

IN THE COURT OF COMMON PLEAS
SUMMIT COUNTY, OHIO

MEMBER WILLIAMS, et al.,)	CASE NO. CV-2016-09-3928
)	
Plaintiffs,)	JUDGE JAMES BROGAN
)	
vs.)	<u>DEFENDANTS' BRIEF IN</u>
)	<u>OPPOSITION TO PLAINTIFFS'</u>
KISLING, NESTICO & REDICK, LLC, et)	<u>MOTION TO STRIKE DEFENDANTS'</u>
al.,)	<u>CONFIDENTIALITY DESIGNATIONS</u>
)	<u>TO DEFENDANT NESTICO'S</u>
Defendants.)	<u>DEPOSITION TESTIMONY</u>

Defendants Kisling, Nestico & Redick, LLC, Alberto R. Nestico, and Robert Redick ("Defendants") hereby oppose Plaintiffs' Motion to Strike Defendants' confidentiality designations of Mr. Nestico's deposition testimony pursuant to the Protective Order issued in this case on September 12, 2017.

Defendants recognize that this Court has previously overruled Defendants' confidentiality designations of the deposition testimony of KNR employee Brandy Gobrogge. However, Defendants maintain that Order has no applicability to the designations at hand, as Plaintiffs have utterly failed to show that any of the testimony Defendants have designated as confidential is either public information, the subject of documents independently obtained by Plaintiffs outside of this litigation, or is otherwise not protected under the Protective Order as issued by this Court. As a result, Plaintiffs' Motion to Strike should be denied.

The Protective Order allows any party to designate information or documents as confidential "upon making a good faith determination that the documents contain information protected from disclosure by statute or that should be *protected from disclosure as confidential personal information, privileged, medical or psychiatric information, trade secrets, personnel records, or such other sensitive or proprietary commercial information that is not publically*

available.” (September 12, 2017 Protective Order, at ¶¶ 3 and 4)(Emphasis added in bold italics).

Beyond the broad scope of protections provided by the Order, Ohio’s Uniform Trade Secrets Act defines a trade secret under Ohio Law as:

[I]nformation, including the whole or any portion or phase of any scientific or technical information, design, process, procedure, formula, pattern, compilation, program, device, method, technique, or improvement, or any business information or plans, financial information, or listing of names, addresses, or telephone numbers, that satisfies both of the following:

(1) It derives independent economic value, actual or potential, from not being generally known to, and not being readily ascertainable by proper means by, other persons who can obtain economic value from its disclosure or use.

(2) It is the subject of efforts that are reasonable under the circumstances to maintain its secrecy.

R.C. 1333.61(D). When analyzing claims that such information is protectable, courts generally consider:

“(1) The extent to which the information is known outside the business; (2) the extent to which it is known to those inside the business, i.e., by the employees; (3) the precautions taken by the holder of the trade secret to guard the secrecy of the information; (4) the savings effected and the value to the holder in having the information as against competitors; (5) the amount of effort or money expended in obtaining and developing the information; and (6) the amount of time and expense it would take for others to acquire and duplicate the information.”

Salemi v. Cleveland Metroparks, 145 Ohio St. 3d 408, 2016-Ohio-1192, 49 N.E.3d 1296, at ¶ 25, quoting *State ex rel. Luken*, 135 Ohio St.3d 416, 2013-Ohio-1532, 988 N.E.2d 546, at ¶ 17.

Pursuant to the Protective Order, Defendants designated the following topics of the deposition testimony of Mr. Nestico as “CONFIDENTIAL – SUBJECT TO PROTECTIVE ORDER” or “CONFIDENTIAL: SUBJECT TO ATTORNEY’S EYES ONLY:”

1. Internal information about the financial ownership structure of the KNR Business (Nestico Tr. at pp. 14-20);¹

¹ The February 6, 2019 and February 7, 2019 deposition transcripts of Mr. Nestico have been filed with the Court under seal.

2. Internal information about the compensation, salary, and/or benefits provided to KNR Employees (Nestico Tr. at pp. 21-28; 44; 57; 60-61; 148);
3. Internal information and documents about how KNR trains its employees and manages and strategizes its cases (Nestico Tr. at pp. 42-43; 132; 340-345; 363-368; 394-395; 612-613; 627-628);
4. Internal information about KNR's marketing practices and financials (Nestico Tr. at pp. 127-128; and
5. Internal client case notes (Nestico Tr. at pp. 623-625).

As this Court is well-aware, KNR is one of thousands of personal injury law firms in the State of Ohio. Any company, let alone a law firm such as KNR, is at all times at risk of competitors, or adversaries, stealing valuable information involving the way it conducts and markets its business, how it trains its employees, or how such employees are compensated. There is no question that this information has independent value to KNR that it has continuously protected from disclosure to its competitors, one of which is Plaintiffs' own Counsel, and would serve to irreparably harm its business if so disclosed. Indeed, Ohio courts have recognized that similar company materials, having independent value and generated over many work hours, are protectable and would irreparably harm a business if disclosed publically. *See, e.g. Columbus Bookkeeping & Bus. Servs. V. Ohio State Bookkeeping, LLC*, 10th Dist. Franklin No. 11AP-227, 2011 Ohio App. LEXIS 5655 *12 (Dec. 30, 2011) (recognizing that client lists may be trade secrets, and "disclosure to a competitor grants the competitor a tremendous advantage in not having to spend the time and money to develop that same information). *See also Buckingham, Doolittle & Burroughs, L.L.P. v. Bonasera*, 157 Ohio Misc.2d 1, 2010-Ohio-1667, ¶ (10th Dist.) (recognizing that attorney compensation may be protectable as a trade secret, disclosure of which might "give an unfair advantage [to a competitor] in recruiting certain employees"). The categories of information designated as confidential by Defendants, therefore, is certainly

protectable as a trade secret or subject to the catch-all provision protecting sensitive commercial information under the Protective Order.

Most significantly, while asserting “most if not all of this purportedly ‘confidential’ information has already been made public or is the subject of documents independently obtained,” Plaintiffs have simply failed to back up such a broad claim. For example, Plaintiffs have pointed this court to no public information or information obtained independently from this case with regard to the financial ownership structure of the KNR business, the compensation structure for KNR employees, or KNR’s marketing practices and financials related to them. While Plaintiffs rely on emails stolen from KNR by a former employee, to which Defendants continue to maintain should retain their confidentiality, Plaintiffs have pointed to none of those documents to establish that the information Defendants have designated here is, indeed, public. Here, none of the categories of information designated as confidential by Defendants is either public information or the subject of documents independently obtained by Plaintiffs outside of this litigation. On the contrary, Defendants have established the internal information is valuable and will cause irreparable harm to its business if disclosed.

Moreover, Plaintiffs have set forth no basis or reason why the designated information should be made available to persons outside of the parties to this litigation, as the information has little to do with the baseless claims brought by Plaintiffs in this case. It is the Court that is the gatekeeper of confidential information produced during discovery, not Plaintiffs’ counsel who has continuously tried to usurp this authority by widely distributing and commenting on stolen documents in court filings, on social media, and in the press. *See, e.g. Dahlstrom v. Sun-Times Media, LLC*, 777 F.3d 937, 939-940 (7th Cir. 2015) (finding that newspaper “possess[ed] no [First Amendment] constitutional right either to obtain [police] officers’ personal information

from government records or to subsequently publish that unlawfully obtained information” in violation of the Driver’s Privacy Protection Act); *DVD Copy Control Assn. v. Bunner*, 31 Cal.4th 864, 75 P.3d 1 (Cal. 2003) (finding that court injunction prohibiting website owner from publishing trade secrets acquired by a third-party through improper means does not violate First Amendment guarantees). The information identified is confidential based upon multiple grounds under the Protective Order, and Plaintiffs’ Motion to Strike should be denied.

Respectfully submitted,

/s/ James M. Popson

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CERTIFICATE OF SERVICE

I certify that a copy of the foregoing was filed electronically with the Court on this 13th day of May, 2019. The parties may access this document through the Court's electronic docket system.

/s/ James M. Popson

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