IN THE COURT OF COMMON PLEAS
SUMMIT COUNTY, OHIO

MEMBER WILLIAMS, et al.,	)	CASE NO. CV-2016-09-3928
	)	
Plaintiffs,	)	JUDGE JAMES BROGAN
	)	
vs.	)	
	)	
KISLING, NESTICO & REDICK, LLC, et al.,	)	**DEFENDANTS' BRIEF IN OPPOSITION TO PLAINTIFFS' SECOND MOTION TO COMPEL AND MOTION FOR SANCTIONS**
	)	
Defendants.	)	
	)	

Plaintiffs' Second Motion to Compel seeks (1) an order compelling Defendants to "confirm they have made a good faith search for responsive documents;" and (2) an order compelling defendants to provide different or additional responses to certain discovery requests. The motion is unsupported by reference to any Civil Rule or case law, and must be denied.

A. Defendants have made a good faith effort to comply with Plaintiffs' prodigious discovery Requests.

As for Plaintiffs' first request, Civ.R. 37(A)(3) permits motions to compel **discovery responses**. The obligation of good faith is implicit in the Rules, and there is no provision for an order compelling "confirmation of good faith" in conducting a document search. Plaintiffs' counsel couches the discovery issues raised in his motion in a manner intended to suggest KNR has located responsive documents that are being intentionally withheld. This suggestion is false. To the extent any responsive document exists and has not been produced, the reason is that it could not be **located or identified** following a good faith search.

In accordance with this Court's order on Plaintiffs' first motion to compel, Defendants have meticulously removed objections and provided amended responses to approximately 152 discovery requests. Defendants have produced all documents uncovered from a reasonable search of its records, or have referred Plaintiffs to (stolen) documents already in their possession, and have thus met their obligations the Civil Rules and this Court's discovery Orders.

Plaintiffs' counsel is attempting to manufacture discovery disputes where none exist. This motion, and Plaintiffs' **three postponements of the deposition of Defendant Nestico**, are designed to further delay the issue of class certification. Each area of inquiry addressed in the Plaintiffs' motion relates to documents Plaintiff counsel claims he needs to prove facts that are not in dispute. Moreover, none of them could possibly have any bearing on the issue of class certification.

RFP 3-28 seeks documents reflecting KNR's basis for believing medical narrative reports are beneficial to clients. It should not be surprising that KNR does not keep a file of documents related to its basis for believing that medical narrative reports are beneficial. Local rules in many Ohio counties require such reports, as do insurance carriers negotiating settlement of claims. KNR has supplemented its prior responses with letters from multiple insurance carriers directing KNR to provide such reports. Moreover, it is for KNR to determine what documents form a basis for KNR's belief that medical reports are beneficial to clients – not plaintiffs' counsel.

RFPs 3-37, 3-46, and 3-47 seek documents "reflecting efforts to direct intake attorneys to steer clients to health care providers, as well as documents reflecting policies and procedures on referrals between KNR and health-care providers." As Plaintiffs note, Defendants **have produced documents** on this topic, referred plaintiffs to documents already in their possession, and answered deposition questions regarding the topic. Although Plaintiffs' counsel uses language intended to suggest that KNR's communication of recommendations for medical referrals is nefarious (which it is not), the means and manner of that communication is not in dispute. KNR employee Brandy Gobrogge sends out periodic emails with recommendations for chiropractic referrals for KNR employees based upon geographic area. Defendants ran a search of the mailbox most likely to have this information (Brandy Gobrogge) for emails with the subject line that KNR would expect in good faith contains the information. Those documents were produced. There is no discovery violation.

RFP 3–48 requests documents "reflecting policies and procedures regarding when a narrative fee should be charged and how to determine whether a charge is reasonable." Again, it should not be surprising that a law firm does not have any documents reflecting "policies and procedures regarding…how to determine whether a charge [for a narrative report] is reasonable." It is doubtful that any law firm in America has a document responsive to this portion of Plaintiffs' request, and KNR certainly does not have any such documents. As to documents regarding when a narrative fee is charged, a fee is paid after a report has been requested by KNR and prepared by the doctor. The fee is charged to a client as an expense if there is a recovery – just like in every law firm in America. To the extent Plaintiffs expect KNR to pull thousands of client files to establish the date a report was requested, the date a report was prepared, and determine whether the fee for the report was actually charged to the client, this courts' prior orders did not require KNR to do so. Defendants have produced responsive documents and directed Plaintiffs to documents already in their possession as responsive. There is no discovery violation, and there is no factual dispute as to how the process works.

RFP 3–2 requests all documents reflecting communications with Liberty Capital representative Ciro Cerrato that do not relate to a particular client file. Again, Plaintiff admits that KNR produced responsive documents. The (false) allegation in the complaint is that Defendant Nestico either owns Liberty Capital or received kickbacks from it. A search of all mailboxes revealed an unwieldly amount of documents (over 150,000 hits based upon the search terms provided). Therefore, KNR in good faith searched the place most likely to have documents relevant to the case and the request. Defendant is not in violation of any order and has made a good faith effort to locate documents responsive to the request.

Plaintiffs' counsel likewise feigns shock that KNR has no documents describing the "reasons" that costs for investigators and medical reports are charges to clients (RFP 3-41 and 3-45). Again, it is unlikely that any law firm has such documents, and KNR has not been able to locate any. The fees are charged to a client upon recovery because they are expenses paid to

third parties.

As it relates to RFP 4-2, Plaintiffs' counsel falsely states that a responsive document exists and is attached as Ex. 9. Defendants **correctly** stated "there are no responsive documents reflecting any changes in or analysis of [this referral] policy taken in response to lawsuits by insurance companies against [these] clinics [alleging a conspiracy with law firms to inflate damages]." Ex. 9 refers to Plambeck clinics, but makes no reference to any lawsuit.

Plaintiffs' reference to RFP 3-4 is equally dishonest. RFP 3–4 requests documents "reflecting business or financial benefits that the KNR Defendants' received from their relationship with the Liberty Capital loan company." Plaintiffs' counsel complains that KNR "routinely wrote down the amounts owed to [Liberty Capital] by KNR" and that documentation of the "write downs" must exist. First – KNR owed nothing to Liberty Capital – the clients took loans and owed money to Liberty Capital. If an amount owed was "wrote down" or reduced, it was a financial benefit to the client – not KNR. KNR was legally entitled to its fee regardless of the loan. Thus, any evidence of loan reductions is not a document reflecting a financial benefit to KNR, and KNR would not begin to think that these were documents Plaintiff was seeking. If Plaintiff counsel wanted documents reflecting loan reductions accepted by Liberty Capital, he should have asked for them. However, these documents would have no bearing on any issue in the case, and would be costly and time consuming to produce. It would likely require reviewing file correspondence and the settlement memorandum of every client who took a loan. Defendants are not in violation of any order, and answered the request that was made – not the request as modified by Plaintiffs' motion.

Interrogatory 2-26 has been answered. Mr. Petti was terminated due to poor performance. Some examples of his poor performance were listed as well. KNR cannot be compelled to provide additional reasons for the termination. Those listed are all that can be stated with certainty at this time. Plaintiff is free to inquire regarding the details of the termination at deposition if additional information needs to be fleshed out. Moreover, the

termination of Mr. Petti has no bearing on any issue remotely related to class certification.

Plaintiffs' description of Interrogatory 2-9 contains a false assumption – that any chiropractors are authorized to prepare reports without authorization from KNR. The only thing that is "automatic" about these fees is the amount that is paid. Defendants cannot identify any Medical Service Providers "with whom any Defendant has agreed that the Provider may prepare a narrative report or charge a narrative fee without first obtaining authorization from the KNR attorney on the case."

Likewise, no further response can be provided for interrogatory 3-6. Defendants do not maintain a list of tasks investigators may perform for KNR that are unrelated to client files and therefore not charged to any client files, and cannot possibly recall every activity the investigators may have engaged in over the years that KNR has been in business. A list of known activities is contained in the response. Defendants do not dispute that, at times, investigators perform activities that are not related to a client matter. This has no bearing on any issue related to class certification. To the extent it exists, any additional information can and will be revealed through the testimony of the investigators themselves and KNR employees.

Defendants have made a good faith and reasonable search for records responsive to the particular requests at issue – in accordance with this Court's discovery Orders – and have either produced documents responsive to the requests at issue or referred Plaintiff's to (stolen) documents in their possession to the extent Plaintiffs contend they are responsive. Plaintiffs are abusing the discovery process in this case by manufacturing discovery disputes and false implications that Defendants are hiding documents.

For instance, Exhibit 3 to Plaintiffs' instant motion was uncovered by Defendants upon its good faith and reasonable search of its records following the filing of Plaintiffs' Fourth Amended Complaint adding new claims on behalf of Plaintiff Norris and against new party defendant Dr. Ghoubrial – claims that were non-existent prior to September 17, 2018 when the Fourth Amended Complaint was filed. Plaintiffs were clearly in possession of this document

prior to filing the Fourth Amended Complaint – admitting that it was referenced therein – and in fact did not produce it in response to Defendants' earlier discovery requests to Plaintiffs seeking the production of the entirely of the stolen documents. Defendants certainly had no reason to search for responsive documents concerning claims against Dr. Ghoubrial *before Plaintiffs ever made those claims*.

B. Plaintiffs Have No Legal Or Factual Basis To Recover Sanctions.

Plaintiffs have no legal or factual basis to recover sanctions against Defendants. While Plaintiffs cast unsupported accusations of improper conduct or the withholding of documentation or information, such accusations are not supported by the factual record. From the very beginning of this litigation, Defendants position has been, and remains, that Plaintiffs are only entitled to relevant, non-privileged information at least related to the issue of certification at this stage of the litigation, understanding that there will be some overlapping of certification and liability issues. This Court agreed with its July 24, 2018 Order denying Plaintiffs' first Motion to Compel.

Civil Rule 37 sets forth the procedure and grounds for court-ordered sanctions against a party who "unjustifiably" resists discovery. Civ. Rule 37(A)(4) sates in pertinent part:

> If the motion is granted, the court shall, after an opportunity for hearing, require the party or deponent who opposed the motion or the party or attorney advising such conduct or both of them to pay the moving party the reasonable expenses incurred in obtaining the order, including attorney's fees, **unless the Court finds that the opposition to the Motion was substantially justified or the that other circumstances make an award of expenses unjust**.

Civ. R. 37(A)(4)(emphasis added). Based upon this Court's discovery Orders, Defendants conduct throughout discovery has obviously been both reasonable and justified. The Motion for Sanctions should also be denied.

C. Conclusion.

Based on the foregoing, Defendants respectfully request that Plaintiffs' Second Motion to Compel and Motion for Sanctions be denied in their entirety.

Respectfully submitted,

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Counsel for Defendants

CERTIFICATE OF SERVICE

I certify that a copy of the foregoing was filed electronically with the Court on this 21st day of December, 2018. The parties may access this document through the Court's electronic docket system.

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