IN THE COURT OF COMMON PLEAS
SUMMIT COUNTY, OHIO

MEMBER WILLIAMS, *et al.*, Plaintiffs, vs. KISLING, NESTICO & REDICK, LLC, *et al.*, Defendants.	Case No. CV-2016-09-3928 Judge Patricia A. Cosgrove **Plaintiffs' Combined Motion for Protective Order and Opposition to Defendants' Motion to Compel Plaintiffs to Respond to Defendants' Second Set of Requests for Production of Documents**

I. Introduction

By their most recent motion to compel, the KNR Defendants mainly ask the Court to compel production of information that the Defendants already have in their possession. They also misrepresent the parties' dispute, including by failing to apprise the Court of Plaintiffs' clearly communicated intent to file a protective order pertaining to the subject of Defendants' motion. More substantively, Defendants' motion fails to acknowledge the legitimacy of Plaintiffs' concern that Defendants will destroy or wrongfully withhold evidence based on their knowledge of the documents in Plaintiffs' possession. This latter concern has unfortunately been validated by Defendants' discovery responses to date, as Plaintiffs are prepared to demonstrate to the Court by an *in camera* presentation of highly relevant and probative evidence that Defendants have wrongly withheld, and falsely denied the existence of, to date.

The conduct that Defendants complain of in their motion will have no substantive impact on their ability to mount a defense in this case. Unlike the Defendants—who have disclaimed any obligation to ever produce the bulk of the relevant and responsive information needed to investigate

and prove Plaintiffs' claims (*See* Plaintiffs' Motion to Compel discovery filed today, Feb. 28, 2018)—Plaintiffs have repeatedly made clear that they will produce the information Defendants request. But, based on their legitimate spoliation concerns, discussed further below, Plaintiffs hereby seek a protective order by which they will only be required to produce this relatively small amount of information *after* the Defendants have made a good faith response to Plaintiffs' own discovery requests. So far, Defendants haven't come close. *Id.*

Courts have properly recognized that, "[a] plaintiff in a fraud action is accorded a broader range of discovery in order to meet the heavy burden imposed on one alleging fraud." *Ex parte John Alden Life Ins. Co.*, 999 So.2d 476, 485 (Ala. 2008). Consistent with this principle, the Court should not compound Defendants' advantage by making it easier for them to avoid discovery on Plaintiffs' already detailed and well-documented fraud allegations. Defendants can wait to obtain Plaintiffs' relatively small set of documents—the contents of which are no secret to them—until after they've responded fully, and in good faith, to Plaintiffs' document requests that were served first.

II. Defendants already have all of the information they are seeking to compel Plaintiffs to produce.

Plaintiffs have repeatedly represented to Defendants that the only responsive documents in their possession are a few hundred pages that were provided to Plaintiffs, as evidence of Defendants' fraudulent self-dealing, by former KNR attorneys Robert Horton and Gary Petti. Plaintiffs have already disclosed and provided the Defendants with all of the documents from Mr. Petti. And Defendants sued Mr. Horton to force him to turn over to them all of the documents in his possession, which includes all of the remaining documents in Plaintiffs' possession. According to the court-approved settlement agreement in Defendants' case against Horton, he has turned these documents over to Defendants. *See* Aug. 18, 2017 Agreed Order in *KNR v. Horton*, Summit County C.P. No. 2017-03-1236, attached as **Exhibit 1**. Thus, there is no question that the Defendants

already have all of the responsive documents in Plaintiffs' possession, which are all documents from KNR's own files, that the Defendants already had even before they filed their strike-suit against Mr. Horton.

III. Plaintiffs are legitimately concerned that Defendants will destroy or wrongfully withhold evidence based on their knowledge of the documents in Plaintiffs' possession, and this concern has both been clearly communicated to Defendants, and validated by Defendants' own conduct in discovery to date.

Defendants sued Mr. Horton so they could keep the Plaintiffs from discovering more evidence of their fraudulent self-dealing. This, apparently, is also the purpose of their instant motion to compel the Plaintiffs to produce the documents that Horton has provided them.

Plaintiffs have repeatedly explained to Defendants that they will produce copies of these documents, but only after the Defendants have made a full and fair response to Plaintiffs' document requests, which has not remotely happened to date. *See* Plaintiffs' Feb. 28, 2018 Motion to Compel. Contrary to Defendants' suggestion that Plaintiffs have acted improperly in taking this approach (*See* Defs' Mot. at 7–8, and footnote 1, below),[1] Plaintiffs' counsel has communicated clearly about their

[1] Not only do Defendants wrongly blame Plaintiffs for having allegedly failed to "seek approval from this Court" to temporarily withhold producing the Horton documents as requested herein, they also devote two and a half pages of their brief (at 10–12) to an extraordinary argument that "Plaintiffs' counsel was ethically obligated to immediately return the Horton documents" to Defendants upon receiving them.

Defendants base this argument entirely on a single very recent and very extraordinary opinion from the District Court of Kansas, which involves much different facts at issue here. Specifically, *Raymond v. Spirit AeroSystems Holdings, Inc.*, No. 16-1282-JTM-GEB, 2017 U.S. Dist. LEXIS 101926 (D. Kan. June 30, 2017), involved the plaintiffs' receipt from an anonymous source of documents that were almost all marked privileged, confidential, or proprietary. *Id.* at *13–14. These documents related to Spirit Airlines' efforts to "revamp its employee performance evaluation process," and were created specifically in response to recent litigation and to avoid future litigation. *Id.* at *7. These documents further 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]." *Id.* at *8. Unlike the Horton documents at issue here, the *Raymond* case did not involve evidence of fraud, and it did not involve information that was accessible to all employees in the organization.

These distinctions between *Raymond* and this case are important mainly because Defendants' *Raymond*-based argument is contrary to well established and soundly reasoned law, including controlling Ohio

concern that Defendants might wrongfully destroy or withhold evidence from Plaintiffs based on their knowledge of the documents that are in Plaintiffs' possession. Plaintiffs also clearly

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precedent, holding that confidentiality agreements cannot bar the disclosure of evidence of fraud. *See, e.g., 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 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.").

Finally, as Defendants acknowledge (at 10–11), the *Raymond* court imposed a sanction for conduct that was not barred by any applicable statute or ethical rule. The sanction imposed by the *Raymond* court also has serious implications on the First Amendment right to receive information (*See Kleindienst v. Mandel*, 408 U.S. 753, 762-763 (1972)), as well as the First Amendment right *not* to speak. *See Wooley v. Maynard*, 430 U.S. 704, 714 (1977). Thus, not only is the *Raymond* opinion based on facts that are extremely different from those at issue here, this recent opinion is also unlikely to survive appellate review if and when that review occurs. *See Grayned v. City of Rockford*, 408 U.S. 104, 108–09, 92 S.Ct. 2294, 33 L.Ed.2d 222 (1972) ("Because we assume that man is free to steer between lawful and unlawful conduct we insist that laws give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly. ... [W]here a vague statute abuts upon sensitive areas of basic First Amendment freedoms, it operates to inhibit the exercise of [those] freedoms.").

communicated their intent to seek a protective order to prevent the same, if necessary. In fact, on the very same day that Plaintiffs received Defendants' responses to Plaintiffs' first round of document requests on the Second Amended Complaint, Plaintiffs' counsel called and wrote to Defendants' counsel stating their concerns about the incompleteness of Defendants' production, and their intent to immediately seek a protective order providing that they would not have to produce Plaintiffs' documents that were due the next day. In response, the Defendants agreed to hold off on a motion to compel to allow the parties to meet and confer on these issues. *See* Oct. 24, 2017 email exchange between Peter Pattakos and Brian Roof, attached as **Exhibit 2**.

Plaintiffs spoliation concerns are legitimate, not just because of the well-documented fraud-based allegations at issue in this case, which themselves show Defendants' will to conceal the relevant information from their clients. Defendants' responses to Plaintiffs' discovery requests have further confirmed the legitimacy of Plaintiffs' spoliation concerns, not only due to Defendants' overall posture of extreme obstruction (*See* Plaintiffs' Feb. 23, 2018 Motion to Compel), but by specifically denying the existence of highly relevant and probative documents that Plaintiffs only know of because they obtained them from Mr. Horton. Plaintiffs are prepared to present these wrongfully withheld documents to the Court for in camera review at the earliest possible opportunity so that the Court may fully assess the legitimacy of Plaintiffs' spoliation concerns, and will arrive at the scheduled March 16, 2018 discovery hearing ready to do so.

IV. Conclusion

No conceivable undue prejudice could result to Defendants in having to wait to see which documents Plaintiffs have until after they've made a good faith response to Plaintiffs' discovery requests. The wide latitude that should be afforded to Plaintiffs alleging fraud claims applies with extra force here given Defendants' obstruction to date, and the fact that Plaintiffs have pleaded their claims with great detail and documentation. Defendants are already at a distinct advantage in terms

of their own awareness of their conduct, and particularly so after having sued Plaintiffs' key witness Rob Horton into silence. Thus, the Court should deny Defendants' motion to compel, and grant Plaintiff's motion for protective order permitting Plaintiffs to withhold production of their documents until it can be determined that Defendants have responded completely and in good faith to Plaintiffs' discovery.

Respectfully submitted,

/s/ Peter Pattakos
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Attorneys for Plaintiffs

CERTIFICATE OF SERVICE

The foregoing document was served on all necessary parties by operation of the Court's e-filing system on February 28, 2018.

/s/ Peter Pattakos
Attorney for Plaintiffs

IN THE COURT OF COMMON PLEAS
SUMMIT COUNTY, OHIO

KISLING, NESTICO & REDICK, LLC ET. AL.	**CASE NO. CV 2017-03-1236**
	JUDGE ALISON BREAUX
Plaintiff,	**AGREED ORDER**
-vs.-	
ROBERT HORTON	
Defendants.	

The Defendant, **ROBERT HORTON** (hereinafter '**HORTON**") has provided Notice of Submission to the Court of a Flash Drive Containing Documents for Retention and Preservation. The Court acknowledges receipt. The Defendant, **ROBERT HORTON** requests that he be allowed to destroy any and all electronic files and copies which he may have on his computer, hard-drive and/or in his possession. Prior to destroying such files, **HORTON** agrees to provide to Plaintiff's counsel, in an agreeable format, the dates on which the files were copied to his computer or hard-drive.

The Plaintiff, **KISLING, NESTICO & REDICK, LLC, et al.** (hereinafter "**KNR**") is satisfied that based upon the representation of the Defendant, **ROBERT HORTON** that he has transferred all documents in his possession related to his employment at **KNR** to the flash drive and hereby stipulates and agrees that the Defendant, **HORTON** shall take all necessary steps to delete any and all documents in his possession which relate in any way to his employment at **KNR**.

THEREFORE, upon representation of the parties and as stipulated and agreed upon herein, the Court grants the Defendant, **HORTON's** request to delete, remove and/or destroy any documents which he has in his possession which have been transferred to the

EXHIBIT 1

flash drive and has been provided to the court. The Defendant, **HORTON** shall not be required to retain any of these documents in his possession.

IT IS SO ORDERED.

JUDGE ALISON BREAUX

APPROVED:

/s/ Thomas A. Skidmore
THOMAS A. SKIDMORE, ESQ.
Attorney for Defendant, Robert Horton

/s/ Thomas Mannion
THOMAS MANNION, ESQ.
Attorney for Plaintiffs, Kisling, Nestico & Redick, LLC, et a.

Williams v. KNR -- Discovery Responses

Peter Pattakos <peter@pattakoslaw.com> Tue, Oct 24, 2017 at 3:15 PM
To: "Brian E. Roof" <broof@sutter-law.com>
Cc: Joshua Cohen <jcohen@crklaw.com>, Daniel Frech <dfrech@pattakoslaw.com>, "James M. Popson" <jpopson@sutter-law.com>, "ekennedy@weismanlaw.com" <ekennedy@weismanlaw.com>, Tom Mannion <Tom.Mannion@lewisbrisbois.com>, Michele Adornetto <madornetto@sutter-law.com>

Brian:

Defendants' egregious refusal to produce basic and obviously relevant documents only heightens our concerns over spoliation. I know you understand that these concerns are legitimate.

Also, it's understood that we have no independent right to withhold documents, which was the whole point of my calling you this morning to tell you that we intended to ask the Court for its approval absent Defendants' permission.

As I said below, tomorrow we'll send you a letter detailing the deficiencies in Defendants' production for your consideration. You can give me a call to talk any time after you've had a chance to review the letter, and we can set up a face to face meeting as well if you think that would be productive. You should also feel free to call me if you want to talk in the meantime.

Thanks.

Peter Pattakos
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On Tue, Oct 24, 2017 at 2:06 PM, Brian E. Roof <broof@sutter-law.com> wrote:

> Peter:
>
> There is absolutely no basis for you to accuse counsel and Defendants of intending to destroy documents or withhold documents intentionally. Such a baseless accusation is completely unprofessional. In addition, even though you have no independent right to withhold documents based on what you perceive as unacceptable objections in Defendants' responses, we will allow you to not produce documents until we meet and confer in order to avoid motion practice. Therefore, in light of Ms. Loya's recent email, please provide us with potential dates to meet and confer regarding the discovery issues. Finally, as you promised on our call this morning, please provide us today with Plaintiffs' written responses to the interrogatories, requests for admission, and requests for production of documents.

EXHIBIT 2

Regards,

Brian

From: Peter Pattakos [mailto:peter@pattakoslaw.com]
Sent: Tuesday, October 24, 2017 12:48 PM
To: Brian E. Roof
Cc: Joshua Cohen; Daniel Frech; James M. Popson; ekennedy@weismanlaw.com; Tom Mannion; Michele Adornetto
Subject: Re: Williams v. KNR -- Discovery Responses

Brian,

When I called you this morning, I informed you of our concerns over Defendants' baseless refusal to produce a substantial amount of basic and essential documents in response to our duly served document requests, as made apparent in your responses (effectively non-responses) that you served us late yesterday.

Out of our 70 pending requests, Defendants only produced documents responsive to 8 of them, with the bulk of the "3,000 pages" you refer to below consisting of the Named Plaintiffs' client files, most of which have no bearing at all on the case. Defendants further state in their responses that they refuse to produce documents responsive to 45 of Plaintiffs' pending requests. This refusal pertains to requests for basic and essential information such as documents reflecting KNR's policies and procedures on when and how to use an "investigator" on a client matter, and when an "investigation fee" should be charged, documents reflecting non-client-specific communications with Liberty Capital representative Ciro Cerrato, documents reflecting discussions, communications or assessments of the value of narrative reports in pursuing personal injury settlements, and the complete "email chains" from which Defendants have claimed that the emails quoted in the second amended complaint were "taken out of context." None of these requests are vague, none of them are overbroad, and none are unduly burdensome. And this is only a partial list of the basic and essential information that Defendants have wrongly refused to produce.

I also informed you on the phone this morning that, in light of Defendants' unlawful refusal to respond to our document requests, Plaintiffs intend to seek a protective order providing that we are not required to turn over the rest of our responsive documents (which are only the rest of the documents that we received from Rob Horton and Gary Petti) until the Defendants fully and fairly respond to our requests. This is so we can ensure that Defendants do not destroy or wrongly withhold information based on their knowledge of what information is in our possession and that the Court and jury will be presented with evidence of any such wrongful withholding or destruction.

That is why I asked you to confirm for us, one way or another, as to whether it will be necessary for us to seek this protective order, or if Defendants will agree to an extension of our deadline to produce documents so that the parties may first attempt to resolve the issues with the Defendants' production.

If you intended to confirm this extension with your email below, please clarify. Otherwise, please let us know if we need to pursue this motion for a protective order.

In either case, we will get back to you tomorrow with a full accounting of the deficiencies in Defendants' production.

Thank you.

Peter Pattakos

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On Tue, Oct 24, 2017 at 11:40 AM, Brian E. Roof <broof@sutter-law.com> wrote:

Peter:

This email confirms that you are not going to produce documents responsive to Defendants' document requests today, as ordered by the Court in her October 17, 2017 Case Management Order, because you believe Defendants did not produce enough documents. Defendants complied with our obligations, including detailed responses to Plaintiffs' Second Set of Interrogatories and Second Set of Requests for Admission. As for the document production, Defendants have produced over 3,000 pages of documents. In addition, per my cover letter, we have asked for dates to meet and confer about the unduly burdensome nature of some of Plaintiffs' document requests. Please provide us with some dates. In the interim, please contact me with any questions or comments.

Regards,

Brian

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This is a privileged and confidential communication. If you are not the intended recipient, you must: (1) notify the sender of the error; (2) destroy this communication entirely, including deletion of all associated attachment files from all individual and network storage devices; and (3) refrain from copying or disseminating this communication by any means.