

IN THE COURT OF COMMON PLEAS  
SUMMIT COUNTY, OHIO

MEMBER WILLIAMS, et al.,

Plaintiffs,

v.

KISLING, NESTICO & REDICK, LLC, et al.,

Defendants.

Case No.: 2016-09-3928

Judge: James Brogan

**KNR DEFENDANTS' MEMORANDUM  
IN OPPOSITION TO PLAINTIFFS'  
MOTION TO COMPEL PRODUCTION  
OF THE KNR'S SETTLEMENT  
AGREEMENTS WITH ROBERT  
HORTON AND PAUL STEELE, AND  
MOTION FOR A PROTECTIVE  
ORDER REGARDING KNR'S  
CONFIDENTIALITY AGREEMENTS  
WITH ITS EMPLOYEES**

Plaintiffs' motion improperly seeks two orders from this Court which have no basis in the Rules in the Rules of Civil Procedure. Accordingly Plaintiffs' motion should be summarily denied.

**I. Plaintiffs have no basis under the Civil Rules to compel production of document that is not been the subject of a request pursuant to Civ.R. 34.**

Plaintiffs' motion must be denied for the simple reason that Plaintiffs' counsel has not issued a discovery request to Defendants seeking the documents referenced in his Motion. This is an elementary and obvious violation of the Civil Rules. A Court's power to compel production of documents is set forth in Civ.R. 37(A)(3)(a), which states:

- (a) **To compel a discovery response.** A party seeking discovery may move for an order compelling an answer, designation, production, or inspection. This motion may be made if:
  - (i) A deponent fails to answer a question asked under Civ.R. 30 or Civ.R. 31;
  - (ii) A corporation or other entity fails to make a designation under Civ.R. 30(B)(5) or Civ.R. 31(A);
  - (iii) A party fails to answer an interrogatory submitted under Civ.R. 33;

- (iv) A party fails to respond that inspection will be permitted—or fails to permit inspection—as requested under Civ.R. 34.

It is patently unreasonable for Plaintiffs to expect that they can simply send an informal email asking for documents that Plaintiffs' counsel knows are confidential. Defendants have a contractual obligation to resist disclosure of these documents, and will respond timely and appropriately to any proper request made pursuant to Civ.R. 34. Defendants will not and cannot voluntarily produce these documents, nor can this Court compel them to do so absent a proper request under the Rules. Had Plaintiffs sent a request to Defendants pursuant to Civ.R. 34, Defendants would have had the opportunity to lodge an appropriate objection for the record, and submit the documents to the Court for in camera review. Plaintiffs are attempting to an end run around the proper procedures set forth in the Civil Rules by moving to compel production of confidential documents - directly to Plaintiffs - based upon solely upon an email.

Defendants have not “failed to respond” to any “request under Civ.R. 34” because Plaintiffs have made no request under Civ.R. 34. Plaintiffs' Motion cites to no request made to Defendants regarding the subject documents. Thus, there is no predicate for Plaintiffs' motion and no legal basis to compel production of the documents pursuant to Civ.R. 37. Plaintiffs must follow the Rules and serve the appropriate request before filing a motion to compel. The Motion must be denied.

**II. No statute or Civil Rule entitles Plaintiffs' counsel to communicate with third party witnesses represented by counsel outside of deposition testimony.**

Plaintiffs' counsel's second request likewise has no basis in statute or the Civil Rules. Plaintiffs' counsel is asking this Court to issue an order permitting him to communicate with third party witnesses prior to a deposition. The request that Mr. Pattakos sent to defense counsel is set forth in the e-mail dated February 13, 2019 and attached to Plaintiffs' motion as an exhibit. Mr. Pattakos wrote: “Please advise immediately as to whether (1) it is KNR's position that Paul Steele

and Robert Horton would be in breach of their respective confidentiality agreements if they conferred with me to discuss the allegations at issue in this case[.]” (emphasis added). Paul Steele and Robert Horton are represented by counsel. Mr. Pattakos is asking this Court to compel a private interview with represented third parties.

Defense counsel appropriately responded that we do not represent these individuals, nor are our clients required to waive any contractual rights or obligations they may have with respect to these third parties. Plaintiffs intentionally failed to attach to their motion defense counsel’s response to Plaintiffs’ email request. The response is attached hereto as Exhibit A and states:

Peter:

I am still in the first of two depositions, but will respond as follows.

Please immediately retract your accusation that Attorney Nestico "unlawfully refuse[d] to answer questions." He is bound by the confidentiality agreements and is not going to breach them just because Peter Pattakos says he can. You are not a party to those agreements nor do you represent either Mr. Horton or Mr. Steele. Likewise, we do not represent Attorney Horton or Attorney Steele. Any questions re: how those witnesses answer questions should be addressed to their individual lawyers. It is our understanding Tom Skidmore represents Attorney Horton and Charles Kettlewell represents Paul Steele. You have spoken with both lawyers, so we know you have their contact information. We certainly are not going to provide a blanket waiver of our rights to object and/or to designate testimony to be subject to the Protective Order, especially since the confidential settlements have no bearing on class certification or the underlying class claims.

Please also stop accusing us of delaying. YOU are the one who has canceled multiple depositions multiple times. We are not threatening to delay future depositions, you are.

We continue to ask for you to supplement your discovery responses, including answering contention interrogatories, providing the information for Ms. Reid's relative who gave her information on the value of the report (are you really forcing us to file a Motion to Compel on this), dates for your clients' depositions, and the many other discovery deficiencies we have addressed in multiple correspondence to you.

Tom

Defense counsel has never taken the position that Plaintiffs are forbidden from asking questions at deposition regarding KNR's practice and any former employees' general experience at KNR. What defense counsel cannot and will not do is convince a represented third party to have a private conference with opposing counsel, nor will defense counsel waive any rights defendants may have pursuant to a separate contract with third parties.

It should be noted that Plaintiffs' counsel has been aware of these witnesses and the documents referenced in the instant motion for more than a year. Both of their depositions have been previously scheduled and cancelled by Plaintiffs' counsel without reference to the issues raised in the instant motion. It appears Plaintiffs' counsel intentionally waited until a week prior to the scheduled deposition of Mr. Steele to raise these issues, setting up a feigned justification to cancel the deposition of Mr. Steele yet again – which he did on the evening of February 19, less than 48 hours before the deposition was set to begin.

Plaintiffs' counsel is again attempting to set up yet another request for additional time to move for certification. There is no other explanation for his delay in bringing these issues to the attention of defendants and the court. No further delays should be tolerated.

### **III. Conclusion**

There is no basis in the Civil Rules for the relief Plaintiffs seek. Plaintiffs cannot move to compel production of documents they have failed to request in discovery, and they are not entitled to an order entitling them to a private interview of represented third parties. Those third parties are free to decline an interview for any reason they choose. The motion must be denied.

Respectfully submitted,

/s/ James M. Popson

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Counsel for Defendants

**CERTIFICATE OF SERVICE**

I certify that a copy of the foregoing was filed electronically with the Court on this 22nd day of February, 2019. The parties may access this document through the Court's electronic docket system.

/s/ James M. Popson

James M. Popson (0072773)

**James M. Popson**

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**From:** Mannion, Tom <Tom.Mannion@lewisbrisbois.com>  
**Sent:** Thursday, February 14, 2019 12:18 PM  
**To:** Peter Pattakos; Joshua Cohen  
**Cc:** James M. Popson  
**Subject:** Williams v KNR

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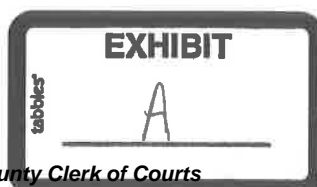
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*Sandra Kurt, Summit County Clerk of Courts*