IN THE COURT OF COMMON PLEAS
SUMMIT COUNTY, OHIO

MEMBER WILLIAMS, *et al.*, Plaintiff, vs. KISLING, NESTICO & REDICK, LLC, *et al.*, Defendants.	Case No. CV-2016-09-3928 Judge James A. Brogan **Plaintiffs' Brief pursuant to May 22, 2019 Court Order regarding Documents Filed Under Seal**

On May 22, 2019, the Court issued an order requiring the parties "to file briefs to show cause why the prior depositions that have been filed in this matter should not be unsealed by this Court." Pursuant to this Order, Plaintiffs state as follows:

It is Plaintiffs' position that none of the deposition transcripts or exhibits at issue could lawfully be redacted[1] or kept under seal if they constitute evidence considered by the Court in issuing any ruling:

It is well established that "what transpires in the courtroom is public property." *State ex rel. Dispatch Printing Co. v. Lias*, 68 Ohio St.3d 497, 502, 628 N.E.2d 1368 (1994). "Attendance at a public trial," and, consequently, attention to the docket in litigation proceedings, "promotes fairness and enhances public confidence in the judicial system." *Id.* citing *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 569–73, 100 S.Ct. 2814, 65 L.Ed.2d 973 (1980)."The principle that justice cannot survive behind walls of silence has long been reflected in the Anglo-American distrust for secret trials." *Id.* "The guarantee of a public trial is a cornerstone of our democracy which should not be circumvented unless there are extreme overriding circumstances." *Id.* citing *State v. Lane* (1979), 60

[1] Plaintiffs do, however, insist that personal identifying information and private medical or personal information having nothing to do with the claims at issue is properly redacted from the deposition transcripts and exhibits filed with the Court.

Ohio St.2d 112, 119, 14 O.O.3d 342, 397 N.E.2d 1338. And "the underpinnings justifying public access to criminal trials apply with equal force to civil trials." *Id.* quoting *Richmond Newspapers*, 448 U.S. 555 at 567.

Thus, "closed proceedings," including orders sealing information from public view, "although not absolutely precluded, must be rare and only for cause shown that outweighs the value of openness." *Press-Enterprise Co. v. Superior Court of California, Riverside County*, 464 U.S. 501, 509, 104 S. Ct. 819, 78 L. Ed. 2d 629 (1984).

Further, these findings must be "specific," "on the record," and must constitute "clear and convincing evidence" that the orders are "essential" to protect higher values than those protected by the First Amendment. *Id.* These standards are consistent with the Supreme Court of Ohio's recognition that "[a]ttorneys and their clients retain a panoply of First Amendment rights and are free to speak to the public about their claims and defenses provided that they do not exceed the contours of protected speech and ethical rules that impose reasonable and necessary limitations on attorneys' extrajudicial statements." *Am. Chem. Soc'y v. Leadscope Inc.*, 133 Ohio St.3d 366, 2012-Ohio-4193, 978 N.E.2d 832, ¶ 90 (citing Prof.Cond.R. 3.6).

Defendants could not possibly (nor have they tried to) submit any evidence, let alone the required "clear and convincing evidence," to support "specific on the record findings," showing that the deposition transcripts and exhibits at issue must remain sealed to preserve values higher than litigants' and the public's First Amendment rights.

Most typically, sealing orders are affirmed only to protect a litigant's right to a fair trial, or to protect "trade secrets" as defined by state and federal law. Here, Defendants have hardly suggested that their right to a fair trial has been jeopardized, let alone made the required showing that less-restrictive alternatives would not suffice. *See Toledo Blade*, 125 Ohio St. 3d at 158 (quoting *Press-Enterprise Co. v. Sup. Ct. of Cal.*, 478 U.S. 1, 15 (1986)) ("The First Amendment right of access cannot

be overcome by the conclusory assertion that publicity might deprive the defendant of [the right to a fair trial]."); *State ex rel. Vindicator Printing Co. v. Wolff*, 132 Ohio St. 3d 481, 2012-Ohio-3328, 974 N.E.2d 89, ¶ 35 ("sealing orders improper" where "the constitutional right of the defendants to a fair trial can be protected by the traditional methods of voir dire, continuances, changes of venue, jury instructions, or sequestration of the jury"); *Skilling v. United States*, 561 U.S. 368, 381 (2010)("Prominence does not necessarily produce prejudice, and juror impartiality, we have reiterated, does not require ignorance. Every case of public interest is almost, as a matter of necessity, brought to the attention of all the intelligent people in the vicinity, and scarcely any one can be found among those best fitted for jurors who has not read or heard of it, and who has not some impression or some opinion in respect to its merits."); *State v. Coley,* 93 Ohio St.3d 253, 258, 2001-Ohio-1340, 754 N.E.2d 1129 (2001) *quoting Nebraska Press*, 427 U.S. at 563 ("Pretrial publicity—even pervasive, adverse publicity—does not inevitably lead to an unfair trial.").

Defendants have also failed to make any showing, let alone by "clear and convincing evidence," that any of the information in the transcripts qualifies for protection under Ohio's Trade Secrets Act. R.C. 1333.61. While Defendants have made conclusory references to the transcripts containing "proprietary business information," this does not suffice, particularly given the relevance of this information to Plaintiffs' allegations of a widespread scheme to defraud consumers. Indeed, in "consumer fraud cases," "the public and press enjoy a presumptive right of access to civil proceedings and documents filed therein, notwithstanding the negative publicity those documents may shower upon a company." *Doe v. Pub. Citizen*, 749 F.3d 246, 269 (4th Cir. 2014). And as the Sixth Circuit has noted:

> The natural desire of parties to shield prejudicial information contained in judicial records from competitors and the public … cannot be accommodated by courts without seriously undermining the tradition of an open judicial system. **Indeed, common sense tells us that the greater the motivation a corporation has to shield its operations, the greater the public's need to know.**

Brown & Williamson Tobacco Corp. v. F.T.C., 710 F.2d 1165, 1180 (6th Cir. 1983) (emphasis added). *See also Gamble Co. v. Bankers Trust Co.*, 78 F.3d 219, 225 (6th Cir. 1996) ("The private litigants' interest in protecting their vanity or their commercial self-interest simply does not qualify as grounds for imposing a prior restraint. It is not even grounds for keeping the information under seal.").

Finally, Defendants should not be permitted to misrepresent *Seattle Times Co. v. Reinhart*, 467 U.S. 20, 33, 104 S. Ct. 2199, 81 L. Ed.2d 17 (1984); Civ.R. 26(C), which holds that the public has no right to access information by virtue of it merely having been exchanged in discovery, which "may be unrelated, or only tangentially related, to the underlying cause of action." The issue here is not with respect to information that has only been exchanged in discovery, but rather, information that becomes subject of the Court's review and analysis in issuing its rulings. The critical point here is that "without access to the proceedings, the public cannot analyze and critique the reasoning of the court," as it has the unquestionable right to do. *Brown & Williamson Tobacco Corp.*, 710 F.2d 1165, 1178 ("The crucial prophylactic aspects of the administration of justice cannot function in the dark; no community catharsis can occur if justice is 'done in a corner [or] in any covert manner.'").

Respectfully submitted,

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Certificate of Service

The foregoing document was filed on June 17, 2019, using the Court's e-filing system, which will serve copies on all necessary parties.

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