IN THE COURT OF COMMON PLEAS
SUMMIT COUNTY, OHIO

MEMBER WILLIAMS, et al.,	)	CASE NO. CV-2016-09-3928
	)	
Plaintiffs,	)	JUDGE ALISON BREAUX
	)	
v.	)	
	)	
KISLING, NESTICO & REDICK, LLC, et al.,	)	**BRIEF IN OPPOSITION TO PLAINTIFF'S MOTION TO LIFT GAG ORDER AND RESTORE REMOTE ACCESS TO CASE RECORDS**
Defendants.	)	

I. INTRODUCTION

The longwinded effort by Plaintiff Member Williams' ("Plaintiff") counsel Subodh Chandra ("Chandra") and Peter Pattakos ("Pattakos") to frame this Court's Sealing Order and Gag Order as unlawful and an unconstitutional prior restraint on their right to free speech, while a brimming compendium on First Amendment law, has no merit. Indeed, *by their own doing*, Chandra and Pattakos forced this Court to issue the Orders through their repeated, improper publication and distribution – on their law firm website and blog, on social media (e.g. Facebook and Twitter), to media outlets, and through filing with this Court – of attorney-client and/or work product privileged and confidential documents belonging to Defendants Kisling, Nestico & Redick, LLC, Alberto R. Nestico, and Robert Redick (collectively "Defendants"). Chandra and Pattakos both (1) knew that these documents were willfully stolen from Defendants, seeing they obtained the documents from their main witness and fired KNR attorney Robert Horton, and (2) knew, or should have known, that Defendants deemed the documents privileged and confidential and the subject of the parties' competing proposed Motions for Protective Order.

There is no question that Chandra and Pattakos deliberately endeavored to circumvent the Civil Rules and this Court's own power to determine whether the documents at issue are protected by widely distributing and commenting on them in court filings, on social media, and in the press. As a result, this Court had the inherent discretionary authority to immediately control

its docket and restrict electronic public access to these filings when faced with this misconduct under the Ohio Supreme Court Rules of Practice and this Court's local rules. In addition, this Court rightfully issued the Gag Order under the controlling authority of the United States Supreme Court in *Gentile v. The State Bar of Nevada*, 501 U.S. 1030, 111 S. Ct. 2729, 2745, 115 L. Ed. 2d 888 (1991) and the Ohio Supreme Court in *In re T.R.*, 52 Ohio St.3d 6, 40, 556 N.E.2d 439 (1990) to curb counsel's unrelenting public smear campaign and widespread distribution of proprietary and client information that Defendants have an ethical obligation as attorneys to protect. Despite their pleas, such reckless conduct by counsel is not protected under the First Amendment, nor does Rule 3.6 of the Ohio Rules of Professional Conduct provide them shelter or otherwise govern this Court's obligation to control and protect the sanctity of the proceedings before it. Indeed, since Chandra and Pattakos very likely have additional documents of Defendants through their admitted relationship with Horton, it is crucial that the Court uphold and maintain the Gag Order until, at the very least, it has the opportunity to review and make a determination of whether *any and all documents subject to discovery in this case* are afforded protection.

Moreover, while Chandra and Pattakos surreptitiously claim that they have a right to distribute Defendants' documents because they obtained them "independently" from the discovery process, and also because the documents allegedly establish evidence of fraud (as they once again have unilaterally concluded without input from this Court), it is clear both attorneys had a fundamental ethical obligation to refrain from publically distributing, let alone reviewing, potentially privileged and confidential documents of their adversaries that they knew were unlawfully obtained by a third-party. Since it is abundantly clear that Chandra and Pattakos have sought to circumvent this Court's decisional authority and improperly and unethically try this case in the media by smearing the character, credibility, and reputation of Defendants with the ultimate goal of coercing an early settlement, this Court – within its complete and utter

discretion – lawfully and properly sent a message that this case would be tried in a court of law and not the court of public opinion. Accordingly, Defendants respectfully request that this Court summarily deny Plaintiff's Motion and uphold the Sealing and Gag Orders issued in this case.

II. FACTS AND PROCEDURAL HISTORY

A. The Deliberate Misconduct of Chandra and Pattakos Caused the Court to Issue the Sealing and Gag Orders.

Plaintiff filed this putative class action lawsuit against Defendants for breach of contract, fraud, and unjust enrichment surrounding KNR's representation of her in an automobile accident. In particular, Plaintiff's First Amended Complaint alleged it was unlawful for KNR to charge an investigation fee upon settlement of her case.

Plaintiff's discovery requests to Defendants sought the production of confidential information, including proprietary business information of KNR, the identities of current and former KNR clients, and personally identifiable information of KNR clients and third-parties. As a result, Defendants rightfully objected to the requests and agreed to produce those documents subject to an agreed upon protective order. The parties exchanged drafts of a Proposed Stipulated Protective Order, but they continued to disagree on crucial provisions. Thus, Defendants were forced to file a Motion for Protective Order.

However, on March 22, 2017 while Defendant's Motion was pending, Chandra and Pattakos deliberately determined that they had the unilateral authority to decide whether Defendants' documents were entitled to protection under a protective order without input by this Court. To that end, Chandra and Pattakos publically filed approximately 45 pages of stolen internal documents belonging to Defendants as exhibits to Plaintiff's Motion for Leave to File Second Amended Complaint. Chandra and Pattakos readily admit that they obtained these documents from Robert Horton, a prior attorney of KNR who unlawfully retained the documents and "emails" on his "hard drive" upon his exit from the firm. (*See, e.g.* April 5, 2017 Hearing Transcript at p.22, attached as Exhibit 2 to Plaintiff's Motion to Lift Gag Order). The documents,

which Defendants maintain are confidential, proprietary, and privileged, contain internal office correspondence, firm spreadsheets, and the personal identifying information of KNR's clients, including a minor.

That same day, in a direct and deliberate effort to further disseminate Defendants' confidential and privileged information to the public, Chandra and Pattakos took to social media in an obvious, concerted effort to widely publicize the documents before this Court could hear arguments on the motion for protective order. For instance, referencing "internal KNR emails, provided by former KNR attorneys and quoted in the complaint," Chandra publically accused Defendants of "defrauding clients" and engaging in "kickback schemes." Pattakos shared Chandra's accusations on his social media pages and furthered his own, that KNR "defrauded its clients with kickback schemes." As Chandra and Pattakos surely anticipated, their smear campaign worked, as the local news media began picking up on the "story."

Immediately upon learning of these actions, on March 23, 2017 Defendants filed a motion for a sua sponte order prohibiting the improper media campaign of Chandra and Pattakos, a motion to strike the confidential and protected exhibits, and a motion to seal public access to the docket. No sooner had Defendants filed their motions than Chandra and Pattakos amplified their public smear campaign. For instance, Pattakos publically commented about KNR's alleged inability to dispute the claims alleged in the proposed Second Amended Complaint. For instance, Pattakos stated that "KNR…has no legitimate response to the new allegations that we filed this week." He continued, "So instead, they've gone into attack mode against us and our clients, and have asked the Court to impose an unconstitutional gag order to keep us from reaching out to the public about this case." In fact, Pattakos blatantly accused KNR of seeking a gag order for an improper purpose: to "keep [Plaintiff] from discovering . . . key information supporting the newly filed allegations." Pattakos further stated, "The KNR law firm has requested a gag order to keep us from discovering more info about their fraudulent

conduct." Chandra shared Pattakos' postings, encouraged people to "spread the word," and continued to improperly publish, comment upon, and draw conclusions about this lawsuit.

B. The Court Issued the Sealing and Gag Order.

In response to this conduct, this Court issued a limited Gag Order barring the parties and their counsel from "disseminat[ing] . . . any information that is the subject of any pending motion for protective order, as well as any information that is the subject of the hearing on April 5th, 2017. This Gag Order includes the dissemination of any court documents, exhibits, and filings to the press or the public by any means, including but not limited to social media such as Twitter, Facebook, or LinkedIn, and law firm websites, including links thereto." (March 29, 2017 Order, pp. 5-6) (emphasis removed). The Court additionally issued a Sealing Order both (1) striking Plaintiff's proposed Amended Complaint and the exhibits attached thereto from the docket, and (2) restricting electronic, online access to filings in this case, finding that "[a]ny concerns about 'secret proceedings' is easily resolved by this restriction, as a copy of any filings or documents not under seal may be requested from the Clerk of Courts, and any hearing conducted by this Court remains a proceeding open to the public." (*Id.* at p. 5).

At the April 5, 2017 hearing, which was open to the public, the Court reaffirmed the Order but allowed the parties to fully brief the issue. (*See* April 5, 2017 Order). Plaintiff has now moved the Court to lift the Sealing and Gag Orders, and Defendants' hereby submit its opposition and respectfully request that the Court uphold both Orders. Additionally, viewing that Chandra and Pattakos likely have additional documents and records unlawfully taken from Defendants by Horton that have not yet been disclosed publically, Defendants respectfully request that this Court maintain the Sealing and Gag Orders to curb future dissemination until this Court has had the opportunity to review all documents subject to discovery in this case and make a determination as to whether such documents are entitled to protection.

III. LEGAL ANALYSIS AND ARGUMENT

A. This Court's Sealing Order is Lawful Pursuant to the Court's Inherent Authority to Control Access to Its Docket.

In response to the misconduct of Chandra and Pattakos, this Court rightfully issued the Sealing Order restricting public access to its docket under Rule 45(E)(2) of the Ohio Supreme Court Rules of Superintendence, which provides in relevant part that:

> A court shall restrict public access to information in a case document or, if necessary, the entire document, if it finds by clear and convincing evidence that the presumption of allowing public access is outweighed by a higher interest after considering . . . (a) [w]hether public policy is served by restricting public access; (b) [w]hether any state, federal, or common law exempts the document or information from public access; (c) [w]hether factors that support restriction of public access exist, including risk of injury to persons, individual privacy rights and interests, proprietary business information, public safety, and fairness of the adjudicatory process.

Additionally, as this Court also recognized, the Summit County Local Rules authorized this Court to restrict access to improperly submitted documents that contain personal or private information. S.C.C. Rule 7.04(E).

While there is a common law right of public access to judicial proceedings in civil cases, that right is not absolute. *See, e.g. Putnam Pit, Inc. v. City of Cookeville*, 221 F.3d 834, 840-841 (6th Cir. 2000), citing *United States v. McDougal*, 103 F.3d 651, 659 (8th Cir. 1996) (finding "no *First Amendment* right to government information in a particular form, as long as the information sought is made available as required by the *First Amendment*"). For instance, the public's access to proceedings may be limited by a protective order, which weighs the privacy rights of the party seeking the order with the public's First Amendment right to obtain information about the judicial proceeding. *See, e.g. Seattle Times Co. v. Reinhart*, 467 U.S. 20, 104 S. Ct. 2199, 81 L. Ed.2d 17 (1984); Civ.R. 26(C). Additionally, civil discovery is typically conducted by the parties in private proceedings, and a right of public access does not attach to documents exchanged by parties or to pretrial discovery that is not filed with the court. *Id.* at 26. As most aptly stated by the United States Supreme Court:

> [E]very court has supervisory power over its own records and files, and access has been denied where the court files might become a vehicle for improper purposes . . . the decision as to access is best left to the sound discretion of the trial court, a discretion to be exercised in light of the relevant facts and circumstances of the particular case.

Nixon v. Warner Communications, Inc., 435 U.S. 589, 598-99, 98 S. Ct. 1306, 55 L. Ed.2d 570 (1978).

As noted above, the Court's Order only restricted *electronic* public *access* to the docket in this case. The Court did not restrict public access to the docket or Court filings in-person at the courthouse itself, nor did it restrict the public's access to any and all hearings conducted by the Court. Indeed, many courts throughout the State of Ohio do not provide immediate electronic access to court records, and Plaintiff has identified no authority that not providing such access violates constitutional protections afforded to them or to the public, in general.

The Order additionally *temporarily* barred complete access to the exhibits filed with Plaintiff's proposed Second Amended Complaint, exhibits that Chandra and Pattakos both (1) knew were stolen from Defendants and (2) knew or should have known were the subject of competing protective orders. Chandra and Pattakos unilaterally appointed themselves judge by distributing these records before this Court could rule on the pending motions for protective order, and the Court thus had good reason and full discretionary authority to temporarily bar immediate and complete public access to these exhibits until it was able to rule. As a result, the Court should uphold the Sealing Order.

B. The Gag Order Does Not Run Afoul of the First Amendment.

1. Trial courts have an obligation to curb extrajudicial publicity that prejudices trail proceedings.

Trial courts have an affirmative duty to curb significant threats to judicial proceedings to protect the fundamental right to a fair trial, including the danger posed by extrajudicial publicity of a case, or what has been referred to as "trial by newspaper." *Pennekamp v. Florida*, 328 U.S. 331, 66 S. Ct. 1029, 1043. 1047, 90 L. Ed. 1295 (1946) (Frankfurter, J., concurring) ("it is

indispensable . . . that in a particular controversy pending before a court and awaiting judgment, human beings, however strong, should not be torn from their moorings of impartiality by the undertow of extraneous influence."). *See also Bridges v. California*, 314 U.S. 252, 62 S. Ct. 190, 197, 86 L. Ed. 192 (1941) ("Legal trials are not like elections, to be won through the use of meeting-hall, the radio, and the newspaper."); *Gannett Co. v. DePadwuale*, 443 U.S. 368, 99 S. Ct. 2898, 2904, 61 L. Ed. 2d 608 (1979) (courts have "an affirmative constitutional duty to minimize the effects of prejudicial pretrial publicity."); *Theil v. S. Pac. Co.*, 328 U.S. 217, 220, 66 S. Ct. 984, 90 L. Ed. 1181 (1946) (citation omitted) ("The American tradition of trial by jury, considered in connection with either criminal or civil proceedings, necessarily contemplates and impartial jury drawn from a cross-section of the community."); *Pfahler v. Swimm*, 2008 U.S. Dist. LEXIS 12064 (D.Colo. Feb. 4, 2008) (citation omitted) ("'[T]rial courts have a wide discretion in being able to protect the judicial process from influences that pose a danger to effective justice.' This would include the authority to issue a civil gag order."); *Shapiro v. Kilgore Cleaning & Storage Co.*, 108 Ohio App. 402, 406, 156 N.E.2d 866, 869 (8th Dist. 1959) ("In [Ohio] every person has the right to a fair and impartial jury trial before an impartial jury in a [civil] case . . .."); *In re Scaldini*, 8th Dist. Cuyahoga No. 90889, 2008-Ohio-6154, ¶12-13, quoting *Affeldt v. Carr*, 628 F. Supp. 1097, 1101 (N.D.Ohio 1986) (trial court has broad discretionary authority to issue gag orders in order to "'maintain appropriate decorum in the administration of justice and to prevent litigants from prejudice.'"). A principle danger to judicial proceedings by outside influences includes disclosing inadmissible evidence to the press, where its exclusion at trial "is rendered meaningless when news media make it available to the public." *Sheppard v. Maxwell*, 384 U.S. 333, 360, 86 S. Ct. 1507 16 L. Ed. 2d 600 (1966).

2. Publicity by attorneys poses a heightened risk of prejudice to trial proceedings, and orders restricting such speech are entitled to more deference than restrictions placed on the press.

While courts have a duty to maintain decorum in the courtroom and curb threats to judicial proceedings, the issuance of an order gagging the press, attorneys, or the litigants raise constitutional considerations under the First Amendment. However, "[a]lthough litigants do not surrender their First Amendment rights at the courthouse door, those rights may be subordinated to other interests that arise" in both civil and criminal trials. *Seattle Times*, 467 U.S. at 32, 20, n.18 (finding that First Amendment rights may be limited by a protective order); *Pennekamp*, 328 U.S. at 366. ("In securing freedom of speech, the Constitution hardly meant to create the right to influence judges or juries.").

The United States Supreme Court in *Gentile* recognized that extrajudicial statements by attorneys undoubtedly create a high potential for prejudice due to the unique role attorneys play in our judicial system. The *Gentile* Court encountered a challenge to a Nevada Supreme Court rule that prohibited attorneys from making extrajudicial comments to the media that he or she knew or should have known would "have a substantial likelihood of materially prejudicing an adjudicative proceeding." *Gentile,* 501 U.S. at 1033. A majority of the *Gentile* Court recognized that prior Court precedent "rather plainly indicate[d] that the speech of lawyers representing clients in pending cases may be regulated under a less demanding standard than that established for the regulation of the press." *Id.* at 1074. In so recognizing, the Court held that the "substantial likelihood of material prejudice" standard identified in the Nevada rule was constitutionally sufficient to justify restricting attorney speech, contrary to the higher "clear and present danger" standard applied to the media in prior Court precedent. *Id.* at 1074-1075.

The *Gentile* Court premised its holding on the unique role of lawyers as "officers of the court" who "in pending cases [are] subject to ethical restrictions on speech to which an ordinary citizen would not be," and "[b]ecause lawyers have special access to information through

discovery and client communications, their extrajudicial statements pose a threat to the fairness of a pending proceeding since lawyer's statements are likely to be received as especially authoritative." *Id.* at 1074. Moreover, when compared to the rights of the press, "[a] lawyer's right to free speech is extremely circumscribed in the court room . . . and, in a pending case, is limited outside the court room as well." *Id.* at syllabus (citations omitted).

3. Ohio courts have routinely issued gag orders on attorneys and trial participants where extrajudicial speech was found "reasonably likely" to prejudice the proceedings.

While the *Gentile* Court found that the "substantial likelihood of material prejudice" standard under the Nevada rule was constitutionally permissible, it did not find that such standard was the "outer limit on restriction of lawyer's speech." *See, e.g. Commission for Lawyer Discipline v. Benton*, 980 S.W.2d 425, 431 (Tex. 1998) ("Thus, *Gentile* left open the possibility that the 'substantial likelihood of material prejudice' test may in fact give lawyers' speech more protection than the First Amendment requires.") For instance, in dicta, the *Gentile* Court recognized that different standards, including the "reasonable likelihood of material prejudice" standard, existed in eleven states. *Id.* at 1068.[1]

In Ohio, courts have routinely issued gag orders on attorneys and/or trial participants where extrajudicial speech was found reasonably likely to prejudice the proceedings. *In re T.R.*, 52 Ohio St.3d 6, 22, 556 N.E.2d 439 (1990) (finding in custody case that the evidence established a "reasonable and substantial basis for believing that . . . [the] media campaign could endanger the fairness of the adjudication."); *In re Scaladini*, 2008-Ohio-6154 at ¶13 (citation omitted) ("The standard applied to gag orders imposing restrictions on parties is whether the extra-judicial statements are 'reasonably likely' to prejudice the proceedings."); *Shell v. Durrani*, Butler C.P. No. CV 12-08-2824, 2013 Ohio Misc. LEXIS 17036, *1 (Nov. 25,

[1] *See also U.S. v. Cutler*, 58 F.3d 825, 835-36 (2nd Cir.1995) (reasonable likelihood standard); *In re Morrissey*, 168 F.3d 134, 139-40 (4th Cir.1999) (reasonable likelihood standard); *In re Russell*, 726 F.2d 1007, 110 (4th Cir.1984); *U.S. v. Tijerina*, 412 F.2d 661, 666-67 (10th Cir.1969).

2013) (issuing gag order in civil matter upon "finding that continued extrajudicial statement about [the cases] are reasonably likely to prejudice the proceedings and prevent the right of the parties to a fair and impartial jury . . .."); *Aaron v. Durrani*, Case No. 1:13-cv-202, 2013 U.S. Dist. LEXIS 194259, **4-5 (S.D.Ohio Oct. 1, 2013) (issuing gag order in a civil matter, where "continued extrajudicial statements about this case are reasonably likely to prejudice the proceedings and inhibit the right of the parties to a fair and impartial jury, and that this Order is necessary and proper for the purposes of governing, controlling and regulating the conduct of the persons participating in this case."). Multiple courts throughout the country have similarly recognized the importance of corralling trial publicity by attorneys and litigants to preserve the integrity of the judicial system:

> With increased frequency practicing attorneys are utilizing the media to publicize their cases as a litigation tactic. This must stop if the integrity of the judicial enterprise is to be preserved.

Kramer v. Tribe, 156 F.R.D. 96, 109-110 (D.N.J. 1994). *See also Constand v. Cosby*, 229 F.R.D. 472, 475 (E.D.Pa. 2005) ("[E]xtrajudicial statements by counsel heighten the risk of turning litigation into a media circus, polluting the jury pool and lowering the esteem and dignity of the court in the eyes of the public.").

4. This Court's Gag Order is constitutionally sound.

a. *There is a reasonable, or even a substantial likelihood that the conduct and publicity by Chandra and Pattakos will impact these proceedings.*

As discussed in detail above, attorneys Chandra and Pattakos are not only waging a prejudicial, ongoing media campaign against Defendants, but they are also widely disseminating and commenting on stolen confidential and privileged documents belonging to Defendants. The public dissemination of confidential and privileged records of a party to litigation, which could likely be found inadmissible at trial, surely poses a reasonable, or even a substantial likelihood of material prejudice to these proceedings. *See, e.g. Sheppard*, 384 U.S. at 360 (recognizing a

principle danger to jury impartiality by outside influences includes disclosing inadmissible evidence to the press, where its exclusion at trial "is rendered meaningless when news media make it available to the public.").

b. *The Gag Order is narrow, applies only to counsel and parties in this case, and applies only to documents and information subject to pending motions for protective order.*

The limitation on speech of trial participants must be no broader than necessary to protect the judicial proceedings. *See Gentile*, 501 U.S. at 1077. *See also Procunier v. Martinez*, 416 U.S. 396, 411 94 S. Ct. 1800, 40 L. Ed.2d 224 (1974) (limitation on First Amendment freedoms should be "no greater than is essential to the protection of the particular governmental interest involved.").

The Gag Order here meets that burden. It is sufficiently narrow to eliminate only speech having a likelihood of prejudicing the proceedings (speech concerning documents that Defendants maintain are confidential and privileged), it does not represent a broad "no comment" rule, and it only applies to the attorneys and parties in the case and not to the media. *See, e.g. U.S. v. McGregor*, 838 F. Supp.2d 1256, 1266 (M.D.Ala. 2012) (finding proposed gag order that applied only to the attorneys and that was not a "no comment" rule met "narrowly tailored" prong). *Accord, Dippolito v. State*, No. 4D17-1145, 2017 Fla. App. LEXIS 7686 (Ct.App.Fla. May 26, 2017).

c. *The Gag Order is the least restrictive method of curtailing prejudice to these proceedings.*

When confronting speech restrictions on the media, the United States Supreme Court indicated that such restrictions should employ the least restrictive means possible. *See Nebraska Press Association v. Stewart*, 427 U.S. 539, 96 S. Ct. 2791, 49 L. Ed.2d 683 (1975) ("The more difficult prospective or predictive assessment that a trial judge must make also calls for a judgment as to whether other precautionary steps will suffice."). In *Sheppard*, the Supreme Court suggested several alternatives to restricting the speech of the press, including change of

venue, jury sequestration, voire dire, and jury instructions as potential alternatives to gagging the press. *Sheppard*, 384 U.S. at 361. Those alternatives also included restrictions on attorneys and litigants, which "might well have prevented the divulgence of inaccurate information, rumors, and accusations that made up much of the inflammatory publicity . . .." *Id*.

It is uncertain whether courts entertaining a restriction on speech of attorneys need to consider the alternative measures posed by the *Sheppard* Court. "In the post-*Gentile* era, courts have found that it is only when a court imposes a blanket prohibition on speech of trial participants or imposes a restraint on the press that the court must explore and consider less intrusive alternative measures." *U.S. v*. *Koubriti*, 307 F. Supp.2d 891, 899 (citation omitted). In *Koubriti*, the court's gag order only prohibited the disclosure and comment on "'confidential, sealed and classified material that is not of public record,'" and there was thus no need to review the alternatives identified in *Sheppard*. *Id.* Nonetheless, the court reviewed the alternative measures and recognized that some, such as voir dire and change of venue, imposed significant costs on the judicial system, and ultimately found that "the only remedial measure that will prevent prejudice to the parties' fair trial rights in this case is the imposition of a limited gag order." *Id.* at 900. Directly applicable to this case, the court also found that "there is no First Amendment right to have confidential, sealed or classified information leaked to the public." *Id.* (citation omitted).

As in *Koubriti*, this Court's Gag Order prohibited the disclosure of and comment on Defendants' confidential and privileged documents, which were improperly attached to Plaintiff's proposed Second Amended Complaint and widely distributed on her counsel's website, social media pages, and to the media, and thus, cannot be seen as a blanket prohibition on speech. Nevertheless, the other measures suggested by the *Sheppard* and *Nebraska Press* Courts would surely be insufficient to immediately address the continued publicity and misconduct of

Chandra and Pattakos in freely distributing Defendant's stolen, confidential, and privileged records.

The misconduct and unrelenting media campaign of counsel in this case exhibits precisely the sort of "collaboration between counsel and press" that the United States Supreme Court described as "highly censurable and worthy of disciplinary measures." *Gentile*, 501 U.S. at 1065-1066 (citation omitted). With its Gag Order, this Court took immediate steps to rectify this behavior and ensure that this case is litigated in the courtroom as opposed to the court of public opinion. In reality, this Court's Gag Order simply acts as a temporary protective order limiting the improper and wide-spread dissemination of stolen documents that Defendants deem confidential and privileged, while affording this Court the opportunity to review the documents and determine if they are legally protected. Defendants have an affirmative ethical obligation under Ohio law and professional conduct rules to safeguard the confidences of their clients and attorney-client privileged materials, and lifting the Gag Order will place those safeguards at risk, protections that cannot be restored once disclosed. Therefore, the Gag Order meets constitutional requirements and is proper and necessary to protect Defendants' and their clients' rights and ensure the impartiality of these proceedings. Accordingly, it should be upheld.

C. The Ohio Rules of Professional Conduct Do Not Shelter the Conduct and Pretrial Publicity of Chandra and Pattakos.

Similar to the Nevada rule encountered by the United States Supreme Court in *Gentile*, Ohio's ethical rules for attorneys also recognize the heightened risk of prejudice to the judicial system by attorneys seeking to try their cases in the press. Under Rule 3.6(a) of the Ohio Rules of Professional Conduct, a lawyer who is participating in the litigation of a case "shall not make an extrajudicial statement that the lawyer *knows* or *reasonably should know* will be disseminated by means of public communication and will have a *substantial* likelihood of materially prejudicing an adjudicative proceeding." Prof.Cond.R. 3.6(a) (emphasis in original).

However, after-the-fact enforcement of Rule 3.6 has little effect to cure damaged cause by an attorney's abuse of trial publicity rules and use of the media during litigation. As a result, trial courts have recognized the need for immediate action when faced with prejudicial pretrial publicity, especially because the proverbial bell cannot be unrung:

> It is true that breaches of the . . . Rules of Professional Conduct are generally enforceable by reference of the offending counsel to the . . . Disciplinary Board. It is also true that this method of post hoc enforcement has been criticized as effectively toothless. This criticism is particularly apt here, where an after-the-fact rebuke by the Disciplinary Board would not address the need for prompt action by the trial court to sanction attorney conduct or to enter orders protecting the integrity of the proceedings while the case is ongoing.

Constand, 229 F.R.D. at 477 (citations omitted). Moreover, the mere fact that Ohio's professional conduct rules address the ethical obligations of attorneys in publicizing their cases does not eviscerate a trial court's obligation to curb extrajudicial threats to fair trials by restricting speech of attorneys, as an attorney's ethical obligations to curb prejudicial publicity will exist whether or not the court issues a gag order. To put it another way, even if the media campaign of Chandra and Pattakos is deemed *ethical* under Prof.Cond.R. 3.6, which Defendants maintain is not, this Court does not lose its authority to restrict the speech of attorneys or otherwise impose sanctions for extrajudicial conduct posing a threat to the right of a fair trial by an impartial jury.

Chandra and Pattakos also claim shelter under the Prof.Cond.R. 3.6(b) "safe harbors" for speech concerning "the claim, offense, or defense involved," "information contained in a public record," or "a request for assistance in obtaining evidence and information necessary thereto." Prof.Cond.R. 3.6(b)(1), (b)(2), and (b)(5). While Chandra and Pattakos maintain that their malicious statements and accusations against Defendants were simply claims alleged in their pleadings filed with this Court, they cannot hide behind the protections of the rule by recklessly including prejudicial, inflammatory and unsupported allegations in their publicly-filed pleadings. *See, e.g. Kramer*, 156 F.R.D. at 103 (finding attorney that sent copies of complaint to

the media violated publicity rule). Chandra and Pattakos made the filings. Chandra and Pattakos improperly attached Defendants' stolen documents to the filings so, low and behold, they could now "report" about them on social media and to the press under the purported protection of Prof.Cond.R. 3.6(b). Counsel should not be allowed to use the professional conduct rules as both a shield and a sword in this case.

In addition, the Gag Order does not prevent Chandra and Pattakos from requesting assistance to obtain evidence or otherwise investigate their case whatsoever. Counsel certainly in whatever fashion located both Plaintiff and their main witness without publicizing Defendants' stolen records, and preventing them from doing so going forward will not impede the prosecution of their claims, however baseless they may be.

Furthermore, the Prof.Cond.R. 3.6 shield of which Chandra and Pattakos claim protection does not hold up in this instance. As noted by Comment 5 to Prof.Cond.R. 3.6:

> [C]ertain subjects that are more likely than not to have a material prejudicial effect on a proceeding, particularly when they refer to a civil matter triable to a jury . . . These subjects relate to: (1) the character, credibility, reputation . . . of a party . . ..

As discussed above, Chandra and Pattakos have routinely violated the rule by making numerous public attacks on the credibility and reputation of Defendants that they knew, or should have known, would have a substantial likelihood of materially prejudicing this case, whether made in public filings or not. For example, both Chandra and Pattakos publically accused Defendants of "defrauding clients" and engaging in "kickback schemes, referencing "internal KNR emails, provided by former KNR attorneys." When Defendants sought to protect their confidential and privileged records and their reputation from these continued baseless attacks, Chandra and Pattakos publically claimed Defendants were "inab[le]" to dispute and "ha[d] no legitimate response" to the allegations, Defendants "have gone into attack mode . . . to keep us from reaching out to the public about this case" and to keep [Plaintiff] from discovering . . . key information supporting the newly filed allegations" or "discovering more

about their fraudulent conduct." These inflammatory statements made by counsel on social media, to the traditional media, and in court filings are nothing more than a direct attack on the character and reputation of Defendants with the ultimate goal of sensationalizing this case and influencing public opinion, prejudicing Defendant's rights and tainting these proceedings. As a result, the Court should uphold its order.

D. Defendants' Documents Have Not Lost Their Protected Status.

Lastly, and most astonishingly, Chandra and Pattakos, in relying on *Seattle Times*, claim they can freely distribute and publicize Defendants' confidential and privileged documents because the stolen documents were "independently obtained" outside of the discovery process and allegedly evidence fraudulent conduct. A clear review of *Seattle Times* undoubtedly supports Defendants' position in this case, namely that a trial court has the unfettered duty and discretion to govern the discovery process and issue protective orders restricting the public dissemination of certain types of information upon a showing of good cause, which does not run afoul of the First Amendment. *See Seattle Times*, 467 U.S. at 33-37. And while Chandra and Pattakos rely on the Supreme Court's statement in dicta that a "party may disseminate the identical information covered by the protective order so long as the information is gained through means independent of the court's processes," the Supreme Court could hardly have contemplated those "independent means" to involve the receipt and distribution of an adversary's business records obtained by improper means, as is at issue in this case. *Id. See also Dahlstrom v. Sun-Times Media, LLC*, 777 F.3d 937, 939-940 (7th Cir. 2015) (finding that newspaper "possess[ed] no [First Amendment] constitutional right either to obtain [police] officers' personal information from government records or to subsequently publish that unlawfully obtained information" in violation of the Driver's Privacy Protection Act); *DVD Copy Control Assn. v. Bunner*, 31 Cal.4th 864, 75 P.3d 1 (Cal. 2003) (finding that court injunction

prohibiting website owner from publishing trade secrets acquired by a third-party through improper means does not violate First Amendment guarantees).

Despite counsel's reliance on *Seattle Times*, a recent decision out of the United States District Court for the District of Kansas is more on point. In *Raymond v. Spirit AeroSystems Holdings, Inc.*, Case No. 16-1282-JTM-GEB, 2017 U.S. Dist. LEXIS 101926 (D.Kan. June 30, 2017), prior to filing a wrongful termination lawsuit, plaintiffs' counsel anonymously received two sets of defendant employer's business documents from anonymous third-party sources, where some of the documents were marked privileged and confidential. *Id.* at **8-14. Upon receipt of both sets of documents, plaintiffs' counsel did not inform the defendant but instead asked a paralegal to segregate the documents marked privileged from the other records and place both sets in sealed envelopes. *Id.* Plaintiffs' counsel claimed to have not reviewed the documents marked privilege, but did review the other documents to make a determination of whether the documents were legally protected. *Id.* While unilaterally determining the documents that were not marked privileged were not protected from a legal standpoint, plaintiffs' counsel admitted that they understood the defendant would have considered the documents confidential in nature. *Id.* Plaintiffs' counsel used the documents in her pre-lawsuit investigation, in preparing the complaint, and in issuing discovery requests. *Id.* at *15.

Once the defendant was notified that its stolen business records were in the hands of plaintiffs' counsel, it moved for sanctions, requesting that the court should require the return of the documents and exclude them from use in the case. *Id.* at *20. On the other hand, plaintiffs' counsel argued that they had no ethical duty to notify Spirit or otherwise return the records based upon the advice they were given, and further claimed that "Defendants blur the necessary line between 'confidential' and 'privileged' documents . . .." *Id.* at *21.

The district court disagreed with plaintiffs' counsel. Reviewing the Kansas ethical rules and the ABA Model Rules, the court recognized that ethical rules and opinions interpreting

those ruled did not address the legal duties of a lawyer who receives records that the lawyer knows was improperly obtained by a third party as opposed to receipt of documents that were inadvertently sent. *Id.* at **24-29. However, reviewing persuasive case law from multiple jurisdictions discussing analogous facts, including Pennsylvania, Illinois, and Utah, the district court found that, at a minimum, plaintiffs' counsel had a legal duty to disclose the receipt of the records to Spirit, regardless of whether the records enjoyed any legal protection or not. *Id.* at 31-51, citing *Burt Hill, Inc. v. Hassan*, No. CIV.A. 09-1285, 2010 U.S. Dist. LEXIS 7492 (W.D.Pa. Jan. 29, 2010) (prohibiting defendants' use of privileged and confidential documents obtained from an anonymous source, recognizing that "cases addressing unauthorized disclosures are decidedly unfavorable to defendants," and receiving "'anonymous source' documents would raise 'red flags' for any reasonable attorney."); *Chamberlain Grp. v. Lear Corp.*, 270 F.R.D. 392 (N.D.Ill. 2010) (barring testimony and the use of records improperly obtained by former employee of defendant and provided to plaintiff, finding "the duty to disclose should be stricter when a party obtains the documents outside legitimate discovery procedures," and "even in the absence of privilege, this duty to disclose extends to receipt of proprietary or confidential documents."); *Xyngular Corp. v. Schenkel*, 200 F. Supp.3d 1273 (D.Utah 2016) (terminating defendants' counsel as a sanction for encouraging employees to steal business documents of plaintiff, concluding "it may use its inherent powers to sanction a party who circumvents the discovery process and the rules of engagement employed by the federal courts by improperly obtaining evidence before litigation and then attempting to use that evidence in litigation," and finding it "inappropriate for the [defendant] and his lawyers to unilaterally decide whether the documents were proprietary, confidential, or privileged, where 'those decisions are best resolved through the formal discovery process.'").

The court was further critical of plaintiffs' counsel's unilateral determination of the legal protection afforded to the documents and was not swayed by counsel's concern that Spirit was destroying documents:

> But the method in which Plaintiffs' counsel, in this case, handled the disclosure sidesteps the orderly discovery process, and inappropriately permitted Plaintiffs' counsel to be the ultimate gatekeeper – for over two years – of Defendants' claims of confidentiality and privilege. It was not Plaintiffs' prerogative to unilaterally determine whether the information received anonymously was truly proprietary, confidential, privileged, or some combination of those labels, and use the information it deemed appropriate. 'Rather, those decisions are best resolved through the formal discovery process.'
>
> * * *
>
> Plaintiffs' concerns regarding potential evidence destruction are understandable, because witnesses informed counsel Defendants were destroying documents. But the 'potential destruction of documents does not entitle a party to circumvent the court rules and engage in self-help.'

Id. at **47-49 (citations omitted). Nor did it matter whether the documents were legally protected at all:

> On the facts before this Court, there appears to be no reason to distinguish between those documents marked privileged and those which are merely marked confidential or proprietary . . . receiving counsel knew both that the documents related to the representation of their clients, and knew – from the markings on the documents themselves and from their prior dealings with Spirit – that the documents were not intended for disclosure outside Defendants' business.

Id. at *50. The court ultimately issued evidentiary sanctions requiring plaintiffs' counsel to return the documents and excluded the documents, and any information specifically derived from the documents, from being used in the case, while not excluding evidence related to the subject matter of the documents that plaintiffs' counsel properly obtained through independent means. *Id.* at **60-61.

Similar to *Raymond* and the cases relied on therein, Chandra and Pattakos received stolen business records by a former employee of Defendants. Viewing that the documents consisted of internal office correspondence, internal spreadsheets, and the personal identifying information of KNR's clients, including a minor, counsel should have realized that Defendants

would claim that the documents were protected, either as proprietary and confidential or otherwise as privileged by the attorney-client privilege and/or the work product doctrine, and especially so since the parties were in the process of negotiating a protective order. Nonetheless, Chandra and Pattakos unilaterally took it upon themselves to be the judge of whether the documents were legally protected (including by making their own dubious conclusion that the documents evidenced fraudulent conduct), failed to notify Defendants of their receipt, reviewed the documents, used them to draft and quoted from them in the Second Amended Complaint and discovery requests, and attached them and filed them as exhibits, and widely distributed and quoted from them on their firm's website, blog, and social media pages. As the Kansas District Court recognized, it was not the right of Chandra and Pattakos "to unilaterally determine whether the information received anonymously was truly proprietary, confidential, privileged, or some combination of those labels, and use the information it deemed appropriate. 'Rather, those decisions are best resolved through the formal discovery process,'" which is in the inherent control of this Court. *Raymond*, 2017 U.S. Dist. LEXIS 101926 at *47 (citation omitted). Defendants therefore respectfully request that the Court reject these baseless arguments and uphold the Orders.

IV. CONCLUSION

Based on the foregoing, Defendants respectfully requests that Plaintiff's Motion be overruled and denied and that this Court uphold its lawful Orders both restricting public electronic access to its docket and issuing a Gag Order on the parties and attorneys in this case.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that a copy of the foregoing was filed electronically with the Court and the parties were served via electronic mail on this 21st day of August, 2017.

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