

**IN THE COURT OF COMMON PLEAS
SUMMIT COUNTY, OHIO**

MEMBER WILLIAMS, et al.,

Plaintiffs,

v.

KISLING, NESTICO & REDICK, LLC, et al.,

Defendant.

Case No.: 2016-09-3928

Judge: James Brogan

**DEFENDANT SAM GHOUBRIAL,
M.D.'S MOTION FOR SANCTIONS
AND MOTION TO STRIKE DR.
GUNNING'S CONFIDENTIAL
DEPOSITION TRANSCRIPT**

Now comes Defendant, Sam Ghoumbrial, M.D. ("Dr. Ghoumbrial" or "Defendant"), by and through undersigned counsel, and respectfully moves this Court to impose sanctions upon Plaintiffs pursuant to Civ.R. 37 as a result of Plaintiffs deliberate **public filing of confidential information** in violation of the Protective Order entered by this Court on September 12, 2017. Additionally, Dr. Ghoumbrial moves this Honorable Court to strike the publicly-filed confidential deposition transcript of Dr. Richard Gunning from the docket and to strike all references to the improperly filed confidential deposition transcript within Plaintiffs' recently filed motions pursuant to the Protective Order and Local Rule 7.04, as Plaintiffs neither redacted nor filed either motion under seal. Plaintiffs indifference to Court Orders and the confidentiality rights of parties and non-parties in this matter warrant the most severe sanctions available under the Ohio Rules of Civil Procedure. A Memorandum in Support is attached and incorporated herein.

Respectfully Submitted,

By: /s/ Bradley J. Barmen

Bradley J. Barmen (0076515)
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MEMORANDUM IN SUPPORT

Plaintiffs publicly filed the deposition transcript of Dr. Richard Gunning, which is explicitly marked as "CONFIDENTIAL," without making any redactions and before giving defense counsel an opportunity to review the transcript and designate any portion as confidential therein, as the parties previously agreed. Moreover, Plaintiffs have repeatedly referenced and/or directly quoted from the improperly filed confidential deposition transcript within recent publicly-filed motions. The aforementioned conduct is in direct violation of the existing Protective Order in this case and in violation of Local Rule 7.04. The Court must reprimand Plaintiffs for their unwillingness to adhere to explicit and longstanding Court Orders aimed at protecting the privacy rights of parties and non parties in this case. Accordingly, pursuant to the Protective Order and Local Rule 7.04, Plaintiffs inappropriate conduct warrants sanctions under Civ.R. 37 and R.C. 2323.51 and the striking of all reference to the inappropriately-filed transcript from the docket and from Plaintiffs' motions.

I. SUMMARY OF FACTS

After considering separate Motions for Protective Order filed on behalf of both Plaintiffs and Defendants, this Court entered a Protective Order covering discovery and confidentiality rights in this matter on September 12, 2017. (Protective Order attached as Exhibit A).

Materials designated confidential 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 publicly 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 Order).

Paragraph Four of the Protective Order permits portions of deposition testimony to be designated confidential, as it states:

4. Depositions. Deposition testimony shall be deemed CONFIDENTIAL – SUBJECT TO PROTECTIVE ORDER . . . only if designated as such. Such designation shall be specific as to the portions of the transcript or any exhibit to be designated as CONFIDENTIAL – SUBJECT OT PROTECTIVE ORDER[.] Thereafter, the deposition transcripts and any of those portions so designated shall be protected as CONFIDENTIAL – SUBJECT TO PROTECTIVE ORDER, pending objection, under the terms of this Order.

(*Id.*)

Moreover, Paragraph Eight of the Protective Order contemplates the filing of confidential documents, it states, in part:

8. Filing of CONFIDENTIAL – SUBJECT TO PROTECTIVE ORDER Documents or CONFIDENTIAL: ATTORNEY’S EYES ONLY – SUBJECT TO PROTECTIVE ORDER Under Seal. The Court highly discourages the manual filing of any pleadings or documents under seal. However, to the extent that a brief, memorandum, or pleading references any document marked as CONFIDENTIAL -- SUBJECT TO PROTECTIVE ORDER . . . then the brief, memorandum, or pleading shall refer the Court to the particular exhibit filed under seal without disclosing the contents of any confidential information.

a. Before any document marked as CONFIDENTIAL – SUBJECT TO PROTECTIVE ORDER . . . is filed under seal with the Clerk, the filing party shall first consult with the party that originally designated the document as CONFIDENTIAL – SUBJECT TO PROTECTIVE ORDER . . . to determine whether, with the consent of that party, the document or a redacted version of the document may be filed with the Court not under seal.

...

c. To the extent that it is necessary for a party to discuss the contents of any confidential information or designated document in a written pleading, then such portion of the pleading may be filed under seal with leave of Court. In such circumstances, counsel shall prepare two versions of the pleadings, a

public and confidential version. The public version shall contain a redactions of references to CONFIDENTIAL . . . documents. The confidential version shall be a full and complete version of the pleading and shall be filed with the Clerk under seal as above.

(*Id.*) Accordingly, when a deposition transcript is marked confidential, the parties must consult before filing the document under seal. As indicated below, it is undisputed the Gunning transcript is marked confidential.

Video Deposition of
RICHARD GUNNING, M.D.

*** CONFIDENTIAL ***

December 12, 2018
10:07 a.m.

Taken at:
The Pattakos Law Firm, LLC
101 Ghent Road
Akron, Ohio 44333

Tracy Morse, RPR

Plaintiffs deposed Dr. Richard Gunning on December 12, 2018. During the deposition, issues of confidentiality and privilege arose and the parties agreed to designate the entire transcript as confidential pursuant to the Protective Order until those issues could be resolved. (*See* Gunning Dep. at 74-75, 180). As such, the deposition transcript was marked "CONFIDENTIAL" at the top of each page.

In blatant violation of the Protective Order, Plaintiffs totally disregarded the designation of Dr. Gunning's transcript as confidential, failed to consult with any other party regarding the confidentiality of portions of the transcript, and publicly filed Dr. Gunning's confidential transcript without making any redactions on December 20, 2019. Plaintiffs' filings, a mere eight (8) days after Dr. Gunning's deposition, demonstrate Plaintiffs' actions occurred immediately upon receipt of the Gunning transcript and before defense counsel had any opportunity to review the transcript and make appropriate designations. Now, despite being clearly labelled "CONFIDENTIAL," Dr. Gunning's deposition transcript is publicly available through this Court's docket. Moreover, after inappropriately filing the transcript, Plaintiffs' repeatedly referenced and cited to the transcript within subsequent filings. (*See* Plaintiffs' Motion to Compel the Continued Deposition of Richard Gunning, M.D., Plaintiffs' Motion for a Protective Order Barring Speaking Objections at Depositions).

Consequently, pursuant to the Protective Order issued by this Court, Dr. Gunning's confidential deposition transcript should be stricken from the docket and all references to the inappropriately-filed transcript should be stricken from all publicly filed motions until the parties have been given their opportunity to designate portions of the transcript confidential.

Significantly, this is not Plaintiffs' first instance of side-stepping the Protective Order. As detailed in the KNR Defendants' Brief in Opposition to Plaintiffs' Motion to Strike Designated Portions of Brandy Gobrogge's Deposition Transcript, Plaintiffs' have regularly failed to meet and confer regarding the confidentiality of portions of depositions before taking unilateral action. (*See* Defendant's Brief in Opposition to Plaintiffs' Motion to Strike Defendants' Confidentiality Designations Regarding Brandy Gobrogge's Deposition Testimony, at pgs. 1-3, 7-8). Apparently, Plaintiffs only consider the Protective Order effective and binding upon the Defendants.

Unfortunately this is fast becoming a pattern of conduct on the part of Plaintiffs and their counsel. Plaintiffs complete failure to abide by this Court's discovery Orders requires the implementation of sanctions to the fullest extent under Civ.R. 37. If sanctions are not implemented, Plaintiffs will continue to abuse the discovery process to the detriment of the privacy rights of all.

II. LAW AND ARGUMENT

It is well established that a trial court has broad discretion in regulating the discovery process. *See State ex rel. Daggett v. Gessaman (1973)*, 34 Ohio St. 2d 55, 295 N.E.2d 659, paragraph one of the syllabus. 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). This Court, in its sound discretion, entered into the Protective Order to prevent abuse of the discovery process on September 12, 2017. Under the Protective Order, the Court is the gatekeeper of confidential information disclosed during depositions. Plaintiffs' utter disregard of the Protective Order and the confidentiality rights it is designed to protect requires immediate remediation.

A. Plaintiffs must be sanctioned under Civ.R. 37(B) for their failure to obey this Court's Protective Order.

Plaintiffs inability to adhere with the Court-issued Protective Order and indifference towards the privacy rights for all should not come without consequence. Ohio Civil Rule 37(B) allows a court to sanction a party for the failure to obey a discovery order. The following sanctions are available under Civ.R. 37(B)(1):

- (a) Directing that the matters embraced in the order or other designated facts shall be taken as established for purposes of the action as the prevailing party claims;
- (b) Prohibiting the disobedient party from supporting or opposing designated claims or defenses, or from introducing designated matters in evidence;
- (c) Striking pleadings in whole or in part;
- (d) Staying further proceedings until the order is obeyed dismissing;
- (e) Dismissing the action or proceeding in whole or in part;

- (f) Rendering a default judgment against the disobedient party; or
- (g) Treating as contempt of court the failure to obey any orders except an order to submit to a physical or mental examination.

Moreover, Civ.R. 37(B)(3) provides:

Payment of expenses. Instead of or in addition to the orders above, the court shall order the disobedient party, the attorney advising that party, or both to pay the reasonable expenses, including attorney's fees, caused by the failure, unless the failure was substantially justified or other circumstances make an award of expenses unjust.

Civ.R. 37 sanctions are necessary to curb Plaintiffs continued violations of the Court-ordered procedure and to ensure the protection of confidential information disclosed in depositions.

Critically, Plaintiffs unilaterally filed and referenced the deposition transcript despite being aware that Dr. Gunning's deposition contains potentially confidential and/or privileged information subject to the protective order. In fact, Attorney Pattakos explicitly recognized this much, stating:

MR. PATTAKOS: - - and it can be marked as confidential subject to filing under seal. Right now we can say that. Okay? And then **we can go back and designate portions of the testimony that need to be treated the same way.** We don't need to make this more complicated than it is.

(Gunning Dep. at 74:22 – 75:2).

MR. PATTAKOS: Yes, she does. And **we're going to designate it as confidential subject to the protective order for now.** And then **we can decide later whether this needs to be filed under seal or not.**

MR. MANNION: That's fair.

MR. PATTAKOS: Okay.

MR. BARMEN: No issue.

(*Id.* at 180:12-19).

Markedly, during the deposition Attorney Pattakos represented that “we” could go back to designate portions of the testimony confidential under the protective order, meaning that all parties would meet and confer before filing, as the Protective Order requires. All parties present at the

deposition designated the transcript confidential to protect each of their respective confidentiality rights. Unfortunately, and in typical fashion, Attorney Pattakos did not live up to his word, as no discussions regarding confidentiality occurred before Plaintiffs **unilaterally** filed the deposition transcript on December 20, 2018. Plaintiffs unilateral filing was not a mistake. It was a blatant and knowing violation of the Protective Order and of attorney Pattakos' express representations on the record during Dr. Gunning's deposition as it occurred in light of the transcript being marked "CONFIDENTIAL" at the top of each and every one of the transcripts 278 pages. Attorney Pattakos' unashamed misrepresentations and his flagrant disregard of confidentiality rights and the Protective Order must be put to an end. Plaintiffs' do not have the right to unilaterally decide what is subject to the Protective Order and what is not.

All parties designated the transcript confidential subject to the Protective Order and agreed to confer about the specifics at a later date. To the detriment of all, attorney Pattakos disregarded his express representations and his obligations under the Protective Order. Plaintiffs' filings clearly constitute violations of the Court's Protective Order. As such, Defendant respectfully request this Honorable Court to impose sanctions under Civ.R. 37(B), including but not limited to: reasonable expenses and attorney's fees in preparing this Motion.

B. The Court must strike the improperly filed deposition transcript and all references to the transcript from the record.

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"). Further, Local Rule 7.04(E) requires that "filing parties and/or legal counsel" remove "personal and private information in any document filed

with the Court.” “Personal and private information” includes “[i]nformation protected by law from public disclosure.” *Id.* at (E)(1)(d). The Clerk of Courts has the authority to redact personal and private information from public view or otherwise reject a filing that contains personal or private information improperly filed in violation of Local Rule 7.04. *Id.* at (E)(5). Thus, because Plaintiffs’ improper filings contain confidential information protected by the Protective Order from public disclosure, Local Rule 7.04 requires that the Court strike all references to the improperly-filed deposition transcript and the transcript itself from the public docket.

Additionally, the Protective Order limits public access to materials designated confidential by the parties. As stated, Paragraph Eight of the Protective Order requires the parties to meet and confer about deposition transcripts marked confidential before filing. Plaintiffs’ failure to lend defense counsel any opportunity to review and designate portions of the transcript as confidential – subject to the Protective Order before publicly filing violates Paragraph Eight of the Protective Order. Consequently, the Court must strike the publicly filed confidential deposition transcript of Richard Gunning, M.D. from the docket.

Moreover, pursuant to Paragraph Eight, Subsection c, the Court must strike any and all references to the improperly filed confidential deposition transcript within Plaintiffs’ unredacted written Motions. To reiterate, Paragraph 8(c) requires that parties must file two versions of written pleadings that discuss the contents of any document designated confidential: one unredacted version, filed under seal, and one redacted version that will remain public. (Exhibit A). Thus, because Dr. Gunning’s deposition transcript is marked confidential and was improperly filed in violation of the Protective Order, requiring the Court to strike it from the docket, all references to the improperly filed deposition within subsequent motions should be similarly stricken. (*See* Plaintiffs’ Motion for a Protective Order Barring Speaking Objections at Depositions, pgs. 8-13; Plaintiffs’ Motion to

Compel Continued Deposition of Richard Gunning, M.D., pgs. 1-10). Plaintiffs' must adhere to the Protective Order and confer with the parties before filing a deposition transcript that is marked confidential. Until Plaintiffs do so, all references to the confidential transcript must be stricken from the record.

III. CONCLUSION

For the reasons stated, Defendant Sam Ghoubrial respectfully requests this Court to impose the most severe sanctions available under Civ.R. 37 in response to Plaintiffs' blatant and repeated violations of the Protective Order. Additionally, Dr. Ghoubrial requests that the Court strike the confidential transcript of Richard Gunning, M.D. from the docket and strike all references to the improperly filed deposition transcript from Plaintiffs' Motion for Protective Order Barring Speaking Objections at Depositions and Plaintiffs' Motion to Compel Continued Deposition of Richard Gunning, M.D.. Plaintiffs' continued abuse of the discovery process must be met with a swift and severe response from this Court.

Respectfully Submitted,

By: /s/ Bradley J. Barmen

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CERTIFICATE OF SERVICE

The foregoing Defendant Sam Ghoubrial, M.D.'s Memorandum in Opposition to Plaintiffs' Motion for a Protective Order Barring Speaking Objections at Depositions has been filed on the 9th day of January, 2019 using the Court's electronic filing system. Notice of this filing will be sent to all parties by operation of the Court's electronic filing system.

/s/ Bradley J. Barmen _____
Bradley J. Barmen (0076515)

*Counsel for Defendant
Sam N. Ghoubrial, M.D.*

SANDRA KURT

IN THE COURT OF COMMON PLEAS
2017 SEP 12 AM 9:22 COUNTY OF SUMMIT

MEMBER WILLIAMS et al.,
CLERK OF COURTS

(CASE NO.: CV-2016-09-3928

)

(JUDGE ALISON BREAUX

)

Plaintiffs,

(

-vs-

)

(**ORDER**

KISLING, NESTICO & REDICK,
LLC, et al.

)

(Protective Order)

(

Defendants;

)

(

This matter comes before the Court on the Motion for Protective Order filed by Defendants, Kisling, Nestico & Redick, LLC; Alberto R. Nestico; and Robert W. Redick (Defendants), on October 12, 2016. Plaintiffs, Member Williams; Naomi Wright; and Matthew Johnson (Plaintiffs), filed their Motion for Protective Order and Opposition to Defendants' Motion for Protective Order on October 28, 2016. Defendants filed their Brief in Opposition to Plaintiffs' Motion for Protective Order and in Support of Defendants' Motion for Protective Order on November 4, 2017. Plaintiffs filed their Reply in Support of Plaintiffs' Motion for Protective Order and in Opposition to Defendants' Motion for Protective Order on November 11, 2016. Plaintiffs then filed their Combined Motion for Protective Order and Opposition to Defendants' Motion to Compel on December 2, 2016. Defendants filed their Brief in Opposition to Plaintiffs' Motion for Protective Order and Reply Brief in Support of Their Motion to Compel Discovery on December 12, 2016. The matter has been fully briefed and is ripe for consideration. The Court notes the parties submitted a number of proposed protective orders and could not reach an agreement for a stipulated protective order. Therefore, it is hereby **ORDERED**:

1. **SCOPE.** All documents produced in the course of discovery, including, without limitation, all responses to discovery requests, all electronic discovery, all deposition testimony and exhibits, other materials which may be subject to restrictions on disclosure for good cause and information derived directly therefrom (hereinafter collectively "documents"), shall be subject to this Order concerning confidential



information as set forth below. This Order is subject to the Local Rules of this Court and Ohio Rules of Civil Procedure on matters of procedure and calculation of time periods.

2. **FORM AND TIMING OF DESIGNATION.** A party may designate documents as confidential and restricted in disclosure under this Order by designating the information and placing or affixing the words "CONFIDENTIAL – SUBJECT TO PROTECTIVE ORDER" or "CONFIDENTIAL: ATTORNEY'S EYES ONLY – SUBJECT TO PROTECTIVE ORDER" or similar designation on the document in a manner that will not interfere with the legibility of the document and that will permit complete removal of the CONFIDENTIAL – SUBJECT TO PROTECTIVE ORDER or "CONFIDENTIAL: ATTORNEY'S EYES ONLY – SUBJECT TO PROTECTIVE ORDER" designation. Documents shall be designated CONFIDENTIAL – SUBJECT TO PROTECTIVE ORDER or CONFIDENTIAL: ATTORNEY'S EYES ONLY – SUBJECT TO PROTECTIVE ORDER prior to or at the time of the production or disclosure of the documents. The designation CONFIDENTIAL – SUBJECT TO PROTECTIVE ORDER or CONFIDENTIAL: ATTORNEY'S EYES ONLY – SUBJECT TO PROTECTIVE ORDER does not mean that the document has any status or protection by statute or otherwise except to the extent and for the purposes of this Order.
3. **DOCUMENTS WHICH MAY BE DESIGNATED 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, medial or psychiatric information, trade secrets, personnel records, or such other sensitive or proprietary commercial information that is not publicly available.* Public records and other information or documents that are publicly available may not be designated as CONFIDENTIAL – SUBJECT TO PROTECTIVE ORDER or CONFIDENTIAL: ATTORNEY'S EYES ONLY – SUBJECT TO PROTECTIVE ORDER.

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 any 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.
5. **PROTECTION OF MATERIAL DESIGNATED CONFIDENTIAL – SUBJECT TO PROTECTIVE ORDER.**
- a. **GENERAL PROTECTIONS.** Documents designated CONFIDENTIAL – SUBJECT TO PROTECTIVE ORDER under this Order shall not be used or disclosed by the parties, counsel for the parties, or any other persons identified in ¶ 5(b) for any purpose whatsoever other than to prepare for and to conduct discovery and trial in this action, including any appeal thereof.
- b. **LIMITED THIRD-PARTY DISCLOSURES.** The parties and counsel for the parties shall not disclose or permit the disclosure of any CONFIDENTIAL – SUBJECT TO PROTECTIVE ORDER documents to any third person(s) or entity except as set forth in subparagraphs i – vi. Subject to these requirements, the following categories of persons may be allowed to review documents that have been designated CONFIDENTIAL – SUBJECT TO PROTECTIVE ORDER:
- i. **COUNSEL.** Counsel for the parties and employees and agents of counsel who have responsibility for the preparation and trial of the action;
- ii. **PARTIES.** Parties and employees of a party to this Order.
- iii. **THE COURT, COURT REPORTERS AND RECORDERS.** The Court and court reporters and recorders engaged for depositions;
- iv. **CONSULTANTS, INVESTIGATORS AND EXPERTS.** Consultants, investigators, or experts (hereinafter referred to collectively as “experts”) employed by the parties or counsel for the parties to assist in the preparation and trial of this action or proceeding, but only after such

persons have completed the certification contained in Attachment A, Acknowledgment of Understanding and Agreement to be Bound;

- v. **OTHERS BY CONSENT.** Other persons only by written consent of the producing party or upon order of the Court and on such conditions as may be agreed or ordered. All such persons shall execute the certification contained in Attachment A, Acknowledgment of Understanding and Agreement to be Bound; and
 - vi. **AUTHORS AND RECIPIENTS.** The author, addressee, or any other person identified in the document as a prior recipient.
- c. **CONTROL OF DOCUMENTS.** Counsel for the parties shall take reasonable and appropriate measures to prevent unauthorized disclosure of documents designated as CONFIDENTIAL – SUBJECT TO A PROTECTIVE ORDER pursuant to the terms of this Order. Counsel shall maintain the originals of the forms signed by persons acknowledging their obligations under this Order for a period of one (1) year after dismissal of the action, the entry of final judgment, and/or the conclusion of any appeals arising therefrom.
- d. **COPIES.** Prior to production to another party, all copies, electronic images, duplicates, extracts, summaries, or descriptions (hereinafter referred to collectively as “copies”) of documents designated as CONFIDENTIAL – SUBJECT TO PROTECTIVE ORDER under this Order, or any individual portion of such a document, shall be affixed with the designation CONFIDENTIAL – SUBJECT TO PROTECTIVE ORDER if the word does not already appear on the copy. All such copies shall thereafter be entitled to the protection of this Order. The term “copies” shall not include indices, electronic databases, or lists of documents provided these indices, electronic databases, or lists do not contain substantial portions or images of the text of confidential documents or otherwise disclose the substance of the confidential information contained in those documents.

6. PROTECTION OF MATERIAL DESIGNATED CONFIDENTIAL: ATTORNEY’S EYES ONLY – SUBJECT TO PROTECTIVE ORDER.

- a. **GENERAL PROTECTIONS.** Documents that contain highly sensitive trade secrets or other highly sensitive competitive or confidential information, the disclosure

of which to another party would result in demonstrable harm to the disclosing party, may be designated CONFIDENTIAL: ATTORNEY'S EYES ONLY – SUBJECT TO PROTECTIVE ORDER under this Order and shall not be used or disclosed to counsel for the parties or any other persons identified in ¶ 6(b) for any purpose whatsoever other than to prepare for and to conduct discovery and trial in this action, including any appeal thereof.

b. LIMITED THIRD-PARTY DISCLOSURES. The parties and Counsel for the parties shall not disclose or permit the disclosure of any CONFIDENTIAL: ATTORNEY'S EYES ONLY – SUBJECT TO PROTECTIVE ORDER documents to any third person or entity except as set forth in subparagraphs i – iv. Subject to these requirements, the following categories of persons may be allowed to review documents that have been designated CONFIDENTIAL: ATTORNEY'S EYES ONLY – SUBJECT TO PROTECTIVE ORDER.

i. COUNSEL. Counsel for the parties and employees of counsel who have responsibility for the preparation and trial of the action but only if:

- a. It is necessary to disclose the designated document to them for purposes of this action;
- b. They are under the supervision and control of litigation counsel; and
- c. All such persons shall execute the certification contained in Attachment A, Acknowledgment of Understanding and Agreement to be Bound.

ii. THE COURT, COURT REPORTERS AND RECORDERS. The Court and court reporters and recorders engaged for depositions;

iii. OTHERS BY CONSENT. Other persons only by written consent of the producing party or upon order of the Court and on such conditions as may be agreed or ordered. All such persons shall execute the certification contained in Attachment A, Acknowledgment of Understanding and Agreement to be Bound; and

- iv. **AUTHORS AND RECIPIENTS.** The author, addressee, or any other person identified in the document as a prior recipient; and
- v. **CONSULTING AND TESTIFYING EXPERTS.** Consulting or testifying experts (hereinafter referred to collectively as “experts”) employed by the parties or counsel for the parties to assist in the preparation and trial of this action or proceeding, but only after such persons have completed the certification contained in Attachment A, Acknowledgment of Understanding and Agreement to be Bound. A party may not disclose Confidential Information to experts unless: 1) it is necessary to disclose the designated document to them for purposes of this action; 2) they are not parties or producing third parties, or affiliates of parties or producing third parties; and 3) they are not officers, directors or employees of parties or producing third parties, or affiliates of parties, or of competitors or vendors or customers of parties or producing third parties.
- c. **CONTROL OF DOCUMENTS.** Counsel for the parties shall take reasonable and appropriate measures to prevent unauthorized disclosure of documents designated as CONFIDENTIAL: ATTORNEY’S EYES ONLY – SUBJECT TO A PROTECTIVE ORDER pursuant to the terms of this Order. Counsel shall maintain the originals of the forms signed by persons acknowledging their obligations under this Order for a period of one (1) year after dismissal of the action, the entry of final judgment, and/or the conclusion of any appeals arising therefrom.
- d. **COPIES.** Prior to production to another party, all copies, electronic images, duplicates, extracts, summaries, or descriptions (hereinafter referred to collectively as “copies”) of documents designated as CONFIDENTIAL: ATTORNEY’S EYES ONLY – SUBJECT TO PROTECTIVE ORDER under this Order, or any individual portion of such a document, shall be affixed with

the designation CONFIDENTIAL: ATTORNEY'S EYES ONLY – SUBJECT TO PROTECTIVE ORDER if the word does not already appear on the copy. All such copies shall thereafter be entitled to the protection of this Order. The term “copies” shall not include indices, electronic databases, or lists of documents provided these indices, electronic databases, or lists do not contain substantial portions or images of the text of confidential documents or otherwise disclose the substance of the confidential information contained in those documents.

- e. **COMPETITION.** Notwithstanding the foregoing provisions of this Protective Order, information and documents designated as CONFIDENTIAL – SUBJECT TO PROTECTIVE ORDER or CONFIDENTIAL: ATTORNEY'S EYES ONLY – SUBJECT TO PROTECTIVE ORDER shall not be disclosed or provided, under any circumstance, to any attorney or law firm that competes with Defendants.
7. **INADVERTENT PRODUCTION.** Inadvertent production of any document or information without a designation of CONFIDENTIAL – SUBJECT TO PROTECTIVE ORDER or CONFIDENTIAL: ATTORNEY'S EYES ONLY – SUBJECT TO PROTECTIVE ORDER or any inadvertent production of a document protected by the attorney-client privilege, work product doctrine, common interest privilege, or similar privilege shall be governed by Ohio R. Evid. 501. Such inadvertent production of such a document or information shall not be deemed a waiver of that privilege or protection or of the producing party's right to assert that the document is CONFIDENTIAL – SUBJECT TO PROTECTIVE ORDER or CONFIDENTIAL: ATTORNEY'S EYES ONLY – SUBJECT TO PROTECTIVE ORDER or is protected by the attorney-client privilege, work product doctrine, common interest privilege, or similar privilege. The receiving party shall treat the document or information as if it were so designated as confidential, protected, or privileged.
8. **FILING OF CONFIDENTIAL—SUBJECT TO PROTECTIVE ORDER DOCUMENTS OR CONFIDENTIAL: ATTORNEY'S EYES ONLY – SUBJECT TO PROTECTIVE ORDER UNDER SEAL.** The Court highly discourages the manual filing of any pleadings or documents under seal. However, to the extent that a brief, memorandum, or pleading references any document marked as CONFIDENTIAL –

SUBJECT TO PROTECTIVE ORDER or CONFIDENTIAL: ATTORNEY'S EYES ONLY – SUBJECT TO PROTECTIVE ORDER, then the brief, memorandum, or pleading shall refer the Court to the particular exhibit filed under seal without disclosing the contents of any confidential information.

- a. Before any document marked as CONFIDENTIAL – SUBJECT TO PROTECTIVE ORDER or CONFIDENTIAL: ATTORNEY'S EYES ONLY— SUBJECT TO PROTECTIVE ORDER is filed under seal with the Clerk, the filing party shall first consult with the party that originally designated the document as CONFIDENTIAL – SUBJECT TO PROTECTIVE ORDER or CONFIDENTIAL: ATTORNEY'S EYES ONLY – SUBJECT TO PROTECTIVE ORDER to determine whether, with the consent of that party, the document or a redacted version of the document may be filed with the Court not under seal.
- b. Where agreement is not possible or adequate, before a CONFIDENTIAL – SUBJECT TO PROTECTIVE ORDER or CONFIDENTIAL: ATTORNEY'S EYES ONLY – SUBJECT TO PROTECTIVE ORDER document is filed with the Clerk, it shall be placed in a sealed envelope marked “CONFIDENTIAL – SUBJECT TO PROTECTIVE ORDER” or “CONFIDENTIAL: ATTORNEY'S EYES ONLY – SUBJECT TO PROTECTIVE ORDER,” displaying the case name, docket number, a designation of what the document is, the name of the party on whose behalf it is submitted, and the name of the attorney who has filed the documents on the front of the envelope. A copy of any document filed under seal shall also be delivered to the judicial officer's chambers.
- c. To the extent that it is necessary for a party to discuss the contents of any *confidential information or designated document in a written pleading*, then such portion of the pleading may be filed under seal with leave of Court. In such circumstances, counsel shall prepare two versions of the pleadings, a public and a confidential version. The public version shall contain a redaction of references to CONFIDENTIAL – SUBJECT TO PROTECTIVE ORDER or CONFIDENTIAL: ATTORNEY'S EYES ONLY – SUBJECT TO PROTECTIVE ORDER documents. The confidential version shall be a full and complete version of the pleading and shall be filed with the Clerk under seal as

above. A copy of the unredacted pleading also shall be delivered to the judicial officer's chambers.

- d. The party seeking to file a brief, pleading, or exhibit under seal shall first file a motion for leave to file under seal prior to filing such brief, pleading, or exhibit.

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. If agreement is reached confirming or waiving the CONFIDENTIAL – SUBJECT TO PROTECTIVE ORDER or CONFIDENTIAL: ATTORNEY'S EYES ONLY – SUBJECT TO PROTECTIVE ORDER designation as to any documents subject to the objection, the designating party shall serve on all parties a notice specifying the documents and the nature of the agreement.

- 10. ACTION BY THE COURT.** Applications to the Court for an order relating to any documents designated CONFIDENTIAL – SUBJECT TO PROTECTIVE ORDER or CONFIDENTIAL: ATTORNEY'S EYES ONLY – SUBJECT TO PROTECTIVE ORDER shall be by motion and any other procedures set forth in the presiding judge's standing orders or other relevant orders. Nothing in this Order or any action or agreement of a party under this Order limits the Court's power to make any orders that may be appropriate with respect to the use and disclosure of any documents produced or use in discovery or at trial.

- 11. USE OF CONFIDENTIAL DOCUMENTS OR INFORMATION AT TRIAL.** All trials are open to the public. Absent order of the Court, there will be no restrictions on the use of any document that may be introduced by any party during the trial. If a party intends to present at trial CONFIDENTIAL – SUBJECT TO PROTECTIVE ORDER or CONFIDENTIAL: ATTORNEY'S EYES ONLY – SUBJECT TO PROTECTIVE ORDER documents or information derived therefrom, such party shall provide advance notice to the other party at least ten days before the commencement of trial by identifying the documents or information at issue as specifically as possible (i.e., by

Bates number, page range, deposition transcript lines, etc.) without divulging the actual CONFIDENTIAL – SUBJECT TO PROTECTIVE ORDER or CONFIDENTIAL: ATTORNEY’S EYES ONLY – SUBJECT TO PROTECTIVE ORDER documents or information. The Court may thereafter make such orders as are necessary to govern the use of such documents or information at trial.

12. OBLIGATIONS ON CONCLUSION OF LITIGATION.

- a. **ORDER REMAINS IN EFFECT.** Unless otherwise agreed or ordered, this Order shall remain in force after dismissal or entry of final judgment not subject to further appeal.

13. RETURN OF CONFIDENTIAL – SUBJECT TO PROTECTIVE ORDER OR CONFIDENTIAL: ATTORNEY’S EYES ONLY – SUBJECT TO PROTECTIVE ORDER.

- a. **RETURN OF CONFIDENTIAL DOCUMENTS.** Within 30 days after dismissal or entry of final judgment not subject to further appeal, all documents treated as CONFIDENTIAL – SUBJECT TO PROTECTIVE ORDER or CONFIDENTIAL: ATTORNEY’S EYES ONLY – SUBJECT TO PROTECTIVE ORDER under this Order, including copies as defined in ¶¶ 5(d) and 6(d), shall be returned to the producing party unless: 1) the document has been offered into evidence or filed without restriction as to disclosure; 2) the parties agree to destruction in lieu of return; or 3) as to documents bearing the notations, summations, or other mental impressions of the receiving party, that party elects to destroy the documents and certified to a producing party that it has done so. Notwithstanding the above requirements to return or destroy documents, counsel may retain attorney work product, including an index which refers or relates to information designated CONFIDENTIAL – SUBJECT TO PROTECTIVE ORDER or CONFIDENTIAL: ATTORNEY’S EYES ONLY – SUBJECT TO PROTECTIVE ORDER, so long as that work product does not duplicate verbatim substantial portions of the text or images of confidential documents. This work product shall continue to be CONFIDENTIAL – SUBJECT TO PROTECTIVE ORDER under this Order. An attorney may use his or her work product in a subsequent litigation provided that its use does not disclose or use CONFIDENTIAL – SUBJECT TO PROTECTIVE ORDER or

CONFIDENTIAL: ATTORNEY'S EYES ONLY – SUBJECT TO PROTECTIVE ORDER documents.

b. RETURN OF DOCUMENTS FILED UNDER SEAL. After dismissal or entry of final judgment not subject to further appeal, the Clerk may elect to return to counsel for the parties or, after notice, destroy documents filed or offered at trial under seal or otherwise restricted by the Court as to disclosure.

14. ORDER SUBJECT TO MODIFICATION. This Order shall be subject to modification by the Court on its own motion or on motion of a party or any other person with standing *concerning the subject matter.*

15. NO PRIOR JUDICIAL DETERMINATION. This Order is entered based on the representations and agreements of the parties and for the purpose of facilitating discovery. Nothing herein shall be construed or presented as a judicial determination that any documents or information designated CONFIDENTIAL – SUBJECT TO PROTECTIVE ORDER or CONFIDENTIAL: ATTORNEY'S EYES ONLY – SUBJECT TO PROTECTIVE ORDER by counsel or the parties is subject to protection under Rule 26(c) of the Ohio Rules of Civil Procedure or otherwise until such time as the Court may rule on a specific document or issue.

16. PERSONS BOUND. This Order shall take effect when entered and shall be binding upon all counsel and their law firms, the parties, and persons made subject to this Order by its terms.

IT IS SO ORDERED



JUDGE ALISON BREAUX

CC: ALL PARTIES OF RECORD

IN THE COURT OF COMMON PLEAS
COUNTY OF SUMMIT

MEMBER WILLIAMS, et al.,	(CASE NO.: CV-2016-09-3928
)	
Plaintiffs,	(JUDGE ALISON BREAUX
-vs-)	
	(
KISLING, NESTICO & REDICK, LLC, et al.)	
	(
Defendants;)	
	(
)	

ACKNOWLEDGMENT AND AGREEMENT TO BE BOUND

The undersigned hereby acknowledges that he/she has read the Protective Order dated September 12, 2017 in the above-captioned action and attached hereto, understands the terms thereof, and agrees to be bound by its terms. The undersigned submits to the jurisdiction of the Court of Common Pleas of Summit County in matters relating to the Protective Order and understands that the terms of the Protective Order obligate him/her to use documents designated CONFIDENTIAL – SUBJECT TO PROTECTIVE ORDER or CONFIDENTIAL: ATTORNEY’S EYES ONLY – SUBJECT TO PROTECTIVE ORDER in accordance with the Order solely for the purpose of the above-captioned action, and to not disclose any such documents or information derived directly therefrom to any other person, firm, or concern.

The undersigned acknowledges that violation of the Protective Order may result in penalties for contempt of Court.

Name: _____

Job Title: _____

Employer: _____

Business Address: _____

Date

Signature