No. 1-17-2969

IN THE APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

STOLTMANN LAW OFFICES, P.C., *Plaintiff/Appellant*, v. ECCELSTON LAW, LLC, *Defendant/Appellee*.	Appeal from the Circuit Court of Cook County, Illinois Circuit Court Number No. 17 L 5914 Judge Raymond Mitchell, Presiding Notice of Appeal: November 27, 2017 Date of Judgment: September 18, 2017

BRIEF OF PLAINTIFF/APPELLANT
STOLTMANN LAW OFFICES, P.C.,

Alexander N. Loftus, Esq.
Jeffrey Dorman, Esq.
Stoltmann Law Offices
10 S. LaSalle, Suite 3500
Chicago, Illinois 60603
F: (312) 442-3200
alex@stoltlaw.com
jeff@stoltlaw.com

ORAL ARGUMENT REQUESTED

TABLE OF AUTHORITIES

INTRODUCTORY STATEMENT OF CASE

This is an appeal from an Order dated September 18, 2017 (the "September 18 Order"), by the Circuit Court of Cook County dismissing Plaintiff's complaint pursuant to Section 619.1[1]. The case arises out Eccleston Law, LLC ("Eccleston") relying on its own breach of ethical rules to avoid sharing fees generated from a joint representation of victims of a failed real estate investment trust ("REIT").

As alleged in the Complaint, Eccleston approached Plaintiff, Stoltmann Law Offices, P.C. ("Stoltmann"), proposing that the two firms jointly represent Eccleston's clients in a series of individual and class action law suits against the failed REIT and the REIT's broker-dealer. The two law firms had a history of jointly representing clients in securities cases and evenly splitting the resulting fees.

Stoltmann orally agreed to the proposed joint venture; and, Eccleston drafted the engagement agreements with its clients. The first set of cases litigated were those filed against the broker-dealer. In the engagement agreements that Eccleston drafted for its clients, Eccleston informed its clients that the two law firms would act as co-counsel, but failed to specify the percentage division of fees.

[1] For ease of reference, 735 ILCS 5/2-615, 610 and 619.1 will generally be cited and referred to simply as Sections 615, 619 and 619.1, respectively.

Subsequently, Stoltmann filed each claim against the dealer-broker and performed virtually all of the legal work, resulting in a series of settlements. Pursuant to the joint representation/fee-sharing agreement, Stoltmann split all fees evenly with Eccleston.

However, after the claims against the dealer-broker were resolved, Eccleston secretly pursued a class action against the REIT on behalf of the same clients represented in the lawsuits against the dealer-broker. Eccleston surreptitiously filed the class action in New York, without informing Stoltmann, settled the class action, and kept all of the contingent fees.

After learning of the REIT class action and the settlement, Stoltmann asked for its share of the fees, but Eccleston refused. Thereafter, Stoltmann filed this lawsuit, claiming breaches of contract and fiduciary duty.

In its September 18 Order, the Circuit Court held that Eccleston's failure to include the fee-splitting percentage in its engagement agreement in the litigation against the dealer-broker violated Illinois Rule of Professional Conduct 1.5(e), thereby rendering the joint representation/fee-sharing agreement unenforceable and allowing Eccleston to keep all of the fees resulting from the REIT class action. Alternatively, the Circuit Court held that, because the REIT class action fell outside the scope of the engagement letter drafted by Eccleston for the deal-broker litigation, it also fell outside the scope of the joint venture agreement.

Stoltmann filed a timely notice of appeal after the Circuit Court denied its motion to reconsider.

JURISDICTION

This is an appeal from a final order of by the Circuit Court of Cook County that resolved all claims brought by each of the parties, and is, therefore, appealable under S.Ct. Rules 301 and 303. (A-2, C.279-C.281.)

STATUTES INVOLVED

Rules 1.5(c) and (e) of the Illinois Rule of Professional Conduct §1.5; Rule 2-107 of the Illinois Code of Professional Responsibility[2]; and 735 ILCS 5/2-615, 619 & 619.1.

ISSUES PRESENTED FOR REVIEW

1. Whether Rule 1.5(e) should be interpreted to prevent a law firm from benefiting from its own wrongdoing.

2. Whether the Circuit Court erred by interpreting an ambiguity in the Complaint without giving Plaintiff the opportunity to file a single amendment to remove the ambiguity.

STATEMENT OF FACTS

Stoltmann and Eccleston are two Chicago securities law firms whose practices focus on victims of fraudulent investment schemes and FINRA arbitration. (C.9.) The two firms have frequently worked together on

[2] For brevity and ease of reference, Rules 1.5(c) and (e) of the Illinois Rules of Professional Conduct and Rule 2-107 of the Illinois Code of Professional Responsibility will be referred to and cited simply as Rule 1.5(c), Rule 1.5(e) and Rule 2-107, respectively.

contingent-fee FINRA cases and class action securities litigation, always splitting contingent fees equally. (*Id.*)

Sometime prior to August 2011, Eccleston contacted Stoltmann, suggesting that the two firms jointly represent Eccleston's client who were victimized by a failed REIT and by the REIT's promoter/dealer-broker. (C. 8-C.9 & C.17.) The two firms orally agreed to work together as joint venturers, pursuing: (a) FINRA claims against the promoter/dealer-broker, David Lerner and Associates ("Lerner"); and, (b) a class action claim against Apple Hospitality REIT, Inc. (hereinafter referred to as the "Eccleston/Stoltmann Law Offices Joint Venture") (C.9.) As part of this joint venture, Eccleston and Stoltmann orally agreed to evenly split the fees generated by the two sets of claims. (*Id.*)

Eccleston drafted the client engagement agreements for its clients in the Lerner litigation, each of which contained the following paragraph:

> Thank you for selecting Eccleston Law Offices, P.C. to represent you. The scope of our engagement is to investigate your potential claims against David Lerner Associates related to the sale of investments including, but not limited to, Apple REITs, CMOs, and other investments, and, if appropriate, to settle, arbitrate or otherwise advance your claim with co-counsel Andrew Stoltmann of Stoltmann Law Offices in order to recover your investment losses and other damages and/or to provide liquidity and any other relief. This is the engagement letter for those services.

(*Id.*)

Pursuant to the Eccleston/Stoltmann Law Offices Joint Venture, Stoltmann prosecuted each of the claims against Lerner, performing all of the work, including: drafting the complaints; responding to all discovery; drafting and responding to all motions; performing all oral arguments; leading settlement negotiations; and, conducting the mediations. (C.9 & C.10.) Despite performing all of the work associated with these claims, Stoltmann honored its obligation pursuant to the Eccleston/Stoltmann Law Offices Joint Venture by splitting all fees generated by these claims during the multiple years that these claims were litigated. (C.9 & C.10.)

On October 23, 2012, Stoltmann and Eccleston jointly filed a class action against Lerner and reaffirmed their agreement to split the fees arising therefrom equally pursuant to the Eccleston/Stoltmann Law Offices Joint Venture. (C.10.)

However, approximately 18 months later, in April 2014, Eccleston filed a class action against the REIT on behalf of one of its clients, Susan Moses, who had been a plaintiff in Lerner litigation represented by the Eccleston/Stoltmann Joint Venture. (*Id.*) Despite the joint venture agreement, which covered lawsuits conducted against the REIT (C. 9), Eccleston took steps to cut Stoltmann out of the REIT class action, surreptitiously filing the case in Kings County, New York without informing Stoltmann of the filing. (*Id.*) Thereafter, Eccleston settled the class action and collected all of the contingent fees without informing Stoltmann. (*Id.*)

Stoltmann did not learn of the REIT class action until after the case was settled. (*Id.*) On March 9, 2017, Stoltmann first learned that Eccleston had filed the REIT class action and had agreed to settle the lawsuit for $5,500,000, generating attorneys' fees of $1,833,331.50. (C.10 & C.11.)

After waiting six weeks without any communication from Eccleston, Stoltmann sent a letter inquiring: "When do I get my share of our Apple derivative lawsuit settlement? It settled approximately 6 weeks ago. Please let me know." (C.10.) Eccleston replied: "Hah! Have our law firms merged?" (*Id.*)

After additional communications, and despite the joint venture agreement between the two law firms, Eccleston refused to split the fees generated by the Moses REIT class action. (C.10 & C.11.)

On June 12, 2017, Stoltmann filed a two-count complaint against Eccleston, claiming breaches of contract and fiduciary duty. (C.8-C.23.) Thereafter, Eccleston filed a motion to dismiss, pursuant to Section 619.1, claiming: (a) that the fee-splitting provision, which Eccleston had drafted for the Lerner litigation, did not strictly meet the requirements imposed by Rule 1.5(e), because Eccleston had failed to disclose the percentage share of the fees to be received by each lawyer; and, (b) that the joint venture agreement only included claims against Lerner, but not against the REIT. (C.105-C.115.)

On September 18, 2017, the Circuit Court of Cook County issued an Order dismissing Stoltmann's claims against Eccleston, anomalously finding that, because Eccleston's engagement agreement in the Lerner litigation failed to strictly meet the requirements of Rule 1.5(e), Eccleston was entitled to keep 100% of the fees from the REIT litigation. (C.279-C.281.)

In addition, the Court found that, despite averments in the Complaint that Eccleston/Stoltmann Law Offices Joint Venture covered claims against Lerner and the REIT, the language of Eccleston's engagement letter supported its claim that the joint venture only covered claims against Lerner. (C.281.)

On November 8, 2017, the Circuit Court denied Stoltmann's motion to reconsider and clarify the September 18 Order. (C.295.)

Stoltmann filed a timely notice of appeal on November 27, 2017. (C.296.)

STANDARD OF REVIEW

A motion to dismiss under Section 619.1 combines motions under Sections 615 and 619. 735 ILCS 5/2-619.1. Under Illinois law, a Circuit Court's dismissal of Plaintiff's Complaint pursuant to Eccleston's Section 619.1 motion is reviewed *de novo*, with all well-pleaded facts in the Complaint to be taken as true *In re Marriage of Baumgartner*, 9 N.E.3d 91, 102 (1st Dist. 2014). A dismissal under Sections 615 or 619 is proper only if it is clearly apparent that no set of facts can be proven which would entitle the plaintiff to recover. *Grassini v. Dupage Township*, 279 Ill. App. 3d 614, 618, 665 N.E.2d 860, 863 (3d Dist. 1996); *Napleton v. Village of Hinsdale*, 229 Ill. 2d 296, 305, 891 N.E.2d 839, 845 (2008).

In addition, in reviewing a dismissal pursuant to Section 615, a Court must interpret the allegations of the complaint and must make all reasonable inferences therefrom in favor of the plaintiff. *Bryson v. News America*

Publications, Inc., 174 Ill. 2d 77, 86, 672 N.E.2d 1207, 1214 (1996); *Napleton v Village of Hinsdale, supra*.

ARGUMENT

This appears to be a case of first impression in Illinois. There are cases under Rule 1.5(e) and its precursor, Rule 2-107, in which a party to a fee-sharing agreement had drafted an engagement letter that did not strictly comply with the provisions of either Rule and did not show the engagement letter to its co-counsel. However, this appears to be the first case in which a party to such an agreement secretly filed and settled a lawsuit without informing its co-counsel.

Under the averments of the Complaint, which must be presumed true for purposes of this appeal, Eccleston entered into a joint venture agreement with Stoltmann to litigate claims against both Lerner and the REIT, then violated the joint venture by secretly pursuing a class action against the REIT on its own. The Circuit Court's holding both rewards and incentivizes that behavior—without providing any additional protection for the client.

The Circuit Court's alternative ground for dismissing Stoltmann's Complaint violates the standard of review under Section 615. Specifically, the Circuit Court's finding that the REIT class action was outside of the scope of the joint venture is based solely on the fact that the language of the engagement letter that Eccleston had drafted for the Lerner lawsuits states that it covered the claims against Lerner.

The Circuit Court's holding simply ignores the averments in the Complaint that the joint venture covered claims *against both Lerner and the REIT*. At best, there is an ambiguity in the Complaint. That ambiguity cannot be resolved on a Section 615 motion.

On a Section 615 motion (and a Section 619 motion as well), Stoltmann is entitled not only to the assumptions that the averments of the Complaint are true, but to any reasonable inferences that can be drawn from those averments. In addition, dismissal is only appropriate if it is apparent that no set of facts can support a right to recovery.

The Court's reasoning is based on a conflict between the averments that the joint venture covered claims against the REIT and that the joint venture agreement was memorialized in the language of the Lerner engagement letter. There is no way to conclude from this that the Complaint (which has not been amended) could not be amended to remedy this inconsistency. The Court's dismissal on this ground violates the requirement that the plaintiff be given the benefit of all reasonable inferences and should only be dismissed if there is no possibility that an amended complaint could not support Stoltmann's claims.

I. RULE 1.5(e) SHOULD NOT BE USED AS A VEHICLE TO INCENTIVIZE BREACHES OF CONTRACT AND FIDUCIARY DUTY WITHOUT PROVIDING ANY ADDITIONAL PROTECTION TO THE CLIENT.

A. Under the Facts of this Case, the Consequences Stemming from the Circuit Court's Holding Thwarts the Purpose of the Rules of Professional Conduct and Produces Absurd, Inequitable Results.

The central issue in this appeal is whether, as the Circuit Court believed, an Illinois court is required to mechanically apply the provisions of Rule 1.5(e), even when such a rote application incentivizes a law firm to violate its contractual and fiduciary duties, without providing any additional protection to the client.

Rule 1.5(e) states:

> (e) A division of a fee between lawyers who are not in the same firm may be made only if:
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> (1) the division is in proportion to the services performed by each lawyer, or if the primary service performed by one lawyer is the referral of the client to another lawyer and each lawyer assumes joint financial responsibility for the representation;
>
> (2) the client agrees to the arrangement, including the share each lawyer will receive, and the agreement is confirmed in writing; and
>
> (3) the total fee is reasonable.

Eccleston's engagement letters for the Lerner litigation disclosed the fact that the clients would be jointly represented by Eccleston and Stoltmann. (C.9.) However, the letter did not specify the percentage of fees that would be received by either law firm. (*Id.*) Consequently, while the letter substantially complied with Rule 1.5(e), it was not strictly compliant. (*Id.*)

The Circuit Court believed that this failure to strictly conform to Rule 1.5(e) rendered Plaintiff's breach of contract and breach of fiduciary duty claims unenforceable under *Donald W. Fohrman & Assocs. v. Marc D. Alberts, P.C.*, 7 N.E.3d 807 (1st Dist. 2014). (C.280 & C.281.) Plaintiff respectfully urges that the Circuit Court misanalysed this issue.

Any analysis of Rule 1.5(e) starts from the premise that the Rules of Professional Conduct are designed to protect the interests of the client, even at the expense of co-counsel. As this Court stated in *Albert Brooks Friedman, Ltd. v. Malevitis*, 304 Ill. App. 3d 979, 985, 710 N.E.2d 843, 847 (1st Dist. 1999):

> The client-centered focus of Rule 1.5 is the most recent expression of the long-standing public policy of this state. The rule's historical antecedents demonstrate that the client's rights rather than the lawyer's remedies have always been this state's greatest concern.

Consequently, if strict application of Rule 1.5(e) would have protected the clients involved in the REIT litigation, then strict compliance is required—even at the expense of allowing Eccleston to benefit from its contractual and fiduciary breaches. However, the Circuit Court's imposition of a strict compliance standard had just the opposite effect.

In forming a joint venture to represent Eccleston's clients in both the Lerner and REIT litigations, both law firms believed that the clients were better represented by both law firms, than by either law firm alone. This sentiment is reflected in the wording of the Lerner engagement letter drafted by Eccleston.

> The scope of our engagement is to investigate your potential claims against David Lerner Associates related to the sale of investments including, but not limited to, Apple REITs, CMOs, and other investments, and, if appropriate, to settle, arbitrate or otherwise advance your claim *with co-counsel Andrew Stoltmann of Stoltmann Law Offices* . . . .

(C.9 & C.16, emphasis added.)

Thus, Eccleston's intentions in cutting Stoltmann out of the REIT class action were not motivated by a desire to better represent the REIT class plaintiffs. Rather, they were motivated by pure greed—in direct violation of Eccleston's contractual, ethical, and fiduciary duties.

Through its holding, the Circuit Court has rewarded Eccleston's actions of putting its interests ahead of its clients and breaching its contractual and fiduciary obligations to Stoltmann. Despite these actions, or rather because of these actions, Eccleston is able to keep 100%, rather than 50% of the fees from the REIT class action.

Further, it should be noted, and emphasized, that the engagement letter that formed the basis of the Circuit Court's decision only pertained to the Lerner litigation, not the REIT litigation. Rule 1.5(c) required Eccleston to create a separate engagement letter signed by its clients to memorialize its contingent fee arrangement for the REIT class action. (C.10 & C.43-C.44.) All fees collected for the Lerner litigation were split evenly under the terms of the joint venture agreement. (C.9.) That litigation is not at issue in this lawsuit or in this appeal. Consequently, the Circuit Court voided the joint venture agreement based upon an engagement letter that had nothing to do with the litigation at issue in this case, the REIT class action.

Moreover, and this is critical to this appeal, unlike any of the other cases litigated under Rule 1.5(e) or its predecessor, Rule 2-107, Eccleston, by secretly filing the REIT class action, put itself in a position to be solely responsible for creating an engagement letter for the REIT litigation that strictly complied with Rule 1.5(e). Because Eccleston deliberately kept Stoltmann unaware that the REIT class action even existed or the contents of the engagement letter that Eccleston drafted for that class action, Stoltmann had absolutely no way to review the REIT engagement letter or to make any changes.

It makes absolutely no sense to penalize Stoltmann for the use of an engagement letter that did not strictly comply with Rule 1.5(e) in a case where: (a) the non-compliant engagement letter was for a different case than the one at issue; (b) neither Stoltmann nor the Circuit Court has seen the engagement letter that Eccleston did use in the REIT class action; and (c) Stoltmann could not possibly have seen or changed the contents of the engagement letter at issue (assuming that Eccleston actually complied with Rule 1.5(c) and drafted an engagement letter for the REIT class action).

Indeed, under the Circuit Court's holding, Eccleston is better off if it had used an engagement letter in the REIT class action that violated Rule 1.5(e) than if its engagement letter complies with Rule 1.5(e). If the engagement letter used in the REIT class action strictly complies with Rule 1.5(e), Eccleston would have had no argument that the joint venture agreement was unenforceable for that litigation. Eccleston would have been obligated by its contractual and fiduciary duties to even split the fees from the REIT class action, rather than keeping all of the fees.

B. The Circuit Court's Holding Is Inconsistent with the Canons of Statutory Construction Used by Illinois Courts and with the Language of the Rules of Professional Conduct.

As the Illinois Supreme Court recently observed, the Rules of Profession Conduct, in general, and Rule 1.5(e) specifically, are to be interpreted using the same principles that govern the interpretation of statutes. *Ferris, Thompson & Zweig, Ltd. v. Esposito*, 90 N.E.3d 400, 405-06 (Ill. 2017).

The general rule is that the most reliable indicator of legislative intent is found in the language of the statue itself (*Michigan Avenue National Bank v. County of Cook*, 191 Ill. 2d 493, 504, 732 N.E.2d 528, 535 (2000)) and that language should be given its plain, ordinary and popularly understood meaning *Carver v. Sheriff of La Salle County*, 203 Ill. 2d 497, 507, 787 N.E.2d 127, 133 (2003)).

However, as the Illinois Supreme Court noted in *People v. Hanna*, 207 Ill. 2d 486, 498, 800 N.E.2d 1201, 1207 (2003):

> [W]here a plain or literal reading of a statue produces absurd results, the literal reading should yield: "It is a familiar rule, that a thing may be within the letter of the statute and yet not within the statute, because not within its spirit, nor within the intention of its makers… If a literal construction of the words of a statute be absurd, the act must be so construed as to avoid the absurdity."

> *Church of the Holy Trinity v. United States,* 143 U.S. 457, 459-60 (1892).

Moreover, as this Court has observed, a statute must be construed as a whole, with "each part of a statute is read in light of every other provision" rather than considering words and phrases in isolation. *American Airlines, Inc. v. Dep't of Revenue*, 402 Ill. App. 3d 579, 598-99, 931 N.E.2d 666, 683 (1st Dist. 2009).

The application of these principles argues strongly against the Circuit Court's holding. First, as discussed in detail above, the Circuit Court's interpretation and application of Rule 1.5(e) results in absurd results that not only rewards a law firm for violating Rule 1.5(e) but, in this case, results in a change in the representation for the REIT class plaintiffs (*i.e.*, the elimination of Stoltmann as co-counsel) that differs from the representation that both law firms deemed optimal in the joint venture agreement.

In addition, the Circuit Court's holding must be construed viewing the Rules of Professional Conduct as a whole, rather than Rule 1.5(e) in isolation. *American Airlines, Inc. v. Dep't of Revenue*, *supra.* The Preamble to the Rules states, in pertinent part:

> The Rules of Professional Conduct are rules of reason. They should be interpreted with reference to the purposes of legal representation and of the law itself.

(Rules of Professional Conduct, Preamble [14].)

The overreaching goal of these Rules is client protection. *Albert Brooks Friedman, Ltd. v. Malevitis*, *supra.* As framed by the above-quoted language, the central issue in this appeal is whether it is reasonable to adopt a standard of strict compliance with Rule 1.5(e) that incentivizes a law firm to both cheat its co-counsel and to remove co-counsel who was successful in representing these same clients in the Lerner litigation—particularly in a case where the victimized law firm was not in a position to take any corrective action.

In this regard, it should be emphasized that, in construing Rule 2-107, the precursor of Rule 1.5(e), this Court recognized that, despite the mandatory language of Rule 2-107, there were circumstances, far less egregious than those presented in the instant case, in which a party to a fee-sharing agreement could enforce a breach of contract and/or a breach of fiduciary duty claim if the engagement letter substantially complied with Rule 2-107.

Rule 2-107 provided, in pertinent part

> (a) A lawyer shall not divide a fee for legal services with another lawyer who is not a partner in or associate of his law firm, unless
>
> > (1) the client consents in a writing signed by him to employment of the other lawyer, which writing shall fully disclose (a) that a division of fees will be made, (b) the basis upon which the division will be made, including the economic benefit to be received by the other lawyer as a result of the division, and (c) the responsibility to be assumed by the other lawyer for performance of the legal services in question;
> >
> > (2) the division is made in proportion to the services performed and responsibility assumed by each, except where the primary service performed by one lawyer is the referral of the client to another lawyer and (a) the receiving lawyer fully discloses that the referring lawyer has received or will receive economic benefit from the referral and the extent and basis of such economic benefit and (b) the

referring lawyer agrees to assume the same legal responsibility for the performance of the services in question as if he were a partner of the receiving lawyer; and

(3) the total fee of the lawyers does not exceed reasonable compensation for all legal services they rendered to the client.

This Rule, which was part of the Illinois Code of Professional Responsibility, was superseded by Rule 1.5 in 1990 (Ill. P. Prof'l Conduct R. 1.5, eff. Aug. 1, 1990), and was further amended to its current form in 2010. *See Ferris,* , 90 N.E.3d at 416.

A comparison of the language of Rule 2-107, quoted above, with the language of Rule 1.5(e) (quoted *supra* at 10) reveals that the two Rules are strikingly similar. While the requirements associated with a fee-sharing agreement have been reorganized and consolidated into one section in the current version of the Rule, both Rules required that the client sign an engagement letter which disclosed that the fees would be divided with another lawyer, the basis upon which that division would be made, and the responsibility to be assumed by the other lawyer for performance of the legal services in question. (*Compare* Rule 2-107 *with* Rule 1.5(e).) Even more important, both Rules contain mandatory language in describing the inclusion of these three requirements in the engagement letter. (*Id.*)[3]

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[3] The only difference in the mandatory language is that Rule 2-107 is phrased in the negative, prohibiting a fee-sharing arrangement among attorneys of different law firms unless the engagement letter contains the required elements and is signed by the client. On the other hand, Rule 1.5(e) is phrased in the positive, stating that such a fee-sharing agreement can be made only if these conditions are met.

In a series of decisions under Rule 2-107, this Court held that, despite the Rule 1-207's mandatory language, there were exceptions to the requirement that the engagement letter strictly comply with the Rule, and accepted a standard of substantial compliance.

The first such case was *Phillips v. Joyce,* 169 Ill. App. 3d 520, 523 N.E.2d 933 (1st Dist. 1988). In *Phillips*, the plaintiff attorney agreed to stay a state suit brought on behalf of a group of injured persons so that a federal class action suit based on the same facts could proceed. The plaintiff alleged that he and the defendant, the lead attorney in the federal class action, entered into a joint venture under which they would equally share both the work and any fees in the federal class action.

As in the instant case, the defendant attorney informed his clients in writing that they were jointly represented by the two law firms and that each client needed to sign new contingent fee agreements. The plaintiff obtained the signatures of his clients, the state court litigants, on new attorney-client agreements. The defendant, however, prepared and sent to all members of the federal class a new fee agreement that referred only to the defendant as the attorney. The defendant pursued the federal litigation without dividing the work equally with the plaintiff. At the end of the litigation, the federal court awarded attorney fees to the plaintiff and the defendant according to the time and expense each firm had expended and not equally as anticipated in the parties' oral agreement. The plaintiff sought to recover additional fees in a suit for a constructive trust and accounting based on the oral fee-sharing agreement.

The defendant attempted to profit by drafting an engagement agreement that failed to strictly comply with Rule 2-107, arguing that his errant draftsmanship invalidated the joint representation/fee sharing joint venture agreement. This Court rejected that argument, holding that, under those facts, a standard of substantial compliance was to be applied. This Court further noted that there may be other defenses to the use of a strict compliance standard.

Five years later, in *Holstein v. Grossman*, 246 Ill. App. 3d 719 (1st Dist. 1993), this Court held that a plaintiff lawsuit could maintain a claim for breach of fiduciary duty arising from a breached fee-sharing agreement, even where the engagement letter did not strictly comply with Rule 2-107. In *Holstein*, the plaintiff and defendants entered into an oral joint representation/fee-sharing agreement regarding a number of personal injury cases. During the formation of the agreement, the parties reviewed Rule 2-107 and agreed that the defendants would disclose in writing the fee arrangement to the referred clients in compliance with Rule 2-107.

However, the defendants used their standard contingency fee agreement which did not disclose the fee-sharing agreement. The plaintiff referred 10 clients to the defendants, but referral fees were not paid on five of those matters. The plaintiff sought the unpaid referral fees by filing suit against the defendants which alleged breaches of contract and fiduciary duty arising out of a joint venture. The Circuit Court granted the defendant's motion for summary judgment on both counts, finding the fee-sharing agreement violated Rule 2-107 and public policy.

However, on appeal, while affirming dismissal of the breach of contract claim, this Court drew a distinction between the breach of contract claim to enforce the fee-sharing agreement and the breach of fiduciary duty claim. In making that distinction, the Court distinguished between the different public policies inherent in the enforcement of a fee-sharing agreement and in the making certain that attorneys honor their fiduciary duties.

Specifically, the Court held that public policy requires that enforcement of a fee-sharing agreement requires that clients be aware of who is representing their interests and on what basis. On the other hand, public policy also requires that attorneys keep their word to their co-counsel. 246 Ill. App. 3d at 740, 616 N.E.2d at 1238; *see also Davies v. Grauer*, 291 Ill. App. 3d 863, 864 n. 1, 684 N.E.2d 924, 925 n.1 (1st Dist. 1997) (reversing dismissal of plaintiff's claims for breach of contract and fiduciary duty regarding a fee-sharing agreement and holding that oral disclosure to the client constituted substantial compliance.)

The instant case presents even stronger justification for allowing Plaintiff to maintain claims for both breaches of contract and fiduciary duty than the justifications in either *Phillips* or *Holstein*. First, in both *Phillips* and

Holstein the Court was basing its decision on the engagement letter pertaining to the litigation at issue. In the instant case, the Circuit Court's holding is based on the engagement letter that Eccleston drafted for the Lerner litigation—not for the REIT class action that is actually at issue in this appeal.

In addition, in both *Phillips* and *Holstein* this Court found it significant that the defendant had sent a written letter to its clients that differed from the letter that had been agreed to with the plaintiff law firm. In both of those cases the plaintiff law firm knew that a case had been filed and had the opportunity to review the notification sent by the defendant law firm. Despite this, the Court held that there was justification to recognize an exception to the requirement of strict compliance with Rule 2-107.

The justification is even stronger in the instant case. Here, Stoltmann did not even know that Eccleston had filed the REIT class action behind its back, much less the content of the engagement letter in that case (if there is one). Thus, while the plaintiff law firms in *Phillips* and *Holstein* could theoretically have protected themselves by demanding to review the retention letter used by the defendant law firm, there was nothing that Stoltmann could possibly have done.

Stoltmann very respectfully urges that it was error for the Circuit Court to have ignored the reasoning and results of these decisions under Rule 2-107 given: (a) the fact that the Circuit Court's holding produces absurd and undesirable results; (b) the preamble of the Rules of Professional Conduct indicates that a rule of reason is to be used in their application; and (c) the similarity of language and identity of purpose underlying Rules 2-107 and 1.5(e).

C. The Circuit Court's Reliance on *Donald W. Fohrman & Assocs. v. Marc D. Alberts, P.C.* is Inapposite to the Facts of the Instant Case.

As noted above, the Circuit Court relied exclusively on this Court's earlier decision in *Donald W. Fohrman & Assocs. v. Marc D. Alberts, P.C.*, 7 N.E.3d 807 (1st Dist. 2014) to conclude that Plaintiff's claims for breaches of contract and fiduciary duty must be dismissed. (C.280 & C.281.) However, the facts and rationale of that case do not logically apply to the instant case.

In *Fohrman*, the plaintiff and defendant law firms entered into an oral fee-sharing agreement under which the plaintiff referred certain personal injury and medical malpractice cases to defendant and was to share the fees with defendant. The defendant law firm drafted the engagement letters that did not strictly conform to the requirements of Rule 1.5(e). Those letters were given to the clients that plaintiff had referred to the defendant and were shown to the plaintiff, who did not object to their use.

The Illinois Supreme Court recently characterized *Fohrman* in the following manner:

> The appellate court in *Fohrman* did agree that a fee-sharing agreement that failed to include a provision advising the client that the attorneys had assumed joint financial responsibility failed to strictly comply with Rule 1.5(e) and was therefore unenforceable. The agreements in that case, however, suffered from numerous deficiencies, and the attorney seeking to enforce them did not dispute that they failed to conform to Rule 1.5(e).

90 N.E.3d at 410.

On these facts, this Court held that the trial court properly dismissed plaintiff's claims because the written notice to the clients did not strictly comply with Rule 1.5(e) and because plaintiff failed to meet its own fiduciary duty to disclose the referral agreement to its clients.

The rationale of *Fohrman* does not logically apply to this case. Unlike *Fohrman*, the Defendant in the instant case *is the referring attorney* who had a duty to inform his clients of the joint representation agreement, including the fee sharing arrangement. Unlike *Fohrman*, the Plaintiff in the instant case was never given the opportunity to review and correct whatever engagement letter Eccleston used for the REIT litigation for their shared client.

But the most important difference between *Fohrman* and the instant case is the engagement letter that the referring attorney should have drafted. In *Fohrman*, the referring lawyer was the plaintiff. Had the plaintiff law firm in *Fohrman* created an accurate engagement letter that complied with Rule 1.5(e), the letter would have notified plaintiff's clients of the joint representation and fee-sharing arrangement.

In direct contrast to *Fohrman*, the referring attorney in the instant case is the defendant, Eccleston. Despite the joint venture agreement, Eccleston intended to keep all of the fees from the REIT litigation. Thus, if Eccleston's engagement letter for the REIT class action reflected Eccleston's actual intent, that letter (if it exists) states to Eccleston's clients that they were being represented solely by Eccleston. The letter would have had no reference to a fee-sharing agreement.

Paradoxically, had Eccleston has created such a letter, even though that letter would have demonstrated a breach of Eccleston's contractual and fiduciary duties to Stoltmann, the Circuit Court's holding would have been the same as it is. Under the Circuit Court's holding, any engagement letter that failed to disclose the existence and details of a fee-sharing arrangement in the Eccleston/Stoltmann Law Offices Joint Venture would invalidate that arrangement—even where the victimized law firm had no ability to take corrective action.

This Court saw that paradox in *Holstein*. The Court's solution was to differentiate between a claim for breach of contract and for breach of fiduciary duty. After affirming the lower court's dismissal of the breach of contract, this Court found that there was a genuine issue of fact as to whether a joint venture existed between the plaintiff and defendant law firms. Assuming for purposes of the appeal that such a relationship existed, this Court stated:

> We must next address whether the undisputed absence of Rule 2-107's signed writing requirement necessitates that the parties joint-venture agreement be held unenforceable on public policy grounds. We think not…
>
> Plaintiff's count II deals with the fiduciary duty one attorney owes to another upon entering a joint-venture agreement in which clients are referred and fees shared. Breach of fiduciary duty actions are not contract actions. This distinction, we believe, requires that our paramount concern becomes the effect such agreements have on the attorneys involved.

> It is clear that Illinois public policy cannot endorse defendants' alleged misconduct in this case. Receiving attorneys cannot be allowed to induce a referring attorney to make a referral under the belief that the receiving attorney will obtain Rule 2-107's signed writing requirement. Clearly, the profession will be better served if attorneys are bound to their word.

246 Ill. App. 3d at 740, 616 N.E.2d at 1238.

In *Fohrman*, this Court questioned, but did not decide, whether the *Holstein* exception to strict compliance with Rule 1.5(e) remained viable. 7 N.E.3d at 822. The Court expressed concern with the fact that, while Rule 2-107 imposed a duty on the referring attorney to inform clients of the joint representation/fee-sharing arrangement, that language was eliminated from the current version of Rule 1.5(e). (*Id.*) The Court also expressed concern that *Holstein's* treatment of breach of fiduciary duties claim was inconsistent with its treatment of the breach of contract claim. (*Id.*)

The Court did not resolve these questions because it found that the *Holstein* exception was not factually applicable to the facts of *Fohrman* because, unlike the facts in *Holstein*, the plaintiff in *Fohrman* was the referring attorney and had failed in its duty to ensure that its own clients were fully informed about the terms of the referral agreement.

This factual distinction between *Holstein* and *Fohrman* does not apply to the instant case. As in *Holstein* (and unlike *Fohrman*), the REIT class action clients had an attorney-client relationship with Eccleston, not Stoltmann. Moreover, regardless of which law firm had the attorney-client relationship with the class plaintiffs, Stoltmann, as a direct result of Eccleston's conduct, did not know that anyone was representing these clients against the REIT, a class action that Stoltmann did not know existed. Therefore, unlike *Fohrman*, no one could accuse Stoltmann of having abandoned its responsibility to these clients.

As to the continued viability of *Holstein*, the *Fohrman* Court's concern was that, unlike Rule 2-107, Rule 1.5(e) does not place the burden of notifying client of a fee-sharing arrangement on the referring attorney. This concern is rendered inapplicable by Eccleston's own conduct. Stoltmann does not contend that the burden of informing the REIT class action plaintiffs of the fee-sharing arrangement falls on Eccleston because Eccleston was the referring attorney. Thus, it is irrelevant whether the Rule 1.5(e) places the burden of notification on the referring attorney. Thus, the difference in the wording of Rule 2-107 vs. Rule 1.5(e) on this point is irrelevant to Stoltmann's argument.

Rather, Stoltmann contends that the burden falls on Eccleston because, as a result of its surreptitious actions, Eccleston was the only law firm that had contact with this client and knew that the class litigation existed. Stoltmann could not possibly have ensured that Eccleston's client was properly informed about the joint venture agreement with respect to a lawsuit that it did not know existed. Thus, whether or not the precise holding *Holstein* (based on the wording of Rule 2-107) applies to cases under Rule 1.5(e), the Court's reasoning certain applies and is necessary to present an absurd and inequitable result.

II. THE CIRCUIT COURT'S ADDITIONAL HOLDING THAT THE REIT CLASS ACTION IS OUTSIDE THE SCOPE OF THE ENGAGEMENT AGREEMENT IGNORES THE SPECIFIC AVERMENTS IN THE COMPLAINT AND VIOLATES THE STANDARD OF REVIEW UNDER SECTIONS 615 AND 619.

As an alternative ground for dismissal, the Circuit Court found that the REIT litigation fell outside the scope of the Lerner engagement letter and, therefore, was not covered by the Eccleston/Stoltmann Law Offices Joint Venture. (C.281.) With great respect for the Circuit Court, this conclusion was not well reasoned.

The Complaint avers the following:

> 8. Eccleston on one hand and Stoltmann on the other entered into a joint venture to jointly handle claims against Lerner and Apple. ("Agreement")
>
> 9. The Agreement provided that Eccleston and Stoltmann would equally split the fees generated on claims against Lerner and Apple.
>
> 10. The Agreement was memorialized in the client engagement agreements. *See* (Susan Moses Engagement Agreement attached hereto and incorporated herein as Exhibit "A").

(C.9.)

Even if the Circuit Court correctly concluded that the REIT class action was not included in the scope of the Lerner engagement letter, there would merely be an inconsistency between the averment in Paragraph 10 (*i.e.*, that the joint venture agreement was memorialized in the Lerner engagement letter) and the specific averments in Paragraphs 8 and 9 (*i.e.*, that the Eccleston/Stoltmann Law Offices Joint Venture included claims against both

Lerner and the REIT). Ambiguities cannot be resolved on a Section 619.1 motion. This falls far short of the standard that a complaint should be dismissed under Sections 615 or 619 only if it is clearly apparent that no set of facts can be proven which would entitle the plaintiff to recover. *Grassini v. Dupage Township*, *supra*; *Napleton v. Village of Hinsdale*, *supra*.

However, the Circuit Court's justification for dismissal suffers from a further flaw. On a motion to dismiss under Sections 615 or 619, Stoltmann, as the non-moving party, is entitled to any reasonable inference that can be drawn from the well-pled facts in the Complaint and its exhibits. *Bryson v. News America Publications, Inc.*, 174 Ill. 2d 77, 86, 672 N.E.2d 1207, 1214 (1996); *Napleton v Village of Hinsdale, supra*. The Circuit Court cannot logically deduce from the complaint and its exhibits that the Eccleston/Stoltmann Law Offices Joint Venture was limited to the Lerner litigation when the Complaint specifically avers that the joint venture also covered the REIT class action.

WHEREFORE for the reasons stated herein, Plaintiff, Stoltmann Law Offices, P.C., respectfully asks this Court to reverse the Circuit Court's dismissal of the Complaint, to remand the case for further proceedings and to grant any additional relief that is deems reasonable under the circumstances.

Respectfully submitted,

STOLTMANN LAW OFFICES, P.C.,
Plaintiff/Appellant

By: /s/*Alexander N. Loftus*
One of Its Attorneys

Alexander N. Loftus, Esq.
Jeffrey Dorman, Esq.
STOLTMANN LAW OFFICES
10 S. LaSalle St., Suite 3500
Chicago, Illinois 60603
T: (312) 332-4200
alex@stoltlaw.com

Dated: April 6, 2018

CERTIFICATE OF COMPLIANCE

The undersigned certifies that this brief conforms to the requirements of Rules 341(a) and (b). The length of this brief, excluding the pages containing the Rule 341(d) cover, the Rule 341(h)(1) statement of points and authorities, the Rule 341(c) certificate of compliance, the certificate of service, and those matters to be appended to the brief under Rule 342(a), is 29 pages.

STOLTMANN LAW OFFICES, P.C.,
Plaintiff/Appellant,

By: /s/*Alexander N. Loftus*
One of Its Attorneys

Alexander N. Loftus, Esq.
STOLTMANN LAW OFFICES
10 S. LaSalle St., Suite 3500
Chicago, Illinois 60603
T: (312) 332-4200

TABLE OF CONTENTS TO APPENDIX TO APPELLANT'S BRIEF

IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT, LAW DIVISION

Stoltmann Law Offices, P.C.,	)	
	)	
Plaintiff,	)	No. 17 L 5914
	)	
vs.	)	Calendar S
	)	
Eccleston Law, LLC,	)	Judge Raymond W. Mitchell
	)	
Defendant.	)	
	)	

ORDER

This matter is before the Court on Defendant Eccleston Law, LLC's motion to dismiss Plaintiff Stoltmann Law Offices, P.C.'s complaint pursuant to 735 ILCS 5/2-619.1.

I.

Plaintiff Stoltmann Law Offices, P.C. and Defendant Eccleston Law, LLC agreed to work together to pursue claims on behalf of Susan Moses and against the promotor of a failed real estate investment via claims against the broker-dealer who sold the investment, David Lerner and Associates. Plaintiff also alleges that the agreement encompassed the parties' pursuit of claims against the investment itself, Apple Hospitality REIT, Inc. The parties prosecuted claims against Lerner and the fees generated were split equally. Defendant then filed a class action complaint on behalf of Moses against Apple and settled the action for $5,500,000 but refused to split fees generated in that case with Plaintiff. Plaintiff filed a two-count complaint, which alleges breach of fiduciary duty (Count I) and breach of contract (Count II).

II.

A section 2-619 motion to dismiss admits the legal sufficiency of the complaint. 735 ILCS 5/2-619. The purpose of a section 2-619 motion to dismiss is to dispose of issues of law and easily proved issues of fact at the outset of the litigation. *Henry v. Gallagher*, 383 Ill. App. 3d 901, 903 (1st Dist. 2008). Although a section 2-619 motion to dismiss admits the legal sufficiency of a complaint, it raises defects, defenses, or some other affirmative matter appearing on the face of the complaint or established by external submissions, which defeat the plaintiff's claim. *Ball v. County of Cook*, 385 Ill. App. 3d 103, 107 (1st Dist. 2008).

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Unlike a section 2-619 motion, a section 2-615 motion attacks the sufficiency of a complaint and raises the question of whether a complaint states a cause of action upon which relief can be granted. *Fox v. Seiden*, 382 Ill. App. 3d 288, 294 (1st Dist. 2008). All well-pleaded facts must be taken as true and any inferences should be drawn in favor of the non-movant. 735 ILCS 5/2-615; *Hammond v. S.I. Boo, LLC*, 386 Ill. App. 3d 906, 908 (1st Dist. 2008). Plaintiffs are not required to prove their case at the pleading stage; they are merely required to allege sufficient facts to state all elements which are necessary to constitute each cause of action in their complaint. *Visvardis v. Eric P. Ferleger, P.C.*, 375 Ill. App. 3d 719, 724 (1st Dist. 2007). A 2-615 motion to dismiss should not be granted unless no set of facts could be proved that would entitle the plaintiff to relief. *Beacham v. Walker*, 231 Ill. 2d 51, 58 (2008).

Defendant Eccleston Law, LLC contends that Plaintiff Stoltmann Law Offices, P.C.'s complaint should be dismissed because the engagement agreement does not state the share each lawyer will receive of the legal fees. Rule 1.5 governs attorney fee agreements. Subsection (e) permits the division of a fee between lawyers who are not in the same firm "only if the client agrees to the arrangement, including the share each lawyer will receive, and the agreement is confirmed in writing." Ill. R. Prof'l Conduct R. 1.5(e). Fee agreements that do not strictly comply with Rule 1.5 are unenforceable as against public policy. *See Donald W. Fohrman & Assocs. v. Marc D. Alberts, P.C.*, 2014 IL App (1st) 123351. Where a fee agreement is unenforceable for lack of strict compliance with the ethical rules, a plaintiff may not recover its share of fees under either a breach of contract theory or under joint venture claims—such as a breach of fiduciary duty claim. *Id.* at ¶54.

Here, the engagement agreement attached to Plaintiff's complaint does not set forth the share of fees each lawyer will receive, and therefore fails to strictly comply with Rule 1.5. Plaintiff argues that only substantial compliance is necessary to enforce the agreement, and relies upon *Phillips v. Joyce*. 169 Ill. App. 3d 520 (1st Dist. 1988). In rejecting the substantial compliance standard, the appellate court analyzed *Phillips* and other analogous cases and stated:

> [W]e observe these decisions turn on a concept of 'practical realities.' It is our understanding that the fee-sharing provisions of the Rules are not guide posts, but mandatory. (citation omitted). The 'practical realities' concept is contrary to this principle and the public policy of protecting the clients which is behind the Rules.

Fohrman, 2014 IL App (1st) 123351, ¶39. Here, the engagement agreement attached to Plaintiff's complaint fails to comply with the mandatory provisions of the Rules, and the agreement is therefore unenforceable.

Defendant also moves to dismiss on the basis that the engagement agreement does not contemplate the class action litigation. The agreement is titled "Engagement Agreement for Services Against David Lerner Associates" and it provides that the scope of the engagement is "to investigate your potential claims against David Lerner Associates . . . and, if appropriate, to settle, arbitrate or otherwise advance your claim[.]" The agreement does not provide for other services. The agreement further provides that the engagement for representation "will be deemed to have terminated when we have completed our services contemplated by this agreement." The claims against David Lerner Associates resulted in a FINRA arbitration award in favor of David Lerner Associates in August 2013. Defendant filed the class action in May 2014 and David Lerner Associates was not named as a Defendant in that case. The class action lawsuit is simply outside the scope of the engagement agreement.

III.

Based on the foregoing, it is hereby ORDERED:

4001

(1) Defendant Eccleston Law, LLC's motion to dismiss is GRANTED. Because there is no set of facts which Plaintiff can plead which would entitle it to a share of the contingent fee earned on the class action lawsuit, Plaintiff Stoltmann Law Offices, P.C.'s complaint is dismissed with prejudice.

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(2) The clerk's status set for September 15, 2017 at 9:00 a.m. is stricken.

(3) This is a final order which disposes of the case in its entirety.

Judge Raymond W. Mitchell

ENTERED, SEP 18 2017

Circuit Court - 1992

CC S.T.

Judge Raymond W. Mitchell, No. 1992

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APPEAL TO THE APPELLATE COURT OF ILLINOIS
FROM THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS

County **DEPARTMENT,** Law **DIVISION/DISTRICT**

Stoltmann Law Offices, P.C.
Plaintiff/ Appellant

v.

Eccleston Law, LLC
Defendant/ Appellee

Reviewing Court No. ______________

Circuit Court No. 17 L 5914

NOTICE OF APPEAL

(Check if applicable. See Ill. Sup. Ct. Rule 303(a)(3).)

☐ **Joining Prior Appeal** ■ **Separate Appeal** ☐ **Cross Appeal**

Appellant's Name: Stoltmann Law Offices, P.C.
Appellant's Attorney (if applicable): Alexander N. Loftus
Address: 10 S. LaSalle, Suite 3500
City/State/Zip: Chicago, Illinois 60654
Telephone Number: 312-332-4200
■ **Cook County Attorney Code:** 43671 **or** ☐ ***Pro se*** **99500 (Choose one)**

Appellee's Name: Eccleston Law, LLC
Appellee's Attorney (if applicable): Mark Roth
Address: 311 S Wacker Dr, Suite 2470
City/State/Zip: Chicago, IL 60606
Telephone Number: (312) 922-6262
☐ **Cook County Attorney Code:** ________ **or** ☐ ***Pro se*** **99500 (Choose one)**

An appeal is taken from the order or judgment described below:

Date of the judgment/order being appealed: 11/8/17 and 9/18/17
Name of judge who entered the judgment/order being appealed: Raymond Mitchell
Relief sought from Reviewing Court: Reverse and Remand

I understand that a *"Request for Preparation of Record on Appeal"* form (CCA 0025) must be completed and the initial payment of $110 made prior to the preparation of the Record on Appeal. The Clerk's Office will not begin preparation of the ROA until the Request form and payment are received. Failure to request preparation of the ROA in a timely manner, i.e., at least 30 days before the ROA is due to the Appellate Court, may require the Appellant to file a request for extension of time with the Appellate Court. A *"Request for Preparation of Supplemental Record on Appeal"* form (CCA 0023) must be completed prior to the preparation of the Supplemental ROA.

/s/Alexander N. Loftus
(To be signed by the Appellant or Appellant's Attorney)

APPEAL TO THE APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT
FROM THE CIRCUIT COURT OF THE COOK JUDICIAL CIRCUIT
COOK COUNTY, ILLINOIS

STOLTMANN LAW OFFICES, P.C.
Plaintiff/Petitioner

Appellate Court No: 1-17-2969
Circuit Court No: 2017L005914
Trial Judge: RAYMOND MITCHELL

v.

ECCLESTON LAW, LLC.
Defendant/Respondent

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