

IN THE COURT OF COMMON PLEAS  
SUMMIT COUNTY, OHIO

MEMBER WILLIAMS, <i>et al.</i> ,  Plaintiff,  vs.  KISLING, NESTICO & REDICK, LLC, <i>et al.</i> ,  Defendants.	Case No. CV-2016-09-3928  Judge James A. Brogan  <b>Plaintiffs' Opposition to Defendant Ghoubrial's Motion to Strike, for Sanctions, and a Finding of Contempt</b>
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Despite that the Court has already rejected nearly identical arguments for sanctions against Plaintiffs' counsel concerning the deposition testimony of Dr. Gunning, Defendant Ghoubrial has again asked the Court to sanction Plaintiffs' counsel for referring to portions of purportedly "confidential" deposition testimony that is not in any way confidential and was never even marked as such. This time, Ghoubrial has requested that the Court strike from the docket Plaintiffs' Motion to Compel Discovery on Defendants' Net Worth (filed 5/1/2019), issue "severe" sanctions on Plaintiffs' counsel, and make a finding of criminal contempt against Plaintiffs' counsel. *See* Ghoubrial's Motion at 4-5.

Ghoubrial's requests here are, frankly, absurd, as he has (1) never marked, indicated, or otherwise designated any portion of his deposition transcript as "confidential" under the protective order; (2) never issued confidentiality designations relating to his deposition testimony; and (3) not provided any indication that Plaintiffs' counsel has violated any Court orders.

**1. Ghoubrial never designated his deposition transcript or testimony as "confidential" as required by the protective order.**

Under the pending protective order in this case, deposition testimony is "confidential" under the order "only if designated as such" and only if such designations are "specific as to the portions of the transcript or any exhibit to be designated as CONFIDENTIAL." *See* Protective Order, at ¶ 4,

attached as **Exhibit 1**. Thus, information is not “confidential” under the protective order unless the parties have (1) affirmatively designated information as such and (2) issued designations that are “specific as to the portions of the transcript” that are claimed to be “confidential.” *Id.*

Indeed, in overruling Ghoumbrial’s Motion for Sanctions and Motion to Strike Dr. Gunning’s Confidential Deposition Transcript, filed on Jan. 9, 2019, the Court flatly rejected Ghoumbrial’s requests for sanctions against Plaintiffs’ counsel for purportedly “violating” the protective order:

Ghoumbrial argues that when a deposition transcript is marked confidential, the parties must consult before filing the document under seal. Ghoumbrial notes that during Dr. Gunning’s deposition, issues of confidentiality and privilege arose and the parties agreed to designate the entire deposition as confidential pursuant to the Protective Order until those issues could be resolved. He refers the Court to Gunning’s deposition at Pages 74-75 and Page 180.

The Plaintiffs argue that the Defendants never designated any portion of the deposition transcript as “confidential,” and (2) in any event no part of the transcript could legitimately be so designated. Plaintiffs also note that the Protective Order, as it applies to depositions, requires that the designation shall be specific as to the portions of the transcript or any exhibit to be designated as confidential. (*See* Para. 4 of Protective Order).

It is not clear who placed “Confidential” on the front of Dr. Gunning’s deposition. On Page 71 of Gunning’s deposition, Plaintiffs’ counsel marks as an exhibit the affidavit of Dr. Gunning concerning his care of patient Monique Norris, a putative class representative and plaintiff ...

The Court agrees with the Plaintiffs that the only discussion of designating the deposition transcript of Dr. Gunning as “Confidential” pertained to documents concerning Norris’ medical records. The record fails to establish that the parties agreed to designate the entire Gunning deposition as confidential ... Defendant Ghoumbrial’s Motion for Sanctions against the Plaintiffs and to Strike Dr. Gunning’s Deposition Transcript is hereby OVERRULED.

*See* 01/30/2019 Order, at 3-4, attached as **Exhibit 2**.

Here, Ghoumbrial has again failed to follow the procedures set forth in the protective order. Despite his claim that deposition testimony is rendered confidential “when the transcripts are so

designated by any party,” *see* Ghoumbrial’s Motion at 2, Ghoumbrial’s counsel made no attempt to mark, indicate, or otherwise designate Ghoumbrial’s deposition transcript as “confidential” under the protective order, and cannot cite any evidence that he did so. Nor did Ghoumbrial’s counsel address any confidentiality concerns during the deposition. Moreover, Ghoumbrial’s counsel has not provided Plaintiffs’ counsel with any confidentiality designations concerning Ghoumbrial’s testimony, let alone the “specific” designations that the protective order requires.

In addition, Ghoumbrial incorrectly suggests that Plaintiffs’ counsel has further “violated” the protective order by citing to the “confidential” deposition testimony of Dr. Gunning,<sup>1</sup> Defendant Nestico,<sup>2</sup> and Defendant Floros.<sup>3</sup> *See* Ghoumbrial’s Motion at 2, note 3. But Ghoumbrial is incorrect, because the portions of testimony to which Plaintiffs cited in their Motion to Compel Discovery on Defendants’ Net Worth were not and have never been designated by counsel for Dr. Gunning, Defendant Nestico, or Defendant Floros as “confidential” under the protective order.

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<sup>1</sup> During Dr. Gunning’s continued deposition, Plaintiffs’ counsel and Dr. Gunning’s personal counsel, attorney John Myers, reached an agreement that *specific* portions of the transcript would be marked as “confidential” under the protective order and that Plaintiff’s counsel would seek the Court’s leave to file references to those specific portions under seal, should it become necessary. *See* Gunning Tr., at 79:2–23, filed under seal on 4/23/19. Consistent with the agreement reached concerning Dr. Gunning’s deposition testimony, Plaintiffs’ counsel has not cited to the portions of Dr. Gunning’s deposition testimony that were specifically marked as “confidential.”

<sup>2</sup> As the protective order requires, the KNR Defendants provided Plaintiffs’ counsel with specific confidentiality designations concerning Defendant Nestico’s deposition testimony. In Plaintiffs’ Motion to Compel Discovery on Defendants’ Net Worth, and consistent with the KNR Defendants’ confidentiality designations, served upon Plaintiffs’ counsel on March 4, 2019, Plaintiffs cited to no portion of Nestico’s transcript that the KNR Defendants marked as “confidential.”

<sup>3</sup> Counsel for Defendant Floros indicated during Floros’s deposition that he believed certain portions of testimony contained confidential information. *See* Floros Tr., at 229:14–232:7, filed under seal on 5/15/2019. Plaintiffs’ counsel cited to no portion of the transcript Defendant Floros designated as “confidential.”

**2. Ghoumbrial has not and cannot show that Plaintiffs' counsel violated any order of the Court.**

In asking the Court to find Plaintiffs' counsel in "criminal contempt," Ghoumbrial relies on his apparent belief that Plaintiffs' counsel has engaged in "willful violations of the Protective Order" and "the April 22, 2019 Order sealing the transcripts of Dr. Ghoumbrial and Dr. Gunning." *See* Ghoumbrial's Motion at 4-5. His beliefs notwithstanding, the party requesting a finding of contempt must "show by clear and convincing evidence that" the alleged wrongdoer "failed to comply with the court's order," and only then does the "show cause" burden shift to the other party. *See Balvas v. Balvas*, 8th Dist. Cuyahoga No. 75946, 2000 Ohio App. LEXIS 4048, at \*10-11 (Sep. 7, 2000).

Because Ghoumbrial has not and cannot show that Plaintiffs' counsel violated any order of the Court, his motion for contempt must be denied. As explained above, Plaintiffs' counsel could not have violated the protective order, because Ghoumbrial failed to designate his testimony as confidential. Similarly, Plaintiffs' counsel could not have violated the "sealing" order, which merely granted Plaintiffs' leave to file these transcripts under seal assuming that the Defendants would timely provide specific confidentiality designations to Plaintiffs' counsel in compliance with the protective order. Ghoumbrial's failure to provide designations to Plaintiffs' counsel does not warrant a finding of contempt against Plaintiffs' counsel.

**Conclusion**

Defendants' baseless motion for sanctions is sanctionable in itself, and should be denied.

Respectfully submitted,

/s/ Rachel Hazelet

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*Attorneys for Plaintiffs*

### **Certificate of Service**

The foregoing document was filed on May 24, 2019, using the Court's e-filing system, which will serve copies on all necessary parties.

/s/ Rachel Hazelet  
*Attorney for Plaintiffs*

SANDRA KURT

IN THE COURT OF COMMON PLEAS  
2017 SEP 12 AM 9:22 COUNTY OF SUMMITMEMBER WILLIAMS, et al.,  
CLERK OF COURTS

Plaintiffs,

-vs-

KISLING, NESTICO & REDICK,  
LLC, et al.

Defendants;

( CASE NO.: CV-2016-09-3928

)

( JUDGE ALISON BREAUX

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( **ORDER**

) (Protective Order)

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This matter comes before the Court on the Motion for Protective Order filed by Defendants, Kisling, Nestico & Redick, LLC; Alberto R. Nestico; and Robert W. Redick (Defendants), on October 12, 2016. Plaintiffs, Member Williams; Naomi Wright; and Matthew Johnson (Plaintiffs), filed their Motion for Protective Order and Opposition to Defendants' Motion for Protective Order on October 28, 2016. Defendants filed their Brief in Opposition to Plaintiffs' Motion for Protective Order and in Support of Defendants' Motion for Protective Order on November 4, 2017. Plaintiffs filed their Reply in Support of Plaintiffs' Motion for Protective Order and in Opposition to Defendants' Motion for Protective Order on November 11, 2016. Plaintiffs then filed their Combined Motion for Protective Order and Opposition to Defendants' Motion to Compel on December 2, 2016. Defendants filed their Brief in Opposition to Plaintiffs' Motion for Protective Order and Reply Brief in Support of Their Motion to Compel Discovery on December 12, 2016. The matter has been fully briefed and is ripe for consideration. The Court notes the parties submitted a number of proposed protective orders and could not reach an agreement for a stipulated protective order. Therefore, it is hereby **ORDERED**:

1. **SCOPE.** All documents produced in the course of discovery, including, without limitation, all responses to discovery requests, all electronic discovery, all deposition testimony and exhibits, other materials which may be subject to restrictions on disclosure for good cause and information derived directly therefrom (hereinafter collectively "documents"), shall be subject to this Order concerning confidential

information as set forth below. This Order is subject to the Local Rules of this Court and Ohio Rules of Civil Procedure on matters of procedure and calculation of time periods.

2. **FORM AND TIMING OF DESIGNATION.** A party may designate documents as confidential and restricted in disclosure under this Order by designating the information and placing or affixing the words "CONFIDENTIAL – SUBJECT TO PROTECTIVE ORDER" or "CONFIDENTIAL: ATTORNEY'S EYES ONLY – SUBJECT TO PROTECTIVE ORDER" or similar designation on the document in a manner that will not interfere with the legibility of the document and that will permit complete removal of the CONFIDENTIAL – SUBJECT TO PROTECTIVE ORDER or "CONFIDENTIAL: ATTORNEY'S EYES ONLY – SUBJECT TO PROTECTIVE ORDER" designation. Documents shall be designated CONFIDENTIAL – SUBJECT TO PROTECTIVE ORDER or CONFIDENTIAL: ATTORNEY'S EYES ONLY – SUBJECT TO PROTECTIVE ORDER prior to or at the time of the production or disclosure of the documents. The designation CONFIDENTIAL – SUBJECT TO PROTECTIVE ORDER or CONFIDENTIAL: ATTORNEY'S EYES ONLY – SUBJECT TO PROTECTIVE ORDER does not mean that the document has any status or protection by statute or otherwise except to the extent and for the purposes of this Order.
3. **DOCUMENTS WHICH MAY BE DESIGNATED CONFIDENTIAL – SUBJECT TO PROTECTIVE ORDER OR CONFIDENTIAL: ATTORNEY'S EYES ONLY – SUBJECT TO PROTECTIVE ORDER.** Any party may designate documents as CONFIDENTIAL – SUBJECT TO PROTECTIVE ORDER or CONFIDENTIAL: ATTORNEY'S EYES ONLY – SUBJECT TO PROTECTIVE ORDER 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, medial or psychiatric information, trade secrets, personnel records, or such other sensitive or proprietary commercial information that is not publicly available.* Public records and other information or documents that are publicly available may not be designated as CONFIDENTIAL – SUBJECT TO PROTECTIVE ORDER or CONFIDENTIAL: ATTORNEY'S EYES ONLY – SUBJECT TO PROTECTIVE ORDER.

4. **DEPOSITIONS.** Deposition testimony shall be deemed CONFIDENTIAL – SUBJECT TO PROTECTIVE ORDER or CONFIDENTIAL: ATTORNEY’S EYES ONLY – SUBJECT TO PROTECTIVE ORDER only if designated as such. Such designation shall be specific as to the portions of the transcript or any exhibit to be designated as CONFIDENTIAL – SUBJECT TO PROTECTIVE ORDER or CONFIDENTIAL: ATTORNEY’S EYES ONLY – SUBJECT TO PROTECTIVE ORDER. Thereafter, the deposition transcripts and any of those portions so designated shall be protected as CONFIDENTIAL – SUBJECT TO PROTECTIVE ORDER or CONFIDENTIAL: ATTORNEY’S EYES ONLY – SUBJECT TO PROTECTIVE ORDER, pending objectIOn, under the terms of this Order.
5. **PROTECTION OF MATERIAL DESIGNATED CONFIDENTIAL – SUBJECT TO PROTECTIVE ORDER.**
- a. **GENERAL PROTECTIONS.** Documents designated CONFIDENTIAL – SUBJECT TO PROTECTIVE ORDER under this Order shall not be used or disclosed by the parties, counsel for the parties, or any other persons identified in ¶ 5(b) for any purpose whatsoever other than to prepare for and to conduct discovery and trial in this action, including any appeal thereof.
- b. **LIMITED THIRD-PARTY DISCLOSURES.** The parties and counsel for the parties shall not disclose or permit the disclosure of any CONFIDENTIAL – SUBJECT TO PROTECTIVE ORDER documents to any third person(s) or entity except as set forth in subparagraphs i – vi. Subject to these requirements, the following categories of persons may be allowed to review documents that have been designated CONFIDENTIAL – SUBJECT TO PROTECTIVE ORDER:
- i. **COUNSEL.** Counsel for the parties and employees and agents of counsel who have responsibility for the preparation and trial of the action;
- ii. **PARTIES.** Parties and employees of a party to this Order.
- iii. **THE COURT, COURT REPORTERS AND RECORDERS.** The Court and court reporters and recorders engaged for depositions;
- iv. **CONSULTANTS, INVESTIGATORS AND EXPERTS.** Consultants, investigators, or experts (hereinafter referred to collectively as “experts”) employed by the parties or counsel for the parties to assist in the preparation and trial of this action or proceeding, but only after such



persons have completed the certification contained in Attachment A, Acknowledgment of Understanding and Agreement to be Bound;

- v. **OTHERS BY CONSENT.** Other persons only by written consent of the producing party or upon order of the Court and on such conditions as may be agreed or ordered. All such persons shall execute the certification contained in Attachment A, Acknowledgement of Understanding and Agreement to be Bound; and
- vi. **AUTHORS AND RECIPIENTS.** The author, addressee, or any other person identified in the document as a prior recipient.
- c. **CONTROL OF DOCUMENTS.** Counsel for the parties shall take reasonable and appropriate measures to prevent unauthorized disclosure of documents designated as CONFIDENTIAL – SUBJECT TO A PROTECTIVE ORDER pursuant to the terms of this Order. Counsel shall maintain the originals of the forms signed by persons acknowledging their obligations under this Order for a period of one ( 1) year after dismissal of the action, the entry of final judgment, and/or the conclusion of any appeals arising therefrom.
- d. **COPIES.** Prior to production to another party, all copies, electronic images, duplicates, extracts, summaries, or descriptions (hereinafter referred to collectively as “copies”) of documents designated as CONFIDENTIAL – SUBJECT TO PROTECTIVE ORDER under this Order, or any individual portion of such a document, shall be affixed with the designation CONFIDENTIAL – SUBJECT TO PROTECTIVE ORDER if the word does not already appear on the copy. All such copies shall thereafter be entitled to the protection of this Order. The term “copies” shall not include indices, electronic databases, or lists of documents provided these indices, electronic databases, or lists do not contain substantial portions or images of the text of confidential documents or otherwise disclose the substance of the confidential information contained in those documents.

**6. PROTECTION OF MATERIAL DESIGNATED CONFIDENTIAL: ATTORNEY’S EYES ONLY – SUBJECT TO PROTECTIVE ORDER.**

- a. **GENERAL PROTECTIONS.** Documents that contain highly sensitive trade secrets or other highly sensitive competitive or confidential information, the disclosure

of which to another party would result in demonstrable harm to the disclosing party, may be designated CONFIDENTIAL: ATTORNEY'S EYES ONLY – SUBJECT TO PROTECTIVE ORDER under this Order and shall not be used or disclosed to counsel for the parties or any other persons identified in ¶ 6(b) for any purpose whatsoever other than to prepare for and to conduct discovery and trial in this action, including any appeal thereof.

**b. LIMITED THIRD-PARTY DISCLOSURES.** The parties and Counsel for the parties shall not disclose or permit the disclosure of any CONFIDENTIAL: ATTORNEY'S EYES ONLY – SUBJECT TO PROTECTIVE ORDER documents to any third person or entity except as set forth in subparagraphs i – iv. Subject to these requirements, the following categories of persons may be allowed to review documents that have been designated CONFIDENTIAL: ATTORNEY'S EYES ONLY – SUBJECT TO PROTECTIVE ORDER.

- i. COUNSEL.** Counsel for the parties and employees of counsel who have responsibility for the preparation and trial of the action but only if:
  - a.** It is necessary to disclose the designated document to them for purposes of this action;
  - b.** They are under the supervision and control of litigation counsel; and
  - c.** All such persons shall execute the certification contained in Attachment A, Acknowledgment of Understanding and Agreement to be Bound.
- ii. THE COURT, COURT REPORTERS AND RECORDERS.** The Court and court reporters and recorders engaged for depositions;
- iii. OTHERS BY CONSENT.** Other persons only by written consent of the producing party or upon order of the Court and on such conditions as may be agreed or ordered. All such persons shall execute the certification contained in Attachment A, Acknowledgment of Understanding and Agreement to be Bound; and

- iv. **AUTHORS AND RECIPIENTS.** The author, addressee, or any other person identified in the document as a prior recipient; and
- v. **CONSULTING AND TESTIFYING EXPERTS.** Consulting or testifying experts (hereinafter referred to collectively as “experts”) employed by the parties or counsel for the parties to assist in the preparation and trial of this action or proceeding, but only after such persons have completed the certification contained in Attachment A, Acknowledgment of Understanding and Agreement to be Bound. A party may not disclose Confidential Information to experts unless: 1) it is necessary to disclose the designated document to them for purposes of this action; 2) they are not parties or producing third parties, or affiliates of parties or producing third parties; and 3) they are not officers, directors or employees of parties or producing third parties, or affiliates of parties, or of competitors or vendors or customers of parties or producing third parties.
- c. **CONTROL OF DOCUMENTS.** Counsel for the parties shall take reasonable and appropriate measures to prevent unauthorized disclosure of documents designated as CONFIDENTIAL: ATTORNEY’S EYES ONLY – SUBJECT TO A PROTECTIVE ORDER pursuant to the terms of this Order. Counsel shall maintain the originals of the forms signed by persons acknowledging their obligations under this Order for a period of one (1) year after dismissal of the action, the entry of final judgment, and/or the conclusion of any appeals arising therefrom.
- d. **COPIES.** Prior to production to another party, all copies, electronic images, duplicates, extracts, summaries, or descriptions (hereinafter referred to collectively as “copies”) of documents designated as CONFIDENTIAL: ATTORNEY’S EYES ONLY – SUBJECT TO PROTECTIVE ORDER under this Order, or any individual portion of such a document, shall be affixed with

the designation CONFIDENTIAL: ATTORNEY'S EYES ONLY – SUBJECT TO PROTECTIVE ORDER if the word does not already appear on the copy. All such copies shall thereafter be entitled to the protection of this Order. The term “copies” shall not include indices, electronic databases, or lists of documents provided these indices, electronic databases, or lists do not contain substantial portions or images of the text of confidential documents or otherwise disclose the substance of the confidential information contained in those documents.

- e. **COMPETITION.** Notwithstanding the foregoing provisions of this Protective Order, information and documents designated as CONFIDENTIAL – SUBJECT TO PROTECTIVE ORDER or CONFIDENTIAL: ATTORNEY'S EYES ONLY – SUBJECT TO PROTECTIVE ORDER shall not be disclosed or provided, under any circumstance, to any attorney or law firm that competes with Defendants.
- 7. **INADVERTENT PRODUCTION.** Inadvertent production of any document or information without a designation of CONFIDENTIAL – SUBJECT TO PROTECTIVE ORDER or CONFIDENTIAL: ATTORNEY'S EYES ONLY – SUBJECT TO PROTECTIVE ORDER or any inadvertent production of a document protected by the attorney-client privilege, work product doctrine, common interest privilege, or similar privilege shall be governed by Ohio R. Evid. 501. Such inadvertent production of such a document or information shall not be deemed a waiver of that privilege or protection or of the producing party's right to assert that the document is CONFIDENTIAL – SUBJECT TO PROTECTIVE ORDER or CONFIDENTIAL: ATTORNEY'S EYES ONLY – SUBJECT TO PROTECTIVE ORDER or is protected by the attorney-client privilege, work product doctrine, common interest privilege, or similar privilege. The receiving party shall treat the document or information as if it were so designated as confidential, protected, or privileged.
- 8. **FILING OF CONFIDENTIAL—SUBJECT TO PROTECTIVE ORDER DOCUMENTS OR CONFIDENTIAL: ATTORNEY'S EYES ONLY – SUBJECT TO PROTECTIVE ORDER UNDER SEAL.** The Court highly discourages the manual filing of any pleadings or documents under seal. However, to the extent that a brief, memorandum, or pleading references any document marked as CONFIDENTIAL –

SUBJECT TO PROTECTIVE ORDER or CONFIDENTIAL: ATTORNEY'S EYES ONLY – SUBJECT TO PROTECTIVE ORDER, then the brief, memorandum, or pleading shall refer the Court to the particular exhibit filed under seal without disclosing the contents of any confidential information.

- a. Before any document marked as CONFIDENTIAL – SUBJECT TO PROTECTIVE ORDER or CONFIDENTIAL: ATTORNEY'S EYES ONLY— SUBJECT TO PROTECTIVE ORDER is filed under seal with the Clerk, the filing party shall first consult with the party that originally designated the document as CONFIDENTIAL – SUBJECT TO PROTECTIVE ORDER or CONFIDENTIAL: ATTORNEY'S EYES ONLY – SUBJECT TO PROTECTIVE ORDER to determine whether, with the consent of that party, the document or a redacted version of the document may be filed with the Court not under seal.
- b. Where agreement is not possible or adequate, before a CONFIDENTIAL – SUBJECT TO PROTECTIVE ORDER or CONFIDENTIAL: ATTORNEY'S EYES ONLY – SUBJECT TO PROTECTIVE ORDER document is filed with the Clerk, it shall be placed in a sealed envelope marked “CONFIDENTIAL – SUBJECT TO PROTECTIVE ORDER” or “CONFIDENTIAL: ATTORNEY'S EYES ONLY – SUBJECT TO PROTECTIVE ORDER,” displaying the case name, docket number, a designation of what the document is, the name of the party on whose behalf it is submitted, and the name of the attorney who has filed the documents on the front of the envelope. A copy of any document filed under seal shall also be delivered to the judicial officer's chambers.
- c. To the extent that it is necessary for a party to discuss the contents of any *confidential information or designated document in a written pleading, then such* portion of the pleading may be filed under seal with leave of Court. In such circumstances, counsel shall prepare two versions of the pleadings, a public and a confidential version. The public version shall contain a redaction of references to CONFIDENTIAL – SUBJECT TO PROTECTIVE ORDER or CONFIDENTIAL: ATTORNEY'S EYES ONLY – SUBJECT TO PROTECTIVE ORDER documents. The confidential version shall be a full and complete version of the pleading and shall be filed with the Clerk under seal as

above. A copy of the unredacted pleading also shall be delivered to the judicial officer's chambers.

- d. The party seeking to file a brief, pleading, or exhibit under seal shall first file a motion for leave to file under seal prior to filing such brief, pleading, or exhibit.

**9. CHALLENGES BY A PARTY TO DESIGNATION AS CONFIDENTIAL.** Any

CONFIDENTIAL – SUBJECT TO PROTECTIVE ORDER or CONFIDENTIAL: ATTORNEY'S EYES ONLY – SUBJECT TO PROTECTIVE ORDER designation is subject to challenge by any party or non-party with standing to object (hereafter "party"). Before filing any motions or objections to a confidentiality designation with the Court, the objecting party shall have an obligation to meet and confer in a good faith effort to resolve the objection by agreement. If agreement is reached confirming or waiving the CONFIDENTIAL – SUBJECT TO PROTECTIVE ORDER or CONFIDENTIAL: ATTORNEY'S EYES ONLY – SUBJECT TO PROTECTIVE ORDER designation as to any documents subject to the objection, the designating party shall serve on all parties a notice specifying the documents and the nature of the agreement.

- 10. ACTION BY THE COURT.** Applications to the Court for an order relating to any documents designated CONFIDENTIAL – SUBJECT TO PROTECTIVE ORDER or CONFIDENTIAL: ATTORNEY'S EYES ONLY – SUBJECT TO PROTECTIVE ORDER shall be by motion and any other procedures set forth in the presiding judge's standing orders or other relevant orders. Nothing in this Order or any action or agreement of a party under this Order limits the Court's power to make any orders that may be appropriate with respect to the use and disclosure of any documents produced or use in discovery or at trial.

- 11. USE OF CONFIDENTIAL DOCUMENTS OR INFORMATION AT TRIAL.** All trials are open to the public. Absent order of the Court, there will be no restrictions on the use of any document that may be introduced by any party during the trial. If a party intends to present at trial CONFIDENTIAL – SUBJECT TO PROTECTIVE ORDER or CONFIDENTIAL: ATTORNEY'S EYES ONLY – SUBJECT TO PROTECTIVE ORDER documents or information derived therefrom, such party shall provide advance notice to the other party at least ten days before the commencement of trial by identifying the documents or information at issue as specifically as possible (i.e., by

Bates number, page range, deposition transcript lines, etc.) without divulging the actual CONFIDENTIAL – SUBJECT TO PROTECTIVE ORDER or CONFIDENTIAL: ATTORNEY'S EYES ONLY – SUBJECT TO PROTECTIVE ORDER documents or information. The Court may thereafter make such orders as are necessary to govern the use of such documents or information at trial.

**12. OBLIGATIONS ON CONCLUSION OF LITIGATION.**

- a. **ORDER REMAINS IN EFFECT.** Unless otherwise agreed or ordered, this Order shall remain in force after dismissal or entry of final judgment not subject to further appeal.

**13. RETURN OF CONFIDENTIAL – SUBJECT TO PROTECTIVE ORDER OR CONFIDENTIAL: ATTORNEY'S EYES ONLY – SUBJECT TO PROTECTIVE ORDER.**

- a. **RETURN OF CONFIDENTIAL DOCUMENTS.** Within 30 days after dismissal or entry of final judgment not subject to further appeal, all documents treated as CONFIDENTIAL – SUBJECT TO PROTECTIVE ORDER or CONFIDENTIAL: ATTORNEY'S EYES ONLY – SUBJECT TO PROTECTIVE ORDER under this Order, including copies as defined in ¶¶ 5(d) and 6(d), shall be returned to the producing party unless: 1) the document has been offered into evidence or filed without restriction as to disclosure; 2) the parties agree to destruction in lieu of return; or 3) as to documents bearing the notations, summations, or other mental impressions of the receiving party, that party elects to destroy the documents and certified to a producing party that it has done so. Notwithstanding the above requirements to return or destroy documents, counsel may retain attorney work product, including an index which refers or relates to information designated CONFIDENTIAL – SUBJECT TO PROTECTIVE ORDER or CONFIDENTIAL: ATTORNEY'S EYES ONLY – SUBJECT TO PROTECTIVE ORDER, so long as that work product does not duplicate verbatim substantial portions of the text or images of confidential documents. This work product shall continue to be CONFIDENTIAL – SUBJECT TO PROTECTIVE ORDER under this Order. An attorney may use his or her work product in a subsequent litigation provided that its use does not disclose or use CONFIDENTIAL – SUBJECT TO PROTECTIVE ORDER or

CONFIDENTIAL: ATTORNEY'S EYES ONLY – SUBJECT TO PROTECTIVE ORDER documents.

- b. **RETURN OF DOCUMENTS FILED UNDER SEAL.** After dismissal or entry of final judgment not subject to further appeal, the Clerk may elect to return to counsel for the parties or, after notice, destroy documents filed or offered at trial under seal or otherwise restricted by the Court as to disclosure.

14. **ORDER SUBJECT TO MODIFICATION.** This Order shall be subject to modification by the Court on its own motion or on motion of a party or any other person with standing concerning the subject matter.

15. **NO PRIOR JUDICIAL DETERMINATION.** This Order is entered based on the representations and agreements of the parties and for the purpose of facilitating discovery. Nothing herein shall be construed or presented as a judicial determination that any documents or information designated CONFIDENTIAL – SUBJECT TO PROTECTIVE ORDER or CONFIDENTIAL: ATTORNEY'S EYES ONLY – SUBJECT TO PROTECTIVE ORDER by counsel or the parties is subject to protection under Rule 26(c) of the Ohio Rules of Civil Procedure or otherwise until such time as the Court may rule on a specific document or issue.

16. **PERSONS BOUND.** This Order shall take effect when entered and shall be binding upon all counsel and their law firms, the parties, and persons made subject to this Order by its terms.

IT IS SO ORDERED

  
JUDGE ALISON BREAU

CC: ALL PARTIES OF RECORD



IN THE COURT OF COMMON PLEAS  
COUNTY OF SUMMIT

MEMBER WILLIAMS, et al.,	(	CASE NO.: CV-2016-09-3928
	)	
Plaintiffs,	(	JUDGE ALISON BREAUX
-vs-	)	
	(	
KISLING, NESTICO & REDICK,	)	
LLC, et al.	(	
	)	
Defendants;	(	
	)	
	***	

**ACKNOWLEDGMENT AND AGREEMENT TO BE BOUND**

The undersigned hereby acknowledges that he/she has read the Protective Order dated September 12, 2017 in the above-captioned action and attached hereto, understands the terms thereof, and agrees to be bound by its terms. The undersigned submits to the jurisdiction of the Court of Common Pleas of Summit County in matters relating to the Protective Order and understands that the terms of the Protective Order obligate him/her to use documents designated CONFIDENTIAL – SUBJECT TO PROTECTIVE ORDER or CONFIDENTIAL: ATTORNEY’S EYES ONLY – SUBJECT TO PROTECTIVE ORDER in accordance with the Order solely for the purpose of the above-captioned action, and to not disclose any such documents or information derived directly therefrom to any other person, firm, or concern.

The undersigned acknowledges that violation of the Protective Order may result in penalties for contempt of Court.

Name: \_\_\_\_\_

Job Title: \_\_\_\_\_

Employer: \_\_\_\_\_

Business Address: \_\_\_\_\_

\_\_\_\_\_  
Date

\_\_\_\_\_  
Signature

**IN THE COURT OF COMMON PLEAS  
COUNTY OF SUMMIT**

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

- - -

On January 9, 2019, Defendant Sam Ghoumbrial, M.D. moved this Court to impose sanctions upon Plaintiffs pursuant to Civ.R. 37 because he alleges that Plaintiffs deliberately filed confidential information in violation of the September 12, 2017 Protection Order. Ghoumbrial notes that the deposition testimony of Dr. Richard Gunning was explicitly marked as “Confidential,” but was publicly filed by the Plaintiffs. Ghoumbrial claims that the parties agreed that defense counsel would be given an opportunity to review the transcript and designate any portion of it as confidential.

The Defendant refers this Court to Paragraph Three of the Protective Order, which states:

3. **DOCUMENTS WHICH MAY BE DESIGNATED CONFIDENTIAL -SUBJECT TO PROTECTIVE ORDER OR CONFIDENTIAL: ATTORNEY'S EYES ONLY – SUBJECT TO PROTECTIVE ORDER.** Any party may designate documents as CONFIDENTIAL – SUBJECT TO PROTECTIVE ORDER or CONFIDENTIAL: ATTORNEY'S EYES ONLY – SUBJECT TO PROTECTIVE ORDER 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, medial or psychiatric information, trade secrets, personnel records, or such other sensitive or proprietary commercial information that is not publicly available. Public records and other information or documents that are publicly available may not be designated as CONFIDENTIAL – SUBJECT TO PROTECTIVE ORDER or CONFIDENTIAL: ATTORNEY'S EYES ONLY – SUBJECT TO PROTECTIVE ORDER.

Paragraph Four of the Protective Order permits portions of deposition testimony to be designated confidential, as it states:

4. **DEPOSITIONS.** Deposition testimony shall be deemed CONFIDENTIAL – SUBJECT TO PROTECTIVE ORDER or CONFIDENTIAL: ATTORNEY’S EYES ONLY – SUBJECT TO PROTECTIVE ORDER only if designated as such. Such designation shall be specific as to the portions of the transcript or any exhibit to be designated as CONFIDENTIAL – SUBJECT TO PROTECTIVE ORDER or CONFIDENTIAL: ATTORNEY’S EYES ONLY – SUBJECT TO PROTECTIVE ORDER. Thereafter, the deposition transcripts and any of those portions so designated shall be protected as CONFIDENTIAL – SUBJECT TO PROTECTIVE ORDER or CONFIDENTIAL: ATTORNEY’S EYES ONLY – SUBJECT TO PROTECTIVE ORDER, pending objection, under the terms of this Order

Moreover, Paragraph Eight of the Protective Order contemplates the filing of confidential documents. It states, in part:

8. **FILING OF CONFIDENTIAL - SUBJECT TO PROTECTIVE ORDER DOCUMENTS OR CONFIDENTIAL: ATTORNEY’S EYES ONLY - SUBJECT TO PROTECTIVE ORDER UNDER SEAL.** The Court highly discourages the manual filing of any pleadings or documents under seal. However, to the extent that a brief, memorandum, or pleading references any document marked as CONFIDENTIAL – SUBJECT TO PROTECTIVE ORDER or CONFIDENTIAL: ATTORNEY’S EYES ONLY – SUBJECT TO PROTECTIVE ORDER, then the brief, memorandum, or pleading shall refer the Court to the particular exhibit filed under seal without disclosing the contents of any confidential information.
  - a. Before any document marked as CONFIDENTIAL – SUBJECT TO PROTECTIVE ORDER or CONFIDENTIAL: ATTORNEY’S EYES ONLY – SUBJECT TO PROTECTIVE ORDER is filed under seal with the Clerk, the filing party shall first consult with the party that originally designated the document as CONFIDENTIAL - SUBJECT TO PROTECTIVE ORDER or CONFIDENTIAL: ATTORNEY’S EYES ONLY – SUBJECT TO PROTECTIVE ORDER to determine whether, with the consent of that party, the document or redacted version of the document may be filed with the Court not under seal.
  - b. Where agreement is not possible or adequate, before a CONFIDENTIAL – SUBJECT TO PROTECTIVE ORDER or CONFIDENTIAL: ATTORNEY’S EYES ONLY – SUBJECT TO PROTECTIVE ORDER document is filed with the Clerk, it shall be placed in a sealed envelope marked “CONFIDENTIAL – SUBJECT TO PROTECTIVE ORDER” or “CONFIDENTIAL: ATTORNEY’S EYES ONLY – SUBJECT TO PROTECTIVE ORDER,” displaying the case name, docket number, a designation of what the document is, the name of the party on whose behalf it

is submitted, and the name of the attorney who has filed the documents on the front of the envelope. A copy of any document filed under seal shall also be delivered to the judicial officer's chambers.

- c. To the extent that it is necessary for a party to discuss the contents of any confidential information or designated document in a written pleading, then such portion of the pleading may be filed under seal with leave of Court. In such circumstances, counsel shall prepare two versions of the pleadings, a public and confidential version. The public version shall contain a redaction of references to CONFIDENTIAL – SUBJECT TO PROTECTIVE ORDER or CONFIDENTIAL: ATTORNEY'S EYES ONLY – SUBJECT TO PROTECTIVE ORDER documents. The confidential version shall be a full and complete version of the pleading and shall be filed with the Clerk under seal as above.

Ghoubrial argues that when a deposition transcript is marked confidential, the parties must consult before filing the document under seal. Ghoubrial notes that during Dr. Gunning's deposition, issues of confidentiality and privilege arose and the parties agreed to designate the entire deposition as confidential pursuant to the Protective Order until those issues could be resolved. He refers the Court to Gunning's deposition at Pages 74-75 and Page 180.

The Plaintiffs argue that the Defendants never designated any portion of the deposition transcript as "confidential," and (2) in any event no part of the transcript could legitimately be so designated. Plaintiffs also note that the Protective Order, as it applies to depositions, requires that the designation shall be specific as to the portions of the transcript or any exhibit to be designated as confidential. (See Para. 4 of Protective Order)

It is not clear who placed "Confidential" on the front of Dr. Gunning's deposition. On Page 71 of Gunning's deposition, Plaintiffs' counsel marks as an exhibit the affidavit of Dr. Gunning concerning his care of patient Monique Norris, a putative class representative and plaintiff. Attorney Brad Barmen, counsel for Dr. Ghoubrial and the corporation for whom Gunning is employed, interposes or objects that Ms. Norris has not waived her physician-patient privilege. Plaintiffs' counsel, Mr. Pattakos, notes that the exhibit content had already

been filed under seal and can be marked as confidential. Pattakos then suggests “we can go back and designate portions of the testimony that need to be treated the same way. We don’t need to make this more complicated than it is.” (Dr. Gunning Deposition Transcript 74 and 75) Again, at Page 180, Mr. Pattakos tries to ask Dr. Gunning about his treatment of Norris and he notes he has the required HIPAA authorization. Pattakos then notes that “we’re going to designate it (the affidavit) as confidential subject to the Protective Order for now, and then we can decide later whether this needs to be filed under seal or not.” Counsel all agreed to that arrangement.

The Court agrees with the Plaintiffs that the only discussion of designating the deposition transcript of Dr. Gunning as “Confidential” pertained to documents concerning Norris’ medical records. The record fails to establish that the parties agreed to designate the entire Gunning deposition as confidential. Also, the Plaintiffs note that the only portions of the deposition transcript that could possibly be subject to the Protection Order were Norris’ medical records for which she provided a signed waiver. (Dr. Gunning Deposition Transcript @ Page 180)

Defendant Ghoubril’s Motion for Sanctions against the Plaintiffs and to Strike Dr. Gunning’s Deposition Transcript is hereby OVERRULED.

IT IS SO ORDERED.



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

CC: ALL COUNSEL/PARTIES OF RECORD