

IN THE COURT OF COMMON PLEAS  
SUMMIT COUNTY, OHIO

<p>MEMBER WILLIAMS, <i>et al.</i>,</p> <p style="text-align: center;">Plaintiffs,</p> <p>vs.</p> <p>KISLING, NESTICO &amp; REDICK, LLC, <i>et al.</i>,</p> <p style="text-align: center;">Defendants.</p>	<p>Case No. 2016-CV-09-3928</p> <p>Judge James A. Brogan</p> <p><b>DEFENDANT MINAS FLOROS' BRIEF IN OPPOSITION TO PLAINTIFFS' MOTION TO COMPEL</b></p>
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Defendant Minas Floros (Floros) requests that this Court deny Plaintiffs' Motion to Compel because:

- In violation of Civ. R. 37(A), Plaintiffs failed to provide a certification stating that they made a "good faith" effort to resolve any discovery disputes;
- In violation of Civ. R. 37(A), Plaintiffs failed to make a "good faith" effort in resolving any discovery disputes before filing their motion;
- Floros is not authorized answer on behalf of his non-party employer, Akron Square Chiropractor (ASC)(Plaintiffs should seek that information directly from ASC);
- Floros is not authorized to provide documents that are owned and in the possession of his non-party employer, ASC (Plaintiffs should seek that information directly from ASC); and
- Floros' discovery responses were complete and responsive.

## MEMORANDUM IN SUPPORT

### **A. Plaintiffs' motion to compel must be denied because Plaintiffs violated Civ. R. 37(A).**

Under Civ. R. 37, Plaintiffs must include with a motion to compel a certification that they made a “good faith” effort to resolve any discovery disputes prior to requesting court action. The failure to engage in reasonable efforts to resolve the dispute extra-judicially and the failure to provide a statement describing those efforts are grounds for denying a party's motion to compel. *See, e.g., Jeffries v. Toledo Area Reg'l Transit Auth.*, 6th Dist. Lucas No. L-03-1318, 2004-Ohio-3797, P 22; *Dean v. Dep't of Rehab. & Corrs.*, 10th Dist. Franklin No. 97API12-1614, 1998 Ohio App. LEXIS 4451, at \*10-11 (Sept. 24, 1998). *Stephenson v. Grant Hosp.*, 10th Dist. Franklin No. 11AP-253, 2011-Ohio-5622(holding that trial court properly denied motion to compel where patient did not attach to his motion a statement reciting the efforts made to resolve the matter through discussion with attorneys, as required by Ohio R. Civ. P. 37); *Cooper v. Drukker*, 2d Dist. Clark No. 07-CA-13, 2007-Ohio-3702, ¶ 1 (“...since plaintiff failed to comply with Civ. R. 37(E) concerning his efforts to resolve the discovery request without the trial court's intervention, the trial court erred in granting the motion to compel.”).

The “prerequisite of a good faith certificate is not an empty formality.” *Stoutamire v. Joseph*, S.D. Ohio No. 1:11-cv-242, 2012 U.S. Dist. LEXIS 179350, at \*12 (Dec. 19, 2012). Rather, the purpose of Civil Rule 37 is “to endorse and enforce the view that, in general, discovery is self-regulating and should require court intervention only as a last resort.” *Unklesbay v. Fenwick*, 167 Ohio App.3d 408, 2006-Ohio-2630, 855 N.E.2d 516, P 10 (2d Dist.); accord *Al-Quaadir v. Budget Rent a Car*, 9th Dist. Summit No. 23790, 2008-Ohio-780, P 4 (“court intervention should be sought only as a last resort”).

Plaintiffs have violated Rule 37. Their motion fails to contain a certified statement that Plaintiffs made a good-faith effort to resolve their discovery disputes. Plaintiffs also failed to make a good faith effort to resolve their discovery disputes prior to moving to compel, especially with their disputes over Floros' responses to Plaintiffs' Request for Production of Documents and Second Set of Interrogatories.

Indeed, the only discovery correspondence Plaintiffs sent was their email, dated November 9, 2018. In this email, Plaintiffs only disputed Floros' interrogatory responses to Nos. 6, 7, 9, 10, 21, and 22. At no point before filing their motion to compel did Plaintiffs inform Floros that they disputed the objections he made in response to Plaintiffs' Request for Production of Documents. Nor did Plaintiffs make any prior effort to resolve disputes they had with Floros' responses to their Second Set of Interrogatories.

Moreover, in response to the November 9<sup>th</sup> email, Floros provided supplementary answers to Interrogatory Nos. 6, 7, 9, 10, 21, and 22. Plaintiffs made no effort to dispute the supplemental answers to Interrogatory Nos. 10, 21, and 22 before moving to compel.

This Court, therefore, should deny Plaintiffs' motion to compel because: 1) Plaintiffs failed to provide a certification stating that they made a "good faith" effort to resolve any discovery disputes; and 2) Plaintiffs failed to make a "good faith" effort in resolving any discovery disputes before filing their motion.

**B. Floros cannot answer questions on behalf of his non-party employer, Akron Square Chiropractor.**

Without providing any supportive authority, Plaintiffs believe that Floros must answer interrogatories in the manner they believe suitable. This is not how discovery works. Floros is an employee of ASC. He is not the owner or representative party. He cannot speak on their behalf. Doing so puts Floros at risk for divulging confidential, trade secrets, or incorrect information

about ASC. Nor should Floros have to guess on how ASC should answer or what ASC knows. Information about ASC is also irrelevant to Plaintiffs' claim, since ASC is not a party to this lawsuit.

Indeed, Plaintiffs sued Floros, individually. They cannot demand that Floros answer on behalf of his non-party employer. Nor can Plaintiffs demand that Floros provide corporate documents that are allegedly owned and in possession of his employer just because he may allegedly have access to corporate documents. Contrary to what Plaintiffs believe, there is a significant difference between an employee having potential access to an employer's documents and the legal right to disclose such documents.

To this end, if Plaintiffs want information about ASC, then they should request that information from ASC through a subpoena. This is the intended procedure under the civil rules for seeking information from a non-party witness.

Lastly, Floros did not just list his objections. He also provided answers. For example, Floros stated in response to Plaintiffs' Request for Production of Documents Nos. 1-25, that he "maintains no records responsive to this request." This is a valid response. Just because Plaintiffs' counsel is unhappy with this answer does not make it invalid.

**C. Floros' answers and objections to Interrogatory Nos. 10, 21, and 22 are sufficient and responsive.**

As discussed above, Plaintiffs only sent one email disputing Floros' answers objections to Plaintiffs' Interrogatory Nos. 6, 7, 9, 10, 21, and 22. Floros responded with supplemental answers and objections. Plaintiffs made no effort to dispute Floros' supplemental answers to Interrogatory Nos. 10, 21, and 22 before filing their motion to compel, in violation of Civ. R. 37(A).

Yet even if Plaintiffs' initial email sufficiently complied with Civ. R. 37(A) as to Interrogatory No. 10, 21, and 22, Plaintiffs' motion is still baseless because Floros' answers and objections were valid and responsive. Plaintiffs disputed Floros' responses to the following first set of interrogatories:

10. Identify the reasons why ASC provides narrative reports to KNR clients and receives a narrative fee upon referral of a KNR client to ASC as a matter of policy.

RESPONSE: Defendant objects to the compound nature of the interrogatory; Defendant objects to the interrogatory in that Defendant is not authorized to respond on behalf of ASC. Defendant does not know how ASC would respond to this interrogatory.

21. Identify the reasons why KNR pays the narrative fees to Floros directly as opposed to ASC or another entity.

RESPONSE: Defendant objects to the interrogatory as speculative and vague. Defendant further objects to the interrogatory as it requires Defendant to answer on behalf of KNR. Defendant does not know how KNR would respond to this interrogatory.

22. Identify the reasons why KNR referred clients to ASC based on KNR's solicitation of that client via a "red bag" of promotional materials.

RESPONSE: Defendant objects to the interrogatory as speculative, assuming facts not in evidence, and vague. Defendant further objects to the interrogatory as it requires Defendant to answer on behalf of KNR. Defendant does not know how KNR would respond to this interrogatory.<sup>1</sup>

The objections here are warranted. The answers are responsive and complete. For instance, Interrogatory No. 10 asks why ASC performs certain actions or has certain policies.

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<sup>1</sup> Plaintiffs also dispute Floros' response to Interrogatory No. 5 for their Second Set of Interrogatory Requests, which asks Floros to identify who is authorized to respond on ASC's behalf. As mentioned earlier, Plaintiffs never disputed this response before moving to compel. Floros, therefore, will assume that the Court will reject Plaintiffs' dispute with Interrogatory No. 5, since Plaintiffs violated Civ. R. 37(A). That said, even if Plaintiffs did comply with Civ. R. 37(A), Floros' response is complete and responsive. Plaintiffs can request the identity of ASC's authorized corporate agent from ASC; Floros does not have answer or guess on ASC's behalf.

Floros objected that he cannot respond on behalf of ASC, which is true. Floros also answered that he does not know how ASC would respond. There is nothing evasive or incomplete about this answer. Floros does not have to guess why ASC performs certain alleged actions or has certain alleged policies. Nor should Floros have to go beyond his authority as an employee of ASC and answer on their behalf. If Plaintiffs want to know why ASC has a certain policy, then Plaintiffs should ask ASC.

Likewise, Interrogatory Nos. 21 and 22 asks why KNR performs certain alleged actions or has certain alleged policies. Plaintiff objected because the interrogatories were vague, speculative, and assumed unproven facts. These are valid objections. These interrogatories assume facts without establishing that Floros agrees with those facts or that Floros knows whether the allegations are true. Nor should Floros have to guess why KNR has certain alleged policies, since he is not an employee or representative of KNR. Put simply, if Plaintiffs want to know why KNR has a certain alleged policy, then Plaintiffs should ask KNR.

Lastly, Plaintiffs' arguments about the interrogatories only asking Floros for his "personal understanding" are baseless. Plaintiffs' interrogatories are not asking for Floros' "personal understanding." Rather, the disputed interrogatories ask specific questions about why ASC or KNR have certain alleged policies. And even if Plaintiffs did ask for Floros' "personal understanding", Floros' objections and responses are valid, since he lacks authority to speak for ASC and is not required to guess on his "personal understanding" on unproven allegations.

## CONCLUSION

For the reasons stated above, this Court should deny Plaintiffs' Motion to Compel. Alternatively, if Court finds that Plaintiffs are excused from following Civ. R. 37(A) and that Floros must answer on behalf of non-party ASC and provide documents owned by non-party ASC, then Floros requests leave so that protective orders may be filed.

Respectfully submitted,

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## CERTIFICATE OF SERVICE

Counsel served a copy of Defendant Floros' Brief in Opposition to Plaintiffs' Motion to Compel electronically on this 7<sup>th</sup> day of January, 2019. The parties will receive notice of this filing Notice of this filing by operation of the Court's electronic filing system.

/s/ Shaun H. Kedir  
Shaun H. Kedir (#0082828)