IN THE COURT OF COMMON PLEAS
SUMMIT COUNTY, OHIO

MEMBER WILLIAMS, e*t al.*, Plaintiffs, vs. KISLING, NESTICO & REDICK, LLC, *et al.*, Defendants.	Case No. 2016-CV-09-3928 Judge James A. Brogan **DEFENDANT MINAS FLOROS' BRIEF IN OPPOSITION TO PLAINTIFFS' MOTION TO EXTEND THE CLASS DISCOVERY DEADLINE**

Now comes Defendant Minas Floros ("Floros"), by and through counsel, submits his brief in opposition to Plaintiffs' motion to extend the deadline for discovery on class certification. This Court should deny Plaintiffs' motion for leave because it is without good cause, unnecessary, and contrary to Civ. R. 26(D). Floros additionally requests that this Court issue an order limiting deposition to party witnesses until a determination is made on class certification.

MEMORANDUM IN SUPPORT

On July 24, 2018, this Court ordered Plaintiffs to complete their discovery on the issue of class certification by November 1, 2018. This deadline was set in response to Defendants' request to restore "structure and order" on this case, which has been pending for two years without a decision on class certification.

In an obvious attempt to further delay this case and undermine "structure and order", Plaintiffs are now requesting to extend the deadline for class-certification by three months. Plaintiffs are also requesting for the first time to depose an additional 10 nonparty witnesses.

Plaintiffs, however, have failed to show good cause for an extension of time. The parties have already exchanged paper discovery. The parties have also offered at least seven dates open for depositions prior to the November 1st deadline.

Plaintiffs have also failed to show how the depositions of 10 nonparty witnesses will produce information relevant to the issue of class certification. Indeed, several of these witnesses have no connection to the named Plaintiffs or knowledge of their underlying claims.

Likewise, Plaintiffs cannot unilaterally delay discovery or dictate the order of depositions without first showing good cause and obtaining a court order under Civ. R. 26(D). Plaintiffs have failed to do so in this case. Plaintiffs also have no one to blame but themselves for their failure to depose 10 additional nonparty witnesses prior to the certification deadline, given that Plaintiffs have known their identities for at least 10 months or longer.

Lastly, allowing Plaintiffs to engage in excessive depositions of nonparty witnesses would be highly prejudicial to Defendants whom have already incurred significant litigation costs. This is especially true for Floros who is paying out-of-pocket for his defense cost, without any insurance coverage. With limited funds and resources, Floros will be greatly harmed if his counsel needs to attend the additional depositions of nonparty witness prior to a ruling on class certification.

For these reasons, Floros requests that this Court deny Plaintiffs' request to extend the deadline. Floros additionally requests that this Court issue an order limiting discovery to only party witness until there is a ruling on class certification.

A. Plaintiffs cannot determine the sequence of depositions or delay discovery on other parties without a court order under Civ. R. 26(D).

Plaintiffs filed their complaint two years ago. Plaintiffs added Floros as a defendant party over 10 months ago. Despite all this time, Plaintiffs waited until last month to serve their first discovery requests to Floros. To date, this is the only discovery related action that Plaintiffs have directed to Floros. Plaintiffs also waited until last month to requests deposition dates for KNR and Nestico. Moreover, approximately three weeks ago was the first time that Plaintiffs informed Defendants that they intended to take 10 depositions of nonparties before November 1, 2018. Prior to this, Plaintiffs only deposed one witness.

Plaintiffs blame their nine-month delay in pursuing discovery on KNR and Nestico. Specifically, Plaintiffs believe that KNR provided incomplete responses to their written discovery request. Because of this, Plaintiffs feel that they were justified in delaying discovery and taking depositions. Plaintiffs also believe that they are entitled to depose Nestico prior to deposing any other parties and witnesses.

Plaintiffs' belief that they can unilaterally delay discovery and dictate the order of depositions without a court order is contrary to Ohio Civ. R. 26(D), which provides:

> **Sequence and timing of discovery**. Unless the court upon motion, for the convenience of parties and witnesses and in the interests of justice, orders otherwise, methods of discovery may be used in any sequence and the fact that a party is conducting discovery, whether by deposition or otherwise, shall not operate to delay any other party's discovery.

As indicated in Staff Notes, Civil Rule 26(D) "makes it clear that there is no particular order or pattern in the use of discovery methods" and that the "parties are on equal footing." *Id.* "For example, interrogatories may be used before or after depositions." *Id*. Likewise, discovery by one party does not require any other party to delay its discovery, as each party's discovery is

independent of other discovery. *Id*. If a party feels it is necessary in the interests of justice to prioritize the sequence of discovery, then they must file a motion with the court. *Id*.

Plaintiffs have failed to timely obtain an order dictating the sequence of discovery and depositions in this case, as required under Civ. R. 26(D). As such, Plaintiffs cannot now claim that they were entitled to delay discovery on other parties. Nor would such an order be justified, given the limited factual issues needed to address class certification.

B. Plaintiffs' request for additional time is unnecessary and unwarranted.

Plaintiffs' request for additional time is unnecessary. The parties have already exchanged discovery. The parties have also already offered deposition dates prior to the certification discovery deadline. Specifically, depositions have been scheduled for Brandy Grobrogge (KNR employee) on October 15th and Nestico on October 29th. Additional dates of October 16th, 22nd, 23rd, 30th, and 31st have also been left open for depositions. Plaintiffs, therefore, have time to complete discovery in this case prior to November 1st.

Moreover, Plaintiffs only have themselves to blame for any issues they have with completing discovery, given that Plaintiffs waited until now to depose these parties, despite knowing the identity of the witnesses from the outset of litigation. Plaintiffs' failure to pursue discovery in a timely and diligent manner does not justify an extension of time.

C. Plaintiffs rely on irrelevant and distinguishable federal cases.

Tellingly, Plaintiffs fail to acknowledge Ohio Civ. R. 26(D) in their Motion and Reply Brief. Instead, Plaintiffs cherry pick quotes and findings made in some random federal cases that have nothing to do with the legal issues or facts here. For instance, *In re Santa Fe Natural Tobacco Co. Marketing & Sales Practices & Prods. Liab. Litigation*, D.N.M. No. MD 16-2695 JB/LF, 2018 U.S. Dist. LEXIS 140453 (Aug. 18, 2018) involved a district trial courts review of a

stipulated agreement that the parties reached under Fed. R. Civ. 29.[1] Based on this stipulated agreement, the trial district court concluded that the defendant did not have to depose the plaintiff prior to plaintiffs' discovery responses. The trial court noted that the plaintiff admitted that the defendants' request was reasonable under the circumstances. *Id.* at P42. No such stipulation or court order exists here.

In re San Juan Dupont Plaza Hotel Fire Litigation, D.P.R. MASTER FILE MDL - 721, 1988 U.S. Dist. LEXIS 17332 (Dec. 2, 1988), involved a Puerto Rico District Court's articulation and restatement of its local rules governing multidistrict litigation. The quote that Plaintiffs use in their brief was a restatement of their local rules, and not a proposition of law or case holding, as Plaintiffs suggest.

Moreover, *In re Oxbow Carbon LLC Unitholder Litigation*, Ch. , 2017 Del. Ch. LEXIS 135 (July 28, 2017) and *Russo v. Burns*, 2014-0952 (La. App. 4 Cir 09/09/14), 150 So.3d 67, do not even involve discovery disputes. In *Oxbow*, the dispute was over the order of a rebuttal witness at trial. In *Russo*, the dispute was over whether the plaintiff could call his tax preparer as a witness in an election contest suit.

The fact that Plaintiffs cited to these cases in support of their position is troubling. These cases have absolutely nothing to do with the legal and factual discovery issues here. Plaintiffs must have known they were taking statements made in these cases out-of-context.

[1] Federal Civ. R. 29 provides "Unless the court orders otherwise, the parties may stipulate that: (a) a deposition may be taken before any person, at any time or place, on any notice, and in the manner specified—in which event it may be used in the same way as any other deposition; and (b) other procedures governing or limiting discovery be modified—but a stipulation extending the time for any form of discovery must have court approval if it would interfere with the time set for completing discovery, for hearing a motion, or for trial."

D. Plaintiffs' reliance on a Court Order from April 6, 2018, is without merit.

In their reply brief, Plaintiffs argue that a court order from April 6, 2018, gave Plaintiffs express permission to delay discovery on all parties. Plaintiffs' reliance on this order is without merit for several reasons. First, nothing in the April 6th order grants Plaintiff the right to delay discovery. Rather, the order merely states that Defendants' Motions to Strike were premature because there was a pending discovery dispute. Second, under Civil R. 26(D) a party cannot delay discovery on other parties without an express court order, which does not exist here.

Third, this order is from seven months ago. Since that time, this Court has ruled on all discovery disputes, and Defendants have complied with those orders. Further, on July 24, 2018, this Court ordered Plaintiffs to complete their discovery on the issue of class certification by November 1, 2018. This order takes precedent over previous orders.

E. Prior to ruling on class certification, this Court should limit depositions to party witnesses.

Plaintiffs seek to depose 10 nonparty witnesses prior to moving for class certification. These depositions include witnesses that lack relevant information to class certification issues, such as a chiropractor that never treated the named plaintiffs and an insurance defense attorney from Columbus, Ohio.

Instead of explaining how these nonparty witnesses will provide information relevant to class certification issues, Plaintiffs cite to several cases that discuss the overlap between class certification issues and the merits of a plaintiff's underlying claim. *See* Plaintiffs' Reply Brief, pg. 2. Plaintiffs' reliance on these cases is misplaced.

First, in "resolving a factual dispute when a requirement of Civ.R. 23 for class certification and a merit issue overlap, a trial court is permitted to examine the underlying merits of the claim as part of its rigorous analysis, **but only to the extent necessary to determine**

whether the requirement of the rule is satisfied." *See Cullen v. State Farm Mut. Auto. Ins. Co.*, 137 Ohio St.3d 373, 2013-Ohio-4733, 999 N.E.2d 614, ¶ 17 (emphasis added). This means that a plaintiff is not free to pursue discovery on all merit issues. Rather the merit issues must relate to class certification issues. Plaintiffs have failed to show how the deposition of these witnesses will provide evidence relevant to the merits of class certification.

Likewise, if this Court is looking for guidance from the Federal Rules in determining the scope of precertification discovery, then this Court should consider both "relevancy" and "proportionality" requirements set forth in Fed. Civ. R. 26(b)(1), which provides:

> Parties may obtain discovery regarding any nonprivileged matter that is relevant to any party's claim or defense and proportional to the needs of the case, considering the importance of the issues at stake in the action, the amount in controversy, the parties' relative access to relevant information, the parties' resources, the importance of the discovery in resolving the issues, and whether the burden or expense of the proposed discovery outweighs its likely benefit. Information within this scope of discovery need not be admissible in evidence to be discoverable.

Under Fed. Civ. R. 26(b)(1), the scope of discovery is governed by six proportionality factors, which include the 1) importance of issue at stake, 2) the amount of controversy, 3) relative access to information, 4) parties' resources, 5) importance of discovery, and 6) whether the burden or expense outweighs its likely benefit. *See also* 1983 Committee Note ("The Court must apply the standards in an even-handed manner that will prevent use of discovery to wage a war of attrition or as a device to coerce a party, whether financially weak or affluent.").

In this case, Plaintiffs are seeking discovery in the form of 10 depositions on nonparty witnesses that is disproportionate to what is needed in this case. This is especially true for Floros. Unlike the non-Ohio cases that Plaintiffs cite in their reply motion, Floros is not a major corporation or business; he is an individual chiropractor. Floros has no insurance coverage to cover his defense costs and is instead paying out-of-pocket for his litigation costs. With limited

funds and resources, Floros will be greatly harmed if his counsel needs to attend 10 additional depositions of nonparty witness.[2]

At the same time, only one named Plaintiff has a claim against Floros, in the amount of $150. Thus, any recovery that Plaintiffs may obtain will be disproportionate to the amount attorney fees that Floros has and will continue incur.

Lastly, Plaintiffs have failed to show how these nonparty witnesses will provide relevant information on class certification issues. Indeed, several of the witness have had no interaction or connection to the named Plaintiffs.

CONCLUSION

Plaintiffs' request to extend the class discovery deadline is without good cause and will be unduly prejudicial to Defendants. Plaintiffs' request to depose 10 nonparty witnesses before the class discovery deadline is also unnecessary at this stage.

Therefore, Defendants respectfully requests that this Court deny Plaintiffs' Motion for Extension of Class Discovery Deadline. Defendants also requests that this Court issue an order limiting depositions to party witnesses until this court rules on class certification.

[2] As detailed in their brief in opposition to Plaintiffs' motion to extend the class discovery deadline, Defendant KNR has been litigating this case for over two years and has incurred over $500,000 in defense cost.

Respectfully submitted,

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CERTIFICATE OF SERVICE

A copy of the foregoing Defendant Floros' Brief in Opposition to Plaintiffs' Motion to Extend the Class Discovery Deadline was served electronically on this 25th day of September, 2018. Notice of this filing will be sent to all parties by operation of the Court's electronic filing system.

/s/ Shaun H. Kedir_____
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