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 **Named Plaintiff Matthew Johnson's Motion to Stay Summary Judgment Proceedings under Civ.R. 56(F)**

I. Issue presented

> Under Ohio law, "a party opposing a motion for summary judgment should be given every reasonable opportunity to complete discovery," and under Civ.R. 56(F), courts "may refuse [an] application for [summary] judgment or may order a continuance to permit ... discovery to be had or may make such other order as is just." Here, Defendants have moved for summary judgment before Plaintiffs have had a reasonable opportunity to complete discovery that would allow them to contest Defendants' arguments for dismissal. Should the Court stay summary judgment proceedings until discovery is reasonably complete?

II. Introduction

For now the fourth time in this litigation, the KNR Defendants again seek premature dismissal of the Named Plaintiffs' claims before any meaningful discovery can be had on them. In moving for summary judgment of Named Plaintiff Matthew Johnson's claims regarding Liberty Capital (Defs.' MSJ, filed 3/13/2018), the Defendants seek to benefit from their own obstruction of discovery, as well as that of key witness Ciro Cerrato, who has willfully dodged Plaintiffs' efforts to serve him with a subpoena. Defendants seek to have it both ways by first refusing to provide the discoverable information that Plaintiffs have sought on their claims, and then by claiming that no genuine issue of material fact exists, having denied Plaintiffs the opportunity to discover relevant

and probative information that would rebut this contention. This approach is contrary to Ohio law, which provides that "a party opposing a motion for summary judgment should be given every reasonable opportunity to complete discovery." *Haller v. O'Donnell*, 10th Dist. Franklin No. 93AP-216, 1993 Ohio App. LEXIS 4389, at *3-4 (Sep. 9, 1993) (collecting cases). Accordingly, under Civ.R. 56(F), courts "may refuse [an] application for [summary] judgment or may order a continuance to permit ... discovery to be had or may make such other order as is just."

As shown in Plaintiffs' pending Motion to Compel Discovery (filed Feb. 28, 2018), the Defendants have not come close to making a full response to Plaintiffs' pending discovery requests, including as to the Liberty Capital claims. As explained further below, the Plaintiffs have been diligent in conducting discovery on this case that would allow them to contest Defendants arguments on summary judgment, including in their efforts to serve Liberty Capital representative Cerrato with a subpoena for documents and his deposition.

Thus, the Court should not allow Defendants and Cerrato to benefit from their obstruction. Rather, it should uphold the Civil Rules by ordering that summary judgment proceedings be stayed until discovery is complete, and should further order that Plaintiffs not be required to go to Florida to take Cerrato's deposition until both Cerrato and Defendants have made a full and fair response to Plaintiffs' pending document requests.

III. Factual background

A. Plaintiffs have set forth detailed and well-documented claims that the KNR Defendants have engaged in unlawful self-dealing with a loan company, Liberty Capital, with whom Defendants entered an exclusive referral arrangement for their own benefit.

Under Ohio law, when attorneys refer their clients to a loan or financing company, they are required to "carefully consider whether the referral is in the client's best interest," including by "encourag[ing] the client to consider other possible sources of loans," and "assist[ing] the client in

determining" whether such loans are necessary as opposed to, for example, "use of the client's already established credit cards." These specific duties—which go along with an attorney's broader fiduciary duties to their clients, including their duty to avoid self-dealing in the attorney-client relationship—were set forth by the Supreme Court of Ohio's Board of Commissioners on Grievances and Discipline, in formal Opinion 94-11 (attached as **Exhibit 1**), which reads, in part, as follows:

> [B]efore referral to a financing company, a lawyer must carefully consider whether the referral is in the client's best interest. A lawyer should consider whether he or she could provide pro bono representation or whether the client might be eligible to receive pro bono representation elsewhere. A lawyer should assist the client in determining whether payment of the legal services or costs and expenses of litigation could be accomplished through the use of the client's already established credit cards, particularly if the interest rates are lower. *See* Opinion 91-12 (1991). A lawyer should encourage a client to consider other possible sources of loans that might carry lower interest rates, such as bank loans or personal loans from family or friends. An attorney should consider whether or not to advance or guarantee the expenses of litigation as permitted under DR 5-103(B). *See* Op. 87-001 (1987) ("[i]t is ethically proper for an attorney to advance expenses of litigation on behalf of a client, provided the client remains ultimately liable for such expenses"); Op. 94-5 (1994) (advising on the issue of settling a lawsuit against a client for expenses of litigation). Finally, the attorney must be satisfied that the terms and conditions of the financing company do not involve the attorney in a violation of the Ohio Code of Professional Responsibility.

Named Plaintiff Johnson's claims are based on detailed and documented allegations showing that the KNR Defendants breached all of the above-listed duties and more in entering an exclusive referral arrangement with a loan company called Liberty Capital Funding between 2012 and 2014. These allegations are based largely on Defendants' own written communications, showing that Defendant Rob Nestico, the managing partner of KNR, instructed all KNR attorneys and staff in May of 2012 to refer all KNR clients to Liberty Capital as a single source for settlement advances, at extremely high interest rates, only weeks after the company was formed, and weeks after Rob

Nestico requested copies of the forms KNR used with other competing loan companies. Third Amended Complaint ("TAC") ¶¶ 112–134. At the time KNR entered this exclusive referral relationship, Liberty Capital had no track record, and was operated by a former insurance salesman with no experience in the lending industry, Ciro Cerrato, out of his own home. *Id.* at ¶¶ 127–28.

When one of Nestico's partners, Gary Kisling, questioned the reasons for this new referral arrangement, explaining that another loan company the firm had used was "excellent at getting reductions on loans to get cases settled," KNR's office manager only replied that, "Rob wants to try this new company." *See* May 14, 2012 email exchange between KNR name-partner Gary Kisling (the "K" in "KNR") and KNR office manager Brandy Lamtman, attached as **Exhibit 2**. By the end of 2014, Liberty Capital was defunct, and by early 2015, the KNR Defendants had acknowledged the impropriety of an exclusive referral arrangement with a loan company, instructing their employees to "be sure to offer two different companies to your clients, only if they request a loan." TAC ¶¶ 126, 132.

These documents alone—which Plaintiffs obtained largely without the benefit of discovery—establish a prima facie case that the KNR Defendants breached their fiduciary duties to their clients by entering an exclusive referral relationship with a loan company.

These documents also establish a strong inference of self-dealing that is prohibited by Ohio law, and, if proven, would entitle KNR clients, including Named Plaintiff Johnson, to reimbursement for or disgorgement of all interest and fees paid on Liberty Capital loans. *See In re Binder: Squire v. Emsley*, 137 Ohio St. 26, 38, 47, 57, 57, 27 N.E.2d 939 (1940) (holding that disgorgement is a proper remedy against a self-dealing fiduciary "notwithstanding there may be no causal relation between [the defendants'] self-dealing and the loss or deprecation incurred," as matter of "public policy" to deter "self-dealing . . . [in] relation[s] which demand[ ] strict fidelity to others," and to deter the natural "temptation to wrong-doing" that fiduciary relations create); *see also Myer v.*

Preferred Credit, 117 Ohio Misc. 2d 8, 9, 2001-Ohio-4190, ¶¶ 23, 26, 30, 33, fn 20, 38, 766 N.E.2d 612 (2001) (quoting 49 3 OHIO JURISPRUDENCE 3D (1998) 136, 134, Agency, §§ 117, 115) ("When agents intentionally conceal material facts or secure to themselves enrichment directly proceeding from their fiduciary position, agreements accompanying such conduct are fraudulent and may be set aside."), OHIO JURISPRUDENCE 3D (1984) 191, Fiduciaries, § 94 ("The law is strict in seeing that a fiduciary shall act for the benefit of the person to whom he stands in a relation of trust and confidence and in maintaining the trust free from the pollution of self-seeking on the part of the fiduciary."); *Hendry v. Pelland*, 73 F.3d 397, 402 (D.C. Cir. 1996) (holding that attorneys, as any fiduciaries, face liability for forfeiture or disgorgement based on their fiduciary breaches, regardless of any proof of consequential injury).[1]

B. Cerrato has intentionally obstructed Plaintiffs' efforts to serve him with a subpoena and Defendants, in prematurely moving for summary judgment, seek to benefit from Cerrato's obstruction.

At the January 5 status conference, the Defendants raised the Court's attention to their pending motion for leave to file their summary judgment motion on the Liberty Capital claims. *See* Jan. 5 hearing transcript at at 34:10–35:4, excerpt attached as **Exhibit 3**. Plaintiffs objected to the filing of this motion as premature, explaining that discovery was ongoing as to these claims, and that they have not had the opportunity to obtain discoverable documents or take necessary depositions,

[1] *See also Miller v. Cloud*, 7th Dist., No. 15 CO 0018, 2016-Ohio-5063, ¶ 92 ("[W]hen a party is a wrongdoer, disgorgement is an option."); 49 OHIO JURISPRUDENCE 3D (1984) 66, 71, Fiduciaries, § 13 ("Abuse of a relation of trust or confidence for personal aggrandizement is the cardinal sin of a fiduciary, and courts are quick to denounce, prevent, or remedy any such action."), *Greenberg v. Meyer*, 50 Ohio App.2d 381, 384, 363 N.E.2d 779 (1st Dist. 1977) ("The rule [providing that "it is immaterial whether the principal suffered injury or damage" when "agents/fiduciaries" breach their duties of "absolute good faith and loyalty"] does not depend upon whether . . . the principal is injured by the conduct of the agent. The wholesome rule is that the agent shall not put himself in a position where he may be tempted to betray his principal, or to serve himself at the expense of his principal. The rule . . . was intended not solely to remedy actual wrongs caused by such misconduct, but to discourage the occurrence of such misconduct altogether."); *First United Pentecostal Church v. Parker*, 514 S.W.3d 214, 221 (Tx. 2017) (the "central purpose" of this principle "is to protect relationships of trust by discouraging [attorneys'] disloyalty").

including of Liberty Capital representative Ciro Cerrato. *Id.* at 35:5–36:19. Defendants then stated that they would wait to file their summary judgment until after Cerrato's deposition was taken. *Id.* at 40:17–41:5. And Plaintiffs confirmed that "if the parties are in agreement that we can take Mr. Cerrato's deposition, and if we can have the opportunity to have that subpoena served beforehand, so we can get his documents and proceed with the deposition ... [t]hen we will be in a position to respond to the summary judgment motion either by responding on the merits or [moving to continue under Rule 56(F)]." *Id.* at 49:5–22. At this point, the Court had not yet been made aware of the extent of the Defendants' obstruction of documentary discovery (as detailed in Plaintiffs' pending Motion to Compel), and stated that it "would really like" the Plaintiffs to obtain the necessary documents and complete Cerrato's deposition within 60 days. *Id.* at 53:20-21.

Plaintiffs have made every reasonable effort to adhere to this timeline even despite Defendants' obstruction of documentary discovery. *See* Affidavit of Peter Pattakos, attached as **Exhibit 4**.[2] In fact, well before the January 5 status conference, on November 11, 2017, Plaintiffs asked Defendants for assistance in serving Cerrato based on the fact that the Defendants had obtained an affidavit from him to attach to their motion for summary judgment that they first moved to file on November 3, 2017. Defendants refused, stating that, "we will not assist in your efforts to subpoena Ciro Cerrato. You are perfectly capable of serving a subpoena on him." Nov. 15, 2017 letter from Roof to Pattakos, attached as **Exhibit 5**.

As a result, Plaintiffs filed for a petition for commission to issue an out of state subpoena on December 7, 2017. The Court issued the commission on January 5, 2018, and Plaintiffs had the subpoena issued by the Florida court by January 24, 2018. Upon attempting to serve Cerrato with this subpoena, however, Plaintiffs' process servers have found, (1) that Cerrato claims to no longer live at the Liberty Capital address where he once resided, which is the same home address that the

[2] The Affidavit of Peter Pattakos attached as **Exhibit 4** further affirms the truth of the factual statements provided in this motion and affirms the basis for the relief requested under Civ.R. 56(F).

Defendants provided for him, and the same address where his wife apparently lives; and (2) when the process servers tried to serve him at his workplace, Cerrato refused to accept service, refusing to come out of his office despite claiming to know what the subpoena is about, and stating that he did not want to deal with the subpoena while he was at work. *See* **Ex. 4** Pattakos Affidavit, and Affidavit of Micheal Bryant, Verified Return of Non-Service, attached as **Exhibit 6**.

In response to Cerrato's obstruction, Plaintiffs again sought Defendants' assistance, asking them to explain to Cerrato that obstructing was not in his or any party's best interests, and also to obtain a current address for him to accept service. *See* Feb 14–Mar. 8, 2018 email exchange between Pattakos and Jim Popson, attached as **Exhibit 7**. In response, on February 16, defense counsel stated, "I will not agree to reach out to him or advise him on attendance or service," but agreed to provide Plaintiffs "with any address that we have for him." *Id.* Nearly three weeks later, on March 7, the Defendants still had not provided this address, and when Plaintiffs' counsel followed up to request it, the Defendants finally provided the same address where Plaintiffs had already attempted service, along with a phone number. *Id.* While Plaintiffs' counsel was able to reach Cerrato at this phone number, when the undersigned identified himself and asked Cerrato where and how he would like to accept service of the subpoena, Cerrato said, "I'm not interested, thank you," and hung up the phone. *See* **Ex. 4**, Pattakos Affidavit.

After this interaction with Cerrato, the Plaintiffs made one last appeal to defense counsel, asking them to consider the inference of coordinated obstruction created by the fact that the Defendants could obtain an affidavit from Cerrato, but would not agree to call him to even try to obtain a current address for service. **Ex. 7**, Pattakos/Popson email exchange. In response, defense counsel stated that, as a "consequence" of Plaintiffs' request, he would "not agree to any extensions of time with regard to serving Cerrato or responding to [the motion for summary judgment] regarding this class." *Id.* Defense counsel maintained his refusal to attempt to contact Cerrato to

obtain an address or any other information, stating that "the mere fact that [Cerrato provided an affidavit for Defendants] voluntarily does not create any affirmative duty for me to call him or speak to him at all." *Id.* The following week, Defendants filed their summary-judgment motion which relies on Cerrato's affidavit, confirming an intent to take advantage of Cerrato's obstruction and their own.

C. The KNR Defendants have obstructed Plaintiffs' efforts to conduct discovery on the Liberty Capital claims.

Defendants' posture with regard to the Cerrato subpoena is consistent with their overall pattern of obstruction in this case, as detailed in Plaintiffs' pending Motion to Compel filed on February 28, 2018, incorporated by reference here and in the Affidavit of Peter Pattakos (**Ex. 4**). In short, the Defendants have not undertaken a comprehensive search for any of the categories of documents requested by Plaintiffs that would, as described below, allow them to contest the arguments on which Defendants' summary judgment motion is based.

IV. Law and Argument

A. Civ.R. 56 should be cautiously invoked, and summary judgment should only be granted when, construing all evidence and resolving all reasonable inferences in favor of the non-moving party, reasonable minds can come to but one conclusion.

"Summary judgment precludes a jury's consideration of a case and should, therefore, be used sparingly, only when reasonable minds can come to but one conclusion." *Shaw v. Cent. Oil Asphalt Corp.*, 5 Ohio App.3d 42, 44, 449 N.E.2d 3 (9th Dist.1981). "Civ. R. 56(C) mandates that the evidence be construed most strongly in favor of the non-moving party." *Id.* "In ruling on summary judgment, a court is not permitted to weigh evidence or choose among reasonable inferences ... [but] must resolve all reasonable inferences in favor of the non-moving party." *Everhome Mtge. Co. v. Rowland*, 10th Dist. Franklin No. 07AP-615, 2008-Ohio-1282, ¶ 7 (citations omitted). "Whenever there exists a conflict of factual and legal issues, a motion for summary judgment is an improper

method of disposing of the case." *Richardson v. Auto-Owners Mut. Ins. Co.*, 9th Dist. Summit No. 21697, 2004-Ohio-1878, ¶ 25. "A moving party does not discharge its initial burden under Civ.R. 56 simply by making a conclusory assertion that the nonmoving party has no evidence to prove its case." *Dresher v. Burt*, 75 Ohio St.3d 280, 293, 1996-Ohio-107, 662 N.E.2d 264. "Rule 56 should be cautiously invoked to the end that parties may always be afforded a trial where there is a bona fide dispute of facts between them." *Tucker v. Webb Corp.*, 4 Ohio St.3d 121, 122, 447 N.E.2d 100 (1983) (reversing the trial court's grant of summary judgment where plaintiff was given insufficient time to discover essential facts surrounding his claims).

B. Under Ohio law, "a party opposing a motion for summary judgment should be given every reasonable opportunity to complete discovery," and under Civ.R. 56(F), courts "may refuse [an] application for [summary] judgment or may order a continuance to permit ... discovery to be had or may make such other order as is just."

As the Ohio Supreme Court has observed, "one cannot weigh evidence most strongly in favor of one opposing a motion for summary judgment when there is a dearth of evidence available in the first place" due to the fact that discovery has not yet been completed. *Tucker v. Webb Corp.*, 4 Ohio St.3d 121, 122-123, 447 N.E.2d 100 (1983). Rather, "Ohio policy favors the fullest opportunity to complete discovery," and "a decision of the trial court that extinguishes a party's right to discovery will be reversed on appeal if the trial court's decision is improvident and affects the discovering party's substantial rights." *Michaels v. Smith*, 9th Dist. Lorain C.A. No. 89CA004582, 1989 Ohio App. LEXIS 4702, at *5 (Dec. 13, 1989).

Accordingly, Civ.R. 56(F) provides that a court "may refuse [an] application for [summary] judgment or may order a continuance to permit affidavits to be obtained or discovery to be had or may make such other order as is just." "The purpose of [Rule 56(F)] is to provide protection to parties who require additional time to discover facts essential to the case before responding to a motion for summary judgment on the merits." *Moore v. Warren Ohio Hosps. Co., LLC*, 2016-Ohio-

1366, 62 N.E.3d 994, ¶ 36 (11th Dist.). Under this rule, "the party opposing a motion for summary judgment should be given every reasonable opportunity to complete discovery." *Haller v. O'Donnell*, 10th Dist. Franklin No. 93AP-216, 1993 Ohio App. LEXIS 4389, at *3-4 (Sep. 9, 1993). Furthermore, "[a] party who seeks a continuance for further discovery is not required to specify what facts he hopes to discover, especially where the facts are in the control of the party moving for summary judgment." *Bank of Am., N.A. v. Litteral*, 2d Dist. Montgomery No. 25086, 2013-Ohio-38, ¶ 23. *See also Galland v. Meridia Health Sys.*, 9th Dist. Summit No. 21763, 2004-Ohio-1416, ¶ 11-12 (reversing trial court's grant of summary judgment to the defendant where the plaintiffs "provided evidence to demonstrate that [defendant] had not complied with their discovery requests and, as a result, [plaintiffs] were unable to obtain certain crucial facts necessary to prepare their response to [defendant's] motion for partial summary judgment.").[3]

C. Defendants' motion for summary judgment relies on disputed contentions of fact, and improperly asks the Court to resolve inferences in Defendants' favor.

In moving for summary judgment on the Liberty Capital claims, the KNR Defendants misrepresent essential disputed facts as undisputed, and they do so before Plaintiffs have had a reasonable opportunity to discover information that would allow them to fully rebut these contentions. Further, Defendants' motion improperly asks the Court to resolve inferences in Defendants' favor when Ohio law requires the Court to do the opposite.

[3] *See also Levine v. Levine*, 10th Dist. Franklin No. 82AP-200, 1982 Ohio App. LEXIS 15002, at *4-5 (July 13, 1982) ("The trial court abused its discretion by ruling on the motion for summary judgment without giving plaintiff an opportunity to present such evidence, by affidavit, deposition or otherwise, in order to demonstrate that there was a genuine issue regarding a material fact ... ."); *Hobson v. Morrow Cty. Commrs.*, 5th Dist. Morrow No. 2004-CA-0003, 2004-Ohio-6644, ¶ 14 ("[S]ummary judgment should be granted only after all parties have had a fair opportunity to be heard."); *LG Mayfield LLC v. United States Liab. Ins. Group*, 2017-Ohio-1203, 88 N.E.3d 393, ¶ 75 (11th Dist.) ("In interpreting Civ.R. 56(F), . . . a trial court should apply the rule liberally to ensure that the nonmoving party in any summary judgment exercise has sufficient time to discover any fact which is needed to properly rebut the argument of the moving party."); *Moore v. Warren Ohio Hosps. Co., LLC*, 2016-Ohio-1366, 62 N.E.3d 994, ¶ 25 (11th Dist.) ("Before a court may rule on summary judgment, it must allow the parties adequate opportunity to complete discovery.").

First as to Defendants' misrepresentations of "undisputed facts," their motion relies primarily on the claim that it "cannot be disputed" that they "had no ownership or financial interest in Liberty Capital" and "never received any financial benefit or alleged kickback when KNR clients use Liberty Capital to secure an advance on potential future recovery." Defs' MSJ at 3. To support this contention, the Defendants rely on their own affidavits, as well as that of Ciro Cerrato, their accomplice in the alleged self-dealing scheme. These affidavits contain nothing more than self-serving conclusions identically stating that the KNR Defendants never had "any ownership or financial interest in Liberty Capital," never "received ... any financial, economic, or any kind of benefit or alleged. kickback," and were not "involve in any self-dealing." *See* Nestico, Redick, and Cerrato Affidavits at ¶ 2–4; These conclusions are completely unsupported by any evidence, let alone evidence that would foreclose the possibility that Plaintiffs could discover information to contradict them. In other words, it *can* be disputed that Defendants "never received any financial benefit or alleged kickback" from their exclusive referral arrangement with Liberty Capital, and, as described in Section D, below, the Plaintiffs have diligently requested and are entitled to discovery that would allow them to do so.

In seeking to deny Plaintiffs the discovery necessary to contest the motion for summary judgment, the Defendants wrongly ask the Court to construe facts and resolve inferences in their favor when Ohio law requires exactly the opposite. *Everhome Mtge. Co. v. Rowland*, 10th Dist. Franklin No. 07AP-615, 2008-Ohio-1282, ¶ 7 ("In ruling on summary judgment, a court is not permitted to weigh evidence or choose among reasonable inferences ... [but] must resolve all reasonable inferences in favor of the non-moving party.") (citations omitted).

For example, at page 6, Defendants argue that, "[r]eferring a client to a 'newly formed' lender does not suggest, much less prove, an improper relationship between the attorney and the lender" and [r]eviewing agreements with other loan companies prior to recommending a 'newly

formed' company to clients is precisely what one would expect an attorney to do." Here, Defendants refer to a couple of cherry-picked facts, and asked the Court to construe and derive inferences from those facts in their favor. In doing so, the Defendants ignore the inferences raised by an attorney or law firm entering an *exclusive* referral arrangement with *any lender at all*, let alone one with no proven track record, run by a manager with no experience in the lending industry. In fact, given that attorneys' fiduciary duties to their clients require them to "carefully consider whether [a loan] referral is in the client's best interest," including by "encourag[ing] the client to consider other possible sources of loans," the fact that KNR was directing its clients to a single source for loans establishes a prima facie case of breach. *See* Supreme Court of Ohio Board of Commissioners on Grievances and Discipline, formal Opinion 94-11.

Moreover, the fact that the KNR Defendants are completely unable to proffer a legitimate explanation for entering an exclusive referral arrangement with this brand new and unproven company only strengthens the inference that they did so for their own financial benefit—particularly given that KNR's own documents show that other loan companies were effectively servicing their clients at the time. *See* **Ex. 2**, May 14, 2012 email exchange between Kisling and Lamtman ("Why are we using the new firm [Liberty Capital] rather than Preferred Capital? Brian is excellent at getting reductions on his loans to get cases settled." "Rob wants to try this new company."). In fact, the Defendants' own documents also reflect their own acknowledgment of the impropriety of an exclusive referral arrangement with a loan company, showing that by 2015 they instructed their employees to "be sure to offer two different companies to your clients, only if they request a loan." TAC ¶¶ 126, 132.

While wrongly asking the Court to construe inferences in their favor, the Defendants also simultaneously attack the Plaintiffs for drawing their own inferences from the facts alleged in the Complaint, claiming that these allegations "merely invite conjecture and speculation based upon

innuendo." Defs' MSJ at 6. Here, Defendants ignore that an inference is "a mere permissible deduction" that a trier of fact "may, [but is not required to] make" from other facts or circumstances that have been established by direct evidence. *State v. Sherrils*, 8th Dist. Cuyahoga No. 41302, 1980 Ohio App. LEXIS 11433 at *8 (Apr. 17, 1980), fn. 2. Moreover, "[t]he fact that [a party] may employ[] circumstantial evidence and inference ... does not equate to mere speculation." *State ex rel. Cordray v. Evergreen Land Dev., Ltd.*, 7th Dist. Mahoning Nos. 15-MA-0115, 15-MA-0116, 2016-Ohio-7038, ¶ 17. Rather, "[c]ircumstantial evidence has the same probative value as direct evidence. [And] rational inferences can be drawn based upon facts in the record and even based upon a combination of a fact in the record and another rational inference." *Id.*

Here, while Defendants have presented no evidence that forecloses the inferences of self-dealing raised by Plaintiffs' allegations, it is not necessary for the Court to construe any inferences at all because Defendants' motion is premature until the Plaintiffs have been permitted a reasonable opportunity to conduct discovery to rebut it. *See Galland*, 9th Dist. Summit No. 21763, 2004-Ohio-1416, ¶ 11-12 (reversing trial court's grant of summary judgment to the defendant where the plaintiffs "provided evidence to demonstrate that [defendant] had not complied with their discovery requests and, as a result, [plaintiffs] were unable to obtain certain crucial facts necessary to prepare their response to [defendant's] motion for partial summary judgment.").

D. Because Plaintiffs have not had a reasonable opportunity to complete discovery that would allow them to contest Defendants' disputed contentions of fact, summary judgment proceedings should be stayed under Rule 56(F).

Plaintiffs have diligently sought discovery that would allow them to rebut Defendants' contentions that they, "had no ownership or financial interest in Liberty Capital" and "never received any financial benefit or alleged kickback when KNR clients use Liberty Capital to secure an advance on potential future recovery." Defs' MSJ at 3. For example, as shown in their currently

pending Motion to Compel Discovery filed on February 28, 2018, Plaintiffs have requested documents that would allow them to assess the operation of Defendants' exclusive referral arrangement with Liberty Capital and the reasons behind it, including the consequences that accrued to Defendants and their clients as a result, including documents reflecting,

- Defendants' process or policies employed in selecting a loan company to refer to their clients, including documents reflecting the reasons behind their decision to exclusively refer Liberty Capital, their reasons for terminating this arrangement, and their subsequent recognition of the impropriety of an excusive referral arrangement by instructed their employees to "be sure to offer two different companies to your clients, only if they request a loan";
- Any business or financial benefit Defendants' derived from their relationship with Liberty Capital;
- Defendants' non-privileged communications with Liberty Capital representative Ciro Cerrato.

See Ex. 6 to Plaintiffs' Feb. 28, 2018 Motion to Compel, requests 2–12.

Additionally, by the subpoena Plaintiffs have issued to Ciro Cerrato, they have sought documents on the same subjects, including as to any input provided by the KNR Defendants into the content or design of Liberty Capital's loan documents, and financial records that would allow Plaintiffs to determine whether Liberty Capital's revenues were ever redirected to the KNR Defendants.

To date, the KNR Defendants and Liberty Capital representative Cerrato have almost completely obstructed Plaintiffs' diligent efforts to discover such information, as outlined above and in Plaintiffs' Motion to Compel. Cerrato has intentionally dodged service of Plaintiffs' subpoena, and Defendants have failed to adequately respond to the vast majority of Plaintiffs' discovery requests: They have refused to search for discoverable information based on improper objections of undue burden; they have delayed the production of the minimal and mostly irrelevant documents they have produced; and they have denied Plaintiffs the right to depose the very witnesses on whose affidavit their summary judgment motion is based. They do all of this despite that discovery is

ongoing, with no deadlines having been set.

Thus, Plaintiffs are not required, at this stage of the case, to respond to the merits of the issues raised in Defendants' motion. *See*, *e.g.*, *Litteral*, 2013-Ohio-38, ¶ 23, *Galland,* 2004-Ohio-1416, ¶ 11-12, above. Plaintiffs are not required to prove their claims in order to obtain discovery on them. *See Id.* To date, no aspect of this case is ripe for a summary judgment ruling.

D. The Plaintiffs should not be required to take Cerrato's deposition until they have received a full and fair response to their requests for documents relevant to his testimony.

Cerrato's obstruction, as well as the Defendants' overall posture of obstruction detailed in Plaintiffs' Motion to Compel, underscores the reasons that Plaintiffs should not be required to take Cerrato's deposition until they have received a full and fair response to their requests for documents relevant to his testimony. Such an order is necessary to conserve judicial resources and ensure basic procedural fairness. Documents exist that shed light on Plaintiffs' Liberty Capital claims. Plaintiffs should be entitled to ask Cerrato about these documents, including his communications with the Defendants, and they should not be required to take multiple trips to Florida for this purpose. Moreover, Cerrato should not be permitted to benefit from his obstruction, nor should the Defendants. Cerrato's obstruction only confirms that he will be a hostile witness, further showing that Plaintiffs should be permitted to examine him with documents relating to his own prior communications and communications about his company.

V. Conclusion

Neither Defendants nor Cerrato should be allowed to benefit from their obstruction of discovery. For the foregoing reasons, Plaintiffs respectfully request that the Court issue a judgment entry consistent with the attached proposed order, and stay any ruling on summary judgment until discovery has been completed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

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

/s/ Peter Pattakos
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The Supreme Court of Ohio

BOARD OF COMMISSIONERS ON GRIEVANCES AND DISCIPLINE

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OFFICE OF SECRETARY

OPINION 94-11

Issued October 14, 1994

[CPR Opinion-provides advice under the Ohio Code of Professional Responsibility which is superseded by the Ohio Rules of Professional Conduct, eff. 2/1/2007.]

[Not current-subsequent rule amendments to DR 5-103(B), eff. Jun. 14, 1999.]

SYLLABUS: It is improper under DR 3-102(A) of the Ohio Code of Professional Responsibility for an attorney to refer a client to a financing company that requires the attorney to prospectively agree to pay the company a percentage of a legal fee when earned as a quid pro quo for the company's agreement to loan money with interest to a client. Such conduct may also violate DR 5-107(B).

OPINION: This opinion addresses whether it is proper for an attorney to refer a client to a financing company that requires the attorney to prospectively agree to pay the company a percentage of a legal fee when earned as a quid pro quo for the company's agreement to loan money to the client. In essence, the finance company pays the attorney the amount billed for legal services minus the agreed upon percentage. The client repays the "loan" through monthly payments with interest to the finance company.

Ethical problems arise when a lawyer, prior to accepting or providing legal representation, enters an agreement to give a percentage of his or her legal fee to a financing company in exchange for the company's agreement to loan high interest rate money to a client. First, there is an improper agreement to divide a legal fee with a non-lawyer in violation of DR 3-102 (A). Second, there is a likelihood of improper influence by a non-lawyer upon a lawyer's independent professional judgment in violation DR 5-107(B). The rules are set forth below.

> **DR 3-102(A)** A lawyer or law firm shall not share legal fees with a non-lawyer, except that:
>
> > (1) An agreement by a lawyer with his [her] firm, partner, or associate may provide for the payment of money, over a reasonable period of time after his [her] death, to his [her] estate or to one or more specified persons.
> >
> > (2) A lawyer who undertakes to complete unfinished legal business of a deceased lawyer may pay to the estate of the deceased lawyer that proportion of the total compensation which fairly represents the services rendered by the deceased lawyer.

EXHIBIT 1

> (3) A lawyer or law firm may include non-lawyer employees in a retirement plan, even though the plan is based in whole or in part on a profit-sharing arrangement.
>
> **DR 5-107(B)** A lawyer shall not permit a person who recommends, employs, or pays him [her] to render legal services for another to direct or regulate his [her] professional judgment in rendering such legal services.

Disciplinary Rule 3-102 (A) broadly prohibits dividing legal fees with non-attorneys, and the exceptions within the rule do not apply to a division with a financing company. Some states may justify such division, but this Board cannot. See e.g., Illinois State Bar Ass'n, Op. 92-9 (1993) (viewing the division as a business agreement between the attorney and the finance company that "'makes it possible for the business to bear a portion of the cost of the loan thereby making the borrower more attractive to the lender"; State Bar of Texas, Op. 481 (undated) (viewing the division as a finance arrangement rather than a fee-splitting arrangement, provided that the finance corporation does not solicit clients and does not perform legal services); Oregon State Bar, Op. 1993-1 (1993) (view is unclear as to why it is not considered a prohibited division of fees.)

It is this Board's view that a lawyer's prospective agreement to pay a finance company a percentage of a legal fee not yet earned in exchange for the company's agreement to loan a client money is not a business arrangement outside of the Code's restraint. First, it is different from a referral to a collection agency. Referrals to collection agencies are permissible only when the fees sought to be collected have been fully earned, the lawyer has made personable and amicable attempts to collect the fee, and the compensation to the collection agency is made on the basis of the amount collected, not the amount billed as legal service. See Ohio SupCt, Bd of Comm’rs on Grievances and Discipline, Op. 91-16 (1991). See also, Maine Bd of Bar Overseers, Op. 138 (1994), (permitting an attorney to enter an agreement with a financing company to remit a percent of amount collected). Second, it does not help to characterize the agreement as a purchase of accounts receivable. At the time of the agreement, no legal services have been performed and in some cases no attorney client relationship has been established. Finally, it cannot be justified as an administrative or service fee necessary to doing business when the finance company is receiving interest on its loans.

In addition, such agreements increase the likelihood that a lawyer's professional judgment will be influenced by a non-lawyer since the lawyer is being paid by the finance company. For example, a lawyer's decision as to whether to enter an attorney client relationship may become based solely upon the financing company's view of the client, rather than

upon a lawyer's traditional and professional decisions regarding a client's needs, case merits, and personal commitment to making legal services available. A further hazard is that the lawyer's performance of legal services may easily be affected by the lawyer's knowledge that the finance company will take a certain percent of legal fees earned in a particular case. This may have the subtle effect of making some cases seem more worthy of the lawyer's effort than others. It may also have the effect of legal fees being raised beyond what is customarily charged.

Thus, in answer to the question raised, this Board advises that it is improper under DR 3-102 (A) of the Ohio Code of Professional Responsibility for an attorney to refer a client to a financing company that requires the attorney to agree to pay the company a percentage of a prospective legal fee when earned as a quid pro quo for the company's agreement to loan money with interest to a client. Such conduct may also violate DR 5-107 (B).

Nevertheless, this opinion is not to be construed as a blanket prohibition on a lawyer's referral of a client to a financing company. However, before referral to a financing company, a lawyer must carefully consider whether the referral is in the client's best interest. A lawyer should consider whether he or she could provide pro bono representation or whether the client might be eligible to receive pro bono representation elsewhere. A lawyer should assist the client in determining whether payment of the legal services or costs and expenses of litigation could be accomplished through the use of the client's already established credit cards, particularly if the interest rates are lower. See Opinion 91-12 (1991). A lawyer should encourage a client to consider other possible sources of loans that might carry lower interest rates, such as bank loans or personal loans from family or friends. An attorney should consider whether or not to advance or guarantee the expenses of litigation as permitted under DR 5-103 (B). See Op. 87-001 (1987) ("[i]t is ethically proper for an attorney to advance expenses of litigation on behalf of a client, provided the client remains ultimately liable for such expenses"); Op. 94-5 (1994) (advising on the issue of settling a lawsuit against a client for expenses of litigation). Finally, the attorney must be satisfied that the terms and conditions of the financing company do not involve the attorney in a violation of the Ohio Code of Professional Responsibility.

Advisory Opinions of the Board of Commissioners on Grievances and Discipline are informal, nonbinding opinions in response to prospective or hypothetical questions regarding the application of the Supreme Court Rules for the Government of the Bar of Ohio, the Supreme Court Rules for the Government of the Judiciary, the Code of Professional Responsibility, the Code of Judicial Conduct, and the Attorney's Oath of Office.

Re: Loans
Brandy Brewer
Sent: Monday, May 14, 2012 11:49 AM
To: Gary Kisling

Rob wants to try this new company

Sent from my iPhone

On May 14, 2012, at 11:43 AM, "Gary Kisling" <kisling@knrlegal.com> wrote:

Why are we using the new firm rather than Preferred Capital? Brian is excellent at getting reductions on his loans to get cases settled.

<image006.jpg>

Gary W. Kisling
Kisling, Nestico & Redick
Attorney At Law
3412 W. Market St., Akron, Ohio 44333
Main: 330-869-9007 | Fax: 330-869-9008 | Outside Ohio: 800-978-9007
Locations: Akron, Canton, Cleveland, Cincinnati, Columbus, Dayton, Toledo & Youngstown

<image007.jpg><image008.jpg> <image009.jpg> <image010.jpg>

From: Brandy Brewer
Sent: Monday, May 14, 2012 10:42 AM
To: Staff
Subject: Loans

For today or until further notice, please use Preferred Capital instead of new company. We are ironing out some glitches.

<image011.jpg>

Brandy Brewer
Kisling, Nestico & Redick
Executive Assistant to Attorney Nestico
3412 W. Market St., Akron, Ohio 44333
Main: 330-869-9007 | Fax: 330-869-9008 | Outside Ohio: 800-978-9007
Locations: Akron, Canton, Cleveland, Cincinnati, Columbus, Dayton, Toledo & Youngstown

<image012.jpg><image013.jpg> <image014.jpg> <image015.jpg>

EXHIBIT 2

IN THE COURT OF COMMON PLEAS
COUNTY OF SUMMIT

MEMBER WILLIAMS, et al.,	)	CASE NO. CV-2016-09-3928
Plaintiffs,	)	
	)	
vs.	)	TRANSCRIPT OF PROCEEDINGS
	)	
KISLING, NESTICO & REDICK, LLC, et al.,	)	
Defendants.	)	VOLUME 1 (Of 1 Volume)

- - -

APPEARANCES:

PETER PATTAKOS,	Attorney at Law,
DEAN WILLIAMS,	Attorney at Law,
JOSH COHEN,	Attorney at Law,
	on behalf of the Plaintiffs.
JAMES M. POPSON,	Attorney at Law,
BRIAN E. ROOF,	Attorney at Law,
THOMAS P. MANNION,	Attorney at Law,
R. ERIC KENNEDY,	Attorney at Law,
	on behalf of the Defendants.
John F. Hill,	Attorney at Law,
Meleah M. Kinlow,	Attorney at Law,
	on behalf of Defendant Minas Floros, D.C.

- - -

BE IT REMEMBERED that upon the hearing of the above-entitled matter in the Court of Common Pleas, Summit County, Ohio, before THE HONORABLE PATRICIA A. COSGROVE, Judge Presiding, commencing on January 5, 2018, the following proceedings were had being a Transcript of Proceedings:

Maryann Ruby, RPR
Official Court Reporter
Summit County Courthouse
209 South High Street
Akron, OH 44308

EXHIBIT 3

unless you file a motion?

But we asked the Court by e-mail how to handle that. And what she said was -- what Judge Breaux's staff attorney said was that we should raise the issue with the Court through the staff attorney first by phone or by e-mail before a motion is filed.

So what --

THE COURT: So there is no motion for summary judgment?

MR. PATTAKOS: There is a motion --

THE COURT: There is a motion for leave?

MR. POPSON: There is a motion for leave. That would be the accurate --

THE COURT: And no response? Did you say no response?

MR. POPSON: We haven't received a response to our motion for leave.

MR. PATTAKOS: I believe that we did file a response to the motion for leave.

MR. POPSON: Well, anyway, it's still on the docket was the point. You asked what motions were pending. That motion is pending.

MR. PATTAKOS: And it's our position that they should not be permitted to engage in summary judgment proceedings prior to discovery taking place. So we believe it is premature and that that motion to file a summary judgment motion should be denied.

THE COURT: What discovery specifically do you need to respond to?

Let's say that the motion were actually filed, what discovery would you still need to respond to that motion?

MR. PATTAKOS: We need to go down to Florida and talk to Ciro Cerrato of Liberty Capital.

And we also need to examine all of the bank accounts by which this entity operated with, Your Honor.

This is -- these are very serious allegations, that Mr. Nestico held an ownership interest in this entity Liberty

Capital, that he was then recommending to KNR clients. That is the -- these allegations are pleaded in detail in the third amended complaint.

This entity mysteriously surfaced around 2012, weeks after this entity was formed. And Mr. Nestico immediately ordered his employees to start referring this company to their clients for loans with no explanation. There was no examination of this company.

THE COURT: So you need to do a deposition of Liberty Capital's --

MR. PATTAKOS: We need to do a deposition of Liberty Capital, yes, and we need to examine documents, and we need to examine financials.

We are months away from being available to do this discovery.

THE COURT: Go ahead, Mr. Popson?

MR. POPSON: I said this to the last Judge on the case, and I will say this again right now. Those allegations are fabricated and false.

We have an affidavit from Mr. Nestico we have -- he's not, never has been, has no ownership interest in this company whatsoever.

Now putting that aside for the moment --

THE COURT: Well, let's just talk about -- let's focus on the discovery portion.

MR. POPSON: Assuming that we were allowed to file our motion for summary judgment -- and I think that is another issue that we need to talk about, whether we leave this order on that we have to ask permission to file anything.

But in the event we were allowed to file this motion, the response would be a 56(f) motion. And he would have to identify exactly what he needs and why he needs it in order to respond to summary judgment motion.

There is no restrictions in the Civil Rules preventing us from filing summary judgment motions supported by affidavits from people with knowledge,

demonstrating that the allegations -- the alleged facts or allegations in support of the claim are dead false. And we have done that.

There is no need to look at financial records. What financial records?

He thinks that he gets access to everyone's bank account that he deems necessary, when he's made an allegation he didn't have a good-faith basis to make in the first place.

Either he had evidence that my client owned that when he filed his lawsuit or he didn't have evidence of that.

We haven't seen any evidence from them in response to our discovery requests related specifically to this class. Not one shred of evidence. They had nothing to suggest that Mr. Nestico is a part owner of Liberty Capital.

MR. ROOF: Quickly, if I may, Your Honor?

We have affidavits from Rob Nestico

and Ciro Cerrato -- all three of the key players we have affidavits from saying there was not ownership in it.

And they have produced absolutely nothing at all in discovery to say that there was ownership in it or a financial stake. They keep referring back to their vague allegations and innuendoes in the complaint.

We have asked for interrogatories. They have refused to provide any information whatsoever.

We have three affidavits of the three key players that all say there is no financial interest, and there is no ownership interest.

And now they need this to come back, like Mr. Popson said, with an 56(f) response and say what they actually need.

MR. POPSON: And we have no objection to Mr. Cerrato's deposition. They can take his deposition if they want. We didn't object when they filed the paperwork.

MR. PATTAKOS: Who is the third

key player? Mr. Nestico, Mr. Cerrato and who?

MR. ROOF: And Mr. Kisling.

MR. PATTAKOS: Mr. Kisling.

Your Honor, we are more than prepared to file that 56(f) motion to show that their summary judgment motion is premature.

Of course, they are going to get their affidavits to say what they say. And we are entitled to respond to those affidavits.

THE COURT: Okay. First, I will grant leave to file a motion for summary judgment.

When are you going to do it?

MR. MANNION: Let's wait until after it is filed.

Let's take the deposition first that they have asked for, Your Honor. If you would sign the order when it is provided to you for the out-of-state commission. Let's take that deposition first and see where we are then.

We can file our motion for summary

judgment then if we have leave supplementing with the deposition testimony.

And if there is anything else that they need, they can file a response 56(f).

MR. PATTAKOS: And that is fine, Your Honor. We want to take this deposition. But we do not want to do so until we are able to obtain documents from Mr. Cerrato.

So we are not going to take his deposition until we get documents from him, as well as documents from the KNR Defendants about why they started using this loan company that appeared out the mist in 2012.

THE COURT: Does anyone have the complaint in front of you? Could you hone in on that particular portion that deals with KNR and Liberty?

MR. ROOF: And it's the corrected third amended complaint because there was some mistake by Plaintiff's counsel on their third amended complaint.

THE COURT: Do you happen to

have that?

MR. KENNEDY: If we could just go on the record, from this day forward when we say "third amended compliant," we always mean the corrected third amended complaint. It is not captioned "corrected third amended complaint." It's just captioned "third amended complaint," and so the record has two, third amended complaints. But we are always referencing the second one that was filed.

MR. PATTAKOS: Right. Your Honor, there were no substantive changes in the third amended complaint.

MR. ROOF: There was substantive changes. Just so the record is clear.

THE COURT: Hold on, guys. One at a time. One at a time.

MR. PATTAKOS: That is merely the most recent filed complaint, which is on November 13, 2017.

MR. MANNION: Maybe we will call it that: The most recently filed complaint.

MR. KENNEDY: Just to note for the record, it is the last one filed. It's the latest in time third amended complaint is what we are always referencing. And those are the motions to strike references.

THE COURT: I just want to go to -- I want to go to that portion of the complaint.

MR. MANNION: As they are looking for that, Your Honor, we may be able to clear up one issue, if Mr. Pattakos wants to as well. Other than if the rules require it, like they do for summary judgment sometimes, are we still required to ask the Court's permission before we feel every motion, or can we file motions as we would do in a normal case?

Because Judge Breaux has that --

THE COURT: I'm not interested in having to read and reread and then read the motion. It's like reading it twice, you know.

I'm sorry. What --

MR. ROOF: We agree. Right.
It's a Class C, Your Honor.
MR. PATTAKOS: If I may approach and show you right where the relevant allegations are.
THE COURT: Okay.
MR. PATTAKOS: I know right where they are. I believe it's paragraph -- here we go.
It starts on page 31, paragraph 112 and goes -- it is not very -- and it goes to page 37, paragraph 134. So paragraph 112 to 134.
MR. ROOF: And the problems are, Your Honor, the allegations above support a strong inference that the Defendants retain ownership interest in Liberty Capital or obtained kickback benefits for referring KNR clients for loans.
There are no facts. It's inferences and innuendos.
MR. PATTAKOS: They are inferences based on facts.
And finders of fact are permitted

to make inferences based on facts in the record. In fact, the Rule 56 standard even says: All reasonable inferences are to be construed in the nonmoving party's favor.

So why Mr. Roof seems to think the word "inference" is some kind of scandal here is a mystery, Your Honor.

MR. POPSON: It's ownership. He either owns it or he doesn't.

MR. ROOF: You can't make inferences upon inferences upon inferences.

THE COURT: Okay, guys. Slow down.

KNR was a signatory on these documents? On the loan documents?

MR. PATTAKOS: Yes, Your Honor.

MR. ROOF: On the loan documents to the individual clients?

THE COURT: I'm reading paragraph 124: Liberty Capital's loan agreement with KNR clients to which KNR was a signatory. That is what I'm reading.

MR. KENNEDY: That is correct. I believe it's a required practice, because the loan is being secured by the proceeds of the underlying lawsuit, Your Honor. That is -- that is what the world is today.

THE COURT: Got you. All right. I see.

All right. Then the last paragraph, 134, of this particular claim states that: Allegations above support a strong inference that Defendants retained an ownership interest in Liberty Capital or obtained kickback benefits for referring KNR clients.

I mean as I read that, that is either he's got -- the Defendants have an ownership interest in Liberty Capital or they obtained kickback benefits for KNR referring their clients for loans.

I mean are you saying that whether or not an ownership interest, apparent or real, let's say that cannot be established, are you still maintaining that KNR got kickbacks from Capital or

Liberty?

MR. PATTAKOS: We are saying we don't know precise form the benefits took, and that we are entitled to discovery to determine --

THE COURT: See. All right. Here is what I'm trying to get here. You seem to focus -- the Defense seems to focus on ownership interest, which apparently you have documentation that there is nothing?

MR. KENNEDY: Ownership or kickback, Your Honor, that is what our affidavit said.

THE COURT: The ownership part is relatively easy to prove via affidavits.

The kickbacks are allegations.

What Plaintiff counsel is saying is that he needs additional discovery to determine whether or not there was any kickbacks?

MR. PATTAKOS: Sure. Your Honor, and, you know, I think that whether a kickback is an ownership interest or not

is a matter of semantics in a way.

If Mr. Nestico and Mr. Cerrato had a secret agreement between one another to provide certain benefits in return for these referrals of KNR clients, then that is something -- you could call that an ownership interest. I mean property is a bundle of rights.

And to the extent that between Mr. Cerrato and Mr. Nestico or Mr. Nestico and whoever else is involved in Liberty Capital, although Mr. Cerrato is the only apparent representative of that company, it could be one in the same.

I believe that ownership -- you know, legal ownership is one thing.

But, of course, if you were going to set up a fraudulent entity like this, one would imagine that one would be careful in doing so to hide the kickbacks.

And, of course, Your Honor, there are ways, of course, that people do this.

THE COURT: Okay. I don't want to get to the merits or non-merits of this. I just want to focus in on

discovery.

What does the Plaintiff need specifically to respond intelligently to a motion for summary judgment?

MR. COHEN: Your Honor, if the parties are in agreement that we can take Mr. Cerrato's deposition, and if we can have the opportunity to have that subpoena served beforehand, so we can get his documents and proceed with the deposition, which we will commit to do in all deliberate speed, to do it as quickly as we reasonably can.

Then, we will be in a position to respond to the summary judgment motion either by responding on the merits or doing what we have to do under Rule 56, which is to say: We need this specific discovery, which we still haven't gotten yet, to answer the summary judgement motion, which I think should satisfy the Defendants.

We will know at that time if there is other things that we haven't yet had access to that we need to fully answer.

But if we do those things preliminarily, I think that would move the process along and enable us to respond as would be normal in the ordinary course under Rule 56.

MR. PATTAKOS: And --

THE COURT: Go ahead. You two are saying something a little bit different.

MR. COHEN: We are saying something completely different.

THE COURT: Go ahead.

MR. PATTAKOS: That is fine, Your Honor. And I can add to that to answer your question more specifically. I believe we need to see Liberty Capital's financials. And we need to examine their banks accounts and be able to track these transactions and see where the money went in and out of this company that arose in 2012, apparently only dealt with KNR clients and then --

MR. COHEN: Right.

MR. PATTAKOS: -- and then shut down very quickly, we believe, after Mr.

Nestico received pushbacks from within his own organization as to the unlawfulness of the relationship.

THE COURT: Okay.

MR. COHEN: Those are the documents that we were asking to get.

THE COURT: Okay, guys. Look. Look. Look. I'm not interested in your personal opinion or your legal opinion as to the merits.

I just want to find out about what you need to go forward and move this case as far as discovery.

I understand that you've got these allegations going back and forth, but let's try to just hone in on what we need.

And you are saying that you need documents before you do the deposition.

And you are saying that you don't need the documents. But once you question this guy in Florida, that you will --

MR. COHEN: No.

THE COURT: -- you will know what you need?

MR. COHEN: No. What I said,

Your Honor, is if we can get the subpoena for documents to him, if we can get his answer to that subpoena, then we would proceed with the deposition.

Then we would be in a position to respond to the summary judgement motion, which would be either on the merits, or I just want to preserve our right to say to invoke Rule 56(f), if we can identify, which we would have to do, with support by an affidavit saying: We need this specific thing, that specific thing, or this specific thing that we don't have. I can't today identify what that is.

But I'm just saying that under those circumstances, we could respond in the ordinary course under Rule 56 the way any Plaintiff would have to respond.

THE COURT: The documents of Liberty Capital -- where is Liberty Capital located?

MR. COHEN: Florida.

THE COURT: They are all in Florida.

MR. COHEN: Yes. Those are

the documents that Peter was referring to.

THE COURT: All right. So if I sign that, we can get that going, and you can get whatever you are going to get from Liberty?

MR. COHEN: Right.

MR. PATTAKOS: Yes, Your Honor.

THE COURT: All right.

Now, I don't know why you are all here. Do you want to talk about setting a potential -- we don't know if Mr. Cerrato is available.

But, I mean, while you have your calendars, do you want to talk about a potential date to depose him?

Just for the fun of it?

MR. PATTAKOS: We have to wait for his counsel, Your Honor.

THE COURT: Okay. All right.

I would really like to get this done in the next 60 days; how about that?

MR. COHEN: I think that is a realistic goal, Your Honor.

THE COURT: That is not unreasonable. Okay.

C E R T I F I C A T E

I, Maryann Ruby, Official Shorthand Reporter for the Court of Common Pleas, Summit County, Ohio, duly appointed therein, do hereby certify that I reported in Stenotypy the proceedings had and testimony taken in the foregoing-entitled matter consisting of 89 pages, together with exhibits (if applicable), and I do further certify that the foregoing-entitled TRANSCRIPT OF PROCEEDINGS conducted before the Honorable PATRICIA A. COSGROVE, Judge of said court, is a complete, true, and accurate record of said matter and TRANSCRIPT OF PROCEEDINGS.

_____
Maryann Ruby, RPR
Official Court Reporter

Dated: January 15, 2108
AKRON, OHIO

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 **Affidavit of Peter Pattakos**

I, Peter Pattakos, having been duly sworn, have personal knowledge of the following matters of fact, and testify as follows:

1. I am an attorney who represents the Plaintiffs in the above-captioned litigation.

2. I have personal knowledge of the facts set forth in the Plaintiffs' Motion to Compel Discovery filed on February 28, 2018, and in Plaintiffs' Motion to Stay Summary Judgment Proceedings under Civ.R. 56(F), to which this Affidavit is attached as an Exhibit. I hereby affirm the statement of facts contained in these documents to be true and accurate based on my personal knowledge.

3. As the documents referenced in Paragraph 2, above, show, discovery in the above-captioned matter remains ongoing and Plaintiffs have not had a reasonable opportunity to complete it to date. As outlined in these documents, Plaintiffs are seeking discovery on all of their claims, including as to the operation of the KNR Defendants' exclusive referral arrangement with Liberty Capital and the reasons behind it, including the

EXHIBIT 4

consequences that accrued to Defendants and their clients as a result. These facts are not practicably available to Plaintiffs by any other means but through discovery in this lawsuit.

3. I have been diligently working with a process server in Florida to obtain service of a subpoena in this litigation on Ciro Cerrato. To this end, I have communicated with the process server by email on the following dates in 2018: January 16, 17, 18, 22, 23, 25, 29, 30, and 31, February 3, and 5, and March 14, 19, and 20. Our efforts to serve Mr. Cerrato with this subpoena are ongoing.

4. Without the above-referenced discovery, Plaintiffs are unable to present by affidavit facts essential to justify opposition to any motions for summary judgment filed by the Defendants.

I affirm the above to be true and accurate to the best of my knowledge under penalty of perjury.

3·21·18

Signature of Affiant Date

State of Ohio
County of _____

Sworn to and subscribed before me on _____

at _____, Ohio.

_____
(Signature of Notary Public)

SUTTER O'CONNELL ATTORNEYS

Brian E. Roof
Phone: 216.928.4527
Fax: 216.928.4400
Cell: 440.413.5919
broof@sutter-law.com

November 15, 2017

VIA E-MAIL

Peter Pattakos
peter@pattakoslaw.com
The Pattakos Law Firm, LLC
101 Ghent Road
Fairlawn, Ohio 44333

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 5

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

VERIFIED RETURN OF NON-SERVICE

State of Florida **County of Palm Beach** **Circuit Court**

Case Number: 2016-CV-09-3928

Plaintiff:
Member Williams, et al

vs.

Defendant:
Kisling, Nestico & Redick, LLC, et al

For:
Peter Pattakos, Esquire
Pattakos Law
101 Ghent Road
Fairlawn, OH 44333

Received by ACE., INC on the 26th day of January, 2018 at 1:00 pm to be served on **Ciro M. Cerrato, 2400 E. Commercial Blvd, # 600, Ft. Lauderdale, FL 33308**.

I, MICHEAL BRYANT, do hereby affirm that on the **31st day of January, 2018** at **1:35 pm, I:**

NON-SERVED the **Subpoena for Deposition and Production of Documents upon Non-Party in the State of Florida, Civil Cover Sheet 1.997, Order (Commission) Granting Petition of out-of-state Subpoena and Notice of Filing, re Cerrato Subpoena with Exhibits and attachments** for the reason that I failed to find **Ciro M. Cerrato** or any information to allow further search. Read the comments below for further details.

Additional Information pertaining to this Service:
1/29/2018 2:35 pm ATTEMPTED SERVICE AT 2400 E. Commercial Blvd, # 600, Ft. Lauderdale, FL 33308, SUBJECT REFUSED TO COME OUT TO ACCEPT THE SUBPOENA, THE RECEPTIONIST HAD HIM ON SPEAKER PHONE, HE SAID TELL HER I AM NOT IN.
1/31/2018 1:35 pm ATTEMPTED SERVICE AT 2400 E. Commercial Blvd, # 600, Ft. Lauderdale, FL 33308, RECEPTIONIST WENT TO THE SUBJECTS OFFICE, SHE CAME BACK AND SAID HE WAS NOT THERE MAYBE HE WAS AT LUNCH, SHE ALSO STATED THAT HE SAID HE KNOWS WHAT THE PAPERS ARE ABOUT AND HE DOES NOT WANT TO DEAL WITH IT AT WORK.

I certify that I am over the age of 18 and have no interest in the above action.

MICHEAL BRYANT

ACE., INC
226 SE 23RD AVE
BOYTON BEACH, FL 33435
(561) 447-7638

Our Job Serial Number: JML-2018012382

EXHIBIT 6

Gmail by Google

Peter Pattakos <peter@pattakoslaw.com>

KNR - Response to Request for Additional searches

James M. Popson <jpopson@sutter-law.com> Thu, Mar 8, 2018 at 7:02 PM
To: Peter Pattakos <peter@pattakoslaw.com>
Cc: "Nathan F. Studeny" <nstudeny@sutter-law.com>

Peter,

I appreciate your response. Please note that I did agree to exchange information as we are all required to do. Unfortunately my information was no different than yours. Based upon your reported difficulties, it is apparent to me that Mr. Cerrato does not desire to voluntarily appear for deposition. I disagree that it is my place, and it certainly is not my obligation, to give him advice on that issue. It puts me in a bad spot. I am required by ethical duties to be completely honest with him if I were to call him - i.e., I would have to tell him I am asking for a different address so he can be served with a subpoena. I am not going to participate in tricking him.

I certainly understand why he won't speak to you. In his view, you have falsely accused him of participating in wrongdoing. But the mere fact that he spoke to Roof voluntarily and refuses to speak to you does not create any affirmative duty for me to call him or speak to him at all - not under the ethical rules or the rules of civil procedure. I sincerely hope that you get him served because I already know his testimony is favorable to my defense, but it is simply not my responsibility to call Mr. Cerrato and coerce him to give you the information you seek.

Jim

Sent from my iPhone

On Mar 8, 2018, at 5:54 PM, Peter Pattakos <peter@pattakoslaw.com<mailto:peter@pattakoslaw.com>> wrote:

Jim,

I have only asked you to make a phone call to see if the same key witness who gave you an affidavit would also give you his address so we could avoid undertaking a needless burden to stake him out. See The Supreme Court of Ohio's Lawyer's Creed<https://www.supremecourt.ohio.gov/Publications/AttySvcs/proIdeals.pdf>, Para. 3 ("I shall attempt to agree with other counsel on a voluntary exchange of information."). You told me three weeks ago that you would get back to me on this and did not do so until yesterday, when you came back with the same address that we already knew was no good. If you really intend to take the position you express below, you are only confirming your client's intent to take advantage of Cerrato's obstruction, and below, I only asked you to consider the appearance that this would create for your client. You may not see it the same way, and it is clear that we disagree about the underlying facts, but that doesn't mean I am accusing you, yourself, of any misconduct. Similarly, when we point out that the KNR Defendants are wrongfully withholding documents, that does not mean we are saying that you or your co-counsel are personally responsible for it. I hope we can keep the two things separate going forward. I have told you directly on the phone that I believe you're a straight shooter, and that I had heard as much from other attorneys who had worked with you.

Anyway, if you do intend to maintain the position that we're no longer entitled to take Cerrato's deposition, please confirm and we can tee that up for the Court as well. Judge Cosgrove did say at the 1/5 hearing that she would like us to get his deposition done within 60 days, but I do not believe she ordered us to do so and given his obstruction I believe it is especially unlikely that she'll hold us to that deadline. We have made every reasonable effort to get him served and had been waiting on you to provide the address as you said you would.

Peter Pattakos
The Pattakos Law Firm LLC

EXHIBIT 7

101 Ghent Road
Fairlawn, OH 44333
330.836.8533 office; 330.285.2998 mobile
peter@pattakoslaw.com<mailto:peter.pattakos@chandralaw.com>
www.pattakoslaw.com<http://www.pattakoslaw.com/>

On Thu, Mar 8, 2018 at 4:23 PM, James M. Popson <jpopson@sutter-law.com<mailto:jpopson@sutter-law.com>> wrote:
Peter,

I will not tolerate your accusations of misconduct on my part. You inclination to toss around allegations of misconduct whenever you become frustrated with a problem is troubling. I follow the rules. It is improper for you to accuse me of violating the rules of discovery without pointing me to a rule or a case that you believe requires me to act. I provided you with the name, address and the phone number we have for this witness. I double checked our internal notes here at my office and the address he provided us is the same address I gave you. The telephone number I gave you was accurate. I have had numerous conversations with you and exchanged correspondence with you on this topic multiple times – all at the cost of my time which is a cost to the defense of this case. I will say it one last time: I am not obstructing your efforts to serve Mr. Cerrato. I am not Mr. Cerrato's counsel, and I cannot (and have not) advised him on accepting or rejecting service of a subpoena. I have not, nor would I ever encourage a witness to dodge service. Mr. Cerrato is making his own decisions. If he is choosing to be uncooperative with you, that is his decision – not mine. And instead of coming to me with hat in hand asking for the professional courtesy of more time – you instead choose to falsely accuse me of being "complicit" in Mr. Cerrato's efforts to avoid service.

You need to understand that there are consequences for falsely accusing opposing counsel of misconduct. You do this repeatedly and without apology, and are apparently so devoid of self-awareness that you maintain a full expectation of further friendly cooperation from the victims of your wild accusations and antics. The consequence here is that I will not agree to any extensions of time with regard to serving Cerrato or responding to our motion regarding this class. The Liberty Capital issue has been pending since November when we filed our motion regarding this class. At the last hearing the judge gave you 60 days to have Mr. Cerrato served and deposed. Apparently you found him - but he is refusing or dodging service. My client is not required to bear the cost and expense of your efforts to serve this witness – and that includes costs and expenses for my time. You filed this lawsuit and the false allegations regarding Liberty Capital, and if you needed to pay for someone to sit on Mr. Cerrato's house until he was served then that was your burden to bear – not my client's. We will oppose any more delays on your response to the Motion on the Liberty Capital class. Time is money and you are wasting my client's. You chose not to expend the resources to serve the witness, and instead resorted to absurdly blaming me for the conduct of the witness and your own failure to get him served.

As I have demonstrated during my time on this case, I am generally amenable to cooperating with opposing counsel regarding deadlines, and I am willing to make efforts to resolve discovery disputes and narrow issues where possible. However, your false allegations regarding my "complicity" in Mr. Cerrato's conduct leave me disinclined to agree to any further extensions of time on this issue. We are going to ask the court to require you to respond to the motion with or without Mr. Cerrato's deposition. Your failure to serve Mr. Cerrato is just that – your failure.

Jim

From: Peter Pattakos [mailto:peter@pattakoslaw.com<mailto:peter@pattakoslaw.com>]
Sent: Thursday, March 08, 2018 1:55 PM

To: James M. Popson
Subject: Re: KNR - Response to Request for Additional searches

Jim,

I assume you didn't just find his affidavit that you filed with your summary judgment motion. Someone had to contact Cerrato to obtain it. If you're refusing to do the same regarding a simple address that's your right, I suppose, but the Civil Rules require cooperation in discovery and ultimately we will seek to hold your client responsible for whatever burden we have to undertake to get the discovery to which we're entitled. This is a key witness with information to which we're clearly entitled. I'd think you would not want to be complicit in his attempted obstruction. What does it look like when you can get an affidavit from him but can't get us his address?

Peter Pattakos
The Pattakos Law Firm LLC
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Fairlawn, OH 44333<https://maps.google.com/?q=101+Ghent+Road+Fairlawn,+OH+44333&entry=gmail&source=g>
330.836.8533<tel:(330)%20836-8533> office; 330.285.2998<tel:(330)%20285-2998> mobile
peter@pattakoslaw.com<mailto:peter.pattakos@chandralaw.com>
www.pattakoslaw.com<http://www.pattakoslaw.com/>

On Thu, Mar 8, 2018 at 1:43 PM, James M. Popson <jpopson@sutter-law.com<mailto:jpopson@sutter-law.com>> wrote:
Peter,

It does not stand to reason that I can find his home address. I don't have it. If I had it, I would give it to you. We have born enough of the burden of the cost and expense of discovery. The burden of serving Mr. Cerrato rests with you.

Jim

From: Peter Pattakos [mailto:peter@pattakoslaw.com<mailto:peter@pattakoslaw.com>]
Sent: Thursday, March 08, 2018 1:34 PM
To: James M. Popson
Cc: Nathan F. Studeny; Barb Day

Subject: Re: KNR - Response to Request for Additional searches

Jim, I reached Mr. Cerrato by phone this afternoon. He refused to provide any information to me and hung up on me. As you know, we've been informed that the Calabria Lakes address is no good for him, and he refuses to accept service at his office. Because your office was able to obtain an affidavit from him, it stands to reason that you would also be able to get us his current address where he can be served. If you're refusing to do that, please confirm and we'll go ahead and undertake more burdensome means of service as necessary.

Thank you.

Peter Pattakos
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Fairlawn, OH 44333<https://maps.google.com/?q=101+Ghent+Road+Fairlawn,+OH+44333&entry=gmail&source=g>
330.836.8533<tel:(330)%20836-8533> office; 330.285.2998<tel:(330)%20285-2998> mobile
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www.pattakoslaw.com<http://www.pattakoslaw.com/>

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On Wed, Mar 7, 2018 at 10:51 AM, James M. Popson <jpopson@sutter-law.com<mailto:jpopson@sutter-law.com>> wrote:
Peter,

I am told we do not have a personal address. The last address KNR has related to Cerrato is the address for Liberty Capital at 8276 Calabria Lakes Drive, Boynton Beach, Florida, 33473<https://maps.google.com/?q=8276+Calabria+Lakes+Drive,+Boynton+Beach,+Florida,+33473&entry=gmail&source=g>. We also have a phone number – (561) 735-1571<tel:(561)%20735-1571>.

Jim

From: Peter Pattakos [mailto:peter@pattakoslaw.com<mailto:peter@pattakoslaw.com>]
Sent: Wednesday, March 07, 2018 10:25 AM
To: James M. Popson
Cc: Nathan F. Studeny

Subject: Re: KNR - Response to Request for Additional searches

Jim,

You said you would get back to me on Cerrato, at least as to an address (per the below), and I still haven't heard anything on that. Please advise.

Thanks.

Peter Pattakos
The Pattakos Law Firm LLC
101 Ghent Road<https://maps.google.com/?q=101+Ghent+Road+Fairlawn,+OH+44333&entry=gmail&source=g>
Fairlawn, OH 44333<https://maps.google.com/?q=101+Ghent+Road+Fairlawn,+OH+44333&entry=gmail&source=g>
330.836.8533<tel:(330)%20836-8533> office; 330.285.2998<tel:(330)%20285-2998> mobile
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On Fri, Feb 16, 2018 at 6:32 PM, Peter Pattakos <peter@pattakoslaw.com<mailto:peter@pattakoslaw.com>> wrote:
OK, thanks. I'm not saying you need to represent him, I'm just saying that whoever convinced him to submit an affidavit should also be able to convince him to stop obstructing.

Peter Pattakos
The Pattakos Law Firm LLC
101 Ghent Road<https://maps.google.com/?q=101+Ghent+Road+Fairlawn,+OH+44333&entry=gmail&source=g>
Fairlawn, OH 44333<https://maps.google.com/?q=101+Ghent+Road+Fairlawn,+OH+44333&entry=gmail&source=g>
330.836.8533<tel:(330)%20836-8533> office; 330.285.2998<tel:(330)%20285-2998> mobile
peter@pattakoslaw.com<mailto:peter.pattakos@chandralaw.com>
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On Fri, Feb 16, 2018 at 5:27 PM, James M. Popson <jpopson@sutter-law.com<mailto:jpopson@sutter-law.com>> wrote:
Peter,

I did not personally participate in securing that affidavit. I have never personally met or spoken with this witness. I do agree that we should provide you with any address that we have for him. I will look at the file or call Brian Roof if necessary and find out what address or email we have for him. I will not agree to reach out to him or advise him on attendance or service. He is not my client, and I assume he that he can get advice from his own attorney. I will get back to you Monday on the address issue.

Jim

Sent from my iPad

On Feb 16, 2018, at 2:17 PM, Peter Pattakos <peter@pattakoslaw.com<mailto:peter@pattakoslaw.com><mailto:peter@pattakoslaw.com<mailto:peter@pattakoslaw.com>>> wrote:

You got an affidavit from him so I assume it's easy enough for you to get in touch with him. Thus, I'd ask you to inform him that his continued obstruction is not in his or the KNR Defendants' best interest, and ask him to accept it, or at least provide us a home address where he can be served. He has refused to come out of his office when we've brought the subpoena to his receptionist. We can continue to stake him out and serve him personally if that's what he insists on but he should understand it won't reflect well on him if he forces us to do this.

Peter Pattakos
The Pattakos Law Firm LLC
101 Ghent Road<https://maps.google.com/?q=101+Ghent+Road+Fairlawn,+OH+44333&entry=gmail&source=g>
Fairlawn, OH 44333<https://maps.google.com/?q=101+Ghent+Road+Fairlawn,+OH+44333&entry=gmail&source=g>
330.836.8533<tel:330.836.8533> office; 330.285.2998<tel:330.285.2998> mobile
peter@pattakoslaw.com<mailto:peter@pattakoslaw.com><mailto:peter.pattakos@chandralaw.com<mailto:peter.pattakos@chandralaw.com>>
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On Fri, Feb 16, 2018 at 12:27 PM, James M. Popson <jpopson@sutter-law.com<mailto:jpopson@sutter-law.com><mailto:jpopson@sutter-law.com<mailto:jpopson@sutter-law.com>>> wrote:
What specifically do you expect me to do? I have no control over third party witnesses.

Jim

From: Peter Pattakos [mailto:peter@pattakoslaw.com<mailto:peter@pattakoslaw.com><mailto:peter@pattakoslaw.com<mailto:peter@pattakoslaw.com>>]
Sent: Friday, February 16, 2018 12:19 PM
To: James M. Popson
Subject: Re: KNR - Response to Request for Additional searches

Jim, one thing I forgot about on our phone call: Will you be able to help us re: getting Ciro Cerrato served? Your letter doesn't mention that. Thanks.

Peter Pattakos
The Pattakos Law Firm LLC
101 Ghent Road<https://maps.google.com/?q=101+Ghent+Road&entry=gmail&source=g><https://maps.google.com/?q=101+Ghent+Road+Fairlawn,+OH+44333&entry=gmail&source=g>
Fairlawn, OH 44333<https://maps.google.com/?q=101+Ghent+Road+Fairlawn,+OH+44333&entry=gmail&source=g>
<https://maps.google.com/?q=101+Ghent+Road+Fairlawn,+OH+44333&entry=gmail&source=g>
330.836.8533<tel:330.836.8533><tel:(330)%20836-8533> office; 330.285.2998<tel:330.285.2998><tel:(330)%20285-2998> mobile
peter@pattakoslaw.com<mailto:peter@pattakoslaw.com><mailto:peter.pattakos@chandralaw.com<mailto:peter.pattakos@chandralaw.com>>
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On Thu, Feb 15, 2018 at 5:43 PM, Peter Pattakos <peter@pattakoslaw.com<mailto:peter@pattakoslaw.com><mailto:peter@pattakoslaw.com<mailto:peter@pattakoslaw.com>>> wrote:
Jim,

Our response to your letter of yesterday is attached. It seems clear that the bulk of our dispute comes down to whether the KNR Defendants will agree to upload their documents to a document-review platform of the type that's commonly used in cases like this. I hope we can come to some resolution on this issue—or at least an agreement to disagree—by the end of the day tomorrow. I'll be around all day to discuss by phone.

Thanks.

Peter Pattakos
The Pattakos Law Firm LLC
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Fairlawn, OH 44333<https://maps.google.com/?q=101+Ghent+Road+Fairlawn,+OH+44333&entry=gmail&source=g>
<https://maps.google.com/?q=101+Ghent+Road+Fairlawn,+OH+44333&entry=gmail&source=g>
330.836.8533<tel:330.836.8533><tel:(330)%20836-8533> office; 330.285.2998<tel:330.285.2998><tel:(330)%20285-2998> mobile
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On Wed, Feb 14, 2018 at 1:00 PM, James M. Popson <jpopson@sutter-law.com<mailto:jpopson@sutter-law.com><mailto:jpopson@sutter-law.com<mailto:jpopson@sutter-law.com>>> wrote:
Peter,

Attached is our response. Please let me know a time that works for us to discuss the searches and see if we can narrow the issues for the court. Talk soon.

Jim

<image001.jpg><http://sutter-law.com>

James M. Popson
3600 Erieview Tower
1301 E. 9th Street<https://maps.google.com/?q=1301+E.+9th+Street&entry=gmail&source=g><https://maps.google.com/?q=1301+E.+9th+Street+Cleveland,+OH+44114&entry=gmail&source=g>
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