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 **Reply in Support of Plaintiffs' Motion To Compel Discovery from KNR "investigators" Aaron Czetli, AMC Investigations, Inc., Eduardo Mateo, Gary Monto, and Dennis Rees**

I. Introduction

After issuing blanket objections to Plaintiffs' subpoenas and refusing to produce a single document in response, the KNR investigators ignored Plaintiffs' follow-up letters and did not communicate in any way with Plaintiffs' counsel about the subpoenas. Now, confronted with the motion to compel that their failure to communicate made necessary, the investigators make several claims they are introducing to this litigation for the first time. This reply is necessary to briefly address these claims, and to establish Plaintiffs' entitlement to attorneys' fees in connection with this motion under Civ.R. 45(E). Plaintiffs should not have been required to file a motion to compel to obtain the disclosures and admissions that the investigators provided for the first time in their opposition brief, and a sanction is warranted to deter such obstructive conduct in the future.

II. Plaintiffs do not require a response from investigator Dennis Rees, who is undergoing treatment for late-stage cancer.

In their opposition brief (at 1, fn. 1), the investigators disclose for the first time that subpoenaed investigator Dennis Rees is currently battling late stage cancer. Thus, Plaintiffs will not seek further discovery from Mr. Rees and hereby withdraw their motion as it applies to him.

III. The Court should order the investigators to describe any privileged or protected information that they have withheld in responding to the subpoena, as required by Civ.R. 45(D)(4).

The investigators' opposition is mainly based on the incredible claim that, apart from their tax returns, they do not have a single document that is responsive to Plaintiffs' subpoena—or at least not one that is not privileged or otherwise immune from production. Investigators' Opp. at 2–3. Despite that KNR charges an "investigation fee" on every case that it closes, and one of the subpoenaed investigators has worked for KNR since 2009 on thousands of cases for which KNR clients were charged a fee for his work, the investigators nevertheless claim to have,

- not a single document reflecting how and on what terms they came to be working for KNR or its clients;
- not a single document reflecting any agreement to perform investigative services for KNR or its clients;
- not a single document reflecting that they've received any training, expertise, or accreditation as investigators;
- not a single document showing that KNR imposed or suggested any standards or requirements on them regarding their work for which KNR charged its clients;
- not a single document relating to the work the investigators performed for KNR clients;
- not a single invoice or document relating to payment received or owed for the work they performed for KNR clients;
- not a single document showing that these so-called "investigators" performed any investigative work at all for anyone, KNR clients or otherwise.

See Exhibit 1 to the subpoenas attached as Exhibit 1 to Plaintiffs' Mar. 1, 2018 Motion to Compel.

The investigators' opposition brief is strangely unclear as to whether they are withholding any responsive material as privileged or otherwise protected. At page 2 of their brief, they state that, "Plaintiffs were instructed that the Subpoenaed Persons did not have any *non-privileged/confidential* records responsive to the subpoena," and that "it is easier to identify the documents that each of the Subpoenaed Persons would have (*if not otherwise objectionable*) pertaining to the information requested." Investigators' Opp. at 2 (emphasis added). But then the investigators go on to apologize—either for issuing overreaching objections, or for falsely suggesting that they were

withholding responsive material when they were not. *Id.* at 2–3. Finally, the investigators state, without qualification, that they "have no documents responsive to the requests of Plaintiffs pertaining to individual investigations, correspondence, communication, case files, or otherwise," and that, "the only documents that any of the Subpoenaed Persons possess that would be at all responsive are personal tax returns and their accompanying schedules and attachments." *Id.* Moreover, the investigators' affidavits attached to their opposition brief do not indicate that they are withholding any material as privileged or otherwise protected.

Regardless of whether the investigators are withholding documents as privileged or otherwise protected, the Court should hold them responsible for their unexcused obstruction of discovery in this matter. First, if the investigators are in fact withholding information as protected, Rule 45(D)(4) requires them to make that claim "expressly," and "support" it "by a description of the nature of the documents, communications, or things not produced that is sufficient to enable the demanding party to contest the claim." The investigators have made no such description to date and lack an excuse for this failure.

Alternatively, if the investigators are not withholding any information, and truly possess not a single document responsive to Plaintiffs' subpoenas apart from their tax returns, they should have confirmed as much in response to Plaintiffs' requests instead of maintaining their claims of protection. Instead, the investigators ignored Plaintiffs' communications, which required Plaintiffs to file the instant motion to compel.

Lacking excuse for their failure to communicate in either case, the investigators should be held responsible, under Civ.R. 45(E) for Plaintiffs' attorneys' fees incurred in filing this motion.

IV. The Court should order the investigators to produce their tax returns because the information contained in the returns is relevant to and probative of Plaintiffs' claims and is not available to Plaintiffs by other means.

The investigators admit that their tax returns are responsive to the subpoenas, and acknowledge that this information is discoverable in part to show "the extent of compensation received ... for providing investigative services to KNR." Investigators' Opp. at 4–5. They nevertheless refuse to produce these documents based on "the inherent privacy concerns associated with sensitive personal information," and claim that Plaintiffs may obtain the same information from "all 1099s, W-2's, or other tax documentation from the party Defendants." *Id.* at 5.

Plaintiffs would, in fact, have preferred to obtain this information from the KNR Defendants, but the KNR Defendants claim they do not have it, and in fact claim that they have never issued any tax forms to the investigators. *See* p. 4 of Brian Roof letter, Nov. 15, 2017, attached as **Exhibit 1** (resisting production of documents on the basis that the investigators "do not receive W-2, W-9, or 1099 forms from KNR. Rather they receive an individual check for each case they are assigned."). Additionally, as Plaintiffs' pointed out in their correspondence, the investigators' privacy concerns may be resolved by the entry of a protective order to guard against the disclosure of any legitimately confidential information. Tesseron, Ltd. v. R.R. Donnelley & Sons Co., 2007 U.S. Dist. LEXIS 49728, *13, 2007 WL 2034286 (N.D. Ohio 2007) ("the appropriate remedy to a Parties' desire to keep their confidential and and proprietary information safe is a protective order."). Thus, the investigators' purported concerns over privacy are not sufficient to justify withholding this relevant and probative information. The tax returns will not only show the extent of the investigators' compensation through KNR, they will also show that some of the investigators were not paid at all for certain work they performed for KNR, and that the "investigation fee" was a means by which KNR unlawfully passed along its overhead expenses to its clients.

Under these circumstances, given the relevance of the tax returns to the Plaintiffs' claims, they are discoverable under Ohio law. *Bellamy v. Montgomery*, 188 Ohio App.3d 76, 2010-Ohio-2724, 934 N.E.2d 403, ¶ 3 (10th Dist.) (noting with approval the trial court order for the discovery of tax returns for 10 years as they were relevant to the subject matter involved in the action). *Hudson v. United Servs. Auto Assn. Ins. Co.*, 150 Ohio Misc.2d 23, 2008-Ohio-7084, 902 N.E.2d 101 (Greene Cty. C.P.) (citation omitted) (ordering the production of tax returns and noting that "[n]umerous cases from the federal courts and those of other states declare tax returns to be discoverable," including where "it clearly appears they are relevant to the subject matter of the action or to the issues raised thereunder, and further, that there is a compelling need therefor because the information contained therein is not otherwise readily obtainable").

V. Plaintiffs have sufficiently tendered witness and mileage fees to the investigators.

The investigators seek to excuse their failure to comply with Plaintiffs' subpoenas by claiming that they were not sufficiently tendered witness and mileage fees as required by Rule 45. Investigators' Opp. at 5–6. Plaintiffs did in fact tender checks for these fees with their three subpoenas to the out-of-county investigators, and investigators' counsel never specifically advised them that these checks were deficient or by what amount. *See* emails from investigators' counsel Stephen Griffin, attached as Exhibits 4 and 5 to Plaintiffs' Mar. 1, 2018 Motion to Compel Discovery from Investigators.

Moreover, under Civ.R. 45(B), Plaintiffs were not required to tender fees for AMC Investigations (38 miles, $50.38) without demand, as AMC resides within the County from which the subpoenas were issued. And AMC never specifically demanded any fees despite Plaintiffs' follow-up request as to how fees, if any, should be tendered. *See* counsel's correspondence at Exhibits 2–3 of Plaintiffs' Mar. 1, 2018 Motion to Compel.

In any event, if the investigators' witness and mileage fees were previously issued (or not

issued) in error, any such error can be and has been cured, as Plaintiffs have ensured by having mailed checks to investigators' counsel on the date of this reply for the following amounts under R.C. 2335.06: $50.38 to AMC (for 38 miles each way at $12 per day plus 50.5 cents per mile), $95.83 to Mateo (83 miles) and $201.88 to Monto (188 miles). *See Future Communs., Inc. v. Hightower*, 10th Dist. Franklin No. 01AP-1175, 2002-Ohio-2245, ¶ 15 (failure to tender fees "a non-issue, because the fees were subsequently tendered to appellant's counsel and would be re-tendered to the witness upon resolution of appellant's motion."). *PHE, Inc. v. Dept. of Justice* (D.D.C. 1991), 139 F.R.D. 249, 255 ("To the extent that the failure to accompany the Rule 45 subpoena to the Postal Service with a check rendered the subpoenas technically defective, the subsequent tender of the check corrected any deficiency.").

VI. Conclusion

The investigators have no excuse for their failure to communicate with Plaintiffs' counsel beyond their initial sweeping objection letters. The Court should order them to produce all material responsive to Plaintiffs' subpoenas, including their tax returns, or to substantiate any claims regarding privileged or otherwise protected materials they have withheld. Under Civ.R. 45(E), the Court should also order the investigators to pay Plaintiffs' attorneys fees incurred in connection with this motion that the investigators' frivolous conduct necessitated. The Plaintiffs' should not have needed to file a motion to compel to obtain the disclosures and omissions that the investigators provided for the first time in their opposition brief and a sanction of attorneys' fees will properly deter such obstructive conduct in the future.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The foregoing document was served on counsel of record for all necessary parties by operation of the Court's e-filing system on March 21, 2018.

/s/ Peter Pattakos
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November 15, 2017

VIA E-MAIL

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Re: Member Williams v. Kisling, Nestico and Redick, LLC, et al.
Summit County, Court of Common Pleas Case No. CV-2016-09-3928
Our File No. 10852-00001

Dear Peter:

We are in receipt of your letters dated November 7, 2017 and November 10, 2017. This letter serves as Defendants' formal response to these letters as well as your October 26, 2017 letter, and our meeting on November 2, 2017 with you and Joshua Cohen.

Response to November 7, 2017 Letter

You listed the following items demanding that Defendants produce these voluminous documents.

- Investigation fee: 3,685
- Sign up fee: 95
- SU fee: 71
- Investigator: 49,096
- Narrative fee: 3,121
- Narrative report: 16,823
- Referrals: 4,878
- Liberty Capital: 14,568
- Ciro: 12,204

Defendants will not review and search over 104,500 items (which could include thousands of more pages of documents) as part of your fishing expedition. The fishing expedition is confirmed by Plaintiffs' lack of proper responses to Defendants' interrogatories and requests for admission in which it has offered no evidence of any wrong doing by Defendants. There are absolutely no facts to support Plaintiffs' allegations. In addition, this request is extremely unduly burdensome. Furthermore, this amount of discovery is not proportional to the needs of the case, considering the stipulations to which Defendants are willing to enter as outlined below. *See*

EXHIBIT 1

Fleming v. Honda of Am. Mfg., S.D. Ohio Case No. 2:16-cv-421, 2017 U.S. Dist. LEXIX 161578, * 6-11 (applying the proportionality standard and noting that the court has the right to prevent a fishing expedition by plaintiff) Indeed, as you have stated before most of the facts are not in dispute.

However, Defendants will produce the responsive and non-privileged documents relating to the 95 hits for "Sign up fee" and the 71 hits for "SU fee." In addition, Defendants will run searches for "investigation fee" for the seven (Aaron Czetli, Brandy Lamtman, Rob Nestico, Robert Redick, Michael Simpson, Holly Tusko, and Jenna Wiley) individuals previously identified in our spreadsheet. Defendants will produce responsive and non-privileged documents. This should provide responsive documents regarding Class A (Investigation Fee Class).

As for Class C (the Liberty Class), we will run searches of Nestico's documents for Ciro or Cerrato and Redick's documents for Ciro or Cerrato. Defendants will produce responsive and non-privileged documents. This should provide the necessary responsive documents for Class C.

You listed the following potential search terms to be run on KNR's entire database:

- chiropract! AND referral!
- chiropract! AND narrative!
- "red bag!"
- ("Akron Square" or ASC or Floros) AND referral!
- ("Akron Square" or ASC or Floros) AND narrative!

We will not run these searches on the entire database as that will be unduly burdensome and crash the system, as we have established before with the documents that we provided to you at the meeting (see attached documents: "Multi-mailbox search failed because the estimated size of the search…"). Again, your request is not proportional to the needs of the case and is a fishing expedition.

But we will run searches of Nestico's documents for ("Akron Square" or ASC or Floros) AND narrative! and of Redick's documents for ("Akron Square" or ASC or Floros) AND narrative!. Defendants will produce responsive and non-privileged documents. This should resolve the production of documents for Classes B (Lien Class) and D (Narrative Fee Class). As an alternative, Defendants are willing to enter into a stipulation that KNR's policy is to receive a narrative report from ASC on all cases, except for cases involving clients under the age of 12 and a few other minor exceptions, for $150.

In addition, we ran searches of communications between Nestico and Floros with the search term "referral!" and searches of communications between Redick and Floros with the search term "referral!". However, the search resulted in no responsive documents.

Furthermore, we will not run searches for all chiropractors, as the other chiropractors are not part of Class B, as Class B is specifically limited to ASC. Per our prior discussions, because ASC is the only chiropractor listed in the class, we will only produce documents outlined above relating to ASC. Similarly, because Plaintiff Reid saw only Dr. Floros as a patient (and not any

of the other chiropractors) and she only sued Dr. Floros, Defendants will not search for other chiropractors for Class D. Your request for all of these documents is not proportional to the needs of the case.

As for the open items to which hit counts from searches should be irrelevant, we will review and produce any responsive, non-privileged documents that complete the "email chains" (RFP 3-1) referenced in Defendants' Answers. We agreed to this in the November 2nd meeting. This search and review will take several weeks to complete.

Regarding the daily intake emails showing which "investigator" was paid on each case, and from where each case originated (RFP 3-16, 4-3), Defendants stand by their objections that these requests seek documents relating to putative class members in which Plaintiffs are not allowed, as the case has not been certified as a class action. In addition, this request is unduly burdensome as it would require a review of each day's emails going back to 2009.

Furthermore, these requests seek irrelevant documents that are not reasonably calculated to lead to the discovery of admissible evidence. Defendants admit that since 2009 KNR has paid the investigator a flat fee (e.g., $30-$100) upfront on each individual case, that most of the clients were charged (as long as there was a recovery) the flat fee, which was clearly set forth on the Settlement Memorandum, and that there were no upcharge or surcharge on that flat fee. Defendants are not hiding these facts, as Defendants have stated the same facts in their discovery responses. Therefore, it is unduly burdensome and irrelevant to go through thousands of pages of documents to establish these admitted facts. Moreover, during the meeting you were open to a stipulation on this issue and agreed to provide us with a draft of the stipulation. Please provide us with a draft of the stipulation for review and consideration.

As for the employment files for Rob Horton and Gary Petti (RFP 3-55, 3-56), Defendants stand by their objection that they cannot produce these files without Horton and Petti's written permission. Per our discussion at the meeting, you can easily obtain their written permission (especially Gary Petti as he is your witness), which will eliminate this issue. You are creating a discovery dispute where there is none.

Regarding the documents relating to the litigation between Defendants and Dr. James Fonner (RFP 3-60), Defendants will not produce these documents as they are irrelevant and not reasonably calculated to lead to the discovery of admissible evidence. In addition, the documents can be obtained from the Court's website and from Dr. James or his counsel.

As we expressed in our meeting, Defendants will not produce the three entire training manuals as the majority of them are irrelevant and are not reasonably calculated to lead to the discovery of admissible evidence. Plaintiffs are not entitled to all the information regarding the training of their employees. Plaintiffs are only entitled to portions of the training manuals that are responsive to Plaintiffs' document requests (RFP 3-44, 3-45, 3-48, 3-49, 3-50). Furthermore, KNR will not produce the entire manuals as they are proprietary and confidential. This objection is especially relevant considering that The Pattakos Law Firm is a new law firm and competitor of KNR, which in fact advertises as a law firm handling personal injury and auto accident cases.

Regarding Interrogatory Nos. 24, 25, 46, and 47 and RFP 3-52, Defendants are not obligated to answer these interrogatories and produce responsive documents about the

"investigative work" charged on Matthew Johnson and Naomi Wright's files, as they are not named Plaintiffs of Class A (Investigation Fee Class). In addition, Johnson and Wright have not asserted any claims relating to the investigation fee. As we have repeatedly stated and which you have failed to provide any case law to the contrary, Plaintiffs are not entitled to the discovery of putative class members until the case has been certified as a class action, which obviously has not happened. Johnson and Wright are putative class members of Class A, and therefore, Plaintiffs are not entitled to discovery on the investigation work for them.

Similarly, Plaintiffs are not entitled to all evidence of "investigative work" performed by the so-called "investigators" (RFP 4-1, 4-4). But as we discussed, we are willing to produce exemplars of some of the investigative work done by MRS and AMC. We are in the process of collecting these exemplars.

In addition, Plaintiffs cannot discover the other work performed by Aaron Czetli and Michael Simpson for Defendants that do not relate to any specific client file, such as stuffing promotional envelopes, decorating the office for holidays, running errands for Rob Nestico, or performing other odd jobs (RFP 3-39, RFA 2-77, RFP 1-11). The focus of the Third-Amended Complaint, specifically Class A (Investigation Fee Class), is the work done for the investigation fee. And right now, Plaintiff is entitled to only discovery on the investigation fee as it relates to Member Williams. Defendants have produced that information and documents.

Regarding your concerns about RFP 1-3, 1-4, and Interrogatory 1-11, as we have repeatedly stated, we are open to a stipulation on this issue and have been waiting for a proposed stipulation from you. Our letters and discovery responses provide the information for which you are asking. Please provide us with a proposed stipulation to resolve this discovery issue.

Finally, as we explained during our meeting, Aaron Czetli and Michael Simpson do not receive W-2, W-9, or 1099 forms from KNR. Rather, they receive an individual check for each case they are assigned. Defendants are not going to produce thousands of checks to establish, which we again are willing to stipulate to, that MRS and AMC are paid $50 per case for their investigative work. This is a pass-through, third-party expense with no surcharge or upcharge. There is absolutely no need to produce the checks.

Response to November 10, 2017 Letter

Regarding Request No. 2 from the Fourth Set of Requests for Production of Documents, please see the First Amended Responses. Because there are no responsive documents, we will not run searches for "Plambeck." Also, please see the First Amended Responses to the Third Set of Requests for Production of Documents.

As for your unreasonable request for the current addresses of the 21 investigators, Defendants will not provide the information. This lawsuit and specifically Plaintiff Williams' investigation fee claim are only about MRS and AMC. The other investigators are not relevant to the lawsuit, as none of them were used on Plaintiff Williams' case. Your attempt to subpoena them is nothing but pure harassment and a fishing expedition to drive up litigation costs for everyone, including third parties who have nothing to do with this lawsuit.

Finally, we will not assist in your efforts to subpoena Ciro Cerrato. You are perfectly capable of serving a subpoena on him.

This should address all of your concerns and resolve the discovery dispute. Please contact me with any questions or comments.

Sincerely,

Sutter O'Connell

Brian E. Roof

BER/ma
Enclosure
cc: James M. Popson
Eric Kennedy
Tom Mannion
John F. Hill