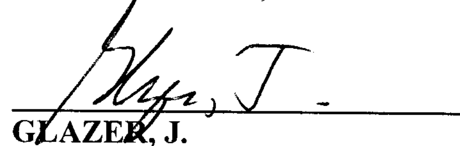
IN THE COURT OF COMMON PLEAS OF PHILADELPHIA COUNTY
FIRST JUDICIAL DISTRICT OF PENNSYLVANIA
TRIAL DIVISION-CIVIL

LIBERTY MUTUAL GROUP, INC. ET. AL., Plaintiffs,	:	September Term 2017
v.	:	No. 1541
700 PHARMACY, LLC, ET. AL., Defendants.	:	Commerce Program
	:	Control Nos 19052627/19052659/ 19052656/19052657/19052697

ORDER

AND NOW, this 13th day of September, 2019, upon consideration of defendants' motions for summary judgment and plaintiffs' responses in opposition, all matters of record and in accord with the attached Opinion, it hereby is **ORDERED** that defendants' motions for summary judgment are **Granted** and judgments are entered in favor of defendants and against plaintiffs on all claims. Plaintiffs' amended complaint is dismissed.

BY THE COURT,



GLAZER, J.

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Liberty Mutual Group Et-WSJDM

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OPINION

This is an action brought by Liberty Mutual Group, Inc. and its related companies, underwriters and subsidiaries[1] alleging fraud, insurance fraud, unjust enrichment and aiding and abetting fraud. The action is filed against pharmacies, pharmacists, physicians, physician assistants and lay investors[2] for creating a business model which allegedly skirts the law and causes plaintiffs to pay thousands of dollars to defendants for unwarranted compounding pain cream prescriptions written to patients that suffered a work injury or an automobile accident

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[1] Plaintiffs are Liberty Mutual Group, Inc., Liberty Mutual Insurance Company and their underwriting companies, American States Insurance Company, Colorado Casualty Company, Employers Insurance Company of Wausau, Excelsior Insurance Company, Liberty Insurance Corporation, Liberty Mutual Fire Insurance Company, Liberty Mutual Fire Insurance Company, Liberty Mutual Insurance Company/Consolidated Insurance Company, Liberty Northwest Insurance Corporation, LM Insurance Corporation, Peerless Indemnity Insurance Company, Peerless Insurance Company, and Safeco Insurance Company of Illinois. Collectively these entities shall be referred to as "plaintiffs" herein.

[2] Defendants are as follows: 1) the pharmacy defendants- 700 Pharmacy, LLC, Insight Pharmaceutical Solutions, LLC, United Pharmacy Services, LLC, Armour Pharmaceutical Solutions, LLC, Omni Pharmacy Services, LLC, Empire Pharmacy Services, LLC, Medicine Worx, LLC, Medarbor LLC, and 1st Choice Pharmacy LLC; 2) the physician defendants -Rishin Patel, M.D., Miteswar Purewal, M.D., Shailen Jalali, M.D., Mark Avart, D.O., Dennis W. Ivill, M.D., Jonas Gopez, M.D., Ronald Luber, D.O., Thomas Skeehan, M.D., Uplekh Purewal, M.D., Scott Epstein, M.D., Mark Eskander, M.D., Cory Hawley, DPM, Mitesh K. Patel, M.D., Gerald Dworkin D.O., Avner R. Griver, M.D., Joseph David Paz, D.O., Steve Valentino, D.O. and Ronald B. Lincow, D.O.; 3) the physician assistant defendants Theresa DiJoseph and Laura Seczech; 4) the pharmacist defendants, Christine Vu, Hajira Ebady, Jason Chong, Steven Katsarakes, Mina Nakhla, Gracja Osinska, Young Hoon Gim, Nina Luu, and Julietta Leung; and 5) the lay investor defendants Phillip Shin, Miroslav Kesic and Mandeep Gill.

injury. Presently before the court are the parties' motions for summary judgment on plaintiffs' direct claims against defendants. For the reasons discussed below, the motions for summary judgment are granted.[3]

A. The Business Model

In 2009, Phillip Shin ("Shin") formed MedArbor Pharmacy. Shin sold shares in the pharmacy to Stephen Katsarakes, a pharmacist, who eventually became Shin's partner. MedArbor Pharmacy dispensed medication and offered a delivery service to its customers. In order to increase MedArbor's volume of filling prescriptions, Shin visited area medical offices to explain the nature of this pharmacy and the services it offered. During one of these visits, Shin met Dr. Rishin Patel, M.D., a pain management doctor at Lankenau Hospital and struck up a relationship with Patel. Dr. Patel's practice included patients suffering from pain with limited mobility who needed an easily accessible pharmacy that delivered prescriptions.

In 2012, Shin acquired an interest in MLS Pharmacy. This pharmacy was located in the same building as Main Line Spine, an orthopedic medicine practice operated by Roy Lerman, M.D. On November 9, 2012, Shin and Dr. Lerman agreed to form 700 Pharmacy LLC. In this partnership, Shin acted as the managing member of the pharmacy. In addition to Shin and Lerman, the pharmacy was also owned by defendant doctors Patel, John Park, Shailen Jalali and Miteswar Purewal, pharmacists Jason Chong and Stephen Katsarkes and non-physician/non pharmacist Alana Shin. As the managing member, Shin tracked the volume and type of prescriptions presented to the pharmacy for completion, signed tax returns and paid distributions to the pharmacies' members. The physician ownership portion in 700 Pharmacy did not exceed

[3] In addition to the motions for summary judgment to plaintiffs direct claims, there are also pending two motions for summary judgment on defendants' counterclaims. These motions are addressed in separate orders issued by the court.

49%.[4] Patients of Dr. Patel could obtain medication at the pharmacy located in the same building as their doctor's office or they could have prescriptions sent to the pharmacy, which would deliver the medications to their homes by carrier.

Patel and Shin opened additional pharmacies using 700 Pharmacy LLC as the model including Insight Pharmaceutical Solutions, LLC, United Pharmacy Services, LLC, Armour Pharmaceutical Solutions, LLC, Omni Pharmacy Services, LLC, and Empire Pharmacy Services, LLC, and 1st Choice Pharmacy. These pharmacies shared similar ownership structures that included physicians, pharmacists, physician assistants and lay persons.

According to plaintiffs, Patel approached physicians about investing in and becoming referral members in the pharmacies. Patel explained to potential investors that the pharmacies were generally profitable and gave examples of past dividends issued to investors. Physicians invested modest sums of $3,000 to $5,000 and received a percentage of ownership from 1% to 14% based on the investment made. Profits were distributed based on the investors' equity ownership.

Shin handled the day to day management of the pharmacies through Insight Medical Partners, LLC and/or Medicine Worx, LLC which is owned solely by Shin and his wife. Insight Medical Partners, LLC and Medicine Worx, LLC are located at 700 E. Township Line Road, Haverford which is the same address used for some of the defendant pharmacies. [5] Medicine Worx is not a pharmacy and does not have an ownership interest in the pharmacies. It handled the day-to-day management while Insight Medical Partners kept the books and records for the

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[4] (Defendants' Exhibit "74" attached to 700 Defendants motion for summary judgment.

[5] Having the same address raised one of the red flags for the National Insurance Crime Bureau ("NICB") and for plaintiffs' fraud unit leading to the investigation of the pharmacies business practices.

company and communicated with individuals who were interested in acquiring an ownership interest in pharmacies. Medicine Worx is paid by the pharmacies for its services. Medicine Worx hires a pharmacist in charge who manages all pharmacy operations for his or her pharmacy. The physician in charge selects the suppliers of medications, orders the supplies and sets the prices.

II. Physician Investors

Physician investors were not given a choice of pharmacy when making this investment. In some situations, physicians created limited liability companies to own the shares of the pharmacies. The pharmacies issued and the physicians received IRS Form K-1s representing their yearly profit distribution. Some defendant physicians owned shares in multiple pharmacies. Physicians with an ownership interest in Omni, Empire, United, Insight and Armour signed Operating Agreements that contained a non-competition and non-solicitation clause. The Armour Operating Agreement contained a member limitation for licensed physicians. Specifically, section 2.12- Member Limitation provided "Of the total number of Units issued and outstanding at any time, no more than 49% may be owned by referring licensed physicians." The Operating Agreements also contained a Non-Solicitation provision, section 6.2.2, which provided as follows:

> (a) Customers. For as long as he owns Units and for a period of three (3) years thereafter, no Member shall, directly or indirectly, solicit any person who has been a customer of the Company, or any family member of such a person, or otherwise seek to induce any such person to use the services of another pharmacy.
> (b) Referral Sources. For as long as he owns Units and for a period of three (3) years thereafter, no Member shall, directly or indirectly, solicit any physician or other person who has referred business to the Company, or otherwise seek to induce any such physician or other person to use the services of another pharmacy.
> (c) Employees and Contractors. For as long as he owns Units and for a period of three (3) years thereafter, no Member shall, directly or indirectly, employ any person who has been an employee or contractor of the company or initiate contact or communicate, directly or indirectly, with such person in an effort to induce such

person to terminate their relationship with the Company or perform services at any other pharmacy.[6] (Plaintiffs exhibit 22, 23, 24, 25).[7]

The pharmacies accepted workers compensation and no fault patients who were covered by insurance policies issued by plaintiffs.

III. Prescription Pads and Letters of Medical Necessity

Once the physicians became owners of the pharmacies, physicians were provided with stamps or pre-printed prescription pads for compounding cream medications. Drug compounding is often regarded as the process of combining, mixing, or altering ingredients to create a medication tailored to the needs of an individual patient. Compounding includes the combining of two or more drugs.[8] Once the physician determined which medication was best for the patient, the physician used the stamps or preprinted prescription pads to select the available formulas of compound pain cream.[9] On occasion, the formula selected was designated a name such as CN 8 and CN10. The pre-printed prescription pads identified the ingredients and percentages for the pain cream formulas. The compound prescription order form divided the medication to be prescribed between pain management, scar therapy and wound therapy. The form contained an area for directions, prescribed quantity and refills. Many physicians prescribed the compound pain creams as an alternative to narcotics to minimize opioid addiction

[6] Plaintiffs' Exhibits 22, 23, 24, 25 attached to plaintiffs' response to defendants' motion for summary judgment.

[7] The Operating Agreement for 1st Choice Pharmacy does not have a member limitation provision and the non-solicitation/non-compete provision is different. Plaintiffs Exhibit 26 attached to plaintiffs' response to defendants' motion for summary judgment.

[8] https://www.fda.gov/drugs/human-drug-compounding/compounding-and-fda-questions-and-answers.

[9] Plaintiffs' Exhibit 37 attached to plaintiffs' response to defendants' motion for summary judgment.

and relieve pain. The formulas were not prepared by the physicians but were submitted to the pharmacies for fulfillment. In some instances, physicians had specific pain creams they prescribed, while others prescribed from the list provided. Prescriptions for the pain creams would be sent electronically to the pharmacies in which the physicians had an interest. Some of the prescriptions were centrally filled at one location and made to look as though the pain cream was coming from a specific location. The pain creams were billed at prices set by defendant Shin. A tube of pain cream ranged from $5,000 to $8,000 or more per tube. The statutory cap of 110% of the average wholesale price ("AWP") was applied by defendants when paying the claim for the compound pain creams.

Preprinted Letters of Medial Necessity ("LMN") were also available. [10] The LMN set forth the patient name, date of birth, claim number, date of injury, date of service and medication. The letter was addressed to the adjuster or claim handler. The letter stated the medication was a "reasonable and medically necessary component of treatment" the physician was providing to the patient. The letter then went on to describe the rationale for the medication which included a brief history of the evolution of topical pain medications. The LMN's were signed by the physicians. Once submitted to plaintiffs, the claims were either paid, denied, or reviewed by the utilization review committees.

IV. Partnership Dividends

Defendant pharmacies issued Schedule K-1s to the investment partners which report each of the partner's share of the partnership earnings, losses, deductions and credits. Investment partners were paid dividends based on the percentage interest of ownership they purchased. The

[10] Plaintiffs' Exhibit 28 attached to plaintiffs' response to defendants' motion for summary judgment.

tax documents for some of the pharmacies reported large profits and cost of goods sold, but low or no labor costs.

V. Investigation by Liberty Mutual

On October 13, 2014, the National Insurance Crime Bureau ("NICB") received a report from Erie Insurance Company that Insight Pharmacy was auto filling compound pain cream prescriptions every thirty days even though the patient had not exhausted its use of the pain cream. NICB opened an investigation regarding the prescriptions and began monitoring Insight Pharmacy for compound pain cream prescription refills. In the meantime, in December 2014 or January 2015, William Welch, a senior investigator in Liberty Mutual' s Special Investigation Unit which investigates questionable insurance claims, was informed of a situation involving 700 Pharmacy. Welch received a report that 700 Pharmacy was filling questionable compound pain cream medications which appeared to be associated exclusively with Greater Philadelphia Spine & Pain. The medication was high priced, the LMNs for the medication were identical and it was discovered that the doctors who prescribed the medication had an ownership interest in the pharmacy that filled the medication. On January 26, 2015, Welch contacted the NICB and shared information on questionable claims involving 700 Pharmacy. The NICB flagged Welch's report as relevant since 700 Pharmacy and Insight shared the same address and Welch, together with other insurance companies and law enforcement, shared information on defendant pharmacies. On February 25, 2015, NICB issued alerts to member insurance companies in the Pennsylvania area, including plaintiffs, to review claims for Insight Pharmacy and 700 Pharmacy and to provide information regarding pharmacies automatically refilling and supplying compounded pain cream and charging more than other suppliers. [11] NICB and law enforcement

[11] Defendants' Exhibit 52 attached to 700 defendants' motion for summary judgment.

agencies expanded the investigation to include Omni Pharmacy, Armour Pharmacy, Medarbor Pharmacy and Phillip Shin, the alleged CEO of the pharmacies. Welch also participated and provided information to the NICB throughout its investigation. On January 2, 2018, NICB closed its investigation.[12] (Exhibit 38 –Defendants).

VI. Procedural History

On September 14, 2017, plaintiffs filed a five count complaint against forty two (42) defendants seeking damages and attorney fees. On November 15, 2017, plaintiffs were granted leave to file an amended the complaint. The amended complaint added additional defendants and reduced the amount of damages. Defendants filed preliminary objections to the amended complaint. On February 15, 2018, plaintiffs filed preliminary objections to the preliminary objections which were overruled by the court. On March 19, 2018, defendants' preliminary objections were sustained in part and the claim for violation of the Pennsylvania Workers' Compensation Insurance Fraud Statute and prohibition of self-referrals were dismissed. The preliminary objections to common law fraud (count I), insurance fraud (count II), unjust enrichment (count V) and aiding and abetting (count VI) were overruled. Thereafter, defendants filed motions for reconsideration which were denied. Now, before the court for disposition are defendants' motions for summary judgment which are ripe for consideration. [13]

DISCUSSION

I. Plaintiffs failed to produce evidence of a material misrepresentation regarding the compound pain cream prescriptions.

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[12] Defendants Exhibit 38 attached to defendants motion for summary judgment.

[13] Defendants respectively filed motions for sanctions based on plaintiffs' spoliation of evidence and motions to strike plaintiffs responses to the motions for summary judgment based on untimeliness. The court denied the respective motions.

In count I of the amended complaint, plaintiffs purport to state a claim for fraud. Fraud is a generic term used to describe anything calculated to deceive, whether by single act or combination, or by suppression of truth, or suggestion of what is false, whether it be by direct falsehood or by innuendo, by speech or silence, word of mouth, or look or gesture.[14] To prove fraud, plaintiff must prove by clear and convincing evidence six elements: "(1) a representation; (2) which is material to the transaction at hand; (3) made falsely, with knowledge of its falsity or recklessness as to whether it is true or false; (4) with the intent of misleading another into relying on it; (5) justifiable reliance on the misrepresentation; and (6) the resulting injury was proximately caused by the reliance."[15] In the case at hand, defendants argue that there is no evidence of fraud because defendants have not made any false or misleading statements. Upon review of the record the court agrees.[16]

One of the essential elements required to prove a claim for fraud is a material misrepresentation. In the amended complaint, plaintiffs allege defendants made false and fraudulent statements in every claim submitted to plaintiffs. In response to the motions for summary judgment, plaintiffs categorized defendants' misrepresentations as follows: statements contained within the LMN[17], statements regarding the compound pain cream prescribed, i.e. was

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[14] *Blumenstock v. Gibson,* 811 A.2d 1029, 1034 (Pa.Super.2002) (citations and quotation marks omitted), *appeal denied,* 573 Pa. 714, 828 A.2d 349 (2003).

[15] *Gibbs v. Ernst*, 538 Pa. 193, 207, 647 A.2d 882 (Pa. 1994).

[16] In responding to defendants' motions for summary judgment, plaintiffs failed to separate the defendants into groups, i.e. pharmacist, physicians etc., and identify which group is responsible for the alleged misrepresentation. Instead, plaintiffs combine all defendants together when discussing the element of material misrepresentation.

[17]Since defendant physicians signed the LMN, the statements may only be attributed to the physicians.

the pain cream a compound drug, and statements regarding the legality of defendants' business structure. [18] Each of these categories shall be discussed below.

First, as to the LMN, plaintiffs allege that the LMNs contained material misrepresentations because they were form letters submitted and signed by the physicians without individually considering the specific patient for whom the combination of the medications was being prescribed and without explaining the specific reason why the particular combination was more appropriate for that particular patient. As it pertains to these letters, this court is not the proper forum to evaluate whether the LMN set forth a proper explanation as to why the compound medication was reasonable and necessary for the patient. Disputes regarding the reasonableness or necessity of treatment must be resolved through the procedures set forth in the Workers' Compensation Act.[19] The administrative process established in the workers' compensation realm is the appropriate forum to make the determination of efficacy. The record contains evidence that some claims submitted by defendants were subject to utilization reviews. The utilization reviewers, based on the reasonable and necessary standard, made the decision to pay or not pay the claims. This court will not second guess decisions made in that process and will not decide reasonableness and necessity on those claims which were not submitted for a utilization review but could have been. Since this court is not the forum to

[18] These statements may be attributed to pharmacies, pharmacist and the physicians since the individual claim files contain numerous documents, including but not limited to medical records, LMN and prescriptions.

[19] *See, Martin v. W.C.A.B. (Red Rose Transit Authority),* 783 A.2d 384, 389 (Pa.Cmwlth. 2001). *See also, Armour Pharmacy v. Bureau of Workers' Compensation Fee Review Hearing Office*, 192 A.3d 304, 309 (Pa.Cmwlth. 2018)

review the LMN for efficacy, plaintiffs may not rely upon the LMNs as a material misrepresentation for fraud and plaintiffs claim for fraud based on the LMNs is dismissed.

The next category of misrepresentations identified by plaintiffs concern the compound pain cream prescribed. Plaintiffs argue that the compounded pain creams prescribed to patients and billed to plaintiffs as a compound drug do not meet the FDA requirements of a compound drug. In *Thompson v. Western States Medical Center,* 535 U.S. 357, 122 S.Ct. 1497, 152 L.Ed.2d 563 (2002), the Supreme Court explained drug compounding as follows:

> Drug compounding is a process by which a pharmacist or doctor combines, mixes, or alters ingredients to create a medication tailored to the needs of an individual patient. Compounding is typically used to prepare medications that are not commercially available, such as medication for a patient who is allergic to an ingredient in a mass-produced product.[20]

Compounding does not include mixing, reconstituting or other such acts that are performed in accordance with directions contained in approved labeling provided by the product's manufacturer and other manufacturer directions consistent with that labeling. [21] Section 503A of the FDCA, codified at 21 U.S.C. § 353a, regulates pharmacy compounding.[22] The statute provides that drug products compounded "for an identified individual patient based on the receipt of a valid prescription order ...approved by the prescribing practitioner... [that are] necessary for the identified patient" are exempted from normal drug-approval requirements

[20] *Id.* at 360–61, 122 S.Ct. 1497.

[21] 21 U.S.C. § 353a (e).

[22] Pennsylvania also regulates compound drugs in Title 49 Pa. Code § 27.601 *et. seq.* which provides that compounding shall be in accord with the FDCA, 21 U.S.C. § 353 (a). Additionally, § 27.602 limits a pharmacist's ability to compound drugs. For instance, a pharmacist may not compound drugs withdrawn by the FDA or removed from the market because they are unsafe, drugs that are essentially copies of commercially available drug products and drugs which the FDA said in the FDCA could not be compounded. See, 49 Pa. Code § 27.602.

under section 503A when: (1) drug compounding after the receipt of a prescription; and (2) drug compounding before the receipt of a prescription when the compounding is "based on a history [of] receiving valid prescription orders for the compounding of the drug product, which orders have been generated solely within an established relationship between" the compounding pharmacy and the patient or prescribing physician. [23]

In both scenarios, the compounded drug is (1) compounded using approved drug products; (2) compounded using ingredients that comply with national standards; (3) not compounded "regularly or in inordinate amounts..." if the compounded drug is "essentially a copy of a commercially available product"; (4) not a drug product whose safety or effectiveness may be adversely effected by compounding; and (5) compounded in a state that has entered into a "Memorandum of Understanding" ("MOU") with the FDA or, if no such MOU exists for that state, compounded by a pharmacy or individual that distributes less than "5 percent of [its] total prescription orders" to out-of-state patients.[24]

Here, the compound pain creams prescribed by the defendant physicians fit the definition of a compound drug under section 503A. The pain creams were ordered by licensed physicians for their specific individual patients. The prescriptions for the pain creams were "valid prescriptions" as required by section 503A since the prescriptions identify the name of the patient for whom the drug was prescribed.[25] The use of pre-printed prescriptions or rubber stamps is not precluded by section 503A and does not affect the prescriptions status as a "valid

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[23] 21 U.S.C. §353a (a)(1)-(2)(A) (B)(i)(ii)(I)(II).

[24] *See,* 21 U.S.C. § 353a(b).

[25] See, *Prescription Requirements Under Section 503A of the Federal Food, Drug and Cosmetic Act Guidance for Industry*, December 2016, p.6, 2016 WL 7972537 (F.D.A.).

prescription" since the prescriptions identify the name of the individual patient for whom the drug is prescribed.[26] Moreover, no evidence has been produced that the compound drug formulas prescribed by physicians are commercially available. Prescribing a similar formula for a compound pain cream to more than one patient does not remove the pain cream formula from the compound drug designation. The pain cream formula need only be prescribed for an individual patient, not solely for one patient. The pain cream formulas prescribed for one patient may also be beneficial for other patients who for instance may have an allergy to a dye or may be unable to swallow pills.[27]

Additionally, section 503A permits pharmacies to produce compound drugs in small batches. [28] Section 353a ((2) (a) of the Federal Drug and Cosmetic Act permits compounding by a licensed pharmacist or licensed physician in "limited quantities before the receipt of a valid prescription order for such individual patient". This is known as anticipatory compounding. In this situation, compounding may occur before the receipt of a valid prescription based on the history of the pharmacy receiving prescriptions for a particular drug product for an identified individual patient. The compounding occurs in the context of the relationship between the physician and the patient. The pharmacist will then compound a batch of drugs in anticipation of receiving a valid prescription for the drug. [29] There is no evidence that any anticipatory

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[26] The existence of a valid prescription for an identified patient is evidence that contrary to plaintiffs' argument, defendant pharmacies were not operating as outsourcing facilities as defined in section 503B. See, *Prescription Requirements Under Section 503A of the Federal Food, Drug and Cosmetic Act Guidance for Industry*, December 2016, p.2, 2016 WL 7972537 (F.D.A.).

[27]See, *supra* at 2.

[28] 21 U.S. C § 353a (2).

[29] See, *supra* at 5.

compounding occurred outside these parameters.[30] Since this court finds that the pain creams prescribed here satisfy the definition of compound drug, plaintiffs' arguments to the contrary may not form the basis for a fraud claim.

The last category of misrepresentation relates to the illegality of defendants ownership structure. Particularly, plaintiffs take issue with the defendant physicians' minority ownership in the defendant pharmacies. Plaintiffs argue that the ownership structure provides a means for defendant physicians to be paid alleged kickbacks for the prescriptions written. The Pharmacy Act governs the practice of pharmacies by its rules and regulations and its establishment of the State Board of Pharmacy, which is charged with regulating the practice of pharmacies, licensing pharmacists, investigating all violations of the Pharmacy Act, and prosecuting violations where appropriate.[31] The Pharmacy Act clearly indicates the Legislature's intention to specifically define 'grossly unprofessional conduct' by means of the thirteen enumerated grounds provided in the statute in order to provide in advance clear notice of what is prohibited conduct and thus avoid vagueness defects. [32] Physician ownership is not prohibited by the Pharmacy Act as long as the medical practitioners holding a proprietary or beneficial interest in the pharmacy does not exercise supervision or control over the pharmacist in his professional responsibilities and duties. [33] Defendants admit that they are investors/owners in the pharmacies. The evidence shows that the interest owned by the physicians is not more than 49%, a percentage which has been

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[30] Compounding drugs in limited quantities per section 503A is also evidence that the defendant pharmacies were not operating as outsourcing facilities as defined by section 503B.

[31] 63 P.S. §§ 390–1 *et. seq.*

[32] *Pennsylvania State Bd. of Pharmacy v. Cohen*, 292 A.2d 277, 282, 448 Pa. 189, 199 (Pa. 1972).

[33] 63 P.S. § 390-8 (14.1).

approved by the Pharmacy Board. Hence, physician ownership in defendant pharmacies is lawful. The evidence further shows that the interest held by the defendant physicians is non-voting, non-controlling and non-supervisory. [34]

Plaintiffs further argue that the pharmacies business structure is illegal because defendant physicians engaged in self-referrals and received "kickbacks" for the number of prescriptions written for pain creams. According to plaintiffs, the "kickbacks" were in the form of dividends; the more prescriptions written for pain creams, the larger the dividend. In an effort to support this claim, plaintiffs attached as exhibits tax returns for the pharmacies as well as included charts within their response to the motions for summary judgment for each pharmacy anonymously identifying the investor by number, the percentage ownership and the dividend received. [35] However, there is no evidence correlating the amount of the dividend received by the investor to the number of prescriptions written and that physician defendants were paid more dividends based on the number of prescriptions for pain cream they wrote. Owners were paid dividends based on the pharmacies profits, which included compounded drugs as well as pills and other medications the pharmacies were authorized to dispense and the percentage of ownership in the pharmacy. The fact that the investors were paid large dividends does not correlate to illegal kickbacks. The large dividends were in part due to the fee schedule used by plaintiffs to reimburse the claims. The evidence shows that the pain creams were billed at the average

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[34] See 700 defendants' Exhibit 74 attached to defendants' motion for summary judgment. .

[35] Plaintiffs take issue with the reimbursement amount paid to the pharmacies for the compound pain creams. However, the issue is not with the prescriptions but with the formularies used by plaintiffs to reimburse for the claims submitted. The cost is high since each medication used to create the compound drug is billed separately. Plaintiffs have not presented any evidence that defendants sought reimbursement for amounts higher than the approved fee schedule for workers compensation or the MVFRL.

wholesale price (AWP), a price which is standard within the industry and paid based on plaintiffs use of the standard fee schedules.[36] As such, while the dollar amount of the dividends paid to the investors is great, the court does not find the dividend payment to be a "kickback".

Plaintiffs also rely on the alleged illegality of self-referrals to support their fraud claim however, there is no evidence that any self- referrals were contrary to the law. Title 35 P.S. § 449.22 (a) provides as follows:

> "any practitioner of the healing arts shall, prior to referral of a patient to any facility or entity engaged in providing health-related service, tests, pharmaceuticals, appliances or devices, disclose to the patient any financial interest of the practitioner or ownership by the practitioner in the facility or entity. In making any referral, the practitioner of the healing arts may render any recommendations he considers appropriate, but shall advise the patient of his freedom of choice in the selection of a facility or entity. "

This statutory provision does not make self-referrals automatically illegal. On the contrary, a physician may refer a patient to a pharmacy if the physician disclosed his/her financial interest in the pharmacy.[37] The record evidence shows that in fact such disclosures were made. There is no evidence of illegal self-referrals.[38] Based on the foregoing, the court

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[36] See, 49 Pa. Code § 127.131.

[37] If this court were to find a violation of this statute, enforcement of this provision is for the appropriate licensing board . See, 35 P.S. § 449.22 (c).

[38] Plaintiffs rely upon the Medicare and Medicaid Patient and Program Protection Act, 42 U.S. C. A. § 1320a-7b to support their claim of illegal self-referrals and illegal business model. However, this provision applies only to Federal health care programs. Additionally, plaintiffs reliance on 34 Pa. Code § 127.301, which makes reference to the safe harbor provisions contained within the Medicare and Medicaid Patient and Program Protection Act, 42 U.S. C. A. § 1320a-7b is also misplaced. While this provision is applicable to workers compensation providers, this court is not the proper forum to determine whether the provider violated referral standards in the workers compensation arena. The Bureau of the Workers' Compensation is the proper authority to decide violation of referral standards. See 34 Pa. Code § 127.302. Additionally, this court on March 9, 2018 held that there is no private right of action for plaintiffs' claims for Prohibition of Self-Referrals, 35 P.S. § 449.22 and PA Workers Compensation Insurance Fraud Statute, 77 P.S. § 1039.3(b). See order dated March 9, 2018 sustaining in part and overruling in part preliminary objections.

finds that plaintiffs have failed to produce evidence to show that defendants made material misrepresentations. Since plaintiffs have failed to present evidence that defendants made material misrepresentations, the claim for common law fraud is dismissed.[39]

II. Plaintiffs claim for unjust enrichment fails since there is no evidence that defendants were unjustly enriched.

Unjust Enrichment is an equitable doctrine. Under the doctrine, the law implies that a contract exists when a party is found to have been unjustly enriched; the doctrine requires the offending party to pay the plaintiff the value of the benefit he has conferred on the defendant. [40] A party alleging that a defendant has been unjustly enriched must establish the following: (1) plaintiff conferred a benefit on the defendant; (2) the defendant appreciated the benefit; and (3) acceptance and retention by the defendant of the benefits, under the circumstances, would make it inequitable for the defendant to retain the benefit without paying for the value of the benefit. [41]. Further, a defendant need not have accepted and appreciated the benefit intentionally; instead, the focus remains on the question of whether the defendant has been unjustly enriched. Additionally, the plaintiff bears the burden of establishing either that the defendant wrongfully secured the benefit or passively received a benefit that it would be unconscionable to retain. [42]

Here, plaintiffs' claim for unjust enrichment fails as a matter of law. First, while defendant pharmacists, lay investors, physicians and physician assistants did realize a benefit in

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[39] Since plaintiffs rely upon the same representations as evidence of insurance fraud under Pennsylvania Insurance Fraud Statute, 18 Pa. C. S. § 4117, the claim for insurance fraud is also dismissed.

[40] *Mitchell v. Moore,* 729 A.2d 1200 (Pa.Super.1999), *petition for allowance of appeal denied,* 561 Pa. 698, 751 A.2d 192 (2000).

[41] *Styer v. Hugo,* 619 A.2d 347, 350 (Pa. Super. 2018).

[42] *Torchia v. Torchia,* 346 Pa.Super. 229, 499 A.2d 581 (1985).

the form of dividends distributed by the defendant pharmacies to them, the dividends may not be the basis for the unjust enrichment since any dividends paid arise from the defendants' ownership interest in the pharmacies. To the extent defendant pharmacists, lay investors, physicians and physician assistants benefitted, the benefit was a result of their ownership in the pharmacies and not from plaintiffs. As for the remaining group of defendants, the pharmacies, while the claim reimbursements were made directly to them, there is no evidence that the reimbursements were unjust. The evidence shows that the pharmacies were paid pursuant to the workers compensation and MVFRL fee schedules. There is no evidence that the pharmacies were paid more than the average wholesale price. Since there is no evidence of overpayment, the claim for unjust enrichment fails.

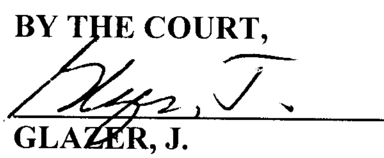
III. Plaintiffs claim for aiding and abetting fails since there is no underlying tort or wrong.

Plaintiffs further purport to state a claim for aiding and abetting the alleged fraud. Since the claims for fraud and insurance fraud fail, the underlying unlawful act required to state a claim for aiding and abetting is nonexistent and therefore the claim is dismissed. [43]

CONCLUSION

For the foregoing reason, defendants' motion for summary judgment are granted and judgment is entered in favor of defendants and against plaintiffs on all claims.

BY THE COURT,



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[43] Additionally, the amended complaint is dismissed for lack of subject matter jurisdiction since plaintiffs failed to sue all the pharmacies owners who are indispensable parties.