IN THE COURT OF COMMON PLEAS
SUMMIT COUNTY, OHIO

MEMBER WILLIAMS, et al.	)	Case No. CV-2016-09-3928
	)	
Plaintiffs,	)	Judge James Brogan
	)	
vs.	)	**KNR Defendants' Notice of Clarification**
	)	**and Reply to Plaintiff Matt Johnson's**
Kisling, Nestico & Redick, LLC, et al.	)	**Brief in Opposition to the KNR**
	)	**Defendants' Motion to Compel**
Defendants.	)	

The KNR Defendants' Motion to Compel does not seek income tax records or attorney/client privileged information. Rather, the Defendants seek discovery concerning:

1. Facts supporting Mr. Johnson's claims, which he claims he was aware of just three days before his deposition when he reviewed documents to prepare for deposition;

2. The factual basis of certain claims, which Mr. Johnson was instructed not to answer;

3. Communications between Defendants and Mr. Johnson; and

4. The continued deposition of Mr. Johnson to address his prior discovery responses, to address other issues, and to allow other counsel the opportunity to ask questions.

Let's be clear about what is happening here:

1. Attorney Pattakos was granted leave to add Class "C" allegations to this case based on his representation he obtained "newly discovered evidence" from Mr. Johnson;

2. The facts Attorney Pattakos included in the amended pleadings were directly contradicted by Mr. Johnson's deposition testimony; and

3. Now, Attorney Pattakos is attempting to "deep six" this negative testimony by withdrawing Mr. Johnson as a class representative and claiming the factual basis of the claims are known by counsel, not the party he claims gave him this "newly discovered evidence."

Withdrawing Mr. Johnson as a witness does not give Attorney Pattakos the right to bury evidence. Matt Johnson not only remains a party, he also is a material witness to certain facts relevant to class certification issues and relevant to the underlying class claims.

I. CLARIFICATION: THIS MOTION DOES NOT INVOLVE TAX RECORDS

The Court does not need to address the request for income tax records. Undersigned counsel made it abundantly clear to Plaintiffs' counsel that the Motion was not intended to address the production of income tax records, and the Motion states the issue was being reserved to be addressed at another time. (See Motion to Compel, Footnote 4). In retrospect, the Motion to Compel should have been clearer on this issue, so Defendants clarify: The Court does not need to address the production of income tax records at this time.

II. CLARIFICATION: THIS MOTION DOES NOT INVOLVE ATTORNEY NOTES

Plaintiff's counsel knows full well Defendants are not requesting his attorney notes. Rather, Defendants request production of the notes PREPARED BY MR. JOHNSON HIMSELF. When asked to identify the factual and evidentiary support for his claims, Mr. Johnson testified:

1. He knew the answers to those questions just days before the deposition, and those answers are contained in notes he left on his counter at home;

2. Mr. Johnson prepared the notes himself;

3. Mr. Johnson reviewed the notes **to prepare for his deposition** just a few days before the deposition;

4. But, he could not "remember" the answers because of:

    a. Fireworks two days before his deposition;
    b. Being "overwhelmed" by the stress of the deposition; and
    c. He does not have a "photographic memory"; and

5. The documents with the answers were left sitting on his counter at home.

Plaintiffs' counsel agreed at the July 6, 2018, deposition for Matt Johnson to give him a copy of those documents. However, more than four months later, the documents still have not been produced. Thus, the Motion to Compel requested "notes prepared and reviewed by Plaintiff Johnson days before his deposition."

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Neither the deposition *duces tecum* nor the Motion to Compel requested Attorney Pattakos' notes or his "advice" to Mr. Johnson re: appropriate demeanor at a deposition, the purpose of objections, his evaluation of the case, or any other protected information. Defendants are simply requesting the notes prepared by Mr. Johnson himself and other non-attorney communication documents reviewed to prepare for deposition. Why? Because he claims the documents contain the answers he was unable to provide at deposition because of lack of memory.

Plaintiffs' counsel raised this same argument before the Motion to Compel was filed, and counsel for the KNR Defendants expressly advised him of his misunderstanding of the deposition testimony and the document request:

> You have completely mischaracterized the documents that Mr. Johnson reviewed. Moreover, he said that he took notes while reviewing documents. He took notes. Not you. Moreover, he could not answer questions because he said the answers were on those papers. …
>
> Your witness specifically told me that he has evidence of the claims against my client, but he could not remember the evidence. He said he took notes reflecting that evidence. …
>
> I am asking the individual witnesses their factual basis. …Facts. If they don't have any, then they can say that. But what Mr. Johnson told me is that he has the facts, but he could not remember them, because they were sitting on his counter at home, in his own handwriting. We have a right to know these facts.

The Plaintiff should not be permitted to claim he has documents identifying the factual basis of his claims and then refuse to produce those documents and refuse to provide testimony relating to those facts.

III. CASE LAW CITED BY PLAINTIFFS' COUNSEL HAS NO BEARING ON THE ISSUES RELATING TO THE MOTION TO COMPEL

The cases cited by Attorney Pattakos are completely inapposite to the present issues.[1]

[1]While the Motion to Compel does not address tax returns, the cases cited by Attorney Pattakos regarding this issue are inapplicable to the issues at hand and are not even instructive on production of tax records of a Class Representative:

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A. *Westgate Ford v. Ford Motor Co.*, 8th Dist. Cuyahoga No. 86596 (2007)

Attorney Pattakos cites to *Westgate Ford* to argue the Defendants "purport to hold Johnson responsible for understanding the complexity of the self-dealing claims as well as his attorneys do." First, the Defendants NEVER argued this at deposition or in the Motion to Compel. Second, the *Westgate Ford* case has nothing to do with discovery, it involves an appeal of the trial court's decision to certify a class in the context of a case where the attorney, not the class representative, was the real party in interest. The case had nothing to do with discovery issues.

The Motion to Compel is not requesting the Court to Order Mr. Johnson to testify on matters he has no knowledge or to provide documents that do not exist, nor are the Defendants being critical of Mr. Johnson's knowledge or lack of knowledge. If he has no such knowledge, he can so testify. The Defendants are simply attempting to obtain the evidence Matthew Johnson admits exists but that he no longer remembers, because that information is allegedly located in the documents he reviewed to prepare for deposition.

B. *Lewis v. Curtis* and *In re Third Circuit Task Force*

The *Lewis v. Curtis* and *In re: Third Circuit Task Force* cases cited by Attorney Pattakos likewise have no bearing on the issues at hand. Those cases involve a class representative's

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In *Mezatasta v. Ent. Hill farm*, 6th Dist. Erie County, No. E-15-037, the issue involved a Plaintiff's subpoena *duces* tecum request to a NON-PARTY WITNESS who had been withdrawn and was not testifying at trial. The Plaintiff issued a *duces tecum* requesting financial information from the expert to show the amount of income the expert made from defense firms. The Court did NOT find any discovery was "abusive" but rather simply ruled that financial records from a non-testifying witness had no relevance in that case.

In *State ex rel. Fisher v. Cleveland*, 109 Ohio St. 3d 33 (2006), the court discussed whether a municipality, in enforcing its residency requirements for municipal employees, could "informally" require an employee to produce income tax returns or whether such request was an abuse of corporate power. The Court ruled the request was NOT an abuse of power, but disallowed the request because the information the municipality sought from the tax returns was available from other sources, and thus the employee's expectation of privacy was not outweighed by the municipality's need for the tax returns.

The *Artis v. Deere & Co.*, 276 F.R.D. 348 case does not address tax information or financial information requests. Those words are not even contained in the decision.

knowledge of facts supporting class allegation claims as it relates to the "adequacy of representation" of the class representative. The Motion to Compel is NOT a motion regarding Mr. Johnson's "adequacy of representation".

C. *Gattozzi v Sheehan*, 2016-Ohio-5230, 57 N.E. 3d 1187

The *Gattozzi* case was cited by Attorney Pattakos as alleged support for his accusation the discovery requested by the KNR Defendants is "abusive". *Gattozzi* is referenced only for its citation to *Amchem Prods. V. Windsor, 521 U.S. 591 (1997). Gattozzi* cited to *Amchem* twice:

> **{¶18}** The class action is an invention of equity. *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 613, 117 S.Ct. 2231, 138 L.Ed.2d 689 (1997). Class

and

> Federal Rules of Civil Procedure. As the United States Supreme Court explained in *Amchem Prods., Inc.* at 617:
>
> > 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. A class action solves this problem by aggregating the relatively paltry potential recoveries into something worth someone's (usually an attorney's) labor.

As can be seen from the above, the citations to *Amchem* have nothing to do with "abusive discovery". Furthermore the *Gattozzi* case was an appeal of a trial court's decision to grant class certification. The case did not involve any discussion whatsoever of alleged "abusive discovery". The only reference to "discovery" in *Gattozzi* was as follows:

> **{¶8}** After discovery and full briefing of the issues, the trial court granted Gattozzi's motion for class certification, finding that the class was readily identifiable,

The word "abuse" only appeared relating to whether the trial court abused its discretion in granting class certification. The words "abuse" or "abusive" or "abused" and "discovery" were

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never once mentioned together. The only time the "discovery" was used was in reference to class certification being granted after "discovery and full briefing of the issues."

D. *In re Cendant Corp. Litigation*, 264 F.3d 201 (2001)

The In re: Cendant Corp. case involved one Plaintiff class member issuing discovery to another Plaintiff class member. Specifically, information concerning "campaign contributions", which the challenging class member argued was relevant to whether the "presumptively most adequate plaintiff is incapable of adequately representing the class." The Court ruled that evidence on campaign contributions, standing alone, was not sufficient on campaign contributions was not sufficient to create a "reasonable basis" sufficient to justify party-conducted. The Court made no finding of abusive discovery nor does the case have anything to do with a Class Action Defendant asking a Class Representative for the factual basis of the class allegations.

E. *On the House Syndication, Inc. v. Fed. Express*, 203 F.R.D. 452 (2001)

The *On the House Syndication* case involves discovery being submitted to ABSENT class members, which the Court ruled violated the "opt in" / "opt out" choice provided to those class members. The case had nothing to do with discovery to an actual class representative who also happens to be a material witness to class certification issues.

VI. DEFENDANTS HAVE A RIGHT TO DISCOVER THE FACTUAL BASIS FOR PLAINTIFF JOHNSON'S CLAIMS AGAINST THEM

A. Request for Documents Reviewed in Preparation for Deposition

Plaintiffs' counsel represented to this Court:

> [T]he only documents reviewed by Mr. Johnson 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.

Put simply, this representation to the Court is FALSE. Even Plaintiff Matthew Johnson's testimony refutes Plaintiffs' counsel's representations:

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1. The Notes were Mr. Johnson's Notes, not Counsel's Notes

Mr. Johnson confirmed multiple times during deposition that these are HIS notes, not his attorney's notes:

a. "I reviewed a bunch of notes **that I wrote down**…" (Page 71)

b,. "They're my **own personal notes**." (Page 281)

c. He took notes on the Complaint (Page 159)

2. The Documents Reviewed Included Multiple Items not Mentioned by Plaintiffs' Counsel and were Reviewed to Prepare for His Deposition

The Plaintiff testified he reviewed:

a. "A bunch of notes that I wrote down." (Page 71).

b. The "Complaint." (Page 259, lines 23-24).

c. His own discovery responses. (Pages 73 and 159).

d. Discovery requests sent by Defendants asking Mr. Johnson the factual and/or evidentiary basis for claims (Page 71/8-11).

e. Documents provided by his counsel.

f. A document purporting to show evidence of ownership interest in Liberty Capital.

The Plaintiff never claimed he reviewed documents regarding "advice". Rather, he admitted the documents he reviewed and the notes he prepared and reviewed contained identification of the facts supporting his claims, NOT advice from counsel.

He also admitted he reviewed the documents "to prepare for this deposition." (Page 71) and "to try to prepare myself [for deposition]. I'm a horrible test taker." (Page 73, lines 12-17).

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3. The Documents Itemize the Facts Supporting Johnson's Claims; Johnson Forgot the Knowledge he had of those Facts (Just Three Days before the Deposition); and Johnson can Provide Testimony on those Facts with the Documents in Front of Him

The documents Mr. Johnson reviewed to prepare for the deposition contained identification of the facts supporting his allegations, but he could not remember the facts without those documents (despite knowing the information just three days before the deposition). (See, for example, page 135, lines 4 – 17 and multiple other citations throughout the Motion to Compel and this Reply Brief). For example, Mr. Johnson testified:

> Q: The information that is written down in those documents, did you know you had forgotten that information when you left to come here today?
>
> A: Not intentionally. I mean, my mind is drawing a blank because I'm not a very good test taker. (*Id.* at p. 135, ll. 4-8)
>
> ….

Mr. Johnson further testified:

> A: If I had known I was able to bring my notes, I would be fine. (Johnson Dep. p. 133, ll. 16-22)

And, he testified, the answers were in his notes:

> A: I have that answer in my notes. Does that help? (*Id.* at 160, ll. 9-13)

Additional testimony confirmed Mr. Johnson did not know evidence "off the top of my head without [the documents] in front of me" and that he could answer questions if he had "everything I have right in front of me.· … So that's that." (Page 75, lines 19-25; page 76, lines 1-11).

Plaintiff Johnson testified the documents he reviewed identified the facts and evidence supporting his claim Attorney Nestico has a financial or ownership interest in Liberty Capital (Pages 75-77). However, without his notes and documents reviewed, Mr. Johnson could not "remember and pinpoint in the paperwork what it was word for word." (Pages 75-77).

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In another example of the documents containing the requested information, Plaintiff Johnson testified:

> I can sit here with all of my paperwork that I reviewed in the last -- you know, it's Friday.· Earlier in the week before the holiday I reviewed them. You know, so if I had them right here in front of me, I could go over everything I have right in front of me.

Mr. Johnson testified he doesn't remember the evidence without his documents/notes. (Page 191, lines 5-12). He testified "there is evidence" but "I don't remember all of it". (Page 192). And, he clarified: "[J]just because I can't remember what all the evidence is today doesn't mean that there's not evidence." (Page 191).

Another example is contained at page 242, lines 3-10:

> Q· And what evidence did you have that KNR defendants knew KNR clients would be unable to repay their loans until their lawsuit resolved? Did you have any?
>
> A· Yeah.
>
> Q· What was it?
>
> A. I don't remember, man. Like I said, I have notes at home.

He also could not remember what was false about his allegation in Paragraph 124 of the Complaint he filed (regarding alleged false misrepresentations):

> Q. Yet in paragraph 124 you're claiming in a court document that this was a false representation. Do you still maintain that?
>
> A. Yes, sir.
>
> Q. What was false about it?
>
> A. I don't remember.
>
> Q. You can't tell us what was false about it?
>
> A. No, sir.

Q. And if that statement is actually true, would you agree to withdraw that claim?

A. No.

Q. You wouldn't withdraw that one either, even if it's not true?

A. No, sir.

Attorney Pattakos included a specific allegation in the Class "C" allegations that KNR told Mr. Johnson Liberty Capital was the best source of funding. When asked what KNR told him in this regard, however, the Plaintiff testified that HE CANNOT REMEMBER ANY CONVERSATION with KNR concerning the best source of funding and the Plaintiff ALREADY KNEW LIBERTY CAPITAL WASN'T THE BEST SOURCE OF FUNDING.

When Defendants' counsel inquired as to why the allegation was included in the Complaint when the Plaintiff can't remember any such conversation, the Plaintiff testified it was included because he "trusts his lawyer." While this might make sense on a legal conclusion or certain inferences, this involved a specific factual allegation concerning a specific Plaintiff (Matthew Johnson) and KNR. What we learned at deposition is that Mr. Johnson cannot identify any such conversations with KNR. The allegation is a complete farce. Mr. Johnson testified:

Q. And what evidence do you have that anybody at KNR told you the best source of loan funding was Liberty Capital? If you don't recall, then how would your lawyer know?

A. Well, I mean, that's what -- he's the lawyer.

Q. Okay.· But you can't recall?

A. I don't remember everything. (Page 253, lines 15-21).

Mr. Johnson testified he has evidence KNR knew clients would not be able to repay their loans before their lawsuit resolved, but the information was in his "notes at home."

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Q. And what evidence did you have that KNR defendant knew KNR clients would be unable to repay their loans until their lawsuit resolved? Did you have any?

A. Yeah.

Q. What was it?

A I don't remember man. Like I said, I have notes at home. (Page 242, lines 3-10).

Additional testimony regarding the alleged ownership interest revealed Mr. Johnson possessed knowledge of facts supporting his claim – but he could "not remember" what he reviewed in his documents:

Q. Name one piece of evidence you have, sir. You're the one making the claim, not me. Name one piece of evidence. Sir, you need to answer the question.

MR. MANNION: Would you please instruct the witness to answer the question.

Mr. PATTAKOS:· Matt, please answer the question.

A. I don't remember. …

Q. As you sit here today, you can't remember any evidence showing that Rob Nestico has a financial interest or ownership interest in Liberty Capital at any time, true?

A. I don't remember what I saw, so I'm not going to lie and tell you otherwise. (Page 70, lines 4-21).

Mr. Johnson testified he has a document showing Mr. Nestico has a financial interest in Liberty Capital, but he could not remember what it said. He also testified he would provide the document to his counsel, but we still haven't seen that document. Mr. Johnson testified:

Q. You're saying you have an email where one of the lawyers at KNR –

A. I didn't say that it was an email.

Q. Okay.

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A. Or did I say it was an email?

Q. You did –

A. I don't know… I have it on the typed paper, so I don't ...If it was an email, it was an email. I don't know.

Q. Are you saying that you saw some type of documents –

A. Document is a better word.

…

Q. Okay. And I would ask you to please identify any such documents that say that and provide them to your attorney, please.

A. Okay. (Page 77, lines 8-25; Page 78, lines 7-10)

When addressing the alleged evidence of kickbacks at another point in the deposition, Mr. Johnson testified his claim was based on "all the evidence gathered" but he "doesn't remember it." (See pages 248 – 249). When asked when he intended to produce such evidence to the Defendants, Mr. Johnson testified: "I don't know, sir."

V. ATTORNEY PATTAKOS INSTRUCTED MR. JOHNSON NOT TO ANSWER THE QUESTION AS TO FACTS SUPPORTING CERTAIN CLAIMS

Plaintiff Matthew Johnson claims KNR received kickbacks on every loan transaction from Liberty Capital to a KNR client. Accordingly, the Defendants inquired as to his evidence to support those claims. Amazingly, Plaintiffs' counsel would not allow Mr. Johnson to answer the question (Page 246, lines 23-25; page 247, lines 1-16):

Q. The next Roman numeral, ii, "Defendants received kickback payments for every loan transaction that Liberty Capital completed with KNR clients." What do you base that on?

A. I don't know. …

Q. You have no idea if it's true, do you? …

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A. Yeah, I do.

MR. PATTAKOS:· Objection, Tom.

Q. What's it based on, then?

MR. PATTAKOS:· Objection. Matthew, don't answer --… the question.

What potential basis could there be for instructing a class representative not to answer a question concerning the factual basis for his claims? If he does not know the evidence personally, let the witness say so. But Defendants are left without knowing what Mr. Johnson has to say on the issue and without any facts to support the allegation referenced.

VI. MR. JOHNSON SHOULD BE REQUIRED TO PRODUCE DOCUMENTS RELATING TO HIS COMMUNICATIONS WITH KNR

The *duces tecum* requested documents concerning communications with Plaintiff and KNR, Nestico, and/or Redick. Not a single document has been provided to this request. Initially, the Plaintiff testified he never emailed with KNR. After being show his testimony was false, the Plaintiff admitted he corresponded with KNR. He also admitted he brought none of those communications to the deposition. Now, 140 days after the deposition, Plaintiff's counsel STILL has not produced copies of those email communications or any other communications between the Plaintiff and KNR. Even more troubling is that Attorney Pattakos has no idea what communications exist on Mr. Johnson's email, because Plaintiff Matthew Johnson never provided a single document to his counsel.

VII. MR. JOHNSON'S DEPOSITION IS NOT COMPLETE

Plaintiffs' counsel deposed Brandy GoBrogge (assistant to Alberto Nestico, Esq.) for two days. Plaintiffs' counsel has requested two days for the deposition of multiple witnesses. Now, though, Plaintiffs' counsel wants to object to Mr. Johnson's deposition being completed. Even a

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cursory review of the deposition will demonstrate why Mr. Johnson's deposition was not completed: Mr. Johnson was beyond obstreperous; he went beyond stonewalling; Mr. Johnson exhibited an absolute flagrant disregard for the truth and the judicial process, and his attorney did nothing to alter the course of his client's conduct at deposition. Undersigned counsel was getting ready to question Mr. Johnson concerning his discovery responses when the deposition concluded. Those issues still need addressed. Also, other counsel has not yet had an opportunity to question Mr. Johnson. And, all counsel should have an opportunity to question Mr. Johnson when he has the documents in front of him that he claims contain his forgotten knowledge.

VIII. CONCLUSION

Multiple times during the deposition, Mr. Johnson testified that while he could not remember the facts, he knew those facts when he reviewed documents to prepare for his deposition, and he would be able to answer questions on those issues if had just brought those documents with him to the deposition rather than leave them on his kitchen counter. Mr. Johnson also testified that – although he could not explain the basis of his claims at deposition - he would be able to explain the factual basis of his claims to a jury because he would "study" the documents before trial. Defendants respectfully maintain such would be trial by ambush. Plaintiffs' Counsel and Plaintiff cannot hide behind attorney/client privilege or work product to hide facts and evidence. Defendants are not seeking advice provided by Mr. Pattakos, the Defendants are seeking the alleged FACTS and EVIDENCE supporting the Plaintiffs' claims.

Based on the foregoing and in the interests of justice, Defendants hereby respectfully request, Defendants respectfully request the following:

1. Production of documents Mr. Johnson reviewed to prepare for his deposition (other than Attorney Pattakos' notes);

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2. An Order requiring Mr. Johnson to answer questions re: the factual basis of certain claims in which he was instructed not to answer;

3. The continuation of Mr. Johnson's deposition; and

4. Documents relating to Mr. Johnson's communications with KNR.

Respectfully submitted,

/s/ *Thomas P. Mannion*

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing was sent by email to counsel on this 14th day of November, 2018, and will be served via the Court's electronic filing system.

/s/ *Thomas P. Mannion*
Thomas P. Mannion #0062551

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