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' Brief in Opposition to the KNR Defendants' Motion to Compel Answers to Contention Interrogatories**

I. Issue presented

> Courts routinely hold that "contention interrogatories" asking parties to identify "all facts and evidence" supporting particular allegations in a case are unduly burdensome, particularly where the propounding party is in possession of all knowledge and evidence of its own conduct, and where the claims at issue are well pleaded. Here, not only are Defendants in possession of all knowledge and evidence of the conduct at issue, but Plaintiffs' claims are pleaded in great detail, and supported with numerous references to documents. Additionally, all relevant documents in Plaintiffs' possession have been produced, and all witnesses known to Plaintiffs have been identified. Should this Court hold that Defendants' contention interrogatories—which systematically track the allegations in the Fifth Amended Complaint and hundreds of requests for admission that Defendants have served—are unduly burdensome under the circumstances?

II. Facts, law, and argument

By their motion to compel answers to their "contention interrogatories," the KNR Defendants ask the Court to require Plaintiffs to identify "all facts and evidence" that support each of dozens of specific allegations raised in the Fifth Amended Complaint, and to continually update these responses every time Plaintiffs' investigation yields new information. Defendants' request—made here in a fraud case where the Defendants are already in possession of all knowledge and evidence of their own conduct at issue, which they've gone to great lengths to keep hidden from

Plaintiffs—does not arise from any legitimate need to understand Plaintiffs' well-pleaded and well-documented claims, but rather is apparently "directed at uncovering the [plaintiffs'] roadmap of the universe of discovery that has already been exchanged, *i.e.*, the [plaintiffs'] work product." *In re E. I. du Pont de Nemours*, S.D.Ohio No. 2:13-md-2433, 2015 U.S. Dist. LEXIS 178306, *1120 (May 20, 2015). Contrary to KNR's motion, contention interrogatories —while a legitimate discovery device under certain circumstances—are not intended as a mechanism by which parties facing liability for fraud may keep exhaustive and convenient tabs on opposing counsel's investigation and work product. Indeed, courts have recognized that the service of contention interrogatories under the circumstances at issue here constitutes "a serious form of discovery abuse." *In re Convergent Technologies Secs. Litigation*, 108 F.R.D. 328, 337 (N.D.Cal. 1985).

Thus, as explained further below, the Court should deny Defendants' motion. Defendants have no legitimate need for the responses requested, particularly while discovery is ongoing, where all documents in Plaintiffs' possession have been produced, all witnesses known to Plaintiffs have been identified, and the parties will be required to identify all trial exhibits and witnesses well in advance of final judgment on the claims at issue.

Civ.R. 33(B) provides, in pertinent part, that,

> An interrogatory otherwise proper is not objectionable merely because an answer to the interrogatory involves an opinion, contention, or legal conclusion, but the court may order that such an interrogatory be answered at a later time, or after designated discovery has been completed, or at a pretrial conference.

(emphasis added). Because Civ.R. 33(B) "was patterned after" FRCP 33(b), the rules are substantially similar, such that federal decisions on the meaning of both rules is especially persuasive. *See State ex rel. Daggett v. Gessaman*, 34 Ohio St.2d 55, 57, 295 N.E.2d 659 (1973); and *Myers v. City of Toledo*, 110 Ohio St.3d 218, 2006-Ohio-4353, 852 N.E.2d 1176, ¶ 18 (where the language of both rules is similar, "federal case law that interprets the federal rule, while not controlling, is persuasive").

A contention interrogatory served before the close of discovery is unduly burdensome, and thus improper under Rule 33 where, as here, the propounding party "ha[s] access to most of the evidence about their own behavior." *In re Convergent Technologies Secs. Litigation*, 108 F.R.D. 328, 337 (N.D.Cal. 1985). Indeed, "there is substantial reason to believe that the early knee jerk filing of sets of contention interrogatories that systematically track all the allegations in an opposing party's pleadings is a serious form of discovery abuse." *Id.* Like the discovery requests at issue here, "[s]uch comprehensive sets of contention interrogatories can be almost mindlessly generated, can be used to impose great burdens on opponents, and can generate a great deal of counterproductive friction between parties and counsel." *Id.* KNR's written discovery requests to Monique Norris, for example, encompassed more than 60 pages and included more than 270 requests for admission that were served along with interrogatories requiring Plaintiffs to identify all of the "facts and evidence" that supported "anything but an unqualified admission" to any of these requests. *See* Exhibit L at pages 128–191 of Defendants' motion, Interrogatory No. 1 at page 131, Interrogatory No. 2 at page 134, *et seq*; Request for Admission No. 27 at pages 137–141 (containing 64 subparts tracking the allegations in the Fifth Amended Complaint that each constituted a separate request), Interrogatory No. 5 at page 145 ("If your answer to any of Request for Admissions Nos. 21 through 28 are anything but an unqualified admission, please identify the facts, evidence, and witnesses supporting such denial or qualified admission."), Request for Admission No. 37 at pages 147–148 (containing 16 subparts), *et seq*.

Accordingly, and contrary to Defendants' argument (*See* KNR Mot. at 8), courts within the Sixth Circuit and elsewhere routinely recognize that a responding party should not be required to provide "virtually all supporting evidence for each fact" at issue in a case simply because it was requested through a contention interrogatory. For example, in *In re E. I. du Pont de Nemours*, S.D.Ohio No. 2:13-md-2433, 2015 U.S. Dist. LEXIS 178306, *1119-1122 (May 20, 2015), a party

moved to compel responses to contention interrogatories that required the responding party to "state each fact … and identify each witness and each document you contend supports your claims." *Id.* at 1115-16. The court refused to compel responses to these interrogatories, finding that they were unduly burdensome, in part because they were "not directed at eliciting previously unknown information, but rather appear to be directed at uncovering the [plaintiffs'] roadmap of the universe of discovery that has already been exchanged, *i.e.*, the [plaintiffs'] work product." *Id.* at 1120 citing *Norwood v. Radtke*, No. 07-cv-624, 2008 U.S. Dist. LEXIS 108765, at *2 (W.D. Wis. Feb. 26, 2008) ("[A party] cannot simply ask [the opposing party] to give him a copy of everything . . . that they intend to use [to support claims]. This puts an impossible burden on [a party] and it invades their attorney-client and work product privileges.")

Numerous cases are in accord. *See*, *e.g.*, *Lucero v. Valdez*, 240 F.R.D. 591, 594 (D.N.M. 2007) ("Contention interrogatories should not require a party to provide the equivalent of a narrative account of its case, including every evidentiary fact, details of testimony of supporting witnesses, and the contents of supporting documents."); *United States v. Edn. Mgt. LLC*, W.D.Pa. No. 2:07-cv-00461, 2013 U.S. Dist. LEXIS 104176, at *78 (May 14, 2013) ("Courts are generally hesitant to require [parties to 'prematurely lock themselves into legal positions' by answering contention interrogatories], particularly when there is little obvious benefit to be derived from requiring early responses ... ."); *Moses v. Halstead*, 236 F.R.D. 667, 674 (D.Kan. 2006) (a contention interrogatory is "overly broad and unduly burdensome on its face to the extent it asks" the responding party "to state 'all' facts that support" claims or defenses); *Olson v. City of Bainbridge Island*, W.D. Wash. No. C08-5513RJB, 2009 U.S. Dist. LEXIS 58171, at *9-11 (June 18, 2009) (denying a motion to compel responses to a contention interrogatory that asked a party to "[s]tate specifically all facts and all evidence supporting [an] allegation."); *Doyle v. First Fed. Credit Union*, N.D. Iowa No. C06-0049, 2007 U.S. Dist. LEXIS 30700, at *6-7 (Apr. 25, 2007) (finding that a party was not required to "set forth

the 'sum and substance of the witness's knowledge' nor is she required to identify 'the source of the witness's knowledge.'"); and *FTC v. Am. eVoice Ltd.*, D.Mont. No. CV-13-03-M-DLC, 2017 U.S. Dist. LEXIS 15813, at *20 (Feb. 3, 2017) (denying motion to compel responses to contention interrogatories seeking "the vast majority of the facts supporting" the plaintiff's allegations).

Here, not only is KNR in possession of all of the evidence of its own behavior, but Plaintiffs' claims have been pleaded in great detail, including with extensive quotations from documentary evidence supporting the allegations in the Fifth Amended Complaint. *See In re Convergent Technologies*, 108 F.R.D. 328, 339 ("The Court will be especially vigilant in its evaluation of proffered justifications [for contention interrogatories] when a complaint is not facially infirm and when defendants appear to have control over or adequate access to much of the evidence relevant to their alleged misconduct."). There is no question as to what is at issue in this case, or as to who the relevant witnesses are, and Plaintiffs have already produced all responsive documents in their possession. Ordering answers to Defendants' comprehensive contention interrogatories now will require Plaintiffs to constantly supplement their responses every time a new "fact" is uncovered or determined to support a particular allegation, and will cause a substantial intrusion on Plaintiffs' counsel's working space by interfering with their ability to develop theories of the case without engaging in constant disputes with defense counsel and related motion practice. Such a result would violate principles of judicial economy and infringe on the protections granted by the work-product doctrine. *See United States v. Edn. Mgt. LLC*, W.D.Pa. No. 2:07-cv-00461, 2013 U.S. Dist. LEXIS 104176, at *76 (May 14, 2013) ("It is ... highly likely that Plaintiffs would be required to supplement their responses [to contention interrogatories] as they receive additional discovery. Such repeated supplementation will not increase the efficiency of the discovery process."); *Ross v. Abercrombie & Fitch Co.*, S.D.Ohio No. 2:05-cv-0819, 2008 U.S. Dist. LEXIS 125521, at *21, 25 (Mar. 24, 2008) citing *Hickman v. Taylor*, 329 U.S. 495, 510-11, 67 S. Ct. 385, 91 L. Ed. 451 (1947) ("It therefore

seems beyond dispute that if an attorney has to tell opposing counsel exactly whom he or she chose to interview when preparing a pleading, and which information obtained from those interviews was deemed worthy enough to support each specific allegation within that pleading, there will be a substantial intrusion upon the attorney's 'working space.' ... While counsel may not withhold either the names of witnesses with relevant information or the location of relevant documents—and that has not happened here—they simply cannot be compelled to give opposing counsel all of the details of how they decided to plead each allegation in the complaint.").

Because Defendants have failed to set forth any legitimate need for answers to their contention interrogatories,[1] let alone one that would justify the burden in responding to them, their motion should be denied. Plaintiffs' compliance with Defendants' document requests and Court

[1]The only discernible basis for Defendants' claimed entitlement to responses to their contention interrogatories is their inapposite claim that the named Plaintiffs have a "collective 'lack of awareness'" of the lawsuit and have used "their lawyer as a 'discovery shield.'" *See* KNR Motion at 2. Leaving aside that this claim is based on misrepresentations of Plaintiffs' deposition testimony, it is well settled that class representatives are neither required nor expected to be experts on the claims of the putative class, particularly in a case involving fiduciary duties owed by attorneys and doctors to their clients. *See, e.g.*, *Westgate Ford Truck Sales, Inc. v. Ford Motor Co.*, 8th Dist. Cuyahoga No. 86596, 2007-Ohio-4013, ¶ 73-74 ("In view of counsel's role in prosecuting this action, [putative named plaintiff's] role as class representative is nominal. It is not surprising that [he] lacked knowledge on how the complaint had been drafted and had not done any 'special investigation' of any of the topic areas contained in his notice of deposition."); *Lewis v. Curtis*, 671 F.2d 779, 788–789 (3d Cir. 1982) ("the adequacy-of-representation test is not concerned whether plaintiff personally derived the information pleaded in the complaint or whether he will personally be able to assist his counsel"); *In re Third Circuit Task Force on the Selection of Class Counsel*, 3d Cir., 2002 U.S. App. LEXIS 30242, at *14 (Jan. 15, 2002) ("Often a lead plaintiff has only a small stake in the litigation and lacks the resources, sophistication or interest to engage in monitoring [the litigation]"); *Latuga v. Hooters, Inc.*, 1996 U.S. Dist. LEXIS 4169, at * 14 (N.D. Ill. Mar. 29, 1996) ("[A] representative plaintiff need not immerse himself in the case. The modern trend is to require little in the way of factual knowledge on the part of the class representative."); *Gunnells v. Healthplan Servs., Inc.*, 348 F.3d 417, 430 (4th Cir. 2003) ("[I]n a complex lawsuit, such as one in which the defendant's liability can be established only after a great deal of investigation and discovery by counsel against a background of legal knowledge, the representative need not have extensive knowledge of the facts of the case in order to be an adequate representative"); *Cassell v. Vanderbilt Univ.*, M.D.Tenn. No. 3:16-cv-2086, 2018 U.S. Dist. LEXIS 181850, at *15 (Oct. 23, 2018) (in a case involving fiduciary duties, class representatives' "lack of specific knowledge about this complex case does not bar class certification").

orders requiring the disclosure of witnesses and exhibits in advance of trial are more than sufficient to address Defendants' purported need for the interrogatories at issue.

Respectfully submitted,

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Certificate of Service

The foregoing document was filed on February 19, 2019, using the Court's electronic-filing system, which will serve copies on all necessary parties.

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