IN THE THIRTEENTH JUDICIAL CIRCUIT COURT
FOR HILLSBOROUGH COUNTY, FLORIDA
CIVIL DIVISION

TAMMY RIVERO and MARYLIN MAZZA, Individually, and On Behalf of All Others Similarly Situated,
Plaintiffs,

v.

CASE NO.: 16-CA-007765
DIVISION: F

LUNG INSTITUTE, LLC,
Defendant.
_____/

ORDER GRANTING PLAINTIFFS' MOTION FOR CLASS CERTIFICATION

THIS MATTER is court on March 4, 2020 and April 8, 2020 for evidentiary hearing (exceeding six hours of hearing time) on the Plaintiff's Motion for Class Certification, filed on August 30, 2019. Plaintiffs and Defendant filed post-hearing briefs regarding Plaintiffs' Motion for Class Certification on April 27, 2020. After considering the motion, the Parties' memoranda of law in support of and in opposition to Plaintiffs' Amended Motion for Class Certification, all exhibits attached to these submissions, the evidence and testimony presented at hearing through live testimony and deposition designations, the arguments of counsel, and being otherwise fully advised in the premises, the court makes the following findings of fact and conclusions of law in support of class certification.

I. Procedural Background

1.1 This action commenced on August 17, 2016. After several earlier iterations, on July 5, 2019, Plaintiffs, Rivero and Mazza, filed their Sixth Amended Complaint asserting counts

under FDUTPA, FCRCPA, Fla. Stat. section 772.11, Breach of Fiduciary Duty and Civil Conspiracy

1.2 On July 17, 2019 Defendant, Lung Institute, answered the Sixth Amended Complaint.

1.3 The Parties have engaged in preliminary discovery and have submitted the discovered materials including depositions, documents, expert reports, and affidavits in the exhibits and filings supporting their respective positions.

1.4 On March 4 & April 8, 2020, the court conducted an evidentiary hearing on the Plaintiff's Motion for Class Certification. At that time, the parties presented evidence that included testimony, exhibits, affidavits, depositions, and other documents. This court has carefully weighed that evidence in reaching the factual determinations contained in this Order.[1]

1.5 On April 23, 2020, at the hearing on Defendant's Motion for Summary Judgment, Plaintiffs, through their counsel, dismissed without prejudice Counts II, III, and IV of their complaint and announced on the record an intention only to pursue Count I of their complaint asserting a claim under FDUTPA.

2. Factual Background

2.1 Defendant, Lung Institute operates a business in Tampa, FL, which it represents to the public as specializing in treatment of lung disease. Between May 2013 and August 2016, when this action was filed, Lung Institute treated over 900 patients at its Tampa location.

[1] As of the class certification hearing on April 8, 2018, the Parties had pending Defendants' Motion For Summary Judgment dated September 27, 2019. That Motion was heard April 23, 2020 and will be ruled on seapartely.

2.2 Whether through adipose, bone marrow or venous procedure, Lung Institute by way of outpatient procedures at their office withdraw patients' blood, bone marrow or adipose tissue and represented Lung Institute can concentrate a specific cell fraction and re-administer the concentrated cells intravenously to the patients to regrow, regenerate and repair lung tissue.

2.3 Whether residing in Florida or outside the state, all Lung Institute patients travelled to Lung Institute in Tampa, FL to receive this treatment. All Lung Institute representatives providing information (or failing to provide information) about the procedure worked in Tampa. All payments made by patients were to Lung Institute in Tampa.

2.4 FDUTPA expresses a primary policy to "protect the consuming public . . . from those who engage in . . . unconscionable, deceptive, or unfair acts or practices in the conduct of any trade or commerce" and that as a rule of construction, FDUTPA "shall be construed liberally to promote [such] policies. . . ." § 501.202(2), Fla. Stat.

2.5 Under Section 501.204(1), all "[u]nfair methods of competition, unconscionable acts or practices, and unfair or deceptive acts or practices in the conduct of any trade or commerce are . . . declared unlawful" under FDUTPA. Independent of Section 501.204(1), a violation of "[a]ny law, statute, rule, regulation, or ordinance which proscribes . . . unfair, deceptive, or unconscionable acts or practices" is also automatically a violation of FDUTPA under Section 501.203(3)(c).

2.6 Section 501.211 grants a private right of action for violations of FDUTPA. Under Section 501.213(1), the "remedies of [FDUTPA] are in addition to remedies otherwise available for the same conduct under state or local law." "In any action brought by a person who has suffered a loss as a result of a violation of [FDUTPA], such person may recover actual damages. . . ." § 501.211(2), Fla. Stat.

2.7 Plaintiffs allege through its filings that as a result of an aggressive marketing scheme by agents and representatives of Defendant, Lung Institute clients were not provided critical information, the omission of which was likely to mislead the consumer acting reasonably in the circumstances, to the consumer's detriment.

2.8 The Defendant opposes Plaintiff's Motion, in part, by asserting that FDUTPA, chapter 501 is inapplicable to plaintiffs' class claim as FDUTPA was not intended to protect non-Florida residents, marketed to and invited by a Florida corporation to travel to Florida, pay for and receive a purported medical procedure in Florida.

2.9 Defendant's position is not correct on this point. FDUTPA does apply to a commercial transaction between a Florida corporation and non-residents invited to Florida by the Florida corporation to undergo a procedure at the corporation's Florida office. *Oce' Printing Systems USA, Inc. v. Mailer Data Srvs., Inc*., 760 So. 2d 1037 (Fla. 2nd DCA 2000); *Millennium Communications & Fulfillment, Inc. v. Office of the Attorney General*, 761 So. 2d 1256 (Fla. 3rd DCA 2000); *Renaissance Cruises, Inc. v. Glassman*, 738 So. 2d 436 (Fla. 4th DCA 1999); *Hutson v. Rexall Sundown, Inc*., 837 So. 2d 1090 (Fla. 4th DCA 2003).

2.10 The *Millennium* court noted that, "conspicuously absent from this chapter … is any language which purports to confine the provision of FDUTPA … to commercial transactions involving only Florida residents." *Millennium* at 1261.

3. Factual Findings on Class Certification

3.1 Plaintiffs and potential class members, who were clients of Defendant Lung Institute, LLC's, suffer from "debilitating, progressive and incurable breathing diseases . . . ." *See* Plaintiffs' Motion. Plaintiffs underwent stem cell therapy and/or supplemental therapies at

the Lung Institute facility located in Tampa, Florida. Plaintiffs allege Defendant advised that it could "'regenerate damaged lung tissue, improve lung function and slow the progression of disease'" through Defendant's stem cell treatments. Plaintiffs allege that Defendant knowingly, recklessly or negligently made misleading claims as "to the efficacy of their 'stem cell' treatments" and supplemental therapies. *Id*. Plaintiffs also allege: (1) Defendant's marketing and business practices violate Florida's Deceptive and Unfair Trade Practices Act ("FDUPTA"); (2) Defendant's deceptive marketing and other questionable business practices violate Florida Statute Section 772.11; (3) Defendant breached its fiduciary duty to its clients; and, (4) the actions taken by Defendant's employees amount to civil conspiracy.

3.2 Plaintiffs filed their Motion for Class Certification to certify a class comprised of Plaintiffs and all other persons similarly situated "who underwent venous, adipose and/or bone marrow 'stem cell' therapy, and/or supplemental therapies, for the four years prior to the filing of the initial complaint at the Lung Institute facility located in Tampa, Florida."

ANALYSIS AND ORDER

1. The Requirements of Class Certification

Pursuant to Florida Rule of Civil Procedure 1.220(a), Plaintiffs must demonstrate the following four prerequisites for class certification: (1) the members of the class are so numerous that separate joinder of each member is impracticable; (2) the claim raises questions of law or fact common to each member of the class; (3) the claim of the representative party is typical of the claim of each member of the class; and, (4) the representative party can fairly and adequately protect and represent the interest of other members of the class. *See City of Tampa v. Addison*, 979 So. 2d 246, 251 (Fla. 2d DCA 2007). These prerequisites are commonly referred to as: numerosity, commonality, typicality, and adequacy of representation. *Id*.

In addition to satisfying the prerequisites outlined in subsection (a) of Rule 1.220, Plaintiffs must also satisfy one of the subdivisions outlined in subsection (b) of Rule 1.220. Here, Plaintiffs move for class certification under subsections (b)(1)(B) and (b)(3). Subsection (b)(1)(B) states that classes may be certified where

> the prosecution of separate claims or defenses by or against individual members of the class would create a risk of . . . adjudications concerning individual members of the class which would, as a practical matter, be dispositive of the interests of other members of the class who are not parties to the adjudications, or substantially impair or impede the ability of other members of the class who are not parties to the adjudications . . . .

Fla. R. Civ. P. 1.220(b)(1)(B). Subsection (b)(3) requires that common questions of law or fact predominate over any individual questions of the separate members and that the class action is superior to other available methods for a fair and efficient adjudication of the controversy. *See Addison*, 979 So. 2d at 251-52.

To obtain class certification, the proponent of class certification carries the burden of pleading and proving the elements required under Rule 1.220.[2] The Plaintiffs have satisfied their burden.

2. Numerosity

To satisfy the numerosity requirement, the members of the class must be so numerous that separate joinder of each member is impracticable. Fla. R. Civ. P. 1.220(a)(1) (2016). courts also look to whether the class is "adequately defined and clearly ascertainable." *See DeBremaecker v. Short*, 433 F. 2d 733 (5th Cir. 1970).

[2] The proper focus is on whether the requirements of Rule 1.220 have been met, and not whether the moving party will ultimately prevail on the merits. *See Océ Printing Systems USA, Inc. v. Mailers Data Services, Inc*., 760 So. 2d 1037, 1045 (Fla. 2d DCA 2000); *Samples v. Hernando Taxpayers Ass'n*, 682 So. 2d 184, 185 (Fla. 5th DCA 1996); *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156 (1974). Accordingly, nothing in this Order should be construed as a determination of the merits of any claims or defenses.

In Defendant's prior pleadings, they did not dispute the numerosity requirement. See Defendant Lung Institute, LLC's Opposition to Plaintiff Tammy Rivero's Second Motion to Compel Discovery Responses. However, at the hearing on March 4, 2020, Defendant attempted to dispute numerosity. Nevertheless, Plaintiffs demonstrated that between May 2013 and August 2016, Lung Institute's Tampa location treated over 900 patients. See Declaration of Ann Miller in Support of Lung Institute, LLC's Opposition to Plaintiffs' Motion for Class Certification. As such, the numerosity factor has been met.

3. Commonality

To satisfy the commonality requirement, Plaintiffs are required to show that the claim raises questions of law or fact common to each class member. Fla. R. Civ. P. 1.220(a)(1) (2016). The primary concerns in consideration of commonality is whether the representative's claims arise from the same practice or course of conduct that gave rise to the remaining claims and whether the claims are based on the same legal theory. *See Sosa v. Safeway Pre. Finance Co.*, 73 So. 3d 91, 107 (Fla. 2011). The commonality requirement only requires that resolution of a class action affect all or a substantial number of the class members and that the subject of the class action presents a question of common or general interest. *Id*. The threshold required for certification is not high. *Id*.

Here, Plaintiffs' claims are based on a single legal theory predicated on FDUTPA. More specifically, FDUTPA based on Defendant's allegedly deceptive and unfair scheme to generate revenue through a deceptive marketing campaign.

Defendant responds that this is a matter of individualized issues. Defendant argues that materiality, reliance, effectiveness (injury), and damages vary from patient to patient and are not subject to common proof. Defendant further contends that individualized issues predominate as

to if and how marketing influenced Plaintiffs. Defendant asserts that such individualized issues, as to why patients underwent treatment, include medical histories, personal goals, and expectations.

Although Defendant's concerns are understandable, this is a marketing omissions case and not a medical negligence one. Therefore, patient medical histories and other similar concerns asserted by Defendant are irrelevant to this class action case. The Plaintiffs have met the commonality factor.

4. Typicality

The typicality requirement requires the court to conclude that the claim or defense of the representative party is typical of the claim or defense of each member of the class. Fla. R. Civ. P. 1.220(a)(3) (2016). The key inquiry for the court, when it determines whether the proposed class satisfies the typicality requirement, is whether the class representative possesses the same legal interest and has endured the same legal injury as the class members. *See Sosa*, 73 So. 3d at 115. Mere factual differences between the class representative's claims and the claims of the class members will not defeat typicality. *Id*.

Here, Plaintiffs argue that typicality is met because they and the proposed Class assert "identical" claims that Defendant violated FDUTPA based on its failure to disclose information about its alleged stem cell therapy. Plaintiffs highlight Defendant's failure to inform prospective patients that: its patient coordinators were incentivized sales people; Defendant had not conducted any human clinical trials; and there was nothing to prove that the treatment was effective for people, only animals. *See* Rivero Depo 60:4-25, 332:1-9, 333:10-13, 153:9-154:10, 344:14-345:5; Mazza Depo 85:13-20, 101:23-103:10, 109:17-110:6, 111:24-112:9, 112:24-113:13, 115:16-116:20.

Defendant maintains, "[e]ach patient's experience at Lung Institute was different, and there is no evidence that [P]laintiffs' experience was typical of the experience of the entire putative class." Defendant Lung Institute, LLC's Opposition to Plaintiffs' Motion for Class Certification. Defendant argues that Plaintiffs' claims are also not typical because Plaintiffs did not rely on the same marketing materials or statements made by Defendant's patient coordinators. Defendant also contends that it has "unique defenses to Plaintiffs' claims, which defeat typicality." *Id*.

The record discloses no impediment to resolving the common issues in a single trial. Additionally, contrary to Defendants' assertions, dismissal is not required. The possibility of different defenses as to individual members of a class is not fatal to a class action. *Moorer v. StemGenex Medical Group, Inc*., 2019 WL 2602536, at *7 (S.D. Cal. June 25, 2019). Further, the individualized patient experiences are irrelevant as the test looks at what an objective consumer would have considered and how relevant or not the misrepresentation or omissions were. Therefore, the record establishes that Plaintiffs' claims are typical. As such, the typicality factor is met.

5. Adequacy

To fulfill the adequacy requirement, the court must determine whether the class representative can fairly and adequately protect and represent the interests of each member of the class. Fla. R. Civ. P. 1.220(a)(4) (2016). The court's inquiry concerning the adequacy requirement requires considering (1) the qualifications, experience, and ability of class counsel to conduct the litigation; and, (2) the class representative's interests and whether those interests are antagonistic to the interest of the class members. *See Sosa,* 73 So. 3d at 115.

With regard to the first prong and based on a review of the qualifications and experience of attorney Stephen Barnes, Plaintiffs' counsel is qualified to represent the class. Defense does not dispute Mr. Barnes' qualifications.[3]

With regard to the second prong and despite Defense's contention otherwise, Plaintiffs assert that they are familiar with the complaint and claims in the case, regularly confer with counsel, are both committed and able to represent the interests of the class, and are willing to participate as necessary in the future. Ms. Mazza also appeared at the hearing for class certification and was prepared to testify. Plaintiffs maintain that their claims parallel those of the class as both Ms. Rivero and Ms. Mazza received one of three identical stem cell treatments administered by Defendant; both are considered vulnerable adults suffering from debilitating diseases; both were misled through deceptive sales and business practices to receive treatment by Defendant's patient coordinators; and, both were "ushered" to pay a large deposit before undergoing an evaluation by Defendant's medical personnel. *See* Rivero Depo 60:4-25, 332:1-9, 333:10-13, 153:9-154:10, 344:14-345:5; Mazza Depo 85:13-20, 101:23-103:10, 109:17-110:6, 111:24-112:9, 112:24-113:13, 115:16-116:20.

Based on the record, Class counsel can adequately represent the Class. The Class representatives' interests are not antagonistic to those of the Class but rather parallel the interests of the Class. As such, Defendant's objections are rejected and this factor is met.

6. Predominancy, Superiority, and Manageability

To assess predominancy, the court must determine whether the purported class representatives can prove their own individual cases and, by doing so, necessarily prove the cases for each one of the other members of the class. *See Rollins v. Butland*, 951 So. 2d 860, 870

[3] Defense counsel did note that there are two other cases similar to The Lung Institute case pending in the Thirteenth Circuit. One case involves RMS, which is the parent company of The Lung Institute.

(Fla. 2d DCA 2006). Here the two common questions are: (1) whether Defendant misrepresented by omission its stem cell therapy to class members, and (2) whether the omission was likely to mislead the reasonable consumer.

In addition, the following three factors are considered when deciding whether a class action is the superior method for adjudicating a controversy: (1) whether a class action would provide the class members with the only economically viable remedy; (2) whether there is a likelihood that the individual claims are large enough to justify the expense of separate litigation; and, (3) whether a class action cause of action is manageable. *See Sosa*, 73 So. 3d at 116.

In the instant case, hundreds of separate suits by claimants will be inefficient and potentially have inconsistent adjudications. In addition, the individual costs associated with individual cases could prevent each individual former patient from pursuing his or her claim. Lastly, the class action is manageable in this case as the class is of moderate size and can be located.

Accordingly, the class action is the most manageable and efficient way to resolve the individual claims of each class member.

Based on the foregoing, it is

ADJUDGED as follows:

1. Plaintiffs' Motion for Class Certification is **GRANTED**.

2. The Parties shall confer with respect to the preparation of a notice to class members as required by Florida Rule of Civil Procedure 1.220(d)(2).

ORDERED in Tampa, Hillsborough County, Florida, on the date imprinted with the Judge's signature.

16-CA-007765 5/22/2020 4:13:15 PM

RICHARD NIELSEN, Circuit Judge

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