IN THE COURT OF COMMON PLEAS
SUMMIT COUNTY, OHIO

MEMBER WILLIAMS, *et al.*, Plaintiffs, vs. KISLING, NESTICO & REDICK, LLC, *et al.*, Defendants.	Case No. 2016-CV-09-3928 Judge James Brogan **Reply in Support of Plaintiffs' Motion to Strike Defendants' Confidentiality Designations regarding Brandy Gobrogge's Deposition Testimony**

In opposing Plaintiffs' motion to strike their designations of various portions of their operations manager Brandy Gobrogge's deposition testimony as confidential, the KNR Defendants (1) falsely accuse Plaintiffs of failing to meet and confer with them on this issue and (2) misapply the bedrock principles that prohibit courts from making decisions based on information that is kept secret from the public. These misrepresentations are briefly addressed below.

1. Defendants falsely accuse Plaintiffs' counsel of failing to meet and confer.

Defendants open their opposition brief by stating that, "Plaintiffs' motion is silent as to whether their counsel made any attempt to meet and confer in good faith with counsel prior to filing [their] motion, because there was none," and arguing that Plaintiffs' motion should be denied for this reason. Defs' Opp. at 1–2. This position is held in complete disregard of the facts, as set forth and documented in Plaintiffs' motion at page 4, FN2, **Ex. 3**, that Plaintiffs attempted to confer with Defendants as required by the protective order and did so in writing. Defendants have not responded to this correspondence and in any way and their assertion that Plaintiffs have failed to meet and confer is a plain and inexcusable misrepresentation.

2. Defendants are not entitled to have these proceedings conducted in secret merely because they're lawyers.

Most tellingly, Defendants cite but nevertheless miss the point of the U.S. Supreme Court's holding in *Seattle Times* that, "a right of public access does not attach to documents exchanged by parties or to pretrial discovery **that is not filed with the court**." Defs' Opp. at 7, citing *Seattle Times Co. v. Reinhart*, 467 U.S. 20, 104 S. Ct. 2199, 81 L. Ed.2d 17 (1984) (emphasis added). The point of course being that while information that is merely exchanged in discovery, but not pertinent to any court decision, may be kept confidential under a protective order so as to facilitate the exchange of information that is "reasonably calculated to lead to the discovery of admissible evidence" (Civ.R. 26(B)(1), once this information is submitted as relevant to a determination by the court it must be accessible to the public absent "extreme overriding circumstances." *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 569–73, 100 S.Ct. 2814, 65 L.Ed.2d 973 (1980). Any outcome to the contrary could only undermine "public confidence in the judicial system" as well as the U.S. and Ohio constitutions' corresponding guarantee that "what transpires in the courtroom is public property." *State ex rel. Dispatch Printing Co. v. Lias*, 68 Ohio St.3d 497, 502, 628 N.E.2d 1368 (1994). This is surely why the Northern District of Ohio's model protective order, adopted in this case, expressly and emphatically states that, "the Court highly discourages the manual filing of any pleadings or documents under seal." Sept. 12, 2017 Protective Order at Section 8, p. 7 (emphasis in original).

If this were a situation where a litigant's constitutional right to a fair trial were seriously threatened, or where national security, the imminent probability of severe bodily harm, the well-being of a child, or a legally protectable trade-secret were legitimately at issue, "extreme overriding circumstances" would arguably be present and the question before the Court might be different.[1] No

[1] While Defendants argue that the information they seek to hide constitutes "confidential and proprietary business information" (Opp. at 2, *et seq.*), they do not go as far as to argue that this information constitutes a protectable "trade secret" under Ohio law, and any such argument would

such circumstances exist here, however, and the KNR Defendants' incentive to pretend to the contrary provides all the more reason for the Court to reject their efforts to do so.[2] Defendants are

---

nevertheless be futile. *See* R.C. 1333.61 (defining a trade secret under Ohio law as information that "derives independent economic value from not being generally known or readily ascertainable"); *State ex rel. Plain Dealer v. Ohio Dep't of Ins.*, 80 Ohio St.3d 513, 526, 1997-Ohio-75, 687 N.E.2d 661 ("Information related to a single, ephemeral event in the conduct of a business does not meet the requirement that a trade secret be 'a process or device for continuous use in the operation of the, business. ... Although the information in the documents at issue is not generally known outside the business, there is no discernible value ... in having this information as against competitors. ... A party ... cannot meet the statutory trade secret definition by stating that documents for which trade secret status is claimed are protected merely by their reference in an agreement of confidentiality."); *Hope Academy Broadway Campus v. White Hat Mgt., LLC*, 10th Dist. Franklin No. 12AP-116, 2013-Ohio-911, ¶ 34 ("[A]ppellants' 'business model,' based on affiliated corporate entities was in no way proprietary ... . The idea that somehow this information is going to make [appellants] look bad to the public is not the basis for a protective order."); *Koval v. Gen. Motors Corp.*, 62 Ohio Misc.2d 694, 699, 610 N.E.2d 1199 (C.P.1990) ("The court concludes that this motion for a protective order has more to do with other litigation and bad publicity than with what the court finds to be but vague and conclusory allegations of competitively sensitive documents.").

Nor does the information at issue fall into the other categories that have been held to justify restrictions on public access. *See*, *e.g.*, *Nebraska Press Ass'n v. Stuart*, 427 U.S. 539, 563, 96 S.Ct. 2791, 49 L.Ed.2d 683 (1976) (public access to court proceedings may be restricted where "(1) there is a clear or serious threat to the fairness of the trial; (2) less restrictive alternatives are not adequate to mitigate the harm; and (3) the order would effectively prevent the threatened danger."); *In re: T.R.*, 52 Ohio St.3d 6, 22, 556 N.E.2d 439 (1990) (restricting public access to a dependency-and-custody proceeding in juvenile court, noting that "juvenile courts differ significantly from courts of general jurisdiction" due to the juvenile court's "mission ... to act as an insurer of the welfare of children and a provider of social and rehabilitative services.").

[2] *See*, *e.g.*, *Brown & Williamson Tobacco Corp. v. F.T.C.*, 710 F.2d 1165, 1180 (6th Cir. 1983) ("The natural desire of parties to shield prejudicial information contained in judicial records from competitors and the public …cannot be accommodated by courts without seriously undermining the tradition of an open judicial system. Indeed, common sense tells us that the greater the motivation a corporation has to shield its operations, the greater the public's need to know.); *Gamble Co. v. Bankers Trust Co.*, 78 F.3d 219, 225 (6th Cir. 1996) ("The private litigants' interest in protecting their vanity or their commercial self-interest simply does not qualify as grounds for imposing a prior restraint. It is not even grounds for keeping the information under seal."); *Press-Enterprise Co. v. Superior Court of California, Riverside County*, 464 U.S. 501, 509, 104 S. Ct. 819, 78 L. Ed. 2d 629 (1984) ("[C]losed proceedings ... although not absolutely precluded, must be rare and only for cause shown that outweighs the value of openness."); *Doe v. Pub. Citizen*, 749 F.3d 246, 269 (4th Cir. 2014) (in "consumer fraud cases," "the public and press enjoy a presumptive right of access to civil proceedings and documents filed therein, notwithstanding the negative publicity those documents may shower upon a company").

not entitled to have these proceedings conducted in secret merely because they're lawyers, nor for any other reason.

Respectfully submitted,

/s/ Peter Pattakos
Peter Pattakos (0082884)
Dean Williams (0079785)
Rachel Hazelet (0097855)
THE PATTAKOS LAW FIRM LLC
101 Ghent Road
Fairlawn, Ohio 44333
Phone: 330.836.8533
Fax: 330.836.8536
peter@pattakoslaw.com
dwilliams@pattakoslaw.com
rhazelet@pattakoslaw.com

Joshua R. Cohen (0032368)
Ellen Kramer (0055552)
COHEN ROSENTHAL & KRAMER LLP
The Hoyt Block Building, Suite 400
Cleveland, Ohio 44113
Phone: 216.781.7956
Fax: 216.781.8061
jcohen@crklaw.com

Attorneys for Plaintiffs

Certificate of Service

The foregoing document was filed on January 2, 2019, using the Court's electronic-filing system, which will serve copies on all necessary parties.

/s/ Peter Pattakos
Attorney for Plaintiffs