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 **Plaintiffs' Opposition to Defendants' Joint Motion for *Sua Sponte* Order Restricting Plaintiffs' Counsel's Speech**

I. Introduction

More than 15 months after Judge Breaux lifted the unlawful gag order imposed by the Court in March of 2017—which stalled this case for nearly a year and resulted in a separate lawsuit by Advance Ohio Media to restore public access to the proceedings—Defendants have again asked the Court to restrict Plaintiffs' communications with potential class members and witnesses. They have done so in response to a Facebook post by which Plaintiffs' counsel truthfully (A) advises the public of (1) the existence of the pending lawsuit, (2) a brief description of some of the proof on which the lawsuit is based, and (3) the possibility that former KNR clients who were treated by Defendant Ghoubrial might be entitled to recover, and (B) requests that those who wish to participate in the case contact Plaintiffs' counsel.

The post of which Defendants complain is no different in substance than the communications to which the initial gag order was ruled not to apply, nor to any of a number of public communications that Plaintiffs' counsel has made since the gag order was lifted. Indeed, the post at issue is not only entirely consistent with and protected by Plaintiffs' well-established First Amendment rights, it consists of an effort to obtain "one of the best sources of discovery," "information from the putative Plaintiffs themselves," by "the conventional way" of "advertising in

the media the fact of the lawsuit," precisely as suggested by the Court in its July 24, 2018 order (at 5).

Defendants' effort to pretend that this is anything else is apparently part and parcel of a continued effort to obstruct discovery and deflect from their conduct that is at issue in this case, including by tying up Plaintiffs' counsel with needless briefing on non-issues in the week before Defendant Nestico's deposition is set to go forward. The issues raised in Defendants' motion have been amply addressed in the voluminous briefing on the earlier issued gag order both in this Court and the related mandamus action in the Ninth District, and have been conclusively resolved both by Judge Breaux's order lifting the gag order and subsequent orders entered by the Court, as summarized below.

II. Facts, Law, and Argument

A. The Facebook post at issue is truthful solicitation of information about this case.

In stark contrast to Defendants' assertion that Plaintiffs published a Facebook post "soliciting putative class members that is defamatory and highly misleading," (Defs' Mot. at 3), the Facebook post does nothing more than accurately convey basic information about the case and invite individuals to contact Plaintiffs' counsel if they wish to participate. The full text of the post at issue is as follows:

> If you have been represented by the law firm of Kisling Nestico & Redick (KNR) and were sent by KNR to be treated by Doctor Sam Ghoubrial or his associates you might be entitled to recover up to and more than $2,000 in a class-action lawsuit based on proof that Dr. Ghoubrial and KNR conspired to overcharge the firm's clients for medical supplies and fraudulent medical treatment, including the administration of "trigger point" injections.
>
> Details about the fraudulent scheme, including a copy of the complaint, are available in the comments below.

> For more information about how to participate in this lawsuit and recover funds unlawfully charged to you, please contact our law firm by phone at 330.836.8533, or by email at info [at] pattakoslaw.com.

Defs' Mot., Ex. A. As shown above, the text of the post accurately communicates: (1) that former KNR clients who were treated by Defendant Ghoubrial might be entitled to recover up to and more than $2,000 in this lawsuit (consistent with Plaintiffs' allegations that Ghoubrial charged up to $500 per TENS unit more than $1,000 for each trigger-point injection) (*See* Fifth Amended Complaint, ¶ 7, 89, 90, 98); (2) that the allegations made in this lawsuit are supported by proof that Ghoubrial and the KNR Defendants are engaged in a scheme to enrich themselves by administering overpriced "trigger-point" injections and medical supplies to KNR clients, regardless of the clients' preferences (*see, e.g.*, Gunning Tr. at 14:5–15; 22:17–23:14; 34:25–35:11; 107:15–21); (3) that Plaintiffs seek to proceed with a class action lawsuit; and (4) those interested in participating in the lawsuit may contact Plaintiffs' counsel for more information.

Contrary to Defendants' attempts to misconstrue the post (*e.g.*, at 5), it does not state that the class has already been certified, nor that KNR and Ghoubrial have already been found liable for such misconduct, nor does it promise potential class members that they are entitled to "thousands of dollars." Indeed, by stating that members of the public "might be entitled" to recovery, and providing a link to the Complaint, it indicates to the contrary and is in no event false or improper.

Moreover, the post of which Defendants now complain contains content that is consistent with if not largely identical to other posts that Plaintiffs' counsel has made over the last year to no objection from Defendants. *See* **Ex. 1**, September 7, 2018 post; **Ex. 2**, October 16, 2017 post; and **Ex. 3**, October 19, 2017 post.

B. No other basis exists to restrict Plaintiffs' Counsel's speech in the manner Defendants have urged.

Under controlling U.S. Supreme Court precedent, attorneys are plainly entitled to, "solicit legal business through printed advertising containing truthful and nondeceptive information and

advice regarding the legal right of potential clients." *Zauderer v. Office of Disciplinary Counsel of the Supreme Court of Ohio*, 471 U.S. 626, 647, 85 L. Ed. 2d 652, 105 S. Ct. 2265 (1985).

Further, the controlling standards set forth in Plaintiffs' earlier briefing on this issue as well as by Advance Ohio Media in the related proceedings against Judge Breaux (Summit County Court of Appeals No. CA-28642) show that restrictions on counsel's speech cannot issue unless specific findings are made showing that the orders are both (1) necessary to preserve values higher than litigants' and the public's First Amendment rights, and (2) that they are narrowly tailored to accomplish this purpose. *State ex rel. National Broadcasting Co. v. Court of Common Pleas of Lake County*, 52 Ohio St. 3d 104, 108, 556 N.E.2d 1120 (1990); *State ex rel. Vindicator Printing Co. v. Wolff*, 132 Ohio St. 3d 481, 2012-Ohio-3328, 974 N.E.2d 89, ¶ 32–37.

Further, these findings must be "specific," "on the record," and constitute "clear and convincing evidence" that the orders are "essential" to protect higher values than those protected by the First Amendment. *Id.* These standards are consistent with the Supreme Court of Ohio's recognition that "[a]ttorneys and their clients retain a panoply of First Amendment rights and are free to speak to the public about their claims and defenses provided that they do not exceed the contours of protected speech and ethical rules that impose reasonable and necessary limitations on attorneys' extrajudicial statements." *Am. Chem. Soc'y v. Leadscope Inc.*, 133 Ohio St.3d 366, 2012-Ohio-4193, 978 N.E.2d 832, ¶ 90 (citing Prof.Cond.R. 3.6).

The orders requested here cannot possibly be supported by any evidence, let alone the required "clear and convincing evidence," and "specific on the record findings" demonstrating that the orders are necessary to preserve values higher than litigants' and the public's First Amendment rights. Indeed, the only discernible justifications that Defendants offer for the gag and sealing orders are: (1) that Defendants' reputations will be damaged unless Plaintiffs' speech is restricted (Defs'

Mot. at 6-7); and (2) that the gag and sealing orders are necessary to preserve Defendants' right to a fair trial. *Id.* Neither of these justifications passes muster.

First, harm to a defendants' reputation resulting from court filings cannot possibly justify a gag order under the Ohio Supreme Court's "higher interest" standard, and Defendants cite no case holding otherwise.[1] In fact, to the contrary:

> The natural desire of parties to shield prejudicial information contained in judicial records from competitors and the public … cannot be accommodated by courts without seriously undermining the tradition of an open judicial system. **Indeed, common sense tells us that the greater the motivation a corporation has to shield its operations, the greater the public's need to know.**

Brown & Williamson Tobacco Corp. v. F.T.C., 710 F.2d 1165, 1180 (6th Cir. 1983) (emphasis added). *See also Gamble Co. v. Bankers Trust Co.*, 78 F.3d 219, 225 (6th Cir. 1996) ("The private litigants' interest in protecting their vanity or their commercial self-interest simply does not qualify as grounds for imposing a prior restraint. It is not even grounds for keeping the information under seal."); *Doe v. Pub. Citizen*, 749 F.3d 246, 269 (4th Cir. 2014) (in "consumer fraud cases," "the public and press enjoy a presumptive right of access to civil proceedings and documents filed therein, notwithstanding the negative publicity those documents may shower upon a company").

Finally, Defendants simply cannot show that their right to a fair trial has been or would be jeopardized by the truthful Facebook post at issue.

> If the interest asserted [in support of a request for a gag order] is the right of the accused to a fair trial, the gag order may issue only if specific findings are made demonstrating that, first, there is a substantial probability that the defendant's right to a fair trial will be

[1] Citing *In re Scaldini*, 2008-Ohio-6154, ¶ 15, Defendants claim that gag orders are properly issued "to prevent a plaintiff, or a plaintiff's attorney, from making extra-judicial comments in order to prejudice a defendant." Defs' Mot., at 6. Thus it is apparent that *Scaldini* was wrongly decided in express contradiction to well-established law that requires a court to make findings that are "specific," "on the record," and constitute "clear and convincing evidence" that a gag order is "essential" to protect higher values than those protected by the First Amendment. *Wolff* at ¶ 32–37. A gag order may not be issued on Defendants' mere desire to avoid unexplained and unsubstantiated "harms."

> prejudiced by publicity that … [the gag order] would prevent and, second, reasonable alternatives … cannot adequately protect the defendant's fair trial rights … . Moreover, representatives of the press and general public must be given an opportunity to be heard on the question.

State ex rel. National Broadcasting Co., 52 Ohio St.3d 104, 108 (citations and quotations omitted) (overruled on other grounds in *State v. Schlee*, 117 Ohio St.3d 153, 2008-Ohio-545, 882 N.E.2d 431, ¶ 10). "The First Amendment right of access cannot be overcome by the conclusory assertion that publicity might deprive the defendant of [the right to a fair trial]." *Toledo Blade*, 125 Ohio St. 3d at 158 (quoting *Press-Enterprise Co. v. Sup. Ct. of Cal.*, 478 U.S. 1, 15 (1986)). And the United States Supreme Court held under far more inflammatory circumstances (relating to the massively publicized fraud that led to the collapse of the Enron Corporation), that:

> Prominence does not necessarily produce prejudice, and juror impartiality, we have reiterated, does not require ignorance. Every case of public interest is almost, as a matter of necessity, brought to the attention of all the intelligent people in the vicinity, and scarcely any one can be found among those best fitted for jurors who has not read or heard of it, and who has not some impression or some opinion in respect to its merits.

Skilling v. United States, 561 U.S. 368, 381 (2010). *See also State v. Coley,* 93 Ohio St.3d 253, 258, 2001-Ohio-1340, 754 N.E.2d 1129 (2001) *quoting Nebraska Press*, 427 U.S. at 563 ("pretrial publicity—even pervasive, adverse publicity—does not inevitably lead to an unfair trial.").

Thus, Defendants' mere conclusory insistence that their right to a fair trial has been jeopardized, completely unsupported by evidence, cannot possibly justify the relief they request. This is especially so considering that the Court must consider other means, such as "voir dire, continuances, changes of venue, jury instructions, or sequestration of the jury" before restricting Plaintiffs' counsel's speech. *State ex rel. Vindicator Printing Co.*, 132 Ohio St.3d at 491.

C. The cases cited by Defendants do not warrant the relief they request.

In addition to their efforts to misrepresent the Facebook post, Defendants have relied on a handful of inapposite cases in an attempt to silence Plaintiffs' counsel. In these cases, unlike here, counsels' actions created a false and misleading impression suggesting that, by responding, potential plaintiffs were automatically entitled to recovery and that they would forfeit rights if they did not respond.

For example, in *Katz v. DNC Services Corp.,* 275 F.Supp.3d 579, 583 (E.D.Pa. 2017), restrictions on counsel's speech were appropriate where the communication at issue expressly asked potential plaintiffs to sign a consent form in order to join the lawsuit. The communication coerced such persons into joining the class action by stating without qualification that, "to assert your rights and obtain compensation from the case, you must join the lawsuit." *Id.* Similarly, in *Jones v. Casey's Gen. Stores*, 517 F.Supp.2d 1080, 1088 (S.D.Iowa 2007), the court found the communication improper due to its emphasis on consent forms, because the communication failed to state that such members were not required to opt-in to the lawsuit.

Here, as discussed above, the Facebook post does not create any such false or misleading impressions in putative plaintiffs because the text of the post merely truthfully provides basic facts about the case, and makes clear that potential plaintiffs or witnesses should feel free to contact Plaintiffs' counsel to learn more about it.

III. Conclusion

As discussed fully above, because Defendants cannot meet the stringent standards imposed by the First Amendment, the Court should deny Defendants' motion.

Respectfully submitted,

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Certificate of Service

The foregoing document was filed on January 31, 2019, using the Court's electronic-filing system, which will serve copies on all necessary parties.

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September 6, 2018 ·

If you or anyone you know has been represented by the KNR law firm (Kisling Nestico and Redick) and treated by Akron-area doctor Sam Ghoubrial, please take notice:

We have recently discovered evidence showing that Dr. Ghoubrial, to whom KNR has funneled thousands of its clients for "pain management" services, has been charging KNR clients exorbitant fees for medical devices without disclosing his financial interest in the transactions. For example, Ghoubrial has sent many KNR clients home with electrical-nerve-stimulation devices ("TENS units"), without advising them that they would be charged for this equipment. Later, the clients would have $500 deducted from their settlements to pay for these devices, for which, as the distributors have confirmed, Ghoubrial only paid $27.50 for and thus took a profit of more than 1,800% on each sale.

Ohio law prohibits doctors from taking secret profits from selling medical supplies to their patients, and if you were charged for a device provided by Dr. Ghoubrial, you might be entitled to recover.

Please see the below-linked post at our website for more information, including about other claims involving alleged kickbacks between KNR and a network of chiropractors, and a loan company called Liberty Capital. Anyone with information or concerns about alleged fraudulent conduct by KNR is encouraged to contact our law firm by phone at 330.836.8533 or by email at info@pattakoslaw.com.

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The Pattakos Law Firm LLC

October 16, 2017 ·

This morning, the Judge lifted the gag order in our fraud lawsuit against the Akron-based personal injury firm Kisling, Nestico, and Redick ("KNR"). We are now free to communicate with the public to seek more information from former KNR clients who believe they have been defrauded by the firm.

The putative class-action lawsuit is based on detailed allegations, supported by KNR's own documents, showing that the firm intentionally deceived and defrauded its clients with kickback schemes involving a network of chiropractors and a now-defunct loan company called Liberty Capital Funding. The case further alleges that KNR has engaged in a scheme to defraud its clients by charging a fraudulent "investigation fee" for so-called "investigations" that are never performed, and for basic clerical services that are not legally chargeable to the firm's clients.

We are very interested in speaking with anyone who has information about this firm's business practices, or anyone who believes they have been defrauded by the firm. Please contact us by phone (330.836.8533) or by email (info@pattakoslaw.com) if you or anyone you know has any information.

More info on the case is available in the linked press release.

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October 19, 2017 ·

If you have been represented by the Ohio law firm of Kisling, Nestico & Redick (KNR), you might be entitled to recover in a class-action lawsuit alleging that the firm deceived and defrauded its clients with kickback schemes involving chiropractors and a loan company. Please see the attached press release for more details—including a link to the complaint, which quotes extensively from KNR's own internal documents—and contact us for more information on the lawsuit, including how you may participate (330.836.8533, info@pattakoslaw.com).

https://www.pattakoslaw.com/personal-injury-law-firm-knr-a.../

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Personal-injury law firm KNR accused of deceiving and defrauding its clients with kickback schemes involving...

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