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 A. Brogan **Plaintiffs' Motion for Judgment on the Pleadings on Defendants' Counterclaims for Abuse of Process and Violation of the Deceptive Trade Practices Act**

Legal defects doom the counterclaims for abuse of process and violation of the Deceptive Trades Practices Act brought by Defendants Kisling, Nestico & Redick, LLC, Alberto Nestico, and Robert Redick (the "KNR Defendants"), which fail as a matter of law as set forth below. Thus, the Plaintiffs respectfully request that the Court, pursuant to Civ. R. 12(C), grant this motion for judgment on the pleadings.

I. Law and Argument

Civil Rule 12(C) permits "any party … [to] move for judgment on the pleadings" after the pleadings in a case "are closed. Dismissal becomes proper under this provision when

> there are no material disputes of fact and the court determines, construing all material allegations in the complaint as true, that the … [non-moving party] can prove no set of facts that would entitle him or her to relief.

State exc rel Mancino v. Tuscarawas Cty. Ct. of Common Pleas, 151 Ohio St. 3d 35, 2017-Ohio-7528, 85 N.E.3d 713, ¶ 8.

A. Denial of Plaintiffs' Motion for Judgment on the Pleadings on a prior iteration of the Counterclaims does not preclude their current Motion to Dismiss.

While Judge Breaux, who previously presided over this case, denied Plaintiffs' motion for dismissal of KNR Defendants' counterclaims when they were first asserted, this ruling was

interlocutory in nature. *Plantation House Partners v. Lindsey*, No. 58196, 1991 WL 34726 at *2 (8th Dist. Mar. 14, 1991). The Court therefore can entertain the current challenge to the counterclaims' validity, particularly given the clearly erroneous nature of Judge Breaux's ruling as made clear below. *See* CIV. R. 54(B) (interlocutory orders remain "subject to revision at any time" prior to entry of final judgment).

B. The Court should grant judgment on the pleadings on the counterclaim for abuse of process.

The KNR Defendants concede for purposes of their counterclaim for abuse of process that the Plaintiffs "brought this action in the proper forum and with probable cause." COUNTERCLAIMS, ¶29. According to them, however, the "Plaintiffs and their agents … perverted the proceeding" through "repeated social media posts, having articles written about this case, [and] sending court communications to the media." *Id.* This supposed conduct served the Plaintiffs' purported goal of "defaming Defendants and harming their reputation and goodwill with the goal of destroying their business, or to pressure Defendants for a quick settlement." *Id.*, ¶30.

These allegations do not state a viable claim for abuse of process. In suing for this tort, the claimant must prove

1) that a legal proceeding was properly initiated and supported by probable cause;

2) that the proceeding was perverted by the opposing party to achieve an ulterior motive for which it was not designed; and

3) damage has resulted from this misuse of process.

Teodecki v. Litchfield Twp., 2015-Ohio-2309, 38 N.E.3d 355, ¶40 (9th Dist.).

Abuse of process "does not lie for the wrongful bringing of an action, but for the improper use … of process once a proper claim has been commenced." *Gugliotta v. Morano*, 161 Ohio App. 3d 152, 2005-Ohio-2570, 829 N.E.2d 757, ¶50 (9th Dist.). The wrongdoer must attempt "to achieve through use of the court that which the court is itself powerless to order." *State ex rel. Morrison v.*

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Wiener, 2017-Ohio-364, 83 N.E.3d 292, ¶22 (9th Dist.). An abuse of process does not take place if "the defendant has done nothing more than carry out process to its authorized conclusion, even though with bad intentions." *Hershey v. Edelman*, 187 Ohio App. 3d 400, 2010-Ohio-1992, 932 N.E.2d 386, ¶41 (10th Dist.).

In *Beacon Journal Pub. Co. v. Zonak, Poulos & Cain*, No. 79AP-123, 1979 WL 209335 (10th Dist. Sept. 25, 1979), the plaintiff sued for abuse of process after the defendant allegedly filed suit against it for the "improper and ulterior motive of obtaining publicity." *Id.* at *1. The defendant later held "press conferences" where "copies of the complaint" apparently "were distributed." *Id.* at *3. In affirming dismissal of the case, the court held that the

> filing of a lawsuit triggering the issuance by way of summons does not constitute abuse of process, even though the purpose of filing such action was not to recover upon the claim asserted but, instead, merely to cause injury to the defendant against whom the action was brought.

Id. at *2. *See also Gugliotta* 161 Ohio App. 3d 152, ¶ 50 (9th Dist.) ("[Plaintiff's] own argument that [defendant] used the threat of litigation as a tool of coercion serves to defeat her claim of abuse of process."); *Levey & Co. v. Oravecz*, 9th Dist. Summit No. 21768, 2004-Ohio-3418, ¶ 8 ("[Plaintiff] believed that the complaint and the lawsuit was for an improper purpose and that it was maintained and perverted … to gain an upper hand in negotiations. It is clear that [plaintiff] misunderstood the nature of the abuse of process claim.").

Courts from elsewhere have similarly recognized that a "smear campaign that does not involve the improper use of the legal process [therefore] is insufficient to allege an abuse of process claim." *Orndorff v. Raley*, No. 3:17-CV-00618-GCM, 2018 WL 5284040 at *3 (W.D.N.C. Oct. 24, 2018). The filing of a complaint "to coerce a settlement and to create bad publicity" [likewise] does not constitute an abuse of process. *Perry v. Manocherian*, 675 F. Supp. 1417, 1429 (S.D.N.Y. 1987) (applying New York law); *see also Grossman v. Perry*, No. 985356, 1999 WL 1318984 at *1 (Mass. Apr.

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15, 1999) (defendant does not commit abuse of process by "publicizing the allegations in the complaint" or by filing suit "in the hope that … [doing so] will cause publicity unfavorable to the defendant").

The counterclaim for abuse of process does not refer to any "process" undertaken in this lawsuit other than instituting the case, for which the Plaintiffs had "probable cause." COUNTERCLAIMS, ¶29. The KNR Defendants have not charged the Plaintiffs with filing subpoenas, motions, or notices or otherwise invoking judicial functions to achieve some end the Court "itself [was] powerless to order." *Morrison*, 2017-Ohio-364 at ¶22.

Conducting a "smear campaign" does not qualify as abuse of process if it does not involve "the improper use of the legal process." *Orndorff*, 2018 WL 5284040 at *3. More specifically, *Beacon Journal* confirms that as a matter of Ohio law, filing this lawsuit does not alone give rise to liability, even if the Plaintiffs took this action for purposes of executing an untoward publicity campaign against the KNR Defendants. 1979 WL 209335 at *1-*2.

The counterclaim for abuse of process has no merit. The Court should dismiss this Count pursuant to Civ. R. 12(C).

C. The Court should dismiss the counterclaim for violation of the Deceptive Trade Practices Act.

In suing under the Ohio Deceptive Trade Practices Act, the KNR Defendants accuse the Plaintiffs of "engag[ing] in an advertising campaign that contains false and misleading statements." COUNTERCLAIMS, ¶45. The Plaintiffs have purportedly committed this proscribed conduct by "assist[ing], acquiesce[ing] to, and/or ratif[ying] the conduct of their agents." *Id.*, ¶46.

The KNR Defendants, however, do not allege (nor could they) that the Plaintiffs committed the purported violations of the Deceptive Trade Practices Act "in the course of … [their] business, vocation, or occupation." R.C. 4165.02(A) The statute's prohibitions explicitly cover only wrongdoing undertaken in these capacities. *Id.*

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Courts must "give effect to every word and clause" included in a statute. *State ex rel Carna v. Teays Valley Local School Dist. Bd. of Educ.*, 131 Ohio St. 3d 478, 2012-Ohio-1484, 967 N.E.2d 193, ¶18. They "may not restrict, constrict, qualify, narrow, … or abridge" any of its express terms. *Id.* To the contrary, when statutes are "clear and unambiguous," courts enforce them as they are written. *State ex rel. Beavercreek Twp. Fiscal Officer v. Graff*, 154 Ohio St. 3d 166, 2018-Ohio-3749, 112 N.E.3d 882, ¶15.

The Plaintiffs are former clients of the KNR Defendants who have sued over misconduct in the handling of their cases. Prosecuting this litigation is not their job or profession. Nor is mounting a purported "advertising campaign" against the KNR Defendants in connection with the lawsuit. COUNTERCLAIMS, ¶45. Whether the Plaintiffs undertook this activity directly or derivatively through their "agents," they were not doing so "in the course of … [their] business, vocation, or occupation." R.C. 4165.02(A).

The KNR Defendants cannot sidestep this integral component of liability under the Deceptive Trade Practices Act. The Court should grant judgment on the pleadings on the counterclaim alleged under the statute.

II. Conclusion

The counterclaims for abuse of process and violation of the Deceptive Trade Practices Act fail as a matter of law. The Court should grant judgment on the pleadings to the Plaintiffs on these counts.

Respectfully submitted,

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

Sandra Kurt, Summit County Clerk of Courts

peter@pattakoslaw.com
dwilliams@pattakoslaw.com
rhazelet@pattakoslaw.com

/s/ Joshua R. Cohen
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 11, 2019, using the Court's electronic-filing system, which will serve copies on all necessary parties.

/s/ Peter Pattakos
Attorney for Plaintiffs

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