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OPINIONS

ALLEGHENY COUNTY COURT OF COMMON PLEAS

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PLJ

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Opinions

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MONIQUE M. McDANIEL and BRIAN K. McDANIEL vs. KENDALL CUSTOM HOMES, LLC and CARL SWINDELL

Driveway Easement

Court examined legalities regarding a driveway easement.

Case No.: GD22-000038. Superior Court docket no. 791 WDA 2023. In the Court of Common Pleas of Allegheny County, Pennsylvania. Civil Division. Hertzberg, J. August 31, 2023.

OPINION

When plaintiffs Monique McDaniel and Brian McDaniel purchased their home approximately eighteen years ago Russell Wright lived in the home next door. Mr. Wright was purchasing his home under an installment land contract he signed in 1997 with Dwight Sanders and Bonnie Sanders, who at that time owned both homes. That installment land contract was recorded by the Recorder of Deeds on May 9, 1997 and contains this provision:

26. DRIVEWAY EASEMENT AND MAINTENANCE AGREEMENT. The Buyer understands and agrees that the driveway common to the property described herein and the adjoining property known as 1853 Stoltz Road is to be shared jointly for purposes of ingress, egress, and regress. Neither party shall block said driveway or otherwise impede the free and clear use of said driveway for access to each individual property.

Department of Court Records electronic docket Document 8, Exhbits to Motion for Declaratory Judgment. Mr. Wright did not object to the McDaniels parking in the driveway. However, the next owner of Mr. Wright's home objected, and then disputes over parking developed between the McDaniels and defendant Carl Swindell, who now owns the home via an LLC.

Mr. Swindell placed obstructions in the driveway and displayed aggressive behavior that upset Monique McDaniel. Calls were made to the police. To reduce the tension, the McDaniels installed another driveway on the other side of their home. Then, in January of 2022 they initiated this proceeding by way of a complaint seeking equitable relief and monetary damages. Later, they filed a motion for judgment on the pleadings that requested the driveway easement be an enforceable agreement between the parties with neither party to interfere with the rights it granted. After reviewing the parties' briefs and hearing argument by their attorneys I granted the motion on February 13, 2023. The McDaniels' claim for money damages is to be decided at a later date.

On March 28, 2023 the McDaniels filed a motion for contempt of court and sanctions that averred the Defendants were violating the February 13, 2023 order by obstructing the McDaniels' access to the driveway easement. I presided over an evidentiary hearing on the motion for contempt. Brian McDaniel was the only witness that testified during the hearing, with the Defendants opting not to call any witnesses. On June 22, 2023 I signed an order of court that found the Defendants to be in contempt of court. I ordered them to remove the obstructions to the McDaniels' use of the driveway, and I prohibited the Defendants as well as the McDaniels from parking in the driveway. The Defendants, Kendall Custom Homes, LLC and Carl Swindell, appealed to the Superior Court of Pennsylvania and explain the basis for the appeal in the statement of errors complained of on appeal that they filed. I will address each alleged error as required by Pennsylvania Rule of Appellate Procedure 1925(a).

The Defendants first contend my ruling is erroneous as there is no evidence the Defendants obstructed the McDaniels use of the driveway for ingress, egress and regress. The basis for this argument likely is that the obstructions the Defendants placed in the driveway easement do not prevent the McDaniels from walking on the driveway easement. See transcript of Contempt Hearing, June 21, 2023 ("T") pp. 17-19. Implicitly the Defendants would restrict the McDaniels from using the driveway for automobiles. Such a restriction is improper because it is absent from the driveway easement and contrary to the circumstances at the time the easement was granted. See Lease v. Doll, 485 Pa. 625 at 621, 403 A.2d 558 at 561 (1979). Such a restriction on the McDaniels also would be inexcusably hypocritical since the defendants use the driveway for automobiles. There was an overwhelming amount of evidence of obstructions to non-pedestrian use of the driveway placed by the Defendants. These obstructions, consisting of a large flower bed, a silver truck, lumber, scaffolding and "things like that," were not removed at any time after the entry of my February 13, 2023 order. T, pp. 10-11 and 17. Hence, there was evidence the Defendants obstructed the McDaniels use of the easement, and I did not make an error.

The Defendants next contend I made an error by prohibiting them from parking their vehicles in the driveway. However, during the evidentiary hearing Defendants' counsel provided caselaw that says parking is not permitted with an easement for ingress and egress. See T, pp. 5 and 26 and Stozenski v. Forty Fort, 456 Pa. 5, 317 A.2d 602 (1974) and Adams v. Ward, 1977 Pa. Dist. & Cnty. Dec. LEXIS 258, 3 Pa.D. C.3d 194 (Fayette Common Pleas 1977). While nearly fifty years old, the cited Pennsylvania Supreme Court case is accurate as to the law today, which prohibits parking on an easement for ingress and egress. Again, Defendants argument is hypocritical as they would have the parking prohibition applied to the McDaniels, but not to the Defendants. In any event, the language of the driveway easement is crystal clear in its application to both property owners ("neither party shall block said driveway or otherwise impede the free and clear use of said driveway for access to each individual property"). Therefore, I was correct to prohibit the Defendants from parking their vehicles in the driveway.

The Defendants next contend my ruling is erroneous because it gives the McDaniels the same right to use the driveway easement as the Defendants when the Defendants own a fee simple interest in the driveway. However, the language of the driveway easement states that the driveway "is to be shared jointly for purposes of ingress, egress and regress" and neither owner shall block or otherwise impede the free and clear use of it. In any event, right-of-way easements typically operate this way, with the fee simple owner's rights subordinate to the terms of the easement Thus, I correctly gave the McDaniels the same right to use the driveway as the fee simple owners of the property.

The Defendants next contend I erroneously converted the easement into a fee simple interest. But, my February 13, 2023 and June 22, 2023 rulings do nothing but enforce the driveway easement, with Defendants continuing to be fee simple owners of their real property. My rulings only prohibit interference with the driveway easement and allow Defendants all other rights of a fee simple owner. Hence, I did not convert the easement into a fee simple interest.

The Defendants next contend I made an error by prohibiting their use of the driveway when their use of the driveway does not prevent ingress, egress and regress by the McDaniels. First, I did not prohibit the Defendants from using the driveway as they are free to use it for ingress, egress and regress as long as they do not block it or impede ingress, egress and regress by the McDaniels. Second, as explained above, the Defendants' use of the driveway by placing obstructions on it prevents the

McDaniels from using the driveway for automobiles, which the easement permits them to do. Therefore, I did not prohibit the Defendants from using the driveway, and the defendants have prevented ingress, egress and regress by the McDaniels.

The Defendants next contend I made an error by binding them to an easement in an installment land contract that Russell Wright never fully consummated. This argument is meritless since the recorded installment land contract between Dwight Sanders, Bonnie Sanders and Mr. Wright contains this provision:

17. SUCCESSORS. The respective rights and obligations provided in this Agreement shall bind and shall insure to the benefit of the parties hereto, their respective legal representative, heirs successors and/or assigns.

Department of Court Records electronic docket Document 8, Exhibits to Motion for Declaratory Judgment. While it appears the Defendants' home was never deeded to Mr. Wright, the Defendants nonetheless are successors to Dwight and Bonnie Sanders and are thus bound by the obligation of the driveway easement in the installment land contract. Hence, it was not an error to bind the Defendants to the driveway easement.

The Defendants' final contention is that Dwight and Bonnie Sanders could not create a driveway easement when they owned both properties since creation of a right of way easement requires the existence of a dominant and a servient tenement. See Obringer v. Minnotte Bros. Co., 352 Pa. 188 at 191, 42 A.2d 413 at 414 (1945). This argument also lacks merit because the doctrine of equitable conversion made Mr. Wright, "for all intents and purposes," the owner of 1855 Stoltz Road with Dwight and Bonnie Sanders retaining "a mere security interest." Byrne v. Kanig, 231 Pa. Super. 531, 536, 332 A.2d 472, 474 (1974). Clearly then Mr. Wright owned the servient tenement at 1855 Stoltz Road while Dwight and Bonnie Sanders owned the dominant tenement at 1853 Stoltz Road. Therefore, Dwight and Bonnie Sanders could create the driveway easement, and I made no error.

BY THE COURT:
/s/The Hon. Alan Hertzberg

RUSSELL CERSOSIMO, JR. and RUSSELL CERSOSIMO, SR. vs. KEYSTONE GROUP OF COMPANIES, LLC, KEYSTONE INTEGRATED CARE, LLC, and THOMAS PERKO

Sanctions

Court has determined that Sanctions were necessary to make the plaintiffs whole for counsel's conduct during a deposition.

Case No.: GD 20-008252. In the Court of Common Pleas of Allegheny County, Pennsylvania. Civil Division. Ignelzi, J.

OPINION

I. Introduction/Relevant Background

The Court has extended considerable effort to analyze the facts of this matter, the transcript of the deposition of David Fasulo, and the arguments of all parties, and has determined that Sanctions are necessary to make the Plaintiffs whole for Defendant Keystone Integrated Care's counsel's, Breanna Kelley, Esq., conduct during the deposition of David Fasulo.

This matter concerns issues stemming from the alleged exclusion of Russell Cersosimo Jr. ("Russ Jr.") from Keystone Integrated Care, LLC ("KIC"). In late 2016, Plaintiff Russ Jr. and Defendant Thomas Perko ("Perko") founded Keystone Group of Companies, LLC ("KGOC") and KIC; KIC's sole member when founded was KGOC. (Amended Complaint in Civil Action at L. 11-12, Russell Cersosimo, JR. and Russell Cersosimo, SR. v. Keystone Group of Companies, LLC, Keystone Integrated Care, LLC, and Thomas Perko, No. 20-008252 (Allegheny Cty. Ct. Com. Pl. Jan. 6, 2021), ECF No. 23) ("Amended Complaint").[1] According to its operating agreement, KIC began as a manager-managed limited liability company, with a two-member board of managers, Russ Jr. and Perko. (Id. at L. 14). Russ Jr. and Perko found KIC with the goal of KIC becoming a medical marijuana organization holding a dispensary permit and grower permit. (Id. at L. 15).

After submitting the permit application, receiving capital investment funding, dispensaries opening, and various instances of managers and investors quarreling, in September 2019, KGOC was dissociated from KIC. See generally (Amended Complaint). It is alleged that KIC did not properly compensate KGOC for its share in KIC, something that is required when dissociation occurs. (Id., L. 101-14). The instant case has been brought alleging the above.

As part of discovery for this case, the Plaintiffs filed a subpoena on November 22, 2022 requiring a former lawyer for KIC, David Fasulo, Esq. ("Fasulo"), from the law firm of Houston Harbaugh ("HH") to be deposed. (Keystone Integrated Care, LLC's Motion to Quash Subpoena at L. 1, Russell Cersosimo, JR. and Russell Cersosimo, SR. v. Keystone Group of Companies, LLC, Keystone Integrated Care, LLC, and Thomas Perko, No. 20-008252 (Allegheny Cty. Ct. Com. Pl. Dec. 7, 2022), ECF No. 100) ("KIC Motion to Quash"). KIC filed a Motion to Quash Subpoena directed to Attorney David Fasulo, which was heard at oral argument on December 12, 2022. At oral argument, the attorneys for KIC attempted to Quash Fasulo's subpoena by arguing that Fasulo, even though he is a lawyer, may potentially answer a question even if the question was objected to based on attorney-client privilege. (Transcript of December 12, 2022 Oral Argument Motion to Quash Subpoena at P. 3, L. 22 – P. 4, L. 2, Russell Cersosimo, JR. and Russell Cersosimo, SR. v. Keystone Group of Companies, LLC, Keystone Integrated Care, LLC, and Thomas Perko, No. 20-008252 (Allegheny Cty. Ct. Com. Pl. May 2, 2023), ECF No. 119) ("Transcript 12/12/22"). The Court instructed the parties during oral argument that it does not give advisory opinions on what a witness can do in a deposition and that privilege objections must be handled on a question-by-question basis. (Id. at P. 40, L. 15-18). The Court dismissed the Motion to Quash and ordered the deposition of Fasulo to go forward. (Order of Court December 12, 2022, Russell Cersosimo, JR. and Russell Cersosimo, SR. v. Keystone Group of Companies, LLC, Keystone Integrated Care, LLC, and Thomas Perko, No. 20-008252 (Allegheny Cty. Ct. Com. Pl. Dec 12, 2022), ECF No. 103) ("Court Order 12/12/22").

The deposition occurred on January 17, 2023. Mr. Harry Kunselman, Esq. ("Attorney Kunselman"), as an attorney for the Plaintiffs, asked Fasulo questions concerning his representation of KIC. Ms. Breanna Kelly, Esq. ("Attorney Kelly") represented KIC, Mr. Prabhu Narahari, Esq. ("Attorney Narahari") represented KGOC and Perko, and Mr. Aaron Ponzo, Esq. ("Attorney

Ponzo") represented Fasulo. According to KIC's estimations, Attorney Kunselman asked 169 questions, 58% of which were met with objections by Attorney Kelly. (Defendant KIC's Opposition to Plaintiffs' Motion For Sanctions For Asserting Bad Faith Objections During Deposition of David Fasulo and Motion to Compel Responses to Questions at L. 4, Russell Cersosimo, JR. and Russell Cersosimo, SR. v. Keystone Group of Companies, LLC, Keystone Integrated Care, LLC, and Thomas Perko, No. 20-008252 (Allegheny Cty. Ct. Com. Pl. Feb. 2, 2023), ECF No. 112) ("KIC Opposition"). Attorney Narahari objected to approximately 11 questions (6.5%) based on attorney-client privilege, according to the Court's calculations.

The Court has extensively reviewed the transcript of the deposition of Mr. Fasulo question-by-question, line-by-line, word-by-word. In most instances, the questions that were not objected to were ancillary questions such as Fasulo's background, some questions about confirming exhibits, etc. Attorney Kelly, as the attorney for KIC, proceeded to object to most substantive questions based on attorney-client privilege, as well as objecting to some ancillary questions. Most objections, on their face, were invalid and beyond the scope of what conduct is allowed in depositions and beyond the law of what is protected under the attorney-client privilege.

To say this Court was astounded upon reading this transcript would be an understatement. It is unmistakable that Attorney Kelly attempted to keep Fasulo quiet during his deposition, for fear of what he might say. Because Attorney Kelly does not represent Fasulo, it is obvious upon reading between the lines of the transcript that she completely overstepped her bounds as a lawyer attempting to control his answers, or lack thereof. The objections are so numerous and replete with bad faith that the Court was astonished after reading the transcript of the deposition. After over forty years as a trial attorney and as a Judge, the Court has never-before seen such behavior from a member of the Bar.

One crystal-clear example of a bad faith objection (and there are several) is the objection based on privilege to the question "On the privilege log that KIC's counsel produced to us in this case, there are references to eDOCS. Does that word mean anything to you, eDOCS?" (Plaintiffs' Motion For Sanctions For Asserting Bad Faith Objections During Deposition of David Fasulo and Motion to Compel Responses to Questions at Exhibit A: Transcript of David Joseph Fasulo at P. 25, L. 5-8, Russell Cersosimo, JR. and Russell Cersosimo, SR. v. Keystone Group of Companies, LLC, Keystone Integrated Care, LLC, and Thomas Perko, No. 20-008252 (Allegheny Cty. Ct. Com. Pl. Jan. 24, 2023), ECF No. 107) ("Motion for Sanctions"), ("Deposition Transcript"). Attorney Kelly objected to this question based on attorney-client privilege, lack of knowledge, and lack of foundation. The Court interprets this question as Attorney Kunselman simply asking the deponent what "eDOCS" is. Attorney Kelly, neither during the deposition, in written submissions, nor at oral argument, has ever provided an explanation as to why this specific question (or similar questions) would elicit privileged information. Under the law of Pennsylvania, simply asking what "eDOCS" is would not and could not elicit privileged information. The Court will not repeat every instance of bad faith objection, because the Court can go on ad infinitum.

Rightfully so, Attorney Kunselman suspended the deposition. Plaintiffs filed their Motion for Sanctions for Asserting Bad Faith Objections During Deposition of David Fasulo and Motion to Compel Responses to Questions on January 24, 2023. Plaintiffs contend that the behavior of defense counsel, namely Attorney Kelly but also Attorney Narahari, was beyond the pale of what is allowed in depositions and caused the Plaintiffs great burden and expense. After meeting and conferring, Attorney Kelly waived some objections and maintained others. However, Attorney Kelly still maintained her position that most objections were valid. See generally (KIC Opposition, supra).

At oral argument held on February 6, 2023 for Plaintiffs' Motion for Sanctions and to Compel Continued Deposition, Attorney Kelly attempted to provide multiple excuses for her behavior, including but not limited to the deposition being "a unique situation," her first time where a client's former counsel was deposed, and having no access to the witness prior to the deposition. See generally (Transcript of February 6, 2023 Oral Argument Motion for Sanctions, Russell Cersosimo, JR. and Russell Cersosimo, SR. v. Keystone Group of Companies, LLC, Keystone Integrated Care, LLC, and Thomas Perko, No. 20-008252 (Allegheny Cty. Ct. Com. Pl.) ("Transcript 2/6/23"). Attorney Kelly, having made excuses, also maintained the "validity" of her objections in written argument.

While the Court will not completely enumerate the parties' positions, it will provide a brief recitation so that certain arguments may become clearer. Plaintiffs argue that because of the Court's statements during oral argument for the Motion to Quash and subsequent order dismissing the Motion, Plaintiffs were able to proceed with the deposition of Fasulo and that attorneys would be able to make objections on a question-by-question basis, but would not proceed with blanket privilege objections. The Court agrees with this assessment.

Attorney Kelly, at oral argument and in written submissions, makes various arguments as to why her objections were valid and appropriate. To summarize, some of these arguments include that "the questions were too broad," "Attorney Kunselman asked questions that could elicit privileged information," and "some questions were less clear." (KIC Opposition, supra, at L. 5-6, & 40) (emphasis added). Most of these arguments were "supported" by excuses and non-precedential law.[2] It is argued that the reason why Attorney Kelly objected to most of the questions asked was because the questions could have elicited privileged information.

The Court agrees with Attorney Kelly's analysis. However, the Court does not agree with how Attorney Kelly acted on this analysis at the deposition. The purpose of the attorney-client privilege is:

[T]o encourage full and frank communication between attorneys and their clients and thereby promote broader public interests in the observance of law and administration of justice. The privilege recognizes that sound legal advice or advocacy serves public ends and that such advice or advocacy depends upon the lawyer's being fully informed by the client. As we stated last Term in Trammel v. United States, 445 U.S. 40, 51, 100 S.Ct. 906, 913, 63 L.Ed.2d 186 (1980): "The lawyer–client privilege rests on the need for the advocate and counselor to know all that relates to the client's reasons for seeking representation if the professional mission is to be carried out." And in Fisher v. United States, 425 U.S. 391, 403, 96 S.Ct. 1569, 1577, 48 L.Ed.2d 39 (1976), we recognized the purpose of the privilege to be "to encourage clients to make full disclosure to their attorneys."

Upjohn Co. v. United States, 449 U.S. 383, 389 (1981).

"[T]he privilege is grounded in a policy entirely extrinsic to protection of the fact-finding process;" instead, the interest of trusting, open, and honest attorney-client communications is paramount. In light of this purpose, however, the privilege is deemed waived once confidential attorney-client communications are disclosed to a third party.

BouSamra v. Excela Health, 653 Pa. 365, 391 (2019) (citations omitted).

The protection of the privilege extends only to communications and not to facts. A fact is one thing and a communication concerning that fact is an entirely different thing. The client cannot be compelled to answer the question, 'What did you say or write to the attorney?' but may not refuse to disclose any relevant fact within his knowledge merely because he incorporated a statement of such fact into his communication to his attorney." Philadelphia v. Westinghouse Electric Corp., 205 F.Supp. 830, 831 (q2.7).

Upjohn, supra, at 395-96.

The privilege does not protect all statements made to a lawyer by a client and vice versa. For example, the filing of a complaint waives all privileged information within that complaint because the information has been disclosed to the public and to third parties. That is the case here because it is the Court's understanding that Fasulo and HH were retained to assist in the formation of KIC, assist in the structuring of the business, and to facilitate dispensary applications with relevant state agencies. (Motion for Sanctions, supra, at Exhibit B, Exhibit 19 "The Engagement Letter"). Clearly it was anticipated much if not all of the information disclosed by the client would be provided to third parties (i.e. the application process). These interactions with third parties would have always constituted disclosure/waiver. Thus, as Attorney Kunselman attempted to do in the deposition, the circumstances of the communications had to be developed to determine confidentiality.

Attorney Kelly objected to most questions based on the attorney-client privilege, perhaps believing that any response by Fasulo could reveal privileged information. Attorney Kelly potentially believed that anytime a question was asked of Fasulo, any answer could reveal privileged information. This is not true, as the attorney-client privilege is narrowly tailored to achieve its purpose and is fact-specific upon analysis.

"[S]ince the privilege has the effect of withholding relevant information from the factfinder, it applies only where necessary to achieve its purpose. Accordingly it protects only those disclosures necessary to obtain informed legal advice which might not have been made absent the privilege." Fisher v. United States, 425 U.S. 391, 403 (1976) (citations omitted).

Attorney Kelly's rationale may be applicable to other privileges such as the Fifth Amendment privilege. The Fifth Amendment provides, in part, that "[n]o person… shall be compelled in any criminal case to be a witness against himself…" U.S. Const. Amend. V.

"The Fifth Amendment stands between the citizen and his government." Ullmann v. United States, 350 U.S. 422, 454, 76 S.Ct. 497, 100 L.Ed. 511 (1956) (Douglas, J., dissenting); see id. at 445, 76 S.Ct. 497 ("The guarantee against self-incrimination ... is not only a protection against conviction and prosecution but a safeguard of conscience and human dignity and freedom of expression as well."); cf. Griswold v. Connecticut, 381 U.S. 479, 484, 85 S.Ct. 1678, 14 L.Ed.2d 510 (1965) (noting that the "Self-Incrimination Clause enables the citizen to create a zone of privacy which government may not force him to surrender to his detriment"). When scrupulously observed, the privilege ensures that a "court ought never to compel a witness to give an answer which discloses a fact that would form a necessary and essential part of a crime which is punishable by the laws." Burr, 25 F.Cas. at 40; see Galbreath's Lessee v. Eichelbergher, 3 Yeates 515, 516 (Pa. 1803). Because "it is the duty of courts to be watchful for the constitutional rights of the citizen, and against any stealthy encroachments thereon," Boyd v. United States, 116 U.S. 616, 635, 6 S.Ct. 524, 29 L.Ed. 746 (1886), the Fifth Amendment is to be "broad[ly] constru[ed] in favor of the right which it was intended to secure." Counselman v. Hitchcock, 142 U.S. 547, 562, 12 S.Ct. 195, 35 L.Ed. 1110 (1892).

Commonwealth v. Taylor, 230 A.3d 1050, 1063-64 (Pa. Sup. Ct. 2020).

Because the Fifth Amendment protection is much broader than the attorney-client privilege, it directly affects how parties and attorneys invoke the privilege. For example, the Court in U.S. v. Yurasovich analyzed whether a contempt order of Court for refusal to give testimony which could be used against the Defendant in an on-going investigation. The Court in that case held that:

A quarter century ago, in Hoffman v. United States, the Supreme Court declared that the privilege "not only extends to answers that would in themselves support a conviction under a federal criminal statute, but likewise embraces answers which would furnish a link in the chain of evidence needed to prosecute the claimant for a federal crime." To support a contempt citation for a refusal to testify on Fifth Amendment grounds, the Court declared, it must be "Perfectly clear from a careful consideration of all the circumstances in the case, that the witness (who invokes the privilege) is mistaken, and that the answer(s) cannot Possibly have such a tendency to incriminate."

United States v. Yurasovich, 580 F.2d 1212, 1215-16 (3d Cir. 1978).

Furthermore, the Court in Yurasovich ruled that:

[W]hen the issue of criminal liability turns on the construction of words invoking the Fifth Amendment we should not resolve doubts against the witness. More importantly, from the language of the Supreme Court's decisions in Maness, Malloy and Hoffman, we draw the conclusion that once a prima facie claim of privilege is raised, it is the burden of the government to make it "perfectly clear" that the answers sought "cannot possibly" tend to incriminate. For, "if the witness upon interposing his claim were required to prove the hazard, . . . he would be compelled to surrender the very protection which the privilege is designed to guarantee."

Id. at 1221.

The Fifth Amendment is broadly construed so that no witness need worry about providing testimony that may incriminate themselves. This stands in direct contrast to the attorney-client privilege, where the privilege is used to protect attorney-client communications, but it is not so protected that it is rarely challenged like the Fifth Amendment privilege. The attorney-client privilege can be challenged in most circumstances to ascertain its validity. Unfortunately for Attorney Kelly, she did not understand the parameters of the attorney-client privilege. Her actions in this deposition bespeak of one invoking a Fifth Amendment privilege.

The Court has previously issued two discovery deposition opinions that it will invoke throughout its findings: I.L., a Minor, by Ashley Lau and Justin Keating, Guardians, and Ashley Lau and Justin Keating, individually v. Allegheny Health Network, et al ("Lau") and Dina-Troiano-Tominello and Anthony Tominello v. UPMC Community Medicine, et al ("Tominello")[3]. It is clear from the record that Defendant KIC's counsel Attorney Kelly did not read nor take heed of these opinions, as these two rulings are how discovery depositions are now conducted in Allegheny County.

II. Standard of Review

As the Discovery Judge in the Fifth Judicial District of Pennsylvania, the Court has exhausted Court resources to reshape how discovery is managed, conducted, and implemented in Allegheny County in an effort for Discovery to become more efficient and congenial. Through Court opinions and procedures, the Court has effectively turned its predecessors' "Happy Hour" into "Happy Minute."[4] In the stage of this evolution, while the Court is still required to hear numerous discovery motions a week, there is no longer a need to have a specially-set day of the week in which attorneys "come on down" to the City-County Building to have their discovery grievances heard. The Court has molded the discovery process in Allegheny County to prevent bad faith, tumultuous exchanges, refusals to meet-and-confer, and conduct restricting the exchange of information within depositions.

The Court has said on many occasions to many members of the Bar, "you're all big boys and girls, play nicely in the sandbox." Needless to say, the Court is tired. After exhaustive efforts by this Court to implement ways in which attorneys can work together to resolve matters, it is yet again disappointed that it needs to babysit an attorney's bad behavior. Attempting to minimize

its refereeing duties, the Court has issued two discovery opinions that have become the law in Allegheny County, Lau and Tominello.

In May 2021, the Court published its Lau opinion (I.L. v. Allegheny Health Network), which concerned the issue of a deposition of a Defendant-doctor and whether that doctor could be asked opinion-based questions during the deposition, even though he was a factual witness. The Court ruled that the doctor, and any factual witness physician or nurse for example, could be asked opinion-based questions because the doctor's care was at issue in the case. The opinion also reshaped "Happy Hour" into "Happy Minute," encouraging attorneys to work their issues out together instead of arguing before the Court.

In May 2022, the Court issued its Tominello opinion (Tominello v. UPMC), which concerned allegations by Defense counsel that Plaintiff's counsel's conduct during deposition violated the Lau standard by making inappropriate speaking objections. Defense counsel asserted in their Motion for Sanctions and Motion to Compel Continued Deposition that Plaintiff's counsel prevented the deponent from testifying by making speaking objections, coaching the witness, and instructing opposing counsel on proper questioning. The Court found that Plaintiff's counsel's conduct violated the Lau standard and that he made inappropriate objections. The Court ruled, by also reiterating Lau, that the only proper objections in depositions are objections to the form of the question (which the questioning attorney may correct in the moment), and objections based on privilege.[5]

Because these two rulings have become the standard by which discovery is conducted in Allegheny County, the Court will rely heavily on these previous rulings to determine its findings throughout this opinion, along with applicable Pennsylvania law.

"Pennsylvania has a long history of liberal discovery in order to further the truth-determining process essential to our judicial system, prevent unfair surprises should the matter proceed to trial, enhance an attorney's ability to strongly and effectively advocate for a client, and enable the efficient operation of our judicial system." Lau, supra, at P. 8, quoting, Office of the District Attorney of Philadelphia v. Bagwell, 155 A.3d 1119, 1138 (Pa. Cmwlth. 2017), app. denied, 643 Pa. 669, 174 A.3d 560 (2017).

Rule 4003.1. Scope of Discovery Generally. Opinions and Contentions.

(a) Subject to the provisions of Rules 4003.2 to 4003.5 inclusive and Rule 4011, a party may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action, whether it relates to the claim or defense of the party seeking discovery or to the claim or defense of any other party, including the existence, description, nature, content, custody, condition and location of any books, documents, or other tangible things and the identity and location of persons having knowledge of any discoverable matter.

(b) It is not ground for objection that the information sought will be inadmissible at the trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence…

Explanatory Note:

Rule 4003.1 incorporates the broad Federal discovery rule and replaces former Rule 4007(a), which had provided a more limited scope of discovery. Rule 4007(a) limited discovery to any matter not privileged which is relevant to the subject matter involved in the action and "will substantially aid in the preparation of the pleadings or the preparation or trial of the case." Fed. R.Civ.P. 26(b)(1), from which Rule 4003.1 is taken almost verbatim, permits discovery of all relevant matter not privileged, whether it relates to a claim or defense. It is not restricted to preparation of pleadings or the trial of the case. It is not ground for objection that the information sought will be inadmissible at the trial if the information sought appears reasonably calculated to lead to discovery of admissible evidence.

PA.R.C.P. 4003.1.

The party objecting to discovery generally bears the burden of establishing that the requested information is not discoverable. Furthermore, any limitations on discovery sought by the civil litigants should be construed narrowly. Lau, supra, at P. 9, quoting Howarth-Gadomski v. Henzes, M.D., 2019 WL 6354235 at *3-4 (Lacka. Co. 2019) (citations omitted).

In a civil matter counsel shall not be competent or permitted to testify to confidential communications made to him by his client, nor shall the client be compelled to disclose the same, unless in either case this privilege is waived upon the trial by the client. 42 Pa. C.S.A. § 5928.

However, according to the Pennsylvania Rules of Professional Conduct, attorneys are permitted to disclose information relating to the representation of a client under certain circumstances:

Rule 1.6: Confidentiality of Information

(a) A lawyer shall not reveal information relating to representation of a client unless the client gives informed consent, except for disclosures that are impliedly authorized in order to carry out the representation, and except as stated in paragraphs (b) and (c)…

(c) A lawyer may reveal such information to the extent that the lawyer reasonably believes necessary:

(4) to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client, to establish a defense to a criminal charge or civil claim or disciplinary proceeding against the lawyer based upon conduct in which the client was involved, or to respond to allegations in any proceeding concerning the lawyer's representation of the client;…

(8) to comply with other law or a court order…

Pa.R.P.C. 1.6 (a), (c).

A party claiming a communication is privileged must set forth facts showing the privilege was properly invoked. In this regard, the moving party must prove four elements:

1) [t]he asserted holder of the privilege is or sought to become a client[;]

2) [t]he person to whom the communication was made is a member of the bar of a court, or his subordinate[;]

3) [t]he communication relates to a fact of which the attorney was informed by his client, without the presence of strangers, for the purpose of securing either an opinion of law, legal services or assistance in a legal matter, and not for the purpose of committing a crime or tort[;]

4) [t]he privilege has been claimed and is not waived.

Upon that showing, the burden shifts to the party seeking disclosure, which must explain why the communication at issue should not be privileged.

BouSamra, supra, at 391-392 (citations omitted).

Pennsylvania law imposes a shifting burden of proof in disputes over disclosure of communications allegedly protected by attorney-client privilege. The party invoking a privilege must initially "set forth facts showing that the privilege has been properly invoked; then the burden shifts to the party seeking disclosure to set forth facts showing that disclosure will not violate the attorney-client privilege, e.g., because the privilege has been waived or because some exception applies. Accordingly, if the party

asserting the privilege does not produce sufficient facts to show that the privilege was properly invoked, then the burden never shifts to the other party, and the communication is not protected under attorney-client privilege.

Saint Luke's Hosp. of Bethlehem v. Vivian, 99 A.3d 534, 542 (Pa. Super. Ct. 2014) (citations omitted).

Under Pennsylvania law, an attorney who is attempting to ascertain the validity of an attorney-client privilege invocation, may make inquiries into the validity of the privilege, in order to factually establish that the privilege was properly invoked. Pennsylvania caselaw construes the attorney-client privilege with balancing factors. While the privilege is sacred, the law also acknowledges that it cannot be construed too broadly as to significantly harm a party. The privilege is not an impenetrable shield that could never be broken, it may be assessed to determine its validity.

Recognizing that its [the attorney-client privilege] purpose is to create an atmosphere that will encourage confidence and dialogue between attorney and client, the privilege is founded upon a policy extrinsic to the protection of the fact-finding process. The intended beneficiary of this policy is not the individual client so much as the systematic administration of justice which depends on frank and open client-attorney communication.

Id. at 550, quoting, In re Thirty–Third Grand Jury Investigation, 86 A.3d 204 (Pa.2014) (clarification added).

[S]ince the [attorney-client] privilege has the effect of withholding relevant information from the fact-finder, it applies only where necessary to achieve its purpose. Accordingly it protects only those disclosures necessary to obtained informed legal advice which might not have been made absent the privilege.

Fisher v. United States, 425 U.S. 391, 403 (1976) (citations omitted) (clarification added).

The privilege does not protect facts, only the confidential communications between attorney and client:

"[T]he protection of the privilege extends only to communications and not to facts. A fact is one thing and a communication concerning that fact is an entirely different thing. The client cannot be compelled to answer the question, 'What did you say or write to the attorney?' but may not refuse to disclose any relevant fact within his knowledge merely because he incorporated a statement of such fact into his communication to his attorney." Philadelphia v. Westinghouse Electric Corp., 205 F.Supp. 830, 831 (q2.7).

Upjohn, supra, at 395-96.

The Pennsylvania Supreme Court case of Levy v. Senate of Pennsylvania provides guidance to this Court in much of its analysis. Levy addressed a RTKL (Right to Know Law) request to the Senate of Pennsylvania, whether 1) client identity is protected by the attorney-client privilege, (2) whether descriptions of legal services are protected by the attorney-client privilege, and (3) whether an agency waives any reasons for non-disclosure that were not raised in the initial written denial. Levy v. Senate of Pennsylvania, 65 A.3d 361, 367 (Pa. 2013).[6] The Court in Levy ruled that depending on the circumstances, client identities and legal services can be subject to attorney-client privilege if the information sought would reveal privileged information such as legal advice given or providing confidential communications; likewise, if information sought would not reveal privileged communications, that information is not privileged. See generally Id..

The issue most relevant to this Court's analysis is the second, privilege and legal services. Concerning the issue of legal services, the Court in Levy held that:

[T]he relevant question is whether the content of the writing will result in disclosure of information otherwise protected by the attorney-client privilege. For example, descriptions of legal services that address the client's motive for seeking counsel, legal advice, strategy, or other confidential communications are undeniably protected under the attorney client privilege. In contrast, an entry that generically states that counsel made a telephone call for a specific amount of time to the client is not information protected by the attorney-client privilege but, instead, is subject to disclosure under the specific provisions of the RTKL.

Id. at 373 (emphasis added) (citations omitted).[7]

The Court's interpretation of the legal services holding in Levy is that if a writing or communication will result in the disclosure of privileged information, then that writing or communication is subject to privilege. However, if a writing or communication may result in the disclosure of privileged information, it may be analyzed for a privilege determination. As such, each determination of privileged information or inquiry into privileged information must be analyzed as to whether such disclosure would reveal the privileged information, not that it could.

III. Analysis of Attorney-Client Privilege Objections

Pennsylvania and Allegheny County law clearly state that the only valid objections made during a deposition are to privilege and form, and that they are merely speaking objections. Objections to form are tools utilized to remove potential errors of testimony during deposition.[8] Objections based on privilege are also allowed to preserve the privilege. However, this Court must now emphasize that the attorney-client privilege cannot and will not be used as a muzzle to silence a deponent when privilege does not exist. The sanctity of attorney-client privilege will not be cheapened by attorneys making outlandish objections when they are prima facie invalid.

The Court, having determined various categories of questions asked during Fasulo's deposition, will analyze these questions based on type and make determinations of valid privilege objections based on those categories.

First, at oral argument and within the parties' submitted briefs, the parties conveyed to the Court that KIC has resolved or waived numerous objections, all based on certain categories of questions. It is the Court's understanding that the following issues/question categories are no longer objected to/and are resolved:

• Questions concerning client identities of Houston Harbaugh (other than KIC).

⊡ E.G.: "Between September of 2016 and June of 2018, did Houston Harbaugh represent Steven D'Achille in his individual or personal capacity?" (Deposition Transcript, supra, at P. 39, L. 8-11).

⊡ (KIC Opposition, supra, at L. 22-25).

• Questions concerning Houston Harbaugh's scope of services to KIC, only regarding dates of retention.

⊡ E.G.: "When did Houston Harbaugh first provide legal services to KIC?" (Deposition Transcript, supra, at P. 49, L. 21-22).

⊡ (KIC Opposition, supra, at L. 28).

• Questions regarding communications between Houston Harbaugh and the Pennsylvania Department of Health.

⊡ E.G.: "Did Houston Harbaugh have any communications with the Department of Health, Pennsylvania Department of Health, relating to KIC?" (Deposition Transcript, supra, at P. 53, L. 4-7).

⊡ (Defendant KIC's Post-Argument Brief in Further Opposition to Plaintiffs' Motion for Sanctions For Asserting Bad Faith Objections During Deposition of David Fasulo and Motion to Compel Responses to Questions at P. 7, n.3, Russell Cersosimo,

JR. and Russell Cersosimo, SR. v. Keystone Group of Companies, LLC, Keystone Integrated Care, LLC, and Thomas Perko, No. 20-008252 (Allegheny Cty. Ct. Com. Pl. Mar. 21, 2023), ECF No. 114) ("KIC Post-Argument Brief").

There are several more categories of questions still objected to/at issue. The Court will analyze each category of questions for valid assertions of attorney-client privilege. Each party has provided their own categories of questions in their arguments. The Court has decided to divide the questions into its own categories. The Court has meticulously analyzed the Fasulo transcript for each attorney-client privilege objection, places each question and objection in the following categories, and makes determinations of valid privilege objections based on each category:

1. Questions regarding Houston Harbaugh sending documents to counsel for KIC and others.

This category concerns questions asked by Attorney Kunselman that reference HH sending documents to counsel for KIC in this litigation, as well as producing documents for this litigation or sending documents to other parties, such as Blank Rome. All questions asked under this category were in reference to the sending and preparation of the documents; none were inquiring as to the contents of the documents themselves.

One example of a question under this category is "Did Houston Harbaugh send documents to KIC's counsel in this case?" (Deposition Transcript, supra, at P. 20, L. 6). Another example is "Did Houston Harbaugh make a representation to KIC's counsel that it had provided all documents?" (Id. at P. 23, L. 13). All other questions the fall under this category are substantially similar to these examples, all concerning actions HH took to send documents to KIC's counsel or Blank Rome in this litigation, and concerning the preparation of these documents for production.

Upon analysis, none of these questions would elicit privileged responses. The act itself of an attorney preparing and sending documents to another is not privileged information. The documents that an attorney sends to another could contain privileged information, but the act of an attorney sending documents to another person or attorney would not reveal privileged information.[9] Analyzing the questions under the factors of determining attorney-client privilege, any answer would not and could not elicit privileged information because the actions of sending and preparing documents are not confidential.

KIC did not address this specific category in its submissions. However, the Court has deduced from KIC's other arguments that inquiring about the act of preparing and sending documents could elicit privileged information, if the attorney being deposed reveals the type of work an attorney has done, what was contained within the documents, what was said between the parties (as communications between lawyers, especially co-defendants about a client are privileged)[10].

The Court does not agree with KIC here. First, just because a question could elicit privileged information, does not mean it will. Second, Attorney Kunselman did not ask questions about the contents of the production or the communications, merely the act of sending and producing. Attorney Kunselman did not even skirt the area of inquiring into privileged communications, he was simply asking questions of whether certain actions were taken. None of these questions asked would elicit privileged information.

2. The Privilege Log

This category concerns questions asked by Attorney Kunselman (and met with a privilege objection by Attorney Kelly) that reference the privilege log provided to Plaintiffs' counsel by KIC's counsel. All questions asked under this category were in reference to the privilege log itself, not the contents of the privilege log, nor any confidential information the privilege log may have contained.

One example of a question under this category is "And if you scan through that column (in reference to what appeared on the privilege log), I believe what you will find is that the earliest date listed is October 20th, 2016. Would you like to confirm that for me?" (Deposition Transcript, supra, at P. 67, L. 17-20) (clarification added). Another example is "The third column from the right is labeled at the top Record Type. Do you see that?" (Id. at P. 72, L. 2-3). All other questions the fall under this category are substantially similar to these two examples, all asking whether Fasulo sees something on the privilege log or asking what "eDOCS" is.

The objections based on privilege to these questions are prima facie invalid. These questions are simply asking Fasulo if he sees something on the log, and asking to confirm something on the log, and asking what the word "eDOCS" means. The Court cannot fathom why Attorney Kelly thought these questions would elicit privileged responses when Attorney Kunselman was simply asking if Fasulo saw something on a page, a simple "yes" or "no" response. Asking someone to confirm something that is happening at that time, to use one's senses, is not privileged. The potential answers would not possibly contain privileged information because the questions are not inquiring into the potential confidential communications on the page, they are simply referring whether something was on the page.

3. Houston Harbaugh's communications with various parties

This category consists of questions asked by Attorney Kunselman that reference the various communications HH had with parties such as Russ Jr. and other attorneys. This is the only category of questions where Fasulo could have provided privileged responses.

One example of a question under this category that would not have elicited a privileged response is "Prior to the time when any investors of KIC became investors in KIC, in other words, before they made their investment in KIC, did Houston Harbaugh have communications with any of those investors?" (Id. at P. 61, L. 14-18). An example of a question under this category that could have elicited a privileged response is "Did you have any communications with Maria Carnicella about KIC?" (Id. at P. 76, L. 16-17). All other questions the fall under this category are substantially similar to these two examples; asking whether someone from HH or Fasulo communicated with certain individuals about either KIC or Russ Jr. Again, some of the questions would not have elicited privileged responses, while others would have.

First, the questions that would not have elicited privileged responses are the questions that ask about communications Fasulo or HH had with other individuals that do not ask about specific details regarding those conversations, such as the topic of the conversation or conversations in service of KIC. As another example of these types of questions, one asked by Attorney Kunselman was "Did you [Fasulo] ever have communications with Attorney Asim Grabowski-Shaikh?" (Id. at P. 55, L. 22-23) (clarification added). Questions like these would not elicit privileged responses, because the questions are not inquiring about privileged information.

Whether Fasulo ever had a conversation with Attorney Asim Grabowski-Shaikh (or anyone who is not a client, such as a potential investor) is not privileged information, nor is a potential conversation privileged because the parties are not in an attorney-client relationship. Even if the argument could be made that the communication was made to aid a client, the deposing attorney is able to ask questions to ascertain the privilege assertion. The simple fact that Fasulo or someone from HH may have had a conversation with an individual does not equate to seeking legal advice, legal services, or assistance in legal matters. The contents of the alleged conversation could contain privileged information. However, the fact that a conversation occurred is not privileged.

Next, under this category of questions, there were also questions asked by Attorney Kunselman that could have elicited privileged responses. Another example of these types of questions is "Did you have any communications with someone named Molly Blasier relating to KIC?" (Id. at P. 74, L. 13-15). Questions like this need to be analyzed further for whether there was a valid privilege objection. The Court, after analyzing these types of questions, determined that a privilege objection is not valid here, even though the question could elicit a privileged response.

The first requirement a party must meet to show the validity of the privilege is that "the asserted holder of the privilege is or sought to become a client." BouSamra, supra, at 392. Attorney Kunselman, as the party seeking disclosure, can inquire into and establish facts necessary to show that a communication is not privileged. Attorney Kunselman, in the example above, asked Fasulo whether he and Molly Blasier ever communicated about KIC. Attorney Kunselman later asks if Molly Blasier was ever a client of HH, a question he is allowed to ask to ascertain potential privilege. If Molly Blasier is a client, and Fasulo responds by talking about their communications, that could elicit a privileged response. By way of example, the fact of whether an individual is a client of a firm would not reveal privileged information. Further, HH is a firm with many practice areas, especially in civil law.[11] The fact that someone may or may not be client of HH would not immediately reveal why a purported client sought out HH to represent them, which for example, could reveal privileged information on why that client sought legal advice. The specific question and others like it could reveal privileged information. However, Attorney Kunselman is entitled to ascertain the validity of the privilege.

Lastly, there are questions in this category that would have elicited privileged information. Another example of these types of questions is "Did you have any oral communications with Russ Jr. about whether he should resign from KIC?" (Deposition Transcript, supra, at P. 59, L. 3-4). Questions similar to this example would elicit privileged responses under the factors to determine privilege because of the specific facts in this case.

First, the holder of the privilege, at the time of a possible communication, was a client. Russ Jr., before his resignation, was a manager of KIC. (Plaintiffs' Reply to Opposition of Keystone Integrated Care, LLC, to Motion for Sanctions For Asserting Bad Faith Objections During Deposition of David Fasulo And Motion to Compel Responses to Questions at P. 3, n.5, Russell Cersosimo, JR. and Russell Cersosimo, SR. v. Keystone Group of Companies, LLC, Keystone Integrated Care, LLC, and Thomas Perko, No. 20-008252 (Allegheny Cty. Ct. Com. Pl. Feb. 20, 2023) ("Cersosimo Post-Argument Brief")[12]. As a representative of KIC and its agent at the time, he was authorized to communicate to KIC's counsel on behalf of KIC. Second, to whom the communication was made was Fasulo, a member of the Bar. Third, the communication relates to potential legal advice for KIC, purportedly without the presence of strangers. A potential communication between a manager of a company and that company's legal counsel about whether that manager should resign can be considered seeking legal advice on behalf of the company. Fourth, the communication has not and cannot be waived by Russ Jr. post-resignation:

It is by now well established… that the attorney-client privilege attaches to corporations as well as to individuals… As an inanimate entity, a corporation must act through agents. A corporation cannot speak directly to its lawyers. Similarly, it cannot directly waive the privilege when disclosure is in its best interest. Each of these actions must necessarily be undertaken by individuals empowered to act on behalf of the corporation… [t]he power to waive the corporate attorney-client privilege rests with the corporation's management and is normally exercised by its officers and directors. The managers, of course, must exercise the privilege in a manner consistent with their fiduciary duty to act in the best interests of the corporation and not of themselves as individuals… Displaced managers may not assert the privilege over the wishes of current managers, even as to statements that the former might have made to counsel concerning matters within the scope of their corporate duties.

Commodity Futures Trading Comm'n v. Weintraub, 471 U.S. 343, 348-49 (1985) (citations omitted).

Therefore, this specific question would have elicited a privilege response, because Attorney Kunselman inquired about specifically whether Fasulo had a communication with a client regarding potential legal advice and asking about the contents of that specific communication. Plaintiffs' counsel also concede this issue in their Motion for Sanctions, stating that certain communications may be privileged regarding these types of questions. (Motion for Sanctions, supra, at P. 6, n.8). The Court finds that questions such as this cannot be asked under these circumstances.

Although this category has mixed results about whether valid privilege objections were made, there were still instances where questions would not have elicited privileged responses. Some questions had valid privilege objections while others did not.

4. Questions regarding documents relevant to KIC (corporate record book, certificate of organization, permit applications).

This category concerns questions asked by Attorney Kunselman that reference relevant documents to KIC such as its corporate record book, certificate of organization, and permit applications.

There was one question with a privilege objection regarding a potential corporate record book: "Did Houston Harbaugh maintain a corporate record book for KIC?" (Deposition Transcript, supra, at P. 21, L. 14-15). In light of the fact that HH maintained a corporate record book as merely a custodian, it would have been intended by the attorneys and client to disclose the information included in the corporate record book.

There were two questions with privilege objections regarding the Certificate of Organization for KIC: "And are you able to determine when it [the certificate] was filed with the Department of State?" and "Mr. Fasulo, did Houston Harbaugh prepare Exhibit 21 [the certificate] before it was filed?" (Id. at P. 47, L. 12-13 & P. 48, L. 25 – P. 49, L. 1) (clarification added). The certificate was provided to Plaintiffs' counsel and is referenced as Exhibit 21. As a provided document during the course of discovery, any potential privilege based on this document has been waived.[13] Furthermore, a certificate of organization filed with the Pennsylvania Department of State is public record by virtue of filing with the State Department.[14]

There were three questions with privilege objections referencing the marijuana dispensary permit applications to the Pennsylvania Department of Health; for example:

"One of the subject matters of this lawsuit is certain permit applications by KIC to the Pennsylvania Department of Health to obtain a dispensary permit and a grower's permit under the medical marijuana law in Pennsylvania, and my question is whether Houston Harbaugh was involved at all in the drafting or preparation of those permit applications."

(Deposition Transcript, supra, at P. 52, L. 18-25).

Much like the certificate of organization, because these documents are filed with a state agency, they are a matter of public record and therefore, not privileged.

All of the documents discussed under this category of questions were either provided to Plaintiffs through discovery, intended to be disclosed to third parties, and/or are a matter of public record. There is no expectation of confidentiality with these documents, therefore, objections based on privilege are not valid here.

5. Manager Identities & Agreement to Reassign Membership Interests

This category concerns questions asked regarding manager identities of KIC and an agreement to reassign membership interests, which was identified in the privilege log provided by KIC.

An example of a question asked regarding managers of KIC is "During a portion of the time period when Houston Harbaugh represented KIC, were Tom Perko and Russ Jr. the managers of KIC?" (Deposition Transcript, supra, at P. 54, L. 2-4). The other questions that were objected to in this category reference Russ Jr.'s potential resignation of a manager position or other positions. (Id. at P. 54, L. 11-12 & P. 58, L. 22-23).

The facts that certain individuals may have been managers of a company or whether an individual resigned from a position, are not privileged. A fact is not considered confidential merely because the fact was included in a privileged communication. Upjohn, supra, at 395-396.

The questions asked regarding the agreement to reassign membership interests with privilege objections are: "Mr. Fasulo, did you modify a document entitled Agreement to Reassign Membership Interests?" and "If you did modify the document, when did you modify it?" (Deposition Transcript, supra, at P. 71, L. 17-19 & L. 22-23).

The agreement to reassign membership interests was detailed on the privilege log created and provided by KIC's counsel DLA Piper. (Id. at P. 69, L. 10-25). Attorney Kelly objects to this line of questioning based on privilege because Mr. Fasulo "has no knowledge about this privilege log and is not the appropriate person with whom to question about this privilege log." (Id.) Again, Attorney Kelly has missed the mark. An attorney, regardless of whether he created or has knowledge about the privilege log itself, may have knowledge of items documented on the log. Again, an attorney is allowed to ask questions to ascertain the validity of the attorney-client privilege, which it appears Attorney Kunselman was doing here by asking if Fasulo had worked on this document.

None of the questions asked in this category would elicit privileged responses. Therefore, the objections based on privilege are invalid here.

6. Questions concerning meetings between HH & other parties

This category concerns questions asked by Attorney Kunselman that reference a specific meeting detailed in several emails. The emails referenced are part of Exhibit 20 from the Fasulo Transcript.[15] As per the emails referenced and Fasulo's testimony, Russ Jr., Perko, and Michael Bergonzi (a former associate at HH) met sometime in September 2016. Fasulo also met with these three individuals sometime in September 2016. (Id. at P. 33, L. 3-11).

The questions that were objected to based on privilege are: "What was the purpose of that meeting?" and "Mr. Fasulo, who was present at that meeting, besides you and Mr. Bergonzi?" (Id. at P. 33, L. 12 & P. 34, L. 11-12).

Both questions reference a meeting of clients and their lawyers that may be privileged. As Attorney Kunselman correctly points out to Mr. Narahari and Attorney Kelly in the deposition: "…whether it's a deposition, interrogatory or otherwise, a party is entitled to ask questions calculated to ascertain the validity of the privilege assertion." (Id. at P. 35, L. 2-5). For example, an attorney is allowed to question a lawyer about the purpose of a particular meeting without eliciting a privileged response. As the Court stated in the December 12, 2022 oral argument on Defendant KIC's Motion to Quash Subpoena, any seasoned attorney could be committing malpractice if they were to answer a question that was either objected to based on attorney-client privilege or answer a question by divulging privileged material. See generally (Transcript 12/12/22, supra). An attorney is also allowed to ask who may have been present at a particular meeting to ascertain potential waiver of the privilege, as the presence of a third party would potentially invalidate such privilege.[16]

Both questions would not elicit a privileged response. Plaintiffs counsel asked appropriate questions to ascertain the validity of a privilege assertion.

7. Houston Harbaugh's Scope of Services to KIC, the Engagement Letter, and Capital Raising of KIC.

This category concerns questions asked by Attorney Kunselman that reference scope of services by HH to KIC (except for dates of retention), the engagement letter[17] of HH in service of KIC, and the subject of raising capital for KIC. The Court grouped these categories together for consolidation purposes only, as these are some of the smallest categories.

An example of a question concerning the scope of services to KIC is "Did he [Adam Shestack] provide legal work in connection with KIC?" (Id. at P. 50, L. 18-19) (clarification added). Other questions in this category also inquire as to what kind of services HH rendered to KIC. KIC argues that questions like this would elicit privileged responses because whether a specific attorney worked for a client would reveal the type of service performed for the client, therefore revealing privileged information. (KIC Opposition, supra, at L. 26). KIC incorrectly interprets the holding in Levy to support its argument, relying on the last-link doctrine, which was not wholly adopted by the Pennsylvania Supreme Court in Levy:

While largely overlapping and sometimes used interchangeably with the confidential communication/legal advice exceptions, the "last link" exception has been questioned because it focuses not on the confidentiality of the attorney-client relationship and the client's reason for seeking the legal advice but, instead, on the potential negative consequences to the client if the identity is revealed. It has been described as applying where "the disclosure of the client's identity by his attorney would have supplied the last link in an existing chain of incriminating evidence likely to lead to the client's indictment." …

Consistently with many of our sister courts, we hold that, while a client's identity is generally not privileged, the attorney-client privilege may apply in cases where divulging the client's identity would disclose either the legal advice given or the confidential communications provided… We do not adopt the "last link," or some of the framings of the other categories of exceptions, because of their focus on the potential negative consequences of the disclosure rather than on whether exposing the identity will divulge otherwise protectable information. While we do not view the Commonwealth Court's articulation of the exception below as limited to criminal cases, we affirmatively hold that the exception applies both in civil and criminal cases. Application of the exception, however, will involve case specific determinations of whether revealing the otherwise non-privileged identity will result in the disclosure of privileged information based upon what has been previously disclosed.

Levy, supra, at 371-372 (citations omitted).

Levy supports the contention that client identities can be privileged in certain circumstances but rejects adopting the last-link doctrine and other exceptions wholly, holding that determinations of privilege must be evaluated on a case-by-case basis.

Levy states that the applicability of the attorney-client privilege depends on whether the relevant question will result in the disclosure of information otherwise protected by the attorney-client privilege:

As with our analysis of client identities, the determination of the applicability of the attorney-client privilege does not turn on the category of the information, such as a client's identity or address, or the category of a document, such as whether it is

an invoice or fee agreement. Instead, the relevant question is whether the content of the writing will result in disclosure of information otherwise protected by the attorney-client privilege.

Id. at 373 (emphasis added).

Accordingly, each question must be analyzed to determine whether it would result in privileged information being disclosed. A disclosure of the lawyer's identity may elicit inferences about the scope of services provided but would not necessarily disclose the actual reason they were retained or the underlying conditions that led to retention. The simple assertion that a response could elicit privileged information, does not mean that it will. Therefore, questions inquiring as to whether a specific lawyer worked for a client or the scope of services rendered, especially in this context, would not elicit privileged information.

Next, an example of a question regarding the engagement letter is "Did you [Fasulo] author Exhibit 19 [the engagement letter]?" (Deposition Transcript, supra, at P. 28, L. 11) (clarification added). The questions in this category reference the engagement letter between HH and KIC, and other engagement letters that may exist. The engagement letter was one of several exhibits provided by counsel for KIC. The Court views any questions surrounding this engagement letter as waiver of any potential attorney-client privilege. Because KIC produced this letter to Plaintiffs' counsel, any privilege that may have existed within this document is waived: Once attorney-client communications are disclosed to a third party, the attorney-client privilege is deemed waived. Bagwell v. Pennsylvania Dept. of Educ., 103 A.3d 409, 417 (Pa. Commw. Ct. 2014). Objections based on privilege are invalid here.

An example of a question regarding the raising of capital funding by KIC is "The documents produced in discovery in this case indicate that there was an initial raising of capital by KIC in or around late 2016, early 2017. Do you recall that being the case?" (Deposition Transcript, supra, at P. 73, L. 18-21). The existence of whether KIC raised capital is not privileged information. As Attorney Kunselman points out in his question, documents provided in discovery allude to the raising of capital. As noted above, the production of a potentially privileged document waives the attorney-client privilege of that document.

None of the questions asked in this category would elicit privileged responses. Attorney Kelly's objections based on privilege are invalid here.

IV. Findings

As Plaintiffs have moved for imposition of sanctions, the Court must determine whether Defense Counsel's conduct rose to sanctionable behavior:

"Generally, courts are afforded great discretion in fashioning remedies or sanctions for violations of discovery rules and orders." City of Philadelphia v. Fraternal Order of Police Lodge No. 5 (Breary), 604 Pa. 267, 985 A.2d 1259, 1269 (2009) (internal citations omitted). Moreover, "in ... exercis[ing] judicial discretion in formulating an appropriate sanction order, the court is required to select a punishment which 'fits the crime.'" Estate of Ghaner v. Bindi, 779 A.2d 585, 590 (Pa.Super.2001) (internal citation omitted).

Saint Luke's Hosp., supra, at 553.

First, the Court has found that Attorney Narahari, although having made invalid privilege objections, did not conduct himself in bad faith. Attorney Narahari objected to a few questions based on privilege and based on the Court's reading of the transcript, found Attorney Narahari's behavior to be reasonable and congenial, as he did not argue with Plaintiffs' counsel but merely placed his objections on the record. The Court will not be imposing sanctions against Attorney Narahari or his firm.

The Court has found that not only is Attorney Kelly's conduct vexatious and abhorrent, it violates the spirit of this Court's order and instructions from the December 12, 2022 oral argument on KIC's Motions to Quash, and it violates the rulings made in Lau and Tominello.

The Court's December 12, 2022 order on Defense's Motion to Quash, simply denied the Motion to Quash Deposition of David Fasulo. However, at oral argument on December 12, 2022, the Court told the attorneys that they "cannot assert blanket privilege in this case." (Transcript 12/12/22, supra, at P. 7, L. 2-4). The Court made its feelings clear on the subject of Fasulo's deposition: that the questions needed to be evaluated on a question-by-question basis for attorney-client privilege, and that the attorneys needed to proceed in good faith. See generally Id..

It is clear to this Court that Attorney Kelly's conduct during the deposition of Mr. Fasulo was contemptible for asserting these objections that were evidently made in bad faith. No jurist could view Attorney Kelly's objections as anything but bad faith, as she objected to 58% of the questions asked, of which only a select few were valid objections. Counsel was creating her own basis for most privilege objections, in effect silencing the witness and hoping a thrown dart would land a bulls-eye, when in fact, she missed the mark completely.

Attorney Kelly's behavior forced Plaintiffs' counsel to suspend the deposition because he could clearly not ask Fasulo any substantive (and some non-substantive) questions without being met with objections. This Court, this County, and this Commonwealth cannot condone such behavior from counsel, excuses aside.

Furthermore, it is evident to this Court that Attorney Kelly has either not read or understood this Court's Lau and Tominello opinions, two opinions that have made crystal-clear the mission of the Discovery Court in Allegheny County and the Court's expectations of lawyers' actions as members of the Bar. The Court will unfortunately need to recapitulate its findings from these two opinions, as they are warranted here.

1. Any objection shall be stated concisely in a non-argumentative and non-suggestive manner; and

2. Counsel shall not direct or request that a witness not answer a question unless counsel has objected on the ground that the answer is protected by a privilege or a limitation on evidence directed by the Court.

Lau, supra, at P. 33.

Protestations including counsel's unnecessary instructions for a witness not to answer (absent privilege or other reason by court order as set forth herein) are counterproductive to the discovery process. Moreover, the unjustified refusal to answer and subsequent compelled intervention of the Special Motions Court is a strain on judicial economy. In effect, counsel's overzealous conduct would have the Special Motions Court engage in prognostic folly to determine admissible evidence before the conclusion of discovery. Moreover, the additional expenditure of counsel's time and court resources to provide an unnecessary prognostic ruling far outweighs the witness simply answering the question at deposition and preserving the objection for the time of trial, after all discovery has concluded. To conclude otherwise would flip judicial economy on its head and place the Court in an obligatory position to babysit legal professionals over myriad nuanced discovery disputes.[18]

Id. at P. 15, n.15.

Lau contemplated speaking objections made by opposing counsel in a deposition, which caused the deposing lawyer annoyance and burden. Lau has ruled that the only valid objections during deposition are objection to form (which may be cured

at the deposition) and objections based on privilege or a limitation on evidence directed by the Court. Lau did not contemplate what were valid privilege objections within a deposition. However, Lau made clear that a lawyer's behavior, if found to be improper, would be met with sanction, and any other remedies where the punishment would fit the crime.

As such, future deposition conduct that would cause unreasonable annoyance, embarrassment, oppression, burden or expense to the deponent or any person or party, particularly to reschedule a deposition because of said conduct; shall be met with the imposition of sanction(s) in this matter or any similar matters brought before this Court presiding as Special Motions Judge.

Id. at P. 16.

"A common tactic in depositions is to impede the questioning lawyer's progress with objections or instructions not to answer." A. Darby Dickerson, The Law of Ethics and Civil Depositions, 57 MD. L. REV. 273, 345 (1998) citing to Hall, 150 F.R.D. at 531 (addressing improper "strategic interruptions, suggestions, statements, and arguments of counsel").

Id. at P. 27, n.24.

Finally, this Court does not now, and in the future will not, condone any type of conduct which reduces or denigrates the level of legal professionalism to unnecessary argumentative barbs or other less than professional behavior. Suffice it to say once: Counsel should never forget that even though the deposition may be taking place far from a real courtroom, with no black-robed overseer peering down upon them, as long as the deposition is conducted under the caption of this court and proceeding under the authority of the rules of this court, counsel are operating as officers of this court. They should comport themselves accordingly[.]

Id. at P. 34.

Like in Lau, the Court acknowledges in this matter that "there are valid and strategic reasons for counsel to place objections on the record," including objections based on privilege. Id. at P. 27. However, absent privilege or prior court order, an instruction to a deponent not to answer a question without a good faith basis will subject the obstructionist to risk of sanction. Id. An attorney in this County and Commonwealth will make an objection based on privilege in good faith as well, or risk sanction(s) by this Court.

Tominello extended the findings made in Lau:

To be clear, and yet again as set forth in Lau, and reiterated here in most common parlance: this Discovery Motions Court does not and will not "babysit" lawyer's conduct. Violations of professionalism or inflated claims of violations will be met with sanction. This Court, if required to assess the nuances of counsel's behavior by expending valuable Court resources to monitor professionals' discovery/deposition behavior, including review of deposition transcripts and various exhibits in Motions practice shall subject the offending party to imposition of costs. Counsel shall be held accountable and are hereby forewarned. Whether to act professionally or in accord with the parameters of Lau is not an option."

Tominello, supra, at P. 12, n.6.

[t]his Court finds that the conduct of counsel: raising spurious or speaking objections; instructing the deponent not to answer; injecting himself as a witness; de facto causing the suspension of the deposition thereby compelling opposing counsel to expend unnecessary legal effort; and requiring subsequent Court intervention is a violation of Pa.R.C.P. 4011(b).[19]

Id. at P. 29.

"Plaintiffs' Counsel's deposition conduct has caused unreasonable annoyance, expense, unnecessary dissipation of Court resources to remedy the conduct, and additional burden upon the parties to reschedule the deposition. This Court shall impose sanctions as described herein."

Id. at P. 30.

The Court undoubtedly finds that Attorney Kelly engaged in similar conduct to the offending attorney in Tominello. Attorney Kelly has caused great annoyance and expense to the Plaintiffs and has caused this Court to extend vast judicial resources to analyze deposition transcripts and discovery exhibits, all to remedy her behavior.

Although the Court finds Attorney Kelly's conduct during the deposition unacceptable, the Court will acknowledge Attorney Kelly's statements during oral argument. Attorney Kelly told the Court that she was inexperienced in this situation, meaning participating in a deposition of a lawyer. (Transcript 2/6/23, supra, at P. 16, L. 17 – P. 17, L. 22). Though this is not an excuse, the Court will temper justice with mercy since Attorney Kelly attempted to fall on her sword, even if she still maintains most privilege objections were valid. (KIC Post-Argument Brief, supra, at L. 4-5). The Court, though understanding of an attorney's inexperience, nevertheless needs to ensure the professionalism and integrity of the discovery process. Inexperience is not an excuse for Ms. Kelly's behavior or improper objections.

KIC proposed the following remedies in response to Plaintiffs' Motion for Sanctions and to Compel:

KIC proposes that Mr. Kunselman could give an outline of the questions to Defendants under a confidential attorneys-eyes only designation; those questions could be reviewed, objected to, and the parties could work out amongst themselves which lines of questions were objectionable. Then, if there are still any objections, the parties could brief the legal issues to this Court for final resolution of these thorny issues. Under that framework, Mr. Fasulo would not get a "sneak peak" of the questions, preserving the integrity of the deposition, but the privilege concerns can be ameliorated and adjudicated. This seems to be a "win-win" situation for the parties. Without some advance organization, the Court will be forced to play whack-a-mole over and over—a result nobody wants.

(KIC Opposition, supra, at L. 45)

What KIC suggests is for Plaintiffs' counsel to hand over their deposition outline to give them a preview of the questions to be asked, for them to potentially brief further these issues, and for this Court to adjudicate these issues even more than it already has. The Court will make this clear: it will not be refereeing this deposition further. The Court, in an effort to make Plaintiffs whole, will enforce their requests with a few changes.[20]

The Court, in finding that Attorney Kelly's conduct of making privilege-based objections wholly improper, finds that she was in violation of this Court's order of December 12, 2022, the rulings made in Lau and Tominello, and Pennsylvania caselaw governing attorney-client privilege objections. The Court finds sanctions appropriate under Pa.R.C.P. §4019 and 42 Pa.C.S. §2503. As such, the Court imposes sanctions on Attorney Kelly in the form of counsel fees incurred by Plaintiffs for convening and conducting Mr. Fasulo's deposition, the fees of the court reporter and videographer for the deposition, and counsel fees incurred by Plaintiffs for researching, preparing, and presenting their Motion for Sanctions and to Compel.

The deposition of Mr. Fasulo will be reconvened, without the presence of the Court or a special master. The Court orders the parties to work together in a professional and good faith manner, so the Court is not forced to oversee this deposition further. The witness will answer most questions to which Defense counsel previously objected to, except for questions that will elicit privileged

responses as discussed above. Fasulo need not answer questions that will require him to divulge privileged information, such as discussing the contents of a particular communication that has not already been provided in discovery. Plaintiffs' counsel will make a good faith effort to not ask about privileged communications unless it is to ascertain the validity of the attorney-client privilege.

The Court will also remind all counsel that as attorneys, they are not allowed to become witnesses in a deposition. The only valid objections within depositions are objections to form and to attorney-client privilege. The attorney-client privilege will not be used to silence the witness. Attorney-client privilege objections will be made in good faith. The only valid attorney-client privilege objections within a deposition occur when the question would elicit a response that would reveal privileged information.

An appropriate order follows with this Opinion.

BY THE COURT:
/s/The Hon. Philip A. Ignelzi

[1] The Court is citing Plaintiff's Amended Complaint for a brief recitation of facts relevant to the specific matter before this Court. The Court does not take any position on the allegations within the Complaint.

[2] Most of the cases KIC cites are from non-precedential cases, such as decisions in federal court districts other than the Western District of Pennsylvania. Although a Court may consider non-precedential cases as guidance when ruling, the Court chooses not to do so here. The Court does not find the arguments based on the caselaw cited persuasive. Also, when citing precedential caselaw, KIC does not apply the law correctly, in this Court's opinion.

[3] Tominello v. UPMC, GD20-002650, Opinion dated November 2, 2022, ECF 50, 171 Pittsburgh Legal Journal No.4, February 24, 2023 (Alleg. Co. 2022, Ignelzi, J.).

[4] An explanation on what constituted Happy Hour can be found in Lau at Footnote 3.

[5] "1. Any objection shall be stated concisely in a non–argumentative and non–suggestive manner; and 2. Counsel shall not direct or request that a witness not answer a question unless counsel has objected on the ground that the answer is protected by a privilege or a limitation on evidence directed by the Court." Lau v. AHN, 2021 WL 1235495, 169 Pittsburgh Legal Journal No. 9, at P. 17, April 23, 2021 (Alleg. Co. 2021, Ignelzi, J.)

[6] Only Levy's first and second issues are relevant to the matter before this Court. However, as explained below in the Court's analysis, issues concerning client identities before this Court have been waived by KIC.

[7] The Court in Levy analyzed whether redacted information from the Pennsylvania Senate in an RTKL request should be disclosed when challenged. Although this factual scenario is not similar to ours, the privilege rulings in Levy control here, as they speak to whether specific information is privileged in civil cases.

[8] See Lau P. 29-30 for further explanation on objections to form.

[9] The United States Supreme Court in Fisher v. United States addressed the issues of whether a summons directing an attorney to produce documents delivered to him by his client in connection with the attorney-client relationship is enforceable over claims that the documents were constitutionally immune from summons in the hands of the client (vis-à-vis the Fifth Amendment right against self-incrimination) and retained that immunity in the hands of the attorney. Fisher, supra, at 393. That Court held that compliance with a summons directing the taxpayer to produce the accountant's documents in that matter would involve no incriminating testimony within the protection of the Fifth Amendment. Id. at 414. Although Fisher contemplated Fifth Amendment issues in conjunction with the attorney-client privilege, the Court finds Fisher informative in that, like the matter before this Court, the act of producing/sending documents to another does not constitute attorney-client privilege. It is worth noting the United States Supreme Court held the physical act of production can violate the Fifth Amendment. United States v. John Doe, 465 U.S. 605 (1984). The Court held because the act of production compels a respondent to admit the records exist, that they are in his/her possession and that they are authentic the Fifth Amendment applies. Id. at 607-08. This fits squarely within this Court's prior analysis the Fifth Amendment privilege is much broader than the attorney-client privilege.

[10] Attorneys of co-defendants communicating with each other are protected by a common interest privilege, which is "an extension of the attorney client privilege." In re Condemnation by City of Philadelphia in 16.2626 Acre Area, 981 A.2d 391, 397 (Pa. Commw. Ct. 2009).

[11] Practice Areas: Cost-Effective Collaboration In Diverse Practice Areas, hh-law.com, https://hh-law.com/practice-areas/ (last visited Aug. 25, 2023).

[12] Plaintiffs' Post-Argument Brief was electronically sent to the Court on February 20, 2023, but was not filed on the docket.

[13] In light of this purpose, however, the privilege is deemed waived once confidential attorney-client communications are disclosed to a third party. BouSamra, supra, at 391.

[14] See "General Information" and "Who should file this form?" Pennsylvania Department of State Bureau of Corporations and Charitable Organizations, www.dos.pa.gov, https://www.dos.pa.gov/BusinessCharities/Business/RegistrationForms/Documents/Updated%202017%20Registration%20Forms/Domestic%20Limited%20Liability%20Company/15-8821%20Cert%20of%20Org-Dom%20LLC.pdf (last visited Aug. 25, 2023).

[15] "Mr. Ponzo: Just for the record, it's [Exhibit 20] a couple of e-mails, and then there's an attached operating agreement of Frequency Management Company." (Deposition Transcript, supra, at P. 32, L. 6-9) (clarification added). Exhibit 20 was submitted to this Court in camera by Plaintiffs' counsel as Exhibit C as part of their Motion for Sanctions, which was originally produced by the Defendants and was designated "confidential" pursuant to protective order.

[16] Indeed, "the privilege is grounded in a policy entirely extrinsic to protection of the fact-finding process;" instead, the interest of trusting, open, and honest attorney-client communications is paramount. In light of this purpose, however, the privilege is deemed waived once confidential attorney-client communications are disclosed to a third party. Bousamra, supra, at 391 (citations omitted).

[17] The Engagement Letter is one of the exhibits provided to Plaintiffs' counsel by counsel for KIC.

[18] The Special Motions Court discussed in Lau is now the Discovery Court in Allegheny County.

[19] Rule 4011. Limitation of Scope of Discovery: No discovery, including discovery of electronically stored information, shall be permitted which… (b) would cause unreasonable annoyance, embarrassment, oppression, burden or expense to the deponent or any person or party… Pa. R.C.P. § 4011(b).

[20] Plaintiffs requests for sanctions and to compel reconvening deposition of Mr. Fasulo can be found at Plaintiff's Motion for Sanctions and to Compel, L. 29-32.

COMMONWEALTH OF PENNSYLVANIA, OFFICE OF ATTORNEY GENERAL, BY ATTORNEY GENERAL JOSH SHAPIRO vs. GILLECE SERVICES, LP, d/b/a GILLECE PLUMBING, HEATING, COOLING, AND ELECTRICAL, INC., GILLECE PLUMBING AND HEATING, INC., ROOTER-MEDIC and ELECTRIC MEDIC, GILLECE PLUMBING AND HEATING, INC.;

THOMAS J. GILLECE, individually and as owner of GILLECE SERVICES, L.P., GILLECE ENERGY, L.P. and GILLECE PLUMBING AND HEATING, INC.;

JAMES F. HACKWELDER, individually and as field supervisor for GILLECE SERVICES, L.P.; and

JOSEPH NIKOULA, individually and as field supervisor for GILLECE SERVICES, L.P.,

Prohibited Business Practices

Plaintiff Pennsylvania Office of Attorney General brought this action against the Defendants pursuant to 73 P.S. § 201-4 in order to enjoin what it argued were prohibited business practices.

Case No.: GD 20-009374. In the Court of Common Pleas of Allegheny County, Pennsylvania. Civil Division. Ward, J. August 1, 2023.

OPINION

I. THE PARTIES.

Defendant Gillece Services, LP is a domestic limited partnership and registered home improvement contractor. Defendant Gillece Plumbing and Heating, Inc. is a general partner and minority owner of Defendant Gillece Services, LP (collectively, the "Corporate Defendants"). Defendant Thomas J. Gillece (hereinafter, "Gillece") is the President and majority owner/shareholder of both the Corporate Defendants. Gillece also manages the day-to-day operations of the Corporate Defendants. Defendants may collectively be referred to as the "Gillece Defendants".

Plaintiff is the Pennsylvania Office of Attorney General, which brought this action against the Defendants pursuant to 73 P.S. § 201-4 in order to enjoin what it argued were prohibited business practices.

II. PROCEDURAL HISTORY AND FACTUAL BACKGROUND.

73 P.S. § 201-4, a subsection of the Pennsylvania Unfair Trade Practices and Consumer Protection Law (CPL)[1] provides that:

Whenever the Attorney General or a District Attorney has reason to believe that any person is using or is about to use any method, act or practice declared by section 3 of this act to be unlawful, and that proceedings would be in the public interest, he may bring an action in the name of the Commonwealth against such person to restrain by temporary or permanent injunction the use of such method, act or practice.

By incorporating 73 P.S. § 201-2(4)(i)-(xxi), 73 P.S. § 201-3 renders several specific "[u]nfair methods of competition and unfair or deceptive acts or practices in the conduct of any trade or commerce" unlawful. 73 P.S. § 201-3(a). The Home Improvement Consumer Protection Act (HICPA)[2] establishes additional consumer safeguards for transactions involving Home Improvement Contracts, which are notably distinct from typical sales/services contracts.[3] The HICPA functions much like an expansion upon the CPL: Violations of the HICPA are treated as violations of the CPL, and no provision of the HICPA precludes any right a consumer may have under the CPL. 73 P.S. § 517-10.

On September 1, 2020, Plaintiff filed a Complaint against the Gillece Defendants seeking to enjoin perceived violations of the above provisions. Plaintiff's Complaint alleged that the following acts by the Defendants constituted violations of either the CPL or HICPA: Misrepresenting the Need for Repairs and/or Replacements (Count I); Using High Pressure Sales and Scare Tactics (Count II); Rejecting Timely Efforts to Cancel Contracts (Count III); Deceptive Advertising (Count IV); Performing Home Improvement Projects and/or Contracts in a Shoddy, Unworkmanlike Manner and/or Failing to Honor Express Warranties (Count V); Making Materially False and/or Misleading Statements and/or Omissions about the Basis for Defendants' Pricing (Count VI); and Failing to Provide Copies of Home Improvement Contracts and Attached Notices of Cancellation at the Time of Sale or Execution (Count VII). In response, the Gillece Defendants filed preliminary objections on September 22, 2020, which were overruled by this Court on December 4, 2020. The Gillece Defendants then filed an Answer to the Complaint and New Matter on December 24, 2020. Discovery formally began shortly thereafter.

On September 27, 2021, Plaintiff filed a Motion for Partial Summary Judgement, seeking the entry of permanent injunctive relief as to Count IV. The Gillece Defendants responded on October 27, 2021, urging this Court to deny summary judgment due the potential relevance of additional depositions and expert testimony. This Court agreed that additional discovery was warranted and denied the Plaintiff's motion on January 11, 2022.

On April 3, 2023, after extensive discovery and the production of several expert opinions, Plaintiff filed a new, vastly expanded Motion for Partial Summary Judgement. This motion sought dismissal of the Gillece Defendant's affirmative defenses and the entry of permanent injunctive relief as to Counts III, IV, VI, and VII. This Court heard arguments as to the Motion on July 11, 2023, and subsequently entered an Order partially granting it on August 1, 2023. The Order dismissed the Gillece Defendants' affirmative defenses and entered permanent injunctive relief as to Counts III, IV, and VI. The permanent injunctive relief granted by this Court provided as follows:

A. [The Gillece Defendants] shall permit customers to rescind their home improvement contracts without penalty within three (3) business days of the date of signing, regardless of the medium used by the customer to provide actual notice of cancellation;

B. [The Gillece Defendants] shall permit customer to rescind within three (3) business days of the date of signing any contract for goods or services having a sale price of twenty-five dollars ($25) or more contracted to be sold at the buyer's residence;

C. [The Gillece Defendants] shall not misrepresent in any manner a customer's right to cancel a home improvement contract;

D. [The Gillece Defendants] shall refund within ten (10) business days all payments made under a contract or sale which was rescinded by the customer within three (3) business days of the date of signing.

E. [The Gillece Defendants] shall not misrepresent to any customer that their deposit is nonrefundable unless that customer has executed a valid emergency work authorization form under the circumstances of a bona fide emergency;

F. [The Gillece Defendants] shall clearly and conspicuously disclose all material terms and restrictions on offers in advertisements; and

G. [The Gillece Defendants] shall not misrepresent that Gillece is prohibited by law from charging consumers on the basis of parts and labor, that Gillece is prohibited by law from providing itemized invoices, or that Gillece is mandated by law to use flat-rate pricing.

August 1, 2023 Order, ¶ 16. The Gillece Defendants filed a notice of appeal shortly after the Order was issued on August 3, 2023. On August 15, 2023, this Court issued an order directing the Gillece Defendants to file a Concise Statement of Errors Complained of on Appeal ("Concise Statement") within 21 days of that order. On August 31, 2023, the Gillece Defendants timely filed their Concise Statement.

III. ERRORS COMPLAINED OF ON APPEAL.

The Gillece Defendants argue that the following constitute either abuses of discretion or reversible errors of law:

i. [D]irecting Gillece to permit customers to rescind their Home Improvement Contracts, regardless of the medium used by the customer to provide actual notice of cancellation, where the express terms of the [CPL] require a recission or cancellation of a Home Improvement Contract to be made by the consumer notifying, in writing, the seller within three (3) full business days following the day on which the contract or sale was made and by returning or holding available for return to the seller, in its original condition, any merchandise received under the contract or sale;

ii. [D]irecting the Gillece Defendants to permit customers to rescind their Home Improvement Contracts, regardless of the medium used by the customer to provide actual notice of cancellation, where the [CPL] requires that to cancel a transaction, the consumer must mail or deliver a signed and dated copy of the cancellation notice or any other written notice, or send a telegram, to the seller;

iii. [D]irecting [the] Gillece Defendants to permit customers to rescind their Home Improvement Contracts, verbally, either in person or over the telephone, when the [CPL] requires the customer provide written notice of the cancellation and states the manner in which written notice must be delivered;

iv. [D]irecting that [the] Gillece Defendants shall permit customers to rescind Home Improvement Contracts verbally, in person or over the telephone;

v. [D]irecting that [the] Gillece Defendants refund within ten (10) business days all payments made under a contract or sale which was rescinded by the customer within three (3) business days of the date of signing, without regard to the statutory requirement that the customer return or hold available for return to the seller, in its original condition, any merchandise received under the contract or sale and by requiring Gillece to refund payments upon verbal cancellation of a Home Improvement Contract, both of which are contrary to law;

vi. [H]olding [the] Gillece Defendants to a standard not contained in the applicable statutes governing consumer recission or cancellation of Home Improvement Contracts; [and]

vii. [D]enying the Gillece Defendants equal protection of the laws.

Concise Statement, ¶ 10 (emphasis in original).

IV. DISCUSSION.

a. This Court did not err by directing the Gillece Defendants to accept non-written notice of Home Improvement Contract cancellation.

The Gillece Defendants' first six alleged errors are functionally a single argument pertaining to standing and statutory interpretation. As mentioned above, the action that gives rise to this appeal is enabled by 73 P.S. § 201-4, which establishes Plaintiff's standing to pursue the temporary/permanent injunction of conduct that violates the CPL. Since the statute only gives Plaintiff standing to enjoin conduct that violates the CPL, it follows that Plaintiff does not have standing to pursue—and therefore cannot be granted—injunctive relief as to conduct the CPL does not prohibit. The Gillece Defendants, presumably relying on the above reasoning, essentially claim that certain portions of this Court's permanent injunctive relief are invalid for lack of standing because they enjoin conduct that is not unlawful under the CPL.

Specifically, the Gillece Defendants argue that the injunctive relief described at A-D is problematic insofar as it requires Gillece to accept non-written notice for Home Improvement Contract cancellation.[4] Id., ¶¶ 5-7, 10. This argument is wholly predicated on an assertion that the CPL only requires Home Improvement Contract cancellation where consumers provide written notice of their intent to cancel. Id., ¶ 10(a)-(f). The Gillece Defendants extrapolate from this assertion that it is not illegal to refuse to cancel Home Improvement Contracts where consumers provide notice in another form. Id. Thus, the Gillece Defendants conclude that Plaintiff did not have the standing to receive the injunctive relief insofar as it requires Home Improvement Contracts be cancelled "regardless of the medium used by the customer to provide actual notice of cancellation." Id.

The Superior Court should not acknowledge this argument because its predicating assertion—i.e., that the CPL requires written notice to cancel Home Improvement Contracts—is patently incorrect. Rather, principals of statutory interpretation support the conclusion that the notice necessary for cancelling Home Improvement Contracts has no formal requirements,[5] precisely as the August 1, 2023 Order provides.

When interpreting statutes, "the objective … is to ascertain and effectuate the intention of the legislature." Bayada Nurses v. Dept. of Labor and Indus., 8 A.3d 866, 880 (Pa. 2010) (citing 1 Pa.C.S. § 1921(a)). "Generally, the best indication of the General Assembly's intent is the plain language of the statute." Allstate Life Ins. Co. v. Commonwealth, 52 A.3d 1077, 1080 (Pa. 2012). "When the words of a statute are clear and free from all ambiguity, they are presumed to be the best indication of legislative intent." Chanceford Aviation v. Chanceford Twp. Bd. of Supervisors, 923 A.2d 1099, 1104 (2007) (citations omitted). Courts look beyond the statutory text to discern legislative intent "only when [the] statutory text is determined to be ambiguous." A.S. v. Pennsylvania State Police, 143 A.3d 896, 903 (Pa. 2016). When it proves necessary to look beyond the statutory text to ascertain legislative intent, courts are guided by several considerations; "[s]uch considerations include, inter alia, the occasion and necessity for the statute, the mischief to be remedied, the consequences of a particular interpretation, and the contemporaneous legislative history." Harmon v. Unemployment Compensation Board of Review, 207 A.3d 292, 304 (Pa. 2019) (citation omitted).

There are two statutory provisions that are relevant to this appeal: 73 P.S. § 201-7 and 73 P.S. § 517-7(b). 73 P.S. § 201-7 is the subsection of the CPL that likely serves as the basis for the Gillece Defendants' assertion. This is because Section 201-7 is the portion of the CPL that concerns consumers' right to rescind sales/services contracts and contains the exact written notice requirement described by the Gillece Defendants: "Where goods or services having a sale price of twenty-five dollars ($25) or more are sold or contracted to be sold to a buyer, … that consumer may avoid the contract or sale by notifying, in writing, the seller within three full business days following the day on which the contract or sale was made[.]" 73 P.S. § 201-7(a) (emphasis added); compare with Concise Statement, ¶ 10(a)-(e).

73 P.S. § 517-7(b), on the other hand, is a similar provision found within the HICPA that specifically pertains to the consumer's right to rescind Home Improvement Contracts—the subject matter of this dispute. This provision controls where Home Improvement Contracts are concerned because, as mentioned above, the HICPA is essentially an expansion upon the CPL. See supra. at p. 2-3; see also Freeman v. Akiladelphia Creative Contracting, LLC, 2023 WL 5944622 at 2 (Pa. Super. Ct. 2023) (holding the HICPA governs if the dispute concerns "an agreement 'for the performance of a home improvement' where Appellants are 'contractor[s]' and Appellee is an 'owner' of a private residence"). Accordingly, the Gillece Defendants' assertion is substantively that Section 517-7(b) contains the same written notice requirement as Section 201-7.

Like Section 201-7, Section 517-7(b) permits consumers to rescind Home Improvement Contracts within three business days of the date of signing. Unlike Section 201-7, however, Section 517-7(b) makes no mention of any form requirements for the provision of notice:

An individual signing a home improvement contract, except as provided in the emergency provisions of [Section 201-7], shall be permitted to rescind the contract without penalty regardless of where the contract was signed, within three business days of the date of signing.

73 P.S. § 517-7(b). Generally, in the absence of contractual or statutory provisions to the contrary, any "positive and unequivocal act … indicating unmistakably" the consumer's intention to no longer be bound is sufficient to effectuate notice of contract cancellation—"no particular form of notice is necessary." Pomenrantz v. Mutual Fire Ins. Co. of Chester Cnty., 124 A. 139, 140 (Pa. 1924); see also Federal Kemper Ins. Co. v. Com., Ins. Dept., 500 A.2d 796 (Pa. 1985) (holding consumer had given notice of insurance contract cancellation because their "knowing nonpayment" of insurance premiums constituted an "overt act" indicating their intent to cancel). Accordingly, Section 517-7(b) facially requires contractors cancel Home Improvement Contracts "regardless of the medium used by the customer to provide actual notice of cancellation." August 1, 2023 Order, ¶ 16(A).

The Gillece Defendants' assertion that Section 517-7(b) provides for the same written notice requirements as Section 201-7 could only be true if Section 517-7(b) impliedly incorporated the Section 201-7 requirements. There is no indication, whether in the statutory text or otherwise, that the General Assembly intended the Section 201-7 written notice requirements be applicable to Section 517-7(b). To the contrary, every indication suggests the General Assembly intended those requirements would not apply to Section 517-7(b).

First, it is readily apparent from provisions like 73 P.S. §§ 517-9(10)(iii)(b) and 517-10, which both contain express references to CPL provisions, that the legislators could cite CPL requirements with specificity where they considered them applicable to the HICPA. That Section 517-7(b) makes no reference to the written notice requirements contained at Section 201-7(a) therefore suggests those requirements are inapplicable. See Woodford v. Com., Ins. Dept., 243 A.3d 60, 74-75 (Pa. 2020) ("although one is admonished to listen attentively to what a statute says; one must also listen attentively to what it does not say"). Moreover, Section 517-7(b)'s reference to Section 201-7's emergency provisions,[6] which is phrased as the sole exception to Section 517-7(b)'s rule of general applicability, suggests that other limitations or exceptions to the rule were not contemplated by the legislators.

Second, the absence of written notice requirements for consumer contract recission and cancellation is in line with the HICPA's policy of expanding consumer protections. See Mid-Atl. Sys. of WPA, Inc. v. Tax Office of Monroeville, 204 A.3d 579, 588 (Pa. Commw. Ct. 2019) (The "HICPA was enacted … with the purpose of protecting consumers from a variety of fraudulent and deceptive practices by home improvement contractors"). Allowing Home Improvement Contracts to be cancelled through overt act, as opposed to requiring written notice, increases consumer protections by reducing the formalities imposed upon consumers.

Third, the absence of written notice requirements for consumer contract recission and cancellation is in line with similar expansions upon CPL protections for specific subtypes of contracts. In insurance contracts, for instance, the General Assembly has repeatedly allowed consumers to give notice of contract cancellation through overt act. See 40 P.S. § 991.2002(c)(2) (the insured may effectuate automobile insurance policy cancellation if he "demonstrate[s] by some overt action to the insurer or its agent that he wishes the policy to be cancelled or that he does not wish the policy to be renewed"); see also 40 P.S. § 1171.5(c)(2) (overt acts are similarly sufficient to effectuate the cancellation of residential and personal property insurance policies). Like with Home Improvement Contracts, the statutory provisions described above were put in place by the legislators to protect consumers from unfair and deceptive practices employed by certain commercial actors (see Id. at §§ 1171.2, 1171.5(a)); an arm of the state is empowered to enjoin those unfair and deceptive practices (see Id. at § 1171.10); and the contractors involved in such transactions must register with a state administrative authority (see Id. at § 991.1404). These similarities all suggest the HICPA employs an overt act notice standard for the consumer recission of Home Improvement Contracts.

In the absence of an implicit incorporation of Section 201-7's writing requirements, the duties imposed upon the Gillece Defendants by Section 517-7(b) are quite clear. Section 517-7(b) provides that consumers "shall be permitted" to rescind Home Improvement Contracts within three days of signing—aside from the emergency provisions, there are no caveats or limitations placed upon that right. No aspect of the provision suggests that contractors may modify or limit this right on their own initiative, such as by requiring written notice through contractual provisions. Rather, a plain reading of Section 517-7(b) indicates that

contractors like the Gillece Defendants must cancel Home Improvement Contracts when a customer gives notice of cancellation within three days of signing, "regardless of the medium used by the customer to provide actual notice of cancellation." August 1, 2023 Order, ¶ 16(A). This Court did not err in ordering to that effect.

b. This Court did not err by directing the Gillece Defendants to issue refunds on sales/services contracts without explicitly making mention of Section 201-7's writing and return requirements.

The Gillece Defendants' fifth alleged error merits a brief separate discussion. This is because, while the injunctive relief described at D and the alleged error could pertain to Home Improvement Contracts covered by the HICPA, in which case the argument above sufficiently addresses the allegation, they could also apply to sales/services contracts covered by the CPL. Insofar as contracts governed by the CPL are concerned, the Gillece Defendants are correct that the law only requires them to issue refunds where they receive written notice of cancellation and the customer "return[s] or hold[s] available for return …, in its original condition, any merchandise received under the contract or sale." Concise Statement, ¶ 16(e); see also 73 P.S. § 201-7(a). This Court's Order does not run afoul of those requirements, however, because it only requires refunds once a contract has been properly rescinded.

It is apparent from the conditional language in Section 201-7 that recission is conditioned upon the customer providing written notice of cancellation and returning or holding out for return any merchandise received:

[A] consumer may avoid the contract or sale by notifying, in writing, the seller within three full business days following the day on which the contract or sale was made and by returning or holding available for return to the seller, in its original condition, any merchandise received under the contract or sale.

73 P.S. § 201-7(a) (emphasis added). Therefore, by requiring a contract be rescinded for the refund obligation to take effect, the August 1, 2023 Order tacitly includes the requirements that the Gillece Defendants complain are lacking. There is no error in this Court ordering as it did.

c. This Court did not deny the Gillece Defendant equal protection of the laws.

It is unclear precisely what the Gillece Defendants' seventh alleged error refers to. That said, this Court does recall that the Gillece Defendants' presented a selective prosecution defense at argument, which this Court ultimately found to be unpersuasive. "[S]elective prosecution is a complete defense to a charge of criminal conduct, in which the accused bears the burden of pleading the existence of the elements of the events." Commonwealth v. Kane, 188 A.3d 1217, 1230 (Pa. Super. Ct. 2018). A prima facie showing of selective prosecution entails some discussion of equal protection, so it is possible that the seventh error refers to this Court's decision on that subject. Presuming this is the case, this Court did not err in denying the selective prosecution defense because the Gillece Defendants did not meet their burden, after extensive discovery, of showing vindictive prosecution.

In order to establish a prima facie case of selective prosecution, a party must establish two things:

[F]irst, that others similarly situated were not prosecuted for similar conduct, and, second, that the Commonwealth's discriminatory prosecutorial selection was based on impermissible grounds such as race, religion, the exercise of some constitutional right, or any other such arbitrary classification. The burden is on the defense to establish the claim; it is error to shift the burden to the prosecution to establish or refute the claim. Because of the doctrine of separation of power, the courts will not lightly interfere with an executive's decision of whom to prosecute.

Commonwealth v. Murphy, 795 A.2d 997, 1000 (Pa. Super. 2002) (internal citations omitted). The Gillece Defendants baldly asserted at argument that the Plaintiff had failed to prosecute other contractors who were committing similar violations of the CPL and HICPA. The Gillece Defendants offered no evidence, however, tending to show these violations were actually occurring or that the Plaintiff was aware of them. Additionally, even presuming the Gillece Defendants' allegations are accurate, no evidence was presented to support the assertion that prosecution was based on impermissible grounds. Rather, Plaintiff supplied an eminently reasonable and permissible basis for why it may investigate and prosecute one entity over another: i.e., complaints lodged by consumers. This Court's denial of the selective prosecution argument was justified and free of any equal protection violations.

V. CONCLUSION.

In light of the aforementioned reasons, this Court's August 1, 2023 Order partially granting Plaintiff's Motion for Partial Summary Judgement should be affirmed.

BY THE COURT:
/s/The Hon. Christine A. Ward

[1] 73 P.S. § 201-1, et seq.

[2] 73 P.S. § 517-1, et seq.

[3] Home Improvement Contracts are distinct from the sales/services contracts covered by the CPL in several ways. First, Home Improvement Contracts concern a vastly narrower suite of transactions, as they are specifically "agreement[s] between a contractor, subcontractor or salesperson and an owner for the performance of a home improvement which includes all agreements for labor, services and materials to be furnished and performed under the contract." 73 P.S. § 517.2 (emphasis added). A "home improvement" is defined as, inter alia, any "[r]epair, replacement, remodeling, demolition, removal, renovation, installation, alteration, conversion, modernization, improvement, rehabilitation or sandblasting" done in connection with a private residence, and "for which the total cash price of all work agreed upon between the contractor and owner is more than $500." Id. In comparison, the CPL is applicable to virtually any contract for any good or service worth twenty-five dollars ($25) or more. Id. at 201-7(a). Second, a Home Improvement Contract must be written and signed to be valid and enforceable. See Id. at 517-7(a). The CPL makes no reference to any such writing requirements being applicable to sales/services contracts. Third, there are several protections extended to consumers involved in Home Improvement Contracts that simply do not exist for consumers in sales/services contracts; these include, inter alia, the presence of certain terms rendering Home Improvement Contracts automatically voidable by the consumer (see Id. at 517-7(e)), requiring contractors to maintain certain licenses and register with administrative authorities (see Id. at 517-3), and a specialized complaint mechanism that allows the consumer to draw upon a contractor's letter of credit (see Id. at 517-9(10)(iii)).

[4] The Gillece Defendants notably do not contest the injunctive relief described at E-G, which relate to Counts IV and VI; only the relief granted as to Count III is contested. Even then, the Gillece Defendants do not purport it was improper for this Court to grant

injunctive relief as to Count III; rather, their claims are narrowly focused on what could essentially be described as the "scope" of the relief granted. Therefore, pursuant to this Court's August 15, 2023 Order and Pa.R.A.P. 1925(b)(4)(vii), arguments related to these issues are waived.

[5] "Formal," as that term is used here and throughout the discussion, is an adjective referring to "established procedural rules, customs, and practices." Black's Law Dictionary (11th ed. 2019), formal. "Formal" or "Form" requirements then are those procedural or customary necessities for an act or submission to be deemed effective and enforceable, such as the state in which notice must be given (i.e., written or otherwise) or the degree to which a contract or contractual provision must be written.

[6] 73 P.S. § 201-7(j.1)-(j.2).

FAIRFIELD CONSTRUCTION, LLC vs. BLUEGRASS LAWN & TREE CARE, LLC, BRIAN STANNY and LAWRENCE SHOCK, JR.

Non-Competition Agreement

Court examines Non-Competition Agreements.

Case No.: GD-23-004599. In the Court of Common Pleas of Allegheny County, Pennsylvania. Civil Division. Ward, J.

MEMORANDUM OPINION

I. The Parties

Fairfield Construction, LLC ("Fairfield" or "Plaintiff"), is a Pennsylvania limited liability company with its principal place of business in Canonsburg, Washington County, Pennsylvania.[1]

Bluegrass Lawn & Tree Care, LLC ("Bluegrass"), is a Pennsylvania limited liability company with its principal place of business in Sewickley Township, Westmoreland County, Pennsylvania. Brian Stanny ("Stanny") and Lawrence Shock, Jr. ("Shock") (collectively, "Individual Defendants"), are Bluegrass's founders and were formerly employed by Fairfield. Stanny resides in Imperial, Allegheny County, Pennsylvania. Shock resides in Cecil Township, Washington County, Pennsylvania.

II. Introduction

Stanny began working as a technician with Fairfield in January 2012. There is no offer letter in the record from Fairfield to Stanny. Plaintiff has failed to produce an Employee Handbook that was in effect when Stanny's employment commenced. On March 1, 2012, Stanny received medical and dental benefits from Fairfield. See Pl. Ex. P-7, at FF 14 (dental insurance), FF 15 (health insurance). On April 12, 2012—some 42 days after Stanny received medical and dental benefits—Fairfield presented Stanny with, and Stanny signed, a Non-Competition Agreement (the "Stanny Non-Compete").

Shock started working as a technician at Fairfield in December 2013. An offer letter from Fairfield to Shock made no reference to a future Non-Competition Agreement. See Pl. Ex. P-6. The offer letter identified Shock as a "non-exempt full time hourly" employee. Id., at FF 260. The employee handbook in effect at the time, which Shock received only after beginning his employment at Fairfield, stated that managers would sign such an agreement "as a condition of their continued employment." Pl. Ex. 2. On or about March 13, 2014, while Shock still held the title of "technician,"[2] Fairfield presented to Shock, and Shock signed, a Non-Competition Agreement (the "Shock Non-Compete").

On or around January 3, 2023, Shock and Stanny tendered their resignations from Fairfield. On February 13, 2023, Bluegrass was formally registered as a Pennsylvania limited liability company with the Pennsylvania Department of State. Both Fairfield and Bluegrass perform various landscaping and arboreal services. Bluegrass performs services for 209 former Fairfield customers.

Fairfield seeks a preliminary injunction, enjoining the Defendants from, inter alia, soliciting business from or performing services for any current or former Fairfield customer, hiring any current Fairfield employee, and from performing services that Fairfield performs within 30 miles of Fairfield's principal place of business. Fairfield also seeks a mandatory preliminary injunction requiring Shock and Stanny to comply with the Non-Competition Agreements they signed as employees of Fairfield.

III. Standard of Review

For a preliminary injunction to issue, the petitioner must demonstrate six factors. First, there must be immediate and irreparable harm, which monetary damages cannot relieve, and for which the injunction is necessary to prevent. Shoemaker v. UPMC Pinnacle Hosps., 283 A.3d 885, 893 (Pa. Super. Ct. 2022) (quoting Summit Towne Centre, Inc. v. Shoe Snow of Rocky Mount, Inc., 828 A.2d 995, 1001 (Pa. 2003)). Second, greater injury must result to the petitioner from refusing to issue an injunction than to the defendants from granting it. Id. Third, the petitioner must show the injunction will restore the status quo as it existed prior to the alleged wrong conduct. Id. Fourth, the petitioner must demonstrate "that it is likely to prevail on the merits." Id. Fifth, the petitioner must show that the injunction is reasonably tailored to restrain the alleged wrong conduct. Id. Finally, the petitioner must show the injunction would not adversely affect public interest. Id. "The burden is on the party who requested injunctive relief." Warehime v. Warehime, 860 A.2d 41, 46–47 (Pa. 2004).

Each prerequisite is "essential"; a court has "reasonable grounds" to deny a preliminary injunction if any one prerequisite is not satisfied. Summit Towne Centre, 828 A.2d at 1001 (citing Maritrans GP v. Pepper, Hamilton & Scheetz, 602 A.2d 1277, 1282 (Pa. 1992). "For a preliminary injunction to issue, every one of the [] prerequisites must be established; if the petitioner fails to establish any one of them, there is no need to address the others." Id. (quoting Cnty. of Allegheny v. Commonwealth, 544 A.2d 1305, 1307 (Pa. 1988)).

IV. Discussion

Fairfield alleges the Individual Defendants breached their Non-Competes by soliciting Fairfield clients and by performing landscaping and arboreal services both for former Fairfield clients and within 30 miles of Fairfield's principal place of business. Fairfield also claims numerous tort counts, alleging Defendants utilized confidential and proprietary Fairfield information and trade secrets.

But Fairfield's petition must be denied. It has failed to show its injury cannot be adequately compensated by monetary damages. Nor has it shown its injury would be greater with the refusal of an injunction than the injury to Defendants with the issuance of an injunction. And its own evidence shows it is unlikely to prevail on the merits.

Because Fairfield has not shown its harm is immediate and irreparable or that monetary damages would be inadequate, that greater injury would result from refusal to issue an injunction, or that it is likely to prevail on the merits on any count, its petition for a preliminary injunction must be denied.

A. An injunction may not issue because the harm to Plaintiffs can be adequately compensated with monetary damages.

To sustain a preliminary injunction, "a plaintiff must present 'concrete evidence' demonstrating 'actual proof of irreparable harm.'" Greenmoor, Inc. v. Burchick Const. Co., 908 A.2d 310, 314 (Pa. Super. Ct. 2006) (quoting Kessler v. Broder, 851 A.2d 944, 951 (Pa. Super. Ct. 2004)). "[T]he claimed harm must be irreversible before it will be deemed irreparable." Id. (citing Sovereign Bank v. Harper, 674 A.2d 1085, 1093 (Pa. Super. Ct. 1996)). "An injury is deemed irreparable if it cannot be adequately compensated by an award of damages." Cosner v. United Penn Bank, 517 A.2d 1337, 1341 (Pa. Super. Ct. 1986) (citing Luckenbach S.S. Co. v. Norton, 21 F. Supp. 707, 709 (E.D. Pa. 1937)). It is the Plaintiff's burden to prove irreparable harm. Warhime, 860 A.2d at 46–47.

Plaintiff avers it has suffered irreparable harm due to Bluegrass "directly compet[ing] with Fairfield," due to Individual Defendants' "continued solicitation and poaching" of Fairfield's former clients, and due to "misappropriation and use of Fairfield's confidential and proprietary information and trade secrets." Pl. Mtn. for Prelim. Inj. ¶ 8. Despite this claim, Plaintiff has failed to evince concrete evidence demonstrating actual proof of irreparable harm, particularly as to the solicitation and misappropriation claims.

First, Plaintiff's evidence of Stanny's and Shock's alleged solicitation and poaching of former Fairfield clients falls flat. Fairfield claims 209 of Defendants' clients are former Fairfield customers. See, e.g., Pl. Post-Hrg. Br., at 1. This, of itself, absent an enforceable non-competition agreement, is not unlawful. Fairfield thus avers that Defendants used or misappropriated Fairfield's confidential and proprietary information and trade secrets to compete, and thus that the damage to Fairfield is irreparable. Its key evidence for this claim is that Shock had emailed to himself—in March 2022—Fairfield's customer chart, and that Shock had general information on Fairfield's planned 2023 price increases. With respect to the customer list, Shock credibly testified that he does not recall emailing it to himself, but that it is possible it was sent to test whether Fairfield's email system was not sending attachments. Hrg. Trans., 5/17/23, 219:14–220:1. Assuming, arguendo, that this testimony is not credible, the emailed list contains just 30 names also found on Bluegrass's customer list. Compare Pl. Ex. P-16, at FF 84–88, with Pl. Ex. P-12. Among these names are Shock's grandmother-in-law, various family friends of Shock's, Shock's uncle and uncle's brother, and Shock's cousin. See Def. Ex. X, ¶¶ 11, 68, 6, 40, 203, 206, 106, 69. Others independently reached out to Bluegrass or the Individual Defendants to request service stating they were displeased with Fairfield, see id., ¶ 148, or by utilizing media which create a discoverable trail. See, e.g., id., ¶¶ 27, 171, 197.

Going one step further, Fairfield's allegation that Defendants used Fairfield's customer list to solicit current and former Fairfield clients is belied by its own evidence. Fairfield points to text messages and emails between Defendants and various former clients. See Pl. Exs. P-22–P-27. None show solicitation or poaching. In at least two text messages involving Shock and a former Fairfield client, it is evident that the former Fairfield client expressed their desire to go with Bluegrass to a friend or neighbor and that interlocutor relayed the information to Shock, who then, and only then, reached out to the client. Pl. Exs. P-22–23. In three other text message exhibits, Fairfield shows merely that the customers and Defendants were in touch; Plaintiff fails to demonstrate that Defendants solicited business from or poached these customers. Pl. Exs. P-24–26. And in a final exhibit, Plaintiff shows the opposite of what it wants to prove. A customer, satisfied with the services provided by Individual Defendants, independently reached out to Bluegrass to solicit its business. Pl. Ex. P-27. Indeed, Plaintiff's own evidence gives credibility to Defendants' accounting of how it gained the business of these customers: The solicitation of Bluegrass by a former Fairfield customer. See Def. Ex. X. None of these evince proof of solicitation and poaching; instead, all Plaintiff's evidence demonstrates is that its former customers were satisfied with Individual Defendants moreso than with Fairfield.

As to the information on Fairfield's planned price increases, Plaintiff's evidence fails to show irreparable harm. The evidence submitted by Plaintiff shows only that the Individual Defendants were aware Fairfield planned to increase prices by at least 7%, and that Shock was aware of materials pricing for 2023. See Pl. Ex. P-15. Shock asked a former Fairfield customer what Fairfield charged that customer in 2022. See. In another instance, Shock's uncle—himself a former Fairfield customer—forwarded to Shock a 2023 Fairfield invoice. See. This is not evidence, as Plaintiff avers, that Shock and Stanny "knew enough information" about Fairfield's pricing due to their access to confidential, proprietary information, "to undercut Fairfield's 2023 pricing." Pl Post-Hrg. Br., at 7. It is instead evidence that Individual Defendants committed the most basic business practice: Setting their prices at a price that consumers were willing to pay.[3]

Finally, evidence put forth by Fairfield contradicts its argument that its injuries are irreparable. Eli Brenlove, Fairfield's founder, testified that the way to remedy the loss of Fairfield customers is either monetary damages "or obtain[ing] more customers," and that Fairfield seeks monetary damages in this case. See Hrg. Trans., 5/16/23, at 47:3–13. The only evidence of the loss of consumer goodwill is the testimony of Fairfield executives, and even then it does not show Defendants caused this loss of goodwill. Fairfield's President, Matthew Accamando, testified that any loss of customer goodwill or damage to Fairfield's reputation is the result of its own actions, not the Defendants':

Q. Has Mr. Stanny's and Mr. Shock's conduct caused any harm that can't be compensated by damages? For example, can you get those customer relationships back? Has there been any loss of good will?

A. I would like to — I think it is going to be a challenge. I think that our name is starting to get drug through the mud because of this so I think it is going to be really hard to get any of those customers back. I would like to try but, yeah, I think it definitely hurt our reputation. It looks like David versus Goliath.

Id., 5/17/23, at 138:1–13 (emphasis added). Mr. Accamando later testified again that Fairfield's reputational damage is due to the instant civil action, not due to the actions of the Defendants:

Q. Now, you spoke about the harm that Mr. Stanny and Mr. Shock's conduct has caused Fairfield. Can that harm be fully fixed?

A. It is going to be tough. I want to say at some point maybe but.

Q. Can you explain in a little more detail?

A. It is this right here, starting to make us look like the bad guys, the big bully, when, you know, some of us know that there is nothing wrong with what we're doing now. Now the word is getting spread Larry [Shock] and Brian [Stanny] are trying to

make a living for themselves and big bad Fairfield is coming to get them. It makes us look bad. So I think our reputation is really taking a hit.

Id., at 166:8–23 (emphasis added). While loss of customer goodwill may establish irreparable harm, courts are not in the business of rehabilitating the public image of a company which has grown negative due to, as its own executives have testified, its own actions.

Fairfield's evidence fails to show irreparable harm. It instead shows that Shock and Stanny perform landscaping and arboreal services for former Fairfield clients, including Shock's family members; that Shock and Stanny performed the most basic diligence to set their prices at a fair and agreeable rate for customers; and that money damages can adequately make Fairfield whole for any injury it has sustained due to Defendants' conduct for which it may be entitled to relief. Fairfield, then, fails to meet the irreparable harm prong, and an injunction may not issue.

B. An injunction may not issue because greater injury would occur to Defendants with the issuance of an injunction than to Plaintiff without an injunction issuing.

"It is not the policy of equity to impose undue hardship." McNanamy v. Firestone Tire & Rubber Co., 173 A. 491, 492 (Pa. Super. Ct. 1934). As such, "[a] party seeking a preliminary injunction must show greater injury would result by refusing the injunction than by granting it." Commonwealth v. Snyder, 977 A.2d 28, 42 (Pa. Commw. Ct. 2009) (citing DiLucente Corp. v. Pa. Roofing Co., 655 A.2d 1035 (Pa. Super. Ct. 1995)). "Greater injury" may be established by a party's "livelihood[] [being] at stake." Constantakis v. Bryan Advisory Svcs., LLC, 275 A.3d 998, 1030 (Pa. Super. Ct. 2022). Plaintiff's burden is high, and the greater injury to Fairfield must be "clear." See Pennsylvania R.R. v. Driscoll, 198 A. 130, 133 (Pa. 1938) ("There should be no balancing of convenience, but it should be clear that greater injury would be done by refusing it than in granting it.").

Here, the injury to Defendants if an injunction issued would be significantly greater than the injury to Plaintiffs if an injunction were refused. Shock testified credibly that an injunction would be "devastating" to his family; that Bluegrass is his family's "only source of income"; and that he and Stanny both would suffer irreparable harm if the injunction issued. See Hrg. Trans., 5/17/23, at 227:5–12. On the other hand, Brenlove testified that "Fairfield is doing well" financially and that Fairfield would not go out of business if an injunction were not granted. Id., 5/16/23, at 53:1–8.

Fairfield did not introduce any evidence as to its annual revenue, nor as to the annual revenue of the division in which Shock and Stanny were employed. Brenlove testified, however, that Fairfield lost "about 25 percent" of its customers in the lawn care and plant health care division. Id., at 46:1–3. Kenneth Sible, Fairfield's Chief Financial Officer, testified that Fairfield lost "40 percent or so" of its revenue in the division between March and April of 2022 and March and April of 2023, a "big piece of [which being] the loss of customer base." Id., at 99:9–13, 100:6–7. But Sible also testified that Fairfield sent its updated proposals to customers in February 2023, which included price increases "in the 8 to 12 percent range." Id., at 117:1–3.[4] At least two large, institutional customers testified that they left Fairfield because the company increased pricing, added surcharges, and failed to justify the new costs to customers. See id., at 123:21–124:4 (testimony of Michael Gross), 129:9–19 (testimony of Gary Whoric).

The only evidence of Fairfield's annual revenue comes from Shock's testimony. Shock, who served as Fairfield's Lawn Care division manager before his resignation, testified that Fairfield earned roughly $1.4 million to $1.5 million in revenue from its lawn care and tree and plant health care services. Id., 5/17/23, at 224:14–20. This, Shock testified, represented roughly 8% of Fairfield's annual revenue. Id., at 224:21–22. It cannot be said that a 25% decrease in the number of customers in a division that represents just 8% of the revenue of a company that recently sold for more than $10 million, see Hrg. Trans., 5/16/23, at 52:11–13, and as much as $25 million, see id., at 151:17–19,[5] is clearly a greater injury than the loss of two individuals' sole sources of income.

Fairfield failed to establish that the injury to Fairfield from refusing an injunction would outweigh the harm to Defendants from an injunction issuing. Indeed, Plaintiff has failed to establish even that injuries to Fairfield are due to the conduct of Defendants. On the other hand, Defendants sincerely testified that an injunction would put their livelihoods at stake. Because the injury to Defendants from granting an injunction would outweigh the harm to Plaintiffs from refusing an injunction, an injunction may not issue.

C. Plaintiff is unlikely to prevail on the merits, and thus an injunction may not issue.

"In a preliminary injunction action, the moving party, in order to prove that it is likely to prevail on the merits, must establish a prima facie right to relief." Porter v. Chevron Appalachia, LLC, 204 A.3d 411, 419 (Pa. Super. Ct. 2019) (citing Synthes USA Sales, LLC v. Harrison, 83 A.3d 242, 249 (Pa. Super. Ct. 2013)). The Plaintiff's right to relief must be "clear." Summit Towne Centre, 828 A.2d at 1001.The Defendants' wrong must be "manifest." Id.

Fairfield's right to relief is not clear. Defendants' alleged wrong is not manifest. And a preliminary injunction will not issue.

i. The Non-Compete Agreements are unenforceable and cannot serve as the basis for an injunction.

"Restrictive covenants not to compete have always been disfavored in Pennsylvania because they 'have been historically viewed as a trade restraint that prevent[ ] a former employee from earning a living.'" Socko v. Mid-Atlantic Systems of CPA, Inc., 99 A.3d 928, 931 (Pa. Super. Ct. 2014) (hereinafter "Socko I") (quoting Hess v. Gebhard & Co., 808 A.2d 912, 917 (Pa. 2002)). When such a covenant "adhere[s] to certain requirements," however, it may be enforceable. Socko v. Mid-Atlantic Systems of CPA, Inc., 126 A.3d 1266, 1274 (Pa. 2015) (hereinafter "Socko II").

Consistent with this legal background, currently in Pennsylvania, restrictive covenants are enforceable only if they are: (1) ancillary to an employment relationship between an employee and an employer; (2) supported by adequate consideration; (3) the restrictions are reasonably limited in duration and geographic extent; and (4) the restrictions are designed to protect the legitimate interests of the employer.

Id. (citations omitted).

Here, Fairfield has failed to demonstrate that the Non-Compete Agreements were supported by adequate consideration. As such, Fairfield has failed to show that the Non-Compete Agreements are enforceable, and thus the Agreements cannot serve as the basis for an injunction.

"[A]n employee must receive actual and valuable consideration for signing an employment agreement containing such a restrictive covenant." Id., at 1270. "Language in an employment contract that the parties intend to be legally bound does not constitute valuable consideration in this context." Socko I, 99 A.3d at 935. The consideration must "be consummated with the exchange of consideration." Socko II, 125 A.3d at 1274–75 (citing Capital Bakers, Inc. v. Townsend, 231 A.2d 292, 293–94 (Pa. 1967)). Beginning employment may serve as adequate consideration. Id. (citing Barb-Lee Mobile Frame Co. v. Hoot, 206 A.2d 59, 61 (Pa. 1965)). But where employment has already commenced, "a restrictive covenant . . . must be supported by new consideration."

Pulse Technologies, Inc. v. Notaro, 67 A.3d 778, 782 (Pa. 2013) (quoting George W. Kistler, Inc. v. O'Brien, 347 A.2d 311, 316 (Pa. 1975)). This may be, for example, promotion to a new position within the company. WMI Group, Inc. v. Fox, 109 A.3d 740, 749 (Pa. Super. Ct. 2015) (citing Records Ctr., Inc. v. Comprehensive Mgmt., Inc., 525 A.2d 433, 435–36 (Pa. Super. Ct. 1987)).

a. The commencement of employment at Fairfield was not consideration for either Defendant for signing the Non-Competes.

First, the Non-Competes were not signed in consideration for beginning employment. Fairfield argues that, because both Defendants were made aware at the beginning of their employment that they would be asked to sign a Non-Compete Agreement, the consideration in exchange for which the Agreements were signed was the beginning of their employment. This argument is supported by case law. See, e.g., Rullex Co., LLC v. Tel-Stream, Inc., 232 A.3d 620, 627 (Pa. 2020). But it is unsupported by fact. "[C]ontinued Tweedledee, 'if it was so, it might be; and if it were so, it would be; but as it isn't, it ain't.'" Lewis Carroll, Through the Looking-Glass, and What Alice Found There 65 (Peter Newell, illus., Harper & Bros. 1902) (1871).

Fairfield alleges that its Handbook at the time of Defendants' hirings stated that all managers would be required to sign a non-competition agreement. This, it argues, made both aware of the future Non-Competes and thus the consideration was the beginning of their employment. See Pl. Ex. P-2, at FF 162 ("October 2012 Handbook"). The October 2012 Handbook was revised on October 1, 2012. Id., at FF 122. This was nearly 10 months after Stanny began his employment at Fairfield. There does not exist in the record a version of the Handbook that existed when Stanny's employment began. Brenlove testified that the prior Handbook did not differ in terms of the noncompete notification. See Hrg. Trans., 5/16/23, at 20:12–21:2. On cross-examination, Brenlove stated he was "not sure" if the October 2022 Handbook differed significantly from the prior Handbook. See id., at 78:24–79:1. Yet the October 2022 Handbook contained 22 additional pages prior to the signature page, and Fairfield sent a letter to all employees notifying them of the "many changes and many new additions" to the Handbook. Compare Pl. Ex. P-2, at FF 163 (signature page of the October 2012 Handbook, on page 37), with Pl. Ex. P-1 (signature page containing Stanny's signature on page 15 of the prior Handbook); see also Pl. Ex. P-3 (letter to employees about the October 2012 Handbook). In summary, Plaintiff's position is that Brenlove could testify that the non-compete provisions in the two Handbooks were identical. But Brenlove was "not sure" if there were substantive changes between the two Handbooks. In reality, the October 2012 Handbook more than doubled the length of the prior Handbook, and Brenlove's own company sent a letter to employees notifying them of "many changes and many new additions." Plaintiff's position, and Brenlove's testimony about the prior Handbook, is incredible. Based on the evidence presented at the hearing, Fairfield has failed to demonstrate that Stanny's commencement of employment at Fairfield was consideration for his signing the Non-Compete.

Moreover, there is no evidence that either Defendant was aware at the beginning of their employment that they would be asked to sign the Non-Compete. The Handbook presented into evidence, again, is not the Handbook in effect when Stanny began working at Fairfield, and Fairfield's only evidence that a similar Non-Compete provision was in the Handbook that Stanny received is the noncredible testimony of its own founder. Assuming, however, that the provision was the same, it applies only to managers. See Pl. Ex. P-2, at FF 162 ("All managers of Fairfield Landscaping will be required to sign a non-compete agreement as a condition of their continued employment with Fairfield Landscaping.") (emphasis added). Stanny credibly testified that he was not hired as a manager. See Hrg. Trans., 5/17/23, at 307:15–20, 308:5–12. Indeed, an employment verification form filled out by Fairfield's business manager in March 2013—a year after Stanny began working at Fairfield—identifies Stanny as a "technician." Def. Ex. BB. The earliest evidence that exists of Fairfield internally identifying Stanny as a manager is in Appendix I of the October 2012 Handbook, which was created six months after his first day at Fairfield. Pl. Ex. P-2, at FF 182. But Mr. Accamando testified that Stanny was "kind of a manager of one" but "mainly a phenomenal technician." Hrg. Trans., 5/17/23, at 138:8, 10.[6] Further, Fairfield's website, dating as late as February 2014, identified Stanny as "Technician Plant Healthcare," Def. Ex. E, at *6, while identifying certain other employees as "Manager" of specific divisions. See id., at *3 (identifying Doug Endy as "Service and Safety Manager"), *3–4 (Mr. Accamando as "Sr. Operations Manager), *4 (Roy Charlton as "Manager Landscaping"), *5 (Chris Hudson as "Manager Tree Services"), *6 (Jeremy Freehauf as "Manager Lawn Maintenance Services"). While Fairfield may have internally identified Stanny as a "manager" in its October 2012 Handbook, it also internally knew him as a "phenomenal technician," Stanny apparently "managed" no employees, and externally identified him as a "technician." For Stanny to know he was subject to the Non-Compete provision, he would have to know he was a manager. Not even Fairfield, it appears, knew that.

Similarly, Shock was hired as a "Lawn Care Technician." Pl. Ex. P-6, at FF 260 ("I am pleased to offer you a position as a Lawn Care Technician."); see also Hrg. Trans., 5/17/23, at 186:24–187:3. Fairfield's website in 2014 identified Shock as a "Lawncare Technician." Def. Ex. E, at *7. In fact, the 2014 website shows another person was the "manager" of "lawn maintenance services." Id., at *6. The earliest-dating documentary evidence identifying Shock as a manager is another clipping of Fairfield's website, this time from 2022 with a copyright notice of 2020, where he is identified as "Lawn Care Services Manager." Def. Ex. E, at *13, *8. As was the case with Stanny, for Shock to be aware he would be subject to the Non-Compete provision, he would need to know he was a manager. Fairfield has failed to show that Shock was, at the time he was hired or any time prior to 2020, a manager. Thus, the Non-Compete provision appearing in the Handbook cannot serve as a basis to hold that the commencement of employment at Fairfield of either Defendant was consideration for signing the Non-Competes.

b. Neither Defendant received actual and valuable consideration for signing the Non-Competes after beginning employment at Fairfield.

When an employee has already begun working at an employer, and the employer asks that the employee sign a non-compete agreement, the "restrictive covenant . . . must be supported by new consideration." Pulse Technologies, 67 A.3d at 782. "'[C]ontinuation of the employment relationship' is not sufficient consideration to support a restrictive covenant." Ozburn-Hessey Logistics, LLC v. 721 Logistica, LLC, 40 F. Supp. 3d 437, 455 (E.D. Pa. 2014) (citing Kistler, 347 A.2d at 316) (applying state law)). Fairfield argues two areas in which the Court may find consideration: the change in Defendants' employment status from provisional to full-time, and the granting of certain health benefits. But it has failed to show a prima facie case on either ground, and the Non-Compete Agreements cannot serve as a basis for a preliminary injunction.

First, the text of the Shock Non-Compete belies Fairfield's arguments. In the Shock Non-Compete, the parties agree that the Agreement is made "in consideration of [Shock's] employment." Pl. Ex. P-9, at FF 423. Yet while Shock began his employment in December 2013, the Agreement was not signed until March 13, 2014. The Agreement could not have been in consideration for Defendant Shock's then-three-month-old employment commencement. Based solely on the text of the Shock Non-Compete, then, there was no consideration commensurate with its execution and therefore cannot be a valid basis upon which for an injunction to issue.

Second, there is no evidence that the Defendants were upgraded from an "introductory" employment basis to a "regular" employment classification. There is, again, no Handbook from when Stanny began his employment at Fairfield, and the Handbook will thus not be considered. Stanny credibly testified that he was not informed that he would be a "provisional employee," or that Fairfield used an "introductory period." Hrg. Trans., 5/17/23, at 280:14–19. On cross-examination, Defendant Stanny testified that "[t]here was no introductory period at all." Id., at 302:25–303:1. Mr. Brenlove testified that he is unaware of any document that refers to Defendant Stanny as an "introductory, provisional, or probationary employee." Id., 5/16/23, at 78:7–16. As to Defendant Shock, the offer letter sent to him by Fairfield identified him as a "non-exempt full time hourly" employee. Pl. Ex. P-6, at FF 260. The only reference to an "introductory period" in the letter was in relation to when Defendant Shock would be eligible for medical and dental insurance benefits and made no reference to an "introductory" employment classification. Id., at FF 261; see also Hrg. Trans., 5/17/23, 190:9–12 ("Q: Did you think it [an "introductory period"] referred to anything beyond this medical and dental insurance that is set forth in this letter? A: No.").

Third, Fairfield has failed to show either Defendant received consideration in the form of benefits as consideration for signing the Agreements. For consideration to be valid, it "must actually be bargained for as the exchange to the promise." Pennsy Supply, Inc. v. American Ash Recycling Corp., 895 A.2d 595, 600 (Pa. Super. Ct. 2006) (quoting Stelmack v. Glen Alden Coal Co., 14 A.2d 127, 129 (Pa. 1940)). One cannot "bargain for" past performance; "past consideration is insufficient." Community Sports, Inc. v. Denver Ringsby Rockets, Inc., 240 A.2d 832, 836 n.5 (Pa. 1968) (citing Erny v. Sauer, 83 A. 205 (Pa. 1912); Wimer v. Worth Twp. Poor Overseers, 104 Pa. 317, 320 (1883)). Stanny enrolled in Fairfield's health and dental insurance plans on February 15, 2012, and the plans became effective on March 1, 2012. Pl. Ex. P-7, at FF 14 (dental insurance), FF 15 (health insurance). The Stanny Non-Compete was then executed on April 12, 2012. See Pl. Ex. P-8, at FF 430. Stanny's insurance plan came into effect 42 days before he signed the Agreement, roughly equidistant between his start date and the date he signed the Agreement, despite counsel's insistence to the contrary.[7] Stanny could not have bargained for his health and dental insurance in which he had already been enrolled for six weeks in exchange for signing the Agreement. The insurance, then, cannot serve as adequate consideration for Stanny.

As to Shock, there is no evidence that Fairfield offered him health or dental insurance benefits in exchange for his executing the Agreement. Shock credibly testified that he did not sign any document declining health or dental benefits in either 2013 or 2014. Hrg. Trans., 5/17/23, at 197:10–12. Fairfield has entered no evidence that it offered these benefits to Shock at the 90-day mark of his employment and that he declined. Its only evidence is Brenlove's testimony that it is "Fairfield's practice" to offer these benefits 90 days after employment began. Id., 5/16/23, at 87:21–88:1. Yet whether this actually occurred is belied by Fairfield's own evidence. Brenlove testified that he does not know an "exact date" when Shock was offered these benefits, but was certain that they were offered "during the right time frame." Id., 87:16–20. And the only employee for whom we have evidence of when he enrolled in health insurance, Stanny, began receiving his insurance 49 days—not 90 days—into his employment. See Pl. Ex. P-7. In sum, Fairfield has failed to demonstrate that either Stanny or Shock received health or dental benefits as consideration for signing their Agreements.

Moreover, these benefits do not qualify as consideration, as they were offered to all employees, regardless of whether they had to sign a Non-Compete Agreement. "All full-time, non-seasonal employees and their spouses and/or dependents, are eligible to participate in Fairfield Landscaping's health, dental, and vision insurance plans . . . following their 90 day [sic] introductory period." Pl. Ex. P-2, at FF 137 (emphasis added). Although a pay raise or the addition of an employment benefit may serve as consideration, "no 'new' consideration to support a restrictive covenant exists where the contract recites the salary which the employee is already receiving, the profit-sharing plan offered is available to all employees, or a bonus is provided but not guaranteed." Sysco Philadelphia, LLC v. Silva, 525 F. Supp. 3d 582, 586 (E.D. Pa. 2021) (citing In re Verdi, 244 B.R. 314, 324 (Bankr. E.D. Pa. 2004)) (applying state law). Thus, because the "consideration" received by the Individual Defendants in exchange for signing the Agreements was a benefit to which all employees had access, it is insufficient to serve as consideration.

Finally, there is no evidence that Stanny or Shocked received anything else of value as consideration for signing their Agreements. As Brenlove testified, Stanny's employment status, pay rate, and benefits receipt was identical the day before he signed the Agreement as it was the day after he signed the Agreement. Hrg. Trans., 5/16/23, at 77:10–21.[8] Neither Stanny nor Shock received a pay raise, a promotion, or a bonus in exchange for signing the Agreement. Id., 5/17/23, at 193:11–25 (testimony of Shock), 285:15–286:5 (testimony of Stanny).

Thus, because Fairfield has failed to show that either Stock or Stanny received any real and valuable consideration for signing their respective Agreements, the Non-Compete Agreements cannot serve as a basis for a preliminary injunction.

ii. Plaintiff's right to relief related to its pricing and customer lists is unclear.

Fairfield has failed to make a prima facie case that it is entitled to judgment on its remaining, non-contract counts, because it has failed to demonstrate that its pricing information is a trade secret or that there is a real or threatened use of either the pricing information or its customer list.

a. Plaintiff has failed to make a prima facie case that its pricing information is a trade secret.

Under the Uniform Trade Secrets Act, 12 Pa. Cons. Stat. §§ 5301–5308, a "trade secret" is:

Information, including a formula, drawing, pattern, compilation including a customer list, program, device, method, technique or process that:

(1) 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) Is the subject of efforts that are reasonable under the circumstances to maintain its secrecy.

12 Pa. Cons. Stat. § 5302. "The crucial indicia for determining whether certain information constitutes a trade secret are 'substantial secrecy and competitive value to the owner.'" Shepherd v. Pittsburgh Glass Works, LLC, 25 A.3d 1233, 1244 (Pa. Super. Ct. 2011) (quoting O.D. Anderson, Inc. v. Cricks, 815 A.2d 1063, 1070 (Pa. Super. Ct. 2003)). Something is not a trade secret "if a competitor could obtain the information by legitimate means." Id., at 1245 (quoting WellSpan Health v. Bayliss, 869 A.2d 990, 997 (Pa. Super. Ct. 2005)).

Plaintiff's planned price increases for 2023 do not constitute a "trade secret" for purposes of granting injunctive relief. First, the information to which Defendants had access and which Plaintiff alleges is a trade secret is not information of substantial secrecy. Second, the information is readily obtainable by Fairfield's competitors via legitimate means, and indeed the evidence shows Defendants in fact obtained this information via legitimate means.

Defendants had access to only vague information regarding Fairfield's planned price increases. Specifically, Shock sent emails to Fairfield's suppliers to learn of the prices of materials it planned on using next year. See Pl. Ex. P-15; Hrg. Trans., 5/16/23, 103:17–104:14 (testimony of Ken Sible). Fairfield uses a "cost-plus" pricing model, in which the business takes the cost of the materials it uses, adds in the cost of labor, and adds a "markup percentage to arrive at profit level." Hrg. Trans., 5/16/23, 102:15–24 (testimony of Ken Sible). But while Shock knew of the material costs for 2023, there is no evidence he knew of the markup Fairfield planned to add, and thus there is no evidence Shock knew the exact prices Fairfield would charge. Id., at 112:1–10. The most specific information that Defendants knew about Fairfield's 2023 price increases was that "all of [Fairfield's] prices across the board were going to have to go up anywhere between 5 to 17, 20 percent depending on the customers." Id., 5/17/23, 157:6–9 (testimony of Matt Accamando). A range of 15 percentage points—the top of which representing a 400% increase from the bottom—can hardly be described as "information."

Fairfield has shown, however, that Defendants found out Fairfield's 2022 and 2023 pricing via legitimate means available to any competitor. Shock's Uncle Tim sent to Shock an invoice he received from Fairfield showing an apparent price increase. See Pl. Ex. P-28; Hrg. Trans., 5/27/23, 217:21–218:19. Shock responded by calling the prices "insane," and saying Fairfield was "pricing themselves out of the market." Pl. Ex. P-28. In another exhibit proffered by Fairfield, Shock asks a former Fairfield customer what that customer was charged last year. See Pl. Ex. P-22. Fairfield tries to argue this is evidence that Defendants "knew enough [confidential] information to undercut Fairfield's 2023 pricing." Pl. Post-Hrg. Br., at 7. But this evidence merely shows that Defendants went through a channel available to any competitor to gain the knowledge of what Fairfield charged last year and what Fairfield charged this year. Fairfield customers are not obligated, by law or contract, to keep Fairfield's prices a secret. They can release them to whomever they so wish, be it a friend, neighbor, or, yes, another landscaper. This is the antithesis of a "trade secret." As such, Fairfield has failed to show it is likely to succeed on the merits of its claims involving its price increases, and an injunction may not issue on these grounds.

b. Plaintiff has failed to show that there is a real or threatened use of its customer list.

Under the Uniform Trade Secrets Act, "[a]ctual or threatened misappropriation may be enjoined." 12 Pa. Cons. Stat. § 5303(a). Misappropriation may be, as relevant here, the "acquisition of a trade secret of another by a person who knows or has reason to know that the trade secret was acquired by improper means," or the use of a trade secret by someone who "used improper means to acquire knowledge of the trade secret." Id., § 5302. "Improper means" includes "theft, bribery, misrepresentation, breach or inducement of a breach of a duty to maintain secrecy or espionage through electronic or other means." Id.

Here, Fairfield has failed to demonstrate any actual or threatened misappropriation of its customer list. Shock credibly testified that he first accessed the email containing the customer list as an attachment when he received Plaintiff's complaint in the instant action, that he did not use the customer list to compete with Fairfield, and that he only kept the email in his account after that date pursuant to a standstill agreement related to the instant case. See Hrg. Trans., 5/17/23, 219:14–220:19, 241:5–13. Moreover, from that customer list, there are more individuals who either were not Fairfield customers or who canceled their service prior to 2022 than those who are now with Bluegrass. See id., at 221:22–223:3; Def. Ex. Z.[9] Shock credibly testified that the customers on the customer list who are now with Bluegrass are either close friends and family or individuals who reached out to Bluegrass. Id. On the other hand, Fairfield employees testified that Defendants had to have used the customer list to poach Fairfield customers because they do not believe Defendants could have obtained a large set of customers without use of the list. See, e.g., id., at 35:14–19 (Brenlove testimony); 5/17/23, at 149:17–23, 153:17–154:4 (Accamando testimony). This is a battle between documentary evidence and mere conjecture. The latter faces an uphill climb. And here, it is insufficient to show that Defendants misappropriated or threaten to misappropriate Fairfield's customer list.

Because Fairfield has failed to show it is likely to succeed on the merits of its tort counts, which all rely on Defendants' alleged misappropriation of its confidential business information, an injunction cannot issue.

V. Conclusion

Fairfield has failed to demonstrate that it has suffered irreparable harm, that the refusal of an injunction will cause more harm to Fairfield than the issuance of an injunction will cause to Defendants, and that it is likely to succeed on the merits. Its evidence of irreparable harm is ongoing harm to its own reputation caused not by Defendants' actions but by its own bringing this lawsuit. Its argument that it will succeed on the merits is based on obvious and meritless backfilling of consideration; the use of confidential information that is neither confidential nor information; and a customer list that contains more non-Fairfield customers than Fairfield customers who are now with Bluegrass. On this an injunction cannot issue.

BY THE COURT:
/s/The Hon. Christine A. Ward

[1] Fairfield operated as Fairfield Construction, Inc., prior to October 2020. For the purposes of this Memorandum Opinion, "Fairfield" refers to both Fairfield Construction, Inc., and Fairfield Construction, LLC.

[2] See Pl. Ex. P-6, at FF 260 ("I am pleased to offer you a position as a Lawn Care Technician."); see also Hrg. Trans., 5/17/23, at 186:24–187:1, 188:1–4 ("Q: What was your job title at the time that you were hired by Fairfield? A: It was lawn care technician. . . . Q: . . . At any time during your first year of employment, were you a manager? A: No.").

[3] See, e.g., Adam Smith, The Wealth of Nations 48 (E.P. Dutton & Co. 1910) (1776): There is in every society or neighbourhood an ordinary or average rate both of wages and profit in every different employment of labour and stock. This rate is naturally regulated, as I shall show hereafter, partly by the general circumstances of the society, their riches or poverty, their advancing, stationary, or declining condition; and partly by the particular nature of each employment.

[4] Mr. Sible also also testified that an 8% to 12% increase in the cost of lawn care "hardly seems significant" "[g]iven inflation is eight percent," Hrg. Trans., 5/16/23, at 117:2–3. The most widely used measure of inflation is the Consumer Price Index ("CPI"), promulgated by the Bureau of Labor Statistics. Consumer Price Indexes Overview, U.S. Bureau of Lab. Statistics (last modified Jan. 23, 2023), https://www.bls.gov/cpi/overview.htm. The cost of gardening and lawn services is included in the CPI, but is assigned a weight, or "relative importance," of 0.316%, roughly the same as clocks (0.317%), and lower than cigarettes (0.41%), airline fees (0.587%), and club membership fees for shopping clubs and sport participant fees (0.677%). See Relative importance of components in the Consumer Price Indexes: U.S. city average, December 2022, U.S. Bureau of Lab. Statistics (last modified Feb. 17, 2023), https://www.bls.gov/cpi/tables/relative-importance/2022.htm.

[5] While Brenlove denied that Fairfield was "acquired" for $25 million, see Hrg. Trans., 5/16/23, at 51:25–52:4, he also said it was "hard to say" what the price was. Id., at 52:5–10. Accamando testified that "Eli [Brenlove] and I didn't snap our fingers one day and sell our company for $25 million dollars, whatever it was sold for." Id., 5/17/23, at 151:17–19.

[6] It is notable that Mr. Accamando testified that Defendant Stanny headed "a division of one for a long time." Hrg. Trans., 5/17/23, at 138:23–25. The National Labor Relations Act defines "supervisor," a term generally synonymous with "manager," as: any individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment. 29 U.S.C. § 152(11); see also U.S. Const. art. VI, cl. 2 (preemption); Supervisor, Black's Law Dictionary (11th ed. 2019) ("One having authority over others; a manager or overseer.") (emphasis added). It is hard to imagine how somebody who works alone, in a division with no other employees, can meet any of the NLRA factors to be a "supervisor," or who can have authority over others.

[7] See Hrg. Trans., 5/17/23, at 303:21–304:17: Q. You agree as it relates to those benefits you did not receive those benefits immediately when you started working for Fairfield in January of 2012, correct? A. Correct, I was paying my own. Q. In fact, you did receive those benefits closer to that 90-day period after January so we're talking to the April time when you signed the non-competition agreement, correct? A. No, that is not closer. That is 45, that is midway. Q. So [your] testimony is March is closer to January than it is to April? A. March to January 12th is 45 days, right. Q. And March to April 12th I'm asking, just your words, closer, is closer to April or January? A. You're splitting hairs. Q. Your testimony is it is not closer? A. I would have to get a calendar and look up the days I guess.

[8] Q: So can we agree, let's use that April 12, 2012 date as a benchmark. The day before Brian Stanny signed the non-competition agreement, he was paid an hourly rate, full-time, and he received medical and dental benefits, correct? A: Correct. Q: And the day after he signed this agreement, Brian Stanny was paid the same hourly rate, a full-time employee, and received the same medical and dental benefits, correct? A: Correct.

[9] The customer list includes 309 names. Eighty-five (85) were individuals whom Shock identified as Fairfield clients who had cancelled prior to 2022, or who were not lawncare customers at all. Twenty-three (23) are family members or close friends of the Individual Defendants. Of the remaining individuals, just eighteen (18) former Fairfield clients, are not family members or close friends of the Individual Defendants, are now Bluegrass customers.

COMMONWEALTH OF PENNSYLVANIA vs. JEROME KIRSCH, JR.

Criminal Appeal

Petitioner's instant motion was simply a restatement of his previous claims that were dismissed.

Case No.: CC201103050. In the Court of Common Pleas of Allegheny County, Pennsylvania. Criminal Division. Todd, J. September 18, 2023.

OPINION

This is an appeal by Petitioner, Jerome Kirsch, Jr., from an Order of April 12, 2023 dismissing his Motion for Exoneration and Reparations which was filed on October 12, 2022. Petitioner filed a Notice of Appeal on May 9, 2023. This matter arises out of Petitioner's arrest on December 16, 2010 at which time he was charged at CC 201103050 with two counts of Involuntary Deviate Sexual Intercourse; three counts of Criminal Solicitation; two counts of Aggravated Indecent Assault; two counts of Endangering Welfare of Children, two counts of Indecent Exposure, two counts of Corruption of Minors, and one count of Indecent Assault. Petitioner was also charged at CC201201972 with one count of theft. On August 7, 2012, Petitioner entered into a negotiated plea agreement at CC 20110350 pursuant to which all counts were withdrawn except for Count 7 (Endangering the Welfare of a Child), Count 9 (Indecent Exposure), Count 11 (Corruption of Minors) and Count 13 (Indecent Assault) for which Petitioner received a negotiated sentence of probation of 10 years. At CC201201972 Petitioner also entered into a plea agreement pursuant to which he would plea as charged for a period of probation and restitution in the amount of $9,120.00. Petitioner was sentenced at CC 201103050 at Count 7 to five years probation; at Count 9, a consecutive term of five years probation; and, at Count 11 a term of five years probation to be run concurrent to Count 9. At CC 201201972 Petitioner was sentenced to a two-year period of probation and ordered to make restitution in the amount of $9,120.00 No post – sentence motions were filed and no direct appeal was taken.

Petitioner's first PCRA Petition, which was filed on October 23, 2012, alleged that his plea was involuntary and unintelligent and was the result of ineffective assistance of counsel who threatened and coerced him into entering the plea. The petition was dismissed after a hearing by an order of April 24, 2014. The dismissal was affirmed by the Superior Court on October 7, 2014 and his Petition for Allowance of Appeal was denied by the Supreme Court on January 8, 2015.

A probation violation hearing was held on April 25, 2018 and Petitioner was sentenced to two and half to five years imprisonment with credit for time served. Petitioner's second PCRA Petition was filed on May 11, 2018 seeking relief from the SORNA registration requirements as a result of the holding in Commonwealth v. Muniz, 164 A.3d 1189 (Pa 2017). This petition was denied by an order of February 25, 2019. Petitioner then filed a Motion Nunc Pro Tunc for Remand for a Preliminary Hearing on March 29, 2019 which was denied by an order of June 11, 2019.

In the instant Motion for Exoneration and Payment of Reparations Petitioner sets forth a brief procedural history of his case and further alleges that his sentence, after the probation violation hearing, was completed on December 28, 2021. Petitioner then attaches a document entitled "Evidence to be reviewed" and "Following relief sought by Petitioner." In his request for relief

Petitioner requests "an order made by the court to exonerate Petitioner's conviction and record." He also requests "restoration of all of Petitioner's civil and constitutional rights under the United States and Pennsylvania constitution's" (sic) He also requests "Payment of reparations of five million dollars" for the time served on probation and incarceration for crimes that he did not commit. Finally, he requests the return of all property taken during the search of his home on October 10, 2017.

In support of his requests, Petitioner attaches "Petitioners (sic) statement," which consists of a five-page detailed account of his version of the events leading up to his arrest in 2010 for the offenses to which he pled guilty in 2012. In his statement, Petitioner contends that the charges against him were the result of fabrications by the mother of his children in retaliation for his attempts to obtain a partial custody order. Petitioner again contends that he pled guilty under duress and that the following day he received a Facebook message from the mother admitting she fabricated the allegations. He further alleges that shortly after his plea he requested counsel to withdraw his plea but that counsel never filed a motion to withdraw his plea. Petitioner's instant motion is a simply a restatement of his previous claims that were dismissed. In addition the requested relief of exoneration and reparations is not cognizable under the PCRA and the Motion was appropriately dismissed.

BY THE COURT:
/s/The Hon. Randal B. Todd