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 Sanctions re: the KNR Defendants' Counterclaims**

I. Introduction

Shortly after this lawsuit was filed, and only four days after it was transferred from Cuyahoga to Summit County after a contentious dispute over venue, the KNR Defendants followed through on various threats communicated by defense counsel by filing counterclaims against Named Plaintiff Member Williams, who, at the time, was the only Plaintiff in the case. These counterclaims, that Defendants have since asserted against the other five former KNR clients who have since sought to join this suit as Plaintiffs, all depended on the notion that the allegations at issue are "defamatory."[1]

Not only are such claims contrary to black-letter law holding that statements made during and related to judicial proceedings are privileged; Under the circumstances here, they constitute an attack on the civil justice system and a serious threat to the ability of ordinary citizens to access Ohio courts. Indeed, courts in Ohio and elsewhere, as well as a majority of legislatures across the U.S., have recognized such tactics as "strategic lawsuits against public participation" ("SLAPP" suits), where moneyed parties institute legal claims, "generally," as here, "for

[1] A copy of the KNR Defendants' most recently filed set of amended counterclaims, dated 12/12/2018, is attached as **Exhibit 1**.

defamation, tortious interference with business or contract, ... or abuse of process," "not necessarily to 'win' the lawsuit, but rather to deter public participation in the democratic process" and "intimidate citizens into silence." *Tri-County Concrete Co. v. Uffman-Kirsch*, 8th Dist. Cuyahoga No. 76866, 2000 Ohio App. LEXIS 4749, at *16-18 (Oct. 12, 2000) quoting *Opinion of the Justices* (N. H. 1994), 138 N.H. 445, 448, 641 A.2d 1012, 1013-1014.

While the task of "identifying SLAPPs, which typically appear as ordinary lawsuits," can "present[ ] difficulties" (*Id.* at *17), here, the improper nature of the counterclaims is confirmed by their utter meritlessness, both legally and factually—particularly given the great detail and documentation with which Plaintiffs' claims have been pleaded and supported. To wit, only three days before Plaintiffs had the opportunity to question KNR's owner, Defendant Nestico, about the counterclaims at his deposition, the KNR Defendants voluntarily dismissed them without prejudice. Then, at the deposition—after (1) testifying that he filed the counterclaims "so that [the Plaintiffs] know what it's like to get sued," (2) explaining that his basis for filing them was that "everything about [this lawsuit]," "every claim," "all the allegations" are "frivolous," and (3) failing to identify a single contract or business relationship with which Plaintiffs had tortiously interfered—Nestico refused, on the advice of counsel, to answer any further questions about the counterclaims on grounds that they had been dismissed. Nestico Tr. at 656:9–658:7. This testimony, along with Nestico's well-documented habit of filing or threatening litigation against anyone who dares question or compete with his business, and his express acknowledgement, in communicating such threats, about how difficult it is to "go to war with someone who has a lot more money" (discussed below), leaves no doubt as to the improper purpose behind the counterclaims.

While Ohio has not yet adopted an anti-SLAPP statute, Defendants' conduct falls squarely within the ambit of R.C. 2323.51, which was enacted to deter the frivolous filing of

unwarranted claims and any legal action taken for an improper purpose. Plaintiffs do not proceed lightly in filing yet another motion and request for sanctions in a lawsuit that has already seen too many of both, but Defendants' counterclaims—transparently intended to manipulate venue and intimidate Plaintiffs, potential class members, and witnesses from participating in the case—constitute a severe abuse that should not stand uncorrected by this Court.[2] Thus, sanctions should be imposed under R.C. 2323.51 as explained further below.

II. Facts

Plaintiffs, victims of automobile accidents who sought legal representation from KNR, filed this class-action lawsuit in Cuyahoga County, where KNR operates from three offices. *See Member Williams v. Kisling, Nestico & Redick, LLC, et al.*, Cuyahoga County Common Pleas No. CV-16-866123. Before answering the complaint, the KNR Defendants moved to transfer venue

[2]Plaintiffs would have preferred to wait to file this motion until the conclusion of this case, at which point the frivolous nature of the counterclaims will be maximally clear, but Ohio courts are split as to whether the 30-day deadline for filing a motion under R.C. 2323.51(B)(1) tolls from the date of voluntary dismissal of the subject claims or upon final disposition of the entire case. *Compare Baker v. AK Steel Corp.*, 12th Dist. Butler No. CA2005-07-188, 2006-Ohio-3895, ¶ 25-26 (finding that a voluntary dismissal "constituted the final judgment," and the trigger for R.C. 2323.51's statutory timeframe, because "the time frame within which a R.C. 2323.51. motion for sanctions is filed cannot be perpetual.") and *Nancy Lowrie & Assocs., LLC v. Ornowski*, 8th Dist. Cuyahoga No. 100694, 2014-Ohio-3718, ¶ 7 ("In order to give effect to the legislative intent behind the statute, Ohio courts have interpreted a Civ.R. 41(A) voluntary dismissal as the triggering event for the filing of sanctions," thus, the trial court may not consider a "motion for sanctions" that "was not filed within the time limit set forth in the statute") with *Merino v. Salem Hunting Club*, 7th Dist. Columbiana No. 11 CO 2, 2012-Ohio-4553, ¶ 9-13 ("There is no final judgment when a case is voluntarily dismissed. ... The triggering event for starting the 30-day time period in R.C. 2323.51 is a 'final judgment' ... .") and *Baryak v. Lange*, 11th Dist. Trumbull No. 2017-T-0036, 2017-Ohio-9348, ¶ 33 ("When an action has been voluntarily dismissed once, is re-filed, and a final order is issued in the re-filed case, the trial court may consider whether fees should be awarded pursuant to R.C. 2323.51 from the date of the initial filing until the date of final judgment.").

to Summit County. On September 8, 2016, the Cuyahoga County court granted the KNR Defendants' motion over Plaintiffs' objection and request for a stay, and four days later defense counsel sent Plaintiffs the first of several letters threatening baseless litigation against them for making allegedly "false, misleading, and defamatory statements" in "soliciting putative class members" for the lawsuit. *See* **Exhibit 2**, 09/12/16 letter from Mr. Sutter to Mr. Pattakos. Plaintiffs' counsel responded by notifying the KNR Defendants that that any lawsuit KNR might file in connection with the case would be "frivolous and sanctionable under Civ.R. 11 and R.C. 2323.51 as lacking legal basis or evidentiary support." **Exhibit 3**, 09/13/16 letter from Mr. Chandra to Mr. Sutter. The KNR Defendants nevertheless continued to level threats against Plaintiffs and their counsel, including allegations regarding violations of the Ohio Rules of Professional Conduct that this Court has since held to be meritless. **Exhibit 4**, 09/14/16 letter from Mr. Sutter to Mr. Chandra, citing Prof.Cond.R. 7.3 ("It is clear by your response that you are unaware of Rule 7.3 of the Ohio Rules of Professional Conduct"); 02/25/2019 Court order at 8, fn 6 ("Defendants' suggestion that Plaintiffs' counsel has violated Prof.Cond.R. 7.1 and 7.3 is incorrect.").

Defendants' scare tactics reached a new level a few days later, on September 20, just four days after the case first appeared on the Summit County docket, when the KNR Defendants filed their counterclaims against Named Plaintiff Member Williams—for abuse of process, tortious interference, deceptive trade practices under R.C. 4165.02, and frivolous conduct under R.C. 2323.51. By filing these counterclaims, which have since been serially filed against each of the five additional Plaintiffs to later join the case, the Defendants neutralized the ability of Plaintiffs—who had asked the Court to permit them the opportunity to locate a Cuyahoga County resident to serve as an additional Named Plaintiff before deciding whether to transfer venue—to voluntarily dismiss the case under Civ.R. 41(A) and refile. *See* Plaintiffs conditional motion to stay

proceedings, filed in Cuyahoga County on 09/06/2016. Approximately six months later, when Plaintiffs sought leave to add new detailed and well-documented claims to the lawsuit, Defendants moved for a gag order against Plaintiffs and their attorneys, as well as for sanctions, and an injunction against their right to communicate with the public about the case, an effort that Defendants reprised again only a month ago. *See*, *e.g.*, Defendants' motions filed 03/23/2017, 01/30/2019.

On February 4, 2019, just three days before Defendant Nestico's deposition, the KNR Defendants voluntarily dismissed the counterclaims without prejudice, apparently to avoid discovery as to their frivolous nature. This was confirmed at the deposition, where Nestico testified as follows:

> Q. Why did you sue the plaintiffs, Mr. Nestico?
>
> MR. MANNION: Objection.
>
> A. Abuse of process. There's a number of claims.
>
> Q. I know what the claims are. What did you hope to accomplish by suing them?
>
> A. What did I hope to accomplish --
>
> Q. Yes, sir.
>
> A. -- so that they know what it's like to get sued. They're the ones who brought this action for no good basis.
>
> Q. How did they abuse process?
>
> MR. MANNION: Objection.
>
> A. This entire lawsuit is an abuse.
>
> Q. How?
>
> A. Because it's frivolous.
>
> Q. The lawsuit is frivolous?

A. Absolutely.

Q. And what makes it frivolous?

A. Everything about it. Every claim. All the allegations.

Q. Every single one?

A. I have a problem with all of them.

Q. Okay. And you sued them for tortious interference, too, didn't you?

A. Okay.

Q. What contracts did they interfere with?

A. I relied on my lawyers to figure that out and that's what they put in there.

Q. But you can't identify a single contract --

A. It's the --

Q. -- or business relationship that they interfered with?

A. What do you mean --

Q. That they --

A. -- contract --

MR. MANNION: Let him finish.

A. The only contract that we have with the client is a contingency fee agreement.

Q. Well, when you sue for tortious interference you have to -- there has to be a contract or a specific business relationship that was interfered with. So what business relationship did you lose or what contract did you lose –

MR. MANNION: I'm going to object.

Q. -- as a result of the lawsuit?

MR. MANNION: No, look, if and when these are re-filed, you can ask these questions.

Nestico Tr. 656:9–658:7. On counsel's advice, Nestico refused to answer any further questions about the counterclaims.

III. Law and Argument

Courts in Ohio and nationwide, as well as a majority of legislatures across the U.S., have recognized a trend by which moneyed parties institute "strategic lawsuits against public participation ("SLAPP")," which are "devastating to individual [parties]" and "act to chill criticism and debate." *Murray v. Chagrin Valley Publishing Co.*, 2014-Ohio-5442, 25 N.E.3d 1111, ¶ 40 (8th Dist.). In identifying this trend, the 8th District has quoted the New Hampshire Supreme Court's observation that SLAPPs "are employed as a strategy to win an underlying economic battle, political fight, or both," to "deter public participation in the democratic process by chilling debate on public and political issues." *Tri-County Concrete Co. v. Uffman-Kirsch*, 8th Dist. Cuyahoga No. 76866, 2000 Ohio App. LEXIS 4749, at *16-18 (Oct. 12, 2000) quoting *Opinion of the Justices* (N. H. 1994), 138 N.H. 445, 448, 641 A.2d 1012, 1013-1014. Additionally, in describing the defining characteristics of SLAPP suits, the New Hampshire court enumerated a series of factors that are precisely at issue in this case:

(1) that SLAPPs "are filed in response to," *inter alia*, actions concerning "the accountability of professionals,"

(2) where such actions, "implicate[ ] the constitutional rights of free speech and to petition for the redress of grievances,"

(3) where "the type of legal claim is generally a claim for defamation, tortious interference with business or contract, civil conspiracy or abuse of process," *inter alia*, and,

(4) that "SLAPP filers are typically real estate developers, property owners," *inter alia.*

Id at *17–18. *See also* Nestico Tr. at 490:21–24; 533:8–535:3, 664:18–21.

While the Ohio legislature has not yet adopted an anti-SLAPP statute (despite the call from courts that it do so (*See Murray* at ¶ 40)),[3] the conduct at issue here falls squarely under R.C. 2323.51, which was enacted to deter the frivolous filing of unwarranted claims and any legal action taken for an improper purpose. *See Tri-County Concrete Co.*, 2000 Ohio App. LEXIS 4749, at *19 (observing that "the Ohio General Assembly has not yet chosen to enact anti-SLAPP legislation," and noting that "any party faced with this kind of lawsuit may avail herself of [R.C. 2323.51], which affords to the grievant ample relief including attorney fees"). Under the statute, "any party adversely affected by the frivolous conduct of another may file a motion for an award of court costs, reasonable attorneys' fees, and other reasonable expenses incurred in connection with the civil action ... ." Conduct is "frivolous" when it satisfies one or more of the following:

[3] *See also* **Exhibit 5**, Frantz Ward Attorneys at Law, "Anti-SLAPP Bill Introduced in the Ohio Senate" (Oct. 9, 2017), available at https://www.frantzward.com/news-blog/october-2017/anti-slapp-bill-introduced-in-ohio-senate (accessed March 6, 2019) ("Last week four Republican State Senators introduced the Ohio Citizen Participation Act in the General Assembly, a bill that would add Ohio to the list of 28 other states with an anti-SLAPP law on the books. ... Under current law, an Ohio court can award sanctions against a party and its attorney for filing a frivolous defamation lawsuit. ... In reality, though, sanctions can be difficult to obtain—often only being awarded after a lawsuit is concluded and the defendant has incurred thousands of dollars in attorney fees following months of litigation. Recognizing this unfortunate fact, the Act is modeled after laws in other states (including Texas and Nevada) to allow Courts to dispose of meritless cases in a more expeditious manner."); **Exhibit 6**, Olivia Wile, "Ohio Citizen Participation Act makes reappearance in Senate," Ohio News Media Association (June 8, 2018), available at https://www.ohionews.org/aws/ONA/p t/sd/news_article/17210/_PARENT/layout_details/false (accessed March 6, 2019) ("More than eight months since its initial appearance in front of the Senate, the much-anticipated second hearing for the Ohio Citizen Participation Act was held Wednesday in the Ohio Senate. ... If the bill, along with hundreds of others, does not get passed by Dec. 31, it will die unless resurrected in 2019. Supporters say the bill would give Ohio the country's best 'anti-SLAPP' law: one that would expedite court processes while also protecting First Amendment rights, even in the digital realm. ... The impetus for ONMA's support was a high-profile libel action against the Chagrin Falls newspaper for its coverage of a protest against Murray Energy Co. The newspaper eventually won the case, but only after the newspaper, citizens who also were sued, and insurance companies spent thousands of dollars as Murray continued to appeal. An Ohio appellate court issued an opinion with the unusual comment that the case illustrated why Ohio needed an anti-SLAPP law.").

> (i) It obviously serves merely to harass or maliciously injure another party to the civil action or appeal or is for another improper purpose, including, but not limited to, causing unnecessary delay or a needless increase in the cost of litigation.
>
> (ii) It is not warranted under existing law, cannot be supported by a good faith argument for an extension, modification, or reversal of existing law, or cannot be supported by a good faith argument for the establishment of new law.
>
> (iii) The conduct consists of allegations or other factual contentions that have no evidentiary support or, if specifically so identified, are not likely to have evidentiary support after a reasonable opportunity for further investigation or discovery.
>
> (iv) The conduct consists of denials or factual contentions that are not warranted by the evidence or, if specifically so identified, are not reasonably based on a lack of information or belief.

R.C. 2323.51(A)(2)(a).

A party's voluntary dismissal of a counterclaim does not shield it from sanctions under R.C. 2323.51. Therefore, a court may sanction conduct that occurred prior to dismissal. *OCRC v. GMS Management Corp.*, 9th Dist. Summit No. 19814, 2000 Ohio App. LEXIS 2827, *6-7 (June 28, 2000) ("[A] hearing on sanctions is considered collateral to the underlying proceedings, and a trial court therefore retains jurisdiction [to apply R.C. 2323.51]."); *State ex rel. J. Richard Gaier Co., L.P.A. v. Keisler*, 97 Ohio App.3d 782, 785, 647 N.E.2d 564 (2d Dist.1994) (holding that "the filing of a voluntary dismissal does not divest the trial court of jurisdiction over a motion for sanctions" because a contrary rule would frustrate the goal of "prevent[ing] parties from using the judicial process to harass one another").

A. The KNR Defendants' counterclaims were legally frivolous under both R.C. 2323.51(A)(2)(a)(ii) and (a)(iii) because they were not warranted under existing law, cannot be supported by a good faith argument for an extension, modification, or reversal of existing law, and had no possible evidentiary support.

Under R.C. 2323.51(A)(2)(a)(ii), the test for determining whether conduct is "frivolous" is "whether no reasonable lawyer would have brought the action in light of the existing law." *Kozar*

v. Bio-Medical Applications of Ohio, Inc., 9th Dist. Summit No. 21949, 2004-Ohio-4963, ¶ 16. The statute "does not require a finding that" a party "acted willfully." *Soler v. Evans, St. Clair & Kelsey*, 152 Ohio App.3d 781, 2003-Ohio-2582, 790 N.E.2d 365, ¶ 5 (10th Dist.).

A party's conduct is frivolous under R.C. 2323.51(A)(2)(a)(iii) where the party's allegations lack "minimal evidentiary support." *Southard Supply, Inc. v. Anthem Contrs.*, Inc., 10th Dist. Franklin No. 16AP-545, 2017-Ohio-7298, ¶ 14. Because a finding of frivolous conduct under this prong of the rule "results from a factual analysis, appellate courts afford such a finding a degree of deference," and "will not reverse a determination that conduct is frivolous ... unless the record lacks competent, credible evidence to support the trial court's factual findings." *Id.* at ¶ 15.

i. Defendants' tortious-interference counterclaims lack any support in law or fact.

To prove a claim for tortious interference, the party must show "(1) a business relationship, (2) known to the tortfeasor, and (3) an act by the tortfeasor that adversely interferes with that relationship, (4) done without privilege and (5) resulting in harm." *Telxon Corp. v. Smart Media of Delaware, Inc.*, 9th Dist. Summit Nos. 22098, 22099, 2005-Ohio-4931, ¶ 88. Incidental interference with a "business relationship alone is insufficient to sustain a cause of action for tortious interference." *Syed v. Poulos*, 8th Dist. Cuyahoga Nos. 103137, 103499, 2016-Ohio-3168, ¶ 17. Instead, "a claim of tortious interference requires an improper act." *Smith v. Natl. W. Life*, 2017-Ohio-4184, 92 N.E.3d 169, ¶ 21 (8th Dist.).

Here, the only alleged "improper act" discernible from Defendants' counterclaims is that Plaintiffs' allegations in this case are defamatory and were made with knowing falsity. Thus, no reasonable attorney could have pursued such a claim because such statements are subject to the litigation privilege, as described below, and could in no event be supported by evidence that they were knowingly false when made.

Ohio courts do not recognize a cause of action for claims premised on defamatory statements that are made in connection with, and in furtherance of, legal proceedings. *A&B-Abell Elevator Co., Inc. v. Columbus/Central Ohio Building & Construction Trades Council*, 73 Ohio St.3d 1, 15, 1995 Ohio 66, 651 N.E.2d 1283 (where a claim is based on statements that are privileged under defamation law, "the protection afforded those statements … must also apply in the derivative claims"). Such statements receive "an absolute privilege against a defamation action as long as the allegedly defamatory statement is reasonably related to the proceeding in which it appears." *Hecht v. Levin*, 66 Ohio St.3d 458, 460, 1993-Ohio-110, 613 N.E.2d 585; *Surace v. Wuliger*, 25 Ohio St.3d 229, 233, 495 N.E.2d 939 (1986) (applying privilege to statements "made in a written pleading."); *Krakora v. Gold*, 7th Dist. Mahoning 98 CA 141, 1999 Ohio App. LEXIS 4699, at *6 (Sep. 28, 1999) (applying privilege to letters submitted to an insurance company before a lawsuit existed, because such writings "were reasonably related to the anticipated judicial proceeding.").

The privilege must be liberally construed "to prevent endless lawsuits because of alleged defamatory statements in prior proceedings." *Surace* at 234. Thus, the nature of the privilege does not change even if "the statement was made in bad faith." *Family Medicine of Stark Cty. v. Smart*, 5th Dist. Stark No. 2016-CA-00218, 2017-Ohio-5866, ¶ 32; *Columbus Bar Assn. v. Elsass*, 86 Ohio St.3d 195, 199, 713 N.E.2d 421 (finding that an action for defamation arising out of litigation was legally unwarranted in light "of the *Hecht* decision."). The privilege exists to protect parties from liability for seeking "thorough discovery and examination of evidence relevant and material to a civil lawsuit," an "interest of social importance" that "is entitled to protection even at the expense of uncompensated harm to the plaintiff's reputation" and even as to "conduct which otherwise would be actionable." *GM, LLC v. Thornhill*, C.P. No. CV-12-786776, 2014 Ohio Misc. LEXIS 8, at *25-26 (Feb. 7, 2014).

As a basis for their tortious interference claim, the KNR Defendants allege that Plaintiffs made "false and inflammatory allegations against Defendants, including but not limited to Plaintiffs' claim that KNR defrauded them as well as the majority of its clients since 2006." Fourth Amended Counterclaim, at ¶ 38. Because such allegedly defamatory statements were made throughout and related to a judicial proceeding, recovery on KNR Defendants' tortious interference claims was a legal impossibility from the start. Additionally, given the documents that were cited and quoted in the Complaint, other evidence that came to light shortly thereafter,[4] as well as the fact that Defendants were and remain on notice of their own conduct, there was never evidentiary support for the notion that these claims were lodged with knowing falsity, nor could there ever be.[5] Thus, the counterclaims are manifestly frivolous and sanctionable under R.C. 2323.51(A)(2)(a)(ii) and (a)(iii).

[4] In addition to the KNR emails that were attached to and quoted in the Second Amended Complaint, which was filed on March 22, 2017, the Plaintiffs also filed, as an exhibit to their motion to lift the gag order filed on May 3, 2017, the Affidavit of former KNR attorney Gary Petti, in which Mr. Petti (1) testifies that the "narrative fee" at issue in this lawsuit is paid as a kickback to high-referring chiropractors, and (2) confirms that the "investigation fee" at issue is charged merely for "sign-ups," and that no actual investigations ever take place. Mr. Petti's affidavit is attached to this motion as **Exhibit 7**, and has since been confirmed by additional testimony provided by Petti at his deposition taken just last Friday, March 1. The notion that Plaintiffs could have been maintaining their claims with knowing falsity even after having received and filed Mr. Petti's affidavit is entirely unsupportable.

[5] Even if the litigation privilege did not apply, and even if Defendants could show that the statements made against them were actually defamatory, the counterclaims would still fail for Defendants' inability to identify a single business relationship with which Plaintiffs have knowingly interfered. At his deposition, Nestico failed to identify a single contract or business relationship, other than a contingency fee agreement with KNR clients, with which he believed the named Plaintiffs improperly interfered. Nestico Tr. at 657:21–22. When pressed, he indicated that he "relied on his lawyers" to "figure" out the details of the counterclaim. *Id.* at 657:11–12. And when Nestico was asked to clarify what evidence existed in support of the counterclaim, counsel for the KNR Defendants again improperly refused to permit Nestico to answer on the basis that KNR had dismissed the counterclaims. *Id.* at 657:7–658:13; 658:14–659:16; 662:8–663:8.

ii. Defendant's abuse-of-process counterclaims lack any support in law or fact.

A claim for abuse of process requires proof "(1) that a legal proceeding has been set in motion in proper form and with probable cause; (2) that the proceeding has been perverted to attempt to accomplish an ulterior purpose for which it was not designed; and (3) that direct damage has resulted from the wrongful use of process." *Robb v. Chagrin Lagoons Yacht Club*, 75 Ohio St.3d 264, 270, 1996-Ohio-189, 662 N.E.2d 9. To prevail on such a claim, one must prove that the alleged wrongdoer attempted "to achieve through use of the court that which the court is itself powerless to order." *Id.* at 271.

The Ohio Supreme Court has explained with respect to the "perversion" element that the "ulterior purpose" "takes the form of coercion to obtain a collateral advantage, *not properly involved in the proceeding itself,* such as the surrender of property or the payment of money, by the use of the process as a threat or a club." *Robb* at 271 (emphasis added) (overruling grant of summary judgment on a claim for abuse of process where litigation was used "to coerce" club membership "to vote in their favor" because a court has "no authority to order club members how to vote."). There can be no abuse of process if "a party uses the court to pursue a legal remedy that the court is empowered to give" even if a court later finds that a claim is "without merit." *Sivinski v. Kelley*, 8th Dist. Cuyahoga No. 94296, 2011-Ohio-2145, ¶ 37.

An abuse-of-process claim cannot be supported by allegations that a lawsuit is "premised on falsehoods" intended to harm a defendant's business or otherwise harm the defendant "financially." *Elite Designer Homes, Inc. v. Landmark Partners*, 9th Dist. Summit No. 22975, 2006-Ohio-4079, ¶ 51 (Aug. 9, 2006); *Gugliotta v. Morano*, 161 Ohio App.3d 152, 2005-Ohio-2570, 829 N.E.2d 757, ¶ 50 (9th Dist.) ("[Plaintiff's] own argument that [defendant] used the threat of litigation as a tool of coercion serves to defeat her claim of abuse of process."); *Beacon Journal Pub. Co. v. Zonak, Poulos & Cain*, 10th Dist. Franklin No. 79AP-123, 1979 Ohio App. LEXIS 11795, at

*6 (Sep. 25, 1979) ("Assuming that such press conferences were held by defendants, and copies of the complaint in the federal court action were distributed at such press conferences, this would not constitute an abuse of process …"); *Willis & Linnen Co., L.P.A. v. Linnen*, 163 Ohio App.3d 400, 2005-Ohio-4934, 837 N.E.2d 1263, ¶ 24 (9th Dist.) (an abuse-of-process claim does not lie unless there is clear evidence that the plaintiffs sought a "collateral advantage *during* the … proceedings.").[6] Likewise, an abuse-of-process claim does not lie where the plaintiff is using the legal process "to gain an objective contemplated by the process, *i.e.*, succeeding in the lawsuit." *Sivinski*, at ¶ 33; *see also Edward D. Jones & Co., L.P. v. Wentz*, 9th Dist. Summit No. 23535, 2007-Ohio-3237, ¶ 13 ("Neither *Robb* nor any other authority has held that a settlement demand is improper…").

Thus, the KNR Defendants' abuse-of-process counterclaim is frivolous as a matter of law. There is no allegation, nor could there be, as to any collateral payment or action that Plaintiffs have sought to compel by way of this lawsuit, or any payment apart from that of the damages sought. The allegations (at ¶ 30) that Plaintiffs abused process by (1) "defaming Defendants and harming their reputation and goodwill" and (2) "pressur[ing] Defendants for a quick settlement" are respectively barred by the absolute privilege for defamatory statements made in connection with litigation (as discussed above[7]), and the controlling precedent cited

[6] Courts from elsewhere agree that a "smear campaign that does not involve the improper use of the legal process" cannot state a claim for abuse of process. *Orndorff v. Raley*, W.D.N.C. No. 3:17 CV-00618-GCM, 2018 U.S. Dist. LEXIS 182149, at *8 (Oct. 24, 2018); *Perry v. Manocherian*, 675 F.Supp. 1417, 1429 (S.D.N.Y.1987) (the filing of a complaint "to coerce a settlement and to create bad publicity" [likewise] does not constitute an abuse of process.); *Grossman v. Perry*, No. 10 Mass.L.Rep. 156, at *4 (1999) (finding that a defendant does not commit an abuse of process by "publicizing the allegations in the complaint or by providing the complaint to a newspaper" or by filing suit "in the hope that … [doing so] will cause publicity unfavorable to the defendant").

[7] As discussed in Section III.A.i., above, to the extent the claim is based on allegedly defamatory statements Plaintiffs or their counsel have made throughout the litigation process in furtherance of this lawsuit, such statements are subject to the litigation privilege.

above holding that an abuse of process claim cannot lie where litigation is otherwise used "as a tool of coercion." Nestico's testimony on the abuse of process claim further confirms that it was leveled with a complete lack of legal and factual support. Nestico Tr. at 656:20–657:6.

iii. Defendants' counterclaims under the Deceptive Trade Practices Act lack any support in law or fact.

Defendants' claim under R.C. 4165.02 is equally inexplicable. In suing under the Ohio Deceptive Trade Practices Act, the KNR Defendants accused the Plaintiffs of "engag[ing] in an advertising campaign that contains false and misleading statements." Fourth Amended Counterclaim, ¶ 45. The Plaintiffs have purportedly committed this proscribed conduct by "assist[ing], acquiesce[ing] to, and/or ratif[ying] the conduct of their agents." *Id.*, ¶ 46.

The KNR Defendants, however, did not allege (nor could they) that the Plaintiffs committed the purported violations of the Deceptive Trade Practices Act "in the course of ... [their] business, vocation, or occupation." R.C. 4165.02(A) The statute's prohibitions explicitly cover only wrongdoing undertaken in these capacities. *Id.*

Courts must "give effect to every word and clause" included in a statute. *State ex rel Carna v. Teays Valley Local School Dist. Bd. of Educ.*, 131 Ohio St. 3d 478, 2012-Ohio-1484, 967 N.E.2d 193, ¶18. They "may not restrict, constrict, qualify, narrow, ... or abridge" any of its express terms. *Id.* To the contrary, when statutes are "clear and unambiguous," courts enforce them as they are written. *State ex rel. Beavercreek Twp. Fiscal Officer v. Graff*, 154 Ohio St. 3d 166, 2018-Ohio-3749, 112 N.E.3d 882, ¶15.

The Plaintiffs are former clients of the KNR Defendants who have sued over misconduct in the handling of their cases. Prosecuting this litigation is not their job or profession. Nor is mounting a purported "advertising campaign" against the KNR Defendants in connection with the lawsuit. Fourth Amended Counterclaim, ¶ 45. Whether the Plaintiffs undertook this activity

directly or derivatively through their "agents," they were not doing so "in the course of ... [their] business, vocation, or occupation." R.C. 4165.02(A). Moreover, even if they were, as discussed above, the allegedly deceptive statements at issue are subject to the litigation privilege and could not possibly support a claim under R.C. 4165 in any event. The Deceptive Trade Practices Act claims are thus frivolous and should be sanctioned under R.C. 2323.51.

iv. Defendants' counterclaims under R.C. 2323.51 lack any support in law or fact.

Whether or not it is true, as the Ninth District has held, that R.C. 2323.51 "does not create a separate cause of action for frivolous conduct," the Defendants have never had a reasonable evidentiary basis for claiming that Plaintiffs' conduct meets any prong of the statute, nor any reasonable belief that such an evidentiary basis could ever be discovered. *Wochna v. Mancino*, 9th Dist. Medina No. 07CA0059-M, 2008-Ohio-996, ¶ 29. Whether or not Plaintiffs are ultimately successful in proving their claims, the documents cited and quoted in Plaintiffs' Complaint conclusively demonstrate that Plaintiffs had every reasonable basis for filing and maintaining them. *See also*, *e.g.*, fn 4, above, citing **Ex. 7**, Petti affidavit. The notion that Plaintiffs have acted frivolously in doing so is thoroughly unsupported and unsupportable.

B. The KNR Defendants' counterclaims were instituted for improper purposes, as prohibited by R.C. 2323.51(A)(2)(a)(i).

The utter lack of legal and factual support for the counterclaims bolsters the strong inference that they were instituted for improper purposes: Namely, to (1) manipulate venue and (2) intimidate the Plaintiffs and other potential parties and witnesses from participating in this case. This provides an independent basis for a sanctions award under R.C. 2323.51(A)(2)(a)(i), as confirmed by Nestico's testimony that he acted out of retribution when he decided to sue the named Plaintiffs, "so that they know what it's like to get sued." Nestico Tr. at 656:17–19, *et seq.* *See also Sawchyn v. City of Middleburg Hts.*, 8th Dist. Cuyahoga No. 66687, 1995 Ohio App. LEXIS

4288, at *10 (Sep. 28, 1995) (affirming award of sanctions under R.C. 2323.51 on the basis that a party used legal proceedings for improper purposes by filing a lawsuit not for redressing a legitimate injury, "but, rather," to "avenge" his personal agenda against those he blamed for losing an election); *Carasalina LLC v. Bennett*, 10th Dist. Franklin No. 14AP-74, 2014-Ohio-5665, ¶ 45 (Dec. 23, 2014) (affirming award of sanctions against party based, in part, on trial court's finding that "improper purpose was a key part of what occurred here, namely [the] misguided effort to try to gain 'leverage'…").

These counterclaims must also be viewed in the context of Nestico's well-documented habit of filing or threatening litigation against anyone who dares to question his business practices or even seeks to compete with his firm. *See Kisling, Nestico & Redick LLC Law Firm v. Robert Paul Horton*, Summit County C.P. No. CV-2017-03-1236 (KNR lawsuit against former KNR attorney Robert Horton in retaliation for Horton having provided information to Plaintiffs on which their claims are based); *Kisling, Nestico & Redick, LLC v. Fonner*, Franklin County C.P. No. 15-CV-003216, Sept. 15, 2015 (KNR lawsuit against chiropractor James E. Fonner, who complained that KNR "has a scheme in place whereby it sends clients who were allegedly injured in motor vehicle accidents to its 'preferred chiropractors,'" who were required to "follow [KNR's] demands and requests as it relates to treatment, billing, and reducing bills."); Feb. 25, 2016 letter from KNR's counsel to former KNR attorney Paul Steele, threatening to sue Steele for "contacting" a chiropractor with whom the firm "has a close working relationship," attached as **Exhibit 8**.

To this tendency, Mr. Horton testified at his deposition[8] to the authenticity of a series of text messages that he received from Mr. Nestico after the firm terminated his employment. In

[8] Mr. Horton also testified that he was fearful and felt extreme pressure and stress as a result of KNR's lawsuit against him, and former KNR attorney Kelly Phillips similarly testified that he was

these messages, excerpts from which are attached as **Exhibit 9**, Nestico threatened to sue Horton for "interfering with KNR clients," and threatened the same against former KNR attorney Amanda Lantz in retaliation for her perceived efforts to communicate with clients she had represented at the firm. Nestico wrote to Mr. Horton of Ms. Lantz,

> I'm am [*sic*.] going to go after her now. First a bar complaint than a law suit. She Can't [*sic*.] read case law if it would save her life. ... You should talk to her, let her know I'm gunning for her. ... See what the nut says[.] ... She is stupid. If I so much as get one termination letter she is done. She just needs to move on. ... Dude she hung herself. Did you tell her to stay the f*ck away[?] ... She doesn't get hints. If you don't tell her straight she is too stupid to figure it out[.] I would hate to go after her but she makes one more move then I will have no choice[.]
>
> She has no idea what it means to go to war with someone who has a lot more money then [*sic*.] her!!!! ... It's all fun and games until you go to war[.]

Id.

These messages also contain yet another threat from Nestico to Horton on June 13, 2016, a year before this lawsuit was filed, where Nestico writes, "[y]ou really need to just move on and stop spreading false rumors or you may get a lesson on a defamation case with your name on it." *Id.*

IV. Conclusion

Mr. Nestico's demonstrated inclination to leverage his vast resources by threatening and instituting legal proceedings against anyone who seeks to question or compete with his business constitutes a threat to the rule of law itself. While the conditions that enable Nestico to be so bold in pushing his "might makes right" agenda in Ohio courts likely require structural reform

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hesitant to communicate with Plaintiffs' counsel about the facts at issue in this case for fear of a retaliatory suit by Nestico. The transcripts of Mr. Horton's and Mr. Phillips' depositions, which took place on February 22, and 25–26, respectively, have not yet been completed. Upon completion of these transcripts, Plaintiffs will supplement this motion with citations to the relevant testimony.

that is appropriately the subject of legislation, sanctions under R.C. 2323.51[9] in this case for the frivolous counterclaims filed against the Named Plaintiffs would be a small, plainly warranted, and much needed step in the right direction.

Respectfully submitted,

/s/ Peter Pattakos
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Attorneys for Plaintiffs

Certificate of Service

The foregoing document was filed on March 6, 2019 using the Court's electronic-filing system, which will serve copies on all necessary parties.

/s/ Peter Pattakos
Attorney for Plaintiffs

[9] Sanctions are also warranted, and hereby requested in the alternative, under Civ.R. 11 for the KNR Defendants' willful violation of the Rule, which bars the filing of claims absent a reasonable belief that good grounds exist to support them.

IN THE COURT OF COMMON PLEAS
SUMMIT COUNTY, OHIO

MEMBER WILLIAMS, et al.,	)	CASE NO. CV-2016-09-3928
	)	
Plaintiffs,	)	JUDGE JAMES BROGAN
	)	
vs.	)	**FOURTH AMENDED COUNTERCLAIM OF DEFENDANTS KISLING, NESTICO & REDICK, LLC, ALBERTO NESTICO, AND ROBERT REDICK**
	)	
KISLING, NESTICO & REDICK, LLC, et al.,	)	
	)	
Defendants.	)	
	)	**JURY DEMAND ENDORSED HEREIN**
	)	

Now come Defendants Kisling, Nestico & Redick, LLC ("KNR"), Alberto R. Nestico ("Nestico"), and Robert Redick ("Redick" and, collectively with KNR and Nestico, "Defendants") and hereby state for their Counterclaim against Plaintiffs Member Williams, Thera Reid, Monique Norris, and Richard Harbour as follows:

PARTIES

1. KNR is an Ohio law firm representing plaintiffs in civil litigation matters with its principal place of business located in Summit County, Ohio.

2. Nestico is the managing partner of KNR and a resident of Summit County, Ohio.

3. Redick is an employee of KNR and a resident of Stark County, Ohio.

4. Plaintiff Member Williams ("Williams") is a resident of Medina County, Ohio, was a former client of KNR in a personal injury case arising out of an automobile accident.

5. Plaintiff Thera Reid is a resident of Summit County and a former client of KNR.

6. Plaintiff Monique Norris is a resident of Summit County and a former client of KNR.

7. Plaintiff Richard Harbour is a resident of Summit County and a former client of KNR.

GENERAL ALLEGATIONS

8. Defendants hereby incorporate their Answers to the Fifth Amended Complaint

EXHIBIT 1

and the foregoing paragraphs of this Counterclaim as if fully rewritten herein.

9. KNR hired Robert P. Horton, Esq. ("Horton"), Horton on February 20, 2012 as an attorney. Horton's responsibilities included providing prospective clients with a free, initial, consultation, determining if the claim had merit, and if so, arranging for the client to sign KNR's fee agreement and medical authorizations, and collecting and preserving evidence.

10. On September 13, 2013, Williams called the firm and was transferred to Horton and discussed her accident. Horton decided she had a viable personal injury claim, and agreed to represent her on behalf of KNR.

11. Horton further engaged MRS Investigations, Inc. to meet with Williams the next day to execute the contingency fee agreement and obtain copies of relevant documents. Horton specifically communicated with Chuck DeRemer ("DeRemer"), an investigator with MRS Investigations, regarding the Williams matter. MRS Investigations charged separately for his services, regardless of whether KNR obtained a settlement or judgment. Horton explained to Williams that KNR would charge expenses to Williams' file only if recovery was made on her behalf.

12. On March 17, 2015 and prior to resolution of Williams' claim, Horton's employment with KNR ceased.

13. After Horton's departure, KNR settled Williams' personal injury claim with Williams' informed consent. KNR provided Williams with an itemized printout of all expenses, fees and payments which listed the investigator's charge as the first expense item. Williams was asked if she had any questions. Williams reviewed and signed the disbursement sheet, release and settlement check at KNR without any questions or objections.

14. On July 13, 2016, Williams filed this action.

15. Although Williams and her attorneys knew KNR's principal place of business was in Summit County, Ohio, and that all of the conduct giving rise to Williams' claim arose in Summit and/or Medina County, Williams filed her complaint in Cuyahoga County.

16. Upon information and belief, Williams filed in Cuyahoga County without any supporting legal authority.

17. On September 9, 2016, the Court of Common Pleas for Cuyahoga County, Ohio found there was no factual or legal basis for Williams to have filed her original complaint in Cuyahoga County, Ohio and transferred venue to the Court of Common Pleas for Summit County, Ohio.

18. During the week of September 5, 2016 Williams, acting through her agent, posted a request for assistance in finding new potential class members on social media. These posts include inaccurate and prejudicial language, including but not limited to, the incorrect allegation that KNR "has engaged in business practices that constitute fraud and other unlawful breaches against the majority of its clients dating back to 2006".

19. On September 13, 2016, KNR and Nestico sent Williams, through her agents and attorneys, a letter requesting that she cease and desist from further defaming them and remove the defamatory posts from any and all social media, including Facebook and Twitter accounts. Initially Williams and her counsel agreed, but then began posting again on Facebook, Twitter accounts, and The Chandra Law Firm's website.

20. Despite the cease and desist requests, Plaintiffs, through their agents and attorneys, continue to post defamatory statements on The Pattakos Law Firm's Facebook page and The Pattakos Law Firm's blog. These posts continue to assert, among other false allegations, that Defendants have deceived and defrauded their clients through kickback schemes and charging them fraudulent "investigation fees", none of which are true. This second round of defamatory statements began in or around October 17, 2017 and has continued to date.

21. The conduct of Plaintiffs' agents of posting defamatory, inaccurate and prejudicial information regarding Defendants occurred while Plaintiffs were clients of The Chandra Law Firm and/or the Pattakos Law Firm. Those postings included false allegations of defrauding

clients and having kickback schemes with chiropractors, Liberty Capital Funding, and Defendant Dr. Sam Ghoubrial.

FIRST CAUSE OF ACTION
(Frivolous Conduct – O.R.C. § 2323.51)

22. Defendants hereby incorporate their Answer and the foregoing paragraphs of this Counterclaim as if fully restated herein.

23. Ohio appellate courts have concluded that a frivolous conduct claim can be brought as a counterclaim. *See, e.g., Texler v. Papesch*, 9th Dist. Summit No. 18977, 1998 Ohio App. LEXIS 4070, *6 ("Although the statute does not specify whether a party can make a claim for attorney's fees in the form of counterclaim, **the case law makes clear** that it is an accepted method.") (emphasis added); *Odita v. Phillips*, 10th Dist. Franklin No. 09AP-1172, 2010-Ohio-4321, ¶59 (citing to *Texler* and concluding: "Ohio courts have recognized that a claim for frivolous conduct under R.C.2323.51 may be made by way of a counterclaim, rather than strictly by way of motion."); *Jones v. Billingham*, 105 Ohio App. 3d 8, 12, 663 N.E.2d 657 (2nd Dist. 1995) ("In our view, the Sixth Count of Billingham's **counterclaim sets forth a claim** that the Complaint filed by plaintiffs-appellees is a frivolous claim under the ambit of Civ. Pro. 11 and **R.C. 2323.51**.") (emphasis added); *Buettner v. Est. of Herbert Bader*, 6th Dist. Lucas No. L-97-1106, 1998 Ohio App. LEXIS 2, *5-6 (in concluding that the trial court did not lack jurisdiction, the appellate court stated: "In the case *sub judice*, appellees' counterclaim set forth a claim within the ambit of R.C.2323.51."); *Craine v. ABM Services, Inc.*, 11th Dist. Portage No. 2011-P-0028, 2011-Ohio-5710, ¶10 (string cite of cases, including *Texler*, that have allowed a frivolous conduct claim under R.C. 2323.51 to proceed via a counterclaim); *Burrell v. Kassicieh*, 128 Ohio App. 3d 226, 232, 714 N.E.2d 442 (3rd Dist. 1998) (retained jurisdiction over R.C. 2323.51 frivolous conduct counterclaim and affirmed judgment in favor defendant on it).

24. Plaintiffs have, by and through their agents, brought this suit to harass and maliciously injure Defendants, and for the improper purposes of defaming Defendants and

harming their reputation and goodwill with the goal of destroying their business.

25. Plaintiffs' action consists of allegations or other factual contentions, and legal theories that have no evidentiary or legal support. In addition, the class action allegations are baseless and frivolous.

26. Pursuant to O.R.C. § 2323.51(B), Defendants are entitled to an award of their costs, reasonable attorney's fees and expenses incurred in defending Plaintiffs' frivolous action.

SECOND CAUSE OF ACTION
(Abuse of Process)

27. Defendants hereby incorporate their Answer and the foregoing paragraphs of this Counterclaim as if fully restated herein.

28. Defendants bring the abuse of process claim in the alternative to their First Cause of Action.

29. Defendants deny the allegations of Plaintiffs' Fifth Amended Complaint, but in the alternative, plead that Plaintiffs, by and through their agents, have brought this action in the proper forum and with probable cause. However, through the acts (e.g., repeated social media posts, having articles written about this case, sending court communications to the media) of Plaintiffs and their agents, Plaintiffs have perverted this proceeding to attempt to accomplish unlawful, ulterior purposes rather than to redress alleged damages incurred by Plaintiffs.

30. In particular, Plaintiffs and their agents have brought the instant case and the class action allegations for purposes of defaming Defendants and harming their reputation and goodwill with the goal of destroying their business, or to pressure Defendants for a quick settlement.

31. Plaintiffs and their agents' conduct is intentional, malicious, and without justification.

32. Plaintiffs have assisted, acquiesced to, and/or ratified the misconduct of their agents.

33. The conduct of Plaintiffs, as alleged above, constitutes malicious, oppressive, fraudulent, willful, and wanton tortious behavior, in blatant and reckless disregard of Defendants' rights, for which Defendants should recover compensatory and punitive damages in an amount sufficient to deter Plaintiffs, their agents, and other persons similarly situated from repeating similar conduct in the future.

34. As a direct and proximate result of Plaintiffs and their agents' abuse of process regarding this class action, Defendants have suffered compensatory and punitive damages, including, without limitation, damage to their reputations, economic loss, business losses, lost profits, opportunity costs, and inconvenience in excess of $25,000, the exact amount to be proven at trial.

THIRD CAUSE OF ACTION

(Tortious Interference With Existing and Prospective Business Relationships)

35. Defendants hereby incorporate their Answer and the foregoing paragraphs of this Counterclaim as if fully restated herein.

36. Defendants have ongoing business relationships with clients, and further, because such relationships are usually limited to representation for a single auto accident, Defendants depend upon obtaining new clients through marketing and referrals from prior clients and other professionals to maintain their business and profession.

37. Plaintiffs and their agents have actual and/or constructive knowledge of Defendants' business relationships and the importance of maintaining their business reputations to obtain new clients.

38. Plaintiffs, by and through their agents, have recklessly, willfully, wantonly and/or intentionally interfered with Defendants' present and future business relationships by disseminating, without any justification and beyond any reasonable scope, false and inflammatory allegations against Defendants, including but not limited to Plaintiffs claim that KNR defrauded them as well as the majority of its clients since 2006. In fact, Defendants

have lost clients and/or revenue because of Plaintiffs and their agents' conduct described above.

39. Plaintiffs and their agents' interference was intentional, malicious, illegal, and without any legitimate, protected, commercial justification.

40. Plaintiffs have assisted, acquiesced to, and/or ratified the misconduct of their agents.

41. Defendants have sustained damages as a result of Plaintiffs' wrongful interference with their current and prospective business relationships.

42. The conduct of Plaintiffs, as alleged above, constitutes malicious, oppressive, fraudulent, willful, and wanton tortious behavior, in blatant and reckless disregard of Defendants' rights, for which Defendants should recover compensatory and punitive damages in an amount sufficient to deter Plaintiffs, their agents, and other persons similarly situated from repeating similar conduct in the future.

43. As a direct and proximate result of Plaintiffs and their agents' tortious conduct, Defendants have suffered compensatory and punitive damages, including, without limitation, damage to their reputations, economic loss, business losses, lost profits, opportunity costs, and inconvenience in excess of $25,000, the exact amount to be proven at trial.

FOURTH CAUSE OF ACTION
(Deceptive Trade Practices – O.R.C. § 4165.02)

44. Defendants hereby incorporate their Answer and the foregoing paragraphs of this Counterclaim as if fully restated herein.

45. Plaintiffs, by and through their agents, have engaged in an advertising campaign that contains false and misleading statements in violation of O.R.C. § 4165.02(A)(10).

46. Plaintiffs have assisted, acquiesced to, and/or ratified the misconduct of their agents.

47. These false and misleading statements are material because they are likely to

adversely affect client decisions with respect to Defendants' services, and have misled consumers causing damage to Defendants that cannot be fully calculated.

48. Unless this Court enjoins Plaintiffs and their agents from continuing to make these false and misleading statements and orders their retraction, the false and misleading statements will continue to harm the general public, which has an interest in being free from mistake and deception.

49. Unless this Court enjoins Plaintiffs and their agents from continuing to make these false and misleading statements and orders their retraction, the false and misleading statements will continue to cause Defendants to suffer a loss of consumer confidence, sales, profits, reputation, and goodwill.

50. Defendants' reputation and goodwill have been irreparably harmed because Plaintiffs and their agents' false and misleading statements deceive consumers and cause them to lose confidence in Defendants and their services.

51. If Plaintiffs and their agents are permitted to continue to make such false and misleading statements, Defendants will suffer further irreparable harm by the continued spread of false statements to consumers.

52. Plaintiffs and their agents' false and misleading statements are willful and made with malicious and deceptive intent, making this an exceptional case.

53. By reason of Plaintiffs and their agents' acts, Defendants' remedy at law is not adequate to compensate them for the injuries inflicted by Williams and her agents. Accordingly, Defendants are entitled to a temporary restraining order and preliminary and permanent injunctive relief pursuant to O.R.C. § 4165.02.

54. By reason of Plaintiffs and their agents' willful acts, Defendants are entitled to damages, which damages may be trebled under O.R.C. § 4165.02.

55. This is an exceptional case making Defendants eligible for an award of attorneys' fees under O.R.C. § 4165.02.

WHEREFORE, Defendants respectfully request that the Court enter judgment dismissing Plaintiffs' Third Amended Complaint and a judgment in favor of Defendants as follows:

1. Awarding Defendants nominal, actual, presumed, special, and punitive damages in excess of Twenty-Five Thousand Dollars ($25,000);

2. Awarding treble damages under O.R.C. § 4165.02;

3. Awarding Defendants their costs, expenses and attorney's fees under O.R.C. § 2323.51(B) and awarding Defendants their costs, expenses and attorney's fees in prosecuting this Counterclaim;

4. Awarding KNR pre- and post-judgment interest;

5. Granting a permanent injunction enjoining Plaintiffs, their agents, their attorneys and persons acting in concert with their or acting on her behalf, from the following acts:

a. Making any false, misleading, libelous, slanderous, defamatory, or disparaging statements or engaging in false, misleading or unfair trade practices or tortious interference with business relationships, including without limitation stating, claiming, suggesting, intimating or implying in any manner whatsoever that any of KNR or Nestico's legal representation and/or billing of Williams and/or other clients was deceptive or fraudulent;

b. Making any other false, misleading, slanderous, disparaging or defamatory statements about KNR, Nestico or their services; and

c. Otherwise engaging in acts, either directly or through other entities, of false advertising, product disparagement, libel, slander, unfair and deceptive trade practices, unfair competition, or tortious interference with actual or prospective business relations;

d. Publicizing the case in a manner inconsistent with the Ohio Rules of Professional Conduct and/or for purposes of improperly influencing the jury venire.

6. Award all such other and further relief, in law or in equity, to which Defendants may be entitled or which the Court deems just and proper.

Respectfully submitted,

/s/ James M. Popson
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Counsel for Defendants

DEMAND FOR JURY TRIAL

Defendants hereby demand a trial by jury of all issues of fact presented by their Counterclaim in accord with the Ohio Rules of Civil Procedure.

/s/ James M. Popson
James M. Popson (0072773)

CERTIFICATE OF SERVICE

I certify that a copy of the foregoing Fourth Amended Counterclaim of Defendants Kisling, Nestico & Redick, LLC, Alberto Nestico, and Robert Redick was filed electronically with the Court on this 12th day of December, 2018. The parties may access this document through the Court's electronic docket system.

/s/ James M. Popson
James M. Popson (0072773)

SUTTER O'CONNELL ATTORNEYS

Lawrence A. Sutter
Direct: 216.928.4545
Fax: 216.928.3645
lsutter@sutter-law.com

September 12, 2016

VIA E-MAIL ONLY
Peter Pattakos
Peter.pattakos@chandralaw.com
The Chandra Law Firm, LLC
1265 W. 6th Street
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Cleveland, Ohio 44113

Re: Member Williams v. Kisling, Nestico and Redick, LLC, et al.
Cuyahoga County, Court of Common Pleas Case No. 866123
Our File No. 10852-00001

Dear Mr. Pattakos:

It has come to our attention that, through your Twitter and Facebook posts, you and The Chandra Law Firm, LLC ("Chandra Law") have been soliciting putative class members for your above-captioned lawsuit against Kisling, Nestico & Redick, LLC ("KNR") and Robert Nestico. True and accurate copies of your posts are attached hereto. These posts contain false, misleading, and defamatory statements (e.g., KNR "has engaged in business practices that constitute fraud and other unlawful breaches against the majority of its clients") that have caused damage and harm (e.g., damage to reputation, loss of goodwill, lost revenue, mental anguish, etc.) to KNR and Mr. Nestico. Not only are these posts defamatory, they form the basis for false-light invasion of privacy, tortious interference with contract, and tortious interference with prospective business relationship claims.

Accordingly, KNR and Mr. Nestico demand that you and Chandra Law immediately cease and desist from making these defamatory and false statements (in whatever format such as the internet, letters, advertisements, etc.) regarding KNR, including, without limitation, any statement that KNR has engaged in fraud, unlawful breaches, or any illegal or unethical conduct. In addition, KNR and Mr. Nestico demand that you and Chandra Law immediately take down and redact your Twitter and Facebook posts and any and all other similar publications (in whatever format) regarding KNR including, without limitation, any statement that KNR has engaged in fraud, unlawful breaches, or any illegal or unethical conduct. KNR and Mr. Nestico reserve their rights to pursue legal action against you, Chandra Law, and Chandra Law's attorneys representing plaintiff in your class action lawsuit.

Very truly yours,

/s/ *Lawrence A. Sutter*

Lawrence A. Sutter

Attachment

EXHIBIT 2

THE CHANDRA LAW FIRM LLC

THE CHANDRA LAW FIRM, LLC
1265 W. 6th Street, Suite 400
Cleveland, Ohio 44113.1326
216.578.1700 office
216.578.1800 fax

September 13, 2016

Via e-mail

Lawrence A. Sutter
Sutter O'Connell
1301 E. 9th St., Ste. 3600
Cleveland, Ohio 44114
lsutter@sutter-law.com

Re: *Member Williams v. Kisling, Nestico & Redick, LLC, et al.*

Dear Mr. Sutter:

I am writing to respond to your correspondence of yesterday, in which you threatened my colleague, Peter Pattakos, and our law firm with legal action in connection with Pattakos' social-media posts soliciting information about Member Williams' class-action lawsuit against KNR.

While you claim that Pattakos' posts establish claims for defamation, false light, and invasion of privacy, the only statement that you identify as false is one that is in fact true: Mr. Pattakos is in fact "working on a case" "alleging" that KNR "has engaged in business practices that constitute fraud and other unlawful breaches against the majority of its clients," with such allegations having been stated in the filed Complaint. As you surely know, truth is a complete defense to claims sounding in defamation, and that, under R.C. 2317.05, "fair and impartial reports" of allegations made in a lawsuit are protected by a privilege that can only be overcome by a showing of actual malice—that the report was made either with knowledge that it is false or with reckless disregard of whether it is false or not.

You could not possibly have evidence that Mr. Pattakos and our firm know, or have been reckless about whether the allegations in the KNR lawsuit are false, because no such evidence exists. And more to the point, your client is in possession of documents showing that the allegations in the lawsuit are not only reasonably founded but are, in fact, true.

Additionally, you must be aware that in *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), the U.S. Supreme Court held that an attorney's "solicit[ation of] legal business through printed advertising containing truthful and nondeceptive information and advice regarding the legal right of potential clients" is protected by the First Amendment. *See also* Prof. Cond. R. 3.6(B)(1-3, 5) (affirming, *inter alia*, an attorney's right to publish "a request for assistance in obtaining evidence and information necessary thereto").

EXHIBIT 3

And none of the statements in Pattakos' social-media posts are otherwise actionable. Therefore, any lawsuit that you or KNR might file in connection with the posts would be frivolous and sanctionable under Civ. R. 11 and R.C. 2323.51 as lacking legal basis or evidentiary support. *See*, *e.g.*, *Norris v. Philander Chase Co.*, 5th Dist. No. 10-CA-04, 2010- Ohio-5297 (sanctions under R.C. 2323.51 where, at the time of filing, plaintiff lacked evidence to prove the elements of his claim); *Slye v. City of London Police Department*, 12th Dist. No. CA2009- 12-027, 2010-Ohio-2824 (sanctions under 2323.51 for pursuing claim without evidence); *Mitchell v. Mid-Ohio Emergency Services, L.L.C.*, 10th Dist. No. 10AP-374, 2010-Ohio-6350 (same); *L&N Partnership v. Lakeside Forrest Association*, 183 Ohio App.3d 125, 2009-Ohio-2987, 916 N.E.2d 500 (10th Dist.) (same); *Rust v. Harris-Gordon*, 6th Dist. No. L-03-1091, 2004- Ohio-1636 (imposing sanctions under Civ. R 11 for willful filing of claim without legal support and for filing an appeal that presented "no reasonable question for review").

We would of course pursue such sanctions to the fullest extent available, and will seek compensation in our fee-petition in the Member Williams case for this and all further demands on our time created by baseless threats of legal action against us.

To the extent that we are mistaken about anything above, we would of course be willing to change our position upon presentation of credible contradictory information.

Finally, I ask that you please copy me on all future correspondence in connection with this lawsuit or any threatened legal action against my law firm or my colleagues. My email address is Subodh.Chandra@ChandraLaw.com.

I invite a discussion of any remaining concerns. Please call me at 216.965.6463 (mobile).

Sincerely,

Subodh Chandra

Cc: R. Eric Kennedy, Esq.

SUTTER O'CONNELL ATTORNEYS

Lawrence A. Sutter
Direct: 216.928.4545
Fax: 216.928.3645
lsutter@sutter-law.com

September 14, 2016

Via E-mail Only
Subodh Chandra
(Subodh.Chandra@chandralaw.com)
The Chandra Law Firm, LLC
1265 W. 6th Street
Suite 400
Cleveland, Ohio 44113

Re: Member Williams v. Kisling, Nestico and Redick, LLC, et al.
Cuyahoga County, Court of Common Pleas Case No. 866123
Our File No. 10852-00001

Dear Mr. Chandra:

I am in receipt of your correspondence dated September 13, 2016. I note that nowhere in your letter do you address the cease and desist request. The only conclusion I can reach is that you will tolerate the continued misconduct, and by your actions and inaction, ratify the improper elicitation of potential class members by Mr. Pattakos. I am sure you are aware of the implications of those decisions.

I am well aware of the holding by the United States Supreme Court in the *Zaunderer* case as it relates to attorney advertising. It is clear by your response that you are unaware of Rule 7.3 of the Ohio Rules of Professional Conduct. If you are somehow claiming that Mr. Pattakos' Facebook and Twitter postings are "advertising" then both he and your firm are in direct violation of that rule and self-reporting of your misconduct is required. I will leave that task to you.

Perhaps threatening other attorneys has served you well in prior cases. Rest assured that your bravado in this matter will fall upon deaf ears. Your pleadings thus far have pushed the limits of professionalism and your misrepresentation of clear case law is deeply troubling. Add to those the improper social media posting and the result is not pretty. I am relatively sure this case will result in sanctions, you just seem to be mistaken as to whom will be the recipient.

Very truly yours,

/s/ Lawrence A. Sutter

Lawrence A. Sutter

LAS:aer
cc: Eric Kennedy (EKennedy@weismanlaw.com)

EXHIBIT 4

ANTI-SLAPP BILL INTRODUCED IN THE OHIO SENATE

News | October 9, 2017

Last week four Republican State Senators introduced the Ohio Citizen Participation Act in the General Assembly, a bill that would add Ohio to the list of 28 other states with an anti-SLAPP law on the books.

The acronym "SLAPP" stands for Strategic Lawsuit Against Public Participation, and refers to baseless lawsuits (often alleging defamation) filed against individuals exercising their First Amendment rights. Examples of SLAPP suits can include:

- Lawsuits filed against victims of domestic violence when they report and speak out against their abusers;
- Lawsuits filed against those who criticize public officials or businesses; and
- Lawsuits filed against internet commenters engaging in free expression or who post negative product reviews in online forums.

SLAPP suits are often filed so that defendants must choose between exercising those rights or spending months (if not years) paying attorneys to defend against meritless claims. Anti-SLAPP laws nationwide typically require courts to award attorney fees in favor of defendants who prevail in meritless defamation lawsuits, and the Ohio Citizen Participation Act would follow that trend.

Under current law, an Ohio court can award sanctions against a party and its attorney for filing a frivolous defamation lawsuit. See, e.g., *Oakley v. Nolan*, 4th Dist. No. 06CA36, 2007-Ohio-4794 (sanctions awarded against the plaintiff and the plaintiff's attorney, jointly and severally, where the plaintiff "never denied the truth of [the defendant's] communications" and that "reasonable inquiry by [the plaintiff's] counsel of record would have revealed the inadequacy of the defamation claim, and thus, its frivolity.")

In reality, though, sanctions can be difficult to obtain – often only being awarded after a lawsuit is concluded and the defendant has incurred thousands of dollars in attorney fees following months of litigation. Recognizing this unfortunate fact, the Act is modeled after laws in other states (including Texas and Nevada) to allow Courts to dispose of meritless cases in a more expeditious manner.

In 2014, the Eighth District Court of Appeals commented on Ohio's lack of an anti-SLAPP law in affirming summary judgment in favor of a defendant in a defamation case:

This case illustrates the need for Ohio to join the majority of states in this country that have enacted statutes that provide for quick relief from suits aimed at chilling protected speech. These suits, referred to as strategic lawsuits against public participation ("SLAPP"), can be devastating to individual defendants or small news organizations and act to chill criticism and debate. The fact that the Chagrin Valley Times website has been scrubbed of all mention of Murray or this protest is an example of the chilling effects this has. Many states provide that plaintiffs pay the attorney fees of successful defendants and for abbreviated disposition of cases. In this era of decentralized journalism where the internet has empowered individuals with broad reach, society must balance competing privacy interests with freedom of speech. Given Ohio's particularly strong desire to protect individual speech, as embodied in its Constitution, Ohio should adopt an anti-SLAPP statute to discourage punitive litigation designed to chill constitutionally protected speech.

Murray v. Chagrin Valley Publ. Co., 8th Dist. No. 101394, 2014-Ohio-5442, ¶ 40.

Among other things, the Act would:

1. Permit defendants facing SLAPP suits to file a special motion to strike within 60 days of being served with a SLAPP complaint;
2. Give courts the authority to grant the defendant's motion and dismiss actions if the complaint is based on a "protected communication;"
3. Limit discovery that is not necessary for a court to decide the motion; and

- Require courts to award attorney fees if the special motion to strike is granted. Conversely, if a defendant files a frivolous motion to strike, a court may award attorney fees in favor of the plaintiff.

Under the Act, a "protected communication" generally includes speech that is protected by the Ohio an United States Constitutions, including speech regarding issues of public interest and concern.

The Act includes procedural requirements to protect anonymous speakers who exercise their First Amendment rights online. These procedures are modeled on the holding of *Dendrite International, Inc. v. Doe*, 775 A.2d 756 (N.J. App 2001), which has been adopted by courts in a number of other states. The Act would require plaintiffs to obtain leave of court before subpoenaing the identity of an anonymous online speaker by showing the claim has merit. Then, after leave is obtained, the speaker must be notified and have an opportunity to contest the subpoena before his or her identity can be revealed.

The Ohio Citizen Participation Act is supported by a number of organizations, including the Ohio News Media Association, the Ohio Association of Broadcasters, the Ohio Domestic Violence Network, the 1851 Center for Constitutional Law, the Motion Picture Association of America, and the Ohio chapter of the American Civil Liberties Union.

Insurance providers can also be positively impacted by the adoption of anti-SLAPP legislation, as it would expedite court processes to dismiss cases and would entitle providers to recoup mandatory attorney fees defending against frivolous claims.

The Ohio Citizen Participation Act has not yet been assigned to a Senate Committee. Hearings on the bill, if any, are likely to be held this fall or early 2018.

If you would like to learn more about the Ohio Citizen Participation Act or SLAPP suits in general, please contact Tom Haren or another attorney in Frantz Ward's litigation group. Tom Haren, having defended clients in SLAPP litigation, consulted during the drafting of the Ohio Citizen Participation Act.

RELATED PROFESSIONALS

THOMAS G.

HAREN

RELATED PRACTICES

LITIGATION

BACK TO NEWS & BLOG

Full name*

Email*

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Phone 216.515.1660

Fax 216.515.1650

Email attorneys@frantzward.com

Address Frantz Ward LLP
200 Public Square
Suite 3000
Cleveland, OH 44114

OPEN IN MAPS

Complete Story

06/08/2018

Ohio Citizen Participation Act makes reappearance in Senate

By Olivia Wile, ONMA intern

More than eight months since its initial appearance in front of the Senate, the much-anticipated second hearing for the Ohio Citizen Participation Act was held Wednesday in the Ohio Senate. Passage of the bill is one of the ONMA's ongoing legislative priorities.

As time is running out in the year, the pressure is greater than ever to get Senate Bill 206 passed. If the bill, along with hundreds of others, does not get passed by Dec. 31, it will die unless resurrected in 2019. Supporters say the bill would give Ohio the country's best "anti-SLAPP" law: one that would expedite court processes while also protecting First Amendment rights, even in the digital realm.

ONMA Executive Director Dennis Hetzel testified about the importance of making this bill a law.

"These are constitutionally protected rights," said Hetzel in an interview. "We're spending a lot of time in this country talking about Second Amendment rights and how those need to be protected, and I think we need to pay the same attention to protecting First Amendment rights."

Twenty-eight other states around the country, including Texas and California, have already established similar laws.

Following Hetzel was Bridget Mahoney, chair-elect of the Ohio Domestic Violence Network.

During her testimony, Mahoney, a victim of domestic violence, explained how her life took another turn for worse when her ex-husband filed a strategic lawsuit against public participation, or SLAPP-suit.

“Because Ohio does not have an anti-SLAPP law, I was forced to endure nearly two years of painful proceedings, an agonizing discovery process and torturous depositions,” stated Mahoney in front of the Senate. “After spending over $100,000 in legal fees, I ran out of money defending the meritless lawsuit, so on the day of the trial, I had to regrettably bargain away some of my freedom of speech.”

Joining Mahoney in testifying was Gary Daniels, chief Lobbyist at the ACLU of Ohio, as well as attorneys Jeff Nye and John Greiner. Proponent testimony was provided by representatives from the Ohio Alliance to End Sexual Violence and Yelp.

Though unsure of the legislature’s agenda, Hetzel feels that progress was made after the bill’s second hearing.

“I was very pleased by the how the hearing went and the interest that the committee had, especially Sen. Huffman, the bill sponsor, and Sen. Coley, the committee chair,” said Hetzel. “The problem is that the legislature has so much to do and so little time to do it.”

The impetus for ONMA’s support was a high-profile libel action against the Chagrin Falls newspaper for its coverage of a protest against Murray Energy Co. The newspaper eventually won the case, but only after the newspaper, citizens who also were sued and insurance companies spent thousands of dollars as Murray continued to appeal. An Ohio appellate court issued an opinion with the unusual comment that the case illustrated why Ohio needed an anti-SLAPP law.

- Additional reading: 'Bigfoot on the Strip' lawsuit illustrates need for anti-SLAPP laws

Printer-Friendly Version

IN THE COURT OF COMMON PLEAS
SUMMIT COUNTY, OHIO

MEMBER WILLIAMS, Plaintiff, vs. KISLING, NESTICO & REDICK, LLC, *et al.*, Defendants.	Case No. CV-2016-09-3928 Judge Alison Breaux

AFFIDAVIT OF GARY PETTI

I, Gary Petti, having been duly sworn, have personal knowledge of the following matters of fact, and testify as follows:

1. In March of 2012, I became employed as a prelitigation attorney with the law firm of Kisling, Nestico & Redick, LLC ("KNR") in Akron, Ohio. Before my employment with KNR, I had worked since 1997 as a personal-injury lawyer with the Akron-based law firm of Slater & Zurz, primarily on behalf of insurance companies on the defense side, and car-accident victims on the plaintiffs' side. I resigned from my position at Slater & Zurz to join KNR because my practice at Slater & Zurz required me to travel frequently to Columbus, Ohio, and the KNR position would allow me to remain closer to my home in Wadsworth, Ohio while my wife went back to school to obtain her degree as a nurse-anesthetist. My wife and I have three children, who, at the time, were ages 6, 10, and 13. When I left Slater & Zurz to join KNR, I took

EXHIBIT 7

approximately 200 cases with me, and continued to represent these clients through KNR.

2. While I was working for Slater & Zurz, I first learned that KNR paid kickbacks to certain chiropractors in the form of a "narrative fee." When I spoke with certain chiropractors from Plambeck-owned clinics who would occasionally refer me cases, they told me that KNR paid them a narrative-report fee every time the chiropractors referred a case to KNR, and asked if I would do the same. I told them that I would not. I did not understand at the time that this was KNR's firm-wide policy, as opposed to a practice followed by certain KNR attorneys, and when I went to work for KNR, I assumed that I would not be required to charge my clients for unnecessary narrative-fee expenses.

3. When I began working at KNR, I primarily worked on the cases that I had brought to the firm, and when I closed these cases, no narrative fee was charged to these clients because I never ordered narrative reports for them. It was always my understanding that the decision as to whether a narrative report is worthwhile in a case is the attorney's to make, upon consultation with the client. I always understood that narrative reports were only properly used to allow a medical professional to explain why the plaintiff's injuries were different or more challenging than they might appear from the contents of the medical records, and in doing so, provide information that was not included in the records.

4. As I began to work on cases from KNR that had been taken in and previously worked on by other KNR attorneys, I would see the narrative fee appear on the client's settlement statement. I assumed that these fees were for narrative reports that were ordered by the previous KNR attorney who worked on the case. I soon learned that these narrative reports ordered by KNR were very different from the narrative reports that I was accustomed to using, and were essentially worthless, containing no information that was not already apparent from the client's medical records. The narrative reports provided by Dr. Minas Floros of Akron Square

Chiropractic, a Plambeck-owned clinic in Akron, were especially bad, and the worst narrative reports I had ever seen. They appeared to follow a basic formula of a few sentences where Floros merely filled in the blanks with information that was readily apparent from the medical records. It was clear that virtually no time or effort could have been expended on his worthless narratives—certainly no effort remotely justifiable by the narrative fees being paid.

5. As I continued to work at KNR, and continued to close the cases that I brought to the firm, I began working on KNR cases that I had taken in while at the firm. On several occasions while I was working at KNR, I took calls from chiropractors from Plambeck-owned clinics who were present on the line with a patient that the chiropractors sought to refer to KNR.

6. In approximately mid-to-late November of 2012, my paralegal Megan Jennings began to collect a package of documentation on a case that was to be submitted to the defendant's insurance company, including police reports, and medical records. When she submitted this package to me for my approval, I noticed a charge for a narrative report in the documents. I immediately expressed my surprise and disapproval that the narrative fee would be included in this package, and asked Jennings why this was the case. I also told her that I am the lawyer, so I'm the one who gets to advise the client as to whether the narrative report is a justifiable expense. In response, Jennings informed me that narrative fees are paid on every case that comes in from Akron Square Chiropractic and other Plambeck-owned clinics, and that the check is made out to the chiropractor personally and sent directly to the chiropractor's house. I then told her that I would not approve of any such fees being charged to my clients without my express approval.

7. Within a few days, I was working with Jennings on another case that was affiliated with Akron Square Chiropractic. On November 28, 2012, I emailed Jennings about this case to instruct her that no narrative fee was to be paid on it. I wrote, "Remember, no reports from

doktor flooroes," deliberately misspelling his name in an effort to defuse tension with humor. I also wrote, as a follow-up to our previous conversation, "I've asked a number of adjusters about the importance of those reports and the most common response is nearly uncontrolled laughter." This comment, while hyperbolic, referred to the fact that on the occasions when I attempted to refer to Plambeck narrative-reports in negotiating settlements on behalf of KNR clients, the insurance adjusters paid absolutely no regard to these reports.

8. Within approximately two weeks of having sent this email to Jennings, KNR terminated my employment. I was told by KNR attorney John Regan that I was "not a good fit" there. I could not disagree and little else was said in the meeting. I understood that by stating that I was "not a good fit" at KNR, Regan was only referring to my unwillingness to participate in KNR's schemes to defraud their clients, like with the narrative fees, as there were no other issues of which I was made aware. At that point, I was glad to leave KNR and the practice of law, and have since been working in the construction business.

9. During my time working at KNR, I became aware of the firm's so-called investigators, including Aaron Czetli and Michael Simpson. I would often witness Czetli and Simpson performing odd jobs around KNR's Akron office, such as stuffing envelopes and putting up holiday lights. Although I had ample opportunity to observe their activities, comings, goings, and work-product, I never witnessed or became aware of these so-called investigators performing any actual investigations. To my knowledge, their only involvement with client matters was to meet potential clients and sign them to KNR fee agreements.

10. Within a few months before KNR terminated my employment, KNR Managing Partner Rob Nestico criticized me in front of other KNR attorneys for my unwillingness to be dishonest to potential KNR clients. This happened in a meeting where all KNR prelitigation attorneys were present, and Nestico played a recording of a phone call that I had over the firm's phone line

with a potential client. On this call, a car-accident victim told me that he was an independent contractor and sub-contractor, and was concerned about recovering lost wages for work missed due to his car-accident injuries. I advised this potential client that his status as a contractor would make it more complicated to recover damages because he would have to prove not only that he did not work as a result of the accident, but also that he would have otherwise worked on certain jobs, for a certain amount of money during the same time period. After Nestico played the recording of the phone call for everyone in the room, he asked what I had done wrong on the call. The answer, according to Nestico, was that I was too honest with the client in advising him of the complications in recovering damages due to his status as an independent contractor, and that I did not tell the potential client "what he wanted to hear."

11. On March 23, 2017, I received a phone call from a man who identified himself as Attorney Brian Roof with the law firm of Sutter O'Connell, and said that he represents KNR and Nestico in the above-captioned lawsuit. He asked me if I was familiar with the lawsuit and the recently filed proposed Second Amended Complaint. I told him that I was, and had read a press release about the Second Amended Complaint. He asked me about my time at KNR and what documents I took with me when I left, and he said that it was his clients' position that all such documents were confidential. I interpreted this as a threat, and told Mr. Roof that as far as I'm concerned, everything in the press release is true, and that I was terminated by KNR because of my refusal to participate in their kickback schemes.

12. Every document I have disclosed and all information I have provided to Plaintiffs' counsel in this litigation was and is, to the best of my knowledge and understanding, evidence of fraud and illegal activity by KNR. I do not believe that any of it is confidential or subject to any confidentiality agreement. I can't imagine that my own emails mocking the fraud would be confidential.

I affirm the above to be true and accurate to the best of my knowledge under penalty of perjury.

Signature of Affiant 4/3/17
Date

State of Ohio
County of Summit

Sworn to and subscribed before me on 4-3-2017

at Sharon Center, Ohio.

(Signature of Notary Public)

(Notary Public Seal)

Attorney Peter G. Pattakos
Resident Summit County
Notary Public, State of Ohio
My Commission Has No Expiration Date
Sec 147.03 RC

Peter Pattakos
(Printed Name of Notary Public)

Notary Public, State of Ohio

My commission expires on N/A

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Facsimile: (614) 464-2634
E-mail: jcoughlan@keglerbrown.com

February 26, 2016

VIA FACSIMILE and REGULAR U.S. MAIL
614-540-7473

Paul Steele, Esq.
Mularski, Bonham, Dittmer & Phillips LLC
107 W. Johnstown Rd
Gahanna, Oh 43230

RE: Kisling, Nestico & Redick

Dear Mr. Steele:

This law firm represents Kisling, Nestico & Redick (KNR). Your employment ended with KNR on September 15, 2015. As you know, you have obligations to KNR through the KNR Employee Manual, which you acknowledged receiving and reading on February 5, 2014. (A copy of the signature page is attached) Your obligations as detailed in the Employee Manual required you to maintain confidential certain firm information. Section 5-12 of the Employee Manual is entitled "Confidential Company Information" and states:

> During the course of work, an employee may become aware of confidential information about Kisling, Nestico & Redick's business, including but not limited to information regarding Firm finances, pricing, products and new product development, software and computer programs, marketing strategies, suppliers, customers and potential customers. An employee also may become aware of similar confidential information belonging to the Firm's clients. It is extremely important that all such information remain confidential, and particularly not be disclosed to our competitors. Any employee who improperly copies, removes (whether physically or electronically), uses or discloses confidential information to anyone outside of the Firm may be subject to disciplinary action up to and including termination. Employees may be required to sign an agreement reiterating these obligations.

We recently learned that you have contacted Westgate Chiropractor, Town & Country Chiropractor among others and solicited their participation in a referral arrangement with you practice. As you know, KNR has close working relationships with

EXHIBIT 8

KEGLER BROWN HILL RITTER

these medical providers and your actions could well be viewed as a violation of your obligations under the Employee Manual.

A primary objective of the Employee Manual was to prevent the misuse of KNR's Confidential Information by its employees and former employees. Your actions appear to be the very harm the Employee Manual was designed to prevent. The Employee Manual requires you to keep KNR's Confidential Information in strict confidence and prohibits its use by you or anyone else. You are hereby instructed to cease and desist from any further violations of the terms of the Employee Manual.

The purpose of this letter is to remind you of your obligations and to inform you that if you take any further actions which violate your obligations as they relate to KNR's Confidential Information, we will pursue appropriate legal action against you. Accordingly, your cooperation in adhering to your obligations is expected and appreciated.

Very truly yours,

Jonathan E. Coughlan

cc: Rob Nestico

Rob this is bad. Paul called me and said you were concerned about bar complaint. I agree not to do anything provided you do not interfere with ANY KNR clients.
10:53 AM

I won't. Wasn't planning on it. I know I fucked up.
10:54 AM

He asked me about calling them and I didn't think I could.
10:56 AM

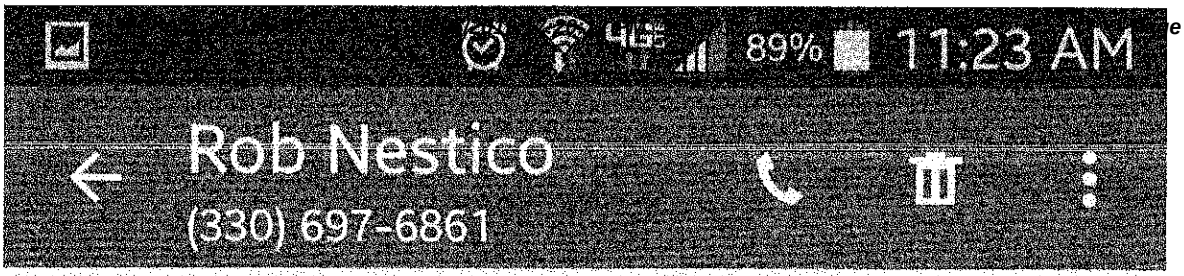
Not sure how it works, but I clearly don't have the resources...
10:56 AM

No you can't you don't represent them anymore is KNR

EXHIBIT 9

Enter message

Send



KNR does. Any tortious interference will draw bar complaints and law suit. Trust me I know I lived it.
10:57 AM

And not that it matters, but as you saw, everything I had was stuff we already were shown at one point or another. Except the phone numbers on that statement. That is all. No other $$ stuff.
10:58 AM

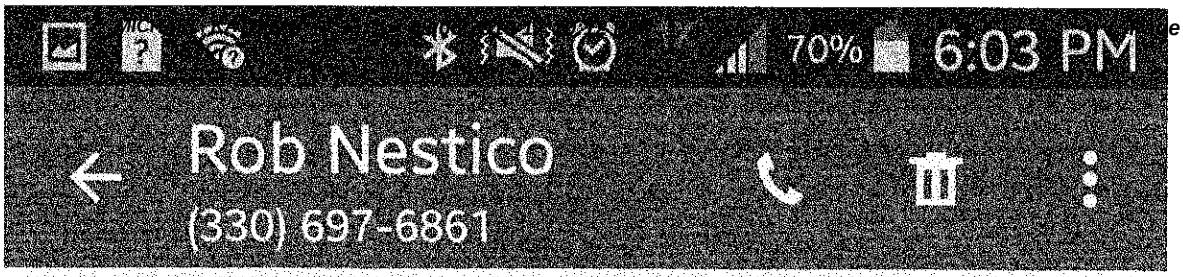
I know this why no one understands
10:59 AM

Can you call me really quick?
11:00 AM

In a few I'm in a meeting with Danny right now

Enter message

Send



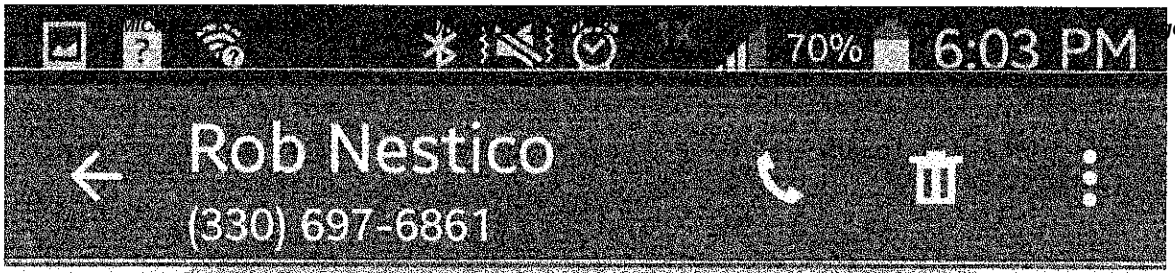
Are you serious your following this Amanda. Seriously. What she didn't read in those decisions is the all the case law. We demanded our client list and you returned it so it is trade secret. We contacted all our clients of your departure. What wasn't followed by either one of you is how you obtained the client list. She may want to do further research and see what rules she has violated and what she will face next. Don't be a fool. I like you but I don't like her. Don't join her file and rank.

8:53 AM

She just asked if I had any case law. I sent her what I

Enter message

Send



She just asked if I had any case law. I sent her what I had. That's it. She can do what she wants. I've moved on.

8:54 AM

Smart cause I'm am going to go after her now.

8:55 AM

First a bar complaint then a law suit. She

8:55 AM

Can't read case law if it would save her life

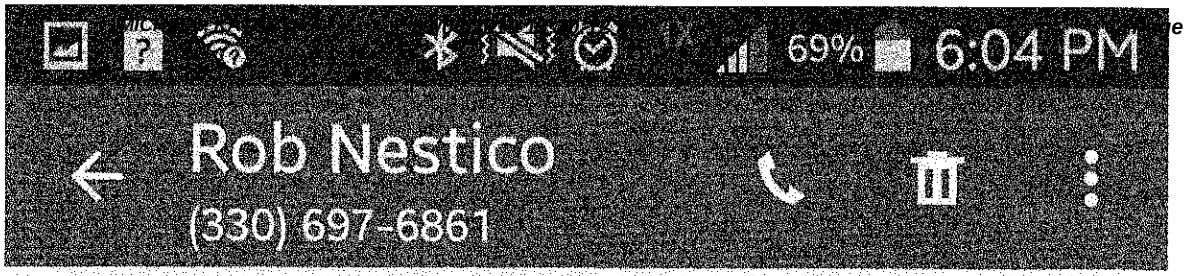
8:56 AM

Your departure was not my wish hers was

8:56 AM

Enter message

Send



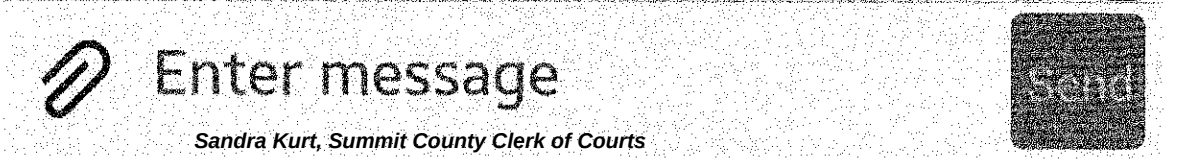
You should talk to her let her know I'm gunning for her. I have copies of e mails to clients asking to go with her for a lower rate. She has violated so many ethical rules it's crazy.
3:02 PM

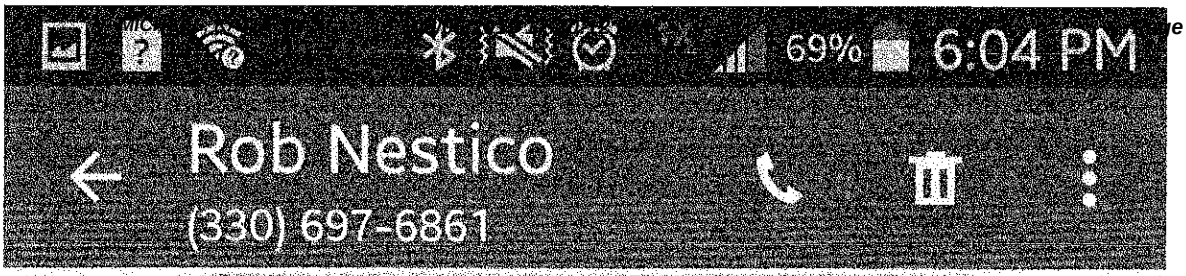
See what the nut says
3:02 PM

Hahaha. She's probably shitting her pants.
3:02 PM

She is stupid. If I so much as get one termination letter she is done. She just needs to move on.
3:03 PM

Speaking of, interview went





And contacting our clients by improperly obtaining info is another

5:35 PM

Dude she hung herself. Did you tell her to stay the fuck away

5:35 PM

I told her it would be in her best interest for sure.

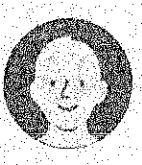
5:36 PM

Like I said, I told her I haven't had any problems at all. Hint hint.

5:37 PM

Hopefully she takes the hint, for her sake...

5:37 PM



Enter message

Send

69% 6:04 PM

Rob Nestico
(330) 697-6861

She doesn't get hints. If you don't tell her straight she is too stupid to figure it out
5:38 PM

I would hate to go after her but she makes one more move then I will have no choice
5:39 PM

Hahaha. She is pretty ditzy
5:39 PM

Sat, 05/02/2015

Hey. I need to come and get my USB drives, along with a copy of my confidentially agreement. I can come by monday, preferably.
4:01 PM

Enter message

Send

69% 6:05 PM

Rob Nestico
(330) 697-6861

This girl continues to fail to tell anyone the truth. She is either ignorant or just absent minded. Either one

4:12 PM

Well, you reap what you sow I suppose.

4:15 PM

Yessir

4:21 PM

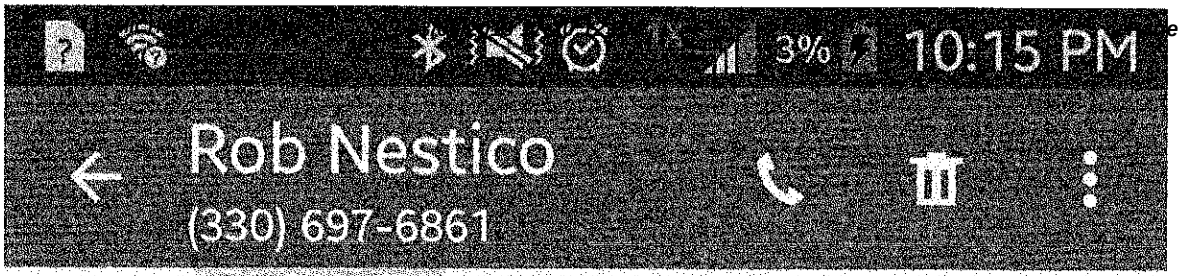
She has no idea what it means to go to war with someone who has a lot more money then her!!!!

4:22 PM

I learned when I went to battle with Eshelman it cost me 75k in legal and 50% of my fees and not

Enter message

Send



She has no idea what it means to go to war with someone who has a lot more money then her!!!!
4:22 PM

I learned when I went to battle with Eshelman it cost me 75k in legal and 50% of my fees and not even one deposition was taken. Lol
4:23 PM

Ouch.
4:24 PM

It's all fun and games until you go to war
4:24 PM

Ha.

Enter message

Send

Jen: Do you wanna take my car so I can watch lily

Rob Nestico
(330) 697-6861

Yep. Day 2.
12:31 PM

And? Good
12:39 PM

Yep. All good. Just training.
12:40 PM

Sat, 06/13/2015

You really need to just move on and stop spreading false rumors or you may get a lesson on a defamation case with your name on it. Remember your the one who was unethical and betrayed our friendship NOT me or KNR.
11:01 AM

Enter message

Send