of this Protective Order, the aggrieved party immediately may apply to obtain injunctive relief against any such person violating or threatening to violate any of the terms of this Protective Order.

26. This Court shall retain jurisdiction of any disputes or issues concerning the terms, interpretation, amendment of, or enforcement of this Protective Order, and all persons receiving Designated Material pursuant to this Protective Order hereby consent to the jurisdiction of this Court.

27. The restrictions imposed by this Order may be modified or terminated only by further order of the Court.

Entered this 9th day of May, 2016.

HON. WILLIAM E. LANE
JUDGE, ROWAN CIRCUIT COURT

CERTIFICATE OF SERVICE

It is hereby certified that a true and correct copy of the foregoing was served via U.S. mail, postage pre-paid, this 9th day of May, 2016, upon the following:

Jaron P. Blandford, Esq.
McBrayer, McGinnis, Leslie
& Kirkland, PLLC
201 East Main Street, Suite 900
Lexington, Kentucky 40507

Alex C. Davis, Esq.
Jones Ward, PLC
Marion E. Taylor Building
312 South Fourth Street, 6TH Floor
Louisville, Kentucky 40202

Hon. William E. Lane, Judge
Rowan Circuit Court
Courthouse Annex
44 West Main Street
Mt. Sterling, Kentucky 40353

Britt Latham, Esq.
Alison Grippo, Esq.
Bass Berry & Sims
150 Third Avenue, Suite 2800
Nashville, Tennessee 37201

Ramona Dannis
CLERK, ROWAN CIRCUIT COURT

09:00 AM CI ROWAN Run Date: 06/13/2016 8:05:01AM DocketList.Rpt

Court C CIRCUIT COURTROOM
Judge HON. WILLIAM LANE

Prep info @00000030644 06/13/2016 8:05:01AM 2
06/14/2016 Court Docket
Page 1 of 2

Start of docket >

1 CI 15-CI-90250 GEARHART, EDWARD P. VS. EXPRESS SCRIPTS HOLDING CO.,

☐

☑ BLANDFORD, JARON PAUL — ATTORNEY FOR DEFENDANT
☑ FORESTER, WILLIAM — ATTORNEY FOR DEFENDANT
☑ LATHAM, BRITT K. — ATTORNEY FOR DEFENDANT
☑ WARD, JASPER D. IV — ATTORNEY FOR DEFENDANT
☐ EXPRESS SCRIPTS HOLDING CO., — DEFENDANT / RESPONDENT
☐ GEARHART, EDWARD P. — PLAINTIFF / PETITIONER
☐ SERVE: CSC-LAWYERS INCORPORATING SERVICE, — REGISTERED AGENT OF SERVICE

☐ Bail Credit Denied ☐ Danger to self or others ☐ Flight Risk

ENTERED
JIM BARKER, CLERK
JUN 14 2016
ROWAN CIRCUIT/DISTRICT COURTS
BY: D.C.

ORAL ARGUMENTS

Motion to Dismiss Denied; Status Conference
10-21-16 @ 9am

 Judge Signature

COMMONWEALTH OF KENTUCKY
ROWAN CIRCUIT COURT
DIVISION ONE
CIVIL ACTION NO. 15-CI-90250

ELECTRONICALLY FILED

EDWARD P. GEARHART PLAINTIFF

v. **ANSWER**

EXPRESS SCRIPTS, INC. DEFENDANT

* * * * * * * *

Comes the Defendant, Express Scripts, Inc., ("Express Scripts"), by counsel, and for its Answer to Plaintiff's First Amended Class Action Complaint ("Complaint"), hereby states as follows:

FIRST DEFENSE

1. The Complaint, in whole or in part, fails to state a claim upon which relief may be granted.

SECOND DEFENSE

2. The claims alleged in the Complaint are barred by the applicable statute(s) of limitations.

THIRD DEFENSE

3. Defendant pleads any and all applicable affirmative defenses of Kentucky Rule of Civil Procedure 8.03 and specifically pleads the affirmative defenses of estoppel; laches; release; waiver; and Defendant's compliance with applicable laws, statutes and regulations, as a complete or partial bar to the Plaintiffs' recovery from Defendant on the claims alleged in the Complaint.

FOURTH DEFENSE

4. Any obligations on the part of Defendant to Plaintiff were subject to various conditions subsequent which have not occurred; accordingly, Defendant does not have any obligation to Plaintiff and Plaintiff's claims are thereby barred in whole or in part.

FIFTH DEFENSE

5. Defendant has fully performed and discharged any obligations to Plaintiff, if any, and accordingly, has no obligation of any kind to Plaintiff.

SIXTH DEFENSE

6. The Complaint fails to comply with the pleading standards under Kentucky Rule of Civil Procedure 9.02.

SEVENTH DEFENSE

7. Defendant is not liable to Plaintiff because it did not make any material misstatements or material omissions and is not responsible for any material misstatements or material omissions by others.

EIGHTH DEFENSE

8. Defendant is not liable to Plaintiff because it had no duty to disclose any information that Plaintiff alleges it failed to disclose.

NINTH DEFENSE

9. Plaintiff's claims against Defendant are barred, in whole or in part, because Plaintiff did not reasonably rely on any statements or omissions alleged in the Complaint to be materially false or misleading.

TENTH DEFENSE

10. Plaintiff's claims against Defendant are barred in part because his prescription claims data was not purchased for personal, family or household purposes.

ELEVENTH DEFENSE

11. Plaintiff's claims against Defendant are barred because Express Scripts is not a "health care provider" regulated by KRS § 422.317(1).

TWELFTH DEFENSE

12. Plaintiff's claims against Defendant are barred, in whole or in part, because prescription claims data is not "medical records" regulated by KRS § 422.317(1).

THIRTEENTH DEFENSE

13. Plaintiff's claims against Defendant are barred, in whole or in part, because Plaintiff is not a "patient" of Defendant as regulated by KRS § 422.317(1).

FOURTEENTH DEFENSE

14. The damages alleged by Plaintiff are conjectural and/or speculative.

FIFTEENTH DEFENSE

15. The conduct of persons and/or entities other than Defendant was a superseding or intervening cause of any damage, loss, or injury allegedly sustained by Plaintiff.

SIXTEENTH DEFENSE

16. Plaintiff failed to mitigate his damages, if any, and therefore, such damages, and any recovery by Plaintiff as a result of such alleged damages, should be reduced or barred accordingly.

SEVENTEENTH DEFENSE

17. Plaintiff's claim for punitive damages is barred by certain provisions of the United States Constitution, the Kentucky Constitution and other applicable law.

EIGHTEENTH DEFENSE

18. Punitive damages are inappropriate under the facts of this case.

NINETEENTH DEFENSE

19. This case fails to satisfy the elements of Kentucky Rule of Civil Procedure 23. Plaintiff has failed to adequately define the proposed class or make prime facie showings of numerosity, typicality, superiority and commonality. Plaintiff also has failed to make a prima facie showing that he and his counsel will fairly and adequately represent the interests of absent class members.

TWENTIETH DEFENSE

20. Plaintiff's claims are barred because he and/or other members of the purported class lack standing to assert their claims.

TWENTY-FIRST DEFENSE

21. Defendant is not liable to Plaintiff because Plaintiff's alleged damages were not actually or proximately caused by Defendant or any alleged misstatement or omission.

TWENTY-SECOND DEFENSE

22. Defendant is not liable to Plaintiff because at all times Defendant acted in good faith and had no knowledge, nor was reckless in not knowing, that any alleged statement or omission was false or misleading.

TWENTY-THIRD DEFENSE

23. The allegations contained in Paragraphs 1, 11, 14, 26, 28, 30, 32, 34, 35, 36, 37, 40, 41, 42, 43, 44, 46, 47, 48, 49, 55, 60, 62, 64, 65 and 66 of the Complaint contain legal assertions or conclusions of law to which no response is required. To the extent a response is required, Defendant denies the same in their entirety. Defendant further states that any statutes cited in the referenced paragraphs speak for themselves.

24. Defendant states that the statute cited in Paragraphs 2, 29, 51 and 52 speak for themselves and denies that these statutes apply to the facts of this case.

25. The allegations contained in Paragraph 3 of the Complaint contain legal assertions or conclusions of law to which no response is required. To the extent a response is required, Defendant admits that it charged Plaintiff's law firm's agent $75 for processing, administration and other costs associated with this third party request for prescription claims data. Defendant further states that the statutes cited in the referenced paragraph speak for themselves and denies they are applicable to the facts of this case. Defendant denies all remaining allegations contained in Paragraph 3.

26. Defendant lacks sufficient knowledge or information to admit or deny the allegations contained in Paragraphs 4, 7, 8, 15, 16, 17, 18 and 20 of the Complaint, and therefore denies the same.

27. In response to the allegations contained in Paragraph 5 of the Complaint, Defendant denies that it is a Missouri corporation. Defendant admits all remaining allegations contained in Paragraph 5.

28. To the extent a response is required to the allegations contained in Paragraph 6 of the Complaint, Defendant admits that Plaintiff previously named Express Scripts Holding Co. as a defendant before amending the Complaint.

29. The allegations contained in Paragraphs 9, 10 and 19 of the Complaint contain legal assertions or conclusions of law to which no response is required. To the extent a response is required, Defendant admits Plaintiff purports to bring this action as a class action but denies that it is proper to do so or that a class can be certified or maintained.

30. The allegations contained in Paragraph 12 of the Complaint contain legal assertions or conclusions of law to which no response is required. To the extent a response is required, Defendant denies the same. Defendant further denies that there are questions of law and fact common to members of the putative class or that common questions of law and fact predominate over individual issues.

31. The allegations contained in Paragraph 13 of the Complaint contain legal assertions or conclusions of law to which no response is required. To the extent a response is required, Defendant denies the same. Defendant further denies that Plaintiff's claims are typical of the putative class.

32. The allegations contained in Paragraph 21 of the Complaint contain legal assertions or conclusions of law to which no response is required. To the extent a response is required, Defendant admits that Plaintiff's law firm's agent requested prescription claims data and paid $75 for five pages of prescription claims data. Defendant denies all remaining allegations contained in Paragraph 21 and specifically denies that the prescription claims data constitutes "medical records." Defendant further states that KRS § 422.317(1) speaks for itself and denies that it is applicable to Express Scripts.

33. In response to the allegations contained in Paragraph 22 of the Complaint, Defendant admits that Express Scripts, Inc. produces more than $100 billion in annual revenue, admits that it offers pharmacy benefit management services through a network of retail pharmacies with which it contracts. Defendant denies all remaining allegations contained in Paragraph 22 and specifically denies that any individuals are "patients" of Express Scripts.

34. In response to the allegations contained in Paragraph 23 of the Complaint, Defendant admits that it provided to Plaintiff's law firm's agent five pages of prescription claims data reflecting pharmacy prescriptions. Defendant denies all remaining allegations contained in Paragraph 23 and specifically denies that the prescription claims data constitutes "medical records" or that Express Scripts "directly filled" any prescriptions for Plaintiff.

35. Defendant lacks sufficient knowledge or information to admit or deny the allegations contained in Paragraph 24 of the Complaint, and therefore denies the same. Defendant further denies that prescription claims data constitutes "medical records" and states, based on information and belief, that Mr. Gearhart's claims in the products liability lawsuit are settled and resolved.

36. Defendant denies the allegations contained in Paragraph 25 of the Complaint. Defendant further states that KRS § 422.317(1) speaks for itself and denies that this statute applies to Express Scripts.

37. With respect to the allegations contained in Paragraph 27 of the Complaint, Defendant restates and affirms the averments set forth above in response to Paragraphs 1 through 26 of the Complaint.

38. The allegations contained in Paragraph 31 of the Complaint contain legal assertions or conclusions of law to which no response is required. To the extent a response is

required, Defendant denies the same in their entirety. Defendant further states that the statutes cited in the referenced paragraph speak for themselves and denies that they are applicable to the facts of this case.

39. The allegations contained in Paragraph 33 of the Complaint contain legal assertions or conclusions of law to which no response is required. To the extent a response is required, Defendant denies the same in their entirety. Defendant further states that the cited statute speaks for itself, denies that it is applicable to the facts of this case, denies that Plaintiff meets the requirements of the statute and denies that prescription claims data constitutes "medical records."

40. The allegations contained in Paragraph 38 of the Complaint do not require a response. To the extent a response is required, Defendant states that the Complaint speaks for itself.

41. With respect to the allegations contained in Paragraph 39 of the Complaint, Defendant restates and affirms the averments set forth above in response to Paragraphs 1 through 38 of the Complaint.

42. With respect to the allegations contained in Paragraph 45 of the Complaint, Defendant restates and affirms the averments set forth above in response to Paragraphs 1 through 44 of the Complaint.

43. With respect to the allegations contained in Paragraph 50 of the Complaint, Defendant restates and affirms the averments set forth above in response to Paragraphs 1 through 49 of the Complaint.

44. Defendant denies the allegations contained in Paragraphs 53, 54 and 58 of the Complaint.

45. In response to the allegations contained in Paragraphs 56 and 57 of the Complaint, Defendant admits Plaintiff's law firm's agent requested prescription claims data for use in litigation. Defendant further admits Plaintiff purports to bring this action as a class action but denies that it is proper to do so or that a class can be certified or maintained. Defendant denies all remaining allegations contained in Paragraphs 56 and 57.

46. In response to the allegations contained in Paragraph 59 of the Complaint, Defendant admits Plaintiff's law firm's agent paid $75 for Plaintiff's prescription claims data. Defendant further admits Plaintiff purports to bring this action as a class action but denies that it is proper to do so or that a class can be certified or maintained. Defendant denies all remaining allegations contained in Paragraph 59.

47. The allegations contained in Paragraph 61 of the Complaint contain legal assertions or conclusions of law to which no response is required. To the extent a response is required, Defendant denies the same. Defendant further denies that prescription claims data constitutes "medical records" or that there is any "statutorily-allowed charge" applicable to Express Scripts.

48. With respect to the allegations contained in Paragraph 63 of the Complaint, Defendant restates and affirms the averments set forth above in response to Paragraphs 1 through 62 of the Complaint.

49. The allegations contained in Paragraph 67 of the Complaint contain legal assertions or conclusions of law to which no response is required. To the extent a response is required, Defendant states that the Complaint speaks for itself. Defendant further denies that Plaintiff or members of the putative class are entitled to a jury trial or the requested relief against Defendant.

50. Defendant hereby denies every allegation in the Complaint not specifically admitted above, including all titles and headings of the Complaint.

51. Express Scripts reserves the right to assert additional defenses as they become known throughout the course of discovery or otherwise.

WHEREFORE, Defendant respectfully requests the following relief:

A. An Order dismissing Plaintiff's Complaint;

B. Its costs incurred herein, including a reasonable attorneys' fee;

C. A trial by jury on all issues so triable; and

D. Any and all other relief to which it may be entitled.

Respectfully submitted,

McBRAYER, McGINNIS, LESLIE
& KIRKLAND, PLLC
201 East Main Street, Suite 900
Lexington, KY 40507
(859) 231-8780

/s/ Jaron P. Blandford
JARON P. BLANDFORD

and

BRITT K. LATHAM
ALISON K. GRIPPO
BASS, BERRY & SIMS, PLC
150 Third Avenue South, Suite 2800
Nashville, TN 37201
(615) 742-6200
ATTORNEYS FOR DEFENDANT

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of this pleading was filed electronically with the Fayette Circuit Court and copies were served via U.S. mail, postage pre-paid, this 1st day of July, 2016, upon the following:

Alex C. Davis , Esq.
Jones Ward PLC
Marion E. Taylor Bldg.
312 S. Fourth Street, 6th Floor
Louisville, KY 40202

Hon. William E. Lane
Judge, Rowan Circuit Court
Courthouse Annex
44 West Main Street
Mt. Sterling, KY 40353

/s/ Jaron P. Blandford
JARON P. BLANDFORD

4811-2049-9252, v. 2

COMMONWEALTH OF KENTUCKY
ROWAN CIRCUIT COURT
CIVIL BRANCH
DIVISION ONE
NO. 15-CI-90250

EDWARD P. GEARHART PLAINTIFF

v.

EXPRESS SCRIPTS, INC.'S FIRST SET OF REQUESTS FOR ADMISSIONS, INTERROGATORIES AND REQUESTS FOR PRODUCTION OF DOCUMENTS

EXPRESS SCRIPTS, INC. DEFENDANT

* * * * * * * *

Pursuant to Rules 33, 34 and 36 of the Kentucky Rules of Civil Procedure, Defendant, Express Scripts, Inc., ("Express Scripts"), hereby requests that Plaintiff Edward P. Gearhart ("Gearhart") answer the following requests for admission, answer the following interrogatories under oath and produce for inspection and copying the following described documents requested herein within thirty (30) days of service.

DEFINITIONS

1. The terms "You" and "Your" refer to Edward P. Gearhart.

2. The term "Your law firm" refers to Jones Ward PLC in the broadest sense consistent with the Kentucky Rules of Civil Procedure, including, but not limited to, any of its representatives, agents, attorneys, heirs, assigns, partners, employees, trusts, custodians or other persons purporting to act on its behalf.

3. The term "request" refers to any request for admission, interrogatory or request for documents described below.

4. The term "Action" refers to the above-captioned litigation.

5. The terms "Defendant" or "Express Scripts" refer to Express Scripts, Inc.

6. The term "subsidiary of Defendant" refers to all subsidiaries of Express Scripts, Inc., including but not limited to ESI Mail Pharmacy Service, Inc. and Express Scripts Specialty Distribution Services, Inc., in the broadest sense consistent with the Kentucky Rules of Civil Procedure, including, but not limited to, any of their representatives, agents, attorneys, heirs, assigns, partners, employees, trusts, custodians or other persons purporting to act on their behalf.

7. The terms "pharmacy data" or "prescription claims data" refer to all information or documents reflecting pharmacy services provided to You and/or prescriptions prescribed to or filled for You.

8. The term "Complaint" refers to Plaintiff's First Amended Class Action Complaint filed by You in the above-captioned litigation.

9. The term "communication" means the transmittal of information, including, but not limited to, transmittal in the form of facts, ideas, inquiries or otherwise, and includes any oral, written, or electronic utterance, notation, or statement of any nature whatsoever, draft or final, potential or actual, by and to whomever made or attempted to be made, including, but not limited to, correspondence, memoranda, conversations, dialogues, discussions, interviews, consultations, agreements, electronic messages (including electronic-mail, text messages, instant messages, company intranet, electronic bulletin board or Internet site posting) and other understandings between two or more persons.

10. The term "concerning" means referring to, relating to, describing, evidencing, regarding or constituting.

11. The terms "including," "include" or "includes" are used in their broadest sense and are not meant to be limiting. Any list following these terms contains partial and/or illustrative examples of the types of Documents responsive to the request, but the list is without

limitation and does not constitute an exclusive, all-encompassing, or exhaustive listing of every type of Document responsive to the request.

12. The words "and," "or," "each" and "any" are intended to be construed as necessary to bring within the scope of these requests any Documents or information that otherwise might be construed to be outside the scope of any of them. Use of a singular noun shall be construed to include the plural noun and use of a plural noun shall be construed to include the singular noun. The use of a verb in any tense shall be construed as the use of that verb in all other tenses whenever necessary to bring within the scope of the request Documents or information that might otherwise be construed to be outside its scope.

13. The term "Document" means any "documents" as defined by Kentucky Rule of Civil Procedure 34.01 and includes, without limitation, any communications and any electronically stored materials and recordings such as emails, instant messages, and voice mails. Drafts or copies that are not identical duplicates of the original of each Document, including those bearing handwritten notations, shall be deemed separate and distinct Documents.

14. When referring to a person, "to identify" means to give, to the extent known, the person's full name, present or last known address, and when referring to a natural person, additionally, the present or last known place of employment.

15. When referring to Documents, "to identify" means to give, to the extent known, the (i) type of Document; (ii) general subject matter; (iii) date of the Document; and (iv) author(s), addressee(s) and recipient(s).

16. The term "person" refers to any natural person or any legal entity, including, without limitation, any business or governmental entity or association.

INSTRUCTIONS

1. These requests call for all information, Documents, and things that are known or available to You, including all information, documents, and things in the possession, custody or control of Your agents, attorneys, representatives or any other person acting on Your behalf or under the direction or control of You or Your attorneys or agents. Each request also calls for all information, Documents, and things that are available to You by reasonable inquiry and due diligence to the extent required by the Kentucky Rules of Civil Procedure.

2. Each request shall be construed independently and without reference to any other request herein for purposes of limitation, unless a request so specifies.

3. In the event that any Document or information called for in these requests has been destroyed, lost, discarded or otherwise is not capable of being produced at any time that Documents or information are produced pursuant to these requests, You are instructed to: (i) identify any such Document or information; (ii) identify any person who previously or currently has possession, custody or control of the Document or information; (iii) indicate the request(s) to which such Document or information is related; and (iv) thoroughly set forth the circumstances under which the Document or information is not capable of being produced.

4. Should You seek to withhold any Document or information based on some limitation of discovery (including without limitation a claim of privilege or immunity), identify the Document or information for which the limitation is claimed and describe the basis for withholding such Document or information, including without limitation any claim of privilege or immunity, in sufficient detail as to permit Defendant and the Court to assess the validity of the basis for withholding such Document or information.

5. If any portion of any Document responsive to these requests is withheld under claim of privilege, any non-privileged portion of such Document must be produced with the

portion claimed to be privileged redacted. Whenever a Document is not produced in full or is produced in redacted form, so indicate on the Document and state with particularity the reason or reasons it is not being produced in full, and describe to the best of Your knowledge, information, and belief, and with as much particularity as possible, those portions of the Document that are not being produced, in sufficient detail as to permit Defendant and the Court to assess the validity of the basis for withholding such portions.

6. If You object to any request, state with specificity the grounds for such objection and the request(s) to which each objection applies. Any request to which an objection is made should be responded to insofar as it is not deemed objectionable.

7. An objection to any request may not be made solely on the ground that the request presents a genuine issue for trial.

8. If, in answering these requests, You claim that any request, or a definition or instruction applicable thereto, is ambiguous, do not use such claim as a basis for refusing to respond, but rather set forth as a part of the response the language You claim is ambiguous and the interpretation You have used to respond to the individual request.

9. If You cannot fully answer any particular request, after exercising due diligence to make inquiry and to secure the necessary information, please answer the request and/or produce Documents to the extent possible, explain Your inability to answer and/or produce Documents in response to the remainder, state whatever information or knowledge You have concerning the unanswered portion of the request or the unproduced Documents and identify the person or persons who do(es) have or might have additional knowledge or information to complete the answer.

10. Unless otherwise indicated, the time period covered by each request is from January 1, 2014 through the present.

11. These requests shall be deemed continuing to the extent permitted by Kentucky Rule of Civil Procedure 26. You are required promptly to serve supplementary responses and produce additional Documents if You obtain further or different information.

12. Each matter as to which an admission has been requested will be deemed admitted unless, within thirty (30) days after service of these requests, You serve on the Defendant a written answer or objection addressed to the matter and signed by Plaintiff.

13. The answers to requests for admission shall specifically admit or deny the matter or set forth in detail the reasons why You cannot directly admit or deny the requested admission, and when good faith requires that You qualify an answer or deny only a part of the matter to which an admission is requested, You shall specify as much of it as is true and qualify or deny the remainder.

14. You may not give lack of information or knowledge as a reason for failure to admit or deny unless You state that a reasonable inquiry has been made and that the information known or readily obtainable is insufficient to enable You to admit or deny.

15. All answers to interrogatories shall be made separately and fully and an incomplete or evasive answer is a failure to answer. When an interrogatory calls for an answer in more than one part, please separate the parts in Your answer accordingly so that each part is clearly set out and understandable.

16. If You answer any interrogatory in whole or in part by attaching a Document containing information sufficient to do so, the relevant portions of such Document must be marked or indexed.

17. You are instructed either to produce Documents as they are kept in the usual course of business or to produce Documents organized and labeled to correspond with the categories in these requests. A request for a Document includes a request for any and all file folders or binders within which the Document was contained, transmittal sheets, cover letters, exhibits, enclosures or attachments to the Document in addition to the Document itself.

18. In producing Documents, all Documents that are physically attached to each other when located for production shall be left so attached. Documents that are segregated or separated from other Documents, whether by inclusion of binders, files, subfiles or by use of dividers, tabs or any other method, shall be left so segregated and separated. Documents shall be retained in the order in which they were maintained and in the file where found.

19. Each request for Documents requires the production of all Documents described herein, including all drafts and non-identical copies.

20. Documents, including electronically stored information, should be produced according to the parties' agreed-upon protocol regarding format of production.

21. If no Documents exist that are responsive to a particular request, You shall so state in writing.

REQUESTS FOR ADMISSIONS

1. Admit Your law firm, through its agent or an agent retained on Your behalf, requested Your prescription claims data from Express Scripts for use in *In Re: Depuy Orthopaedics, Inc. ASR Hip Implant Products Liability Litigation*, N.D. Ohio Case No. 1:11-dp-21482.

RESPONSE:

2. Admit Your involvement in *In Re: Depuy Orthopaedics, Inc. ASR Hip Implant Products Liability Litigation*, N.D. Ohio Case No. 1:11-dp-21482 was settled or resolved on or before April 22, 2015.

RESPONSE:

3. Admit Your involvement in *In Re: Depuy Orthopaedics, Inc. ASR Hip Implant Products Liability Litigation*, N.D. Ohio Case No. 1:11-dp-21482 was settled or resolved on or before October 8, 2015.

RESPONSE:

4. Admit You did not communicate directly with Defendant regarding any request for Your prescription claims data.

RESPONSE:

5. Admit You did not pay any monies directly to Defendant for Your prescription claims data.

RESPONSE:

6. Admit You did not reimburse Your law firm or any agent of You or Your law firm for expenses related to obtaining Your prescription claims data from Express Scripts before April 22, 2015.

RESPONSE:

7. Admit Your law firm received prescription claim data for You from Express Scripts related to prescriptions filled by entities other than Defendant or a subsidiary of Defendant.

RESPONSE:

8. Admit that Express Scripts, Inc. has never filled any prescription for You.

RESPONSE:

INTERROGATORIES

1. Identify by name, address, and telephone number and place of employment each and every individual whom You know or whom You believe to have knowledge of the facts alleged in the Complaint, or who may have knowledge of such facts, and describe in detail the substance of the individual's knowledge.

ANSWER:

2. Identify every person who provided information or documents in response to this set of discovery requests, providing such person's name, address, and job title and stating the identification of each specific interrogatory(ies) and/or request(s) within this set of discovery for which such person supplied responsive information.

ANSWER:

3. For each expert You intend to call at the trial of the dispute, please state the following: (a) the subject matter on which the expert is expected to testify; (b) the substance of the facts and opinions to which the expert is expected to testify; (c) a summary of the grounds for

each opinion; (d) the expert's qualifications (including publications authored in the previous ten years); (e) a list of all other cases in which, during the previous four years, the witness testified as an expert; and (f) a statement of the compensation to be paid for the expert's study and testimony in this case.

ANSWER:

4. Identify each person You expect to call as a fact witness at trial. For each person so identified, please state the name, address and telephone number of each such witness along with the subject matter on which the witness is expected to testify.

ANSWER:

5. List all lawsuits or arbitrations in which You are or have been a party.

ANSWER:

6. Describe in detail Your involvement in *In Re: Depuy Orthopaedics, Inc. ASR Hip Implant Products Liability Litigation*, N.D. Ohio Case No. 1:11-dp- 21482, including identifying the timing and circumstances surrounding the conclusion of Your involvement in the case and the timing and circumstances surrounding resolution of the case.

ANSWER:

7. Identify all communications between You and Defendant or any subsidiary of Defendant, and describe in detail the time, location, substance and individuals involved in such communications.

ANSWER:

8. Describe the timing, facts and circumstances concerning any prescriptions filled or other services rendered for You by any subsidiary of Defendant.

ANSWER:

9. Identify all communications between You and Your law firm or Your law firm's agent or an agent retained on Your behalf regarding any request to Express Scripts for Your prescription claims data, and describe in detail the time, location, substance and individuals involved in such communications.

ANSWER:

10. Identify all communications between Your law firm or Your law firm's agent or an agent retained on Your behalf with any third party regarding any request for Your prescription claims data, and describe in detail the time, location, substance and individuals involved in such communications.

ANSWER:

11. Identify any requests for Your pharmacy data or prescription claims data made to any individual or entity other than Defendant, including but not limited to any pharmacy that filled prescriptions for You, including identifying the time, location, substance, recipients and other individuals or entities involved in making or receiving such requests.

ANSWER:

12. Describe the manner in which You or Your law firm or Your law firm's agent or an agent retained on Your behalf requested that Defendant send or ship your prescription claims data and the manner in which Your prescription claims data was shipped or sent from Defendant to You, Your law firm, Your law firm's agent or an agent retained on Your behalf.

ANSWER:

13. Describe the timing, amount, method, and circumstances of any payments or reimbursement You made to Your law firm or Your law firm's agent or an agent retained on Your behalf for expenses related to obtaining Your prescription claims data from Defendant.

ANSWER:

14. Identify all facts and documents establishing any obligation existing at the time Your prescription claims data was requested from Defendant for You to reimburse Your law firm or Your law firm's agent or an agent retained on Your behalf for any expenses incurred to obtain Your prescription claims data from Defendant.

ANSWER:

15. Identify all facts providing a basis for, contradicting or otherwise concerning Your allegation in Paragraph 26 of the Complaint that payment to Defendant for Your prescription claims data was not "voluntary."

ANSWER:

16. Identify all facts providing a basis for, contradicting or otherwise concerning Your contention that Defendant is a "health care provider" subject to KRS § 422.317.

ANSWER:

17. Identify all statements supporting, providing a basis for, contradicting, or otherwise concerning Your allegation that Defendant engaged in unfair or deceptive acts or practices.

ANSWER:

18. Identify all statements supporting, providing a basis for, contradicting, or otherwise concerning Your allegations that the Defendant made fraudulent, false or misleading statements of material fact and/or omitted to state material facts necessary to make other statements not fraudulent, false or misleading, including identification of any and all allegedly false or fraudulent statements or omissions.

ANSWER:

19. Identify all facts and documents supporting, providing a basis for, contradicting or otherwise concerning Your contention that Your prescription claims data was obtained from Defendant for a personal, family or household purpose.

ANSWER:

20. Describe in detail the approximate amount, nature and type of damages You allege were caused as a direct result of Defendant's alleged conduct set forth in the Complaint.

ANSWER:

REQUESTS FOR PRODUCTION

1. Documents concerning the allegations in the Complaint, including but not limited to (a) Documents relied on in drafting and preparing the Complaint and (b) Documents concerning the investigation(s), discovery or detection of the facts underlying the allegations in the Complaint.

RESPONSE:

2. Documents concerning Defendant, including but not limited to communications with, Documents received from or statements attributed to Defendant or any current or former employees, officers, directors, agents or representatives of Defendant.

RESPONSE:

3. Documents concerning any subsidiary of Defendant, including but not limited to communications with, Documents received from, or statements attributed to any subsidiary of Defendant or any current or former employees, officers, directors, agents or representatives of any subsidiary of Defendant.

RESPONSE:

4. Documents concerning any request for pharmacy data or prescription claims data made to any entity, including a pharmacy or pharmacy benefits manager.

RESPONSE:

5. Documents concerning the use of pharmacy data from Defendant or any other pharmacy or pharmacy benefits manager by You, Your law firm or any agent of You or Your law firm.

RESPONSE:

6. Documents concerning any agreement or obligation for You to reimburse expenses incurred by Your law firm or any agent of You or Your law firm to obtain Your prescription claims data.

RESPONSE:

7. Documents concerning the deduction of funds from the settlement of your claims in a products liability lawsuit to reimburse Your law firm or any agent of You or Your law firm for the cost of obtaining Your prescription claims data, as alleged in Paragraph 24 of the Complaint.

RESPONSE:

8. Documents that You may rely on to support certification of this Action as a class action pursuant to Kentucky Rule of Civil Procedure 23, including but not limited to Documents

You may rely on to establish that: (a) You are an adequate class representative; (b) Your claims in this Action are typical of the claim of other potential class members; (c) the potential class in this Action is so numerous that joinder of all members is impracticable; and (d) there are questions of law or fact common to the class.

RESPONSE:

9. Documents concerning any purported expert witness, whether testifying or not, that You may rely on to support certification of this Action as a class action pursuant to Kentucky Rule of Civil Procedure 23, including but not limited to (a) a report providing a complete statement of all opinions the purported expert witness will express and the basis and reasons for them; (b) the facts or data considered by the purported expert witness in forming his or her opinions and the basis and reasons for them; (c) any exhibits that will be used to summarize or support the purported expert witness's opinions and the basis and reasons for them; (d) the purported expert witness's qualifications, including a list of all publications that he or she authored in the previous ten years; (e) a list of all other cases in which, during the previous four years, the purported expert witness submitted an expert report or testified as an expert at trial or by deposition; (f) a statement of the compensation to be, or already, paid to the purported expert witness for his or her work in this Action and (g) any other types of Documents referenced in Kentucky Rule of Civil Procedure 34.01.

RESPONSE:

10. Documents supporting, providing a basis for, contradicting, or otherwise concerning Your allegations that the Defendant made false statements of material fact and/or omitted to state material facts necessary to make other statements not misleading.

RESPONSE:

11. Documents supporting, providing a basis for, contradicting or otherwise concerning or related to any affirmative defense asserted by Defendant.

RESPONSE:

12. Documents concerning the amount, nature, or any type, of damages that You allege were caused by the alleged conduct that forms the basis of the claims You assert against Defendant in this Action.

RESPONSE:

13. Documents concerning Your role as class representative and/or lead plaintiff in this Action, or otherwise concerning Your decision to commence litigation against Defendant, including (a) Your decision to seek to serve as a named plaintiff; (b) Your decision to seek to serve as lead plaintiff; (c) Your decision to retain counsel in this Action, including (i) any engagement letters, retainer agreements, contracts, or other similar Documents evidencing the terms under which You have retained counsel, and (ii) any financial or other arrangements that exist or existed between You and Your law firm, whether in this Action, any other matter, including *In Re: Depuy Orthopaedics, Inc. ASR Hip Implant Products Liability Litigation,* N.D. Ohio Case No. 1:11-dp-21482, or otherwise, including (d) any arrangement to pay a fee,

including a legal fee, to anyone with respect to this Action; (e) the person who will advance and is responsible for the payment of fees, costs and expenses incurred in connection with this Action; (f) any payment, consideration, potential payment or other compensation, remuneration or benefit (including any bonus, fee or reimbursement of expenses) of any kind to You in connection with Your acting as class representative and/or lead plaintiff in this Action; and (g) any persons who will share in the recovery, if any, realized in this Action.

RESPONSE:

14. Documents constituting or concerning communications between You and any potential member of the proposed class that relate to this Action, including Documents concerning any communications, relationships or agreements between You and Your counsel, on the one hand, and any other plaintiff, party or member or potential member of the proposed class in this Action, on the other hand, concerning the subject matter of this Action.

RESPONSE:

15. Documents and communications concerning any expenses incurred or expected to be incurred by You and/or the putative class with respect to this Action.

RESPONSE:

16. Documents sufficient to show arrangements for oversight of class counsel.

RESPONSE:

17. Documents concerning any litigation, arbitration or other proceeding (including, for example but without limitation, transcripts of depositions (and exhibits thereto) in which You were examined) in which You sought to serve, had discussions about the possibility of serving, or in fact served, as a lead plaintiff or otherwise in a representative capacity. This request specifically includes Documents whenever dated or created.

RESPONSE:

18. Documents concerning any litigation, arbitration, or other proceeding (including, for example but without limitation, transcripts of depositions in which You were examined) in which You are or were an actual or contemplated party or witness. This request specifically includes Documents whenever dated or created.

RESPONSE:

19. Documents concerning any litigation, arbitration, or other proceeding (including, for example but without limitation, transcripts of depositions (and exhibits thereto) in which You were examined), whether pending or not, in which You are or were represented by any attorney acting as counsel in this Action. This request specifically includes Documents whenever dated or created.

RESPONSE:

20. Documents concerning any sanction imposed by a court on You or any representative thereof, including, but not limited to, Your legal counsel (including but not limited

to Jones Ward PLC) in their capacity acting on Your behalf in any arbitration, litigation or other proceeding. This request specifically includes Documents whenever dated or created.

RESPONSE:

21. Documents concerning Your arrest or conviction for any felony. This request specifically includes Documents whenever dated or created.

RESPONSE:

22. Documents concerning any allegation in a criminal or civil proceeding, arbitration or military tribunal that You acted dishonestly. This request specifically includes Documents whenever dated or created.

RESPONSE:

23. Documents concerning any determination by any court, hearing officer, arbitrator or tribunal that testimony You provided was not credible. This request specifically includes Documents whenever dated or created.

RESPONSE:

24. Documents concerning Your Document preservation in connection with this Action.

RESPONSE:

25. To the extent not otherwise requested herein, Documents concerning the subject matter of any claims asserted in this Action, or any documents referred to or related to any of Your responses to the First Set of Interrogatories.

RESPONSE:

26. All documents reflecting any sanction, finding or misconduct, or penalty imposed on you by any court, regulatory agency, other government agency, professional organization or any other governing body or organization.

RESPONSE:

27. Witness statements, declarations, or affidavits prepared or received in conjunction with this litigation.

RESPONSE:

Respectfully submitted,

BASS, BERRY & SIMS, PLC
Britt K. Latham (Admitted *Pro Hac Vice*)
Alison K. Grippo (Admitted *Pro Hac Vice*)
150 Third Avenue South, Suite 2800
Nashville, TN 37201
Email: blatham@bassberry.com
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McBRAYER, McGINNIS, LESLIE
& KIRKLAND, PLLC
Jaron P. Blandford
201 East Main Street, Suite 900
Lexington, Kentucky 40507
(859) 231-8780

BY: _____
Jaron P. Blandford

ATTORNEYS FOR DEFENDANT

CERTIFICATE OF SERVICE

I hereby certify that a true and accurate copy of the foregoing was served this 13th day of September, 2016, upon the following via hand delivery:

Hon. Alex C. Davis
Jones Ward PLC
Marion E. Taylor Building
312 South Fourth Street, 6TH Floor
Louisville, Kentucky 40202

_____
ATTORNEY FOR DEFENDANT

COMMONWEALTH OF KENTUCKY
ROWAN CIRCUIT COURT
DIVISION ONE
CIVIL ACTION NO. 15-CI-90250

EDWARD P. GEARHART PLAINTIFF

v. **NOTICE OF SERVICE OF DISCOVERY**

EXPRESS SCRIPTS, INC. DEFENDANT

* * * * *

Comes the Defendant, Express Scripts, Inc., by and through counsel, and hereby gives the Court and the parties notice of the service of Defendant's First Set of Requests for Admissions, Interrogatories and Request for Production of Documents upon the Plaintiff on September 13, 2016.

Respectfully submitted,

McBRAYER, McGINNIS, LESLIE
& KIRKLAND, PLLC
201 East Main Street, Suite 900
Lexington, KY 40507
(859) 231-8780

/s/ Jaron P. Blandford
JARON P. BLANDFORD

and

BRITT K. LATHAM
ALISON K. GRIPPO
BASS, BERRY & SIMS, PLC
150 Third Avenue South, Suite 2800
Nashville, TN 37201
(615) 742-6200
ATTORNEYS FOR DEFENDANT

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of this pleading was filed electronically with the Rowan Circuit Court and copies were served via U.S. mail, postage pre-paid, this 15th day of September, 2016, upon the following:

Alex C. Davis , Esq.
Jones Ward PLC
Marion E. Taylor Bldg.
312 S. Fourth Street, 6th Floor
Louisville, KY 40202

/s/ Jaron P. Blandford
JARON P. BLANDFORD

4812-1811-3336, v. 1

TENDERED

ENTERED
JIM BARKER, CLERK
OCT 18 2016
ROWAN CIRCUIT DISTRICT COURTS
BY: D.C.

COMMONWEALTH OF KENTUCKY
ROWAN CIRCUIT COURT
DIVISION ONE
CIVIL ACTION NO. 15-CI-90250

EDWARD P. GEARHART — PLAINTIFF

v. **AGREED ORDER TO RESCHEDULE STATUS CONFERENCE**

EXPRESS SCRIPTS, INC. — DEFENDANT

* * * * * * * *

This matter having come before the court by agreement of the parties as evidenced by the signatures of their respective counsel below and the court being otherwise sufficiently advised,

IT IS HEREBY ORDERED AND ADJUDGED that:

The parties' status conference before this Court is moved to Feb. 17, 2017.

William E. Lane, Judge
Rowan Circuit Court, Division 1

Date: 10/18/2016

HAVE SEEN AND AGREE TO:

s/ Alex C. Davis
Jasper D. Ward IV
Alex C. Davis
JONES WARD PLC
Marion E. Taylor Building
312 S. Fourth Street, Sixth Floor
Louisville, Kentucky 40202
Tel. (502) 882-6000
Fax (502) 587-2007
alex@jonesward.com
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Counsel for Plaintiff and the Class

s/ Britt K. Latham
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BASS, BERRY & SIMS, PLC
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Counsel for Defendant Express Scripts, Inc.

s/ Jaron P. Blandford
Jaron P. Blandford
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Lexington, Kentucky 40507
Tel: (859) 231-8780
Counsel for Defendant Express Scripts, Inc.

COMMONWEALTH OF KENTUCKY
ROWAN CIRCUIT COURT
CIVIL BRANCH
DIVISION ONE
NO. 15-CI-90250

FILED ELECTRONICALLY

EDWARD P. GEARHART PLAINTIFF

v. **EXPRESS SCRIPTS, INC.'S NOTICE TO TAKE DEPOSITION OF EDWARD P. GEARHART**

EXPRESS SCRIPTS, INC. DEFENDANT

* * * * * * * *

To: Edward P. Gearhart
c/o Alex C. Davis, Esq.
Jones Ward PLC
Marion E. Taylor Building
312 South Fourth Street, 6th Floor
Louisville, Kentucky 40202

PLEASE TAKE NOTICE that counsel for Defendant, Express Scripts, Inc., will take the deposition upon oral examination of Edward P. Gearhart on December 7, 2016 at 10:00 a.m. at the offices of McBrayer, McGinnis, Leslie & Kirkland, PLLC located at 201 East Main Street, Suite 900, Lexington, Kentucky 40507, before a person authorized by the laws of the Commonwealth of Kentucky to administer oaths, and will continue until complete. The deposition shall be used for all purposes in accordance to Kentucky Rules of Civil Procedure. Some or all of the deposition testimony will be recorded by stenographic, audio, audiovisual, video and/or real-time computer means.

Respectfully submitted,

BASS, BERRY & SIMS, PLC
Britt K. Latham (Admitted *Pro Hac Vice*)
Alison K. Grippo (Admitted *Pro Hac Vice*)
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McBRAYER, McGINNIS, LESLIE
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/s/ Jaron P. Blandford
JARON P. BLANDFORD
ATTORNEYS FOR DEFENDANT

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of this pleading was filed electronically with the Rowan Circuit Court and copies were served via email and U.S. mail, postage pre-paid, this 16th day of November, 2016, upon the following:

alex@joneward.com
Alex C. Davis, Esq.
Jones Ward PLC
Marion E. Taylor Building
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Louisville, Kentucky 40202

depo@cslreporting.com
Collins Sowards Lennon Reporting, LLC
176 Pasadena Drive, Bldg. 2
Lexington, KY 40503

/s/ Jaron P. Blandford
JARON P. BLANDFORD

NO. 15-CI-90250

ROWAN CIRCUIT COURT
DIVISION I
HON. WILLIAM E. LANE

EDWARD P. GEARHART,
INDIVIDUALLY AND ON BEHALF OF
ALL OTHERS SIMILARLY SITUATED

PLAINTIFF

v.

MOTION TO FILE AN AMENDED COMPLAINT

EXPRESS SCRIPTS, INC.
1 Express Way
St. Louis, MO 63121

ENDANT

* * * * * * * *

NOTICE

Please take notice that the Plaintiff will make the following motion and tender the following Order on the 17th day of February 2017 at 10:00 AM, or soon thereafter as desired by the Rowan County Circuit Court.

MOTION

Now comes the Plaintiff, Edward Gearhart, by and through counsel, pursuant to Kentucky CR 15.01, and hereby moves for an Order granting leave to file a Second Amended Complaint ("SAC"). The SAC is attached hereto and incorporated herein. (Attached as Exhibit A).

Mr. Gearhart originally filed his complaint on October 14, 2015 naming Express Scripts Holding Co. as the Defendant. After conferring with opposing counsel, Mr. Gearhart, pursuant to Kentucky CR 15.01 took leave and amended his complaint only to properly name Express Scripts, Inc. ("ESI") as the correct defendant. After amendment of the original Complaint, the

parties have since conducted extensive discovery, trading thousands of documents, and completed depositions involving Mr. Gearhart and a corporate representative of ESI, and discussed potential settlement options in the hopes of resolving this matter. Unable to reach a n agreement, Mr. Gearhart now so moves the court to permit amendment of his complaint for a second time.

Rule 15.01 of the Ky. R. Civ. P. permits a party to amend its pleading "once as a matter of course at any time before a responsive pleading is served..." However, if a responsive pleading is filed, the rule allows a party to amend its pleading only by leave of court or by written consent of the adverse party. Ky. R. Civ. P. § 15.01. Permission for leave of court is mandatory only if justice so requires. *Stout v. Martin*, 395 S.W.2d 591, 592 (Ky. Ct. App. 1965). A court may properly deny leave if the amendment would unduly prejudice the other party, is unduly delayed, is not offered in good faith, or that the party has had sufficient opportunity to state a claim or has failed. *Id.* (*citing* 3 Moore's Federal Practice, R15).

Here, Plaintiff's counsel, in good faith, filed its Original Complaint Naming Express Scripts Holding Co., as the Defendant in the current action. However, it was not until after the Original Complaint was filed and after conferring with opposing counsel did Plaintiff's counsel realize the error. Plaintiff's then, prior to Defendant's answer to the Original Complaint, amended as a matter of course in order to name the proper Defendant, ESI.

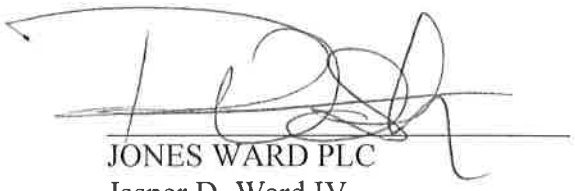
Defendant ESI will not be unduly prejudiced if the Court grants Plaintiff's leave to file a Second Amended Complaint. Only after extensive discovery and review of the documents provided by Defendant has Plaintiff's counsel realized the extent of Defendant's fraudulent practices. Moreover, the Second Amended complaint contains no new legal claims, but instead expands the nature of the original claims in scope. Defendant's counsel will not be unduly

prejudiced by the addition of these claims, as they have vigorously defended the same claims for the pendency of this litigation. Finally, only after extensive discovery has Defendant's fraudulent conduct been revealed, therefore the attached SAC is not unduly delayed, nor is it offered in bad faith, as the extent of Defendant's conduct could not be known until discovery.

For the foregoing reasons, Plaintiff respectfully requests the Court grant Plaintiffs leave to file their Second Amended Complaint, and have attached a proposed order hereto.

Dated: February 17, 2017

Respectfully submitted,



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Attorneys for Plaintiff and the Class

EXHIBIT A

NO. 15-CI-90250

ROWAN CIRCUIT COURT
DIVISION I
HON. WILLIAM E. LANE

EDWARD P. GEARHART,
INDIVIDUALLY AND ON BEHALF OF
ALL OTHERS SIMILARLY SITUATED

PLAINTIFF

v.

PLAINTIFF'S SECOND AMENDED CLASS ACTION COMPLAINT

EXPRESS SCRIPTS, INC.
1 Express Way
St. Louis, MO 63121

DEFENDANT

* * * * * * * *

Plaintiff Edward P. Gearhart, by Counsel, individually and on behalf of all others similarly situated, pursuant to Ky. R. Civ. P. 15.01, states the following for his Second Amended Class Action Complaint against Defendant Express Scripts, Inc. (hereinafter "Express Scripts"):

INTRODUCTION

1. This is a civil action on behalf of a Class citizens nationwide who were charged fraudulently charged by a health care provider for copies of their healthcare records, as well as a Class of individual citizens of the Commonwealth of Kentucky who were charged in in excess of the statutory limit for a copy of their healthcare provider records from Express Scripts (hereinafter the "Class").

2. The Health Insurance Portability and Accountability Act ("HIPAA") permits

Defendant to only charge a "reasonable, cost-based fee" to prepare and transmit protected health information as permitted by state law to third-party requestors.

3. Ky. Rev. Stat. § 422.317(1) provides in pertinent part:

> Upon a patient's written request, a hospital licensed under KRS Chapter 216B or a health care provider shall provide, without charge to the patient, a copy of the patient's medical record. A copying fee, not to exceed one dollar ($1) per page, may be charged by the health care provider for furnishing a second copy of the patient's medical record upon request either by the patient or the patient's attorney or the patient's authorized representative.

4. Express Scripts charged Plaintiff and members of the both proposed Classes a flat fee of $75 for "data processing" when they requested and later received a copy of their Express Scripts pharmacy records, and this charge is in violation of Ky. Rev. Stat. § 422.317(1), the Kentucky Consumer Protection Act, Ky. Rev. Stat. § 367.170, et. seq., and Kentucky common law, as well as 45 C.F.R. § 164.502(a)(5)(ii)(B)(2)(viii) because Defendant does not attempt to comply with any state statute, nor do they provide any accounting of the costs to produce such records.

5. Defendant willfully misrepresents the nature of the fee when requestors are presented with a form required to request and process such health records, and refuses to process any requests unless the fee is paid first.

PARTIES

6. Plaintiff Edward Gearhart is a citizen of the State of Kentucky, residing on Bearskin Hollow Road in Morehead, which lies in Rowan County, Kentucky.

7. Defendant Express Scripts is a Missouri corporation having its principal place of business at 1 Express Way, St. Louis, MO 63121. Defendant does business throughout the United States, including in the Commonwealth of Kentucky, and maintains a registered agent in

Kentucky.

8. Plaintiff previously named as a Defendant in this matter a different but related corporate entity, Express Scripts Holding Co., which on information and belief, and after conferring with opposing counsel, is believed to not be a proper party to this action.

JURISDICTION AND VENUE

9. This Court has jurisdiction over both the parties and the subject matter of this class action proceeding because a substantial number of the events related to Plaintiff's claims transpired in Rowan County, Kentucky.

10. Rowan Circuit Court is the appropriate venue for this action because the events giving rise to the Complaint and the damages suffered occurred in this County.

CLASS ACTION ALLEGATIONS

11. This action may be brought and properly maintained as a class action pursuant to the provisions of Kentucky Rule of Civil Procedure 23. Plaintiff brings this action on behalf of himself and a class of all others similarly situated.

12. Plaintiff brings this class action on behalf of the following classes:

Nationwide Class:

All third-parties and individuals who, themselves or on behalf of their clients, were charged and paid $75.00 to request a copy of their health information and/or health records from Express Scripts.

Kentucky Class:

All individual citizens of the State of Kentucky who were charged in excess of the statutory limit for a copy of their health records from Express Scripts.

13. In accordance with Kentucky Rule of Civil Procedure 23, the Class is so

numerous that joinder of all members is impracticable. While the exact number is not known at this time, it is generally ascertainable by appropriate discovery, and it is believed the class includes thousands of members.

14. In accordance with Kentucky Rule of Civil Procedure 23, there are questions of law and fact common to the Class and which predominate over any individual issues. Common questions of law and fact include, without limitation:

a. Whether Defendant owed a duty to the class members under the applicable statutes and law;

b. Whether Defendant violated the Kentucky Consumer Protection Act, Ky. Rev. Stat. § 367.170, et. seq. ("KCPA");

c. Whether Defendant violated Ky. Rev. Stat. § 422.317(1), by charging a flat fee for medical records that should have been free;

d. Whether Defendant committed fraud by its violation of the Kentucky Consumer Protection Act, Kentucky's medical records law, and/or other applicable Kentucky laws;

e. Whether Defendant is a health plan, health plan clearinghouse, and/or a health care provider as described by HIPAA, 45 C.F.R. § 160.103.

f. Whether Defendant maintains health information as defined by HIPAA, 45 C.F.R. § 160.103.

g. Whether Defendant maintains patient protected health information as defined by HIPAA, 45 C.F.R. § 160.103.

h. Whether HIPAA's privacy section applies applies to Defendant because Defendant is a health plan, health care clearinghouse, and/or health care provider,

45 C.F.R. §§ 164.104, 164.500.

i. Whether Defendant's production of prescription claims information constitutes the transmission of protected health information under HIPAA.

j. Whether Defendant violated the above Kentucky laws by charging a flat fee of $75.00 for the cost of handling, copying, and shipping pharmacy records;

k. Whether Defendant is charging a "reasonable, cost-based fee" to prepare and transmit protected health care information as permitted by state law to third-party requestors without providing any accounting to prepare and transmit such records. 45 C.F.R. § 164.502(a)(5)(ii)(B)(2)(viii); 78 Fed. Reg. 5606 (Jan. 25 2013).

l. Whether Defendant fraudulently induced Nationwide Class members to pay for health records by claiming the fee is necessary for "processing" when in fact no such flat fee is permitted.

m. Whether Defendant violated the above Kentucky laws by describing fees in an inherently vague and ambiguous manner as to confuse Plaintiff and Class into believing that they are being charged for important services provided, when they are not;

n. Whether Defendant was unjustly enriched by overcharging for medical records;

o. Whether Plaintiff is entitled to declaratory judgment to prevent Defendant from overcharging for medical records in the future;

p. Whether the Class is entitled to notice as to the statutory overcharges;

q. The policies and procedures developed by the Defendant regarding the retrieval and reproduction of medical records requested by Putative Class Plaintiffs;

r. Defendant's vicarious liability for the actions of its employees;

s. The legal relationships among the Defendant; and/or

t. The extent of damages caused by Defendants' willful violations.

15. Plaintiff's claims are typical of the Class. As with members of the Class, Plaintiff was fraudulently, unfairly, deceptively and/or unlawfully overcharged for the retrieval and reproduction of medical records in violation of state statute. Plaintiff's interests coincide with, and are not antagonistic to, those of the other class members.

16. In accordance with Kentucky Rule of Civil Procedure 23, Plaintiff will fairly and adequately represent and protect the interests of the Class.

17. Plaintiff has retained counsel experienced in the prosecution of class action litigation and counsel will adequately represent the interests of the Class.

18. Plaintiff and his counsel are aware of no conflicts of interests between Plaintiff and absent Class members or otherwise;

19. Plaintiff has or can acquire adequate financial resources to assure that the interests of the Class will not be harmed; and

20. Plaintiff is knowledgeable concerning the subject matter of this action and will assist counsel to vigorously prosecute this litigation.

21. In accordance with Kentucky Rule of Civil Procedure 23, the class litigation is an appropriate method for fair and efficient adjudication of the claims involved. Class action treatment is superior to all other available methods for the fair and efficient adjudication of the controversy alleged herein; it will permit a large number of individual citizens of the State of Kentucky to prosecute their common claims in a single forum simultaneously, efficiently, and without the unnecessary duplication of evidence, effort and expense that numerous individual actions would require. Class action treatment will also permit the adjudication of relatively small

claims by certain class members, who could not individually afford to litigate a complex claim against a large corporate defendant. Further, even for those class members who could afford to litigate such a claim, it would still be economically impractical, as the cost of litigation is almost certain to exceed any recovery they would obtain.

22. Plaintiff is unaware of any difficulty likely to be encountered in the management of this case that would preclude its maintenance as a class action.

STATEMENT OF FACTS

23. Plaintiff Edward P. Gearhart requested his medical records, through his agent Jones Ward PLC, from defendant Express Scripts, and was charged by Express Scripts and paid a $75.00 flat fee for five (5) pages of his medical records on or about May 12, 2014, which was in excess of what he should have been charged at the time pursuant to Ky. Rev. Stat. § 422.317(1), and in excess of the cost of the handling, cost of copies, and actual shipping.

24. Express Scripts is one of the largest corporations in the United States, with more than $100 billion in annual revenue. It offers pharmacy benefit management services through a network of retail pharmacies, and also provides home-delivery pharmacy services to patients.

25. The five pages of medical records received by Plaintiff through his agent reflect a mix of both retail pharmacy prescriptions and prescriptions directly filled by Express Scripts.

26. The cost of Plaintiff's Express Scripts medical records was deducted from a partial settlement of his claims in a products liability lawsuit that remains pending in federal court, and that may require additional medical records from Express Scripts and other sources before its final resolution.

27. Express Scripts refuses to comply with Ky. Rev. Stat. § 422.317(1), claiming it is not a health care provider, but instead a "pharmacy benefit management company." Express

Scripts claims that its $75.00 fee is for "processing" and not for shipping[1].

28. Although Plaintiff, through his agent, paid the data processing fee to Express Scripts, the payment was not voluntary because Express Scripts did not offer to waive or discount the fee if certain conditions were met.

COUNT I
VIOLATION OF KY. REV. STAT. § 422.317(1)
THE KENTUCKY CONSUMER PROTECTION ACT
(On Behalf Of The Kentucky Class)

Plaintiff, individually and on behalf of all others similarly situated, for this Count, alleges the following:

29. Plaintiff repeats, realleges, and incorporates by reference each of the foregoing paragraphs of this Complaint as if fully set forth herein.

30. This Count is a class action claim brought pursuant to the Kentucky Consumer Protection Act, Ky. Rev. Stat. § 367.170, et. seq. ("KCPA").

31. Pursuant to Ky. Rev. Stat. § 367.170(1), the KCPA provides that "(u)nfair, false, misleading, or deceptive acts or practices in the conduct of any trade or commerce are hereby declared unlawful."

32. Privity existed between Plaintiff and Defendant, and between Class members and Defendant.

33. In connection with production of medical records to Plaintiff and Class, Defendant, through its employees, agents and representatives, violated KCPA by engaging in the following unfair or deceptive acts or practices:

a. overcharging for reproduction of medical records in violation of Kentucky's

[1] A copy of the authorization form is available publicly at: https://www.express-scripts.com/members/hipaa/docs/prescriptionRecords.pdf (Last Accessed February 8, 2017).

Health Records Law;

b. failing to disclose that Kentucky allows residents to obtain one free copy of their medical records;

c. charging a flat fee of $75.00 for the cost of "data processing," and/or handling, copying, and shipping pharmacy records, which was far in excess of the actual costs of such services; and/or

d. describing fees in an inherently vague and ambiguous manner as to confuse Plaintiff and Class into believing that they are being charged for important services provided, when they are not.

34. As a direct and proximate result of Defendant's unfair and/or deceptive acts or practices, Plaintiff and Class were damaged.

35. Defendant offered its service of copying Plaintiff's and the Putative Class members' medical records primarily for personal, family or household purposes pursuant to Ky. Rev. Stat. § 367.220.

36. Plaintiff and the class members are consumers within the meaning of the law.

37. Defendant at all times acted intentionally, maliciously, willfully, outrageously and/or knowingly in the statutory overcharging of Plaintiff and Class for the reproduction of medical records in violation of Kentucky's Health Records Law. This conduct reflects a deliberate indifference to Plaintiff and the class members' rights, entitling Plaintiff and the Putative Class to an award of punitive damages.[2]

38. In the event Plaintiff is the prevailing party, Plaintiff also seeks a reasonable

[2] *See* Ky. Rev. Stat. § 367.220(1) ("Nothing in this subsection shall be construed to limit a person's right to seek punitive damages where appropriate.")

attorney's fee and costs as provided under Ky. Rev. Stat. § 367.220(3).

39. Plaintiff and the Class are entitled to equitable relief, including restitutionary disgorgement of monies unfairly, deceptively and/or unlawfully collected by Defendant and an injunction prohibiting Defendants from engaging in the same or similar practices described herein in the future.

COUNT II
FRAUD
(On Behalf Of The Kentucky Class)

40. Plaintiff, individually and on behalf of all others similarly situated, for this Count, alleges the following:

41. Plaintiff repeats, realleges, and incorporates by reference each of the foregoing paragraphs of this Complaint as if fully set forth herein.

42. Defendant has engaged in a common scheme of fraud, through which it intentionally overcharged Plaintiff and Class for reproduction of medical records in violation of Kentucky law.

43. Defendant perpetrated the common scheme of fraud complained of herein by omitting, or failing to disclose to Plaintiff and Class, that it intentionally overcharged Plaintiff and Class for reproduction of medical records in violation of Kentucky law, which allows each patient to receive one free copy of his or her medical record.

44. Defendant knowingly and intentionally overcharged Plaintiff and Class for reproduction of medical records in violation of the Kentucky Consumer Protection Act and/or other applicable Kentucky laws.

45. Plaintiff and the Class are presumed to have justifiably relied on Defendant's omissions and failures to disclose.

46. As a direct and proximate result of Defendant's common scheme of fraud, Plaintiff and Class were damaged.

COUNT III
UNJUST ENRICHMENT
(On Behalf of the Nationwide and Kentucky Class)

Plaintiff, individually and on behalf of all others similarly situated, for this Count, alleges the following:

47. Plaintiff repeats, realleges, and incorporates by reference each of the foregoing paragraphs of this Complaint as if fully set forth herein.

48. To the detriment of Plaintiff and the Class, Defendant has been, and continues to be, unjustly enriched as a result of their wrongful conduct alleged herein.

49. Plaintiff and the Class conferred a benefit on Defendant when Defendant overcharged Plaintiff and Class for reproduction of medical records in violation of Kentucky law.

50. Defendant unfairly, deceptively, unjustly and/or unlawfully accepted said benefits, which under the circumstances, would be unjust to allow Defendant to retain.

51. Plaintiff and the Class, therefore, seek disgorgement of all wrongfully obtained profits received by Defendant as a result of their inequitable conduct as more fully stated herein.

COUNT IV
VIOLATION OF KY. REV. STAT. § 422-317(1)
KENTUCKY'S HEALTH RECORDS LAW
(On Behalf Of The Kentucky Class)

Plaintiff, individually and on behalf of all others similarly situated, for this Count, alleges the following:

52. Plaintiff repeats, realleges, and incorporates by reference each of the foregoing

paragraphs of this Complaint as if fully set forth herein.

53. Under Kentucky's Health Records Law, Ky. Rev. Stat. § 422.317(1), as stated above, a patient is entitled to one free copy of his or her medical record.

54. The provisions of Ky. Rev. Stat. § 422.317(1) apply to hospitals and health care providers, including pharmacies as defined under Ky. Rev. Stat. § 304.17A-005(23), which defines a health care provider as "any facility or service required to be licensed pursuant to KRS Chapter 216B" and any "pharmacist as defined pursuant to KRS Chapter 315."

55. The Kentucky Board of Pharmacy lists Express Scripts as an active licensed pharmacy in Kentucky, holding permit numbers including but not limited to MO617 and MO1530.[3]

56. Defendant, a pharmacy, provided prescription medication services and pharmacy benefit management services to Plaintiff and the Class.

57. Defendant is a custodian of "records" including prescription medication records under the meaning of Ky. Rev. Stat. § 422.317(1).

58. Plaintiff and the Class, by and through its authorized agents, requested in writing with accompanying authorizations copies of their pharmacy records from Defendant.

59. Plaintiff and the Class's requests for records and valid authorization for the release of records were delivered to the administrator or manager of the Defendant.

60. Defendant would not release records unless Plaintiff and the Class submitted reimbursement in an amount that exceeded the statutorily defined limit.

61. As such, Plaintiff and the Class, by and through their agents, paid $75.00 so that Defendant would release their pharmacy records.

---

[3] Kentucky Board of Pharmacy, License Verification System Search Results, available at https://secure.kentucky.gov/pharmacy/licenselookup/ (last visited October 6, 2015).

62. Plaintiff's pharmacy medical records should have been free, excluding the cost of certification and/or postage.

63. As alleged herein, Express Scripts did not timely provide Plaintiff with copies of his medical records at the statutorily-allowable charge.

64. As a direct and proximate result of Defendant's violation of Ky. Rev. Stat. § 422.317(1), Plaintiff and Class were damaged.

COUNT V
FRAUD
(On Behalf Of The National Class)

65. Plaintiff, individually and on behalf of all others similarly situated, for this Count, alleges the following:

66. Plaintiff repeats, realleges, and incorporates by reference each of the foregoing paragraphs of this Complaint as if fully set forth herein.

67. Defendant has engaged in a common scheme of fraud, through which it intentionally overcharged Plaintiff and Class for reproduction of "prescription claims information" by making a material misrepresentation that the $75.00 Defendant charges to produce such records is a "processing fee", when in fact it is a flat fee intended to profit on requests to produce patient protected health information.

68. Defendant is a health plan, health plan clearinghouse, and/or a health care provider as described by HIPAA. 45 C.F.R. § 160.103.

69. Defendant maintains health information as defined by HIPAA. 45 C.F.R. § 160.103.

70. Further, Defendant maintains patient protected health information as defined by HIPAA. 45 C.F.R. § 160.103.

71. HIPAA's privacy section applies to Defendant because Defendant is a health plan, health care clearinghouse, and/or health care provider. 45 C.F.R. §§ 164.104, 164.500.

72. HIPAA permits Defendant to charge a "reasonable, cost-based fee" to prepare and transmit protected health care information as permitted by state law to third-party requestors. *See* 45 C.F.R. § 164.502(a)(5)(ii)(B)(2)(viii); 78 Fed. Reg. 5606 (Jan. 25 2013).

73. Defendant's production of prescription claims information constitutes the transmission of protected health information under HIPAA.

74. Defendant does not attempt to comply with HIPAA or any state medical records fee statutes, and instead profits off of third-party requests by charging a $75.00 fee for "prescription claims information" as a "processing fee" in an attempt to evade definitions applicable to Defendant.

75. Defendant falsely states that its processing fees are for producing prescription claims information, when according to Defendant's own form, it is an authorization to produce "health information."

76. Defendant, as an entity subject to HIPAA as described above, knew these statements to be false and/or willfully misrepresented the true nature of the fees, and intended Plaintiff and members of the Class to be induced to rely on these material statements so that they would pay $75.00 to obtain patient medical records.

77. As a direct and proximate result of Defendant's common scheme of fraud, Plaintiffs and members of the Class have been damaged due to Defendant's fraudulent and material misrepresentations as to the true nature of the fees required to produce their protected health information.

COUNT V
DECLARATORY JUDGMENT
(On Behalf of All Classes)

Plaintiff, individually and on behalf of all others similarly situated, for this Count, alleges the following:

78. Plaintiff repeats, realleges, and incorporates by reference each of the foregoing paragraphs of this Complaint as if fully set forth herein.

79. An actual and justiciable controversy exists between Defendant and Plaintiff and Class.

80. Plaintiff and Class are entitled to a declaration from this Court that Defendant's practice of charging a $75.00 flat fee for producing a copy of their pharmacy records when the handling charge, shipping charge, certification charge, postage, and cost of copies is actually a lesser amount, is unlawful and in violation of applicable Kentucky laws.

PRAYER FOR RELIEF

81. WHEREFORE, Plaintiff, on behalf of himself and the members of the Class, demands judgment as follows:

A. A determination that this action is a proper class action for compensatory, consequential, and statutory damages as alleged herein;

B. For pre-judgment interest from the date of filing this suit;

C. For reasonable attorney's fees and expenses;

D. For exemplary and punitive damages;

E. For all costs of this proceeding;

F. Restitution of all fees paid to Defendant in excess of what the law allows;

G. A preliminary injunction enjoining Defendant and all others, known and unknown, from continuing to take unfair, deceptive, illegal and/or unlawful action as set forth in this Complaint; and

H. Such other and further relief as this Honorable Court finds just and proper under the circumstances.

JURY DEMAND

82. WHEREFORE, as to each of the foregoing matters, Plaintiff demands a trial by jury on all issues so triable as a matter of right.

Dated: February 16, 2017

Respectfully submitted,

JONES WARD PLC
Jasper D. Ward IV
Alex C. Davis
Patrick C. Walsh
Marion E. Taylor Building
312 South Fourth Street, Sixth Floor
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Attorneys for Plaintiff and the Class

NO. 15-CI-90250

ROWAN CIRCUIT COURT
DIVISION I
HON. WILLIAM E. LANE

EDWARD P. GEARHART,
INDIVIDUALLY AND ON BEHALF OF
ALL OTHERS SIMILARLY SITUATED

PLAINTIFF

v.

ORDER

EXPRESS SCRIPTS, INC.
1 Express Way
St. Louis, MO 63121

DEFENDANT

This matter, having come before this Court on February 17, 2017, on the Plaintiff, Edward Gearhart's Motion For Leave to File an Amended Complaint, and the Court hearing arguments of counsel, and being otherwise fully and sufficiently advised, IT IS HEREBY ORDERED that Plaintiff's Motion for Leave to File an Amended Complaint is GRANTED.

So ORDERED this the ____ day of _____ 2016.

_____
JUDGE, ROWAN CIRCUIT COURT

CERTIFICATE OF SERVICE

It is hereby certified that on the 16th day of February 2017, a true and correct copy of the above was served by electronic mail and/or facsimile to the following:

Britt K. Latham
Bass, Berry & Sims PLC
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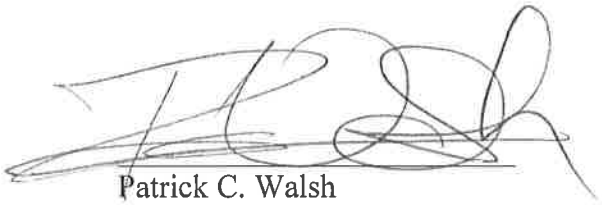
Counsel for Defendant Express Scripts, Inc.



Patrick C. Walsh
Counsel for Plaintiff

3-2-17 PAM
TENDERED

ENTERED
JIM BARKER, CLERK
MAR 03 2017
ROWAN CIRCUIT DISTRICT COURTS
BY: _____ D.C.

COMMONWEALTH OF KENTUCKY
ROWAN CIRCUIT COURT
DIVISION ONE
CIVIL ACTION NO. 15-CI-90250

EDWARD P. GEARHART — PLAINTIFF

v.

ORDER

EXPRESS SCRIPTS, INC. — DEFENDANT

* * * * * * * *

This matter came before the Court on February 17, 2017 for a status conference; the Plaintiff tendered a Motion for Leave to File Amended Complaint which is opposed by the Defendant. The Court finds it is appropriate to establish a briefing schedule on the pending Motion; **NOW, THEREFORE, IT IS HEREBY, ORDERED, ADJUDGED AND DECREED AS FOLLOWS:**

1. Defendant shall file its Response to the Motion for Leave to File Amended Complaint on or before March 22nd, 2017.

2. Plaintiff shall file any Reply in Support of his Motion for Leave to File Amended Complaint by or before April 11th, 2017.

3. The parties shall appear in the Rowan Circuit Court for a Status Hearing on April 21st, 2017 at 10:00 am.

SO ORDERED, this 3RD day of March, 2017.

JUDGE WILLIAM E. LANE
ROWAN CIRCUIT COURT

HAVE SEEN:

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Alex C. Davis by Jaron P. Blandford by permission

ALEX C. DAVIS
ATTORNEYS FOR PLAINTIFF

CLERK'S CERTIFICATE OF SERVICE

I hereby certify that a true and accurate copy of the foregoing was served this 3rd day of March, 2017, upon the following via U.S. Mail:

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COMMONWEALTH OF KENTUCKY
ROWAN CIRCUIT COURT
DIVISION ONE
CIVIL ACTION NO. 15-CI-90250

FILED ELECTRONICALLY

EDWARD P. GEARHART PLAINTIFF

v. **RESPONSE IN OPPOSITION TO MOTION TO FILE AMENDED COMPLAINT**

EXPRESS SCRIPTS, INC. DEFENDANT

* * * * * * * *

Defendant Express Scripts, Inc. ("Express Scripts") respectfully submits this Response in Opposition to the Motion to File Amended Complaint ("Plaintiff's Motion") filed by Plaintiffs on February 17, 2017.

I. INTRODUCTION

Plaintiff's Motion to File Amended Complaint is no ordinary request for leave to amend pleadings. To the contrary, it is unprecedented. Plaintiff's claims have been pending for one-and-a-half years and the parties have conducted extensive discovery. Yet, Plaintiff now seeks to amend his complaint a second time. In his proposed Second Amended Complaint, Plaintiff seeks to add new claims for violation of the Health Insurance Portability and Accountability Act ("HIPAA") and add a nationwide class that would exponentially change the nature and scope of this action. Specifically, he endeavors to convert a proposed Kentucky class action involving application of only Kentucky law into a proposed nationwide class action that would burden the Court with construing the varying laws of every state in the nation, not to mention the herculean challenge of managing a nationwide class action.

In seeking this unreasonable and unjustified expansion of the case, Plaintiff asks this Court to ignore that he has no connection to any state besides Kentucky, ignore that he cannot state a claim for violation of HIPAA and ignore that his proposed nationwide class could never be certified. Allowing Plaintiff to add his proposed HIPAA allegations and nationwide class allegations would be an enormous waste of valuable time and resources by the Court and the parties.

There are at least *three independent reasons* Plaintiff's proposed amendment would be futile, and therefore should be denied:

1. A nationwide class action would involve the laws of other states, yet Plaintiff, a Kentucky resident with no connection to any other state, lacks standing to sue under the laws of states other than Kentucky.

2. Amendment is futile because HIPAA cannot serve as the basis for state law claims.

3. Amendment is futile because a nationwide class alleging fraud and unjust enrichment cannot be certified for numerous reasons, including variations in state laws and individualized factual inquiries inherent in the claims alleged here.

Because any one of these reasons renders amendment futile, the Court should exercise its discretion to deny leave to amend.

II. FACTUAL BACKGROUND

Plaintiff filed the Complaint in October 2015, followed by the Amended Complaint in November 2015. Express Scripts moved to dismiss the Amended Complaint in January 2016 and, after denial of that motion, filed its Answer in July 2016. Since then, the parties conducted substantial discovery, including exchanging written discovery requests and responses, producing thousands of pages of documents, and taking depositions of both the Plaintiff and Express Scripts' corporate representative. Now, seventeen months after initiating this litigation, Plaintiff petitions the Court to amend his Complaint yet again.

In doing so, Plaintiff seeks to dramatically inflate the scope of the case by asserting claims on behalf of a nationwide class comprised of all individuals and third parties who were charged and paid $75 for records from Express Scripts. *See id.* ¶¶ 12, Count III, Count V. Yet, unbelievably, despite this dramatic request, Plaintiff's proposed Second Amended Complaint *only adds a single factual allegation* regarding an Express Scripts authorization form used in requesting and processing records requests. *See* 2d Amend. Compl. ¶¶ 5, 27 n.1. There are no allegations that Plaintiff used the authorization form, much less any allegation that he or other putative class members relied on such a form when requesting records. There are no allegations regarding any other purported class members, any requests or fee payments for records by anyone outside of Kentucky, or anything else that would support this request to file an amended complaint on behalf of all persons throughout the United States who may have made a third party request for records to Express Scripts. The remainder of the proposed amendments amount to legal conclusions that Express Scripts violated HIPAA's limitation on fees charged for health records and that such violation provides the basis for Plaintiff's state law claims. *See, e.g., id.* ¶¶ 4, 68-76. As discussed further below, Plaintiff has wholly failed to plead facts or allegations that support his unprecedented request.

III. LEGAL STANDARD FOR LEAVE TO AMEND COMPLAINT

Kentucky Rule of Civil Procedure ("CR") 15.01 requires plaintiffs to seek leave of the Court to amend a complaint to which a defendant has already responded. CR 15.01. Plaintiff's Motion, which represents his second request to amend the Complaint, comes more than a year after Defendant petitioned the Court to dismiss the Amended Complaint and seven months after Defendant filed its Answer to the Amended Complaint. Accordingly, the Court's permission is required to allow amendment in the instant case.

While leave is "freely given when justice so requires" (CR 15.01), "this does not mean that leave should be granted without limit or restraint." *Laneve v. Standard Oil Co.*, 479 S.W.2d 6, 9 (Ky. App. 1972). Kentucky trial courts have "wide discretion [in ruling on motions for leave to amend] and may consider such factors as the failure to cure deficiencies by amendment or the futility of the amendment itself." *First Nat. Bank of Cincinnati v. Hartman*, 747 S.W.2d 614, 616 (Ky. App. 1988) (holding that allowing amendment would amount to "an exercise in futility"). "Other factors include whether amendment would prejudice the opposing party or would work an injustice."[1] *Kenney v. Hanger Prosthetics & Orthotics, Inc.*, 269 S.W.3d 866, 869 (Ky. App. 2007) (citing *Shah v. Am. Synthetic Rubber Corp.*, 655 S.W.2d 489, 493 (Ky. 1983)).

As stated, a motion to amend should be denied if the amendment is futile. *See Hartman*, 747 S.W.2d at 616. This requires courts to focus upon "whether the amendment fails to state a claim upon which the trial court could grant relief." *Bank One, Kentucky, N.A. v. Murphy*, 52 S.W.3d 540, 550 (Ky. 2001). Thus, as noted by Courts interpreting CR 15's federal counterpart,[2] Fed. R. Civ. P. 15, the relevant inquiry is whether the proposed amendment could survive a motion to dismiss. *See Rose v. Hartford Underwriters Ins. Co.*, 203 F.3d 417 (6th Cir. 2000) (citing *Thiokol Corp. v. Dep't of Treasury, State of Mich., Revenue Div.*, 987 F.2d 376, 382-83 (6th Cir. 1993)); *see also Williams v. Pledged Prop. II, LLC*, 508 F. App'x 465, 469 (6th Cir. 2012) ("[A]ny amendment would have been futile because [plaintiff's] vague and speculative assertions were insufficient to state a plausible claim of fraud.…").

[1] While this opposition focuses on the futility of the proposed amendments, it is equally clear that allowing Plaintiff to conduct discovery on nationwide claims would unquestionably prejudice defendant Express Scripts, especially given the significant discovery that has already been conducted.

[2] "It is well established that Kentucky courts rely upon federal case law when interpreting a Kentucky rule of procedure that is similar to its federal counterpart." *Curtis Green Clay Green, Inc. v. Clark*, 318 S.W.3d 98, 105 (Ky. App. 2010)

In a proposed class action lawsuit, amendment of a complaint is futile if the class proposed in the amended complaint cannot be certified. *See Smith v. Transworld Sys., Inc.*, 953 F.2d 1025, 1032-33 (6th Cir. 1992)[3] (affirming denial of a motion to amend because amended complaint failed to allege facts enabling court to "reasonably infer" satisfaction of requirements necessary to maintain a class action); *Dong v. Bd. of Educ. of Rochester Cmty. Sch.*, 197 F.3d 793, 804 (6th Cir. 1999) (following *Smith*, 953 F.2d at 1032-33); *Wooden v. Alcoa, Inc.*, 511 F. App'x 477, 481 (6th Cir. 2013) (affirming denial of leave to amend complaint that failed to meet class certification requirements). This futility principle applies equally where a plaintiff seeks to expand the definition of a proposed class or amend allegations related to a nationwide class. *See, e.g., Lewis v. Wal-Mart Stores, Inc.*, 232 F.R.D. 687, 691–92 (N.D. Okla. 2005) ("Granting leave to amend so as to permit plaintiffs to expand the definition of the class they seek to have certified, where the Court would not certify a class in any event, would be futile."); *In re Flash Memory Antitrust Litig.*, No. C 07-0086 SBA, 2010 WL 2332081, at *18 (N.D. Cal. June 9, 2010)[4] (noting that allowing amendments related to class representatives would be futile because such amendment could "not cure the deficiencies" preventing certification of nationwide class).

[3] Kentucky courts interpreting Kentucky Rule of Civil Procedure 23 may rely on federal case law interpreting Federal Rule of Civil Procedure 23, which is substantially similar to its Kentucky counterpart. *See Haynes Trucking, LLC v. Hensley*, No. 2013-CA-000190-ME, 2016 WL 930271, at *4 (Ky. App. Mar. 11, 2016) (observing similarity of Fed. R. Civ. P. 23 and CR 23). Pursuant to Kentucky Rule of Civil Procedure 76.28, all unpublished Kentucky decisions referenced herein were rendered after January 1st, 2003 and are included for their persuasive value, rather than as binding precedent, consistent with the provisions of CR 76.28. Any unpublished or Westlaw published decision has been included in a compendium provided to all parties and to the Court for the Court's convenient reference.

IV. ARGUMENT

A. Amendment is Futile Because Plaintiff Lacks Standing to Sue Under Laws of States Other than Kentucky.[5]

As in any other type of litigation, a named plaintiff in a class action must establish Article III standing. *See Lewis v. Casey*, 518 U.S. 343, 357 (1996) ("That a suit may be a class action ... adds nothing to the question of standing…") (internal quotation and citations omitted); *Dunn v. Kentucky Farm Bureau Mut. Ins. Co.*, No. 2008-CA-000718-MR, 2009 WL 792746, at *3 (Ky. App. Mar. 27, 2009)[6] (referring to standing of a representative plaintiff in a class action as a "threshold issue"). "It is black-letter law that standing is a claim-by-claim issue." *Rosen v. Tennessee Comm'r of Fin. & Admin.*, 288 F.3d 918, 928 (6th Cir. 2002) (finding that named plaintiffs lacked standing to pursue class action claim. The Amended Complaint asserts claims under only Kentucky statutory and common law. The Second Amended Complaint would add proposed nationwide class claims that would incorporate the laws of the forty-nine other states. *See* § IV(C)(1), *infra* (analyzing why Kentucky law would not apply to the claims of class members from other states).

A plaintiff purporting to represent a nationwide class lacks standing, however, to bring claims based on state laws outside of the plaintiff's home state. *See, e.g., In re Wellbutrin XL Antitrust Litig.*, 260 F.R.D. 143, 152, 158 (E.D. Pa. 2009) (limiting standing to states in which named plaintiffs were located and holding that "a plaintiff whose injuries have no causal relation to Pennsylvania, or for whom the laws of Pennsylvania cannot provide redress, has no standing to assert a claim under Pennsylvania law, although it may have standing under the law of another state."); *In re Actimmune Mktg. Litig.*, No. C08–02376, 2009 WL 3740648 at *17 (N.D.Cal.

[5] Express Scripts does not concede that Plaintiff has proper standing to sue under Kentucky law and, in fact, contested Plaintiff's standing based on his lack of direct injury in its Motion to Dismiss the Amended Complaint. *See* Corrected Mem. in Supp. of Express Scripts, Inc.'s Mot. to Dismiss at 19-20.

Nov. 6, 2009) (dismissing claims brought under consumer protection statutes in states beyond those where representative plaintiffs resided); *In re Ductile Iron Pipe Fittings Indirect Purchaser Antitrust Litig.*, No. 12-169, 2013 WL 5503308, at *11 (D.N.J. Oct. 2, 2013) ("named plaintiffs lack standing to assert claims under the laws of the states in which they do not reside or in which they suffered no injury"); *Parks v. Dick's Sporting Goods, Inc.*, No. 05-CV-6590 (CJS), 2006 WL 1704477, at *3 (W.D.N.Y. June 15, 2006) (holding that the plaintiff's standing to sue under state labor laws was limited to his state of employment). Similar to the facts here, in *Xi Chen Lauren v. PNC Bank, N.A.*, a federal district court considered a challenge to the class representative's "constitutional standing to assert unjust enrichment claims arising under the laws of . . . 49 states." 296 F.R.D. 389, 390 (W.D. Pa. 2014). The class representative, an Ohio resident, sought to bring a putative nationwide class action challenging the defendant's insurance practices, but her alleged injuries arose "exclusively under Ohio law." *Id*. at 391. The court granted the defendant's motion to dismiss on the ground that the class representative lacked "standing to assert unjust enrichment claims based on the laws of states other than Ohio." *Id*. at 390.

Plaintiff lacks any connection to any state besides his home state of Kentucky. There is not a single reference in the proposed Second Amended Complaint regarding any other state, and Plaintiff does not allege that he resided in or suffered injury in any other state.[7] As *Xi Chen* and all of the other cases cited make clear, Plaintiff lacks standing to sue under the laws of states other than Kentucky. Therefore, Plaintiff's amendment to add nationwide class claims necessarily based on laws of other states would be futile, and leave should be denied. *See id.*

[7] Moreover, it has been established that Plaintiff has resided in Kentucky his entire life. Gearhart Dep. 13:12-16 (deposition excerpts attached as Exhibit A).

B. Amendment is Futile Because HIPAA Cannot Serve as the Basis for State Law Claims.

As Plaintiff readily concedes in his proposed Second Amended Complaint, the proposed amendments would require the Court to analyze HIPAA to determine whether the statute applies to Express Scripts and, if so, whether Express Scripts violated HIPAA's limitation on fees to provide records. *See* 2d Amend. Compl. ¶ 14(e)–(i), (k). Plaintiff also seeks to assert a new fraud claim based exclusively on the alleged HIPAA violation. *See id.* ¶¶ 64-78. Because the other claims asserted rely upon all of the foregoing allegations, including presumably the new HIPAA allegations, Plaintiff may attempt to base those claims on the alleged HIPAA violation as well.[8] *See id.* ¶¶ 29, 41, 47, 52, 78. It would be futile, however, to allow amendment to add allegations asserting a HIPAA violation or claims based on any such violation.

First, HIPAA does not create a federal private right of action. *Young v. Carran*, 289 S.W.3d 586, 588 (Ky. App. 2008) (citing multiple federal cases); *Yeager v. Dickerson*, 391 S.W.3d 388, 393 (Ky. App. 2013). Second, Kentucky courts have also repeatedly held that "HIPAA does not create a state-based private cause of action for violations of its provisions." *See Young*, 289 S.W.3d at 588 (citations omitted). Finally, litigants cannot circumvent Congress's intent not to create a private right of action under HIPAA by using the federal statute as the basis for state law claims. *Id.* at 588-89 (rejecting attempt to base negligence *per se* claim under KRS 446.070 on alleged HIPAA violation).

Courts assessing fraud and unjust enrichment claims based on an alleged violation of HIPAA have reached the same result. *See, e.g., Polanco v. Omnicell, Inc.*, 988 F. Supp. 2d 451,

[8] As pled, Plaintiff seeks to state a claim for unjust enrichment on behalf of a nationwide class "for reproduction of medical records in violation of Kentucky Law" (*id.* ¶ 49) and a declaratory judgment claim on behalf of a nationwide class "for violation of applicable Kentucky laws" (*id.* ¶ 80). Thus, those claims cannot survive on behalf of a nationwide class either because they improperly rely on HIPAA or they improperly rely on a Kentucky statute that does not apply to citizens outside Kentucky.

468-69, 470 n. 24 (D.N.J. 2013) (dismissing complaint and rejecting that state fraud statute could "serve as a backdoor remedy for HIPAA violations"). In fact, courts have considered and dismissed the exact claims that Plaintiff seeks to add. In *Espinoza v. Gold Cross Servs., Inc.*, a Utah appellate court evaluated a common law unjust enrichment claim based on allegations that the fee charged by an ambulance services provider to provide records to the plaintiff's lawyer violated HIPAA's restriction that health care providers only charge "a reasonable cost-based fee"— *the same HIPAA provision raised in the amendments at issue in this case* (*see* 2d Amend. Compl. ¶ 2.) *See* 234 P.3d 156, 158 (Utah App. 2010). In affirming summary judgment, the court held that it had "no basis in state or federal law to enforce federal regulations promulgated under HIPAA, either directly or as a component of a state cause of action." *Id.* at 159. The court refused to consider HIPAA copy fee schedules or determine applicability of HIPAA to the fee charged by the defendant for the records "because HIPAA has no application here." *Id.* As in the present case, "[t]here is no private right of action under HIPAA, and Plaintiffs have presented…no state statute establishing a remedy for HIPAA violations." *Id.*

Because Plaintiff's new claims rely on an alleged violation of HIPAA and because the law is clear that he cannot state a claim based on a HIPAA violation, Plaintiff's amendment is futile and leave to amend should be denied.

C. Amendment is Futile Because a Nationwide Class for Fraud or Unjust Enrichment Cannot be Certified.

Amendment of a complaint should be denied as futile if the class proposed in the amended complaint cannot be certified. *See Smith,* 953 F.2d at 1032-33 (affirming denial of a motion to amend because amended complaint failed to alleged facts enabling court to "reasonably infer" satisfaction of requirements of Rule 23(a) necessary to maintain a class action); *Dong,* 197 F.3d at 804 (following *Smith.*, 953 F.2d at 1032-33); *Wooden,* 511 F. App'x

at 481 (affirming denial of leave to amend complaint that failed to meet class certification requirements). To achieve class certification, a plaintiff must establish the four criteria outlined in CR 23.01:

> (a) the class is so **numerous** that joinder of all members is impracticable, (b) there are questions of law or fact **common** to the class, (c) the claims or defenses of the representative parties are **typical** of the claims or defenses of the class, and (d) the representative parties will fairly and **adequately** protect the interests of the class."

CR 23.01 (emphasis added). Even if a plaintiff establishes the prerequisites of CR 23.01, a class may only be certified if the case meets additional criteria laid out in CR 23.02, including the requirement that common issues of fact or law predominate over individual questions:

> (a) The prosecution of separate actions by or against individual members of the class would create a risk of (i) inconsistent or varying adjudications with respect to individual members of the class which would establish incompatible standards of conduct for the party opposing the class, or, (ii) adjudications with respect to individual members of the class which would as a practical matter be dispositive of the interests of the other members not parties to the adjudications or substantially impair or impede their ability to protect their interests; or
>
> (b) the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole; or
>
> (c) **the court finds that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy.** The matters pertinent to the findings include: (i) the interest of members of the class in individually controlling the prosecution or defense of separate actions; (ii) the extent and nature of any litigation concerning the controversy already commenced by or against members of the class; (iii) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; (iv) the difficulties likely to be encountered in the management of a class action.

CR 23.02 (emphasis added). A class cannot be certified unless "the legal mandates outlined in both CR 23.01 and 23.02 are fulfilled." *Hughes v. UPS Supply Chain Solutions, Inc.*, Nos. 2012-CA-001353-ME, 2012-CA-001757-ME, 2013 WL 4779746, at *2 (Ky. App. Sept. 6, 2013), *reh'g denied*, Oct. 28, 2013.

Certification of a nationwide class is an even higher burden. Nationwide classes are rare because the "preliminary burden of determining which states' laws apply may render the class uncertifiable." Rory Ryan, *Uncertifiable?: The Current Status of Nationwide State-Law Class Actions*, 54 BAYLOR L. REV. 467, 476, 479–80 (2002) (further stating that a "nationwide class action may present an even greater problem because of the sheer burden of organizing and following fifty or more different bodies of complex substantive principles."); *see also* Sindhu Sundar, *Nationwide VW Class Action Faces Long Road to Certification*, Law360 (Sept. 30, 2015, 9:50 P.M.), https://www.law360.com/articles/708686/nationwide-vw-class-action-faces-long-road-to-certification (Professor Stephen Burbank of the University of Pennsylvania Law School opining that "[i]n general, nationwide state law class actions are almost impossible to certify these days, because the predominance requirement can't be satisfied, given the differences in state law[.]"); Joel S. Feldman et al., *Consumer Fraud Acts Class Actions in State Courts*, ALI-ABA 67, 75–76 (May 2–3, 2002) ("Nearly every circuit court addressing a nationwide, non-federal question class action has denied class certification based on the presence of legal variation.").

Here, based simply on the face of the proposed Second Amended Complaint, Plaintiff's proposed nationwide classes do not meet several requirements in CR 23.01 and 23.02. Among other things, the claims that Plaintiff seeks to add on behalf of a nationwide class fail to satisfy the commonality requirement of CR 23.01 and the predominance requirement of CR 23.02(c). Variations in state laws and individual proof issues related to these claims are fatal to nationwide class certification. Given the obvious insurmountable barriers to nationwide class certification of these claims, amendment of the complaint to add nationwide class allegations should be denied as futile.

1. Kentucky lacks contacts with purported class members outside Kentucky.

In the seminal case *Phillips Petroleum Co. v. Shutts*, the United States Supreme Court established that the Due Process Clause of the United States Constitution requires a separate choice of law determination for each plaintiff and for each claim in a proposed nationwide class action. 472 U.S. 797, 819-23 (1985). "In *Shutts*, the United States Supreme Court held that where a plaintiff seeks to apply a single state's law in a multi-state class action, that state must have a significant contact or significant aggregation of contacts, creating state interests, such that choice of its law is neither arbitrary or unfair." *Corder v. Ford Motor Co.*, 272 F.R.D. 205, 208 (W.D. Ky. 2011) (denying class certification because application of Kentucky law would not be appropriate on a class-wide basis since Kentucky lacked sufficient contacts with class members) (internal quotation and citations omitted); *see also Mazza v. Am. Honda Motor Co., Inc.*, 666 F.3d 581, 590-97 (9th Cir. 2012) (reversing certification of nationwide class action because each class member's claim was governed by the law of the state in which a transaction took place and there were material differences between state laws).

Plaintiff seeks to amend his complaint to bring several Kentucky state law claims on behalf of a nationwide class. *See* Plaintiff's Response in Opposition to Defendant's Motion to Dismiss Plaintiff's First Amended Class Action Complaint (confirming to the Court that his claims are brought under Kentucky law); 2d. Amend. Compl. ¶ 49 (asserting a nationwide class claim for "violation of Kentucky law"); ¶ 80 (asserting a nationwide class claim for "violation of applicable Kentucky laws."). Yet, it is clear from the proposed allegations that Kentucky lacks the required significant contacts with members of the proposed nationwide class, namely individuals and third parties outside Kentucky charged by Express Scripts for copies of records. *See* 2d Amend. Compl. ¶ 12 (nationwide class definition). There is not even a single allegation

regarding some connection between Kentucky and purported class members outside Kentucky that would allow this Court to conclude that non-Kentucky residents can be governed by Kentucky law. Accordingly, this Court cannot constitutionally apply Kentucky law to the claims of class members outside Kentucky. *Therefore, because Plaintiff only asserts claims under Kentucky law, a nationwide class cannot be certified and amendment is futile.*

2. Variations in state laws prevents nationwide class certification.

In addition, even assuming Kentucky had significant contacts with class members outside Kentucky, which it does not, a nationwide class cannot be certified unless Kentucky law is materially the same as the law of every other state. "[G]enerally speaking, common issues do not predominate in a multi-state class action based on state law when there is significant variation in the laws of the various jurisdictions." William B. Rubenstein, Newberg on Class Actions § 4:61 (5th ed. 2016). **"If more than a few of the laws of the fifty states differ, the [ ] judge would face an impossible task of instructing a jury on the relevant law, yet another reason why class certification would not be the appropriate course of action."** *In re Am. Med. Sys., Inc.*, 75 F.3d 1069, 1085 (6th Cir. 1996) (emphasis added) (reversing trial court's decision to certify a nationwide class action because, in part, "the law of negligence differs from jurisdiction to jurisdiction"); *see also Pilgrim v. Universal Health Card, LLC*, 660 F.3d 943, 945 (6th Cir. 2011) (affirming grant of defendant's motion to strike nationwide class allegations on the ground that "it would have [had] to analyze each class member's claim under the law of his or her home State."); *In re Bridgestone/Firestone Inc.*, 288 F.3d 1012, 1015 (7th Cir.2002), *cert. den.*, 537 U.S. 1105 (Jan. 13, 2003) ("No class action is proper unless all litigants are governed by the same legal rules. Otherwise the class cannot satisfy the commonality and superiority requirements of Fed.R.Civ.P. 23(a), (b)(3).").

Moreover, courts have limited proposed classes to Kentucky residents because a "nationwide class would simply be unmanageable" if it requires the conducting of mini-trials under the laws of various states. *Brummett v. Skyline Corp.*, No. C 81-0103-L(B), 1984 WL 262559, at *4 (W.D. Ky. Apr. 11, 1984). In the same vein, courts sitting in Kentucky should avoid "foreclose[ing] other courts from considering these issues, especially where they will be applying and construing state law with which they have superior familiarity." *Id.* Plaintiff's proposed nationwide class claims would burden this Court with the unwieldy task of analyzing and applying the fraud and unjust enrichment laws of each state.

a. Elements of fraud vary by state.

Nationwide class actions for fraud are almost impossible to certify due to variations in state fraud laws. *See Miller v. Gen. Motors Corp.*, Nos. 98 C 7386, 98 C 2851, 2003 WL 168626, at *1–2 (N.D. Ill. Jan. 26, 2003) ("No court has held that the fifty states' consumer fraud statutes, or common laws of fraudulent omission, are so similar that a single forum state's law could be applied to a multi-state class. In fact, virtually every court to face the issue has steadfastly refused to certify nationwide class actions due to variance in states' laws.") (citations omitted). Under Kentucky law, a claim of fraud requires proof of six elements: (1) the defendant made a material representation; (2) the representation was false; (3) the defendant knew of or was reckless as to the falsity of the representation; (4) the defendant intended to induce the plaintiff to act upon the misrepresentation; (5) the plaintiff reasonably relied upon the misrepresentation; and (6) the misrepresentation resulted in injury to the plaintiff. *See United Parcel Serv. Co. v. Rickert*, 996 S.W.2d 464, 468 (Ky. 1999). There are material differences in the fraud laws of numerous other states. *See, e.g., Green v. Lisa Frank, Inc.*, 211 P.3d 16, 34 (Ariz. Ct. App. 2009) (requiring several elements under Arizona law, including plaintiff's

ignorance of falsity, absent from Kentucky law); *Lomont v. Bennett*, 172 So.3d 620, 629 (La. 2015) (requiring only two elements—intent to defraud and damages—to prevail on a fraud claim); *Wells v. Stone City Bank*, 691 N.E.2d 1246, 1250 (Ind. Ct. App. 1998) (requiring that misrepresentation be of past or existing fact); *Beeck v. Kapalis*, 302 N.W.2d 90, 94 (Iowa 1981) (expanding Iowa intent element to include intent to make the plaintiff refrain from acting); *Tom's Amusement Co., Inc. v. Total Vending Servs.*, 533 S.E.2d 413, 418 (Ga. Ct. App. 2000) (same as Iowa). As discussed above, the variations in the elements needed to prove fraud under the laws of the various states make Plaintiff's proposed nationwide fraud class inappropriate for class certification.

b. Elements of unjust enrichment vary by state.

Nationwide class certification of unjust enrichment claims is equally inappropriate because "[t]he laws of unjust enrichment vary from state to state and require individualized proof of causation." *Clay v. Am. Tobacco Co.*, 188 F.R.D. 483, 500-01 (S.D. Ill. 1999) (listing several variations in state unjust enrichment law). When faced with multi-state class actions for unjust enrichment, "[o]verwhelmingly, [] courts have found material conflicts among the fifty states' laws on the claims plaintiffs bring in this case and have denied class certification, at least in part, on that basis." *In re McDonald's French Fries Litig.*, 257 F.R.D. 669, 674 (N.D. Ill. 2009) (citing multiple cases denying class certification based on differences in state laws).

Under Kentucky law, an unjust enrichment claim requires proof of three elements: "(1) benefit conferred upon defendant at plaintiff's expense; (2) a resulting appreciation of benefit by defendant; and (3) inequitable retention of benefit without payment for its value." *Jones v. Sparks*, 297 S.W.3d 73, 78 (Ky. App. 2009). Numerous other states, however, apply materially different elements of unjust enrichment. *See, e.g., Avis Rent A Car Systems, Inc. v. Heilman*, 876

So.2d 1111, 1122–23 (Ala. 2003) (adding elements of "*equity and good conscience*" and "mistake or fraud" under Alabama law) (emphasis in original); *Wang Elec., Inc. v. Smoke Tree Resort, LLC*, 283 P.3d 45, 49 (Ariz. Ct. App. 2012) (heightened causal connection between enrichment and impoverishment under Arizona law); *Nemec v. Shrader*, 991 A.2d 1120, 1130 (Del. 2010) (heightened causal connection between enrichment and impoverishment and "absence of justification" element under Delaware law). Plaintiff's proposed nationwide class for unjust enrichment, therefore, cannot be certified because of the differences in state unjust enrichment laws.

c. Statutes of limitations for fraud and unjust enrichment vary by state.[9]

Besides differences in the elements of various state laws, differences in the applicable statutes of limitations prevent nationwide class certification. *See Ralston v. Mortgage Investors Group, Inc.*, No. 5:08–cv–00536–JF (PSG), 2012 WL 1094633, at *2–4 (N.D. Cal. Mar. 30, 2012) (limiting class to California residents because consumer protection laws of other states and the corresponding statutes of limitations were materially different from California); *Fisher v. Bristol-Myers Squibb Co.*, 181 F.R.D. 365, 371–72 (N.D. Ill. 1998) (denying class certification due to "serious reservations" because "[t]he statutes of limitations imposed on consumer fraud claims vary widely in length and begin to run at different times (some states from the date of the act or practice, some from the date of discovery by the plaintiff)"); *Ex parte Green Tree Fin. Corp.*, 723 So.2d 6, 11 (Ala. 1998) (vacating class certification due, in part, to variances in state

[9] Although this Section focuses on variations in state laws and statutes of limitation applicable to fraud and unjust enrichment claims, the same argument against class certification extends to the declaratory judgment claim that Plaintiff seeks to assert on behalf of the proposed nationwide class, especially since the laws of many states, including Kentucky, look to the underlying claim or legal theory asserted when considering declaratory judgment claims. *See, e.g.*, *Million v. Raymer*, 139 S.W.3d 914, 918 (Ky. 2004) ("[T]he underlying theory of law asserted in the petition determines what statute of limitations should apply."); *Breland v. City of Fairhope*, No. 1131057, 2016 WL 5582405, at *6 (Ala. Sept. 30, 2016) ("[T]he Statute of Limitations for Declaratory Judgment actions is the same as the Statute of Limitations for the underlying or associated claim from which the Declaratory Judgment action is derived."). Thus, as with the statutes of limitations for fraud and unjust enrichment, the applicable statute of limitations for declaratory judgment will vary by state.

law statutes of limitations). Under Kentucky law, the statutes of limitations for both fraud and unjust enrichment claims are five years. KY. REV. STAT. § 413.120; *Journey Acquisition-II, L.P. v. EQT Prod. Co.*, 39 F.Supp.3d 877, 888 (E.D. Ky. 2014).

By contrast, other states allow between two to six years to bring claims for fraud and unjust enrichment. *See, e.g.*, *Kelly v. VinZant*, 197 P.3d 803, 814 (Kan. 2008) (two year statute of limitations from time of discovery of fraud in Kansas); *Doe v. Boy Scouts of Am.*, 356 P.3d 1049, 1052 (Idaho 2015) (three year statute of limitations for fraud in Idaho); IND. CODE § 34-11-2-7(4) (six year statute of limitations for fraud in Indiana); *Auburn Univ. v. Int'l Bus. Mach., Corp.*, 716 F.Supp.2d 1114, 1118 (M.D. Ala. 2010) (two year statute of limitations for unjust enrichment claims in Alabama); *F.D.I.C. v. Dintino*, 84 Cal.Rptr.3d 38, 50 (Cal. Ct. App. 2008) (three year statute of limitations for unjust enrichment claims in California); *San Manuel Copper Corp. v. Redmond*, 445 P.2d 162, 166 (Az. App. 1968) (applying four year statute of limitations to unjust enrichment in Arizona); *Desai v. Franklin*, 895 N.E.2d 875, 882 (Oh. Ct. App. 2008) (applying six-year statute of limitations for unjust enrichment claims in Ohio). A nationwide class cannot be certified in this case because of the wide range of limitations periods for fraud and unjust enrichment claims across the states. To hold otherwise would result in enormous inequities, i.e., denying some class members the additional time to bring their claims offered by their state or allowing claims by class members who should be time barred.

3. <u>Individual proof issues prevent nationwide class certification of fraud and unjust enrichment claims.</u>

Plaintiff seeks to add nationwide class claims for fraud and unjust enrichment, both of which would involve individualized inquiries that prevent class certification. Because denial of class certification is inevitable due to these individual proof issues, the Court should deny leave to amend as futile.

a. Proof of individual reliance prevents nationwide class certification on the fraud claim.

Proof of individual reliance is a significant hurdle to class certification in fraud cases because proof of this element often prevents courts from finding that common issues predominate over individual issues. *See, e.g.*, *Stout v. J.D. Byrider*, 228 F.3d 709, 718 (6th Cir. 2000) (affirming denial of class certification in fraud case due to individualized proof of reliance and citing *Castano v. Am. Tobacco Co.*, 84 F.3d 734, 745 (5th Cir.1996) for the proposition that "[A] fraud class action cannot be certified when individual reliance will be an issue."); *Corder*, 869 F. Supp. 2d at 836 (because "proof of reliance would entail an individualized inquiry into the state of mind of each consumer, it would be an overwhelming challenge to have a trial where the individual reliance of each of those numerous consumers must be proved.").[10]

The fraud claim that Plaintiff requests to add through the Second Amended Complaint would require individual inquiry on reliance for each putative class member.[11] The proposed fraud claim appears to be based on the allegation that Express Scripts misrepresents the $75 fee for third party requests for prescription claims data as a "processing fee" and Plaintiff, for the first time, refers generally to an authorization form. *See* 2d Amend. Compl. ¶¶ 5, 67, 75-76. Notably, however, there are no allegations that Plaintiff even saw, much less directly relied upon,

[10] Plaintiff and putative class members would not be entitled to a presumption of reliance under the facts alleged in the Second Amended Complaint, which assert that Express Scripts misrepresented its fee for third party records requests as a "processing fee." *See* 2d Amend. Compl. ¶ 66; *Clayton, Jr. v. Heartland Res., Inc.*, No. 1:08CV-94-JHM, 2010 WL 4778787, at *3 (W.D. Ky. Nov. 16, 2010) ("[W]hen the plaintiff alleges affirmative misrepresentations he is not entitled to such a presumption and must prove reliance…").

[11] In asserting a fraud claim, Plaintiff is required to plead all elements of fraud, including the element of reliance, with particularity as required by CR 9.02. *See Keeton v. Lexington Truck Sales, Inc.*, 275 S.W.3d 723, 725-26; *see also Clark v. Danek Med., Inc.*, 64 F. Supp. 2d 652, 656–57 (W.D. Ky. 1999) (holding that proposed amended complaint failed to state a claim upon which relief may be granted because "Plaintiffs have made no allegations of their belief in and reliance upon [[D]efendant's] representations"); *Wilson v. Henry*, 340 S.W.2d 449, 451 (Ky. 1960) ("The very essence of actionable fraud or deceit is the belief in *and reliance upon* the statements of the party who seeks to perpetrate the fraud.") (citations omitted) (emphasis added).

any such authorization form as part of his law firm's records requests.[12] Even assuming the truth of these allegations, proof of reliance would require individual inquiry on at least two facts: (1) whether each class member received or reviewed the authorization form as part of the records request; and (2) whether each class member relied upon representations made in the authorization form in making the records request. Conducting this overwhelming factual inquiry for every member of a nationwide class would defeat the efficiencies offered by the class action procedure and prevent class certification. *See, e.g.*, *Stout*, 228 F.3d at 718.

b. Individual proof of payment prevents nationwide class certification on the unjust enrichment claim.

Individualized inquiries are "inherent in a claim for unjust enrichment." *Russell v. Citigroup, Inc.*, No. 12-16-DLB-JGW, 2015 WL 9424144, at *6-8 (E.D. Ky. Dec. 22, 2015) (denying class certification on unjust enrichment claim because, in part, the commonality requirement was not met due to individualized inquiry on whether each class member conferred a benefit on the defendant); *see also Clay*, 188 F.R.D. at 501 (holding that unjust enrichment claim is "packed with individual issues and would be unmanageable" as a class action). Courts routinely deny class certification on unjust enrichment claims "[d]ue to the necessity of this inquiry into the individualized equities attendant to each class member." *Vega v. T-Mobile USA, Inc.*, 564 F.3d 1256, 1274 (11th Cir. 2009); *see also Grandalski v. Quest Diagnostics, Inc.*, 767 F.3d 175, 184 (3d Cir. 2014) (affirming denial of class certification on unjust enrichment claim based on individual analysis involved); *Westways World Travel, Inc. v. AMR Corp.*, 265 F.

[12] The dearth of factual allegations related to reliance is unsurprising in light of Plaintiff's deposition, during which he expressly stated that he did not communicate with or rely upon any statement made by Express Scripts. *See* Gearhart Dep. 87:15-24; 88:1 (negating that he communicated with Express Scripts or relied upon any communication with Express Scripts in relation to the request for his records) (deposition excerpts attached as Exhibit A).

App'x 472, 476 (9th Cir. 2008) (affirming decertification of class because unjust enrichment claim would require individualized inquiry).

Here, Plaintiff seeks to assert his unjust enrichment claim on behalf of a nationwide class. He cautiously alleges that the proposed class conferred a benefit on Express Scripts "when Defendant overcharged" class members for records. *See* 2d Amend. Compl. ¶ 49. Plaintiff's proposed nationwide claim for unjust enrichment requires proof that each class member actually paid a fee to Express Scripts. This case only involves records requests made by third parties like law firms and insurance companies. If a fee was paid by the law firm or insurance company and not reimbursed by the class member, the class member would have no damages.[13] In circumstances such as Plaintiff's, where a third party paid the fee on behalf of a putative class member, those individuals must prove both payment by the third party and reimbursement to the third party.[14]

Given the multiple layers of individual fact inquiries related to payment inherent in the proposed unjust enrichment claim, nationwide class cannot be certified, and leave to amend should be denied as futile.

V. CONCLUSION

For the foregoing reasons, Express Scripts respectfully requests that the Court exercise its discretion to deny Plaintiff's Motion to File Amended Complaint because such amendment would be utterly futile, and allowing these nationwide class claims to proceed would be an enormous and unjustified waste of the Court's and the parties' time and resources.

---

[13] Plaintiff tries to circumvent this glaring deficiency by seeking to include "third parties" as part of its nationwide class but no law or claim asserted by Plaintiff even arguably extends to law firms, insurance companies or other "third parties". Regardless, there is no representative law firm or other third party plaintiff in this case.

[14] Tellingly, Plaintiff did not pay the fee before filing this lawsuit and never incurred any alleged damage until he was charged for the fee by his law firm in October 2016, one year after suing Express Scripts. *See* Gearhart Dep. 75:18-21, 184:21-185:2 (admitting he never reimbursed his law firm for the fee before October 2016) (deposition excerpts attached as Exhibit A).

Respectfully submitted,

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ATTORNEYS FOR DEFENDANT

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing was filed electronically with the Rowan Circuit Court and copies were served this 22nd day of March, 2017, upon the following via electronic mail or First Class U.S. mail:

Alex C. Davis, Esq.
Jasper D. Ward IV, Esq.
Jones Ward PLC
1205 E. Washington St., Suite 111
Louisville, Kentucky 40206

Judge William E. Lane
Rowan Circuit Court
Courthouse Annex
44 West Main Street
Mt. Sterling, Kentucky 40353

/s/ Jaron P. Blandford
JARON P. BLANDFORD

4817-6382-9573, v. 1

EXHIBIT A

COMMONWEALTH OF KENTUCKY
ROWAN CIRCUIT COURT
DIVISION I
CIVIL ACTION NO. 15-CI-90250

EDWARD P. GEARHART, PLAINTIFF	DEPOSITION TAKEN ON BEHALF OF THE DEFENDANT BY: NOTICE
VS.	
EXPRESS SCRIPTS, INC., DEFENDANT	WITNESS: EDWARD POWELL GEARHART

* * * * * * * *

The deposition of EDWARD POWELL GEARHART was taken on behalf of the defendant before MARYBETH C. SOWARDS, Certified Court Reporter and Notary Public in and for the State of Kentucky at Large, at the law offices of McBrayer, McGinnis, Leslie & Kirkland, PLLC, located at 201 East Main Street, Lexington, Kentucky, on Wednesday, December 7, 2016, commencing at the approximate hour of 10:25 a.m.

Said deposition was taken pursuant to notice previously filed, pursuant to the Kentucky Rules of Civil Procedure, in the above-styled action now pending before the Rowan Circuit Court of Kentucky.

he wasn't sure --
MR. DAVIS: Sure.
MR. LATHAM: -- so I'm just trying to clarify that.

Q But it doesn't sound like, if you paid for gas driving over here today, that you're going to send anybody a bill for your gas; correct?
A No, I'm not doing like that, no.
Q And you're not expecting to get a check in the mail for being here today?
A No.
Q All right. How long have you lived in Kentucky, Mr. Gearhart?
A Sixty -- or 56 years. I'm sorry.
Q And how old are you?
A Fifty-six.
Q That would have been my guess based on your first answer.
What's your highest educational degree, Mr. Gearhart?
A Ninth.
Q And where did you go to school?
A I went to Rowan County High.
Q Have you had any other formal training or education outside of the school setting?

A Seemed like I did, but I can't be 100 percent sure, no.
Q If you did, would you have kept a copy?
A No, not necessarily.
Q Is it your understanding that this $75 is an expense that is being deducted from the money that you're being paid as part of this last claim in the DePuy case?
A Yes.
Q And you see where it has the parens around it that shows that as a deduction.
A Yes.
Q So that's Jones Ward reducing your claim by $75 for the Express Scripts medical records; correct?
A Yeah, I think you're right. As far as I know you're right.
Q And you hadn't paid them or reimbursed them the $75 prior to this October 16 date; correct?
A No.
Q This doesn't indicate when the $75 had first been paid to Express Scripts or who paid it. Do you know?
A No.

A A statement of fraud. I don't know how you get that. I don't know. I don't understand the question. It don't make no sense, the question don't.
Q Tell me what you know about your claim for fraud.
A That they should've paid for my insurance records. They did not.
Q Who should have paid?
A My insurance company, Express Scripts.
Q That they should have paid for your --
A My records.
Q -- pharmacy records?
A Yeah.
Q Have you ever talked to anybody at Express Scripts related to this request for your pharmacy records?
A No, I have not.
Q Have you ever relied on any statements from anybody at Express Scripts?
A Relied on anybody?
Q I'm assuming you haven't since you've never talked to anybody --
A No.
Q -- related to this request.

A No, not this request, no.
Q You've also asserted a claim for declaratory judgment. Do you know the basis for that claim?
A I don't even know what you're talking, declaratory judgment. I don't know what you're saying.
Q Do you have any sense of what the Express Medical Records would have charged for making the request to Express Scripts?
A What they would charge?
Q Yeah.
A No.
Q If you look at that same document, Mr. Gearhart --
A Where at?
Q If you'll look here with me, it says -- the last part of that sentence says, if records will be over $150 please notify me before proceeding.
A Yeah, I see where it says that.
Q Do you see that?
A Uh-huh. (Affirmative)
Q Would you assume from that that some companies charge more than $150?

Q And would you be willing to listen carefully if I provide you with important information about the case?
A Yes, I would.
MR. DAVIS: I think that's all I have. If you have any follow-ups --
MR. LATHAM: Okay.

RE-EXAMINATION

BY MR. LATHAM:
Q Mr. Gearhart, I've just got a couple of follow-ups here. If you're asked to sign something that you're not comfortable taking the time to read, is it fair to say that your lawyer or your niece would read it for you?
A Depends on what it is you're talking about.
Q Do you sign things without reading them at all or having somebody read them for you?
A No.
Q Mr. Davis talked about the $75 being taken out in October of this year; correct?
A Yes.
Q So the $75 had not been taken out when you first filed this lawsuit in October of 2015;

correct?
A Correct.
Q And he asked you if you would file a lawsuit over $75. Do you remember him asking you that?
A Yes.
Q And I think your response was that you wouldn't.
A I wouldn't?
Q Remember he asked you if you would file a lawsuit over $75? You remember what your answer was?
A If I'd file a lawsuit over $75. If it amounts to this, yes.
Q So you would file a lawsuit over $75?
A Depends on what it's over.
Q I think your answer was that you wouldn't, but you're telling me that if, say, I broke a window in your house but I wasn't going to pay for it and it was $75 that you might file a lawsuit over that?
A Well, I might, if I didn't know you and what -- depends on what it is.
Q Remember me asking you earlier about damages in this case? What are you expecting to

NO. 15-CI-90250

ROWAN CIRCUIT COURT
DIVISION I
HON. WILLIAM E. LANE

EDWARD P. GEARHART,
INDIVIDUALLY AND ON BEHALF OF
ALL OTHERS SIMILARLY SITUATED — PLAINTIFF

v.

PLAINTIFF'S REPLY IN SUPPORT OF MOTION TO AMEND CLASS ACTION COMPLAINT AGAINST EXPRESS SCRIPTS, INC.

EXPRESS SCRIPTS, INC. — DEFENDANT

* * * * * * * *

Plaintiff Edward P. Gearhart, on behalf of himself and all other persons similarly situated, submit this Reply in support of his Motion to Amend Class Action Complaint.

INTRODUCTION

Defendant, Express Scripts, Inc., wishes to avoid disclosure of unsavory details about its fraudulent business practices by thwarting Plaintiff's effort to file an amended complaint. While this strategy may benefit Express Scripts, it runs contrary to Kentucky law which allows leave to amend freely. Express Scripts wants to keep confidential every document produced in this case, including every page of the deposition of its corporate representative, yet it also seeks to deny Plaintiff the opportunity to amend the pleadings due to a failure to disclose these same documents and supporting facts. Defendant cannot have it both ways. Plaintiff asks the Court to grant his motion to amend, or in the alternative conduct an *in camera* hearing of the documents that Express Scripts refuses to allow Plaintiff to use in his pleadings.

ARGUMENT

Under the Kentucky Rules of Civil Procedure and Fed. R. Civ. P. 15(a)(2), leave to amend should be granted liberally and when justice so requires. *Kendrick v. Std. Fire Ins. Co.*, No. 06-141-DLB, 2007 U.S. Dist. LEXIS 28461, at *48 (E.D. Ky. Mar. 31, 2007); *S. Fifth Towers, LLC v. Aspen Ins. UK, Ltd.*, No. 3:15-CV-00151-CRS, 2015 U.S. Dist. LEXIS 158511, at *6 (W.D. Ky. Nov. 24, 2015). Express Scripts, in its response to Plaintiff's Motion to Amend, argues that amendment is futile because the class cannot be certified. Defendant's Response in Opposition to Motion at 5, citing *Smith v. Transworld Sys., Inc.*, 953 F.2d 1025, 1032 (6th Cir. 1992). Plaintiff respectfully submits that *Smith* is not applicable here. In *Smith*, an Ohio debt collection case, plaintiff claimed that defendant's use of computer generated forms — with no other supporting evidence — created a reasonable inference that there were hundreds or thousands of potential class members. *Id.* By comparison, in this case, Express Scripts admits that hundreds of Kentucky citizens have requested their health records and paid money for them. The exact number of such residents cannot be disclosed here because Express Scripts claims such information is proprietary, which underscores the need for an *in camera* review of discovery by this Court. Similarly, Express Scripts relies on another Ohio case involving long-term disability benefits. *Wooden v. Alcoa, Inc.*, 511 F. App'x 477, 481 (6th Cir. 2013). The court in *Wooden* denied the motion to amend because plaintiff did not include a 23(b) category in her complaint. By comparison, Plaintiff Edward Gearhart does address Rule 23(b) issues related to fair and efficient adjudication of claims. Amended Complaint at ¶ 21. Therefore, the *Wooden* case is inapplicable here.

ARGUMENT

The allegations in Plaintiff's proposed amended complaint meet the requirements of Rule 23, but the sufficiency of these facts and allegations is best addressed in a dispositive motion or at

the class certification stage. Express Scripts suggests otherwise, and invites this Court to deny the motion to amend without having the benefit of reviewing any of the discovery that supports plaintiff's claims. Plaintiff has requested that counsel for Express Scripts allow the use of certain deposition transcripts and statements made during discovery to support his claims, but Express Scripts has declined. Thus, it may be necessary to conduct an *in camera* review of the discovery documents so the Court can decide on whether they are appropriate to be included in the amended complaint. See *People v. Stanaway*, 446 Mich. 643, 678, 521 N.W.2d 557, 575 (1994), citing *United States* v *Gambino,* 741 F. Supp. 412, 414 (SD NY, 1990) and *People* v *Hackett,* 421 Mich. 338; 365 N.W.2d 120 (1984). Out of an abundance of caution, and due to the refusal by Express Scripts to allow use of these documents in pleadings, Plaintiff has not included them in his proposed amended complaint.

Express Scripts also raises issues about the class definitions in Plaintiff's amended complaint. Defendant's Response in Opposition to Motion at 6-7. However, under Rule 23, the United States Supreme Court and Kentucky courts are clear that parties and/or the court can change class definitions even after certifying a class. *See, e.g, Childers Oil Co. v. Reynolds*, No. 2011-CA-001352-ME, 2012 Ky. App. Unpub. LEXIS 386, at *5 (Ct. App. May 25, 2012)(court and parties made "subtle changes to the definition of the classes" at the certification hearing); *see also Gen. Tel. Co. of the Southwest v. Falcon*, 457 U.S. 147, 160 (1982) ("Even after a certification order is entered, the judge remains free to modify it in the light of subsequent developments in the litigation."). Plaintiff submits that the appropriate moment to determine the sufficiency of the claims in his amended complaint is at the certification stage, or at the very least after this Court has had the opportunity to determine which documents and depositions Plaintiff should be allowed to use in the pleadings. Express Scripts makes similar arguments about Plaintiff's alleged lack of

standing, along with variations in state laws, issues with numerosity and the elements of Plaintiff's fraud claims. For the same reason stated above, Plaintiff should be allowed an opportunity to submit detailed documents to this Court, in camera, that were produced by Express Scripts during discovery before the Court decides whether Plaintiff's claims are futile.

CONCLUSION

For the reasons stated above, Plaintiff requests that this Court grant his Motion to Amend, or in the alternative conduct a hearing, in camera, to review documents and deposition transcripts that Express Scripts objects to Plaintiff using in his pleadings.

Dated: April 11, 2017

Respectfully submitted,

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CERTIFICATE OF SERVICE

It is hereby certified that on the 11th day of April 2017, a true and correct copy of the above was served by electronic mail and/or facsimile to the following:

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Counsel for Defendant Express Scripts, Inc.

Alex C. Davis
Counsel for Plaintiff

Childers Oil Co. v. Reynolds

Court of Appeals of Kentucky

May 25, 2012, Rendered

NO. 2011-CA-001352-ME

Reporter
2012 Ky. App. Unpub. LEXIS 386 *; 2012 WL 1900135

CHILDERS OIL COMPANY; HINDMAN PETROLEUM SERVICE, INC.; AND MOUNTAIN RAIL PROPERTIES, INC., APPELLANTS v. PEYTON REYNOLDS AND OTHER INDIVIDUAL APPELLEES AS DESIGNATED IN THE NOTICE OF APPEAL, APPELLEES

Notice: THIS OPINION IS DESIGNATED "NOT TO BE PUBLISHED." PURSUANT TO THE RULES OF CIVIL PROCEDURE PROMULGATED BY THE SUPREME COURT, CR 76.28(4)(C), THIS OPINION IS NOT TO BE PUBLISHED AND SHALL NOT BE CITED OR USED AS BINDING PRECEDENT IN ANY OTHER CASE IN ANY COURT OF THIS STATE; HOWEVER, UNPUBLISHED KENTUCKY APPELLATE DECISIONS, RENDERED AFTER JANUARY 1, 2003, MAY BE CITED FOR CONSIDERATION BY THE COURT IF THERE IS NO PUBLISHED OPINION THAT WOULD ADEQUATELY ADDRESS THE ISSUE BEFORE THE COURT. OPINIONS CITED FOR CONSIDERATION BY THE COURT SHALL BE SET OUT AS AN UNPUBLISHED DECISION IN THE FILED DOCUMENT AND A COPY OF THE ENTIRE DECISION SHALL BE TENDERED ALONG WITH THE DOCUMENT TO THE COURT AND ALL PARTIES TO THE ACTION.

Subsequent History: Review denied by Childers Oil Co. v. Reynolds, 2012 Ky. LEXIS 302 (Ky., Sept. 12, 2012)
Appeal after remand at Reynolds v. Childers Oil Co., 2014 Ky. App. Unpub. LEXIS 270 (Ky. Ct. App., Apr. 4, 2014)

Prior History: [*1] APPEAL FROM LETCHER CIRCUIT COURT. HONORABLE JAMES L. BOWLING, JR., JUDGE. ACTION NOS. 09-CI-00063; 09-CI-00065; 09-CI-00068; 09-CI-00252. Total Renal Care, Inc. v. Childers Oil Co., 743 F. Supp. 2d 609, 2010 U.S. Dist. LEXIS 102588 (E.D. Ky., 2010)

Counsel: BRIEFS AND ORAL ARGUMENT FOR APPELLANTS: J. Dale Golden, Drew Byron Meadows, Lexington, Kentucky.

BRIEF FOR APPELLEES PEYTON REYNOLDS AND OTHER INDIVIDUAL APPELLEES AS DESIGNATED IN THE NOTICE OF APPEAL: Kevin C. Burke, Louisville, Kentucky; Damon B. Willis, C. David Ewing, Louisville, Kentucky; Ira Branham, Pikeville, Kentucky; Jonah L. Stevens, Pikeville, Kentucky; Stephen W. Owens, Kent Varney, Pikeville, Kentucky; Melanie Fields Horton, Pikeville, Kentucky.

ORAL ARGUMENT FOR APPELLEES: Damon B. Willis, Louisville, Kentucky.

Judges: BEFORE: CLAYTON, MOORE, AND NICKELL, JUDGES. All concur.

Opinion by: CLAYTON

Opinion

REVERSING AND REMANDING

CLAYTON, JUDGE: Childers Oil Company, Hindman Petroleum Service, Inc., and Mountain Rail Properties, Inc. (hereinafter "Childers Oil") appeal from the July 20, 2011, order of the Letcher Circuit Court that certified two classes of plaintiffs in a class action lawsuit. In the underlying lawsuit, Peyton Reynolds and other plaintiffs allege that because of two separate incidents of water contamination, ostensibly caused by the Appellants, they [*2] have suffered damages. The underlying issues in the case are not being challenged here, but rather, Childers Oil argues on appeal that class certification was improper under Kentucky Rules of Civil Procedure (CR) 23, and it seeks a reversal of the class-certification order. Because the trial court's factual findings were insufficient, we reverse the order of the Letcher Circuit Court and remand for further findings of fact.

FACTUAL AND PROCEDURAL BACKGROUND

Peyton Reynolds and other plaintiffs brought this class action under CR 23 to recover damages suffered by him, a named plaintiff, and other class members as a result of fuel spills, which caused alleged water contamination in Letcher County, Kentucky.

On or before November 1, 2008, Childers Oil dumped sludge from an oil plant into a plastic-lined pit next to the Kentucky River in Whitesburg, Kentucky. The sludge from the pit seeped into the river and flowed downstream into the drinking water treatment plant that provides water to the residents and businesses of Whitesburg, Kentucky, as well as the surrounding Letcher County communities. Subsequently, the State Environmental Agency issued an advisory to consumers informing them that [*3] they should not use the water except for flushing toilets. The advisory was in effect from November 1 through November 6, 2008.

Again, in February 2009, a diesel fuel tank stored on Appellants' property began leaking into the water. From February 16 through February 25, 2009, Kentucky officials issued another water quality advisory, which lasted ten days. During this time period, residential and business customers of Letcher County Sewer and Water Company were unable to use the water supply for anything other than flushing toilets.

The Kentucky Department for Environmental Protection determined that the Appellants' sludge pit was the source of the spill in the November 2008 incident and issued a notice of violation to Childers Oil. With regard to the February 2009 occurrence, Kentucky officials again issued a notice of violation to Childers Oil. Ultimately, on September 23, 2010, the Appellants entered into a consent judgment with the Commonwealth of Kentucky Energy and Environmental Cabinet. The judgement resulted in approximately a $500,000 payment to the Cabinet because of the November 2008 and February 2009 water contaminations.

Returning to the case at hand, in March 2009, four separate [*4] civil actions involving over eighty named plaintiffs had been filed following the two water advisories. At least two of these civil suits requested class action status. In addition, all the law suits were filed in Letcher Circuit Court with the exception of an out-of-state dialysis company that chose to file an action in federal district court. In response to these lawsuits, Appellants made motions for the recusal of the Letcher Circuit Court Judge and for a change of venue from Letcher County. On November 5, 2009, the Letcher County Circuit Court judge recused himself. Then, the Kentucky Supreme Court appointed Special Judge James L. Bowling to the case.

Thereafter, in April 2010, all the separate actions were consolidated. Peyton Reynolds and the other plaintiffs filed the first amended class action complaint on November 5, 2010. The named plaintiffs asserted the same theories of liability, alleged the same causes of action, and sought redress for damages caused by the November 2008 and February 2009 spills. In sum, the complaint sought the same relief - monetary damages - for

each plaintiff representative and putative class member for the same injury — inconvenience and loss of the [*5] use and enjoyment of their homes and businesses — due to the water advisories that occurred in November 2008 and February 2009.

After completing written discovery, Appellees sought an order certifying the action as a class action under CR 23.01 and CR 23.02(c). The circuit court held a class action certification hearing on June 28, 2011. At the hearing, after discussion among the judge and the parties, it became apparent that subtle changes to the definition of the classes would provide clarity and make the management of the classes easier. Instead of proceeding with three classes, individuals, minors, and businesses, the minor class was merged into the individual class. Additionally, the business class was re-labeled business customers of the water company. At the conclusion of the hearing, the circuit court confirmed that the case was best managed as a class action and instructed Peyton Reynolds and the other plaintiffs to tender findings of fact with a corresponding order that directed the certification of the class. Further, the circuit court advised Childers Oil that it could submit objections to these findings of fact.

On July 20, 2011, the circuit court's order was entered certifying [*6] the class action. The order certified two subclasses of plaintiffs:

> Class I: Shall mean the class of persons that were residential customers in Letcher County, Kentucky at the time of the November 2008 or February 2009 water contaminations that were subject to the water advisories. This class does not include visitors or guests of class members, government entities, or the officers or directors of the Defendants.
>
> Class II: Shall mean the class of persons that were business customers in Letcher County, Kentucky at the time of the November 2008 or February 2009 water contaminations that were subject to the water advisories. This class does not include visitors or guests of class members, government entities, or the officers or directors of the Defendants.

The named class representative for the residential class was Peyton Reynolds, and the named class representative for the business customer class was Josephine Richardson d/b/a The Courthouse Café. Childers Oil now appeals from this order.

ISSUES

Childers Oil presents three issues in its appeal. First, it claims that the circuit court improperly allowed Peyton Reynolds and the other plaintiffs to orally alter the proposed class definitions [*7] and the nature of the relief requested at the hearing. Next, Childers Oil maintains that the circuit court failed to make independent findings of fact as required under CR 23.03, that the adopted findings of fact have no basis in the record, and also, that the findings of fact fail to address several issues raised in the pleadings. Lastly, it argues that Peyton Reynolds and the other plaintiffs did not meet the requirements for class certification. Conversely, Peyton Reynolds and the other plaintiffs maintain that the circuit court did not abuse its discretion in its handling of the class action certification process nor in its decision that the requirements for class certification were satisfied.

STANDARD OF REVIEW

On appeal a certification order is reviewed for an abuse of discretion. *Sowders v. Atkins*, 646 S.W.2d 344 (Ky. 1983). "The test for abuse of discretion is whether the trial [court's] decision was arbitrary, unreasonable, unfair, or unsupported by sound legal principles." *Commonwealth v. English*, 993 S.W.2d 941, 945, 46 8 Ky. L. Summary 28 (Ky. 1999). With this standard in mind, we will first address whether the circuit court's order certifying the class was proper.

ANALYSIS

I. Prerequisites for a [*8] class action certification

The prerequisites necessary for the certification of an action as a class action are set forth in CR 23.01:

> one or more members of a class may sue or be sued as representative parties on behalf of all only if (a) the class is so numerous that joinder of all members is impracticable, (b) there are questions of law or fact common to the class, (c) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (d) the representative parties will fairly and adequately protect the interests of the class.

Thus, the requirements for class certification are numerosity, commonality, typicality, and adequacy of representation by the class representatives and counsel. Moreover, "[t]he party seeking the class certification bears the burden of proof." *In re American Medical Systems, Inc.*, 75 F.3d 1069, 1079, 64 USLW 2559 (6th Cir. 1996). Next, we will address whether Peyton Reynolds and other plaintiffs met these prerequisites for certification of class action.

1. Numerosity

First, under Rule 23.01(a), the trial court must determine that the class is so numerous that joinder of all members is impracticable. To ascertain whether **[*9]** the number of parties is large enough to render it impracticable to join all parties is not dependent upon any specific number but upon the circumstances surrounding the case. Therefore, "[t]he numerosity requirement requires examination of the specific facts of each case and imposes no absolute limitations." *Id.* quoting *General Tel. Co. of the Northwest, Inv. v. Equal Employment Opportunity Commission*, 446 U.S. 318, 330, 100 S. Ct. 1698, 1706, 64 L. Ed. 2d 319 (1980).

In the case at hand, all residential and business customers in the Letcher County area were affected by the November 2008 and February 2009 water advisories which were the result of the oil spills. The circuit court took notice that just the affected number of Letcher County water customers exceeds 1,000. Although Childers Oil maintains that the numerosity requirement is not met because a specific number of class members have not been identified, it acknowledged in its verified motion for a change of venue that a large number of people were affected by the water outages. In response to Childers Oil's contention that class members have not been identified, the Appellees provided the water company databases, which contain **[*10]** the names and addresses of more than 1,000 customers. Certainly, the large number of affected persons demonstrates the impracticability of joinder and meets the numerosity requirement.

2. Commonality

The next prerequisite to consider is whether the questions of law and fact are common to the class representatives and class members. CR 23.01(b). The rationale behind this requirement is that where there are common questions of law or fact, "the class-action device saves the resources of both the courts and the parties by permitting an issue potentially affecting every [class member] to be litigated in an economical fashion under Rule 23." *General Telephone Co. of Southwest v. Falcon*, 457 U.S. 147, 155, 102 S. Ct. 2364, 2369, 72 L. Ed. 2d 740 (1982), quoting *Califano v. Yamasaki*, 442 U.S. 682, 701, 99 S. Ct. 2545, 61 L. Ed. 2d 176 (1979).

Nonetheless, although the requirement under CR 23.01(b) is that there must be common questions of law or fact, it does not require that all questions of law or fact be common. *Wiley v. Adkins*, 48 S.W.3d 20, 23 (Ky. 2001). Even though Childers Oil, citing an unreported federal case, suggests that commonality also entails a common issue that will advance **[*11]** the litigation, such a factor is not listed under CR 23.01(b). In the case at bar, the legal and factual underpinnings of the case are closely aligned, and the claims for nuisance, trespass, and negligence are based on common questions of fact and law. Since Peyton Reynolds and the other plaintiff's claims arise from the same events, practices and course of conduct, the circuit court did not abuse its discretion in finding that the commonality prerequisite is met.

3. Typicality

Under CR 23.01(c), the third prerequisite requires that "the claims or defenses of the representative parties are typical of the claims or defenses of the class[.]" This requirement is referred to as "typicality." In general, threshold requirements for "typicality" are not high. *Shipes v. Trinity Industries*, 987 F.2d 311, 25 Fed. R. Serv. 3d 1390 (5th Cir. 1993). The typicality requirement operates as a safeguard to ensure that the named plaintiffs' interests are substantially co-extensive with interests of the class. *Simpson v. Specialty Retail Concepts*, 149 F.R.D. 94, 99 (M.D.N.C. 1993).

Typicality necessitates that a class representative be a part of the class, possess the same interests and suffer the same [***12**] injury as the other class members. In sum, "[a] plaintiff's claim [is] considered typical if it arises from the same event or practice or course of conduct that gives rise to the claims of other class members, and . . . [is] based on the same legal theory." *Burkhead v. Louisville Gas & Elec. Co.*, 250 F.R.D. 287, 295 (W.D.Ky. 2008), quoting *In re Am Med. Sys.*, 75 F.3d at 1082.

To ascertain the typicality requirement, the circuit court here had to focus upon the alignment of the claims of the class representative and the class members. In fact, the same series of events applied equally to the class representative as well as the class members, and the claims of the class representative and the class members are based on the same legal theories.

Childers Oil argues that the claims of the plaintiff class representative are not typical of the other members of the class. It suggests that typicality is not present for two reasons. First, Childers contends that the claims necessitate individualized proof as to the degree and quality of the harm suffered. Second, it maintains that because some claims originally asserted in the prior complaints are not being asserted by the plaintiff class representative, [***13**] the claims of the class representative are not typical. We are not persuaded by these contentions.

With regard to whether certain claims require individualized proof, we observe that Peyton Reynolds and the other plaintiffs are not seeking a class action for claims like personal injury, increased cancer risks, future medical monitoring, or unsellable homes, which might necessitate individualized proof. They have, in fact, specifically excluded such claims from the class action. In addition, the plaintiff representative and putative class members have the authority to choose which claims to pursue in the class action, and Childers Oil is not a part of the plaintiffs' decision as to which claims to pursue.

Clearly, the same series of events (water advisories and/or water contamination) apply to everyone — class representative and all putative class members. Class representatives and putative class members are basing the claim on theories of negligence, nuisance, and trespass. Typicality exists because everyone's claims arise from the same event or practice or course of conduct and is based on the same legal theory. Thus, the circuit court did not abuse its discretion in determining that [***14**] typicality existed between the class representative and the other plaintiffs.

4. Adequacy of representation

The last criterion under CR 23.01 is whether "the representative parties will fairly and adequately protect the interests of the class." CR 23.01(d). The United States Sixth Circuit Court of Appeals (the Sixth Circuit) has held that "[t]here are two criteria for determining whether the representation of the class [are] adequate: (1) the representative must have common interests with unnamed members of the class, and (2) it must appear that the representatives will vigorously prosecute the interests of the class through qualified counsel." *Senter v. General Motors Corp.*, 532 F.2d 511, 524-25 (6th Cir. 1976).

Childers Oil proposes that the interests of Peyton Reynolds and Josephine Richardson d/b/a The

Courthouse Café are atypical and not representative of the other class members. Nonetheless, other than making the statement, Appellants provide no support that illustrates the basis for this claim. Indeed, as noted above, both Peyton Reynolds and Josephine Richardson d/b/a The Courthouse Café are class members, possess the same interests, suffered the same injuries, and claim the same **[*15]** economic redress as the group that they seek to represent. Further, Childers Oil has stipulated that the appointed legal counsel for the class is qualified.

Therefore, the named plaintiffs share a common interest with other class members and are strongly pursuing these interests through appropriate legal counsel. Again, the circuit court did not abuse its discretion in finding that the proposed class has satisfied the adequacy of representation requirement under CR 23.01(d).

II. Certification of the class action

Once the prerequisites for class certification are met, the trial court may certify the action as a class action as long as one of the requirements of CR 23.02(a), (b), or (c) is satisfied. In the present case, the trial court granted certification under CR 23.02(c). Under this subsection, a class action may be maintained if:

> [T]he court finds that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy.

CR 23.02(c). Hence, the focus of the analysis is to ascertain whether class issues **[*16]** predominate over individualized issues and whether a class action is superior to other available methods for the fair and efficient adjucidation of the controversy.

Before examining the issue of predominance, we note that in the instant case, Childers Oil does not dispute the superiority of a class action over other available methods. Given that the purpose of a class action is the promotion of judicial economy and preservation of judicial resources in order to determine whether a class action is the superior method for fair and efficient adjudication, a court must consider the difficulties of managing a class action, compare other means of disposing of the suit, and the value of individual damage awards because smaller awards weigh in favor of class suits. *Beattie v. Century Tel, Inc.*, 511 F.3d 554, 567 (6th Cir. 2007). The trial court correctly recognized that the situation herein is more effectively addressed with class action status because the economies of time and expense would be achieved by certifying this litigation as a class action. Specifically, with reference to the monetary value of each plaintiff's claim in these proceedings, a class action makes sense. As explained in **[*17]** *Iliadis v. Wal-Mart Stores, Inc.*, 191 N.J. 88, 922 A.2d 710 (N.J. 2007), a class action equalizes adversaries, which is even more compelling when the proposed class consists of people with small claims. Next, we attend to the predominance requirement.

Predominance "tests whether proposed classes are sufficiently cohesive to warrant adjudication by representation," *Amchem Products, Inc. v. Windsor*, 521 U.S. 591, 623, 117 S. Ct. 2231, 2249, 138 L. Ed. 2d 689 (1997). Generally, under CR 23.02(c), a trial court must find a sufficient mutuality of interests among the class members to justify the adjudication in a single action. 6 Kurt A. Phillips, Jr., and David V. Kramer, *Kentucky Practice: Rules of Civil Procedure Annotated Rule* 23.02 (6th ed. 2005). Under this prong, the "commonality" requirement does not require that the common questions be dispositive of the entire action but only that questions common to the class predominate over individual issues. *Id.*; *see also Wiley v. Adkins*, 48 S.W.3d 20, 23 (Ky. 2001).

Childers Oil argues that Peyton Reynolds and the other plaintiffs have the burden of proving that their claims can be established through evidence that is common to the class rather than through **[*18]** each individual claimant. It then goes on to posit that the

relied upon theories of nuisance, trespass, and negligence necessitate individualized proof and, thus, obviate the predominance of common issues. Childers Oil, however, never cites any authority that such claims are barred from a class action suit because of the need for individualized proof. And, while it is possible that there may be some individualized damages, courts have held that "[c]ommon issues may predominate when liability can be determined on a class-wide basis, even [with] individualized damage issues." *See In re Scrap Metal Antitrust Litigation*, 527 F.3d 517, 535 (6th Cir. 2008), quoting *In re Visa Check/MasterMoney Antitrust Litigation*, 280 F.3d 124 (2001), *overruled on other grounds*. Moreover, as noted in *Burkhead*, 250 F.R.D. 287, 298-99, guidance has been provided by the Sixth Circuit on the types of cases that may be best suited to (b)(3) class adjudication, which is analogous to CR 23.02(b):

> In complex, mass, toxic tort accidents, where no one set of operative facts establishes liability, no single proximate cause equally applies to each potential class member and each defendant, and individual issues outnumber **[*19]** common issues, the district court should properly question the appropriateness of a class action for resolving the controversy. However, where the defendant's liability can be determined on a class-wide basis because the cause of the disaster is a single course of conduct which is identical for each of the plaintiffs, a class action may be the best suited vehicle to resolve such a controversy.

Sterling v. Velsicol Chemical Corp., 855 F.2d 1188, 1197 (6th Cir. 1988). The situation described in the aforementioned quote is similar to the one herein.

Notwithstanding our disagreement with Childers Oil's contentions about individualized proof, we have concern about the existence of common questions of law and a common nucleus of facts in the claims asserted in this action.[1] While all the potential plaintiffs were subject to the loss of use of water during the water advisories of November 2008 and February 2009, we have several difficulties in determining whether CR 23.02(c) requirements have been met.

Our first concern is whether the amount in controversy requirement for subject matter jurisdiction has been established in this case so that it may proceed as a class action. Whether a court has subject matter jurisdiction over the case is a question of law; therefore, such review is de novo. *Floyd County Bd. of Educ. v. Ratliff*, 955 S.W.2d 921, 44 13 Ky. L. Summary 13 (Ky. 1997).

In *Lamar v. Office of Sheriff of Daviess County*, 669 S.W.2d 27 (Ky. App. 1984), it was specifically held that under CR 23, "the sums of the individual claims of the respective parties may not be aggregated in order to meet the jurisdictional amount requirements for an action to be brought in the circuit court and be maintained as a class action where none of the individual claims is equal to or exceeds the statutory jurisdictional amount." *Id.* at 31. Our Court explained that the reasoning in *Zahn v. International Paper Co.*, 414 U.S. 291, 94 S. Ct. 505, 38 L. Ed. 2d 511 (1973), a case about pertinent federal civil rule concerning class actions, was applicable. *Id.* In the *Zahn* case, the U.S. Supreme Court affirmed a ruling by a lower court that refused to permit a case to proceed as a class action because **[*21]** the Court reasoned that every member of the class must satisfy the jurisdictional amount before the case may proceed as a class action. *Id.* at 301, 94 S. Ct. 505. Clearly, in Kentucky Circuit Courts, the sums of the claims of individual class members may not be aggregated to meet the jurisdictional amount requirement for actions to be brought.

Here, the Appellee is basing its lawsuit on the mere

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[1]The issue of the subject matter jurisdiction of the circuit court involving whether these are two separate events has no bearing on our discussion on pages 9-12 of commonality and typicality **[*20]** for class action certification.

fact that customers of the water company were subject to two separate water advisories. During oral arguments in this case, the Appellees informed the Court that the parties' damages would be determined by the difference between the value of the use of a party's home with water compared to the value of the home without the use of water during the two water advisories. Given the description of damages, we are unable to discern if an individual party's damages exceed or are equal to the statutory jurisdictional amount of $4,000, which was effective in February 2009. Kentucky Revised Statutes (KRS) 23A.010. We remand this matter to the trial court for a finding of fact as to whether subject matter jurisdiction has been met.

Related to our concerns about the subject matter jurisdiction is the fact **[*22]** that the water advisories were for two separate incidents of contamination by the Appellant/Defendants. In addition to addressing subject matter jurisdiction, the trial court needs to make findings of fact about the two separate causative events. Even though the action involves the same defendants and parties, if the causation for the water advisory is different, this may impact whether the question of law or fact predominate for all members as a result of two separate incidents of water problems. Therefore, the trial court is to determine whether the separate causation of the water advisory has an impact on this issue. The trial court is to pay particular attention to the issue of damages. If the separate causation for the water advisories negates the predominance of the law and facts for this action, it will definitely impact the amount of damages.

Finally, plaintiffs claim that because of a common experience, they may be entitled to recovery under the theories of negligence, nuisance, and trespass. Significantly, although our concern in the case at bar is not the merits of the claim, we still note that. Rather, whether Peyton Reynolds and other plaintiffs will prevail under their **[*23]** legal theories is for the next stage of the litigation. With regard to the issues of predominance, however, we believe that the plaintiffs' issues predominate and that class certification is proper. Therefore, we conclude that the trial court did not abuse its discretion when it determined, as mandated under CR 23.02(c), "that the questions of law or fact [are] common to the members of the class [and] predominate over any [individual] questions[.]"

III. Miscellaneous issues regarding class certification

Childers Oil also maintains that the proposed class definitions are inadequate and overly broad. First, we direct our attention to the adequacy of the class definition. Citing an unreported case, Childers Oil says that it is a prerequisite requirement that a trial court make a threshold inquiry as to whether a precisely defined class exists. Further, it states that the trial court did not do so in the case at bar. Finally, Childers Oil argues that the proposed subclasses were defined by injury, and hence, constitute a "fail-safe" class, which is not permitted, according to them.

As elucidated above, the trial court certified two subclasses of plaintiffs. These classes are defined as residential **[*24]** and business customers in Letcher County at the time of the November 2008 and February 2009 water advisories. Appellants dispute the definition of the classes because they say that the classes are defined exclusively by injury. Then, relying on *Alberton v. Commonwealth Land Title Ins. Co.*, 264 F.R.D. 203 (E.D. Pa. 2010), the Appellants note that a Court must ensure that "eligibility as a class member . . . is not dependent upon a legal conclusion." *Id.* at 207. Additionally, *Alberton* provides an explanation of a fail-safe class as one that does not allow any person to be deemed "a member of the class until after an ultimate finding of liability is made[.]" *Alberton*, 247 F.R.D. at 206.

At its most fundamental level, the subclasses in this case consist of people subject to the water advisories. Therefore, the members of the class can be determined without a finding of liability. And, as Childers Oil mentions throughout its brief, Peyton Reynolds and the other plaintiffs must still prove

liability under nuisance, negligence, and trespass.

With regard to whether the definition of the subclasses is overly broad, interestingly, Appellants argue this factor since the definition, according to **[*25]** them, could include some who were not harmed. This proposition seems to contradict their previous assertion that the class is defined by liability. The subclasses are defined by the notion of those subject to the water advisories. The Letcher County water treatment plant has a list of its customers, which, as conceded by Childers Oil, is a part of the record.

Finally, as observed by Appellees, since "courts may amend or alter class certification orders at any time prior to final judgment, it is not uncommon that the bases for certification are redefined after an initial order has been issued." *Bowers v. Windstream Kentucky East, LLC*, Slip Copy, 2012 U.S. Dist. LEXIS 7809, 2012 WL 216616 (W.D. Ky. 2012). If the subclasses require some alteration, the trial court has such authority and retains the ability to redefine the class in keeping with the court's understanding of the scope and substance of the class.

Childers Oil also proffers that the trial court failed to make findings of fact as required by CR 23.03, adopted findings that have no basis in the record and did not address several issues raised in the pleadings. With regard to the failure to make findings pursuant to CR 23.03, Childers Oil cites *Rose v. Council for Better Education, Inc.*, 790 S.W.2d 186 (Ky. 1989). **[*26]** In that case, however, not only did the trial court fail to make findings of fact, it also did not have a hearing or certify any class and never addressed the requirements of CR 23. In the case at hand, the trial judge held a hearing and certified classes under the purview of CR 23. Further, while it allowed Appellees to submit findings of fact, it also permitted the Appellants to submit a written challenge to these findings of fact. A review of the record shows that the trial judge was engaged and involved in the decision making required for this class certification.

Although the practice of adopting verbatim findings of fact drafted by one party is disfavored, if the trial court does not abdicate its fact-finding and decision-making role, it is not fatal to an action. In *Bingham v. Bingham*, 628 S.W.2d 628 (Ky. 1982), also cited by Childers Oil, the Kentucky Supreme Court clarified the issue regarding the drafting of findings of fact by counsel:

> We do not condemn this practice (of permitting attorneys to draft findings of fact and conclusions of law) in instances where the court is utilizing the services of the attorney only in order to complete the physical task of drafting the record. **[*27]** However, . . . [o]ur concern . . . is that the trial court does not abdicate its fact-finding and decision-making responsibility[.]

Id. at 629. And, in *Prater v. Cabinet for Human Resources, Commonwealth of Ky.*, 954 S.W.2d 954, 956, 44 11 Ky. L. Summary 35 (Ky. 1997), the Kentucky Supreme Court again observed on this issue, and in a situation where the adoption of findings was verbatim, that the adoption of facts of finding verbatim is not proof that a trial judge has abdicated his or her fact-finding responsibility. Under CR 23.03, a trial court "must determine by order whether to certify the action as a class action[]" and issue "[a]n order that certifies a class action [by] defin[ing] the class . . . the class claims, issues, or defenses, and appoint[s] class counsel[.]" Because Appellants have not demonstrated that the trial court abdicated its judicial role and since the trial court met its obligation under CR 23.03, no abuse of discretion occurred.

Lastly, Childers Oil complains that the trial court erred in its failure to issue a case management order, commonly referred to as a "Lone Pine" order as an alternative for class certification. Since it has not yet been determined whether class certification **[*28]** was proper or whether subject matter jurisdiction exists, we will not address this contention. This factor may be addressed by the

trial court if it determines that such a consideration is necessary.

CONCLUSION

Because the trial court's factual findings were insufficient, we reverse the order of the Letcher Circuit Court and remand for further findings of fact including the issues of whether subject matter jurisdiction exists and to ascertain whether the different causative factors for the two water advisories had an impact both on subject matter jurisdiction and class certification. Therefore, we reverse and remand the order of the Letcher Circuit Court for proceedings consistent with this opinion.

ALL CONCUR.

End of Document

COMMONWEALTH OF KENTUCKY
ROWAN CIRCUIT COURT
DIVISION ONE
CIVIL ACTION NO. 15-CI-90250
ELECTRONICALLY FILED

EDWARD P. GEARHART PLAINTIFF

V. **NOTICE OF ENTRY OF APPEARANCE**

EXPRESS SCRIPTS, INC. DEFENDANT

****

Comes now, M. Catherine "Katie" Halloran, and hereby enters her appearance of record in this matter as counsel for the Plaintiff. Please take notice that pursuant to CR 5.02(2), the Plaintiff elects to effectuate and receive service via electronic means to and from all other attorneys and parties in this action. The undersigned is registered to receive service of all filed documents via the AOC's electronic filing system, agrees to accept service through that system and will effectuate service through that system.

Respectfully submitted,

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CERTIFICATE OF SERVICE

It is hereby certified that a true and correct copy of the foregoing was sent via the AOC's electronic filing system, U.S. Mail, e-mail, facsimile, and/or hand delivery on this 9th day of May 2017 to the following:

Hon. William E. Lane, Judge
Rowan Circuit Court
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COMMONWEALTH OF KENTUCKY
ROWAN CIRCUIT COURT
DIVISION ONE
CIVIL ACTION NO. 15-CI-90250
ELECTRONICALLY FILED

EDWARD P. GEARHART

PLAINTIFF

V.

ORDER

EXPRESS SCRIPTS, INC.

DEFENDANT

Upon the motion of Plaintiff, Edward P. Gearhart, to file under seal certain confidential documents and information subject to the Agreed Protective Order entered by this Court of May 9, 2016, and being otherwise duly advised, it is hereby ORDERED that the motion is GRANTED and the following documents shall be filed under seal:

1. An unredacted copy of the Deposition Transcript of Maryanne Cameron, Corporate Representative for Express Scripts, dated November 15, 2016; and
2. Plaintiff's Second Amended Class Action Complaint.

The above documents shall remain sealed in perpetuity, subject to the provisions of the Agreed Protective Order entered in this case and/or other applicable law.

IT IS SO ORDERED.

Entered this 12th day of May 2017.

JUDGE, ROWAN CIRCUIT COURT

Tendered by:

/s/ Katie Halloran
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____ Jaron P. Blandford

COMMONWEALTH OF KENTUCKY
ROWAN CIRCUIT COURT
DIVISION ONE
CIVIL ACTION NO. 15-CI-90250

FILED ELECTRONICALLY

EDWARD P. GEARHART PLAINTIFF

v. **RESPONSE TO PLAINTIFF'S MOTION FOR LEAVE TO FILE EVIDENCE AND SECOND AMENDED COMPLAINT THAT INCLUDES THE SUBJECT EVIDENCE UNDER SEAL**

EXPRESS SCRIPTS, INC. DEFENDANT

* * * * * * * *

Defendant Express Scripts, Inc. ("Express Scripts") respectfully submits this Response to Plaintiff's Motion for Leave to File Evidence and Second Amended Complaint That Includes The Subject Evidence Under Seal filed by Plaintiff on May 9, 2017.

As discussed at the Status Hearing on April 21, 2017, Plaintiff's counsel indicated their intent to file certain discovery-related documents and information under seal relating to Plaintiff's currently pending Motion to File an Amended Complaint, which was filed by Plaintiff on February 16, 2017. Plaintiff has now done that by filing this Motion for Leave to submit an updated version of the proposed Second Amended Complaint under seal to now include references to certain deposition testimony from Express Scripts' corporate representative, Maryanne Cameron.

On May 12, 2017, the Court entered an Order filing an unredacted copy of the November 15, 2016 deposition transcript of Maryanne Cameron, Corporate Representative for Express Scripts, and Plaintiff's proposed Second Amended Class Action Complaint under seal. Express Scripts files this response to state that it has no objection to Plaintiff filing the deposition transcript and the references to certain deposition testimony under seal. However, this evidence

that Plaintiff now seeks to file under seal does nothing to change the merits of the pending Motion to File an Amended Complaint or the legal arguments establishing the futility of the proposed amendment. In particular, Ms. Cameron's testimony has no impact on Plaintiff's lack of standing to bring a nationwide class action, the fact that HIPAA cannot serve as a basis for state law claims, or the fact that a nationwide class cannot be certified in this case.

Thus, for the reasons stated more fully in Express Scripts' Response in Opposition to the Motion to File an Amended Complaint, Plaintiff's proposed amendment remains futile and leave to amend should be denied.

Respectfully submitted,

McBRAYER, McGINNIS, LESLIE
& KIRKLAND, PLLC
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(859) 231-8780

/s/ Jaron P. Blandford
JARON P. BLANDFORD

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(615) 742-6200
ATTORNEYS FOR DEFENDANT

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing was filed electronically with the Rowan Circuit Court and copies were served this 16th day of May, 2017, upon the following via electronic or First Class U.S. mail:

Alex C. Davis, Esq.
Jasper D. Ward IV, Esq.
M. Catherine Halloran, Esq.
Jones Ward PLC
The Pointe
1205 E. Washington Street, Suite 111
Louisville, KY 40206

Hon. William E. Lane
Judge, Rowan Circuit Court
Courthouse Annex
44 West Main Street
Mt. Sterling, Kentucky 40353

/s/ Jaron P. Blandford
JARON P. BLANDFORD

4834-0741-4856, v. 1

COMMONWEALTH OF KENTUCKY
ROWAN CIRCUIT COURT
DIVISION ONE
CIVIL ACTION NO. 15-CI-90250

FILED ELECTRONICALLY

EDWARD P. GEARHART PLAINTIFF

v.

AGREED ORDER

EXPRESS SCRIPTS, INC. DEFENDANT

* * * * * * * *

The parties being in agreement, the pending Motion to Amend before the Court being fully briefed by the parties and under consideration; and the Court being otherwise sufficiently advised;

IT IS HEREBY ORDERED that the status hearing in this matter that was scheduled for Friday, June 16, 2017 at 10:00 a.m., is rescheduled for Friday, August 18, 2017 at 10:00 a.m. in the Rowan Circuit Court.

Entered this 22nd day of June, 2017.

HON. WILLIAM E. LANE
JUDGE, ROWAN CIRCUIT COURT

TD : 000001 of 000003

HAVE SEEN AND AGREED:

McBRAYER, McGINNIS, LESLIE
& KIRKLAND, PLLC
201 East Main Street, Suite 900
Lexington, Kentucky 40507

/s/ Jaron P. Blandford
JARON P. BLANDFORD

and

BRITT K. LATHAM
ALISON K. GRIPPO
BASS, BERRY & SIMS, PLC
150 Third Avenue South, Suite 2800
Nashville, Tennessee 37201
ATTORNEYS FOR DEFENDANT

JONES WARD, PLC
312 S. 4th Street, 6th Floor
Louisville, Kentucky 40202

/s/ Alex C. Davis (w/ permission)
ALEX C. DAVIS
ATTORNEYS FOR PLAINTIFF

CLERK'S CERTIFICATE OF SERVICE

I hereby certify that a true and accurate copy of the foregoing was served this 22 day of June, 2017, upon the following via U.S. Mail:

Alex C. Davis, Esq.
Jones Ward PLC
312 S. Fourth Street, 6th Floor
Louisville, KY 40202

Britt K. Latham, Esq.
Alison K. Grippo, Esq.
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150 Third Avenue South, Suite 2800
Nashville, TN 37201

Jaron P. Blandford, Esq.
McBrayer, McGinnis, Leslie
& Kirkland PLLC
201 E. Main Street, Suite 900
Lexington, KY 40507

Peggy Moore, DC
CLERK, ROWAN CIRCUIT COURT

4815-6798-9578, v. 1

COMMONWEALTH OF KENTUCKY
ROWAN CIRCUIT COURT
DIVISION ONE
CIVIL ACTION NO. 15-CI-90250

FILED ELECTRONICALLY

EDWARD P. GEARHART PLAINTIFF

v. **RESPONSE TO PLAINTIFF'S SUPPLEMENTAL INFORMATION IN SUPPORT OF MOTION TO AMEND CLASS ACTION COMPLAINT AGAINST EXPRESS SCRIPTS, INC.**

EXPRESS SCRIPTS, INC. DEFENDANT

* * * * * * * *

Defendant, Express Scripts, Inc. ("Express Scripts"), respectfully submits this Response to Plaintiff's Supplemental Information in Support of Motion to Amend Class Action Complaint Against Express Scripts, Inc., filed by Plaintiff on September 15, 2017, following the Court's Status Conference. As discussed below, Plaintiff's Supplemental Information changes nothing, and this Court should deny the Motion to Amend or, at a minimum, defer to the federal courts.

The supplemental information provided by Plaintiff regarding two similar cases pending against Express Scripts in federal courts in Florida and Missouri does not change or even address the merits of the pending Motion to Amend Class Action Complaint or the legal arguments establishing the futility of the proposed amendment. Here, Plaintiff *still* lacks standing to bring a nationwide class action, HIPAA *still* cannot serve as a basis for state law claims, and a purported nationwide class alleging state law claims *still* cannot be certified. Importantly, Plaintiff has *still* failed to respond to any of those arguments or otherwise explain how amendment is not futile.

Moreover, the fact that these federal cases in Florida and Missouri assert a nationwide class action alleging state law claims does nothing to support Plaintiff's Motion to Amend.[1] As

[1] In fact, in the Florida case, a nationwide class is currently the subject of a motion to dismiss and is being specifically contested.

set forth in Express Scripts' Response in Opposition to Plaintiff's Motion to Amend Class Action Complaint at 11, 13, certification of a nationwide class alleging state law claims—*whether in federal or state court*—is incredibly rare as it requires a court to apply different laws to individuals in the same class. Recognizing these issues, both federal and state courts around the country have almost universally refused to certify a nationwide class alleging state law claims.

Rather than tackle the issue of futility head-on, Plaintiff instead claims that amendment is in the interests of judicial economy and efficiency in light of the Florida and Missouri cases. But that is simply untrue. To the contrary, Plaintiff's amendment would simply force this Court to assume the heavy burden of managing and adjudicating a nationwide class when Kentucky lacks any jurisdiction, much less any special obligation, to do so. Thus, for the foregoing reasons and for the reasons stated more fully in Express Scripts' Response in Opposition to the Motion to Amend Class Action Complaint, Plaintiff's proposed amendment remains futile and the motion to amend should be denied. Regardless, at a minimum, in the interests of avoiding a ruling that is inconsistent with the federal courts in Florida and Missouri, the Court should defer to those courts on whether a nationwide class can be brought.

Respectfully submitted,

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/s/ Jaron P. Blandford
JARON P. BLANDFORD

and

BASS, BERRY & SIMS, PLC
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Email: blatham@bassberry.com
Email: agrippo@bassberry.com
(615) 742-6200
ATTORNEYS FOR DEFENDANT

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing was filed electronically with the Circuit Court and copies were served this 22nd day of September, 2017, upon the following via electronic or First Class U.S. mail:

Alex C. Davis, Esq.
Jasper D. Ward IV, Esq.
Jones Ward PLC
The Pointe
1205 E. Washington St., Suite 111
Louisville, Kentucky 40206

Judge William E. Lane
Rowan Circuit Court
Courthouse Annex
44 West Main Street
Mt. Sterling, Kentucky 40353

/s/ Jaron P. Blandford
JARON P. BLANDFORD

4850-9468-7824, v. 1

COMMONWEALTH OF KENTUCKY
ROWAN CIRCUIT COURT
DIVISION I
CASE NO. 15-CI-90250

EDWARD GEARHART **PLAINTIFF**

vs.

ORDER

EXPRESS SCRIPTS HOLDING CO. **DEFENDANT**

****

This matter coming before the Court, and the Court being otherwise sufficiently advised, **IT IS HEREBY ORDERED** that a Status Hearing is scheduled for January 19, 2018, at 10:00 a.m.

This 17th day of November, 2017.

HON. WILLIAM E. LANE
ROWAN CIRCUIT JUDGE
DIVISION I

DISTRICT:

ALL ATTORNEYS OF RECORD

Peggy Moore, DC
Rowan Circuit Clerk

COMMONWEALTH OF KENTUCKY

ROWAN CIRCUIT COURT

DIVISION NO. 1

CASE NO. 15-CI-90250

EDWARD GEARHART PLAINTIFF

VS. ORDER GRANTING LEAVE

EXPRESS SCRIPTS, INC DEFENDANT

****

This matter coming before the Court upon the Plaintiff's Motion for Leave to File a Second Amended Complaint and Counsel on both side have fully briefed the matter and the Court otherwise being fully advised ORDERS AS FOLLOWS:

The Court grants leave for the filing of the second amended complaint. The Court takes notice of the possible futility of certifying a class in this matter with the differentiation of applicable law and the potential lack of substantial contact with Kentucky, but at this time the Court will allow the Plaintiff to proceed under its incumbent burden.

November 29, 2017

Judge Rowan Circuit Court

CLERK'S CERTIFICATE OF SERVICE

I hereby certify that a true and accurate copy of the foregoing was served upon the following by mail this 4th day of December 2017.

Jasper D. Ward IV

Britt K. Latham

BY: Ramona Dawn

Rowan Circuit Court Clerk

KENTUCKY COURT OF JUSTICE

15-CI-90250

GEARHART, EDWARD P. VS. EXPRESS SCRIPTS HOLDING CO.,

ROWAN CIRCUIT COURT

Filed on **10/14/2015** as **OTHER** with **HON. WILLIAM LANE**

****** NOT AN OFFICIAL COURT RECORD ******

Parties	**15-CI-90250**

ALEX C DAVIS, ESQ as **OTHER PARTY**

Address

JONES WARD PLC
312 S. FOURTH STREET, 6TH FLOOR
LOUISVILLE KY 40202

EXPRESS SCRIPTS HOLDING CO., as **DEFENDANT / RESPONDENT**

GEARHART, EDWARD P. as **PLAINTIFF / PETITIONER**

BLANDFORD, JARON PAUL as **ATTORNEY FOR DEFENDANT**

Address

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FORESTER, WILLIAM as **ATTORNEY FOR DEFENDANT**

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150 THIRD AVENUE, SUITE 2800
NASHVILLE TN 37201

WARD, JASPER D. IV as **ATTORNEY FOR PLAINTIFF**

Address

THE POINTE
1205 E WASHINGTON ST SUITE 11
LOUISVILLE KY 40202

SERVE: CSC-LAWYERS INCORPORATING SERVICE, as **REGISTERED AGENT OF SERVICE**

Memo

FOR EXPRESS SCRIPTS HOLDING CO.

Summons

CIVIL SUMMONS issued on **10/27/2015** by way of **RETURNED TO ATTORNEY/PETITIONER**
ALIAS
CIVIL SUMMONS issued on **10/16/2015** served on **10/22/2015** by way of **CERTIFIED MAIL**

RET'D 10-22-15; SERVED; SIGNED BY LINDA SMITH

Documents	15-CI-90250

COMPLAINT / PETITION filed on **10/14/2015**
CLASS ACTION COMPLAINT

AMENDED COMPLAINT filed on **11/16/2015**
PLS 1ST AMENDED CLASS ACTION COMPLAINT/COPY TO JUDGE LANE

ORDER - AGREED entered on **12/01/2015**
DEADLINE OF DEF EXPRESS SCRIPTS TOANSWER, MOVE TO DISMISS OR OTHERW ISE RESPOND TO AMENDED COMPLAINT SHALL BE 1-29-16; SHOULD A MOTION TO DISMISS BE FILED IN RESPONSE TO AMENDED COM; ANY OPPOSITION TO MOT

ORDER FOR APPEARANCE PRO HAC VICE entered on **12/18/2015**
ORDER TO ADMIT COUNSEL , PRO HAC VICE; HON. BRITT K. LATHAM/HON. ALLISON K. GRIPPO ARE ADMITTED TO PRACTICE AS CO-COUNSEL FOR DEF PRO HAC VICE; COPIES TO PARTIES LISTED

CIVIL DOCKET filed on **12/18/2015**
ORDER ENTERED

MEMORANDUM filed on **01/29/2016**
IN SUPPORT OF EXPRESS SCRIPTS INC. 'S MOTION TO DISMISS

RESPONSE filed on **02/26/2016**
IN OPPOSITION TO DEF'S MOTIONTO DISMISS PL'S 1ST AMENDED CLASS ACTION COMPLAINT

MEMORANDUM filed on **03/08/2016**
CORRECTED MEMORANDUM IN SUPPORT OFEXPRESS SCRIPTS INC.'S MOTION TO DISMISS

REPLY filed on **03/21/2016**
IN SUPPORT OF EXPRESS SCRIPTS INC. 'S MOTION TO DISMISS

NOTICE OF SERVICE filed on **03/29/2016**
DEF, EXPRESS SCRIPTS GIVES NOTICE OF SERVICE OF RESPONSES AND OBJECTIONS TO PL'S FIRST SET OF REQS FORADMISSION, INTERR AND RPOD ON THE 29TH DAY OF MARCH, 2016

CIVIL DOCKET filed on **04/15/2016**
ORAL ARGUMENT 6-14-16 AT 9AM ; ORDER TO BE TENDERED

ORDER - OTHER entered on **04/22/2016**
ORDERED THAT DEF, EXPRESS SCRIPTS INC.'S MOTION TO DISMISS IS HEREBYSCHEDULED FOR ORAL ARGUMENT ON 6- 14-16 AT 9AM; COPIES TO PARTIES LISTED

ORDER - PROTECTIVE entered on **05/09/2016**
AGREED/COPIES TO ATTYS OF RECORD

CIVIL DOCKET filed on **06/14/2016**
MOTION TO DISMISS DENIED; STATUS CONFERENCE 10-21-16 AT 9AM

ANSWER filed on **07/01/2016**
DEF, EXPRESS SCRIPTS, INC FOR ITS ANSWER TO PL'A FIRST AMENDED CLASSACTION COMPLAINT - COPY HD TO JUD GE LANE

NOTICE OF SERVICE filed on **09/15/2016**
DEF, EXPRESS SCRIPTS GIVES NOTICEOF SERVICE OF DEF'S 1ST SET OF R EQ FOR ADMISSIOS, INTERR AND RPOD UPON PL ON 9-13-19

REPORT filed on **10/13/2016**
JOINT STATUS REPORT

ORDER - AGREED entered on **10/18/2016**
AGREED ORDER TO RESCHEDULE STATUS CONFERENCE; COPIES TO J. WARD/B. LATHAM/J. BLANDFORD

NOTICE TO TAKE DEPOSITION filed on **11/16/2016**
OF EDWARD P GEARHART 12-7-16 10AM @ MCBRAYER MCGINNIS LESLIE & KIRKLAND

CIVIL DOCKET filed on **02/17/2017**
3O DAYS TO RESPOND TO MOTION, 20 DAYS TO ANSWER SH 4-21-17 @ 10 AM

ORDER SCHEDULING entered on **03/03/2017**
AD SHALL FILE RESP TO MOTION FOR LEAVE TO FILE AMENDED COMPLAINT/PL SHALL FILE ANY REPLY IN SUPPORT OFMOTION/STATUS 4-21-17 10AM/COPIES MAILED TO ATTYS

NOTICE OF CHANGE OF ADDRESS filed on **03/10/2017**
ALEX C DAVIS JONES WARD PLC

RESPONSE filed on **03/22/2017**
IN OPPOSITION TO MOTION TO FILE AMENDED COMPLAINT

RESPONSE filed on **04/12/2017**
IN SUPPORT OF MOTION TO AMEND CLASS ACTION COMPLAINT AGAINST ESPRESSSCRIPTS, INC COPIES TO JUDGE L ANE

CIVIL DOCKET filed on **04/21/2017**
SH 6-16-17 @ 10 AM, BRIEFINGS SUBMITTED

ENTRY OF APPEARANCE filed on **05/09/2017**
KATIE HALLORAN

EXHIBIT filed on **05/09/2017**

TENDERED DOCUMENT filed on **05/09/2017**

ORDER - OTHER entered on **05/12/2017**
TO SEAL DEPOSITION TRANSCRIPT OF MARYANNE CAMERON AND PL'S SECOND AMENDED CLASS ACTION COMPLAINT CO PIES TO ATTYS

SEALED DOCUMENT filed on **05/12/2017**

RESPONSE filed on **05/16/2017**
TO PLS MOTION FOR LEAVE TO FILE EVIDENCE & SECOND AMENDED COMPLAINT THAT INCLUDES THE SUBJECT EVIDENCEUNDER SEAL

ORDER - AGREED entered on **06/22/2017**
STATUS HEARING RESET FOR 8-18-17 @ 10 AM COPIES TO A DAVIS, J BLA NDFORD, B LATHAM

TENDERED DOCUMENT filed on **06/22/2017**

CIVIL DOCKET filed on **08/18/2017**
SH 9-15-2017 @10AM

INFORMATION filed on **09/15/2017**
PL'S SUPPLEMENTAL INFORMATION IN SUPPORT OF MOTION TO AMEND CLASS ACTION COMPLAINT AGAINST EXPRESS SCRIPTS, INC

CIVIL DOCKET filed on **09/15/2017**
SH 11-17-17 @ 10 AM JUDGE HAS F ILE

RESPONSE filed on **09/22/2017**

CIVIL DOCKET filed on **11/17/2017**
SH 1-19-18 @ 10 AM

ORDER - OTHER entered on **11/21/2017**
A STATUS HEARING IS SCHEDULED FOR 1-19-18 @ 10 AM COPIES TO ALL A TTYS

ORDER GRANTING entered on **12/04/2017**
LEAVE TO FILE SECOND AMENDED COMPLAINT/COPY MAILED TO J WARD B LATHAM

Events **15-CI-90250**

STATUS HEARING scheduled for **01/19/2018 10:00 AM** in room **C** with **HON. WILLIAM LANE**

STATUS HEARING scheduled for **11/17/2017 10:00 AM** in room **C** with **HON. WILLIAM LANE**

STATUS HEARING scheduled for **09/15/2017 10:00 AM** in room **C** with **HON. WILLIAM LANE**

STATUS HEARING scheduled for **08/18/2017 10:00 AM** in room **C** with **HON. WILLIAM LANE**
WAS SET 6-16-17

STATUS HEARING scheduled for **04/21/2017 10:00 AM** in room **C** with **HON. WILLIAM LANE**

STATUS HEARING scheduled for **02/17/2017 10:00 AM** in room **C** with **HON. WILLIAM LANE**

Motions

- **MOTION - OTHER** filed on **02/17/2017** by **AP**
TO FILE AN AMENDED COMPLAINT

ORAL ARGUMENTS scheduled for **06/14/2016 09:00 AM** in room **C** with **HON. WILLIAM LANE**

STATUS HEARING scheduled for **06/14/2016 09:00 AM** in room **C** with **HON. WILLIAM LANE**

MOTION HOUR scheduled for **04/15/2016 09:00 AM** in room **C** with **HON. WILLIAM LANE**

Motions

- **MOTION FOR ORAL ARGUMENT** filed on **03/24/2016** by **AD**

MOTION HOUR scheduled for **12/18/2015 09:00 AM** in room **C** with **HON. WILLIAM LANE**

Motions

- **MOTION - OTHER** filed on **11/25/2015** by **AD**
MOTION TO ADMIST COUNSEL, PRO HAC VICE

MOTION HOUR scheduled for **12/18/2015 01:01 PM** in room **C** with **HON. WILLIAM LANE**

MOTION NOT REQUIRING HEARING in room **C** with **HON. WILLIAM LANE**

Motions

- **MOTION - OTHER** filed on **05/09/2017** by **AP**
PLT'S MOTION FOR LEAVE TO FILE EVIDENCE AND SECOND AMENDED COMPLAINTTHAT INCLUDES THE SUBJECT EVIDENC E UNDER SEAL

- **MOTION TO DISMISS** filed on **01/29/2016** by **AD**

Images	**15-CI-90250**
MOTION TO APPEAR PRO HOC VICE filed on **11/25/2015** *Page(s): 8*	
TENDERED DOCUMENT filed on **11/25/2015** *Page(s): 2*	
MOTION TO DISMISS filed on **01/29/2016** *Page(s): 3*	
MEMORANDUM filed on **01/29/2016** *Page(s): 22*	
EXHIBIT filed on **01/29/2016** *Page(s): 10*	
EXHIBIT filed on **01/29/2016** *Page(s): 2*	
EXHIBIT filed on **01/29/2016** *Page(s): 66*	
TENDERED DOCUMENT filed on **01/29/2016** *Page(s): 2*	
MEMORANDUM filed on **03/08/2016** *Page(s): 99*	
REPLY filed on **03/21/2016** *Page(s): 11*	
MOTION FOR HEARING filed on **03/23/2016** *Page(s): 2*	
NOTICE - OTHER filed on **03/29/2016** *Page(s): 2*	
ANSWER filed on **07/01/2016** *Page(s): 11*	
CERTIFICATE OF MAILING filed on **09/15/2016** *Page(s): 2*	
NOTICE TO TAKE DEPOSITION filed on **11/16/2016** *Page(s): 2*	
RESPONSE filed on **03/22/2017** *Page(s): 29*	
MOTION - OTHER filed on **05/09/2017** *Page(s): 3*	
ENTRY OF APPEARANCE filed on **05/09/2017** *Page(s): 2*	
EXHIBIT filed on **05/09/2017** *Page(s): 12*	
TENDERED DOCUMENT filed on **05/09/2017** *Page(s): 2*	
RESPONSE filed on **05/16/2017** *Page(s): 3*	
TENDERED DOCUMENT filed on **06/22/2017** *Page(s): 3*	
RESPONSE filed on **09/22/2017** *Page(s): 3*	

****** End of Case Number : 15-CI-90250 ******

COMMONWEALTH OF KENTUCKY
ROWAN CIRCUIT COURT
DIVISION ONE
CIVL ACTION NO. 15-CI-90250

EDWARD P. GEARHART PLAINTIFF

v. **NOTICE TO CLERK OF DEFENDANT EXPRESS SCRIPTS INC.'S NOTICE OF REMOVAL**

EXPRESS SCRIPTS, INC. DEFENDANT

* * * * * * * *

To: Clerk of Court
Rowan Circuit Court
1001 Vandalay Drive
Frankfort, Kentucky 40601

Pursuant to 28 U.S.C. §§ 1332, 1441, 1446 and 1453, Defendant Express Scripts, Inc. has filed a Notice of Removal of this action with the United States District Court for the Eastern District of Kentucky the 3rd day of January 2018. A copy of the Notice is attached.

In accordance with 28 U.S.C. § 1446(d), the filing of both the Notice of Removal with the United States District Court for the Eastern District of Kentucky and a copy of that Notice with this Court effects the removal of the above-styled case to the United States District Court, and this Court may proceed no further unless and until the case is remanded.

Respectfully submitted,

McBRAYER, McGINNIS, LESLIE
& KIRKLAND, PLLC
201 E. Main Street, Suite 900
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(859) 231-8780
jblandford@mmlk.com

/s/ Jaron P. Blandford
JARON P. BLANDFORD

BASS, BERRY & SIMS, PLC
Britt K. Latham (*Pro Hac Vice* Forthcoming)
Elaina S. Al-Nimri (*Pro Hac Vice* Forthcoming)
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blatham@bassberry.com
eal-nimri@bassberry.com
(615) 742-6200
ATTORNEYS FOR DEFENDANT

CERTIFICATE OF SERVICE

I hereby certify that on the 3rd day of January, 2018, a true and correct copy of the foregoing was served via electronically with the Clerk of the Court by using the CM/ECF system, which will send a notice of electronic filing to all counsel of record.

/s/ Jaron P. Blandford
JARON P. BLANDFORD

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF KENTUCKY
_____ DIVISION

EDWARD P. GEARHART, Individually And On Behalf of All Others Similarly Situated	)	
Plaintiff	)	**Civil No. _____**
v.	)	
EXPRESS SCRIPTS, INC.	)	
Defendant	)	

DEFENDANT EXPRESS SCRIPTS, INC.'S NOTICE OF REMOVAL

Pursuant to 28 U.S.C. §§ 1332, 1441, 1446 and 1453, Defendant Express Scripts, Inc. ("ESI") hereby gives notice of the removal of this action from the Rowan County Circuit Court in the Commonwealth of Kentucky to the United States District Court for the Eastern District of Kentucky. In support of this Notice, ESI states the following facts, which show that this case may be properly removed to this Court.

1. Plaintiff Edward P. Gearhart ("Plaintiff") first filed this case on October 14, 2015 in the Rowan County Circuit Court in the Commonwealth of Kentucky, Case No. 15-CI-90250. Plaintiff's Class Action Complaint named one of ESI's affiliates as the sole defendant and did not name ESI. *See* **Exhibit A** (Copies of "all process, pleadings, and orders served" on ESI pursuant to 28 U.S.C. § 1446(a)).

2. On November 16, 2015, Plaintiff filed his First Amended Class Action Complaint instead naming ESI as defendant and deleting ESI's affiliate.

3. Plaintiff's First Amended Class Action Complaint asserted various claims against ESI, on behalf of a purported class of Kentucky citizens, for ESI's alleged practice of

overcharging customers who authorize a third party to request a copy of their prescription claims data on his or her behalf.

4. Specifically, Plaintiff alleged that ESI charged Plaintiff and members of the purported Kentucky class a "flat fee" of $75 for "data processing" in order to release a copy of Plaintiff's and the purported Kentucky class members' respective records. *See* **Exhibit A** (First Amend. Compl. ¶ 3).

5. Based on the allegations in the First Amended Class Action Complaint, the action was not removable under 28 U.S.C. §§ 1331, 1332, 1441, and 1446.

6. On February 17, 2017, Plaintiff filed a motion requesting leave to file a Second Amended Class Action Complaint. Plaintiff's Second Amended Class Action Complaint was signed and attached to the motion as an exhibit.

7. Like Plaintiff's First Amended Class Action Complaint, the Second Amended Class Action Complaint asserts various claims against ESI for allegedly overcharging customers who authorize a third party to request a copy of their prescription claims data on his or her behalf. *See id.* (Sec. Amend. Compl. at 1-2, 7-16).

8. However, the Second Amended Class Action Complaint now asserts claims against ESI on behalf of *two* purported classes: (1) a class of Kentucky citizens, which includes "[a]ll individual citizens of the State of Kentucky who were charged in excess of the statutory limit for a copy of their health records from Express Scripts"; and (2) a nationwide class, which includes "[a]ll third-parties and individuals who, themselves or on behalf of their clients, were charged and paid $75.00 to request a copy of their health information and/or health records from Express Scripts." *See id.* (Sec. Am. Compl. ¶ 12). There is no time limitation or specified class period alleged for either of the putative classes.

9. Specifically, Plaintiff's Second Amended Class Action Complaint asserts claims for (i) violation of the Kentucky Consumer Protection Act, Ky. Rev. Stat. § 367.170, *et seq.*, on behalf of the Kentucky class; (ii) fraud on behalf of both the Kentucky class and the nationwide class; (iii) unjust enrichment on behalf of both the Kentucky class and the nationwide class; (iv) violation of Kentucky's Health Records Law, Ky Rev. Stat. § 422.317(1) on behalf of the Kentucky class; and (v) declaratory judgment on behalf of both the Kentucky class and the nationwide class. *Id.* (Sec. Am. Compl. at 8-15).

10. Plaintiff seeks compensatory, consequential, statutory, exemplary, and punitive damages as well as an award of attorneys' fees on behalf of both purported classes. Plaintiff also seeks, on behalf of both purported classes, various forms of equitable or injunctive relief, including restitution of all fees paid to ESI in excess of what the law allows, and injunctive relief prohibiting ESI "from continuing to take" the alleged "unfair, deceptive, illegal and/or unlawful action" of charging a "flat fee" of $75 in order to release a copy of an individual's records. *Id.* (Sec. Am. Compl. at 15-16).

11. The parties submitted extensive briefing as to whether Plaintiff's proposed Second Amended Class Action Complaint should be permitted in light of the newly asserted claims on behalf of a purported nationwide class. *See generally id.* (Motion to File Amended Complaint; ESI's Response in Opposition to Motion; Reply in Support of Motion).

12. On May 9, 2017, Plaintiff filed a motion requesting leave to file a new version of the Second Amended Class Action Complaint under seal. Plaintiff's revised Second Amended Class Action Complaint asserted the same claims on behalf of the same two putative Kentucky and nationwide classes, but now contained some additional allegations, including allegations involving deposition testimony of ESI's corporate representative. Plaintiff sought to file the new

Second Amended Class Action Complaint under seal as it contained certain confidential materials covered by an Agreed Protective Order previously entered by the court. Along with his motion, Plaintiff simultaneously submitted a signed copy of the newly revised Second Amended Class Action Complaint to be filed under seal. *See generally id.* (Motion for Leave to File Evidence and Second Amended Complaint That Includes The Subject Evidence Under Seal; Second Amended Class Action Complaint (Filed Under Seal)).

13. On May 12, 2017, the Rowan Circuit Court ordered that the updated version of the Second Amended Class Action Complaint be filed under seal. However, the Rowan Circuit Court had yet to rule on Plaintiff's motion for leave to file an amended complaint. *See id.* (Order from May 12, 2017).

14. On December 4, 2017, the Rowan Circuit Court entered an order granting Plaintiff's motion for leave to file a Second Amended Class Action Complaint. *See id.* (Order Granting Leave).

15. Counsel for ESI received a copy of the Rowan Circuit Court's order via U.S. mail on December 6, 2017.

16. Based on the allegations contained in both versions of the Second Amended Class Action Complaint, this case is properly removed to this Court pursuant to 28 U.S.C. §§ 1441 and 1446 because ESI has satisfied the procedural requirements for removal, and this Court has subject matter jurisdiction over this action pursuant to 28 U.S.C. § 1332(d).[1]

[1] Two similar actions for alleged overcharging were filed against ESI by Plaintiff's counsel on behalf of nationwide classes in Florida and Missouri. Both actions were removed to federal court without objection. *See Harrod v. Express Scripts, Inc.*, No. 8:17-cv-1607 (M.D. Fla.) and *Burton v. Express Scripts, Inc.*, No. 4:17-cv-2279 (E.D. Mo.).

I. ESI HAS SATISFIED THE PROCEDURAL REQUIREMENTS FOR REMOVAL.

17. On December 4, 2017, the Rowan Circuit Court entered an order granting Plaintiff's motion for leave to file the Second Amended Class Action Complaint, and counsel for ESI received a copy of the Rowan Circuit Court's order via U.S. mail on December 6, 2017.

18. Upon receipt of the Rowan Circuit Court's order granting Plaintiff's motion for leave to file the Second Amended Class Action Complaint, ESI ascertained for the first time that the case, which was not previously removable, had become removable.

19. This Notice of Removal is timely, in accordance with 28 U.S.C. § 1446(b)(3), as it is filed within thirty (30) days "after receipt by [ESI], through service or otherwise, of a copy of an amended pleading, motion, order or other paper from which it may first be ascertained that the case is one which is or has become removable." *See* 28 U.S.C. § 1446(b)(3); *see also Graiser v. Visionworks of America, Inc.*, 819 F.3d 277, 283 (6th Cir. 2016) (discussing the process for removal under the Class Action Fairness Act of 2005); *Freeman v. Blue Ridge Paper Prods.*, Inc., 551 F.3d 405, 409-10 (6th Cir. 2008) (removal was timely because defendant removed action within 30 days of the state court's written order granting leave to amend); *Crump v. Wal-Mart Grp. Health Plan*, 925 F. Supp. 1214, 1219 (W.D. Ky. 1996) (30-day removal period begins to run when state court grants motion to amend).

20. As of this date, no additional pleadings and papers have been filed, and no proceedings have occurred the Rowan County Circuit Court since the court granted Plaintiff's motion for leave to file a Second Amended Class Action Complaint. *See* **Exhibit B** (docket). ESI has not filed a responsive pleading to the Second Amended Complaint. ESI hereby reserves all rights to assert any and all defenses. ESI further reserves the right to amend or supplement this Notice of Removal.

21. ESI is removing this case to the United States District Court for the Eastern District of Kentucky pursuant to 28 U.S.C. § 1441(a), because the original action was filed in the Rowan County Circuit Court in the Commonwealth of Kentucky. This Court, therefore, is the "district and division embracing the place where [the] action is pending." *See* 28 U.S.C. § 1441(a).

22. Pursuant to 28 U.S.C. § 1446(d), a copy of this Notice of Removal is being served upon counsel for Plaintiff, and a copy is being filed with the Rowan County Circuit Court in the Commonwealth of Kentucky. *See* **Exhibit C** (Notice of Removal to Plaintiff) and **Exhibit D** (Notice of Removal to State Court).

23. An appropriate civil cover sheet JS-44 form is also attached.

II. REMOVAL IS PROPER BECAUSE THE COURT HAS SUBJECT MATTER JURISDICTION PURSUANT TO 28 U.S.C. § 1332(d).

24. The Court has original jurisdiction over this action, and the action may be removed to this Court pursuant to the Class Action Fairness Act of 2005, Pub. L. No. 109-2, 119 Sta. 4 (codified in scattered sections of 28 U.S.C.) ("CAFA").

25. As set forth below, this is a putative class action in which: (1) there are 100 or more members of the alleged class; (2) ESI is a citizen of a state different than at least one member of the proposed class; and (3) based on the allegations in the Complaint, the putative class members' claims put in controversy over $5 million, exclusive of interest and costs.

26. Accordingly, this Court has subject matter jurisdiction over this action under 28 U.S.C. § 1332(d), and the action may be removed to this Court pursuant to 28 U.S.C. § 1332(d)(2).

A. The Proposed Class Consists of More Than 100 Members.

27. Plaintiff filed this case on behalf of a putative Kentucky class and a putative nationwide class, seeking to represent "[a]ll third-parties and individuals" who were charged and paid $75.00 for copies of their "health records" from ESI. *See* **Exhibit A** (Sec. Amend. Compl. ¶ 12; Sealed Sec. Amend. Compl. ¶ 14).

28. Plaintiff alleges that "it is believed the class includes thousands of members." *Id.* (Sec. Amend. Compl. ¶ 13; Sealed Sec. Amend. Compl. ¶ 15).

29. From 2011 through 2015, during the five years prior to the filing of the original Class Action Complaint at the end of 2015, ESI's records show that it received approximately 31,210 third-party requests for records. *See* **Exhibit E** (Declaration of Valerie Sancamper, ¶ 2).[2]

30. Accordingly, the aggregate number of alleged class members is greater than 100 for the purposes of 28 U.S.C. § 1332(d)(5)(B).

B. Minimal Diversity Exists.

31. Under CAFA, only minimal diversity is required to confer original federal jurisdiction. *See* 28 U.S.C. § 1332(d)(2)(A) ("The district courts shall have original jurisdiction of any civil action in which the matter in controversy exceeds the sum or value of $5,000,000, exclusive of interest and costs, and is a class action in which . . . ***any member of a class of plaintiffs is a citizen of a State different from any defendant*****[.]**") (emphasis added). This element is satisfied here.

32. ESI is, and was at the time the court granted Plaintiff's motion for leave to file a Second Amended Class Action Complaint, a corporation duly organized and validly existing

[2] The Second Amended Class Action Complaint does not purport to describe the law applicable to all of Plaintiff's claims. While ESI does not concede that Kentucky law could apply to those claims, assuming it did, Plaintiff's claims for fraud and unjust enrichment would both be governed by a five-year statute of limitations. *See* KRS

under the laws of the State of Delaware, with its principal place of business in Missouri. *Id.* (Sec. Amend. Compl. ¶ 7; Sealed Sec. Amend. Compl. ¶ 9).

33. Plaintiff alleges that he is a citizen of the state of Kentucky. *Id.* (Sec. Amend. Compl. ¶ 7; Sealed Sec. Amend. Compl. ¶ 8). Accordingly, on information and belief, Plaintiff is a citizen of Kentucky.

34. Because at least one member of the putative class is diverse from ESI, the requirements for minimal diversity under 28 U.S.C. § 1332(d)(2)(A) are satisfied.

C. The Amount-in-Controversy Exceeds $5 Million.

35. Under CAFA, federal district courts have original jurisdiction where, among other things, the "matter in controversy exceeds the sum or value of $5,000,000, exclusive of interest and costs." 28 U.S.C. § 1332(d)(2). Per the legislative history of CAFA, "if a federal court is uncertain about whether 'all matters in controversy' in a purported class action 'do not in the aggregate exceed the sum or value of $5,000,000,' the court should err in favor of exercising jurisdiction." S. Rep. No. 109-14, at 42.

36. Plaintiff alleges three claims on behalf of a putative nationwide class and requests compensatory damages, declaratory and injunctive relief, punitive damages, and attorneys' fees, thereby placing in excess of $5 million in controversy. *See id.* (Sec. Amend. Compl. at 15-16; Sealed Sec. Amend. Compl. at 16-17). Plaintiff contends that each time ESI receives a request for records, ESI charges a "flat fee" of $75. *Id.* (Sec. Amend. Compl. ¶ 4; Sealed Sec. Amend. Compl. ¶ 4, 31). Plaintiff further contends that in every instance, ESI "willfully misrepresents the nature of the fee," and this alleged $75 flat fee is "fraudulent and excessive." *Id.* (Sec. Amend. Compl. ¶ 5; Sealed Sec. Amend. Compl. ¶¶ 5-6).

413.120. Thus, as described further below, this case puts at issue, in the least, the claims of all those requesting records from ESI during that time period.

37. Plaintiff does not identify a relevant class period, but for purposes of establishing the amount in controversy in this case, all of the alleged claims of the purported class members should be considered. *See* 28 U.S.C. § 1332(d)(6) ("In any class action, the claims of the individual class members shall be aggregated to determine whether the matter in controversy exceeds the sum or value of $5,000,000, exclusive of interest and costs."); *see also Kendrick v. Standard Fire Ins. Co.*, 2007 WL 1035018, at *3 (E.D. Ky. Mar. 31, 2007) (finding that defendants satisfied the CAFA amount-in-controversy requirement where it could be reasonably deduced from the allegations that "the aggregate damages 'more likely than not' [would] exceed $5 million") (citation omitted).

38. Based on Plaintiff's asserted claims, the alleged class members would, at least, include those who submitted third-party record requests to ESI during the relevant time period. While ESI does not concede that Kentucky law could apply to all of the claims alleged in this case, assuming it did, Plaintiff's claims for fraud and unjust enrichment would both be governed by a five-year statute of limitations. *See* KRS 413.120.

39. In conducting extensive discovery, the parties produced information and documents for the five-year period spanning from January 1, 2011 through December 31, 2015

40. ESI's records show that from 2011 through 2015, ESI received approximately 31,210 third-party requests for records. *See* **Exhibit E** at 1.

41. Considering Plaintiff's challenge to all of these record requests, and its related contention that the amount ESI charges to collect records is improper for each request, Plaintiff's request for compensatory damages related to these record requests therefore potentially places approximately $2,340,750 in controversy. *Id.* (31,210 requests x $75).

42. Of course, this number reflects only the amount placed in controversy by Plaintiff's compensatory claims for the five-year period between 2011 and 2015, based on ESI's historical records.

43. In addition to compensatory damages, Plaintiff also seeks declaratory and injunctive relief, seeking to enjoin ESI from charging the $75 "flat fee" in the future. *See* **Exhibit A** (Sec. Amend. Compl. at15-16; Sealed Sec. Amend. Compl. at16-17).

44. The declaratory and injunctive relief sought by Plaintiff results in a concrete benefit to Plaintiff and the purported classes in the form of $75 per record request submitted to ESI, effectively in perpetuity. *See Petrey v. K. Petroleum, Inc.*, No. 6:07-168-DCR, 2007 WL 2068597, at *2 (E.D. Ky. July 16, 2007) ("In actions in which a plaintiff is seeking declaratory or injunctive relief, the amount in controversy is measured by the value of the object of the litigation. . . the Plaintiffs are seeking monetary damages and declaratory relief. Thus, for purposes of determining the amount in controversy, the Court must consider not only the money judgment sought but also the 'value of the object of the litigation.'") (quoting *Hunt v. Wash. St. Apple Advert. Comm'n*, 432 U.S. 333, 347 (1977) (holding that the value of declaratory relief must be included in the calculation of the amount in controversy)). Thus, the value of this declaratory and injunctive relief further adds to the amount in controversy in this case.

45. Since 2011, third-party requests for prescription claims data have been increasing. In 2015 and 2016, ESI received 9,636 and 7,641 requests from third parties, respectively. *See* **Exhibit E** at 2.

46. Assuming that the rate at which ESI will continue to receive requests is an average of the requests received in 2015 and 2016, ESI will conservatively receive 8,639 requests in each of the next five years alone. Thus, the injunction Plaintiff seeks could

potentially prohibit the collection of $3,239,625 for the next five years. *See id.* (8,639 requests x $75 x 5 years). This sum is considered in determining the amount in controversy associated with this case.

47. Considering only Plaintiff's request for monetary damages and injunctive relief, there could be $5,580,375 in controversy in this case, satisfying CAFA's $5 million jurisdictional threshold.

48. Additionally, Plaintiff seeks punitive damages, which are appropriate for consideration in determining the amount in controversy for removal under CAFA. *See Hayes v. Equitable Energy Res. Co.*, 266 F.3d 560, 572 (6th Cir. 2001) ("When determining the jurisdictional amount in diversity cases, punitive damages must be considered . . . unless it is apparent to a legal certainty that such cannot be recovered") (citation omitted); *England v. Advance Stores Co.*, No. 1:07-cv-00174, 2008 WL 4372902, at *2 (W.D. Ky. Sept. 22, 2008) (finding defendant's calculation of amount in controversy for CAFA removal reasonable when considering all relief sought, including punitive damages); *Kendrick*, 2007 WL 1035018, at *3 (noting that "[t]o the extent there remains a question [that the amount in controversy exceeds $5 million], removing Defendants also point out other damages sought . . . [including] punitive damages.") (citing *Brown v. Jackson Hewitt, Inc.*, 2007 WL 642011, at *3 (N.D. Ohio 2007) (noting punitive damages are considered in determining amount in controversy in the Sixth Circuit)).

49. Plaintiff has not indicated the amount of punitive damages he seeks. However, the amount of punitive damages in controversy can be estimated by applying the same ratio of punitive-to-compensatory damages that has been upheld in other cases. *See State Farm Mutual Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 425 (2003) (stating that "[s]ingle digit multipliers are

more likely to comport with due process . . . than awards with ratios in the range of 500 to 1"); *Clark v. Chrysler Corp.*, 436 F.3d 594, 606-07 (6th Cir. 2006) (applying *State Farm*, and concluding that a 13:1 ratio between punitive and compensatory damages was excessive, and determining that a 2:1 ratio was warranted in products liability action); *Fastenal Co. v. Crawford*, 609 F. Supp. 2d 650, 670 (E.D. Ky. 2009) (finding ratio of punitive-to-compensatory damages in the range of 1:1 to 2:1 reasonable in action based on fraud claims); *PBI Bank, Inc. v. Signature Point Condominiums LLC*, 2016 WL 7030423, at *21 (Ky. Ct. App. Dec. 2, 2016) (finding that a little more than a 3:1 ratio of punitive-to-compensatory damages was not excessive in fraud action).

50. In this case, for purposes of determining jurisdiction, even a conservative punitive damages estimate of a 1:1 ratio of compensatory damages could bring the amount in controversy over CAFA's $5 million jurisdictional threshold to $11,160,750.

51. Finally, Plaintiff seeks statutory attorneys' fees, which are also appropriate for consideration in determining the amount in controversy for removal under CAFA. *See* **Exhibit A** (Sec. Amend. Compl. at 9-10, 15; Sealed Sec. Amend. Compl. at 11, 17).*; see also Kendrick*, 2007 WL 1035018, at *3 (noting that the Sixth Circuit considers statutory attorneys' fees in calculating the amount in controversy and other jurisdictions have similarly included such fees in the CAFA context as long as they were authorized by that state's law); *Hampton v. Safeco Ins. Co. of Am.*, 2013 WL 1870434, at *1 (E.D. Ky. May 3, 2013) ("The Sixth circuit has held that reasonable attorney's fees may be included in determining the jurisdictional amount in controversy in diversity cases, assuming those fees are allowed by statute.") (citing *Charvat v. GVN Mich., Inc.*, 561 F.3d 623, 630 n.5 (6th Cir. 2009).

52. Reasonable estimates of attorneys' fees may be considered in calculating the amount in controversy. *See e.g., Carrollton Hosp., LLC v. Kentucky Insight Partners II, LP*, 2013 WL 5934638, at *4 (E.D. Ky. Oct. 31, 2013) (finding that while "[s]ome speculation is necessary when estimating legal fees," estimated attorneys' fees of less than fifty percent of the all damages claimed is "not an unreasonable estimate" for purposes of determining the amount in controversy) (citing *Pub. Funding Corp. v. Lawrence Cnty. Fiscal Court*, 892 F.2d 80 (6th Cir.1989)); *Hollon v. Consumer Plumbing Recovery Ctr.*, 417 F. Supp. 2d 849, 853 (E.D. Ky. 2006) (finding amount in controversy to be met assuming attorneys' fees in an amount of thirty percent).

53. Without even assuming any amount for attorneys' fees, Plaintiff's claims for compensatory damages, declaratory and injunctive relief, and punitive damages could conservatively bring the amount in controversy to approximately $11,160,750, which is well over the $5 million jurisdictional threshold for CAFA. *See Hollon*, 417 F. Supp. at 853 (denying motion to remand because "the amount in controversy [was] met easily by combining the Plaintiff's assessment of [compensatory damages], with a conservative 1–1 ratio of punitive damages, and attorneys [sic] fees in an amount of thirty percent.").

III. CONCLUSION

54. For all the reasons stated, this action is removable to this Court pursuant to 28 U.S.C. §§ 1441, 1446, and 1453, and this Court may exercise jurisdiction over this matter pursuant to 28 U.S.C. § 1332(d).

Based on the foregoing, ESI respectfully requests that this action be removed from the Rowan County Circuit Court in the Commonwealth of Kentucky to the United States District Court for the Eastern District of Kentucky pursuant to 28 U.S.C. §§ 1332, 1441, 1446 and 1453.

Respectfully submitted,

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(615) 742-6200
ATTORNEYS FOR DEFENDANT

CERTIFICATE OF SERVICE

I hereby certify that on the 3rd day of January, 2018, a true and correct copy of the foregoing was served via electronically with the Clerk of the Court by using the CM/ECF system, which will send a notice of electronic filing to all counsel of record.

/s/ Jaron P. Blandford
JARON P. BLANDFORD

4825-6201-7114, v. 1

JS 44 (Rev. 07/16)

CIVIL COVER SHEET

The JS 44 civil cover sheet and the information contained herein neither replace nor supplement the filing and service of pleadings or other papers as required by law, except as provided by local rules of court. This form, approved by the Judicial Conference of the United States in September 1974, is required for the use of the Clerk of Court for the purpose of initiating the civil docket sheet. *(SEE INSTRUCTIONS ON NEXT PAGE OF THIS FORM.)*

I. (a) PLAINTIFFS

Edward P. Gearhart

(b) County of Residence of First Listed Plaintiff Rowan County, KY
(EXCEPT IN U.S. PLAINTIFF CASES)

(c) Attorneys *(Firm Name, Address, and Telephone Number)*

Jasper D. Ward IV, Alex C. Davis, & Katie Halloran, Jones Ward PLC, 1205 E, Washington Street, Suite 111 Louisville KY 40206

DEFENDANTS

Express Scripts, Inc.

County of Residence of First Listed Defendant St. Louis County, MO
(IN U.S. PLAINTIFF CASES ONLY)

NOTE: IN LAND CONDEMNATION CASES, USE THE LOCATION OF THE TRACT OF LAND INVOLVED.

Attorneys *(If Known)*

Jaron Blandford, McBrayer McGinnis, Leslie & Kirkland PLLC, 201 East Main Street, Lexington, KY 40507 & Britt Latham, Bass, Berry & Sims PLC, 150 Third Ave. S., Nasvhiville, TN 37201

II. BASIS OF JURISDICTION *(Place an "X" in One Box Only)*

- ☐ 1 U.S. Government Plaintiff
- ☐ 3 Federal Question *(U.S. Government Not a Party)*
- ☐ 2 U.S. Government Defendant
- ☒ 4 Diversity *(Indicate Citizenship of Parties in Item III)*

III. CITIZENSHIP OF PRINCIPAL PARTIES *(Place an "X" in One Box for Plaintiff and One Box for Defendant)*
(For Diversity Cases Only)

	PTF	DEF		PTF	DEF
Citizen of This State	☒ 1	☐ 1	Incorporated *or* Principal Place of Business In This State	☐ 4	☐ 4
Citizen of Another State	☐ 2	☐ 2	Incorporated *and* Principal Place of Business In Another State	☐ 5	☒ 5
Citizen or Subject of a Foreign Country	☐ 3	☐ 3	Foreign Nation	☐ 6	☐ 6

IV. NATURE OF SUIT *(Place an "X" in One Box Only)*

CONTRACT
- ☐ 110 Insurance
- ☐ 120 Marine
- ☐ 130 Miller Act
- ☐ 140 Negotiable Instrument
- ☐ 150 Recovery of Overpayment & Enforcement of Judgment
- ☐ 151 Medicare Act
- ☐ 152 Recovery of Defaulted Student Loans (Excludes Veterans)
- ☐ 153 Recovery of Overpayment of Veteran's Benefits
- ☐ 160 Stockholders' Suits
- ☐ 190 Other Contract
- ☐ 195 Contract Product Liability
- ☐ 196 Franchise

REAL PROPERTY
- ☐ 210 Land Condemnation
- ☐ 220 Foreclosure
- ☐ 230 Rent Lease & Ejectment
- ☐ 240 Torts to Land
- ☐ 245 Tort Product Liability
- ☐ 290 All Other Real Property

TORTS

PERSONAL INJURY
- ☐ 310 Airplane
- ☐ 315 Airplane Product Liability
- ☐ 320 Assault, Libel & Slander
- ☐ 330 Federal Employers' Liability
- ☐ 340 Marine
- ☐ 345 Marine Product Liability
- ☐ 350 Motor Vehicle
- ☐ 355 Motor Vehicle Product Liability
- ☐ 360 Other Personal Injury
- ☐ 362 Personal Injury - Medical Malpractice

PERSONAL INJURY
- ☐ 365 Personal Injury - Product Liability
- ☐ 367 Health Care/ Pharmaceutical Personal Injury Product Liability
- ☐ 368 Asbestos Personal Injury Product Liability

PERSONAL PROPERTY
- ☐ 370 Other Fraud
- ☐ 371 Truth in Lending
- ☐ 380 Other Personal Property Damage
- ☐ 385 Property Damage Product Liability

CIVIL RIGHTS
- ☐ 440 Other Civil Rights
- ☐ 441 Voting
- ☐ 442 Employment
- ☐ 443 Housing/ Accommodations
- ☐ 445 Amer. w/Disabilities - Employment
- ☐ 446 Amer. w/Disabilities - Other
- ☐ 448 Education

PRISONER PETITIONS

Habeas Corpus:
- ☐ 463 Alien Detainee
- ☐ 510 Motions to Vacate Sentence
- ☐ 530 General
- ☐ 535 Death Penalty

Other:
- ☐ 540 Mandamus & Other
- ☐ 550 Civil Rights
- ☐ 555 Prison Condition
- ☐ 560 Civil Detainee - Conditions of Confinement

FORFEITURE/PENALTY
- ☐ 625 Drug Related Seizure of Property 21 USC 881
- ☐ 690 Other

LABOR
- ☐ 710 Fair Labor Standards Act
- ☐ 720 Labor/Management Relations
- ☐ 740 Railway Labor Act
- ☐ 751 Family and Medical Leave Act
- ☐ 790 Other Labor Litigation
- ☐ 791 Employee Retirement Income Security Act

IMMIGRATION
- ☐ 462 Naturalization Application
- ☐ 465 Other Immigration Actions

BANKRUPTCY
- ☐ 422 Appeal 28 USC 158
- ☐ 423 Withdrawal 28 USC 157

PROPERTY RIGHTS
- ☐ 820 Copyrights
- ☐ 830 Patent
- ☐ 840 Trademark

SOCIAL SECURITY
- ☐ 861 HIA (1395ff)
- ☐ 862 Black Lung (923)
- ☐ 863 DIWC/DIWW (405(g))
- ☐ 864 SSID Title XVI
- ☐ 865 RSI (405(g))

FEDERAL TAX SUITS
- ☐ 870 Taxes (U.S. Plaintiff or Defendant)
- ☐ 871 IRS—Third Party 26 USC 7609

OTHER STATUTES
- ☐ 375 False Claims Act
- ☐ 376 Qui Tam (31 USC 3729(a))
- ☐ 400 State Reapportionment
- ☐ 410 Antitrust
- ☐ 430 Banks and Banking
- ☐ 450 Commerce
- ☐ 460 Deportation
- ☐ 470 Racketeer Influenced and Corrupt Organizations
- ☐ 480 Consumer Credit
- ☐ 490 Cable/Sat TV
- ☐ 850 Securities/Commodities/ Exchange
- ☒ 890 Other Statutory Actions
- ☐ 891 Agricultural Acts
- ☐ 893 Environmental Matters
- ☐ 895 Freedom of Information Act
- ☐ 896 Arbitration
- ☐ 899 Administrative Procedure Act/Review or Appeal of Agency Decision
- ☐ 950 Constitutionality of State Statutes

V. ORIGIN *(Place an "X" in One Box Only)*

- ☐ 1 Original Proceeding
- ☒ 2 Removed from State Court
- ☐ 3 Remanded from Appellate Court
- ☐ 4 Reinstated or Reopened
- ☐ 5 Transferred from Another District *(specify)*
- ☐ 6 Multidistrict Litigation - Transfer
- ☐ 8 Multidistrict Litigation - Direct File

VI. CAUSE OF ACTION

Cite the U.S. Civil Statute under which you are filing *(Do not cite jurisdictional statutes unless diversity)*:
28 U.S.C. §§ 1332, 1441, 1446, and 1453

Brief description of cause:
Class Action related to alleged overcharges

VII. REQUESTED IN COMPLAINT:

☒ CHECK IF THIS IS A CLASS ACTION UNDER RULE 23, F.R.Cv.P.

DEMAND $ Not Listed

CHECK YES only if demanded in complaint:
JURY DEMAND: ☒ Yes ☐ No

VIII. RELATED CASE(S) IF ANY

(See instructions):

JUDGE _____ DOCKET NUMBER _____

DATE 1/3/2018

SIGNATURE OF ATTORNEY OF RECORD

FOR OFFICE USE ONLY

RECEIPT # _____ AMOUNT _____ APPLYING IFP _____ JUDGE _____ MAG. JUDGE _____