IN THE COURT OF COMMON PLEAS
SUMMIT COUNTY, OHIO

MEMBER WILLIAMS, et al., Plaintiffs, v. KISLING, NESTICO & REDICK, LLC, et al. Defendants.	Case No.: CV-2016-09-3928 Judge James Brogan **KNR DEFENDANTS' REPLY TO PLAINTIFFS BRIEF IN OPPOSITION TO KNR DEFENDANTS' MOTION TO COMPEL**

The KNR Defendants submit this Reply to primarily address the: a) inapplicability of the case law cited by the Plaintiffs re: "order" of questioning and whether a Notice of Deposition is valid; and 2) the appropriate method to notice a non-party witness for deposition under the Ohio Rules of Civil Procedure and the case construing those rules.

A. Plaintiffs' Case Law Inappropriately Addresses the Rights of a Non-Cooperating Witness, not the Procedure to be Followed by the Parties

The Plaintiffs contend a subpoena is the only way to properly obtain the deposition of a non-party witness. The Plaintiffs are simply wrong in this regard. A subpoena "may" be issued, but is not required. A Notice of Deposition is a completely proper method to notice a deposition, and that is especially true where the represented non-party witness agrees to appear without need of a subpoena. The lack of a subpoena in no way invalidates a proper Notice of Deposition.

The cases Plaintiff cites to involve the rights of the non-party witness, not whether the parties can contest the deposition or which party asks questions first. Neither of those issues are addressed in the Plaintiffs' "smoking gun" cases. Rather, those cases talk about the duty of the non-party witness to attend the deposition, not the duty of the parties to attend the deposition.

1. *State ex rel. Ghoubrial v. Herbert*

Ghoubrial involved a situation of where a non-party witness openly stated he would not attend a deposition. The Plaintiffs had actually pertained written judgment entry ordering the

deposition to go forward on a date certain. The parties both agreed the Notice of Deposition was valid if the witness showed. But the witness did not show and resulting motions ensued regarding the non-party witness, not regarding the parties. The appellate court only addressed the issue of whether the witness was compelled to attend, not whether a party could object to the deposition because a subpoena was not issued. Moreover, the *Ghoubrial* Court simply stated "When [the non-party witness] indicated that he would not attend the deposition," then the proper vehicle to COMPEL HIS ATTENDANCE is a subpoena. The holding states: states:

> Based on the facts presented here, the civil rules at issue and the relevant case law, the magistrate finds that the court's April 3, 2015 entry was sufficient to notify him that his deposition was scheduled but was not sufficient to compel relator to attend the deposition in the Franklin County Municipal Court on May 8, 2015. **When relator indicated that he would not attend the deposition, the proper vehicle by which to compel his attendance was through a subpoena issued pursuant to Civ.R. 45.** (Emphasis added.) *State ex rel. Ghoubrial v. Herbert*, 10th Dist. Franklin No. 15AP-470, 2016-Ohio-1085, ¶ 13.

Critically, the court's holding turns on whether the witness indicates that they will not attend the deposition. Moreover – this related to the rights of the witness. NONE of the parties in that case argued the deposition should not go forward without a subpoena or that the party noticing the deposition could not inquire first because a subpoena was never issued.

Using Plaintiffs' interpretation of this *Ghoubrial* case, counsel for a party could ignore a Notice of Deposition AND A COURT ORDER simply because a witness is not subpoenaed. Such is simply not the law. The party's counsel would be under notice of the deposition and required to attend by the rules (or waive his appearance, I supposed).

In this case, Attorney Robert Horton, through counsel, has not raised any issue with the date, time, or location of the deposition, nor has he raised any issue re: a subpoena or appearance. To

avoid any confusion, a subpoena has now been issued by both sides. However, that only impacts the rights and duties of Attorney Horton, not the parties.

2. *Bank of N.Y. Mellon v. Wahle* 2012-Ohio-6152, P28, 2012 Ohio App. LEXIS 5316

The Plaintiffs' cite to *Bank of N.Y. Mellon* is also inapplicable. The Court in *Bank of N.Y. Mellon* simply held that it was improper for a party to attempt to compel a specific employee of a corporate entity for deposition through a notice of deposition via Civ.R. 30(B)(5). *Bank of N.Y. Mellon v. Wahle*, 2012-Ohio-6152, P28, 2012 Ohio App. LEXIS 5316, *15-16. Civ. R. 30(B)(5) leaves it for the corporate party to identify the witnesses to testify on any individual subject areas. The opposing party does not have a right to tell the corporate party whom at the corporation should be the corporate representative.

The *Bank of N.Y. Mellon* case in no way applies to a non-party witness with a valid Notice of Deposition and agreement by the witness and his counsel to appear to a validly noticed deposition. The individual at the corporation to be deposed was not a named party and refused to testify voluntarily. Thus, the Court held the only way to COMPEL THAT PARTICULAR WITNESS was to issue a subpoena. The Court did not Order that the party's counsel did not have to attend because a subpoena was not issued. Nor did the Court make a decision on order of inquiry at deposition. In other words, that case, like *Ghoubrial*, involved how a Notice of Deposition impacts the duties of a non-party witness, not the duty of a party or a party's counsel. Those two cases have absolutely nothing to do with situation at hand.

B. The Defendants' Notice of Deposition of Robert Horton is Proper

A Notice of Deposition is a completely proper and expressly recognized form of notifying all opposing counsel of a deposition, including the identity of the witness and the date, time, and location of the deposition. All of these were included in the Notice of Deposition, which was issued

a year before Plaintiffs' request for deposition and continually re-issued by Defendants as the date of the deposition changed. The Defendants first noticed the February 25, 2019, deposition as well.

Civil Rule 30 expressly permits scheduling and conducting depositions of non-party witnesses through a notice of deposition. The KNR Defendants issued multiple valid Notices of Deposition before Plaintiffs issued a subpoena. And, the deponent, through counsel, agreed to be present at the deposition, thus making use of a subpoena unnecessary under Civil Rule 30(A). Moreover, the first party to serve a notice of deposition is entitled to priority of questioning, especially when such notice was a year prior to opposing counsel's notice.

First, as stated, Civil Rule 30 expressly permits scheduling depositions through the issuance of a notice. Civil Rule 30(B)(1) provides, in pertinent part, as follows:

> A party desiring to take the deposition of any person upon oral examination shall give reasonable notice in writing to every other party to the action. The notice shall state the time and place for taking the deposition and the name and address of each person to be examined, if known, and, if the name is not known, a general description sufficient to identify the person or the particular class or group to which the person belongs.

Defendants have issued several valid Notices to Robert Horton under Civ.R. 30(B)(1):

1. October 19, 2017: KNR filed Notice of Deposition of Robert Horton
2. October 5, 2018: KNR filed Notice of Deposition of Robert Horton
3. October 11, 2018: KNR filed Amended Notice of Deposition of Horton
4. January 4, 2019: KNR filed a Notice of Deposition of Robert Horton
5. January 8, 2019: KNR filed Amended Notice of Deposition of Horton.

Before the Defendants' January 8, 2019, Amended Notice of Deposition, the Plaintiffs never issued a Notice of Deposition. The Plaintiffs issued a subpoena on November 8, 2018 for the deposition to take place January 23, 2019, which could not occur because Attorney Pattakos and

Counsel for Robert Horton were not available. But even that subpoena was after three previous valid Notices of Deposition by the Defendants.

Nothing in the Ohio Civil Rules of Procedure require that a party must issue a subpoena to conduct the deposition of a non-party witness where the witness has agreed to appear on a date pursuant to a notice of deposition. Instead, on its face, Civil Rule 30(A) shows that use of a subpoena is discretionary. Civil Rule 30(A) provides, in relevant part: "After commencement of the action, any party may take the testimony of any person, including a party, by deposition upon oral examination. **The attendance of a witness deponent may be compelled by the use of subpoena as provided by Civ.R. 45.**" (Emphasis added.)

The Ohio legislature expressly used the term "may" rather than "shall" when drafting Civ.R. 30(A). This distinction is important, as the Ohio Supreme Court has held that "may" connotes discretion, whereas "shall" connotes that the provision is mandatory. *See Dorrian v. Scioto Conservancy Dist.*, 27 Ohio St.2d 102, 107, 271 N.E.2d 834 (1971) (Citations omitted.) ("The statutory use of the word "may" is generally construed to make the provision in which it is contained optional, permissive, or discretionary . . . The word "shall" is usually interpreted to make the provision in which it is contained mandatory[.]"). Based on the express language of Civil Rule 30, Defendants *may* have sought to depose Robert Horton through use of a subpoena, however, the decision not to do so during 2017 and 2018 does not render the valid Notices of Deposition and subsequent agreed-upon deposition date invalid.

C. The Defendants are Permitted to Question Mr. Horton First

Although there is a lack of Ohio case law on the issue of order of questioning at depositions, likely because the answer is obvious, several federal courts addressing the order of deposition questioning hold that the first party to serve a valid notice are entitled to priority. *See e.g. Schlein v.*

Wyeth Pharmaceuticals, Inc., S.D.Ga. No. CV 105-014, 2012 U.S. Dist. LEXIS 189857, at *7, fn. 3 (Dec. 13, 2012) ("the first party to serve a notice of deposition is entitled to priority of questioning at that deposition.); *Pierson*, No. 05-CV-527, 2012 U.S. Dist. LEXIS 189881, doc. no. 48, p. 8 (concluding that "the party who first serves a valid notice of deposition shall have priority of questioning in that deposition"); *Urquiza v. Wyeth*, 1:04-CV-12247-DPW, doc. no. 50, pp. 9-10 (D. Mass. Sept. 27, 2012) ("The short of it is, if you want my ruling on it, my ruling on it is whoever noticed it [the deposition] first gets to do it."); cf. *Corso v. Wyeth*, 3:04-CV-1259-JBA, doc. no. 64 (D. Conn. Jan. 30, 2012) (concluding that deposition notices issued prior to remand from CV 403-1507 conferred priority without addressing whether the notices complied with Fed. R. Civ. P. 30(b)(1)).); *Dargis v. Wyeth, Inc.*, D.Minn. No. 04-3967 (DSD/LIB), 2012 U.S. Dist. LEXIS 189881, at *16 (Nov. 30, 2012) ("for any fact witness, the party who first serves a valid notice of deposition shall have priority of questioning in that deposition").

In sum, Defendants issued numerous valid Notices of Deposition to Robert Horton that resulted in an agreed upon date, time and location for deposition. Under Civil Rule 30, the Notices were proper and the parties' agreement rendered an accompanying subpoena unnecessary. Defendants respectfully request the Plaintiffs should not be permitted to delay the deposition of their own "star" witness for more than 15 months and then dictate the order of questioning despite the fact multiple valid Notices of Deposition were issued by the opposing party.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned certifies that a copy of the foregoing was filed electronically with the Court and sent via email to counsel for all parties on this 30th day of January 2019. The parties, through counsel, may also access this document through the Court's electronic docket system.

Respectfully submitted,

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