

IN THE COURT OF COMMON PLEAS
SUMMIT COUNTY, OHIO

MEMBER WILLIAMS, et al.,	:	Case No. CV-2016-09-3928
	:	
Plaintiffs,	:	Judge James A. Brogan
	:	
vs.	:	KNR DEFENDANTS' MOTION
	:	FOR LEAVE TO FILE SUR-REPLY
KISLING, NESTICO & REDICK, LLC, et	:	IN OPPOSITION TO PLAINTIFFS'
al.	:	MOTION TO COMPEL THE
	:	CONTINUED DEPOSITION OF
Defendants	:	ALBERTO NESTICO

Come now the KNR Defendants and respectfully move for leave to file a Sur-Reply in Opposition to Plaintiffs' Motion to Compel the Continued Deposition of Alberto Nestico. This motion is supported by the attached Memorandum. The KNR Defendants' proposed Sur-Reply is attached hereto as Exhibit 1.

Respectfully submitted,

/s/ George D. Jonson

GEORGE D. JONSON (83926)
MONTGOMERY, RENNIE & JONSON
36 East Seventh Street, Suite 2100
Cincinnati, Ohio 45202
Tel: (513) 768-5220
Fax: (513) 768-9220
gjonson@mrjlaw.com

*Counsel for Defendants Kisling, Nestico
& Redick, LLC, Alberto R. Nestico, and
Robert W. Redick*

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MEMBER WILLIAMS, et al.,	:	Case No. CV-2016-09-3928
	:	
Plaintiffs,	:	Judge James A. Brogan
	:	
vs.	:	MEMORANDUM IN SUPPORT OF
	:	KNR DEFENDANTS' MOTION
KISLING, NESTICO & REDICK, LLC, et	:	FOR LEAVE TO FILE SUR-REPLY
al.	:	IN OPPOSITION TO PLAINTIFFS'
	:	MOTION TO COMPEL THE
Defendants	:	CONTINUED DEPOSITION OF
	:	ALBERTO NESTICO

The KNR Defendants seek the opportunity to respond to two discrete points: (a) the alleged lack of case law in support of Defendants' assertion that proprietary information is protected from discovery, and (b) the contention that KNR's Youngstown office was more than 5 miles away from Popeye's Chicken at the time Plaintiffs' Deposition Exhibit 86 was sent. For these reasons, the KNR Defendants' respectfully request that the attached Sur-Reply be permitted and be deemed filed instanter.

Respectfully submitted,

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*Counsel for Defendants Kisling, Nestico
& Redick, LLC, Alberto R. Nestico, and
Robert W. Redick*

CERTIFICATE OF SERVICE

I hereby certify that on March 29, 2019, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system which will send notification of such filing to all attorneys of record.

/s/ George D. Jonson
GEORGE D. JONSON

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	:	ALBERTO NESTICO
Defendants	:	

I. Proprietary information is properly protected in cases like this.

Although Plaintiffs cite no law in support of their contention that proprietary information is not protected from discovery, even where Plaintiffs' counsel is himself a competitor of the deponent, Plaintiffs criticize the lack of case law on this point in the opposition papers filed by the KNR Defendants.

Many courts recognize the disclosure of confidential, proprietary or trade secret information as a valid basis for counsel instructing his client not to answer questions at deposition under Rule 30(C)(2) or the state's functional equivalent. *See, e.g., Agxplode Int'l, LLC v. Shelley*, No. 1:12-cv-16 SNLJ, 2013 U.S. Dist. LEXIS 3265, *4 (E.D. Mo. Jan. 9, 2013) ("Although Mr. Snider's counsel was not entitled to object and instruct his client not to answer on the grounds of relevancy, Mr. Snider may have had justifiable concerns about protecting his company's competitive information."); *Continental Distilling Corp. v. Humphrey*, 17 F.R.D. 237, 241 (D.D.C. 1955) ("If the defendant Avis submits to the taking of his deposition, questions which relate to privileged or confidential matters, or are otherwise legally objectionable may be objected to by

counsel and the defendant instructed not to answer.”); *Friction Div. Prods. v. E.I. Du Pont de Nemours & Co.*, 117 F.R.D. 535, 539-540 (D. Del. 1987) (“In general, instructing a witness not to answer particular questions asked in a deposition is not a proper course of conduct under the Rules * * *. However, this principle is not strictly applied in cases calling for the disclosure of trade secrets or privileged information.”); *Luc Vets Diamant v. Akush*, No. 05 Civ. 2934, 2006 U.S. Dist. LEXIS 4039, *6-7 (S.D. N.Y. Feb. 3, 2006) (declining to award sanctions against plaintiff who refused to answer deposition questions regarding customer list that plaintiff considered a trade secret); *Anderson News, LLC v. Am. Media, Inc.*, No. 09 Civ. 2227, 2014 U.S. Dist. LEXIS 4840, *6 (S.D. N.Y. Jan. 14, 2014) (denying plaintiff’s motion to amend protective order to permit its corporate representative to attend deposition of competitor-defendant because “once privileged information is given to a competitor, * * * the damage is already done.”).

Here, Plaintiffs’ counsel is a competitor of KNR, so the protective order offers no protection to KNR’s proprietary information. KNR’s right to protect its proprietary information covers: the reasons KNR tracks its referrals and how KNR makes use of that information; KNR’s marketing budget; and KNR’s use of cutting edge technology in its practice.

II. Who doesn’t like fried chicken?

Plaintiffs’ counsel doubled down on his stereotypical conclusion that because KNR’s clients are “lower socioeconomic,” they must be black, by attempting to prove most black people are poor. Of course, even if true, that misses the point. The relevant inquiry, if there was anything relevant about this topic at all, would be: “Are most poor people black?,” because to prove that a person in the “lower socioeconomic” group is probably black, that is what you would have to prove. Nothing in Plaintiffs’ Reply

addresses that question. The fact is that no one knows if the client who sold her gift card to the pawn shop was black or white. The client's identity is not on the email (Plaintiffs' Exhibit 86). Plaintiffs' counsel assumed—and continues to assume—that the client is black. It isn't provable, and, more importantly, it isn't relevant.

Plaintiffs have alleged in the Reply that “. . . KNR engaged in egregious misrepresentation that 'Popeye's Chicken is the closest restaurant to [KNR's] Youngstown office.'" Plaintiffs' counsel then locates KNR's current Youngstown office, which is more than 5 miles from the nearest Popeye's. However, until August 2018, KNR's Youngstown office was located at 4790 Market Street, Boardman. The email in question was sent while KNR occupied that Market Street office. That office was .8 miles from the nearest Popeye's Chicken. (See Gobrogge Aff., March 29, 2019, attached as Exhibit A.)

Finally, it isn't an act of kindness to accuse someone of being a racist when you don't really think they are. Moreover, Mr. Nestico's knowledge of a stereotype that African-Americans like fried chicken isn't remotely relevant to any fact in issue in this case. He should not be subjected to the condescending, accusatory questions of counsel about a news article on that topic. And the plain fact is (although the undersigned couldn't find an article which addressed the question), white people like fried chicken too.

Respectfully submitted,

/s/ George D. Jonson

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CERTIFICATE OF SERVICE

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-vs-

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LLC, et al,

Defendants.

CASE NO.: 2016 09 3928

JUDGE JAMES BROGAN

AFFIDAVIT OF
BRANDY R. GOBROGGE

Now comes Affiant, Brandy R. Gobrogge, having first been sworn upon her oath, and attests as follows:

1. I am of legal age, sound mind and otherwise competent to testify.
2. This affidavit is based on my personal knowledge.
3. I have been employed by Kisling, Nestico & Redick, LLC (“KNR”) since 2010, in various positions, including my current role as Director of Operations.
4. During my tenure at the firm, I have been familiar with the KNR office facilities and locations throughout the state of Ohio.
5. From the time I started working at KNR in 2010, up until August of 2018, KNR’s “Youngstown” office was located at 4790 Market Street, Boardman, Ohio 44512. In August of 2018, the office was moved to its present address of 22 East McKinley Way, Suite A, Poland, Ohio 44514.
6. Specifically, in November of 2012, KNR’s Youngstown office was located at the 4790 Market Street address in Boardman. There is a Popeyes Chicken fast food restaurant located at 40 W Midlothian Blvd, which was 0.8 miles from the KNR Youngstown office

at the time, a driving distance of 2 minutes according to Google Map directions attached hereto as **Exhibit 1**.

FURTHER AFFIANT SAYETH NAUGHT.

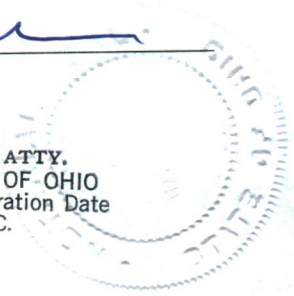
Brandy Gobrogge
BRANDY R. GOBROGGE

STATE OF OHIO)
)SS;
COUNTY OF SUMMIT)

Affiant, Brandy R. Gobrogge, appeared in my presence this 29th day of March, 2019, and having first been sworn upon her oath, attested that the facts stated in this Affidavit are true to the best of her knowledge.

John J. Reagan
NOTARY PUBLIC

JOHN J. REAGAN, ATTY.
NOTARY PUBLIC • STATE OF OHIO
My Commission Has No Expiration Date
Section 147.03 O.R.C.







4790 Market St, Youngstown, OH 44512 to Popeyes Louisiana Kitchen



Drive 0.8 mile, 2 min



Map data ©2019 Google 500 ft

 via OH-7 N/Market St **2 min**
Fastest route, lighter traffic than usual 0.8 mile

 via OH-7 N/Market St and Hillman St **2 min**
Some traffic, as usual 0.8 mile

 11:10 AM–11:16 AM **6 min**
 8

