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' Second Motion to Compel Discovery from Richard Gunning, M.D.**

Perhaps the most illuminating aspect of Defendant Ghoubrial's opposition to the continued deposition of his employee Dr. Gunning—that Ghoubrial's attorneys unlawfully influenced and cut short—is its accusation that Plaintiffs were not long-winded enough in their motion to compel. *See* Ghoubrial Opp. at 3 ("Plaintiffs' Motion to Compel spends the first six pages summarizing the extensive and confidential testimony given by Dr. Gunning, then spends one mere paragraph arguing why the continued deposition is legally necessary."). Short of acknowledging liability on the claims alleged against him in this lawsuit, Ghoubrial apparently has no choice but to employ extreme and absurd means to obscure and deflect from the obvious: Given the testimony that Gunning did provide—as detailed in pages 1 through 6 of Plaintiffs' motion—there is very little need to explain why he must be required, consistent with the most basic requirements of the Civil Rules, to answer the questions that Defendants' attorneys kept him from answering.

In his opposition brief that is rather the inverse of Plaintiffs' motion—long on opinions and short on facts—Ghoubrial fails to confront the substance of the essential elements of Dr. Gunning's testimony: Namely, that,

- Ghoubrial, "a volatile person," "bullied" Gunning into executing an affidavit for this case, which caused Gunning to spend two hours on the phone with Plaintiffs' counsel on October 2 discussing Ghoubrial's practice of treating personal injury victims, and

confirming that he has wanted to leave Ghoubrial's practice for years, but has been unable to do so, in part because he fears retaliation from Ghoubrial; Gunning Tr. at 10:13–25, 11:1–11, 11:24–13:10, 32:12–33:13, 55:23–56:14, 60:1–12; 63:7–64:19, 79:4–13;

- Ghoubrial excluded Gunning from treating KNR clients at the so-called personal injury "clinics" that are the subject of this lawsuit because Gunning wasn't administering enough of the fraudulent trigger-point injections at issue; *Id.* at 14:5–15; 107:15–21;

- Ghoubrial's so-called "approach to informed consent" was to surreptitiously administer the injections to KNR clients without informing them that they would receive a shot, a practice that caused multiple patients to complain to Gunning that "they didn't want shots and the next thing they knew they were getting a shot;" *Id.* at 22:17–23:14; 34:25–35:11;

- "It's possible" that other employees of Ghoubrial have heard Gunning complain about Ghoubrial's practices in administering these injections; *Id.* at 178:6–179:20;

- Gunning recalls a conversation involving Ghoubrial, Defendant Nestico, and Ghoubrial's former employee Frank Lazzerini (since indicted on 272 felony counts pertaining to allegations that he "overprescribed pain medications for profit"), about how Ghoubrial and Lazzerini would administer trigger point injections and sell a back brace to Nestico's sister, who had just been in an accident, and who, as Gunning confirmed, did not treat with Ghoubrial's office; *Id.* at 45:10–18; 47:9–22, 51:15–22, 52:25–53:25.

- When Gunning was asked to confirm that he told Plaintiffs' counsel that this conversation was in jest, with the humor lying in the notion that Ghoubrial and Lazzerini would administer the same treatment to (engage in the same self-dealing against) Nestico's sister as they did to KNR clients, Gunning did not deny that this was the case, but rather testified that he "[did] not recall their intent," and did not "remember why [he mentioned this discussion]." *Id.* at 45:10–18; *Id.* at 47:9–22, 51:15–22, 52:25–53:25.

- And Gunning similarly did not deny, and "could not remember the actual words [he] said," when asked to confirm that he told Plaintiffs counsel that Ghoubrial "constantly" admonished Gunning that the practice "didn't make money" if he didn't administer the trigger point injections. *Id.* at 31:18–32:6; *See also Id.* at 26:6–31:16.

In light of this testimony from an admittedly intimidated witness who admittedly called Plaintiffs' counsel of his own accord and admittedly spent two hours on the phone talking about his "volatile" and "retaliatory" Defendant employer and the practices at issue in this contentious lawsuit, Ghoubrial's claim that Plaintiffs' motion represents an effort to "manufacture tenuous

discovery issues" is simply ridiculous. Opp. at 1. The fact that Gunning did not deny having said any of what he was asked to confirm at his deposition, as set forth above, but rather at most only claimed not to remember certain aspects of the conversation, similarly exposes Ghoubrial's various accusations as meritless. The questions that Ghoubrial's attorneys instructed Gunning not to answer (summarized at pages 6 and 7 of Plaintiffs' motion) go profoundly to the merits of Plaintiffs' allegations, and/or, *inter alia*, Ghoubrial's credibility generally, Gunning's basis for fearing retaliation from Ghoubrial, and, thus, the motivation behind and credibility of various aspects of Gunning's testimony, including his reasons for contacting Plaintiffs' counsel in the first place, and his subsequent "memory loss" and post-hoc defenses of Ghoubrial's fraudulent practices on which Ghoubrial now seeks to rely. *See* Opp. at 5–6; *see also* Opp. at page 6–7, FN 2 (where Ghoubrial remarkably tries to argue that Plaintiffs should be forced to amend their allegations that Ghoubrial treated Ms. Norris based on Gunning's testimony about Norris's medical records, while also maintaining that it was proper for Ghoubrial's counsel to instruct Gunning not to answer questions about whether Gunning told Plaintiffs' counsel that those records might have been fraudulently altered).

While Plaintiffs' questions surely do call for information that is "embarrassing" to Ghoubrial, as he repeatedly complains, there is no conceivable argument that they aren't "reasonably calculated to lead to the discovery of admissible evidence" under the circumstances here. Civ.R. 26(B)(1); *Ward v. Summa Health Sys.*, 128 Ohio St.3d 212, 2010-Ohio-6275, 943 N.E.2d 514, ¶ 32 (information is discoverable even where it is "embarrassing" to a witness or a party); *Dater v. Charles H. Dater Found.*, 1st Dist. Hamilton Nos. C-020675, C-020784, 2003-Ohio-7148, ¶ 11, 60 (finding that the trial court abused its discretion in denying plaintiff's motion to compel a continued deposition where, even if "embarrassing," certain testimony "could have led to the discovery of evidence relevant to the motive for and existence of" an alleged "scheme" of personal benefit

because plaintiff's amended complaint placed such conduct at issue); *In re Zenith Radio Corp.*, 1 F.R.D. 627, 629-630 (E.D.Pa. 1941) ("The mere fact that a deponent may be annoyed, embarrassed, or oppressed by the necessity of giving evidence is not sufficient to move the Court to limit the scope of the inquiry. The deponent has no redress unless the annoyance, embarrassment or oppression will be unreasonable. ... unless it plainly appears that the evidence can have no possible bearing upon the issue, the degree of its probative value cannot be considered as an element in determining whether the embarrassment to the deponent is unreasonable or not"). And Ghoubrial's statement that these questions are "not even arguably relevant to the issues in the Complaint" (Opp. at 1) is something out of the Twilight Zone.[1]

If the Court allows this egregious obstruction to stand, the Defendants are sure to turn every other deposition in this case into a quagmire, each requiring multiple days, played out over weeks if not months, and necessitating endless motion practice while allowing Defendants to evade and regroup on questions they don't like at their own whim. The Court has already admonished the parties in its Nov. 27 order that, "counsel may not instruct a witness not to answer questions except when necessary to preserve a privilege or to present a motion under Civ.R. 30(D)." It should require Gunning to return to his deposition and answer questions as the Civil and Local Rules require, and Ghoubrial to pay the court-reporter and videographer fees necessitated by his obstruction.

Respectfully submitted,

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[1] Ghoubrial's claim that questions about whether Gunning informed Plaintiffs' counsel that Ghoubrial referred to the trigger point injections as "n*gger point injections" and "afro-puncture" are somehow "not even arguably relevant" to this case—which involves allegations that Ghoubrial set out to enrich himself by systematically administering unnecessary injections to KNR's clientele, a relatively large proportion of whom consist of black people—is particularly inexplicable; as is his ridiculous and insulting claim that he would not use such slurs because, despite the fact that he is Caucasian, he is of Egyptian descent, and thus "African American" himself. Opp. at 7.

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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. Counsel for deponent Gunning, John Myers, Esq. (johnmyerscolpa@gmail.com), was also emailed a copy of this document on this date.

/s/ Peter Pattakos
Attorney for Plaintiffs