IN THE COURT OF COMMON PLEAS
SUMMIT COUNTY, OHIO

MEMBER WILLIAMS, Plaintiff, vs. KISLING, NESTICO & REDICK, LLC, *et al.*, Defendants.	Case No. CV-2016-09-3928 Judge Alison Breaux

MOTION FOR LEAVE TO FILE INSTANTER A REPLY BRIEF IN SUPPORT OF PLAINTIFFS' MOTION TO LIFT GAG ORDER AND RESTORE REMOTE ACCESS TO CASE RECORDS

Plaintiffs seek leave to file the following reply brief, instanter, to address certain misleading arguments contained in Defendants' opposition brief. Defendants had nearly four months to form their arguments to support the gag and sealing orders in response to Plaintiffs motion that was filed on May 3, and Plaintiffs should be permitted a chance to reply—especially given the First Amendment rights at stake and the risk the Court will be misled by Defendants' continued misrepresentations. The reply brief Plaintiffs wish to submit follows immediately below.

I. Introduction

Defendants' (collectively, "KNR's") opposition depends primarily on the repeated claim (at 1–4, 6, 13–14) that the gag and sealing orders are justified by the "misconduct" of Plaintiffs' counsel. In evaluating the merits of this claim, it's instructive to note just what it is that sparked Defendants accusations in the first place: That is, the filing—and the publication, in a manner expressly permitted by the Ohio Rules of Professional Conduct—of detailed and cogent claims against them,

supported by KNR's own documents which show, at a minimum, that

- KNR deducted $50 from every client settlement for what it represented to be an "investigation," when, behind closed doors, it referred to the same fee as a "sign-up fee" (Second Amended Complaint at ¶¶ 87–92);

- KNR's so-called "investigators" did nothing more than travel to meet potential clients to sign them to fee agreements as quickly as possible so that KNR didn't lose these clients to other firms (*Id.*);

- When KNR needed someone to perform an actual investigation, they contracted with actual investigators, not the fake "investigators" that they sent to "sign up" their clients (*Id.* at ¶¶ 93–96);

- KNR pressured its clients into treating with certain chiropractors based on the number of cases that the chiropractors sent to KNR, regardless of the clients' own needs or preferences (*Id.* at ¶¶ 24–50);

- KNR referred its clients to Plambeck-owned clinics—with whom it had a referral relationship—even though KNR knew that major insurance companies were engaged in a massive fraud lawsuit against these clinics and would naturally view any lawsuits involving these clinics as suspect (*Id.* at ¶¶ 36–43);

- KNR began referring all of its clients to take out loans at extremely high interest rates from a now-defunct loan company with no track record, run by a former insurance salesman with no experience in the lending industry, only weeks after the company was formed, and weeks after Rob Nestico requested copies of the forms KNR used with other competing loan companies (*Id.* at ¶¶ 100–113).

These facts alone—which are undeniable based on KNR's own documents—strongly support claims that this high-volume, high-profile law firm, whose advertising is as voluminous and ubiquitous as any firm's in the state, was serially defrauding its clients on at least three different fronts. These documented facts present a matter of significant public concern—which is undoubtedly why the press was interested in reporting on them in the first place. And these documented facts show that Defendants' continued claims of victimhood—that they're entitled to special treatment as victims of "misconduct" and a "smear campaign" by Plaintiffs and their counsel (*See* KNR Opp. at 1–4, 6, 13–14)—are only intended to mislead and deflect from their conduct that is the real subject of this lawsuit.

KNR's claim that the gag and sealing orders are justified by Plaintiffs' counsel's

"misconduct" depends entirely on the unsupported notion that Plaintiffs had a duty to keep this evidence of KNR's fraud confidential. KNR derives this notion from two additional false premises. The first is that Plaintiffs are somehow bound by Defendants' confidentiality agreements with their own employees, which could not prohibit disclosing evidence of fraud. And the second premise is that the mere fact that the Court was considering whether to enter a protective order that would apply to a limited set of documents could somehow mean that Plaintiffs' independently acquired evidence of fraud—which couldn't legitimately be the subject of a non-consensual protective order in any event—could be subject to this hypothetical protective order before it ever existed. These propositions are both facially absurd and contradicted by the law, as explained below. But even if it could somehow be considered "misconduct" for Plaintiffs to have filed and published this evidence of KNR's fraud (there is no legitimate way that it could), it would still not justify the sweeping gag and sealing orders that have been imposed.

Defendants have had nearly four months to come up with law and argument to justify the gag and sealing orders. Yet, unsurprisingly, they have failed to find any way around the Ohio Supreme Court's controlling standards providing that such orders cannot issue unless specific findings are made showing that the orders are both (1) necessary to preserve values higher than litigants' and the public's First Amendment rights, and (2) that they are narrowly tailored to accomplish this purpose. *State ex rel. National Broadcasting Co. v. Court of Common Pleas of Lake County*, 52 Ohio St. 3d 104, 108, 556 N.E.2d 1120 (1990); *State ex rel. Vindicator Printing Co. v. Wolff*, 132 Ohio St. 3d 481, 2012-Ohio-3328, 974 N.E.2d 89, ¶ 32–37.

Instead, Defendants simply ignore this controlling precedent, and—while mocking Plaintiffs for presenting *too much law* showing that the gag and sealing orders are unconstitutional (KNR Opp. at 1)—only offer a smattering of ancient, wrongly decided, or otherwise inapplicable cases from other jurisdictions. None of Defendants' purported authority binds this Court, and none of it begins

to justify Defendants' request that the Court continue to depart from well-established, controlling Ohio and U.S. Supreme Court standards protecting litigants' freedom of speech and the public's access to court proceedings.

As much as KNR might wish to the contrary, the law does not allow defendants to silence plaintiffs and stifle public access to lawsuits merely because defendants are embarrassed or inconvenienced by the allegations. Given the extent of KNR's resources and the nature of their conduct that this lawsuit has exposed so far, it's not especially surprising that they would go to extreme lengths to mislead the Court to deflect from their conduct, as well as to harass and silence Plaintiffs, and cut off their access to potential witnesses. This tendency has already led to a number of unfortunate consequences, not least being the imposition of the gag and sealing orders at issue. Thus, it is critical that the Court reconsider and treat Defendants' abusive tactics for what they are, restore basic fairness and order to these proceedings, and immediately lift the gag and sealing orders as required by Ohio law. Specific arguments raised in KNR's opposition are addressed in more detail below.

II. Law and Argument

A. Defendants ignore the Ohio Supreme Court's controlling standards regarding gag and sealing orders.

Most of the cases Defendants cite in their brief are ancient, dating back to an era when the general standards governing attorney-speech were much more restrictive than those that apply today—including Prof.Cond.R. 3.6 and the U.S. Supreme Court's decision in *Gentile v. The State Bar of Nevada*, 501 U.S. 1030, 111 S. Ct. 2729, 2745, 115 L. Ed. 2d 888 (1991).[1] Defendants brief relies

[1] *Gentile* was decided in 1991. The currently applicable version of Prof.Cond.R. 3.6 is derived from Model Rule 3.6, which was first adopted by the American Bar Association in 1983, and amended in 1994 to comply with *Gentile*. *See Constand v. Cosby*, 229 F.R.D. 472 (E.D. Pa. 2005) ("[Rule 3.6] puts flesh on the bones of the 'substantial likelihood of material prejudice' standard endorsed by the United States Supreme Court."). These updated standards were created in deference to the First Amendment and in recognition of the important functions served by attorney speech and publicity

almost entirely on misleading citations to dicta from these outdated cases and others, referring to broad principles without any scrutiny of the underlying facts of these cases,[2] and without any

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of court proceedings, and marked a major departure from the now-outdated ABA Canon 20, which provided that attorney communications with the press were "generally … to be condemned" and "better to avoid" "even in extreme cases." *See Gentile*, 501 U.S. 1030 at 1066–76. Yet, in their Opposition brief, Defendants attempt to rely on cases from 1941, 1946, 1959, 1966, 1969, 1974, and 1978 to justify the gag and sealing orders. Their reliance on these outdated cases only underscores the gag and sealing orders unconstitutionality under contemporary jurisprudence. *See also* Jonathan M. Moses, *Legal Spin Control: Ethics and Advocacy in the Court of Public Opinion*, 95 Colum. L. Rev. 1811, 1819–20, et seq. (1995); *Atty. Grievance Comm'n of Md. v. Gansler*, 377 Md. 656, 681, 835 A.2d 548 (Md.Ct.App. 2003) ("Rule 3.6 of the Model Rules of Professional Conduct … attempted to regulate trial publicity in a way that constitutionally balanced the lawyers' right to free expression and an accused's right to a fair trial."); *In re Goode*, 5th Cir. No. 15-30643, 2016 U.S. App. LEXIS 6918, *14 (Apr. 18, 2016) (The rule "constitutes a constitutionally permissible balance between the First Amendment rights of attorneys in pending cases and the State's interest in fair trials.") (internal citations omitted).

[2] For example, Defendants cite "the controlling authority of" *Gentile v. The State Bar of Nevada* to justify the gag order, including for the proposition that Plaintiffs' counsel's conduct is "the sort of 'collaboration between counsel and press' that the United States Supreme Court described as 'highly censurable and worthy of disciplinary measures.'" KNR Opp. at 2, 14 citing *Gentile*, 501 U.S. 1030 at 1065–66. This is an extreme misrepresentation of the *Gentile* opinion, which actually held (1) that the "substantial likelihood of material prejudice" standard articulated in a Nevada ethics rule [also contained in Prof.Cond.R. 3.6] struck a "constitutionally permissible balance between the First Amendment rights of attorneys in pending cases and the State's interest in fair trials," and (2) that a safe-harbor provision of the Nevada rule was unconstitutionally vague. *Gentile*, 501 U.S. 1030 at 1048, 1074. The *Gentile* Court's statement that, "Collaboration between counsel and the press as to information affecting the fairness of a criminal trial is not only subject to regulation, but is highly censurable and worthy of disciplinary measures" was a quotation from an earlier decision about the sensational Sam Sheppard murder trial, *Sheppard v. Maxwell*, 384 U.S. 333, 350, 16 L. Ed. 2d 600, 86 S. Ct. 1507 (1966). This statement was employed as dicta by the *Gentile* Court in its lengthy discussion of how rules governing attorney speech have evolved from Canon 20's outdated restrictions. *Id.* at 1066–1076. It does not impact the *Gentile* Court's holding and it does not justify the gag and sealing orders at issue here.

Defendants also devote four pages of their brief to a recent opinion from the District Court of Kansas involving the plaintiffs' receipt from an anonymous source of documents that were marked privileged, confidential, and proprietary. KNR Opp. at 18–21, citing *Raymond v. Spirit AeroSystems Holdings, Inc.*, No. 16-1282-JTM-GEB, 2017 U.S. Dist. LEXIS 101926 (D. Kan. June 30, 2017). These documents related to Spirit Airlines' efforts to "revamp its employee performance evaluation process" in response to recent litigation and to avoid future litigation, contained "presentations and other documents for review and critique by ... legal advisors," and were otherwise "accessible to only a few high-level HR personnel, in-house Spirit counsel, and [outside counsel]." *Raymond* at *8. The *Raymond* case, unlike the case at bar, did not involve evidence of fraud, and it did not involve information that was accessible to all employees in the organization. Most

reference to the standards that actually bind this Court. None of Defendants' cases can be applied to justify the gag and sealing orders in a manner consistent with the controlling standards articulated by the Ohio Supreme Court.

As explained above, these controlling standards provide that gag and sealing orders cannot issue unless specific findings are made showing that the orders are both (1) necessary to preserve values higher than litigants' and the public's First Amendment rights, and (2) that they are narrowly tailored to accomplish this purpose. *State ex rel. National Broadcasting Co. v. Court of Common Pleas of Lake County*, 52 Ohio St. 3d 104, 108, 556 N.E.2d 1120 (1990); *State ex rel. Vindicator Printing Co. v. Wolff*, 132 Ohio St. 3d 481, 2012-Ohio-3328, 974 N.E.2d 89, ¶ 32–37. Further, these findings must be "specific," "on the record," and constitute "clear and convincing evidence" that the orders are "essential" to protect higher values than those protected by the First Amendment. *Id.* These standards are consistent with the Court's recognition that "[a]ttorneys and their clients retain a panoply of First Amendment rights and are free to speak to the public about their claims and defenses provided that they do not exceed the contours of protected speech and ethical rules that impose reasonable and necessary limitations on attorneys' extrajudicial statements." *Am. Chem. Soc'y v. Leadscope Inc.*, 133 Ohio St.3d 366, 2012-Ohio-4193, 978 N.E.2d 832, ¶ 90 (citing Prof.Cond.R. 3.6).

Apart from a passing reference to Sup. R. 45(E)(2)'s "clear and convincing evidence" standard (at 6), Defendants refuse to acknowledge that these standards exist,[3] let alone attempt to apply them or explain how they were met here.

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pertinently, the *Raymond* case did not involve the imposition of a gag or sealing order, and the court's opinion did not contain any analysis or consideration of the First Amendment at all, let alone under the standards the Ohio Supreme Court mandates. *Raymond* does not apply here.

[3] Remarkably, the only Supreme Court of Ohio case that Defendants cite in their opposition brief (or in any of their briefing supporting the gag and sealing orders) is *In re: T.R.*, 52 Ohio St.3d 6, 556 N.E.2d 439 (1990). Defendants only cite this case in passing (at 2, 10), and again fail to confront that

B. The gag and sealing orders are not supported by any evidence, let alone the required "clear and convincing evidence," and "specific on the record findings" showing that the orders are necessary to preserve values higher than litigants' and the public's First Amendment rights.

To the extent that any "evidence" was presented at all regarding the gag and sealing orders, it was not and could not be the type of "clear and convincing" evidence or "specific on the record findings" to justify them under Ohio law. Rather, the orders were imposed based on Defendants' unsupported assertions (not evidence) that Plaintiffs hardly had a chance to rebut, let alone present evidence against.

The only discernible justifications that Defendants offer for the gag and sealing orders are: (1) that Defendants' reputations will be damaged unless Plaintiffs and their counsel are gagged (KNR Opp. at 2, 16–17); (2) that the information Plaintiffs published is somehow entitled to protection as privileged or confidential (*Id.* at 1–2, 11–12, 14, 16); and (3) that the gag and sealing

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it involved dependency-and-custody proceeding in *juvenile* court, where a lower standard is imposed regarding public access. As the *T.R.* Court noted, "juvenile courts differ significantly from courts of general jurisdiction. The mission of the juvenile court is to act as an insurer of the welfare of children and a provider of social and rehabilitative services." *Id.* at 22. These considerations, unlike those Defendants have advanced here, constituted sufficient cause to outweigh the litigants' and the public's First Amendment rights, consistent with the above-discussed standards set forth by the Ohio and U.S. Supreme Courts.

The limited application of *In re: T.R.* is further affirmed by the Supreme Court of Ohio's later decision in *State ex rel. Dispatch Printing Co. v. Lias*, 68 Ohio St.3d 497, 501–502, 628 N.E.2d 1368 (1994), where the Court acknowledged that "children have a very special place in life which law should reflect," and that "[m]atters involving children have always been subject to close scrutiny and supervision of the courts," which have a duty to ensure that court proceedings "not have a detrimental and adverse effect" on them. Despite this recognition, and with reference to the *T.R.* case, the *Lias* Court granted a writ of prohibition against a trial-court judge for seeking to close a hearing in a child-custody case, and set forth a list of exacting standards to be imposed before any such restrictions are imposed. *Id.* at 502–503. The Court "reaffirm[ed] that any restriction shielding court proceedings from public scrutiny should be narrowly tailored to serve the competing interests of protecting the welfare of the child or children and of not unduly burdening the public's right of access," and noted that "[t]he doors to the courtroom may be closed to the general public only on a rare occasion after a determination that in *no* other way can justice be served." *Id.* at 503–504 (emphasis in original).

orders are necessary to preserve Defendants' right to a fair trial (*Id.* at 7–12). None of these justifications pass muster.

First, harm to a defendants' reputation resulting from court filings cannot possibly justify a gag order under the Ohio Supreme Court's "higher interest" standard, and Defendants cite no case holding otherwise. In fact, to the contrary:

> The natural desire of parties to shield prejudicial information contained in judicial records from competitors and the public … cannot be accommodated by courts without seriously undermining the tradition of an open judicial system. **Indeed, common sense tells us that the greater the motivation a corporation has to shield its operations, the greater the public's need to know.**

Brown & Williamson Tobacco Corp. v. F.T.C., 710 F.2d 1165, 1180 (6th Cir. 1983) (emphasis added). *See also Gamble Co. v. Bankers Trust Co.*, 78 F.3d 219, 225 (6th Cir. 1996) ("The private litigants' interest in protecting their vanity or their commercial self-interest simply does not qualify as grounds for imposing a prior restraint. It is not even grounds for keeping the information under seal."); *Doe v. Pub. Citizen*, 749 F.3d 246, 269 (4th Cir. 2014) (in "consumer fraud cases," "the public and press enjoy a presumptive right of access to civil proceedings and documents filed therein, notwithstanding the negative publicity those documents may shower upon a company").

Second, none of the published documents are entitled to protection as privileged or confidential, and no findings were made to the contrary. None of these documents implicates any privilege, none of these documents contains any information that is confidential (with one minor exception[4]), and none of them contain or constitute trade secrets. No evidence was presented and

[4]Apart from a single instance where a former KNR attorney inadvertently neglected to redact two names from an email before providing it to Plaintiffs' counsel, who attached it to the Second Amended Complaint as evidence of Defendants' fraudulent conduct, there is not even a hint that KNR clients' privileged or confidential information is at risk. Notably, even this single email did not include any personal information about these clients apart from the fact that one or both of them were fraudulently charged a "narrative fee" as a kickback to a chiropractor. There is no suggestion that anyone has been harmed by this accidental disclosure, and one may reasonably infer that these individuals would be glad to be identified and informed of the implications of this email regarding

no findings were made to the contrary, nor could there have been. These documents consist entirely of KNR's public advertisements, its correspondence with Plaintiffs, and internal emails relating to solicitation practices and referring cases to chiropractors and loan companies that were neither communicated to clients nor reflect any legal analysis or work product whatsoever. Finally, all of these documents were gained through means independent of the discovery process. *See Seattle Times Co.v. Rhinehart*, 467 U.S. 20, 34 (1984) ("a protective order prevents a party from disseminating only that information obtained through use of the discovery process. Thus, the party may disseminate the identical information covered by the protective order as long as the information is gained through means independent of the court's processes.").

While Defendants claim that this information is somehow protected by their confidentiality agreements with their own employees, Plaintiffs and their counsel are not party to these agreements and are not and cannot be bound by them. Further, these agreements can in no event prohibit the disclosure of evidence of fraud.[5] And even if these documents were somehow confidential or

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KNR's misconduct. While Plaintiff understands that even such a random, inadvertent, and ultimately harmless disclosure is regrettable and impermissible, this Court should not be misled by Defendants' repeated false suggestion (at 3–4, 11–12, 14) that Plaintiffs and their counsel are engaged in a campaign to expose KNR clients' privileged and confidential information.

[5] *Eagle v. Fred Martin Motor Co.*, 157 Ohio App.3d 150, 2004-Ohio-829, 809, N.E.2d 1161, ¶ 64 (9th Dist.) citing *King v. King*, 63 Ohio St. 363, 372, 59 N.E. 111 (1900) ("[C]ontracts which bring about results which the law seeks to prevent are unenforceable as against public policy. Moreover, actual injury is never required to be shown; it is the tendency to the prejudice of the public's good which vitiates contractual relations."); *Cochran v. N.E. Ohio Adoption Servs.*, 85 Ohio App.3d 750, 756, 621 N.E.2d 470 (11th Dist. 1993) ("[I]t is clear that the dictates of public policy would mandate disclosure of information likely to uncover fraud or misrepresentation."); *Goodman v. Genworth Fin. Wealth Mgmt.*, 881 F.Supp.2d 347, 355 (E.D.N.Y. 2012) citing RESTATEMENT (THIRD) OF UNFAIR COMPETITION, § 40, comment c, *Bartnicki v. Vopper*, 532 U.S. 514, 121 S.Ct. 1753, 149 L.Ed.2d 787 (2001) ("Deceptive, illegal or fraudulent activity simply cannot qualify for protection as a trade secret."); *Cecil & Geiser, LLP v. Plymale*, 10th Dist. Franklin No. 12AP-398, 2012-Ohio-5861, ¶ 9 ("Just as private contracts are executed in the context of binding state and federal statutes, contracts between lawyers are executed in the context of the Ohio Rules of Professional Conduct. ... The Ohio Rules of Professional Conduct trump any terms of an agreement between or among lawyers."); *Soc. of Lloyds v. Ward*, S.D. Ohio No. No. 1:05-CV-32, 2006 U.S. Dist. LEXIS 29, *27–28 (Jan. 3, 2006) (holding that "documents that are neither privileged nor confidential are not covered" by

privileged (they are not), it still wouldn't justify the Court's sweeping gag order that has—as explained in Section II.C. below—effectively barred Plaintiffs from speaking publicly about this case at all.

Finally, no evidence was presented that Defendants' right to a fair trial has been jeopardized, nor could it have been. Ohio law provides that,

> If the interest asserted [in support of a request for a gag order] is the right of the accused to a fair trial, the gag order may issue only if specific findings are made demonstrating that, first, there is a substantial probability that the defendant's right to a fair trial will be prejudiced by publicity that … [the gag order] would prevent and, second, reasonable alternatives … cannot adequately protect the defendant's fair trial rights … . Moreover, representatives of the press and general public must be given an opportunity to be heard on the question.

State ex rel. National Broadcasting Co., 52 Ohio St.3d 104, 108 (citations and quotations omitted) (overruled on other grounds in *State v. Schlee*, 117 Ohio St.3d 153, 2008-Ohio-545, 882 N.E.2d 431, ¶ 10). "The First Amendment right of access cannot be overcome by the conclusory assertion that publicity might deprive the defendant of [the right to a fair trial]." *Toledo Blade*, 125 Ohio St. 3d at 158 (quoting *Press-Enterprise Co. v. Sup. Ct. of Cal.*, 478 U.S. 1, 15 (1986)). And the United States

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confidentiality agreements, and that such agreements may not be "interpret[ed in a manner as to] lead to nonsensical results … [or] to perpetrate frauds and injustices in violation of public policy"); *In re JDS Uniphase Corp. Sec. Litig.*, 238 F.Supp.2d 1127, 1137-1138 (N.D. Cal. 2002) ("To the extent that this agreement can be read to prohibit an employee from providing any information about any wrongdoing by [defendant], it is plainly unenforceable. … [Defendant] cannot use its confidentiality agreements to chill former employees from voluntarily participating in legitimate investigations into alleged wrongdoing by [defendant]."); Reutzel, Stefan, "*Snitching for the Common Good: In Search of a Response to the Legal Problems Posed by Environmental Whistleblowing*," University of Georgia Law School Digital Commons, Jan. 1, 1994, citing Farnsworth, Contracts, Sec. 7, (1990) ("Confidentiality agreements are phrased in general terms and will never explicitly cover illegal conduct. They are interpreted inter alia in the light of the purpose both parties assented to. Restrictive provisions in standardized agreements are generally construed against the drafter, and the public interest is taken into account when choosing between different possible interpretations. The purpose of an employer's including a confidentiality clause in an employment contract or another agreement is not, at least not from the viewpoint of the employee, to cover up possible illegal behavior. An employee legitimately can—and will—expect that illegal behavior will not occur in the firm. Thus, he legitimately understands a confidentiality clause not to include illegal acts.").

Supreme Court held under far more inflammatory circumstances (relating to the massively publicized fraud that led to the collapse of the Enron Corporation), that,

> Prominence does not necessarily produce prejudice, and juror impartiality, we have reiterated, does not require ignorance. Every case of public interest is almost, as a matter of necessity, brought to the attention of all the intelligent people in the vicinity, and scarcely any one can be found among those best fitted for jurors who has not read or heard of it, and who has not some impression or some opinion in respect to its merits.

Skilling v. United States, 561 U.S. 368, 381 (2010). *See also State v. Coley,* 93 Ohio St.3d 253, 258, 2001-Ohio-1340, 754 N.E.2d 1129 (2001) *quoting Nebraska Press*, 427 U.S. at 563 ("pretrial publicity—even pervasive, adverse publicity—does not inevitably lead to an unfair trial.").

Defendants' mere conclusory insistence that their right to a fair trial has been jeopardized, completely unsupported by evidence, cannot possibly justify the gag or sealing orders at issue. This is especially so considering that, prior to issuing a gag order, the Court was required to—and did not—consider other means before restricting public access, such as "voir dire, continuances, changes of venue, jury instructions, or sequestration of the jury." *State ex rel. Vindicator Printing Co.*, 132 Ohio St.3d at 491.

C. The gag and sealing orders are not narrowly tailored.

Finally, even if any of Defendants' purported justifications could justify imposing a gag or sealing order (as explained above, they cannot), they would still not justify the broad gag and sealing orders imposed by this Court.

First, the gag order bars "the dissemination of any court documents, exhibits, and filings to the press or public by any means" and "information regarding any materials that are the subject of pending motions." Order (3/29/17) at 4. This effectively pertains to every claim, issue, or piece of information that is the subject of a pending motion, or any piece of information that is contained or referred to in any court filing. It is an exceedingly broad order that effectively bars Plaintiffs and

their counsel from making any public statements about this case at all—including those that would yield assistance from potential witnesses and interested non-parties—and cannot possibly be considered "narrowly tailored" to achieve any legitimate objective.

Similarly, the sealing order barring electronic access to every filing in the case cannot possibly be considered "narrowly tailored." Even if the sealing order could have been justified under Ohio law based on Plaintiffs' filing of the exhibits to the Second Amended Complaint (it could not), those documents have since been stricken from the record, leaving no conceivable justification for a sealing order. *See* Sup.R. 45(E)(3) (requiring that "the court shall use the least restrictive means available" in "restricting public access to a case document" and identifying potential options to achieve narrow tailoring, including "[r]edacting information rather than limiting public access to the entire document; [r]estricting remote access to either the document or the information while maintaining its direct access; [or] [r]estricting public access to either the document or the information for a specific period of time."). Instead the Court's sealing order has choked off access by media and others who are interested in the case, contrary to the principle of open government.

D. Defendants do not address the U.S. Supreme Court's controlling decision in *Zauderer v. Office of Disciplinary Counsel of the Supreme Court of Ohio*, which affirms attorneys' First Amendment right to publish truthful and nondeceptive information about lawsuits.

Defendants do not even attempt to address The U.S. Supreme Court's decision in *Zauderer v. Office of Disciplinary Counsel of the Supreme Court of Ohio*, 471 U.S. 626, 646–47, 85 L.Ed.2d 652, 105 S.Ct. 2265 (1985), which held that attorneys retain a First Amendment right to "solicit[] legal business through printed advertising containing truthful and nondeceptive information and advice regarding the legal rights of potential clients." Defying *Zauderer*, the gag order prevents Plaintiffs from publishing information about any of their claims, which are all currently and at any given time will likely be the "subject of pending motions." This has effectively cut Plaintiffs off from putative class-members and potential sources of evidence, severely hampering their ability to investigate and

prosecute their claims. No doubt this was precisely Defendants' intent in seeking the gag order and they have succeeded for the time being. But they cannot just wish away *Zauderer* or any of the above-discussed controlling precedent.[6]

III. Conclusion

Defendants' misrepresentations of law and fact in seeking the gag and sealing orders have created yet another sideshow in a long line of them apparently intended to deflect from Defendants' conduct that is actually at issue in this suit. By lifting the gag and sealing orders, the Court will restore normalcy and the rule of law to these proceedings and affirm that Defendants' baseless personal attacks on Plaintiffs will not further delay the administration of justice in this case.

Dated: September 5, 2017

Respectfully submitted,

THE CHANDRA LAW FIRM LLC

/s/ Peter Pattakos
Subodh Chandra (0069233)
Donald Screen (00440770)
Peter Pattakos (0082884)
The Chandra Law Building
1265 W. 6th St., Suite 400
Cleveland, OH 44113-1326
216.578.1700 Phone
216.578.1800 Fax
Subodh.Chandra@ChandraLaw.com
Donald.Screen@ChandraLaw.com
Peter.Pattakos@ChandraLaw.com

Attorneys for Plaintiff Member Williams

[6] Defendants also devote 3 pages of their brief (at 14–17) to arguing that the Court should ignore the safe-harbor provisions of Prof.Cond.R. 3.6(b). They cite Comment 5 of the Rule to falsely suggest that it bars the publication of any information at all reflecting on a defendant's "character, credibility, or reputation" because it would have a "material prejudicial effect on a proceeding." Here, they ignore (and fail to disclose) Comment 4, which states that, "Division (b) identifies specific matters about which a lawyer's statements would not ordinarily be considered to present a substantial likelihood of material prejudice [including information contained in a public record], and should not in any event be considered prohibited by the general prohibition of division (a)."

CERTIFICATE OF SERVICE

The foregoing document was served on all necessary parties by operation of the Court's e-filing system on September 5, 2017.

/s/ Peter Pattakos
One of the Attorneys for Plaintiff