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' Motion for Clarification of the Court's February 25, 2019 Order**

Plaintiffs hereby request clarification of the Court's February 25, 2019 Order denying the Defendants' motion for a *sua sponte* order regarding Plaintiffs' public communications about this case. (*See* Feb. 25, 2019 Order attached as **Exhibit 1**). Specifically, Plaintiffs request clarification as to point number 6 at page 8 of the Order, which states that, "The January 26, 2019 Facebook post is only misleading and the circumstance presented in Defendants' Motion do not warrant sanctions." It is unclear to Plaintiffs as to whether this sentence was written in error, as it appears to be inconsistent with the holdings made throughout the Order, and there is nowhere else in the Order where the Court finds or explains that any particular portion of the post is misleading and why. Indeed, at page 7, the Court appears to be specifically declining to decide whether the Facebook post at issue is misleading in the sentence beginning with the phrase, "To the extent that the January 26, 2019 Facebook post is misleading ... ."

Thus, Plaintiffs request clarification as to whether (1) the statement at point number 6 on page 8 of the Feb. 25 Order was included in error, and the Court did not intend to hold that the January 26, 2019 Facebook post is misleading, or, (2), if the Court did intend to hold that the Facebook post is misleading, to clarify the extent of this holding by identifying what about the post the Court finds to be misleading and why. Plaintiffs request this clarification in part because (1)

defense counsel has stated to Plaintiffs' counsel that they interpret the Feb. 25 Order as in fact holding that the January 26 post is misleading, and (2) Defendants have repeatedly threatened to sue Plaintiffs' counsel and report them to disciplinary authorities in connection with their representation of the Plaintiffs in this case. *See*, *e.g.,* Nestico Tr. at 582:5–21, 584:17–586:17. To the extent the Defendants intend to follow through on these threats, they will likely seek to use any holding by this Court that Plaintiffs published "misleading" information about them as evidence for their claims, thus underscoring the potential significance of the aspect of February 25, 2019 Order for which Plaintiffs seek clarification.

Respectfully submitted,

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Certificate of Service

The foregoing document was filed on February 25, 2019, using the Court's electronic-filing system, which will serve copies on all necessary parties.

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Attorney for Plaintiffs

IN THE COURT OF COMMON PLEAS
COUNTY OF SUMMIT

MEMBER WILLIAMS, et al.	)	CASE NO.: CV-2016-09-3928
	)	
Plaintiffs	)	JUDGE JAMES A. BROGAN
-vs-	)	
	)	
KISLING NESTICO & REDICK LLC, et al.	)	**DECISION**
	)	
	)	
Defendants		

- - -

This matter comes before the Court upon Defendants' (Kisling, Nestico & Redick, LLC [KNR] and Dr. Sam Ghoubrial) Joint Motion for *Sua Sponte* Order Prohibiting Defamatory Statements or Dissemination of Misleading Information to the Public, Media or Press and Request for Emergency Hearing and Sanctions on Plaintiffs' Counsel.[1]

Defendants ask the court for a *sua sponte* order enjoining Plaintiffs and their counsel, representatives, and agents from engaging in the following conduct:

(1) communicating inaccurate and/or misleading information to the press;

(2) communicating inaccurate and/or misleading information to putative class members;

(3) publishing false, misleading and/or defamatory statements regarding these Defendants in or on any forum, including, but not limited to, social media posts;

(4) ordering Plaintiff and their counsel to immediately remove any and all false, misleading and/or defamatory social media posts about Defendants;

(5) ordering Plaintiffs' counsel comply with the Rules of Professional Conduct relative to his social media posts and his attempts to advertise for putative class members; and

(6) sanctioning Plaintiffs' counsel for his repeated false and defamatory social media posts about Defendants.

[1] Plaintiffs responded in opposition on February 1, 2019; Defendants filed a joint reply brief on February 7, 2019, and; Plaintiffs filed a sur-reply brief on February 13, 2019.

EXHIBIT 1

Defendants assert immediate Court action is necessary to protect the integrity of these proceedings and to protect Defendants from undue prejudice and extra-judicial influence. Defendants acknowledge Plaintiffs' and their counsels' First Amendment right to free speech but they insist they are entitled to protection from Plaintiffs' counsels' 'public smear campaign' and 'false, misleading and malicious social media posts.' Defendants point to a January 26, 2019 post by the Pattakos Law Firm LLC on Facebook, which reads:

> 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.[2]

Defendants assert this Facebook post is misleading and defamatory because it is written to imply that a conspiracy between KNR and Dr. Ghoubrial has already been proven. Defendants also complain that the post intentionally implies that putative class members "might be entitled to recover up to and more than $2,000 in a class-action lawsuit" even though no classes have been certified under Civ.R. 23. Finally, Defendants complain the Facebook post is a poorly disguised advertisement soliciting additional putative class members.

Plaintiffs responded in opposition pointing to the procedural history of this case and the KNR Defendants' previously filed motion for a gag order.[3] Plaintiffs oppose any "gag order" or injunction/order to remove their counsels' Facebook post about this litigation. They characterize the content of the Facebook post as truthful and well within their rights under the First Amendment. Plaintiffs argue the Facebook post truthfully advises the public of (1) the existence of the pending lawsuit, (2) a brief description of some of the proof on which the

[2] The post links to a copy of the Fifth Amended Class Action Complaint filed in this Court on November 28, 2018.
[3] This case was filed in September 2016. In 2017, the judge presiding over this matter issued a sweeping gag order and sealed the entire public docket in this case. As a result, an original action for writs of mandamus and prohibition was filed in the 9th District Court of Appeals. *State ex rel. Advance Ohio Media v. Judge Breaux*, 9th Dist. Summit App. No. 28642. Judge Breaux vacated the gag and sealing orders while the mandamus and prohibition action was pending, rendering it moot.

lawsuit is based, and (3) the possibility that former KNR clients who were treated by Dr. Ghoubrial might be entitled to recover. They also state the post truthfully and legitimately requests that those who wish the participate in the case contact Plaintiffs' counsel. Finally, Plaintiffs point out that since at least September 2018, their counsel occasionally posts updates about the case on the Pattakos Law Firm's Facebook page.[4] But, Defendants' Motion only jointly complained about the Pattakos Law Firm's most recent Facebook post from January 26, 2019.

LAW & ANALYSIS

"Attorneys 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 attorney's extrajudicial statements." *Am. Chem. Soc'y v. Leadscope*, 133 Ohio St.3d 366, 2012 Ohio 4193, ¶90, 978 N.E.2d 832 (citing Prof.Cond.R. 3.6). And, attorneys are entitled to "solicit legal business through printed advertising containing truthful and non-deceptive 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, 195 S.Ct. 2265 (1985).

Restrictions on counsel's speech cannot issue unless specific findings are made showing that the orders are (1) necessary to preserve values higher than litigants' and the public's First Amendment rights, and (2) 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, 566 N.E.2d 1120 (1990); *State ex rel. Vindicator Printing Co. v. Wolff*, 132 Ohio St.3d 481, 2012 Ohio 3328, ¶¶32-37, 974 N.E.2d 89. These findings must be specific, on the record, and must constitute "clear and convincing evidence" that the orders are "essential" to protect higher values that those protected by the First Amendment. *Id*.

Defendants assert a gag order on Plaintiffs' counsels' speech is necessary (1) to prevent harm to their reputations and (2) to preserve their rights to a fair trial.

First, harm to a defendant's reputation resulting from public court filings (or Plaintiffs' counsels' speech about the existence of this case) cannot possibly justify a gag order under the Ohio Supreme Court's "higher interest" standard as set forth above.

[4] See Exhibits attached to Plaintiffs' February 1. 2019 Brief in Opposition.

> 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).

Also, "[t]he private litigants' interest in protecting their vanity of their commercial self-interest simply does not qualify as grounds for imposing a prior restraint." *Gamble Co. v. Bankers Trust Co*., 78 F.3d 219, 225 (6th Cir. 1996)

Second, Defendants failed to demonstrate that their right to a fair trial is jeopardized by Plaintiffs' counsels' speech or the Facebook post. This case is still in the discovery phase and trial is not imminent. Further, any ruling on the upcoming motion to certify classes is immediately final and appealable (likely resulting in a potentially lengthy delay in the appellate court).

But, even if an upcoming trial were 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 prejudiced by publicity that…[the gag order] would prevent and, second, reasonable alternatives…cannot adequately protect defendant's fair trial rights…Moreover, representatives from 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 at 108 (citations and quotations omitted) (overruled on other grounds in *State v. Schlee*, 117 Ohio St.3d 153, 2008 Ohio 545, □10, 882 N.E.2d 431).

The right of public access to these court proceedings cannot be overcome by a conclusory assertion that publicity might deprive these Defendants of the right to a fair trial. The Court has been informed that there has only been moderate media attention to this case since it was filed in 2016. But even if the case had significant media attention, "pretrial publicity – even pervasive, adverse publicity – does not inevitably lead to an unfair trial." See *State v. Coley*, 93 Ohio St.3d 253, 258, 2001 Ohio 1340, 754 N.E.2d 1129 (2001), quoting *Nebraska Press Assn. v. Stuart*, 427 U.S. 539, 563, 96 S.Ct. 2791 (1976).

The "*sua sponte*" gag order these Defendants seek – to ban or enjoin attorney speech about pending litigation – would be an unconstitutional restraint on speech under the First Amendment. See Erwin Chemerinsky, *Lawyers have free speech rights, too: Why gag orders on trial participants are almost always unconstitutional*. 17 Loy. L.A. Ent. L. Rev. 311 (1997).

Gag orders are based on the assumption that pre-trial publicity jeopardizes a fair trial, that statements by lawyers and the parties exacerbate the harm of publicity, and that the benefits of the gag order outweigh the burden on First Amendment rights. Id. at 312-313.

> * * * The [gag] orders are content-based restrictions on speech and therefore subject to strict scrutiny. Moreover, the court orders are prior restraints on speech and the Supreme Court has declared that "prior restraints on speech…are the most serious and least tolerable infringement on First Amendment rights. (*Nebraska Press Ass'n v. Stuart*, 427 U.S. 539, 559 (1976)). The Supreme Court frequently has stated that "[a]ny system of prior restraints of expression comes to this court bearing a heavy presumption against its constitutional validity." (*New York Times Co. v. United States*, 403 U.S. 713, 714 (1971), quoting *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 70 (1963)). Court orders preventing speech are classic forms of prior restraint. Thus gag orders on lawyers and parties should be allowed only if no other alternative would suffice. The Supreme Court has held that attorneys may be disciplined for speech that poses a substantial likelihood of materially prejudicing an adjudicatory proceeding. (*Gentile v. State Bar*, 501 U.S. 1030 (1991)). The assumption underlying gag orders is that such disciplinary proceedings are insufficient and that a prior restraint is necessary.
>
> Unless and until these assumptions are justified, gag orders on attorneys and parties should be regarded as unconstitutional. * * *

Id. at 313.

"In *Gentile* [*v. State Bar*, 501 U.S. 1030 (1991)], the Court held that attorney speech involving pending cases is protected by the First Amendment, but that it can be punished if it poses a substantial likelihood of materially prejudicing an adjudicatory proceeding." *Id*. at 315. "[T]he 'substantial likelihood of materially prejudicing the proceedings' is a 'constitutional permissible balance between the First Amendment rights of attorneys in pending cases and the State's interest in fair trials.'" *Id*. at 361, quoting *Gentile*, 501 U.S. at 1075. "However, *Gentile* only involved the standard for after-the-fact punishment on lawyer speech, not prior restraints." *Id*. (emphasis added).

"[I]n *CBS v. Young*, the Sixth Circuit stated that such a court order 'must be subjected…to the closest scrutiny.'" *Id*. at 317 quoting *CBS v. Young*, 522 F.2d 234, 238. The *CBS* case involved civil litigation about the killing of Kent State University students by the National Guard during a campus demonstration on May 4, 1970. *Id*. "[T]he district court entered a gag order that prohibited all parties to the litigation, as well as their relatives, friends, and associates from discussing 'in any manner whatsoever these cases with the news media or the public.'" *Id*., quoting *CBS Inc. v. Young*, 522 F.2d 234 at 236. "The Court of Appeals found the order was an 'extreme example of a prior restraint upon freedom of speech and expression.'" *Id*., quoting *CBS Inc. v. Young*, 522 F.2d at 240. The Court found such broad gag orders impair the First Amendment rights of the press and the public to gather and discuss information and therefore, to meet judicial approval, the statements "must pose a clear and present danger, or a serious and imminent threat to a competing protected interest" and "must be narrowly drawn and cannot be upheld if reasonable alternatives are available having a lesser impact on First Amendment freedoms." *Id*. at 317-318, quoting *CBS v. Young*, 522 F.2d at 238 and 239.

> The Sixth Circuit reaffirmed this test in *United States v. Ford* [830 F.2d 596 (6th Cir. 1987)]. In this highly publicized case involving mail and bank fraud charges against United States Congressmember Harold Ford of Tennessee, the district court entered an order that prohibited Ford from making any "extrajudicial statement that a reasonable person would expect to be disseminated by means of public communication. The court stated that the *Nebraska Press* test, which concerns gag orders on the press, should apply to gag orders on trial participants. The court explained that "any restrictive order involving a prior restraint upon First Amendment freedoms is presumptively void and may be upheld only on a basis of a clear showing that an exercise of First Amendment rights will interfere with the rights of the parties to a fair trial. In order to validate such a prior restraint against speech, the speech must pose a "'serious and imminent threat' of a specific nature, the remedy for which can be narrowly tailored in an injunctive order." The court also noted that there must be a finding that "less burdensome alternatives of voir dire, sequestration, or change of venue" will not suffice to protect a fair trial.

Id. at 318 (internal citations omitted).[5]

[5] *Nebraska Press Ass'n v. Stewart*, 427 U.S. 539 (1976)

CONCLUSION

The actions these Defendants ask this Court to take with their Motion for *sua sponte* order are extraordinary and unwarranted under the circumstances. In light of all of the above authority and the heavy burdens that must be met for gag orders on counsel's speech during civil litigation, this Court holds such a request in civil litigation must be in the nature of an injunction. See *State ex rel. National Broadcast Co v. Court of Common Pleas of Lake County*, 52 Ohio St.3d 104, 108-109, 566 N.E.2d 1120 (indicating the standards under Civ.R. 65 [for an injunction] in civil cases should be met). Since Defendants failed to offer any justification under Civ.R. 65, their Motion does not merit a hearing.

However, to the extent that the January 26, 2019 Facebook post is misleading, the Court makes clear (1) a conspiracy between KNR and Dr. Ghoubrial has not proven and (2) the claims in the Fifth Amended Class-Action Complaint have not been certified for class action under Civ.R. 23 at this stage of the proceedings.

IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED that:

(1) Defendants request to gag or enjoin Plaintiffs and their counsel from communicating inaccurate and/or misleading information to the press is DENIED.

(2) Defendants request to gag or enjoin Plaintiffs and their counsel from communicating inaccurate and/or misleading information to putative class members is DENIED.

(3) Defendants request to gag or enjoin Plaintiffs and their counsel from publishing false, misleading and/or defamatory statements regarding these Defendants in or on any forum, including, but not limited to, social media posts is DENIED. Even allegedly defamatory statements cannot be subject to a prior restraint. Defendants remedy for alleged defamatory statements is a lawsuit for defamation (not a prior restraint on speech). Were these Defendants to bring a defamation suit on these facts, they would bear to burden of proving the statements are defamatory.

(4) Defendants request to gag or enjoin Plaintiffs' counsel by ordering Plaintiff and their counsel to immediately remove any and all false, misleading and/or defamatory media posts about Defendants is DENIED. Even allegedly defamatory statements cannot be subject to a prior restraint. Defendants remedy for alleged defamatory statements is a lawsuit for defamation (not a prior restraint on speech).

Were these Defendants to bring a defamation suit on these facts, they would bear to burden of proving the statements are defamatory.

(5) Defendants request to gag or enjoin Plaintiffs' counsel by ordering Plaintiffs' counsel comply with the Rules of Professional Conduct relative to his social media posts and his attempts to advertise for putative class members is DENIED. Plaintiffs' counsel has a right to advertise for putative class members. If these Defendants in good faith believe that Plaintiffs' counsel has violated the Rules of Professional Conduct they should file a complaint with Disciplinary Counsel.[6]

(6) Defendants request that this Court sanction Plaintiffs' counsel for his repeated false and defamatory social media posts about Defendants is DENIED. The January 26, 2019 Facebook post is only misleading and the circumstance presented in Defendants' Motion do not warrant sanctions.

IT IS THEREFORE ORDERED that Defendants' (KNR and Ghoubrial) Joint Motion for *Sua Sponte* Order Prohibiting Defamatory Statements or Dissemination of Misleading Information to the Public, Media or Press and Request for Sanctions on Plaintiffs' Counsel is OVERRULED IN ITS ENTIRETY.

IT IS SO ORDERED.

JUDGE JAMES A. BROGAN
Sitting by Assignment #18JA1214
Pursuant to Art. IV, Sec. 6
Ohio Constitution

CC: ALL COUNSEL / PARTIES OF RECORD

[6] Defendants' suggestion that Plaintiffs' counsel has violated Prof.Cond.R. 7.1 and 7.3 is incorrect. See Defendants' February 7, 2019 Joint Reply Brief. Plaintiffs' January 26, 2019 Facebook post is not directed at a specific person, but is instead directed to the public at large.