

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.,)	<u>DEFENDANT'S BRIEF IN OPPOSITION TO</u>
)	<u>PLAINTIFFS' MOTION TO STRIKE</u>
Defendants.)	<u>DEFENDANTS' CONFIDENTIALITY</u>
)	<u>DESIGNATIONS REGARDING BRANDY</u>
)	<u>GOBROGGE'S DEPOSITION TESTIMONY</u>
)	

Defendants Kisling, Nestico & Redick, LLC, Alberto R. Nestico, and Robert Redick ("Defendants") hereby oppose Plaintiffs' Motion to Strike Defendants' confidentiality designations of KNR employee Brandy Gobrogge's deposition testimony pursuant to the Protective Order issued in this case on September 12, 2017.

A. Plaintiffs' counsel failed to meet and confer with Defendants' counsel prior to filing their motion, which should be denied on this basis alone.

Paragraph 9 of the Protective Order issued by this Court outlines the required procedure upon the issuance of challenges to confidential designations, and states in pertinent part:

- 9. CHALLENGES BY A PARTY TO DESIGNATION AS CONFIDENTIAL.** Any CONFIDENTIAL – SUBJECT TO PROTECTIVE ORDER or CONFIDENTIAL: ATTORNEY'S EYES ONLY – SUBJECT TO PROTECTIVE ORDER designation is subject to challenge by any party or non-party with standing to object (hereafter "party"). ***Before filing any motions or objections to a confidentiality designation with the Court, the objecting party shall have an obligation to meet and confer in a good faith effort to resolve the objection by agreement.***

(September 12, 2017 Order)(Emphasis added in bold italics).

Plaintiffs' motion is silent as to whether their counsel made any attempt to meet and confer in good faith with counsel for Defendants prior to filing the instant motion, because there was none. The meet and confer requirement of this Court's Protective Order is identical to the obligations bestowed under the Civil Rules and Local Rules of courts throughout the State of

Ohio before a party may file a discovery motion, and Ohio courts have routinely denied such motions when those obligations have not been met. See Civ.R. 37(E) (prior to filing a motion to compel, “the party shall make a reasonable effort to resolve the matter through discussion with the attorney, unrepresented party, or person from whom discovery is sought” and recite such efforts in the motion to compel); *Star Bank, N.A. v. Summers*, 8th Dist. Cuyahoga No. 76486, 2000 Ohio App. LEXIS 5457, *5, fn. 1 (Dec. 4, 2000) (“Civ.R. 37(E) . . . requires a party requesting an order to compel discovery to provide ‘a statement reciting the efforts made to resolve the matters in accordance with this section’”); *Hamper v. Suburban Umpires Ass’n.*, 8th Dist. Cuyahoga No. 92505, 2009-Ohio-5376, ¶ 21 (“[F]ailure to comply with [Cuyahoga County] Loc.R. 11(F), which requires a movant to meet and confer with opposing counsel and attempt to resolve the dispute prior to filing a motion to compel, is grounds enough to deny a motion to compel”). Seeing Plaintiffs made no such effort, as they were obligated to do, their motion should be denied at the outset.

B. The testimony designated by Defendants is deemed confidential under the Protective Order and have not lost such protection by way of Plaintiffs’ unilateral and improper filing of documents with the Court.

There is no dispute Plaintiffs’ class action claims involve KNR’s confidential and proprietary business information (e.g., financial information; proprietary information on how KNR analyzes, strategizes, and manages lawsuits and claims; confidential information on how KNR assesses and analyzes whether to accept a matter, etc.). This Court agreed as much with the issuance of the Protective Order.

Materials that are to be designated are governed by Paragraph Three of the Protective Order, which provides in pertinent part:

3. **DOCUMENTS WHICH MAY BE DESIGNATED AS CONFIDENTIAL – SUBJECT TO PROTECTIVE ORDER OR CONFIDENTIAL: ATTORNEY’S EYES ONLY – SUBJECT TO PROTECTIVE ORDER.** Any party may designate documents as CONFIDENTIAL – SUBJECT TO PROTECTIVE ORDER or CONFIDENTIAL: ATTORNEY’S EYES ONLY – SUBJECT TO PROTECTIVE ORDER upon making a good faith determination that the documents contain information protected from disclosure by statute or that

should be ***protected from disclosure as confidential personal information, privileged, medical or psychiatric information, trade secrets, personnel records, or such other sensitive or proprietary commercial information that is not publically available.*** Public records and other information or documents that are publically available may not be designated as CONFIDENTIAL – SUBJECT TO PROTECTIVE ORDER or CONFIDENTIAL: ATTORNEY’S EYES ONLY – SUBJECT TO PROTECTIVE ORDER.

(September 12, 2017 Protective Oder)(Emphasis added in bold italics). The Protective Order allows portions of deposition testimony taken in this case to be so designated as confidential:

4. **DEPOSITIONS.** Deposition testimony shall be deemed CONFIDENTIAL – SUBJECT TO PROTECTIVE ORDER or CONFIDENTIAL: ATTORNEY’S EYES ONLY – SUBJECT TO PROTECTIVE ORDER only if designated as such. Such designation shall be specific as to the portions of the transcript or exhibit to be designated as CONFIDENTIAL – SUBJECT TO PROTECTIVE ORDER or CONFIDENTIAL: ATTORNEY’S EYES ONLY – SUBJECT TO PROTECTIVE ORDER. Thereafter, the deposition transcripts and any of those portions so designated shall be protected as CONFIDENTIAL – SUBJECT TO PROTECTIVE ORDER or CONFIDENTIAL: ATTORNEY’S EYES ONLY – SUBJECT TO PROTECTIVE ORDER, pending objection, under the terms of this Order.

Pursuant to these provisions, Defendants properly and timely designated portions of Ms. Gobrogge’s October 16, 2018 deposition testimony as confidential and subject to the Protective Order. While Plaintiffs failed to meet and confer in good faith with Defendants in an attempt to resolve their objections to these confidential designations, as they were required to do under the Protective Order, their misphrased objections to Ms. Gobrogge’s testimony can be boiled down to the following categories of designations made by Defendants, each of which are subject to the Protective Order as confidential information:

1. **Ms. Gobrogge’s salary at KNR (Plaintiffs’ Ex. 2, pp. 24-27)¹**

This information is obviously “confidential personal information” or subject to the catch-all provision protecting sensitive information that is not publically available under the Protective Order. Ms. Gobrogge hesitatingly provided her salary and benefits information. There is no reason why a party outside this lawsuit should have access to this information, and Plaintiffs

¹ Exhibit 2 to Plaintiffs’ Motion to Strike was filed with the Court under seal.

have set forth no reason why this information should not be protected as designated by Defendants.

2. Internal information about Ms. Gobrogge's job responsibilities and firm marketing practices (Plaintiffs' Ex. 2, pp. 27-29)

The internal job responsibilities and marketing efforts of KNR and its employees are surely proprietary information that is not publically available and would be extremely beneficial to KNR's competitors and enormously detrimental to KNR. Again, people outside this lawsuit should not have access to this information. Further, Plaintiffs tactics in unilaterally disseminating documents stolen from KNR by former employees should not eviscerate the protections afforded by the Protective Order.

3. Internal information about how KNR manages its pre-litigation department and uses case investigators (Plaintiffs' Ex. 2, pp. 27-29, 30-34, 92-110, 141, 164-165)

This information involves how KNR manages its pre-litigation department and how it uses investigators hired by KNR as outside contractors. A competitor would obtain an advantage with this information, as it could now copy KNR's business model. It is proprietary information that is not publically available, and people outside this lawsuit should not have access to this information. Further, Plaintiffs tactics in unilaterally disseminating documents stolen from KNR by former employees should not eviscerate the protections afforded by the Protective Order.

4. KNR's practices for internal e-mail lists (Plaintiffs' Ex. 2, pp. 51-53)

This information involves proprietary information on how KNR manages its business and communicates with its employees. This information is not public and would benefit KNR's competitors in copying its business model. There is no need for this information to be disclosed to people outside of this lawsuit. Further, Plaintiffs tactics in unilaterally disseminating documents stolen from KNR by former employees should not eviscerate the protections afforded by the Protective Order.

5. KNR's internal client intake and case management procedures (Plaintiffs' Ex. 2, pp. 60-66, 70-89, 132-135, 145-154)

This information involves proprietary information on how KNR manages its intake of clients and the prosecution of their claims and attorney work product. This proprietary business information and work product would surely benefit KNR's competitors in copying its successful business model, and there is no need to disclose this information outside of this case. While Plaintiffs may think this is mundane business information, they seem to forget (or ignore) that they have sued a law firm, and the production of this information should not be distributed publically for a variety of reasons. Further, Plaintiffs tactics in unilaterally disseminating documents stolen from KNR by former employees should not eviscerate the protections afforded by the Protective Order.

6. KNR's internal procedures for handling referrals (Plaintiffs' Ex. 2, pp. 225-227)

This information again involves internal procedures on how KNR manages its intake of referrals, clients, and its pre-litigation department. A competitor would obtain an advantage with this information and copy KNR's business model. It is proprietary and work product information that is not publically available, and people outside this lawsuit should not have access to it. Further, Plaintiffs tactics in unilaterally disseminating documents stolen from KNR by former employees should not eviscerate the protections afforded by the Protective Order.

7. KNR's internal procedures for medical referrals (Plaintiffs' Ex. 2, pp. 228-229, 235-236, 242, 489-490)

This involves information on KNR's business model and procedures to identify proper professionals in the medical field to refer its clients who require treatment for their injuries and communications with such professionals regarding clients. It is proprietary and work product information which should not be disclosed publically. Further, Plaintiffs' tactics in unilaterally disseminating documents stolen from KNR's by former employees should not eviscerate the protections afforded by the Protective Order.

8. Internal communications with medical professionals (Plaintiffs' Ex. 2, pp. 230-234)

Again, this information involves KNR's communication with medical professionals regarding its clients. This is clearly protected work product and medical information and should not be disclosed publically. Further, Plaintiffs' tactics in unilaterally disseminating documents stolen from KNR by former employees should not eviscerate the protections afforded by the Protective Order.

9. KNR's internal marketing practices and their relationship, if any, with medical professional referrals (Plaintiffs' Ex. 2, pp. 378-391)

Again, this information involves KNR's internal marketing practices and business model, which is proprietary information that would be beneficial to its competitors and detrimental to KNR. There is no reason why people outside this lawsuit should not have access to it. Further, Plaintiffs tactics in unilaterally disseminating documents stolen from KNR by former employees should not eviscerate the protections afforded by the Protective Order.

10. KNR's internal practices for attorney evaluation and assigning cases (Plaintiffs' Ex. 2, pp. 178, 456-463, 466-468, 472-473, 474-477)

Plaintiffs lastly object to the internal business practices of KNR in evaluating its attorneys and assigning cases. This is clearly proprietary business information of the firm that should not be disclosed publically, and there is no reason for it to be disseminated to persons outside of this case. Further, Plaintiffs' tactics in unilaterally disseminating documents stolen from KNR by former employees should not eviscerate the protections afforded by the Protective Order.

It is well established that a trial court has broad discretion in regulating the discovery process. See *Breech v. Turner*, 127 Ohio App. 3d 243, 248, 712 N.E.2d 776 (4th Dist. 1998). The purpose of protective orders is to prevent an abuse of the discovery process. See *In re Guardianship of Johnson*, 35 Ohio App. 3d 41, 519 N.E.2d 655, ¶ 1 of the syllabus (10th Dist. 1987). A trial court's determination of whether a protective order is necessary is within its sound discretion. *Med. Mut. of Ohio v. Schlotterer*, 122 Ohio St. 3d 181, 2009-Ohio-2496, ¶ 13; 23.

While there is a common law right of public access to judicial proceedings in civil cases, that right is not absolute. See, e.g. *Putnam Pit, Inc. v. City of Cookeville*, 221 F.3d 834, 840-841 (6th Cir. 2000), citing *United States v. McDougal*, 103 F.3d 651, 659 (8th Cir. 1996) (finding “no *First Amendment* right to government information in a particular form, as long as the information sought is made available as required by the *First Amendment*”). For instance, the public’s access to proceedings may be limited by a protective order, which weighs the privacy rights of the party seeking the order with the public’s First Amendment right to obtain information about the judicial proceeding. See, e.g. *Seattle Times Co. v. Reinhart*, 467 U.S. 20, 104 S. Ct. 2199, 81 L. Ed.2d 17 (1984); Civ.R. 26(C). Additionally, civil discovery is typically conducted by the parties in private proceedings, and a right of public access does not attach to documents exchanged by parties or to pretrial discovery that is not filed with the court. *Id.* at 26. As most aptly stated by the United States Supreme Court:

[E]very court has supervisory power over its own records and files, and access has been denied where the court files might become a vehicle for improper purposes . . . the decision as to access is best left to the sound discretion of the trial court, a discretion to be exercised in light of the relevant facts and circumstances of the particular case.

Nixon v. Warner Communications, Inc., 435 U.S. 589, 598-99, 98 S. Ct. 1306, 55 L. Ed.2d 570 (1978).

Here, Defendants have properly designated portions of Ms. Gobrogge’s deposition testimony as confidential under the Protective Order for the reasons mentioned above. Plaintiffs have set forth no basis or reason why the designated information should be made available to persons outside of the parties to this litigation. It is the Court that is the gatekeeper of confidential information produced during discovery, not Plaintiffs’ counsel who has continuously tried to usurp this authority by widely distributing and commenting on stolen documents in court filings, on social media, and in the press. See, e.g. *Dahlstrom v. Sun-Times Media, LLC*, 777 F.3d 937, 939-940 (7th Cir. 2015) (finding that newspaper “possess[ed] no [First Amendment]

constitutional right either to obtain [police] officers' personal information from government records or to subsequently publish that unlawfully obtained information" in violation of the Driver's Privacy Protection Act); *DVD Copy Control Assn. v. Bunner*, 31 Cal.4th 864, 75 P.3d 1 (Cal. 2003) (finding that court injunction prohibiting website owner from publishing trade secrets acquired by a third-party through improper means does not violate First Amendment guarantees). The information identified is confidential based upon multiple grounds under the Protective Order, including protected personal or sensitive information and/or information that is proprietary to KNR's business. Accordingly, Plaintiffs' Motion to Strike should be denied.

Respectfully submitted,

/s/ James M. Popson

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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.

/s/ James M. Popson

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