UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MICHIGAN

WINERIES OF THE OLD MISSION PENINSULA ASSOC (WOMP)., a Michigan nonprofit corporation; BOWERS HARBOR VINEYARD & WINERY, INC., a Michigan corporation; BRYS WINERY, LC, a Michigan corporation; CHATEAU GRAND TRAVERSE, LTD, a Michigan corporation; CHATEAU OPERATIONS, LTD, a Michigan corporation; GRAPE HARBOR, INC., a Michigan corporation; MONTAGUE DEVELOPMENT, LLC, a Michigan limited liability company; OV THE FARM, LLC; a Michigan limited liability company; TABONE VINEYARDS, LLC, a Michigan limited liability company; TWO LADS, LLC, a Michigan limited liability company; VILLA MARI LLC, a Michigan limited liability company; WINERY AT BLACK STAR FARMS, LLC., a Michigan limited liability company,

Plaintiffs,

v

PENINSULA TOWNSHIP, a Michigan municipal corporation,

Defendant,

and

PROTECT THE PENINSULA, INC.,

Intervenor-Defendant.

Case No. 1:20-cv-01008

HON. PAUL L. MALONEY
MAG. JUDGE RAY S. KENT

PROTECT THE PENINSULA'S RESPONSE IN OPPOSITION TO PLAINTIFFS' MOTION TO STRIKE THE TOWNSHIP'S OFFER OF PROOF

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PROTECT THE PENINSULA'S RESPONSE IN OPPOSITION TO PLAINTIFFS' MOTION TO STRIKE THE TOWNSHIP'S OFFER OF PROOF

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PROTECT THE PENINSULA'S RESPONSE IN OPPOSITION TO PLAINTIFFS' MOTION TO STRIKE THE TOWNSHIP'S OFFER OF PROOF

Intervening Defendant Protect the Peninsula, Inc. (PTP), by undersigned counsel, respectfully opposes the Motion to Strike the Township's Offer of Proof filed by Plaintiffs Wineries of Old Mission Peninsula Assoc., *et al* (Wineries). (ECF No. 255) The Court should deny the motion because it is premature, pointless, procedurally improper, and the Wineries brought it in violation of Local Rule 7.1(d).

INTRODUCTION

The Wineries filed a motion to strike an offer of proof filed by Defendant Peninsula Township (Township). The Township presented their offer of proof after Magistrate Kent granted the Wineries' motion in limine "to exclude evidence and testimony regarding history of Peninsula Township ordinances and testimony from non-township employees." (ECF No. 223, PageID.8416) The offer of proof is three affidavits from witnesses personally and professionally involved in matters related to this lawsuit, including enactment of zoning provisions that the Wineries argue are invalid. Two affiants – Grant Parsons and John Wunsch – have represented PTP in various contexts over the years. (ECF No. 183, PageID.6810) The third affiant is Gordon Haywood, long-time Peninsula Township planner. The Wineries dispute the form, foundation, and relevance of parts of each affidavit. (ECF No. 256, PageID.9071-9081) PTP opposes the Wineries' motion to strike the offer of the three affidavits for the following reasons: (1) it would be premature and cause unnecessary prejudice to PTP and overall confusion to strike the affidavits; (2) the offer of proof is practically harmless to the Wineries; (3) the motion is procedurally improper; and (4) the Wineries violated LCivR 7.1(d).

1. **It would be premature and cause unnecessary prejudice to PTP and overall confusion to strike the affidavits before PTP is heard on the merits of the Wineries' claims.**

Granting the Wineries' motion to strike the affidavits at this time may have the effect of later limiting PTP's opportunity to develop and present defenses to the Wineries' claims. In fact, that may be the intent of the motion. That would be both unfair and unnecessary.

The Wineries teed up their motion in limine to exclude testimony regarding historic township events on July 7, 2022. (ECF No. 183) At that time, this Court had granted parts of the Wineries' motions for summary judgment and invalidated many challenged zoning provisions. (ECF No. 162) The case was proceeding towards trial scheduled for August 16, 2022. When Magistrate Kent granted the Wineries' motion in limine on August 3, he understood the upcoming trial would be limited to three issues remaining after the summary judgment order: damages amount, regulatory takings, and First Amendment violations. (ECF No. 223, PageID.8414-8415)

Since then, several relevant things happened. First, the Sixth Circuit granted PTP the right to intervene on July 27. (ECF No. 215). Then this Court adjourned trial on August 8. (ECF No. 236) Then on August 23, the Sixth Circuit vacated the injunction that followed the summary judgment order. (ECF No. 251) In its opinion vacating the injunction, the appellate court recognized that "PTP's intervention below will fundamentally alter the district court's evaluation of its decision on summary judgment." (ECF No. 251, PageID.8978) It further recognized that many provisions were invalidated,

> based not on the merits of the legal arguments, but on the Township's waivers, defaults, and/or concessions before the district court on various of the Wineries' claims. These circumstances raise serious questions regarding the merits of the district court's injunction following its partial grant of summary judgment.

(*Id*.) The Sixth Circuit concluded that "PTP's intervention changes the landscape and requires reconsideration of the district court's partial summary judgment and issuance of an injunction."

(*Id.* at 8982) The Court has not yet ruled on how PTP will proceed on the merits going forward.[1] While there are unresolved questions, it appears clear to PTP that the practical effect of the August 23 order is that the June 3 summary judgment order should not be treated as binding upon PTP.

As the Wineries point out, two of the witnesses whose affidavits the Wineries seek to exclude (Mr. Parsons and Mr. Wunch) have been involved with or on behalf of PTP in various contexts over the last 40 years. Among other interests, they own property and have been involved in litigation involving some wineries. (ECF No. 183, PageID.6810; ECF No. 237-2, PageID.8577-78, 8598-99, 8586-87) By the Wineries' own characterization, these witnesses have lots to say.[2] The third affiant, Mr. Haywood, was Township Planner for decades, involved in virtually every aspect of township planning, zoning adoption, zoning enforcement, litigation related to winery zoning provisions, applications, conservation easements on winery parcels, and much more. (ECF No. 237, PageID.8611-12) Their affidavits cover numerous events and topics. Their breadth correlates to the breadth of the Magistrate's order excluding all evidence regarding history of the ordinances and testimony from non-township employees. (ECF No. 223, PageID.8416)

PTP may defend against the Wineries' claims by raising defenses related to Plaintiffs' conservation easements and property interests; prior litigation and legal positions taken by

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[1] The Court has recognized PTP may file motions and filed PTP's original Answer and Motion to Dismiss. (ECF Nos. 246 to 250)

[2] The Wineries described Mr. Parsons and Mr. Grant as "longwinded." (ECF No. 183, PageID.6810). PTP disputes that characterization and notes the length of their deposition testimony correlated more to the quality of questions posed than to any predisposition for rambling. Even so, it is objectively true that these witnesses have a lot to say. Which is because: (a) all 11 Wineries plus WOMP are trying to invalidate scores of zoning provision; (b) those provisions and the plans they advance were adopted many decades ago; (c) the provisions are complex because they address the many impacts to various neighbors from the many activities the numerous wineries want to do in the agricultural district; and (d) both witnesses have been deeply involved in land use planning, winery provisions, winery projects, winery applications, winery lawsuits, winery easements, and numerous other issues that bear on the Wineries' many claims.

Plaintiffs regarding zoning provisions they now challenge; the intent of ordinances aimed at minimizing nuisance impacts to neighbors; how the ordinances are supported by studies, research, and plans; that Plaintiffs and others offered and the Township considered other means or alternatives to advance local interests; and other relevant defenses. Mr. Grant, Mr. Parsons, and Mr. Haywood may speak to some or all of these matters based on their personal and professional involvement in historic activities.

PTP has not yet been provided the Wineries' and Township disclosures and written discovery to see what is in the record or missing. PTP has not yet been allowed to make its own disclosures and to identify witnesses and relevant exhibits. PTP has not had an opportunity to bring respond to the Wineries' or bring its own motion for summary judgment,[3] nor to conduct discovery into the evidence the Wineries' relied upon in its motion. So it would be premature at this point to strike witness affidavits that cover numerous at least potentially relevant topics before PTP is permitted some leeway to develop and present its disclosures and defenses. To the extent PTP may depend on testimony from any of these affiants to support defenses, striking their affidavits now would impose unnecessary confusion and complexity going forward. Striking them also may irreparably harm PTP by preventing or limiting PTP from developing and presenting available defenses. The harm to PTP in striking the offer of proof is compounded because the Wineries' bases for striking these affidavits arise out of motions (summary judgment and motion to limine) filed, briefed, and decided before PTP was granted intervention and became a full party.

The Court should deny the motion to strike because it would be premature and unfair to limit the scope of evidence that PTP may present in defenses to the Wineries' claims.

[3] In April 2021, PTP attempted to move to the dismiss the Wineries' state claims, and that motion was since filed. ECF No. 250.

2. The offer of proof is practically harmless to the Wineries' case.

At the same time that granting the motion and striking the offer of proof may practically harm PTP's ability to make its case, denying the motion and letting the offer of proof stand would have no corresponding negative impact on the Wineries' case. The Magistrate recommended exclusion of testimony, which would prevent Mr. Parsons, Mr. Wunch, and Mr. Haywood from testifying at trial (and potentially any other historic evidence). If the Court rejects that recommendation, the testimony is not excluded, and the offer of proof is moot. If the Court adopts the recommendation, the offered testimony is excluded. Either way, the offer of proof would not change the trial record; it only preserves the affiants' testimony for appellate review. Fed. R. Evid. 103(a); *Barner v. Pilkington N. Am., Inc.*, 399 F.3d 745, 749 (6th Cir. 2005). The offer of proof does not put the Wineries' case here in any better or worse position, independent of the outcome of the motion in limine.

Even if the Court struck the offer of proof, that would not prevent the appellate court from reviewing the affidavits. *See New Prods. Corp. v. Tibble*, No. DK-09-00651, 2016 Bankr. LEXIS 4746 (W.D. Mich. Bank. March 14, 2016) (**Ex A**) ("To the extent the Defendants are concerned about the effect of the Offer of Proof on any reviewing court, unless the court somehow seals the docket from the appellate court's review, it is difficult to see how granting the Motion to Strike would affect that review either. Granting the Motion to Strike, in other words, is pointless and inconsistent with appellate review."). In other words, even if this Court strikes the offer of proof, it does not go away nor otherwise prevent an appellate court from reviewing it.

The motion to strike the offer of proof is effectively pointless for the Wineries' case in this Court, and of no practical impact in future appellate review. The Court should deny the motion to strike because, while it threatens to harms PTP's case, it is of no practical effect on the Wineries' case.

3. The motion to strike the offer of proof is improper.

The Township filed the affidavits as an offer of proof with their objection to the order granting the Wineries' motion in limine. (ECF No. 237, objection and offer of proof; ECF No. 222, order granting motion in limine) The Wineries filed a brief opposing the Township's objection and offer of proof. (ECF No. 253) The Wineries also filed a separate "motion to strike" the offer of proof appended to the objection. (ECF No. 256) There is no procedure that permits the Wineries to respond to the objection twice, nor to oppose the offer of proof through a "motion to strike." The Court should deny the motion to strike accordingly.

The Wineries cite Fed. R. Civ. P. 12(f) as authority to file this motion to strike. (ECF No. 256, PageID.9067, 9068-9069) Rule 12(f) does not authorize a court to strike a motion, objection, or offer of proof; it authorizes a court to strike particular matters "from a *pleading*." (Emphasis added). An offer of proof is not a pleading. Rule 7(a) sets forth the definition of "pleading": "a complaint"; "an answer to a complaint"; "an answer to a counterclaim designates as a counterclaim"; "an answer to a cross claim"; "a third-party complaint"; "an answer to a third-party complaint"; and "a reply to an answer," if so ordered by the court. There is no rule or authority to strike materials not in pleadings. *See Fox v. Michigan State Police Dep't*, 173 F. App'x 372, 375 (6th Cir. 2006) ("Under [Rule] 12(f), a court may strike only material that is contained in the pleadings."). The Sixth Circuit explained that "[e]xhibits attached to a dispositive motion are not 'pleadings' within the meaning of [Rule] 7(a) and are therefore not subject to a motion to strike under Rule 12(f)." *Id.* at 375. *See also Baker v. Shelby Cnty. Gov't,* Case No. 05-2798 B/P, 2008 U.S. Dist. LEXIS 6010, *2 (W.D. Tenn. Jan. 28, 2008) (**Ex B**) ("Affidavits and exhibits are not 'pleadings' that are subject to a motion to strike under Rule 12(f)."), citing *Lombard v. MCI Telecommunications Corp*., 13 F. Supp. 2d 621, 625 (N.D. Ohio 1998) (stating that there is no basis in the Federal Rules for striking an affidavit; while the court should "disregard" inadmissible

evidence, it should not strike that evidence from the record). This Court, also, has recognized that a motion to strike a non-pleading is procedurally improper. ECF No. 108, PageID.4174 ("Rule 12(f) does not allow for a court to strike an entire motion; rather, it allows a court to strike certain material from a pleading."), citing *Davis v. Cox,* No. 2:18-cv-11255, 2019 U.S. Dist. LEXIS 68637 (E.D. Mich. Mar. 29, 2019) (concluding that "a motion to strike is the wrong vehicle for overcoming Defendants' motions [for summary judgment]" because Rule 12(f) only permits the striking of pleadings).

The proper way for the Wineries to oppose the Township's offer of proof was in a brief opposing it, which they filed. (ECF No. 253) The Wineries' motion to strike filed in opposition to the offer of proof is effectively a second bite at the same apple. Had the Wineries' limited their opposition to the offer of proof to their opposition to the Township's objection (ECF No. 253), instead of filing an additional, procedurally unfounded, and pointless "motion to strike" the offer of proof, this entire round of motions would have been avoided. The Court should deny the Wineries' motion accordingly.

4. <u>The Wineries violated Local Rule 7.1(d) when they failed to seek concurrence from PTP before filing their improper motion to strike.</u>

This Court's local rules require real effort between parties to confer and seek concurrence before filing any non-dispositive motion. *See* W.D. LCivR 7.1(d) ("With respect to all motions, the moving party shall ascertain whether the motion will be opposed. In addition, in the case of all non-dispositive motions, counsel or pro se parties involved in the dispute shall confer in a good-faith effort to resolve the dispute. All non-dispositive motions shall be accompanied by a separately filed certificate setting forth in detail the efforts of the moving party to comply with the obligation created by this rule.") The Wineries apparently consulted with the Township's counsel but not

with PTP's counsel before filing their motion to strike. (ECF No. 257, "I emailed all counsel for Peninsula Township requesting concurrence in Plaintiff's Motion to Strike Offer of Proof.")

"It is true that failure to follow Local Rule 7.1(d) provides a sufficient basis in itself to deny a motion." *Griffin v. Reznick*, 609 F. Supp. 2d 695, 705 (W.D. Mich. 2008) (quoting *Krygoski Const. Co., Inc. v. City of Menominee, Michigan*, 2006 U.S. Dist. LEXIS 51248, 2006 WL 2092412, *2 (W.D. Mich. July 26, 2006) (Richard Allan Edgar, J.), and citing *Woodhull v. Kent Cty*., 2006 U.S. Dist. LEXIS 21487, 2006 WL 708662, *1 (W.D. Mich. Mar. 27, 2006) (Wendell Miles, J.) ("The importance of the communication required by this rule . . . cannot be overstated."; *Aslani v. Sparrow Health Sys*., 2008 U.S. Dist. LEXIS 83651, 2008 WL 4642617 (W.D. Mich. Oct. 20, 2008) (Paul L. Maloney, C.J.) (defendants' failure to comply with LCIVR 7.1(d) warranted denial without prejudice of their motion to dismiss); *Kim v. USDOL*, 2007 U.S. Dist. LEXIS 89147, 2007 WL 4284893, *1 (W.D. Mich. Dec. 4, 2007) (Brenneman, U.S.M.J.) ("[T]he court properly denied plaintiff's motion for judgment on the pleadings because he failed to seek concurrence under the local court rule, W.D. MICH. LCIVR 7.1(d), and the motion was premature.")).

The Wineries filed their motion to strike on August 31, 2022 –after PTP intervention was granted, the mandate issued, and PTP motions filed. The Wineries know PTP is now a full party and who its attorneys are, and they have responded to PTP requests for concurrence and otherwise. (ECF Nos. 65-1, 230) The Wineries also know the affidavits they are trying to strike are affidavits of people who represented PTP in various capacities over the years. (ECF No. 183, PageID.6810)

In fact, the Wineries point their motion to strike in part directly at PTP's case. (ECF No. 256, PageID.9607-9608) They characterize the Township's offer of proof as follows: "***PTP***, and the Township, are asking this Court to consider witness testimony from individuals who are not

Township officials as to legislative intent." (*Id*., emphasis added) As with the motion to strike generally, this erroneous snippet is a gratuitous and misplaced whack at PTP's case. The main point here is that the Wineries failed to confer with PTP, though they obviously understood PTP's interests are implicated. PTP responds summarily to their attack to clear the record. PTP has indicated an intent to discover legislative history materials related to the challenged zoning provisions – the minutes of meetings adopting challenged zoning provisions, studies and reports relied upon by the planning commission and township board in adopting the zoning provisions, and other historic, contemporaneous evidence of the purpose, intent, and alternatives considered. (ECF No. 262, PageID.9415) These historical materials may show the intent and effect of a zoning ordinance relevant to whether it violates constitutional rights. *See Village of Arlington Heights v. Metro. Hous. Dev. Corp.,* 429 U.S. 252, (1977) ("The historical background of the decision is one evidentiary source, particularly if it reveals a series of official actions taken for invidious purposes. … The legislative or administrative history may be highly relevant, especially where there are contemporary statements by members of the decision making body, minutes of its meetings, or reports. In some extraordinary instances the members might be called to the stand at trial to testify concerning the purpose of the official action, although even then such testimony frequently will be barred by privilege." (citations omitted); *Frazier v. City of Grand Ledge*, 135 F. Supp. 2d 845, 854 (W.D. Mich. 2001) (in challenge to zoning provision, court considered staff report to planning commission and that planning commission asked outside group to conduct research and considered its land use plan); *Gannett Outdoor Co. v. Feist,* No. G89-471, 1990 U.S. Dist. LEXIS 2423 (W.D. Mich. Feb. 26, 1990) (**Ex C**) (in evaluating Section 1983 claim that zoning violated constitutional rights, court considered legislative history of zoning provision, including minutes of board meeting and lack of outside consultant in drafting ordinance, and testimony from former planning

commissioner at time of enactment) (vacated on other grounds). To make their case that the ordinances are invalid, the Wineries rely extensively on testimony from one board member as to their meaning, effect, intent, how they advance public interests, what more or less restrictive means were considered, and more. (ECF No. 162) PTP appropriately seeks contemporaneous records that may shed light on the same issues. The motion to strike the offer of proof has the appearance of a back-door attempt to block PTP from developing defenses before PTP has the opportunity to discover, raise, and present them. The very least the Wineries could do is confer with PTP before doing so.

It is clear the Wineries knowingly failed to confer with PTP before filing the motion to strike the offer of proof. PTP can only speculate *why* the Wineries would intentionally exclude PTP from its pre-filing inquiry – PTP opposition would not prevent the Wineries from filing the motion anyway. Regardless, the Court should deny the motion to strike for this reason.

CONCLUSION

The Court should deny the motion to strike because of its numerous fatal flaws. Not the least of these is the fact that PTP has only recently been made a full party, has not had the opportunity to do any discovery, was not a party when the motion in limine was brought, and would be prejudiced going forward by striking these affidavits at this juncture. PTP is also disadvantaged in addressing the motion in limine and proffered testimony for the first time in this responsive posture.[4] PTP respectfully requests that the Court deny the Wineries' motion to strike.

[4] For the record, PTP opposes the assertion that the affidavits are based on hearsay, lack personal knowledge, contain improper lay opinions, and are irrelevant because the witnesses testified to their observations and conclusions based on personal and professional knowledge and experience, and it is premature yet to determine relevance.

Respectfully submitted,

Date: September 14, 2022

By: _____

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CERTIFICATE OF SERVICE

I, Tracy Jane Andrews, hereby certify that on the 14th day of September, 2022, I electronically filed the foregoing document with the ECF system which will send a notification of such to all parties of record.

By: _____
Tracy Jane Andrews (P67467)

CERTIFICATE OF COMPLIANCE WITH LOCAL RULE 7.3(b)(i)

This Brief complies with the word count limit of L. Ci. R. 7.3(b)(i). This brief was written using Microsoft Word version 2016 and has a word count of 3,384 words.

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Exhibit A

New Prods. Corp. v. Tibble (In re Modern Plastics Corp.)

United States Bankruptcy Court for the Western District of Michigan

March 14, 2016, Decided; March 14, 2016, Filed

Case No. DK 09-00651, Chapter 7, Adversary Pro. No. 13-80252

Reporter
2016 Bankr. LEXIS 4746 *

In re: MODERN PLASTICS CORPORATION, Debtor.NEW PRODUCTS CORPORATION and UNITED STATES OF AMERICA, Plaintiffs, v. THOMAS R. TIBBLE, individually and in his capacity as Chapter 7 Trustee, and FEDERAL INSURANCE COMPANY, Defendants.

Counsel: [*1] For Modern Plastics Corporation, Debtor (09-00651-swd): Denise D. Twinney, Robert F. Wardrop, II, Wardrop & Wardrop, P.C., Grand Rapids, MI.

For Laura J. Genovich, Trustee (09-00651-swd): Elisabeth M. Von Eitzen, Warner Norcross + Judd LLP, Grand Rapids, MI.

For U.S. Trustee (09-00651-swd) (13-80252-swd): Dean E. Rietberg, Trial Attorney, Office of the US Trustee, Grand Rapids, MI.

For New Products Corporation, Plaintiff (13-80252-swd): Melissa L. Demorest LeDuc, LEAD ATTORNEY, Demorest Law Firm PLLC, Royal Oak, MI.

United States of America, Plaintiff (13-80252-swd), Pro se.

For Thomas R. Tibble, Defendant (13-80252-swd): John Chester Fish, James, Dark & Brill, Kalamazoo, MI; Timothy Hillegonds, Warner Norcross & Judd, LLP, Grand Rapids, MI; Cody H. Knight, Rayman & Knight, Kalamazoo, MI; Elisabeth M. Von Eitzen, Warner Norcross & Judd LLP, Grand Rapids, MI.

For Federal Insurance Company, Defendant (13-80252-swd): John Chester Fish, James, Dark & Brill, Kalamazoo, MI, Cody H. Knight, Rayman & Knight, Kalamazoo, MI.

Judges: PRESENT: HONORABLE SCOTT W. DALES, Chief United States Bankruptcy Judge.

Opinion by: SCOTT W. DALES

Opinion

MEMORANDUM OF DECISION AND ORDER DENYING POST-TRIAL MOTIONS

I. BACKGROUND

At the conclusion of **[*2]** New Products Corporation's presentation of its case, and in response to the motion of defendants Thomas R. Tibble and the Federal Insurance Company for judgment on partial findings under Rule 52(c), Fed. R. Civ. P.,[1] the court entered its Findings of Fact and Conclusions of Law After Trial (ECF No. 272, the "Opinion After Trial") and Judgment in an Adversary Proceeding (ECF No. 273, the "Judgment") against New Products. Within fourteen days after entry of the Judgment, New Products filed the Motion of New Products Corporation for New Trial and to Alter and Amend Judgment (ECF No. 279,

[1] In this opinion, the court will refer to any of the Federal Rules of Civil Procedure or Federal Rules of Bankruptcy Procedure simply as "Rule __," relying on the numbering convention in each set of rules to identify the particular rule at issue. In addition, for convenience, capitalized terms in this opinion shall have the meanings prescribed in the Opinion After Trial.

the "Rule 9023 Motion").

Shortly thereafter, New Products also filed a document entitled Offer of Proof (ECF No. 280, the "Offer of Proof"), prompting the Defendants to file the Defendants' Motion to Strike Plaintiff's Offer of Proof (ECF No. 283, the "Motion to Strike").

The court issued scheduling orders and, as a courtesy to counsel, enlarged New Products's time for filing various briefs. The Rule 9023 Motion and the Motion to Strike are fully briefed, and the court has decided to resolve them without oral argument. *See* Fed. R. Bankr. P. 1001.

The court will assume familiarity with its Opinion After Trial and its prior rulings in response to various pretrial motions **[*3]** under Rule 56. For the following reasons, the court will deny the Rule 9023 Motion and the Motion to Strike.

II. ANALYSIS

A. Rule 9023 Motion

The court entered its Judgment in response to the Defendants' motion under Rule 52(c) after concluding that there was no equity in the Property (at any time post-petition) that might have justified Mr. Tibble's spending estate resources to preserve it. In so finding, the court drew on its prior rulings made in response to numerous summary judgment motions under Rule 56 that substantially narrowed the issues to be tried. Arguing, essentially, that the "fix" was in before trial, New Products now seeks an order vacating the Judgment and setting a new trial, presumably to introduce additional evidence detailed in its Offer of Proof.

Motions for reconsideration under Rule 59, made applicable by Rule 9023, are properly regarded as either motions for a new trial, or motions to alter or amend judgment. *Compare* Fed. R. Civ. P. 59(a) *with* Fed. R. Civ. P. 59(e); *see also Feathers v. Chevron U.S.A., Inc.*, 141 F.3d 264, 268 (6th Cir. 1998). In the prayer for relief at the end of its brief in support of the Rule 9023 Motion, New Products asks for a new trial and for the court to vacate the judgment, rather than amend it.

The standard governing motions for new trial under Rule 59(a) generally requires the movant to show that "the verdict is against **[*4]** the weight of the evidence, the damages are excessive, there is newly discovered evidence, or the trial was otherwise unfair." *In re Quality Stores, Inc.*, 272 B.R. 643, 650 (Bankr. W.D. Mich. 2002) (citations omitted). Properly read, New Products contends that the court's decision is against the weight of the evidence and that the trial was unfair. The court does not agree.

The clear weight of the evidence established that there was no meaningful value in the Property, given the substantial encumbrances. Indeed, a pretrial stipulation -- signed by Plaintiff's counsel -- practically established as much. Unwilling or unable to procure a real estate appraiser to support its view of value, New Products offered an eleventh hour theory based on the scrap value of the metal and other materials removed from the Property. After carefully considering the Plaintiff's evidence, which did establish significant pre-assignment scrapping activity, the court nevertheless ruled against the Plaintiff. Even accepting its unusual theory of the Property's valuation, which largely depended on expert testimony that the court rejected at trial, the metal and other materials removed from the building were fully encumbered, so, in any event, their value would not have inured to **[*5]** the bankruptcy estate. Comparing the value of the liens, which far exceeded the value of the Property, and because no secured

party asked for adequate protection of that value, the court found that Mr. Tibble was justified in treating the Property as he did. In reaching this decision, the court also reiterated its earlier suggestion that precluding recovery under these circumstances "protects the estate and its unsecured creditors from an end-run around the statutory scheme" of adequate protection. *See* Opinion After Trial at p. 23. In other words, if both secured creditors, BOA and later New Products, failed to see fit to adequately protect their interest, they could hardly expect the Trustee (or, now, the court) to do so at the expense of the unsecured creditors.

Although New Products disagrees with the court on this point, a bankruptcy trustee's primary obligation runs to the estate and the unsecured creditors. Secured creditors have many arrows in their quiver, but the bankruptcy trustee is not one of them. Moreover, secured creditors have a duty to monitor their collateral, a duty that does not evaporate upon the commencement of bankruptcy proceedings. *See Peoples Banking Co. v. Derryberry (In re Peckinpaugh)*, 50 B.R. 865 (Bankr. N.D. Ohio 1985). As the court has noted **[*6]** throughout this proceeding, the bankruptcy concept of "adequate protection" of a secured creditor's interest in non-cash collateral, embodied in statute, requires a secured creditor to take steps to protect itself from post-petition diminution in value due to market factors and even, as here, destruction. *See Volvo Commercial Finance LLC the Americas v. Gasel Transp. Lines, Inc. (In re Gasel Transp. Lines, Inc.)*, 326 B.R. 683, 694 (B.A.P. 6th Cir. 2005) (Gregg, J., concurring); *In re Kain*, 86 B.R. 506, 513 (Bankr. W.D. Mich. 1988) (as to adequate protection, "if you don't ask for it, you won't get it"); *First State Bank v. Advisory Info. & Mgmt. Sys., Inc. (In re Advisory Info. & Mgmt. Sys., Inc.)*, 50 B.R. 627, 630 (Bankr.M.D.Tenn.1985) (when a creditor delays making its request for adequate protection, "'the cost of such delay [is] to be borne by the creditor'"). Indeed, as Judge Lundin observed in *Advisory Info. & Mgmt. Sys.*, the Bankruptcy Code precludes a "back door request" for payment from a secured creditor that sits on its rights. *See* 11 U.S.C. § 361(3) (precluding courts from awarding administrative expenses as an *ex post facto* substitute for adequate protection). The evidence admitted during the Plaintiff's presentation of its case established there was not enough value in the Property to justify an award of adequate protection, let alone a request for such relief. Therefore, the court rejects the Rule 9023 Motion to the extent premised on a contrary view of the weight of the evidence.

The Rule 9023 Motion, however, is also premised on **[*7]** suggestions that the trial was somehow unfair -- one of the grounds for granting a new trial under Rule 59. Certainly, a trial may seem unfair to a litigant who does not accept a court's legal conclusions. Here, in addition to rejecting the court's opinion about the relationship between Plaintiff's claims and adequate protection, New Products fundamentally disagrees with several of the court's pretrial rulings, including the following: (1) New Products may not assert a claim arising from any breach of duty that Mr. Tibble may have owed to Bank of America;[2] (2) New Products may not assert a breach of fiduciary duty owed to the bankruptcy estate and its unsecured creditors, given the appointment of a successor trustee;[3] and (3) the value of the

[2] New Products could have bargained to purchase Bank of America's tort claims against Mr. Tibble or the estate, but it did not. Rather, after reviewing the assignment document in response to one of the Defendants' summary judgment motions, the court concluded that New Products purchased only the Bank's claims against the Debtor and its property.

[3] *See* Memorandum of Decision and Order dated December 18, 2014 (ECF No. 69) at p. 19 ("if the court concludes at trial

Property, compared to the valid encumbrances, would largely determine whether Mr. Tibble acted reasonably.[4] These fundamental disagreements with the court's prior legal rulings should be saved for appeal, and not addressed through a motion to amend findings under Rule 59.

Also suggesting unfairness, New Products argues that the court should not have decided value without hearing from the Defendants' witnesses. Stated differently, New Products **[*8]** is now arguing that the Defendants should have put their case on first. If so, the Plaintiff should not have waited until after the hearing to make this argument, which would have required a departure from the usual presentation of proofs. Moreover, it is not enough simply to argue that the issue of value is in the nature of an affirmative defense -- an argument asserted rather late in the proceedings and never fully developed. In any event, the court addressed the argument when it concluded that, regardless of the locus of the burden of proof, the Plaintiff's own presentation -- indeed, its own stipulation -- persuaded the court that the valid liens greatly exceeded the Property's value. By doing so, the Plaintiff either failed to demonstrate an essential element of its case or, under its own under-developed theory, it successfully established one of the Defendants' defenses. Either way, the case was ripe for the Defendants' Rule 52 motion.

In a similar vein, New Products apparently asserts a right to cross-examine witnesses whom the Defendants never called, as well as a right to cross-examine Mr. Tibble -- whom New Products itself called. There is no unfairness in rejecting these arguments. **[*9]** Just like the Plaintiff, the Defendants have a right to manage their own case. The lack of opportunity for the Plaintiff to cross-examine the Defendants' witnesses would have occurred if, after the Plaintiff's proofs, the Defendants simply rested. By making a Rule 52 motion, this is essentially what they did. The Defendants are not required to provide witnesses at all, let alone to provide witnesses solely to give the Plaintiff an opportunity to cross-examine.

By suggesting that the court unfairly made decisions centered on matters outside the record, New Products ignores the court's authority to draw inferences based on evidence in the record, renewing an argument premised on its mistaken view of a court's role under Rule 52(c) in a bench trial. *See, e.g., Fisher v. Prime Table Restaurant & Lounge, Inc. (In re Lake States Commodities, Inc.)*, 271 B.R. 575, 588 (Bankr. N.D. Ill. 2002) (unlike a motion for directed verdict, a court does not draw inferences in favor of either party under

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that the Trustee breached only his duty to the unsecured creditors (*i.e.*, to the estate), the court will not permit a single unsecured creditor to enjoy the entire recovery for such injuries, given the derivative nature of an unsecured creditor's injury"). Shortly after this ruling, Mr. Tibble resigned as trustee, implicitly accepting the court's suggestion that he might not be disinterested in light of New Products's claims against him and the estate. Accordingly, the United States Trustee appointed Laura Genovich as his successor, and since her appointment she has participated fully in this adversary proceeding. She is the representative of the estate and the person with standing to sue Mr. Tibble for any breach of duty he owed to the estate during his tenure. *See* 11 U.S.C. § 323; *see also* Fed. R. Bankr. P. 2012(b) and 6009. New Products never sought, and the court never granted, derivative standing. Instead, at several junctures in this proceeding, the court inquired whether the current trustee, Laura Genovich, intended to assert claims against Mr. Tibble for breach of any duty to the estate. She said the estate has no such claims, and as the estate's representative, she makes this determination in the first instance. 11 U.S.C. § 323(a); Fed. R. Bankr. P. 2012(b) and 6009.

[4] The important and dispositive role that the Property's value played in the court's decision could hardly have taken New Products by surprise. Indeed, to prevent surprise, the court suggested that an adverse ruling on value could result in judgment against New Products under Rule 52(c). New Products mischaracterizes the court's reference to Rule 52 as an invitation; it was a warning.

Rule 52(c), but instead weighs the evidence for itself). Almost without exception, everything the court admitted into evidence during the Plaintiff's case in chief came in without objection *and* for all purposes, as the court made quite clear. Indeed, the Defendants' response brief does a good job of marshaling the record citations in support of the court's **[*10]** conclusions. Regardless, Rule 59 is not a platform to correct strategic decisions that a litigant made at trial but has since come to regret.

The court has carefully considered the Rule 9023 Motion, the Defendants' response, and New Products's reply, and sees no reason to set aside the Judgment or conduct a new trial.

B. Motion to Strike Offer of Proof

The Defendants move to strike New Products's Offer of Proof, arguing that it "is nothing more than an attempt to re-argue already decided matters of law, present new evidence after the close of proofs and to pad the record for an eventual appeal." *See* Motion to Strike at p. 2. In other words, the Defendants are concerned that the Offer of Proof will either affect the decision of this court or a reviewing court.

As explained above, this court will not depart from its prior decisions or in any way change the Judgment, Offer of Proof or no Offer of Proof. Whether the court grants or denies the Motion to Strike, therefore, will have no impact on the outcome of the case at the trial level: the Judgment stands. To the extent the Defendants are concerned about the effect of the Offer of Proof on any reviewing court, unless the court somehow seals the docket from **[*11]** the appellate court's review, it is difficult to see how granting the Motion to Strike would affect that review either. Granting the Motion to Strike, in other words, is pointless and inconsistent with appellate review.

Finally, the court's decision to bifurcate the issues for trial -- focusing first on the Property's value and the implications of value on the Trustee's fulfillment of his duties -- arguably distinguishes this case from the authorities the Defendants cite in their Motion to Strike, none of which involved the court's use of its authority under Rule 42(b). The decision to bifurcate the issues had the effect of limiting the evidentiary presentation more dramatically than the typical situation addressed in the cases the Defendants cite, involving discrete evidentiary rulings in a trial which the court has not limited under Rule 42(b). In other words, given the court's decision to try the value-related issues first, the Offer of Proof may have greater significance on appeal than in a case such as any upon which the Defendants rely.

For these reasons, the court will deny the Motion to Strike.

III. CONCLUSION AND ORDER

Certainly, as the court has already noted, Mr. Tibble could have avoided the aggravation **[*12]** and expense of this proceeding by promptly abandoning the Property, but his failure to abandon the Property while it served as Bank of America's collateral (*i.e.*, before the assignment) did not harm New Products. And, because the court has concluded that New Products did not succeed to any claims that Bank of America had against Mr. Tibble, New Products lacks standing to assert any such claims (even assuming, contrary to the evidence, their merit). Finally, given the conclusions the court reached about value, encumbrances, and other issues raised during the trial or in the Defendant's motion for judgment on partial findings, the court perceives no other basis for relief on the merits of the Plaintiff's Amended Complaint.

New Products and its counsel have prosecuted its claims throughout the main bankruptcy case and this adversary proceeding, mostly at undue expense to themselves and others. The litigation is now over, at least in this court. The Plaintiff may seek any necessary correction of the court's supposed errors on appeal if so advised.

NOW, THEREFORE, IT IS HEREBY ORDERED as follows:

1. The Rule 9023 Motion (ECF No. 279) is DENIED; and

2. The Motion to Strike (ECF No. 283) is DENIED.

IT **[*13]** IS FURTHER ORDERED that the Clerk shall serve a copy of this Memorandum of Decision and Order pursuant to Fed. R. Bankr. P. 9022 and LBR 5005-4 upon Melissa L. Demorest, Esq., Mark S. Demorest, Esq., John Chester Fish, Esq., Cody H. Knight, Esq., Matthew Cooper, Esq., Elizabeth M. Von Eitzen, Esq., Mathew Cheney, Esq., and the United States Trustee.

[END OF ORDER]

IT IS SO ORDERED.

Dated March 14, 2016

/s/ Scott W. Dales

Scott W. Dales

United States Bankruptcy Judge

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Exhibit B

Baker v. Shelby County Gov't

United States District Court for the Western District of Tennessee, Western Division

January 28, 2008, Decided; January 28, 2008, Filed

No. 05-2798 B/P

Reporter
2008 U.S. Dist. LEXIS 6010 *

PATRICIA BAKER, et al., Plaintiffs, v. SHELBY COUNTY GOVERNMENT, SHELBY COUNTY SHERIFF'S DEPARTMENT, Defendants.

Prior History: Baker v. Shelby County Gov't, 2008 U.S. Dist. LEXIS 5998 (W.D. Tenn., Jan. 28, 2008)

Counsel: **[*1]** For Patricia Baker, Autrty Henry, Mary Holman, Sherman Lackland, Earnestine Pugh, Marguerite Richmond, Kenneth Woodard, Faye Wright, attorney at law glenwood p roane, sr., Plaintiffs: Glenwood Paris Roane, Sr., LEAD ATTORNEY, GLENWOOD P. ROANE, SR. & ASSOCIATES, Memphis, TN.

Sherman Lackland, Plaintiff, Pro se, Memphis, TN.

For Shelby County Government, Defendant: Louis P. Britt, III, LEAD ATTORNEY, FORD & HARRISON, LLP- Ridge Lake Blvd., Memphis, TN; Marcy Ingram, LEAD ATTORNEY, SHELBY COUNTY ATTORNEY'S OFFICE, Memphis, TN; Emily B Bjorkman, FORD & HARRISON LLP, Memphis, TN.

For Shelby County Sheriff's Department, Defendant: Louis P. Britt, III, LEAD ATTORNEY, FORD & HARRISON, LLP- Ridge Lake Blvd., Memphis, TN; Marcy Ingram, LEAD ATTORNEY, SHELBY COUNTY ATTORNEY'S OFFICE, Memphis, TN.

Judges: TU M. PHAM, United States Magistrate Judge.

Opinion by: TU M. PHAM

Opinion

ORDER GRANTING IN PART AND DENYING IN PART DEFENDANTS' MOTION TO STRIKE EXHIBITS AND AFFIDAVITS

Before the court by order of reference is defendants' Motion to Strike Exhibits and Affidavits Attached to Plaintiffs' Response to Defendant's Motion for Summary Judgment, filed October 23, 2007. (D.E. 68). Plaintiffs filed their response in opposition on November **[*2]** 9, 2007. Defendants filed a reply to plaintiffs' response on November 27, 2007. For the reasons below, the motion is GRANTED in part and DENIED in part.

I. BACKGROUND

On October 25, 2005, plaintiffs filed their complaint against the defendants alleging discrimination in connection with their reduction in rank, and bringing causes of action under Title VII of the Civil Rights Act of 1964, the Americans with Disabilities Act, the Age Discrimination in Employment Act, the Family and Medical Leave Act, 42 U.S.C. §§ 1981 and 1983, and various state tort claims. The court's scheduling order required the plaintiffs to disclose their experts by September 1, 2006, which was later extended to March 2, 2007. On March 2, plaintiffs

identified their experts, but did not provide an expert report as required under Fed. R. Civ. P. 26(a)(2)(B). On March 8, 2007, defendants' counsel sent a letter to plaintiffs' counsel requesting that plaintiffs provide their expert reports "no later than March 16, 2007, otherwise we will move the Court to strike plaintiffs' expert designations and preclude said expert witnesses from testifying at trial." On March 30, 2007, defendants' counsel sent another letter to plaintiffs' **[*3]** counsel stating that they still had not received plaintiffs' expert reports, and indicated that they (defendants) would file a motion with the court asking for an extension of defendants' expert disclosure deadline until thirty days after plaintiffs disclosed their expert reports. In that motion, defendants stated that "[a]s of March 30, 2007, Plaintiffs have not provided reports with its Rule 26(a)(1) disclosures; nor have they sought leave of court for an extension of time within which to provide the reports. . . . Without knowing the subject matter or substance of Plaintiffs' witnesses, Defendants cannot produce or provide rebuttal reports." On April 6, 2007, the court granted the defendants' motion for extension of time to disclose their experts. The court, however, did not extend plaintiffs' expert disclosure deadline.

On May 21, 2007, plaintiffs provided defendants with a copy of the curriculum vitae for their expert, Dr. David C. Sharp, but not a report. [1] On June 15, 2007, defendants filed a Motion to Compel Plaintiffs to Respond to Discovery Requests. Although the motion related to outstanding interrogatory responses and requests for production of documents, the defendants **[*4]** mentioned in their motion that they still had not received plaintiffs' expert reports. Defendants also stated in their motion that

> Plaintiffs' most recent correspondence asked Defendant to prepare a scheduling order requesting the Court for an additional thirty (30) days for the discovery and expert depositions. Counsel for Defendant has been unable to confer with Plaintiffs' counsel regarding said request, as Plaintiffs' counsel was called out of town and has been unavailable. Defendant is not opposed to allowing Plaintiffs an additional thirty (30) days to respond to Defendant's written discovery. However, Defendant cannot agree to Plaintiffs' request for an additional 30 days to take depositions. Plaintiffs have served no discovery requests and have yet to submit their expert witnesses' written reports that were due March 2, 2007. They have had ample time to complete these reports and take expert depositions.

Plaintiffs never filed a response to the defendants' motion to compel. As a result, the court granted the motion and ordered the plaintiffs to respond to the defendants' interrogatories and document requests by no later than July 15, 2007. [2] The parties shortly thereafter completed discovery pursuant to the amended scheduling order, and defendants timely filed their motion for summary judgment on August 15, 2007. On October 4, 2007, plaintiffs filed their response to the summary judgment motion, which contained an affidavit and an expert report from Dr. Sharp. Although the report was apparently dated July 9, 2007, plaintiffs had not disclosed the report and defendants had not seen the report (or even knew of its existence) prior to October 4. [3]

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[1] Dr. Sharp is an economist who offers the opinion that the appraisal system employed by the defendants to demote the plaintiffs was "seriously flawed and unevenly applied" in that African-Americans over the age of 40 appeared to have been significantly under-represented among **[*5]** those reinstated and significantly over-represented among those demoted.

[2] Pursuant to the scheduling order, the discovery period closed on June 15, 2007.

[3] On November 1, 2007, plaintiffs filed an amended initial

In addition, plaintiffs' summary judgment response included affidavits from plaintiffs Mary Holman, Autry Henry, Kenneth Woodard, Earnestine Pugh, Marguerite Richmond, and Faye Wright; closed **[*6]** promotional job postings in the Sheriff's Office during June and July of 2004 (Ex. 2); a memorandum dated June 29, 2004 relating to reassignment of positions due to a reduction in force (Ex. 7); a July 2004 document relating to a meeting involving the demotions (Ex. 8); memoranda dated December 2004 to Shift Captains and assignment rosters evidencing reassignments in their tour of duty (Ex. 16); a spread sheet comparing evaluation data for plaintiffs (Ex. 17); a spread sheet comparing the seniority of lieutenants and sergeants selected as candidates for job elimination during June 2004 (Ex. 21); and spread sheets comparing data for plaintiffs and other Sheriff's Office employees relating to the reduction in force (Exs. 22, 24, and 25).

In the present motion, defendants contend that the court should strike the above-mentioned affidavits and exhibits attached to plaintiffs' response to defendants' motion for summary judgment because (1) plaintiffs failed to timely disclose Dr. Sharp's expert report; (2) plaintiffs failed to timely produce exhibits 16, 17, 22, 24, and 25 during the discovery period; [4] (3) exhibits 2, 7, 8, 16, 17, 21, 22, 24, and 25 are unauthenticated, lack foundation, **[*7]** and/or contain hearsay; [5] and (4) the affidavits contain conclusory allegations and are based on speculation.

II. ANALYSIS

A. Excluding Exhibits as Discovery Sanction Under Rule 37

Federal Rule of Civil Procedure 37 sets forth the consequences for a party's failure to provide Rule 26 initial disclosures and expert disclosures. "If a party fails to provide information or identify a witness as required by Rule 26(a) or (e), the party is not allowed to use that information or witness to supply evidence on a motion, at a hearing, or at trial, unless the failure was substantially justified or is harmless." Fed. R. Civ. P. 37(c). Rule 37 provides further that, in lieu of exclusion and upon motion and after affording an opportunity to be heard, the court may impose "other appropriate sanctions." *Id.* The Sixth Circuit has "established that Rule 37(c)(1) mandates that a trial court sanction a party for discovery violations in connection with Rule 26(a) unless the violations were harmless or were substantially justified." **[*8]** *Sexton v. Uniroyal Chemical Co., Inc.,* 62 Fed. Appx. 615, at *3 n.1 (6th Cir. 2003).

As set forth in this court's order granting defendants' Motion to Strike Plaintiffs' Amended Rule 26 Initial Disclosures (D.E. 94), the court has found that the plaintiffs' late disclosure of Dr. Sharp's expert report was not substantially justified or harmless. Specifically, the court found that plaintiffs did not provide defendants with Dr. Sharp's report until October 4 -- seven months after the expert disclosure deadline, more than two months after the extended time for plaintiffs to respond to discovery, and over a month after defendants filed their summary judgment motion. The court further found that the late disclosure was not harmless and defendants were prejudiced by the untimely disclosure, as the defendants did not have an opportunity to retain their own expert to rebut Dr. Sharp's opinions, they were prohibited by the late

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disclosure, naming Dr. Sharp as an expert witness.

[4] Defendants concede in their reply brief that exhibits 2, 7, 8, and 21 were timely produced.

[5] Defendants no longer seek to strike exhibit 18, which consists of copies of court opinions.

disclosure from deposing Dr. Sharp and challenging his opinions, and they filed their summary judgment motion without having the benefit of reviewing the report. For these same reasons, the court grants defendants' motion to strike Dr. Sharp's affidavit and expert report **[*9]** (Ex. 23) as a sanction under Rule 37.

With respect defendants' motion to strike exhibits 16, 17, 22, 24, and 25 under Rule 37, the motion is denied. First, it is unclear from the record whether plaintiff, in fact, produced Exhibit 16 in an untimely manner in violation of Rule 26(a)(1). In their response brief, plaintiffs state that the exhibit was timely produced as part of plaintiffs' initial disclosures in the group labeled "M. Shelby County documents re: Faye Wright." In their reply brief, defendants state generally that exhibits 16, 17, 22, 24, and 25 were not produced, but provide no further evidence or details regarding their non-production. Without more, the court cannot find that plaintiffs failed to timely produce exhibit 16. Moreover, exhibit 16 consists of documents created and distributed by the Sheriff's Office, and thus to the extent defendants did not timely receive these documents, the court finds that the late disclosure is harmless and certainly does not warrant the sanction of exclusion of evidence.

Second, the spread sheets in exhibits 17, 22, 24, and 25 were created by plaintiffs from data provided by plaintiffs as part of their initial disclosures or from data provided **[*10]** by the defendants, which defendants do not dispute. Although the plaintiffs should have provided the defendants with these spread sheets sooner, the court finds that the late disclosure is harmless and does not warrant the sanction of exclusion under Rule 37.

B. Motion to Strike Affidavits and Exhibits

In addition to seeking exclusion of evidence under Rule 37, the defendants also move to strike the plaintiffs' affidavits and exhibits 2, 7, 8, 16, 17, 21, 22, 24, and 25 because they lack foundation, are unauthenticated, and/or contain hearsay. Motions to strike are governed by Rule 12(f) of the Federal Rules of Civil Procedure, and are generally disfavored. *Scott v. The Dress Barn, Inc.,* No. 04-1298-T/An, 2006 U.S. Dist. LEXIS 19501, 2006 WL 870684, at *1 (W.D. Tenn. March 31, 2006). Rule 12(f) authorizes the court to order stricken from "any pleading any insufficient defense or any redundant, immaterial, impertinent, or scandalous matter." *Id.* Rule 7(a) defines a "pleading" as a complaint; an answer to a complaint; an answer to a counterclaim; an answer to a crossclaim; a third-party complaint; an answer to a third-party complaint; and a reply to an answer. Fed. R. Civ. P. 7(a). Affidavits and exhibits are not "pleadings" **[*11]** that are subject to a motion to strike under Rule 12(f). *Scott,* 2006 U.S. Dist. LEXIS 19501, 2006 WL 870684, at *1 (denying motion to strike affidavit attached to plaintiff's response to motion for summary judgment); *see also Fox v. Michigan State Police Dept.,* 173 Fed. Appx. 372, 375 (6th Cir. 2006) (stating that "[e]xhibits attached to a dispositive motion are not 'pleadings' within the meaning of Fed. R. Civ. P. 7(a) and are therefore not subject to a motion to strike under Rule 12(f)."); *Lombard v. MCI Telecommunications Corp.,* 13 F. Supp. 2d 621, 625 (N.D. Ohio 1998) (stating that there is no basis in the Federal Rules for striking an affidavit; while the court should "disregard" inadmissible evidence, it should not strike that evidence from the record). Thus, defendants' motion to strike the affidavits and exhibits is denied. [6]

[6] Defendants also argue that the plaintiffs' affidavits should be stricken because they contain statements that are conclusory and speculative, and are contradicted by plaintiffs' deposition testimony. Although the court may consider these arguments

III. CONCLUSION

For the reasons **[*12]** above, the defendants' motion to strike is GRANTED in part and DENIED in part.

IT IS SO ORDERED.

s/ Tu M. Pham

TU M. PHAM

United States Magistrate Judge

January 28, 2008

Date

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in deciding the summary judgment motion, they do not provide a basis for the court to strike the affidavits.

Exhibit C

Gannett Outdoor Co. v. Feist

United States District Court for the Western District of Michigan

February 26, 1990, Decided and Filed

File No. G89-472

Reporter
1990 U.S. Dist. LEXIS 2423 *

GANNETT OUTDOOR COMPANY OF MICHIGAN, Plaintiff, v. LARRY FEIST and PLAINFIELD TOWNSHIP, Defendants

Opinion by: [*1] ENSLEN

Opinion

OPINION

RICHARD A. ENSLEN, UNITED STATES DISTRICT JUDGE

This case is before the Court on summary judgment motions by both parties. Defendants made a November 15, 1989 motion for summary judgment based on Michigan's Governmental Immunity Statute which they argue precludes liability in this action. Plaintiff filed a November 16, 1989 motion for summary judgment, contending that it is entitled to judgment as a matter of law on Count I, an action under 42 U.S.C. § 1983.

This case involves dispute over the interpretation and application of zoning laws in Plainfield Township. Plaintiff Gannett Outdoor Company of Michigan ("Gannett Company") is an Arizona corporation with its principal place of business in the City of Detroit. Defendants are Plainfield Township and Larry Feist, the building inspector for the township. Plaintiff Gannett Company is in the business of outdoor advertising. In 1988, plaintiff applied for a permit to erect an off-site sign on property at 5285 Plainfield Avenue. Defendant Larry Feist, as building inspector, denied plaintiff's request. Plaintiff then appealed Feist's decision to the Plainfield Township Zoning Board of Appeals. On April 18, 1989, the Zoning **[*2]** Board of Appeals voted to uphold Feist's denial of the permit.

This lawsuit followed. Plaintiff's complaint is in two counts. Count I alleges deprivation of First Amendment rights pursuant to 42 U.S.C. § 1983. In Count II, plaintiff alleges a § 1983 claim for denial of due process of law under the Fourteenth Amendment.

DISCUSSION

Background

Facts

Plaintiff is in the business of erecting and maintaining outdoor advertising signs, commonly known as billboards. Gannett's billboards are used for the display of truthful commercial and non-commercial messages. Gannett conducts business in and around Grand Rapids as well as in Detroit and Flint. Gannett is part of the nationwide standardized outdoor advertising industry and, with few exceptions, its signs conform with industry-wide sizes. [1] Plaintiff's Exhibit A, at para. 3. Standardizing sizes allows advertisers to use

[1] The common types of signs are posters, which are 12' by 25', and bulletins, which are 14' by 48'.

Gannett's billboards economically for nationwide campaigns and permits local advertisers to design one message that can be used on many billboards without change. Id. at para. 5. Gannett's billboards are commonly referred to as "off-premises or "off-site" signs because they display messages that are unrelated **[*3]** to the activities on the property where they are located. Id. at para. 8.

Defendant Plainfield Township is a municipal corporation, existing under the laws of the State of Michigan, and is located in Kent county, just north of Grand Rapids. Plainfield is approximately 26 square miles in area and has a population of approximately 25,000. Plainfield regulates signs through its zoning ordinance. Defendant Larry Feist has been the Building Inspector in Plainfield for approximately twenty years. Deposition of Feist, Plaintiff's Exhibit B, at 6.

In 1988, Gannett applied to Feist for a permit to erect an off-site sign on property it had leased in Plainfield, at a location zoned industrial. Id. at 8-11. See also Plaintiff's Exhibit C. Feist denied Gannett the permit, stating that no more than one principal use could be located on the premises and there was already a principal use on the property. Id. at 10-11. See also Plaintiff's Exhibit D. [2] To reach this conclusion, Feist had to and did interpret off-site signs as principal uses under the Ordinance. Id.

[*4] Gannett appealed Feist's decision to the Plainfield Township Zoning Board of Appeals ("Board") on the ground that all signs were defined in the Ordinance as "accessory to the principal use." See Ordinance, Chapter II § 2.54. On April 18, 1989, the Board voted to deny Gannett's appeal. Plaintiff's Exhibit F. However, the vote was not unanimous and one member, Suzanne Slot, stated that "[w]hen the zoning ordinance was written, it was not intended that billboards were to be the only use that could be made of a parcel." Id. Slot also stated that "virtually all the existing signs were located on parcels containing a building. Also, some of these billboards had been erected since the adoption of the present ordinance." Id.

Summary Judgment Standard

In considering a motion for summary judgment, the narrow questions presented to this Court are whether there are "no genuine issues as to any material fact and [whether] the moving party is entitled to judgment as a matter of law." F. R. Civ. Proc. 56(c). The Court cannot try issues of fact on a Rule 56 motion, but is empowered to determine only whether there are issues to be tried. In re Atlas Concrete Pipe, Inc., 668 F.2d **[*5]** 905, 908 (6th Cir. 1982).

The moving party has a right to summary judgment where that party is able to demonstrate, prior to trial, that the claims of the plaintiff have no factual basis. Celotex Corporation v. Catrett, 477 U.S. 317 (1986). As the Supreme court held in Celotex, ". . . the plain language of Rule 56(c) mandates the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." Id. at 322. Moreover, the Court must read the allegations of the complaint in the light most favorable to the non-moving party. Windsor v. The Tennessean, 718 F.2d 155, 158 (6th Cir. 1983). Where, as here, the moving party has

[2] Without a building permit, the Plainfield Township Zoning Ordinance ("Ordinance") prohibits the erection of any structure in Plainfield. See Plaintiff's Ex. E (Chapter XXIX, Section 29.02 of Ordinance).

supported its motion with documents, the non-moving party may not rest on the mere allegations or denials of the pleadings, but must set forth "specific facts showing that there is a genuine issue of trial." F. R. Civ. Proc. 56(e); Davis v. Robbs, 794 F.2d 1129, 1130 (6th Cir. 1986).

The standard for granting a motion for summary judgment is essentially **[*6]** the same as that for granting a motion for a directed verdict. "The judge's inquiry, therefore, unavoidably asks whether reasonable jurors could find by a preponderance of the evidence that the plaintiff is entitled to a verdict. . . ." Anderson v. Liberty Lobby, Inc., 477 U.S. 242 (1986). The moving party is not entitled to summary judgment where there is sufficient evidence to allow a reasonable jury to return a verdict for the non-moving party. Id. at 211-212. "The evidence of the nonmovant is to be believed, and all justifiable inferences are to be drawn in his favor." Id. at 216. With this standard in mind, the Court will review the arguments presented by both parties.

Governmental Immunity

In their summary judgment motion, defendants argue that they are immune from any liability in this action under the Michigan Governmental Immunity statute. See Mich. Comp. Laws § 691.1407. That statute provides in pertinent part:

691.1407. Governmental immunity from tort liability

Sec. 7. 1) Except as otherwise provided in this act, all governmental agencies shall be immune from tort liability in all cases wherein the government agency is engaged in the exercise **[*7]** or dicharge of a governmental function. Except as otherwise provided in this act, this act shall not be construed as modifying or restricting the immunity of the state from tort liability as it existed before July 1, 1965, which immunity is affirmed.

Id. Defendants argue that the issuance of a building permit is a "governmental function" under this statute, citing Trommater v. Michigan, 112 Mich. App. 459 (1982). Trommater states:

In determining whether an activity is a 'governmental function', the primary focus is on whether the purpose, planning, and carrying out of the activity can be accomplished effectively only by the government.

112 Mich. at 462.

Plaintiff contends that defendants' reliance on the governmental immunity statute is misplaced because the action arises under the U.S. Constitution and the federal remedy found in 42 U.S.C. § 1983. Indeed, it is well-established that states have no power to bestow any immunity from responsibility springing from federal law. Scheuer v. Rhodes, 416 U.S. 232 (1974). The Supreme Court in Scheuer wrote that "The state has no power to impart to [a state official] any immunity from responsibility under federal law." **[*8]** Id. at 237 (quoting Ex Parte Young 209 U.S. 123, 159-60 (1908)).

Thus the Supreme Court has found that states may not provide immunity to state officials in cases brought under 42 U.S.C. § 1983. See Martinez v. California, 444 U.S. 278 (1980). The Martinez Court was clear that conduct unlawful under 42 U.S.C. § 1983 "cannot be immunized by state law." Id. at 284 n.8. Whether immunity exists is instead a question of federal law under these circumstances. See Hampton v. Chicago, 484 F.2d 602 (7th Cir.), cert. denied, 415 U.S. 917 (1973). The

Supreme Court recognized that a different rule would have undesirable results, stating:

A construction of a federal statute which permitted a state immunity defense to have controlling effect would transmute a basic guarantee into an illusory promise; and the Supremacy Clause of the Constitution insures that the proper construction may be enforced.

Martinez, 444 at 284 n.8. [3]

[*9] It is also well established in both federal and state courts that the Michigan Governmental Immunity Statute is limited to tort actions arising under state law and does not apply to actions brought under 42 U.S.C. § 1983. Gordon v. Sadasivan, 144 Mich. App. 113, 119-120 (1985), (citing Central Advertising, Inc v. Novi, 91 Mich. App. 303 (1977)); Moore v. Detroit, 128 Mich. App. 491 (1983). See also Huron Valley Hosp. Inc. v. City of Pontiac, 686 F. Supp. 608, 610 (E.D. Mich. 1988) ("state immunity law for defendants under Ross v. Consumers Power Co., 420 Mich. 567 (1984), is irrelevant to the § 1983 analysis.").

It is proper therefore, based on the foregoing, to deny defendants' motion for summary judgment based on the state immunity defense. I will enter such an order.

Section 1983

On the § 1983 action in Count I, plaintiff asks this Court to grant summary judgment in its favor.

A claim under § 1983 arises as follows:

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory . . . subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to **[*10]** the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured. . . .

42 U.S.C. § 1983. Thus, this section creates a civil remedy against governmental violation of federal rights. Plaintiff contends that defendants deprived Gannett Company of its First Amendment rights by denying the company a permit to which it was entitled under the express provisions of the ordinance. Defendant Feist's alleged liability is premised on his own acts which caused the violation of Gannett's rights under the First Amendment. Public officials can be liable for their own actions which violate the First Amendment. E.g., Glasson v. City of Louisville, 518 F.2d 899 (6th Cir.), cert. denied, 423 U.S. 930 (1975). Defendant Plainfield Township's liability is premised on its adoption and execution of an unconstitutional ordinance. See Monell v. Department of Social Services, 436 U.S. 658 (1978).

Defendants' interpretation of Plainfield's zoning ordinance is inconsistent with basic principles of statutory interpretation. To begin with, absent unusual circumstances, a court must apply the plain meaning of a statute or ordinance. **[*11]** Miller v. C.I.R., 733 F.2d 399 (6th Cir. 1984). Thus a court should look first to the language of a statute, and give it its ordinary meaning absent strong reasons to the contrary. Henry T. Patterson Trust v. United States, 729 F.2d 1089 (6th Cir. 1984); Anness v. United Steelworkers of America, 707 F.2d

[3] See also, Daniels v. Williams, 474 U.S. 337, 361 n. 20 (1986) ("The fact that an immunity statute does not give rise to a procedural due process claim does not, of course, mean that a state's doctrine of sovereign immunity can protect conduct that violates a federal constitutional guarantee: obviously it cannot.").

917 (6th Cir. 1983). [4] In addition, different portions of the same statute should be read and interpreted consistent with each other, avoiding conflicts. United States v. Stauffer Chemical Co., 684 F.2d 1174, aff'd, 464 U.S. 165 (1982). Consistent with this principal, a statute should be read as a whole, not piecemeal or with a given section in isolation. United States v. Firestone Tire & Rubber Co., 455 F. Supp. 1072 (D.D.C. 1978). A court must--where possible--give effect to every phrase in a statute so that no part is rendered superfluous. National Insulation Transportation Comm. v. I.C.C., 683 F.2d 533 (D.D.C. 1982). Michigan law is consistent with this principal. See, e.g., Deshler v. Grigg, 90 Mich App. 49, 53-54 (1979) ("Courts are bound to arrive at a reasonable construction of a statute and to reconcile seeming inconsistencies, striving to **[*12]** give effect to all the provisions of the statute . . . Every word of a legislative enactment is presumed to have some force and meaning. . . .") (emphasis in original).

The controversy in this case stems from an interpretation by defendants which equates all off-site signs with the classification of a principal use. In assessing this interpretation, the Court looked at the following terms as defined by the ordinance. Under Chapter II § 2.09 of the Plainfield Zoning Ordinance, see Plaintiff's Brief in Support, Exhibit E (Nov. 16, 1989), "billboard" (or "signboard") means:

Any structure or portion thereof on which lettered, figured, or pictorial matter is displayed, not related to the premises or the nature of the business conducted thereon or the products primarily sold or manufactured thereon. This definition shall not be held to include signs used for official notices issued by a court or public office. See also the definition "sign".

A "sign" under the ordinance is **[*13]** defined as:

Any announcement, declaration, illustration, or insignia that is accessory to the principal use of a building or premises and is used to identify, advertise, or promote the interest of any person, product or project, when the same is placed, painted or displayed out of doors in view of the general public, provided however, that the following shall not be included in the application of the regulations herein:

A. Signs not exceeding one square foot in area and bearing only property numbers, names or occupants of premises, or other identification of premises not having commercial connotations.

B. Flags and insignia of any government except when displayed in connection with commercial promotion.

C. Legal notices, identification, informational, or directional signs which are required or authorized by law.

D. Signs directing and guiding traffic and parking on public or private property, but bearing no advertising matter.

Id. at Chapter II § 2.54. "Structure" refers to the following:

Anything constructed or erected with a fixed location on the ground, or attached to something having a fixed location on the ground, including but without limiting the generality **[*14]** of the foregoing, advertising signs, billboards, tennis courts, swimming pools, and pergolas. Fences, sidewalks, and driveways shall not be considered structures.

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[4] Where a statute is plain and unambiguous on its face, a court generally need not look to legislative history as a guide to meaning. Tennessee Valley Authority v. Hill, 437 F.2d 153 (6th Cir. 1978).

Id. at Chapter II § 2.61.

According to the Plainfield ordinance, signs are classified as one of two types, either an "on site" sign or an "off site" sign. A sign on site is "a sign relating in this subject matter to the premises on which it is located, or to products, accommodations, services or activities on the premises." Id. at Chapter II § 2.55. An off site sign is simply a sign "other than an on site sign." Id. at Chapter II § 2.56.

For zoning purposes, the ordinance also distinguishes between a "principal use", which is "the primary or predominate use of the premises", id. at Chapter II § 2.50, and an "accessory use", one that is "naturally and normally incidental, ancillary, and subordinate to the main use of the premises." Id. at Chapter II § 2.02. [5] See also Deposition of Feist, Plaintiff's Exhibit B, at 11-12.

[*15] In Plainfield Township, off-site signs are only permitted in districts zoned industrial and what is called C-5 commercial. Id. at Chapter XXV §§ 25.08 B.6, C.2. Gannett Company's signs are considered off site signs, as a Gannett sign on the property of an industrial plant, for example, might advertise Ford automobiles one month, then solicit contributions for United Fund the next month.

Defendants would have this Court interpret the Plainfield ordinance to say that an off site sign or billboard is not an accessory use, and must be a principal use. Given this position, defendants have prohibited plaintiff from displaying its off site sign on the Plainfield Avenue site, because with Kales Collision Service, there would then be two principal uses on one site which is prohibited by § 3.20 of the ordinance. See id. Exhibit D (Feist letter); Exhibit G (Annis letter). Section 3.20 of Chapter III reads as follows:

Principal Use No lot or part of a recorded plat and no parcel of unplatted land shall be devoted to more than one principal use except as herein permitted.

As the Court sees it, there are essentially two semantic categories represented by the following two sets of **[*16]** terms in the ordinance. The terms on site and off site refer to the content of billboards and signs, in that when the content is related to a business on the site, a billboard or sign is classified as on site, and when the content is unrelated to the business, it is called off site. So content is the first category. The second category is the degree of or importance of the use on the site, with a primary or foremost use being called principal and a incidental or subordinate use being accessary.

Thus the issue of whether defendants correctly apply the ordinance when they state that "all off site signs or billboards are principal uses" depends on whether degree or importance of use on the site is related to content. If unrelatedness (and off site status) between the content of a sign or billboard and the land necessarily means the use is principal, then defendants are correct. Nowhere, however, is this suggested by the ordinance. Defendants admit this. See Deposition of Feist, Plaintiff's Exhibit B, at 17 ("Q. And there's no mention in the ordinance that off site signs are not accessory uses? A. That's correct.") At another point in defendant Feist's testimony, he is unable **[*17]** to produce explicit language from the ordinance which states that off site signs or billboards are necessarily defined as principal uses. See id. at 18-19. [6] Thus the plain

[5] According to plaintiff, the paradigm of an accessory use is a private garage used in the ordinary manner in connection with a residential dwelling, a garage being a separate structure that is considered subordinate to the house on the lot. Brief in Support, at 5 (Nov. 16, 1989).

[6] Feist says at one point that "the billboard is going to tell you

meaning of the ordinance itself and the failure of the ordinance to state that any off site (or unrelated) sign or billboard is necessarily defined as a principal use both suggest that no such interpretation is proper. [7]

In fact, to the contrary, in Chapter II § 2.54, the ordinance places all signs--without limitation--in the category of accessory uses. [8] Thus to interpret the ordinance **[*18]** as defendants have done would be to create conflicting passages in the same ordinance, a result clearly undesirable by well-accepted principles of statutory interpretation. The Court will likewise refrain from concluding that much of the content in § 2.54 has no meaning and is mere surplusage.

Further, when Plainfield Township sought to limit the location for off site signs, it did so specifically in Chapter XXV by explicitly limiting off site signs to industrial and C-5 commercial districts. The lack of a similar explicit requirement or provision stating that off site signs are principal uses, thus only able to be placed on vacant land where no other principal use is present, is strong evidence that no such interpretation was **[*19]** contemplated or intended by Plainfield Township.

Finally, should the Court decide to resort to legislative history to help interpret the Plainfield ordinance, plaintiff has provided evidence--and defendant has not--which indicates that the ordinance was not designed to be interpreted in the manner defendants have with regard to plaintiff Gannett Company's signs. To begin with, the planning commission drafted the ordinance here with no outside consultants. Deposition of Feist, Plaintiff's Exhibit B, at 26. Defendant Feist could not remember any discussion in which the planning commission discussed or acted upon a suggestion to require billboards or signs to be a principal use, the only principal use, on a property. Id. at 27. In addition, plaintiff sets forth evidence suggesting that the planning commission did not intend for all off site signs and billboards to be principal uses. Plaintiff's Brief in Support, Exhibit F, at 2 (Minutes of Board of Appeals); Deposition of Slot, Plaintiff's Exhibit I, at 12. [9] A former member of the Plainfield Township Planning Commission at the time it enacted the current zoning ordinance in 1982, Suzanne Slot testified as follows:

Q. That opinion, **[*20]** I believe, states that [an] off site sign should be considered a principal use so that no other [principal] use could be permitted on the same property. Is that your understanding of it?

A. That's my understanding of it.

Q. And my reading of these minutes indicates that you didn't agree with that opinion.

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that it's not an accessory". Id. at 18-19. However, looking at the definition of billboard one sees that it addresses only content, that is it states that a billboard is a structure unrelated to the premises or the nature of the business or the products made or sold there.

[7] Nor does any provision of the ordinance limit off site signs or billboards to vacant industrial or C-5 commercial property. The only limitation on the location of off site signs is in Chapter XXV which limits off site signs to industrial and C-5 commercial districts.

[8] When asked about this, at one point defendant Feist admitted this. The testimony went as follows:

Q. So it would be fair to say that off site signs and billboards are essentially the same? . . .

A. Yes.

Q. In the definition of sign in [§] 2.54, . . . is it fair to say that the definition of sign includes--or any sign is an accessary use? . . .

A. It doesn't say any sign, but any announcement, I believe, accessory to the principal use is a sign.

[9] Slot also testified that at the time the ordinance was passed, virtually all the existing billboards were located on parcels containing a building, and since the time the ordinance was adopted, some have been erected in this manner. Plaintiff's Brief in Support, Exhibit F, at 2.

A. Right.

Q. What about the opinion did you not agree with?

A. I personally did not agree with it because I personally did not understand it that way when we drafted the ordinance. That was not the way I thought is was being drafted.

Q. What was your understanding of how the ordinance had been drafted?

A. It didn't occur to me that a billboard would be a principal use and therefore the only use on a parcel.

Q. You mean an off site billboard?

A. Right.

Thus I find that under the Plainfield Township Zoning Ordinance, classification of an off site sign or billboard as necessarily a principal **[*21]** use violates the clear implication of the language of the ordinance when read as a whole. Given this, plaintiff has shown that based on the evidence, there is no disputed issue of material fact, and plaintiff is entitled to judgment as a matter of law as to Count I. [10] Under Count I, plaintiff's § 1983 claim alleges that defendants deprived Plaintiff of its First Amendment rights by denying the company a permit based on an improper interpretation of the zoning ordinance. I will enter judgment in favor of plaintiff Gannett Company on Count I. Count II will be dismissed without prejudice.

Dated: February 26, 1990

JUDGMENT

In accordance with the opinion entered this date;

IT IS HEREBY ORDERED that defendants' motion for summary judgment is DENIED;

IT IS FURTHER ORDERED that plaintiff's motion for summary judgment as to Count I is GRANTED;

IT IS FURTHER ORDERED that Count II is DISMISSED without prejudice.

Dated: February 26, 1990

End of Document

[10] Given that plaintiff has prevailed on Count I, I need not address Count II which is a second theory of recovery under § 1983. I will dismiss this count without prejudice.