

IN THE COURT OF COMMON PLEAS
SUMMIT COUNTY, OHIO

<p>MEMBER WILLIAMS, <i>et al.</i>,</p> <p style="text-align: center;">Plaintiffs,</p> <p style="text-align: center;">vs.</p> <p>KISLING, NESTICO & REDICK, LLC, <i>et al.</i>,</p> <p style="text-align: center;">Defendants.</p>	<p>Case No. 2016-CV-09-3928</p> <p>Judge James Brogan</p> <p>Reply in Support of Plaintiffs’ Motion to Compel Production of KNR’s Settlement Agreements with Robert Horton and Paul Steele, and Motion for Protective Order regarding KNR’s Confidentiality Agreements with its Employees</p>
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I. Introduction

In asking the Court to deny Plaintiffs’ access to a “confidential” settlement agreement between KNR and former KNR attorney Paul Steele,¹ the KNR Defendants have incorrectly asserted that a motion to compel may never be based on an informal request for documents, particularly where the requested documents are responsive to other pending requests. The KNR Defendants also misrepresent Plaintiffs’ Feb. 14, 2019 motion to compel as including “a request to compel a private interview with represented third parties.” Contrary to this misrepresentation, Plaintiffs merely seek an order that former KNR employees subject to confidentiality agreements with the firm may communicate with Plaintiffs—through counsel or otherwise—about information relevant to this case subject to the protective order in this case without fear of the same type of retaliatory lawsuit to which the KNR Defendants subjected (and by which they silenced) Mr. Horton.

Thus, as explained more fully below and in Plaintiffs’ Feb. 14 Motion to Compel, the Court should issue an order (A) compelling production of Mr. Steele’s settlement agreement, because it is

¹ The KNR Defendants agreed to produce their settlement agreement with Mr. Horton in the middle of his deposition, which took place earlier this week on Feb. 25 and 26. Thus, the portion of Plaintiffs’ Feb. 14, 2019 motion pertaining to the Horton settlement agreement is now moot.

(1) not privileged; (2) otherwise discoverable; and (3) responsive to currently pending document requests that Plaintiffs have previously served; and (B) confirming that former KNR employees subject to confidentiality agreements may communicate with parties to this case about the facts at issue in this case subject to the confidentiality provisions contained in the Sept. 12, 2017 protective order.

II. Facts, Law, and Argument

A. The Court should order Defendants to produce their settlement agreement with Paul Steele and any documents pertaining to the related dispute.

1. The lack of a “formal request” does not preclude a motion to compel.

Generally, when a party **completely ignores** an informal discovery request from opposing counsel, the requesting party “may not use another party’s failure to respond to an informal discovery request as a catalyst to filing a motion to compel.” *Lujan v. Exide Technologies*, D.Kan. No. 10-4023-JTM, 2011 U.S. Dist. LEXIS 45579, at *7 (Apr. 27, 2011).

But the KNR Defendants have overstated the rule.² “[W]hen one party responds to another’s informal request,” for example, by refusing to produce the requested information, “resort to a motion to compel is an acceptable next step.” *Lujan v. Exide Technologies*, D.Kan. No. 10-4023-JTM, 2011 U.S. Dist. LEXIS 45579, at *7 (Apr. 27, 2011). In such instances, the mere fact that the request was informal “does not preclude [a] motion to compel.” *M.M. v. Yuma Cty.*, D.Ariz. No. 2:07-cv-01270 JWS, 2011 U.S. Dist. LEXIS 130778, at *3 (Nov. 10, 2011). *See also Armamburu v. Healthcare Fin. Servs.*, E.D.N.Y. No. CV 2002-6535 (ARR) (MDG), 2007 U.S. Dist. LEXIS 49039, at

² Due to the dearth of Ohio case law on point, the Court need not deny Plaintiffs’ motion to compel Mr. Steele’s settlement agreement with KNR by distinguishing between a “formal” and “informal” discovery request. Some local rules even encourage this route of discovery practice. *See, e.g., Hughes v. Greene*, C.P. No. 14-CV-3939, 2015 Ohio Misc. LEXIS 12891, at *2 (Jan. 30, 2015) (“Local Rule 47.01 ... requires counsel to ‘freely exchange discoverable information and documents upon informal request’ ... it is essential that defendant provide all the requested documents to plaintiff and do so expeditiously.”).

*8-10 (July 6, 2007) (compelling defendant to produce documents requested by informal letter, because “by drawing the distinction of form over substance,” the defendant “continue[d] to remain non-compliant in providing further demanded discovery.”).

Here, the KNR Defendants did not ignore Plaintiffs’ informal request for the production of the settlement agreement between the KNR Defendants and Mr. Steele. Instead, they acknowledged Plaintiffs’ informal discovery request by refusing to produce the requested settlement agreement. On January 18, 2019, Plaintiffs’ counsel emailed counsel for the KNR Defendants asking that they produce the settlement agreement between KNR and Mr. Steele. Plaintiffs also communicated that the agreement between KNR and Mr. Steele was responsive “to a number of Plaintiffs’” prior document requests. *See* Ex. 3 to Plaintiffs’ Feb. 14, 2019 Motion to Compel, at 2; *See also* Section II.A.2 immediately below. In response, the KNR Defendants specifically refused to produce the settlement agreement based on their position that they could not produce a “confidential” settlement agreement. *See* Plaintiffs’ Feb. 14, 2019 Motion to Compel at 1.

Because the KNR Defendants have refused to produce documents responsive to Plaintiffs’ document request, “resort to a motion to compel is an acceptable next step.” *Lujan*, at *7. Moreover, Plaintiffs were not required to file a formal request because, as discussed below, the agreement is responsive to another currently pending document request.

2. In any event, the settlement agreement of Mr. Paul Steele is responsive to Plaintiffs’ currently pending “formal” requests.

The KNR Defendants insist that this motion be “summarily denied” because “Plaintiffs’ counsel has not issued a discovery request to Defendants seeking the documents referenced in this [t]his Motion.” KNR Opposition, at 1. But the requested settlement agreement is plainly responsive to other requests Plaintiffs have propounded on the KNR Defendants throughout this lawsuit. For example, in Plaintiffs’ third set of requests for production of documents, Plaintiffs formally requested from the KNR Defendants:

All documents, including emails, text messages, or demand letters, reflecting or containing threats of litigation, or the suggestion of possibility of litigation, by any Defendant against any ... attorney or law firm, including attorneys who ... worked for KNR.

See RFP No. 3-61, attached as **Exhibit 1**. By its terms, this request applies to any document relating to the making, stating, or suggesting that the KNR Defendants might pursue litigation against Mr. Paul Steele, who was a former attorney for the KNR Defendants. A settlement agreement containing any terms or conditions, including terms of confidentiality, certainly explains or suggests that the KNR Defendants have the right to pursue litigation for any such breach. Thus, the settlement agreement between KNR and Mr. Steele falls squarely within RFP No. 3-61, which was propounded through a “formal” request, and which the KNR Defendants must respond to in order to comply with their obligations under Civ.R.34.³ Additionally, Mr. Steele’s counsel has informed Plaintiffs’ counsel that Mr. Steele would not oppose production of the settlement agreement and related documents with the KNR Defendants’ consent. Mr. Steele has been served with a copy of this motion, through counsel, and has not indicated any opposition to it.

B. The Court should enter an order providing that former KNR employees subject to confidentiality agreements are permitted to share relevant and discoverable information about this case with any party, subject to the pending September 12, 2017 protective order.

The KNR Defendants offer no explanation as to why the confidentiality agreements they forced their employees to sign should prohibit former employees from sharing discoverable information about the claims in this case subject to the Sept. 12, 2017 protective order. Instead, they misrepresent Plaintiffs’ motion as “request[ing] to compel a private interview with represented third

³ As fully explained in Plaintiffs’ Motion to Compel the Production of the KNR’s Settlement Agreements, the KNR Defendants may not refuse to produce Mr. Steele’s settlement agreement on the basis of “confidentiality” because “confidential” settlement agreements are not privileged. See, e.g., *Oberthaler v. Ameristep Corp.*, N.D. Ohio No. 5:08-cv-1613, 2010 U.S. Dist. LEXIS 37367, at *4 (Apr. 13, 2010) (“[L]itigants may not shield otherwise discoverable information from disclosure to others merely by agreeing to maintain its confidentiality.”).

parties,” and insist that it is their “contractual right” that Plaintiffs may not communicate with their former employees about the facts at issue in this case outside the context of a deposition. Reply at 3.

First, it is simply untrue that Plaintiffs are requesting “private interviews with represented third parties.” Rather, Plaintiffs merely seek an order that former KNR employees subject to confidentiality agreements with the firm may communicate with Plaintiffs—through counsel or otherwise—about information relevant to this case subject to the protective order in this case without fear of the same type of retaliatory lawsuit to which the KNR Defendants subjected (and by which they silenced) their former employee Robert Horton.

Second, there is no good reason for the Court to allow Defendants to continue to hamper Plaintiffs’ investigation of their claims by enforcing their confidentiality agreements so that Plaintiffs may only communicate with KNR’s former employees on the record, in KNR’s presence, at depositions. The pending protective order dated September 12, 2017 protects against any legitimate concerns about legitimately confidential information. And testimony recently provided by Kelly Phillips (on Feb. 22, 2019) and Mr. Horton (on Feb. 25–26, 2019) confirms that both of these former KNR attorneys were hesitant to communicate with Plaintiffs counsel about the facts at issue in this case because they feared retaliation from KNR for doing so.⁴ Such fears have no place in litigation in U.S. courts, particularly where a protective order is already in place and where such little need for confidentiality is apparent.

III. Conclusion

For the foregoing reasons, and those stated in Plaintiffs’ Feb. 14, 2019 motion to compel, the Court should grant the motion, ordering Defendants to produce their settlement agreement with Paul Steele and related documents, and confirming that former KNR employees subject to

⁴ The transcripts for Mr. Phillips’ and Mr. Horton’s depositions have not yet been completed but will be filed by Plaintiffs no later than immediately upon receipt of Defendants’ confidentiality designations to this testimony.

confidentiality agreements may communicate with parties to this case about the facts at issue in this case subject to the confidentiality provisions contained in the Sept. 12, 2017 protective order

Respectfully submitted,

/s/ Rachel Hazelet

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Certificate of Service

The foregoing document was filed on February 28, 2019, using the Court's electronic-filing system, which will serve copies on all necessary parties.

/s/ Rachel Hazelet

Attorney for Plaintiffs

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<p>DEFENDANTS' SECOND AMENDED RESPONSES TO PLAINTIFFS' THIRD SET OF REQUESTS FOR PRODUCTION OF DOCUMENTS TO ALL DEFENDANTS</p>	

Pursuant to Rule 34 of the Ohio Rules of Civil Procedure, Defendants Kising, Nestico & Redick, LLC ("KNR"), Alberto R. Nestico, and Robert Redick (collectively "Defendants") object and respond as follows to Plaintiffs' Third Set of Requests for Production of Documents ("Document Requests"):

GENERAL OBJECTIONS

1. Defendants object to Plaintiffs' Document Requests to the extent that they seek information protected by the attorney-client privilege, work product doctrine, the joint defense and common interest privilege, and other applicable privileges and rules. Specifically, some requests of Plaintiffs' Document Requests seek information and communications between Plaintiffs and KNR and between putative class members and KNR that are protected by the attorney-client privilege, work product doctrine, ethical and professional rules governing attorneys, or other applicable privileges. By filing this

lawsuit and attaching the Settlement Statement to her Class Action Complaint, Plaintiffs have waived the attorney-client privilege and all other applicable privileges, as those privileges apply to only them, and not to putative class members.

2. Defendants object to the “Instructions” and “Definitions” preceding Plaintiffs’ Document Requests on the grounds that they are vague, ambiguous, seek irrelevant information not reasonably calculated to lead to the discovery of admissible evidence, and seek to impose obligations on Defendants that are greater than, or inconsistent with, those obligations imposed by the Ohio Rules of Civil Procedure. Defendants will respond to these Document Requests in accordance with its obligations under the Ohio Rules of Civil Procedure.

3. Defendants object as overly broad and unduly burdensome to the extent that a request for documents seeks information relating to Medical Service Providers or Chiropractors other than Akron Square Chiropractic (“ASC”).

4. Defendants object as overly broad and unduly burdensome to the extent a request for documents seeks information relating to Litigation Finance Companies other than Liberty Capital Funding, LLC (“Liberty Capital”).

5. Defendants object that there are no date limitations on these requests, which makes them overly broad and unduly burdensome.

6. Defendants object to the extent that requests are based on illegally obtained documents. Plaintiff should not be able to take advantage of the illegally obtained documents. *See Raymond v. Spirit AeroSystems Holdings, Inc.*, Case No. 16-1282-JTM-GEB, 2017 U.S. Dist. LEXIS 101926 (D. Kan. June 30, 2017).

7. Defendants object that the terms "investigation fee," "investigative fee," and "investigatory fee" are vague, ambiguous, and undefined. Defendants will interpret these terms to mean the flat fee paid to investigators by KNR that are similar to the \$50 fee paid to MRS Investigations, Inc. in Plaintiff Williams' case. All of Defendants' answers to requests involving these terms are based on Defendants' definition of those terms as outlined above.

8. Defendants state that they and the firm's IT vendor cannot conduct Boolean searches.

9. Defendants object that the Document Requests are overly broad and unduly burdensome in that there are no date limitations on the requests.

10. Defendants reserve their right to amend their responses to these Document Requests.

11. Defendants deny all allegations or statements in the Document Requests, except as expressly admitted below.

12. These "General Objections" are applicable to and incorporated in each of Defendants' responses to the Document Requests. Moreover, Defendants' responses are made subject to and without waiving these objections. Failing to state a specific objection to a particular Document Request should not be construed as a waiver of these General Objections.

13. Defendants' discovery responses are made without a waiver of, and with preservation of:

- a. All questions as to competency, relevancy, materiality, privilege, and admissibility of the responses and the subject matter thereof as evidence for any purpose in any further proceedings in this action and in any other action;

- b. The right to object to the use of any such responses or the subject matter thereof, on any ground in any further proceedings of this action and in any other action;
- c. The right to object on any ground at any time to a demand or request for a further response to the requests or other discovery involving or relating to the subject matter of the Document Requests herein responded to;
- d. The right at any time to revise, correct, add to, supplement, or clarify any of the responses contained herein and to provide information and produce evidence of any subsequently discovered facts;
- e. The right to assert additional privileges; and
- f. The right to assert the attorney-client privilege, attorney work product doctrine, or other such privilege as to the discovery produced or the information obtained therefrom, for any purpose in any further proceedings in this action and in any other action.

REQUESTS FOR PRODUCTION OF DOCUMENTS

Please produce the following documents:

1. All documents completing all of the "chain[s] of email" you repeatedly identify in your Answer to the Second Amended Complaint, or supplying the "context" to which emails have been "taken out of" as you repeatedly allege in your Answer. Please organize your response to this request by identifying the paragraph of the Second Amended Complaint to which each document pertains.

RESPONSE: See documents bates stamped KNR03342-KNR03396.

2. All documents reflecting communications between any Defendant or KNR employee and Ciro Cerrato or Liberty Capital Funding not related to a specific client matter.

RESPONSE: Defendants have produced documents generated from searches of Rob Nestico's and Robert Redick's electronic mail for "Ciro" or "Cerrato," see documents bates stamped KNR03433-03650.

3. All documents reflecting any financial interest any Defendant or employee of KNR might have had in Liberty Capital Funding.

the lawsuit *Kisling Nestico & Redick, LLC v. James E. Fonner*, Franklin County Common Pleas Case No. 15-CV-003216.

RESPONSE: Objection. Defendants object that this request seeks irrelevant documents that are not reasonably calculated to lead to the discovery of admissible evidence.

61. All documents, including emails, text messages, or demand letters, reflecting or containing threats of litigation, or the suggestion of the possibility of litigation, by any Defendant against any Medical Service Provider or other attorney or law firm, including attorneys who work or worked for KNR.

RESPONSE: Objection. Defendants object that this request seeks irrelevant documents that are not reasonably calculated to lead to the discovery of admissible evidence.

62. All documents relating to Naomi Wright, including relating to any disclosures made to Wright regarding KNR's ongoing business/referral relationship with Akron Square Chiropractic.

RESPONSE: See response to Request No. 13, above. See documents bates stamped KNR00761-01427 (Plaintiff Wright).

63. All documents relating to Matthew Johnson, including relating to any disclosures made to Johnson regarding KNR's ongoing business/referral relationship with Liberty Capital Funding.

RESPONSE: Objection. Defendants object that this request seeks confidential and proprietary information. Subject to and without waiving these objections, see response to Request No. 13. See documents bates stamped KNR01428-01682 (Plaintiff Johnson).

64. All documents reflecting communications with "Attorney at Law Magazine."

RESPONSE: Objection. Defendants object that this request seeks irrelevant documents that are not likely to lead to the discovery of admissible evidence.

65. All documents reflecting payments of any kind to "Attorney at Law Magazine."

RESPONSE: Objection. Defendants object that this request seeks irrelevant

documents that are not likely to lead to the discovery of admissible evidence.

66. All documents reflecting or containing policies and procedures regarding reviews on Google, Facebook, and other websites, including all documents reflecting any instructions or suggestions to employees regarding these reviews.

RESPONSE: Objection. Defendants object that this request seeks irrelevant documents that are not likely to lead to the discovery of admissible evidence.

As to objections,



Respectfully submitted,



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CERTIFICATE OF SERVICE

A copy of the foregoing Defendants' Second Amended Responses to Plaintiffs' Third Set of Requests for Production of Documents to All Defendants was sent this 17th day of September, 2018 to the following via electronic Mail:

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