IN THE COURT OF COMMON PLEAS
SUMMIT COUNTY, OHIO

MEMBER WILLIAMS, *et al.*, Plaintiff, vs. KISLING, NESTICO & REDICK, LLC, *et al.*, Defendants.	Case No. CV-2016-09-3928 Judge James A. Brogan **Matthew Johnson's Brief in Opposition to the KNR Defendants' Motion to Compel Discovery**

Some courts have a rule requiring parties to contact the court about pending discovery disputes before filing a motion to compel. If such a rule applied to this case, it is doubtful that the instant motion to compel would have been filed.

The KNR Defendants purport to need discovery from Matthew Johnson, who sought leave to withdraw as a Named Plaintiff weeks before Defendants filed their motion.[1] The only factual issues that were ever relevant to Mr. Johnson's involvement in this case were with respect to whether KNR engaged in self-dealing in recommending that Mr. Johnson take out a high-interest loan from Liberty Capital Funding, a loan company with whom KNR maintained an exclusive referral relationship.[2]

The Defendants have nevertheless moved to compel Johnson to produce "all documents

[1] Mr. Johnson formally withdrew his claims in Plaintiffs' motion for leave to file a Fifth Amended Complaint, filed on October 25, 2018, and did so to simplify this matter by eliminating factual questions about whether and to what extent his loan was repaid. These questions do not exist with regard to Ms. Norris, who was, by the Court's order of October 24, 2018, permitted to join the case as a putative class representative for Class C (the Liberty Capital class).

[2] 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. Supreme Court of Ohio Board of Commissioners on Grievances and Discipline formal Opinion 94-11.

relating to income earned by [him] from January 1, 2013," including his tax returns and payroll stubs, as well as categories of documents that—as Johnson has repeatedly advised Defendants and would stipulate—either do not exist, are already in Defendants' possession, or constitute privileged advice to Mr. Johnson from his attorneys. Incredibly, the Defendants' motion to compel does not attach, cite, or even mention the correspondence from Plaintiffs counsel advising them of the same, nor does it even mention that Mr. Johnson has withdrawn his claims.

Instead, the Defendants' motion rambles on for 20 pages that consist of nothing more than personal smears against Johnson and misleading arguments about the merits of the Liberty Capital claims,[3] based on excerpts from Johnson's deposition testimony, that purport to hold Johnson

[3] The Liberty Capital claims are based on detailed and documented allegations showing that the KNR Defendants breached their fiduciary duties by entering an exclusive referral arrangement with 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 Nestico requested copies of the forms KNR used with other competing loan companies. Fourth Amended Complaint ("FAC") ¶¶ 131–152. 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 ¶¶ 133–136, 148–149.

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 partner Gary Kisling and office manager Brandy Lamtman. 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." FAC ¶¶ 146, 152.

These documents 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. They 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. *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

responsible for understanding the complexity of the self-dealing claims as well as his attorneys do. *See Westgate Ford Truck Sales, Inc. v. Ford Motor Co.*, 8th Dist. Cuyahoga No. 86596, 2007-Ohio-4013, ¶ 73-74 ("[S]ome [class-action] litigation does not require [a class representative] to have an extensive knowledge of the issues, and in some cases it may be unreasonable to expect him to have knowledge. **…** In view of counsel's role in prosecuting this action, [putative named plaintiff's] role as class representative is nominal. It is not surprising that [he] lacked knowledge on how the complaint had been drafted and had not done any 'special investigation' of any of the topic areas contained in his notice of deposition."); *Lewis v. Curtis*, 671 F.2d 779, 788–789 (3d Cir. 1982) (finding named plaintiff an adequate representative despite small stake in litigation and ignorance of facts and claims, noting that "the adequacy-of-representation test is not concerned whether plaintiff personally derived the information pleaded in the complaint or whether he will personally be able to assist his counsel"); *In re Third Circuit Task Force on the Selection of Class Counsel*, 3d Cir., 2002 U.S. App. LEXIS 30242, at *14 (Jan. 15, 2002) ("Often a lead plaintiff has only a small stake in the litigation and lacks the resources, sophistication or interest to engage in monitoring [the litigation].").[4]

In sum, the motion reveals nothing as much as the extent to which Defendants intend to

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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); *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).

[4] The principles announced in *Westgate Ford*, *Lewis*, and *In re Third Circuit Task Force* apply with extra force to claims by clients against defendant lawyers and doctors alleging that the defendants abused their professional positions to enrich themselves. It is not reasonable to expect laypeople to understand the full extent of the professional duties maintained by lawyers and doctors, or the details of the schemes these professionals undertook to defraud them.

punish their former clients for taking a stand against KNR's fraudulent practices, chill Plaintiffs' participation in this case with abusive discovery knowing that each Plaintiff has little to gain, individually, and distract Plaintiffs' counsel from conducting discovery on what is actually at issue. *See Gattozzi v. Sheehan*, 2016-Ohio-5230, 57 N.E.3d 1187, ¶ 18 (8th Dist.) quoting *Amchem Prods. v. Windsor*, 521 U.S. 591, 617, 117 S.Ct. 2231, 138 L.Ed.2d 689 (1997) ("The policy at the very core of the class action mechanism is to overcome the problem that small recoveries do not provide the incentive for any individual to bring a solo action prosecuting his or her rights."); *In re Cendant Corp. Litigation*, 264 F.3d 201, 270 (3d Cir. 2001), fn. 49 ("Courts must ... take care to prevent the use of discovery to harass presumptive lead plaintiffs."); *On the House Syndication, Inc. v. Fed. Express Corp.*, 203 F.R.D. 452, 455-456 (S.D.Cal. 2001) ("[A] compelling ... reason for not subjecting absent class members to discovery is the fear that defendants will use burdensome discovery requests as a method of unfairly reducing the number of class members.").

For these reasons, as explained further below, the motion to compel should be denied.

1. There is no reason to compel Mr. Johnson to produce his tax returns or other documentation of his income.

Even apart from the fact that Mr. Johnson has withdrawn his claims, Defendants have not even tried to argue that they ever had a legitimate need for his tax returns or other documentation of his income. "While tax returns are not, in a strict sense, 'privileged,' the Ohio Supreme Court has recognized that 'tax returns reflect intimate, private details of an individual's life,' and citizens have an expectation of privacy with respect to their tax returns." *Mezatasta v. Ent. Hill Farm*, 6th Dist. Erie No. E-15-037, 2016-Ohio-3371, ¶ 18 citing *State ex rel. Fisher v. Cleveland*, 109 Ohio St.3d 33, 2006-Ohio-1827, 845 N.E.2d 500, ¶ 27, 32. "Even when discovery of private information is found directly relevant to the issues of ongoing litigation, it will not be automatically allowed; there must then be a 'careful balancing' of the 'compelling public need' for [the] discovery." *Artis v. Deere & Co.*, 276 F.R.D. 348, 352-353 (N.D.Cal. 2011). Here, information about Mr. Johnson's income has no

conceivable relevance to whether the KNR Defendants engaged in self-dealing in recommending a high-interest loan from a loan company with whom it maintained an unlawful exclusive referral arrangement and again, Defendants do not even offer an argument to the contrary in their motion. Thus, there is no reason to compel its production. *Ferraro v. Gen. Motors Corp.*, 105 F.R.D. 429, 433-434 (D.N.J. 1984) ("Whatever arguable relevance may be found in [plaintiff's personal financial information] is outweighed by the prospect of oppressiveness and embarrassment in the forced disclosure of such personal financial information."); *In re Fedex Ground Package Sys.*, N.D.Ind. No. 3:05-MD-527 RM (MDL-1700), 2006 U.S. Dist. LEXIS 92636, at *37-41 (Dec. 14, 2006) (affirming the magistrate's decision to "deny the production of the tax returns, finding this information had little bearing on the Rule 23(a) elements and therefore didn't warrant a vast discovery request at this stage of the bifurcated discovery process").

2. The remaining documents that Defendants seek to compel production of either do not exist, are already in Defendants' possession, or constitute privileged advice to Mr. Johnson from his attorneys.

As for the remaining categories of documents Defendants seek to compel production of, the Defendants have previously been advised that these documents either do not exist, are already in Defendants' possession, or constitute privileged advice to Mr. Johnson from his attorneys.

- As to Defendants' request for "any and all documents [Mr. Johnson] reviewed in preparation for his deposition," the Defendants have been advised that the only documents Mr. Johnson reviewed in preparation for his deposition were counsel's notes that counsel wrote out for him, Mr. Johnson's notes of counsel's advice to him, excerpts from the Third Amended Complaint, and excerpts from Plaintiffs' Rule 56(F) motion that was filed in response to the Defendants' motion for summary judgment on Mr. Johnson's claims. These documents are either in Defendants' possession, or protected by the attorney-client privilege. *See* emails from Peter Pattakos to Tom Mannion attached as **Exhibit 1**.

- As to Defendants' requests for "any and all documents supporting Johnson's claim relating to the loan with Liberty Capital and the alleged 'kickbacks' between Defendants and Liberty Capital," "documents relating to Defendants' alleged ownership interest in Liberty Capital," and "documents relating to communications between Plaintiff Johnson and KNR," the Defendants have been advised that all such documents in Mr. Johnson's possession have already been produced in this litigation, either by Plaintiffs or Defendants. *See Id.*

- As to Defendants' request for "all other documents responsive to the Notice of Deposition Duces Tecum," apart from the request for tax returns and income documents discussed in the preceding section, the "Duces Tecum" request is entirely duplicative of the categories mentioned in the bullet points above.

Thus, there is no basis for compelling production of any of the requested categories of documents.

3. There is no reason to resume Mr. Johnson's deposition.

Finally, there is no reason to resume Mr. Johnson's deposition. Not only has he already provided Defendants with all information that could possibly be relevant to this case, he has withdrawn his claims against the Defendants. To the extent the Defendants claim that their counterclaims against Mr. Johnson entitle them to his deposition or to any further discovery against him, the Court should stay discovery on the counterclaims until after the Court has issued its decision on class certification. Defendants' counterclaims have nothing to do with class certification, and Plaintiffs intend to file a motion for summary judgment on the counterclaims after class certification is resolved.

III. Conclusion

In moving to compel Mr. Johnson's tax returns without providing a hint as to why these documents would be relevant, and filing their motion without even referencing counsel's correspondence advising them that the remaining categories of requested documents were not subject to production (as outlined above), the KNR Defendants have made their intent clear. They were going to file a motion to harass Mr. Johnson and his counsel regardless of any legitimate need for discovery. The Court should not countenance such abusive tactics, more of which are surely impending as to the Named Plaintiffs if defense counsel's recent correspondence is any indication. For the reasons stated above, the motion to compel discovery from Mr. Johnson should be denied and the Court should consider entering an order providing that the parties must confer with the Court as to any pending discovery disputes for a determination as to whether any motion practice pertaining to the alleged discovery issue is necessary.

Respectfully submitted,

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Attorneys for Plaintiffs

Certificate of Service

The foregoing document was filed on November 19, 2018 using the Court's e-filing system, which will serve copies on all necessary parties.

/s/ Peter Pattakos
Attorney for Plaintiffs

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Peter Pattakos <peter@pattakoslaw.com>

Williams, et al. v. KNR, et al. - Case No. 2016 09 3928

Peter Pattakos <peter@pattakoslaw.com> Mon, Oct 8, 2018 at 9:26 AM
To: "Mannion, Tom" <Tom.Mannion@lewisbrisbois.com>
Cc: Joshua Cohen <jcohen@crklaw.com>

Tom,

You just sent your 11-page letter alleging these so called "production failures" on Friday, three months after Mr. Johnson's deposition took place. We will need a bit of time to look into these issues before responding. I can say now, however, in response to your message below, that Mr. Johnson didn't produce any documents at his deposition because any such responsive documents were either privileged (my own notes, and Mr. Johnson's notes of my advice to him), not subject to production (e.g., a copy of the complaint, which you already have), or was the subject of a dispute that was then pending before the Court on Defendants' motion to compel and Plaintiffs' related motion for protective order. Under the Civil Rules, Mr. Johnson was not required to produce any of the documents you asked him to bring to his deposition.

Thanks and will be in touch soon on the rest.

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2 attachments

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EXHIBIT 1

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Peter Pattakos <peter@pattakoslaw.com>

Williams v KNR

Peter Pattakos <peter@pattakoslaw.com> Wed, Oct 24, 2018 at 9:27 AM
To: "Mannion, Tom" <Tom.Mannion@lewisbrisbois.com>

Tom,

I told you on Monday that Mr. Johnson intends to withdraw as class representative if and when Ms. Norris is approved to take his place. Ms. Williams and Ms. Reid do not intend to withdraw their claims.

Second, I told you weeks ago that the only documents Mr. Johnson reviewed in preparation for his deposition were my own notes that I wrote out for him, his notes of my advice to him, and excerpts from the complaint, and our Rule 56(F) motion. These are the "counter" documents that you continue to repeatedly refer. You already have what is discoverable from them.

The evidentiary basis for all of the class representatives' claims is laid out in detail the complaint, and in various briefs that we have filed, including in our motion to compel, and our Rule 56(F) motion. If you are confused about the basis for our claims (it is hard to believe that you are), you should review those documents. The Plaintiffs themselves—who, unsurprisingly, did not have these documents memorized at their depositions—are not aware of any additional evidence that is not so described, and my and my co-counsel's determinations of what we consider to be additional evidence that we have not yet presented to the Court as such are to date incomplete, and in any event would constitute our own work product that is not discoverable. In short, you have all of the documents that we have that could possibly be considered evidence at this point, including all of Ms. Reid's emails with KNR, which KNR has, indeed, already produced in discovery.

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LEWIS BRISBOIS

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Member Williams, et al. v. KNR, et al. Summit County No. CV-2016-09-3928

Peter Pattakos <peter@pattakoslaw.com> Thu, Nov 8, 2018 at 9:44 AM
To: "Mannion, Tom" <Tom.Mannion@lewisbrisbois.com>

Tom,

I saw that you filed your motion to compel without giving me three days to respond to the follow-up letter you sent on Saturday on the discovery responses that we submitted on Friday. I thought it was clear enough from our many exchanges on these issues that there was no point bothering the Court with any of them, but in any event, here is our response to the numbered points in your letter of 11/3:

1. We did provide the basis of our denials in each denial of the requests for admission. If there is any particular request on which you take issue with the stated basis, please let me know.

2. Our answer to RFA No. 3 was a typo. It should have read the same as the response to RFAs No. 4 and 5. Please refer to that. And also, as you state in your letter, no specific kickbacks can be identified at this time but discovery is ongoing.

3. We obtained some documents from Jack Morrison, Mr. Johnson's attorney, that have been produced in this case. Including the loan agreement. Whether we obtained the documents from Mr. Johnson or his attorney is irrelevant as Mr. Johnson had authorized Mr. Morrison to release them to us.

4. Mr. Johnson's responses to RFPs 1 and 3 are clear. There is no responsive non-privileged information to produce.

5. Mr. Johnson's responses to RFPs 3 and 4 are clear. Mr. Johnson does not have any documents relevant to this case that were not already produced.

6. Same with RFP 7. Mr. Johnson does not have any such documents in his possession apart from the documents that have already been produced in this lawsuit.

This should resolve any legitimate issues you might have with the discovery responses to date. As you know, we intend to seek a stay on discovery on the counterclaims and to move for summary judgment on those claims after the class-discovery deadline.

Thanks.

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Peter Pattakos <peter@pattakoslaw.com>

Williams v KNR: Failure to Produce Evidence of Kickbacks

Peter Pattakos <peter@pattakoslaw.com> Wed, Nov 14, 2018 at 12:35 AM
To: "Mannion, Tom" <Tom.Mannion@lewisbrisbois.com>

Tom, the simple answer to your question is no, we are not "claiming privilege on some documents or other evidence that [we] believe form an evidentiary or factual basis, or otherwise support, [our] claims of kickbacks." I don't know how many different ways I can say this to you but all such documents we have access to have been produced in this litigation. Obviously, we believe that Defendants are withholding other such documents, and others would be in Ciro Cerrato's possession.

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