

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MICHIGAN

WINERIES OF THE OLD MISSION
PENINSULA ASSOCIATION, *et al.*,

Plaintiffs,

Case No: 1:20-cv-01008

v.

PENINSULA TOWNSHIP, Michigan Municipal
Corporation,

Honorable Paul L. Maloney
Magistrate Judge Ray S. Kent

Defendant,

and

PROTECT THE PENINSULA,

Intervenor-Defendant.

**PLAINTIFFS' BRIEF IN OPPOSITION TO PENINSULA TOWNSHIP'S
MOTION TO STAY PROCEEDINGS**

TABLE OF CONTENTS

	Page
FACTUAL BACKGROUND.....	2
ARGUMENT	10
A. Peninsula Township does not have standing to assert a conflict of interest.	11
B. Peninsula Township does not carry its burden to establish need for a stay and further delay in this case is not warranted.....	13
CONCLUSION.....	16

TABLE OF AUTHORITIES

	Page(s)
Cases	
<i>Bialik v. Raddatz</i> , 2012 WL 2913201 (W.D. Mich. June 6, 2012)	12
<i>Clinton v. Jones</i> , 520 U.S. 681	13
<i>Courser v. Allard</i> , 2016 WL 10520134 (W.D. Mich. Nov. 28, 2016).....	11, 12
<i>Dana Corp. v. Blue Cross & Blue Shield Mut. of N. Ohio</i> , 900 F.2d 882 (6th Cir. 1990)	12
<i>F.T.C. v. E.M.A. Nationwide, Inc.</i> , 767 F.3d 611 (6th Cir. 2014)	13
<i>Factory Mut. Ins. Co. v. APComPower, Inc.</i> , 662 F. Supp. 2d 896 (W.D. Mich. 2009)	12
<i>Ferrell v. Wyeth-Ayerst Labs., Inc.</i> , 2005 WL 2709623	14
<i>Indiana Fine Wine & Spirits, LLC v. Cook</i> , 459 F. Supp 3d 1157 (S.D. In. 2020)	15
<i>Int’l Watchman Inc. v. Barton Watchbands Holdco, LLC</i> 2021 WL 855119 (N.D. Ohio Mar. 8, 2021)	14
<i>Landis v. N. Am. Co.</i> , 299 U.S. 248 (1936).....	13
<i>Magna Elecs., Inc. v. Valeo, Inc.</i> , 2015 WL 10911274 (W.D. Mich. Sept. 30, 2015)	14
<i>Manning v. Waring, Cox, James, Sklar & Allen</i> , 849 F.2d 222 (6th Cir. 1988)	12
<i>Obama for America v. Husted</i> , 697 F.3d 423 (6th Cir. 2012)	15
<i>Ohio Envtl. Council v. U.S. District Court, S. Dist. of Ohio, E. Div.</i> , 565 F.2d 393 (6th Cir. 1977)	13

TABLE OF AUTHORITIES

(continued)

	Page
<i>Regents of the Univ. of Mich. v. St. Judge Med., Inc.</i> , 2013 WL 2393340 (E.D. Mich. May 31, 2013).....	14
<i>Am. Special Risk Ins. Co. ex rel. S. Macomb Disposal Auth. v. City of Centerline</i> , 69 F. Supp. 2d 944 (E.D. Mich. 1999).....	12
<i>S.D. Warren Co. v. Duff-Norton</i> , 302 F. Supp. 2d 762 (W.D. Mich. 2004)	12
<i>Stonebridge Cas. Ins. v. D.W. Van Dyke & Co.</i> , 2015 WL 8330980 (S.D. Fla. Oct. 23, 2015).....	13
<i>In re Valley-Vulcan Mold Co.</i> , 237 B.R. 322 (B.A.P. 6th Cir. 1999).....	11
Court Rules	
Fed. R. Civ. P. 26.....	1, 2, 3, 5
Fed. R. Civ. P. 37(c)(1).....	11

This case has been pending for two and a half years. The Wineries filed this action in 2020 to challenge certain Peninsula Township ordinances (the “Ordinances”) as violating the United States Constitution and being preempted by Michigan law. The Wineries named Peninsula Township as a defendant because the Township is the body that enacted those ordinances. Later, Protect the Peninsula (“PTP”), a small group representing a few landowners, intervened as an additional defendant over the Wineries’ objection. The Wineries have not asserted claims against any other defendants and certainly have never asserted claims against any of Peninsula Township’s potential insurers.

After discovery, dueling dispositive motions, and waves of motions to reconsider filed by both Defendants, this Court recently reaffirmed its prior grant of summary judgment in favor of the Wineries on their dormant Commerce Clause and vagueness/due process claims. ECF No. 319, PageID.11882. Now, on the eve of a scheduling conference intended to schedule the conclusion of this case with respect to the Wineries remaining claims, Peninsula Township argues that this Court should stay this case to permit a non-party (the Michigan Township Participating Plan, referred to either as the “Par Plan” or “MTPP”) – against whom no claims have ever been asserted – to consider whether it might wish to lob an accusation that Miller Canfield has a conflict of interest, at which point the Township may then “need to consider its options....” ECF No. 329, PageID.11962.

Peninsula Township’s motion to stay has no basis in law or fact. As discussed below, Peninsula Township was required under Fed. R. Civ. P. 26 to disclose the existence of any applicable insurance policy at the outset of this case more than two years ago. No policy was disclosed then or in response to a court order compelling the same. This current motion is nothing more than a desperate attempt to keep the Ordinances on the books and enforceable for as long as

possible. To do so, the Township's newest set of attorneys now turn to attacking the Wineries' attorneys, attempting to fabricate a purported conflict that does not exist to deny the Wineries the counsel of their choosing. As demonstrated below, Peninsula Township does not come close to meeting the standard for a stay of this lawsuit and its motion should be summarily denied and the Wineries awarded their costs and attorneys' fees incurred in responding to such a baseless motion.

FACTUAL BACKGROUND

On June 22, 2021, the Wineries served their Second Set of Requests for Production of Documents on Peninsula Township. **(Exhibit A)**. Request for Production No. 22 specifically requested that the Township "Produce a copy of any insurance policy covering Peninsula Township's litigation expenses in the Lawsuit." *Id.* On July 22, 2021, Peninsula Township objected to the request stating that "The documents sought by this request are, in part, inadmissible under Fed. R. Evid. 411 and associated caselaw. Furthermore, the documents sought by this request are not relevant to any party's claim or defense in this matter. Without waiving said objections and subject to the same, the Township has requested a copy of any potentially applicable policy." **(Exhibit B.)** The Township at that time not only refused to produce any insurance policies, but argued that any such policies were "not relevant" in this lawsuit.

On August 17, 2021, counsel for the Wineries sent a letter detailing the deficiencies in Peninsula Township's production stating: "The Township objected to this request and refused to produce a copy of any applicable insurance policies. This objection is improper. Fed. R. Civ. P. 26(A)(iv) requires production of 'any insurance agreement under which an insurance business may be liable to satisfy all or part of a possible judgment in the action or to indemnify or reimburse for payments made to satisfy the judgment.'" **(Exhibit C.)** Peninsula Township did not respond to this correspondence which required the Wineries to file a motion to compel with this Court. ECF

No. 83; Brief in Support at ECF No. 84.

Of course, the Wineries should not have been required to file a motion as Fed. R. Civ. P. 26(A)(iv) required Peninsula Township to produce all insurance policies without the need for the Wineries to serve a discovery request. The Township's Initial Disclosures were served on March 17, 2021, wherein the Township represented that it was unaware of any applicable insurance policy. **(Exhibit D.)** This was untrue. During a Peninsula Township town board meeting on February 23, 2021, a month before the Township served its initial disclosure, Peninsula Township's attorney stated that he "[h]as spoken to the insurance carriers for the township and made them aware that fees are incurring and made them aware of the success of the township at this point." **(Exhibit E.)** During a March 9, 2021, town board meeting, counsel for Peninsula Township again represented that he has "[c]ommunicated with the insurance carriers." **(Exhibit F.)** Finally, during a June 8, 2021, town board meeting, a citizen asked whether the Township had insurance for the winery lawsuit. Counsel for the Township responded: "Yes, through Trident and Tokio Marine. If we win, we will go after plaintiffs to the full extent of the law, and if we lose, all costs and expenses other than the deductible will be covered." **(Exhibit G.)**

On September 28, 2021, this Court granted the Wineries Motion to Compel and ordered that "Defendant shall, within 21 days, produce any policy of insurance responsive to Request to Produce No. 22." ECF No. 94, PageID.3778. Peninsula Township then served their Second Supplemental Initial Disclosures on October 20, 2021. Therein, on the topic of insurance, Peninsula Township stated that it "has produced a potentially applicable policy of insurance to the Plaintiffs." **(Exhibit H)**. Previously, on October 12, 2021, Peninsula produced an insurance policy between the Township and *Argonaut Insurance Company* commencing with policy period July 1, 2014. **(Exhibit I.)**

That is the extent of the Township's representations with respect to its insurance in this action – it first failed and refused to produce any insurance policy on the basis insurance was not relevant to this action, then was ordered by this Court to produce all applicable insurance policies, and then produced a single policy from Argonaut. At no point has the Township ever produced an insurance policy from MTPP. If MTPP has issued an applicable insurance policy to the Township, then the Township is in contempt of this Court's September 28, 2021, Order, and the Wineries will seek sanctions. And, despite counsel's representation that Peninsula Township was insured through "Trident and Tokio Marine," Peninsula Township has never produced a policy with either of these companies.¹

Peninsula Township has never represented that it is, in fact, insured by MTPP and has never produced an MTPP policy. In fact, the first time the Wineries counsel ever heard the name MTPP in reference to this case was when counsel for Peninsula Township, on January 20, 2023, called an associate attorney in Miller Canfield's Lansing office, who does not work on this case, and informed her that he believed a conflict might exist due to Miller Canfield's representation of MTPP. That same day, lead counsel for the Wineries called counsel for the Township seeking further information. Counsel for Peninsula Township refused to provide information related to the alleged conflict to counsel for the Wineries. Instead, following that telephone call, counsel for Peninsula Township sent a letter to the Miller Canfield associate attorney, Ashley Higginson, wherein he represented that "Peninsula Township was insured through the Michigan Township Participating Plan ('MTPP') up to and including the 2013-14 policy period." ECF No. 329-1,

¹ Oddly, on June 5, 2022, counsel for Peninsula Township sent an email to counsel for the Wineries stating that "[T]he insurance companies are Segwick and Toyko Marine." **Exhibit J**. Again, no policies were ever produced.

PageID.11975. Note that the Township’s attorney represented the Township “was” (not “is”) insured “through” (not “by”) MTPP.

Counsel also stated that Miller Canfield had been the general counsel for MTPP for the past 20-30 years. *Id.* On this point, counsel is wrong, as Miller Canfield is not and has never been MTPP’s general counsel. Finally, counsel for Peninsula Township advised Ms. Higginson that in his view she should reach out to MTPP directly to review the issue. *Id.* at PageID.11976.²

On January 23, 2023, counsel for the Wineries sent correspondence to counsel for Peninsula Township stating:

In response to your letter, please provide me with a copy of the insurance policy you referenced in your letter so that I can review. I will note that on September 28, 2021, the Federal District Court ordered Peninsula Township to comply with both its discovery obligations and Rule 26(a)(iv) and produce any insurance policy which might provide coverage. A copy of that order is attached for your reference. In response to that order, Peninsula Township only produced an insurance policy with Argonaut. No insurance policy related to Tokio Marine or Michigan Township Participating Plan was ever produced. Once I receive these documents (and any other policies which might provide coverage) from you I can better address your letter with my colleagues.

ECF No. 3292, PageID.11978. On January 24, 2023, Mr. McGraw responded, but refused to provide a copy of the insurance policy. As to why an insurance policy was not previously produced, Mr. McGraw stated: “you likely did not get the information you mention from prior counsel during discovery because, as you have indicated many times, you are only seeking damages from 2016 forward, when the Township was not insured through the MTPP.” (ECF No. 329-3, PageID.11981.) So, despite claiming now that MTPP was the Township’s insurer, the Township’s counsel is also now claiming that MTPP was not the insurer during the relevant timeframe.

² This was a common refrain from Mr. McGraw in all correspondence and conversations with Miller Canfield. He kept repeating there was a conflict between Miller Canfield and MTPP, although why he thought this was his issue to raise is unclear, but then refused to provide any information to help Miller Canfield understand his accusation.

Given the refusal to provide the requested information, Miller Canfield sought information directly from MTPP. On January 27, 2023, Miller Canfield's general counsel, Soni Mithani, sent an email to the Chair of the Board of MTPP, Linda Preston. ECF No. 329-4, PageID.11985. In that email, Ms. Mithani noted that "it is our understanding that MTPP has nothing to do with this matter" and that "[w]e do not believe that there is any conflict of interest because we do not see how MTPP could be involved in or responsible for this matter in any way." *Id.* In addition, she stated that "under the Michigan Rules of Professional Conduct, a conflict would not exist because MTPP is not directly adverse to the plaintiffs we represent in the litigation and thus, we are not materially limited in our ability to effectively represent these plaintiffs based on the limited services we provide for MTPP, but, perhaps we are missing something here." *Id.* Ms. Mithani noted that no insurance policy related to MTPP had ever been produced in the litigation and the only insurance policy produced was related to Argonaut. *Id.* Ms. Mithani ended the correspondence by requesting to set up a call.

After not hearing back from MTPP, Ms. Mithani sent a follow up email on February 3, 2023, to which Ms. Preston stated that MTPP was in the processing of reviewing the matter. ECF No. 329-5, PageID.11989. After again not hearing back, Ms. Mithani sent another email on February 7, 2023, seeking a response from MTPP and stating again that "we do not believe there is a conflict." ECF No. 329-6, PageID.11991.

Instead of hearing back from the Chair of the Board of MTPP, on February 9, 2023, Ms. Mithani received an email from Jennifer Venema, seemingly an employee of Tokio Marine. **Exhibit K.** Ms. Mithani responded that she was not able to correspond with Ms. Venema given that Tokio Marine was not a client of Miller Canfield. ECF No. 329-8, PageID.11998.

Over the course of several weeks, counsel for Peninsula Township repeatedly and vaguely accused Miller Canfield of having a conflict of interest related to MTPP, while refusing to provide Miller Canfield with any documentation to substantiate the Township's accusation. Of course, this raises the issue of why Peninsula Township's attorneys were involved in this matter to begin with. The Wineries are not asserting claims against MTPP, MTPP is not a party to this action and the Township's attorneys, presumably, do not represent MTPP. The answer, of course, is that the Township's attorneys, knowing that they could not win the fight against the Wineries in court, had decided to switch their attack to the Wineries' attorneys.

When Miller Canfield attempted to obtain information from MTPP to confirm its conclusion that there was no conflict, MTPP, through Tokio Marine, declined to provide Miller Canfield with information. Eventually, Miller Canfield decided the most prudent (and ethical) course of action was to withdraw from representing MTPP, which is precisely what the Michigan Rules of Professional Conduct instruct in this situation. Miller Canfield's withdrawal does not mean that there ever was a conflict – it means that Miller Canfield decided to assume MTPP might assert that there was one, since MTPP would not confirm there was not. Accordingly, Miller Canfield sent its letter to MTPP, ECF No. 329-9, PageID.119977. In that letter, Miller Canfield noted that “[n]one of [Miller Canfield's] work for MTPP related in any way to this litigation” that “MTPP is not a party to that action and has never been mentioned in the context of the litigation until, for the first time, late last month.” *Id.* Miller Canfield confirmed that “[w]e believe there is no conflict of interest” and that “we specifically asked you to confirm certain facts, which, as we understand them, support our conclusion that no such conflict of interest exists.” *Id.* But, “[Miller Canfield] never received a response from MTPP.” *Id.* Because of that, Miller Canfield determined it would “proceed as if there is *now* a conflict of interest ... due solely to our inability to obtain

MTPP’s verification of the facts that we believe demonstrate that no conflict of interest exists.” *Id.* At that time, Miller Canfield had “no outstanding matters that [it] was handling for MTPP.” *Id.* at PageID.11998.

On February 15, 2023, Miller Canfield receive a letter from an attorney representing MTPP. ECF No. 329, PageID.12000. Counsel stated: “I am not suggesting that you did or did not have a conflict, I am not suggesting that you did or did not breach a duty.” *Id.* at PageID.12002. Despite this, counsel for MTPP stated that “MTPP would and does object to you representing anyone in opposition to the MTPP including any direct or indirect litigants against the MTPP or Peninsula Township.” *Id.* Of course, Miller Canfield’s clients (the Wineries) have brought no claims against MTPP. While they have brought claims against Peninsula Township, Miller Canfield has never represented the Township, and no one has suggested that Miller Canfield cannot be adverse to the Township.

On February 20, 2023, Ms. Mithani responded on behalf of Miller Canfield, noting that many of the statements in counsel’s letter were “inaccurate or mischaracterizations – including the assertion that the firm acted as ‘General Counsel’ to MTPP. The firm acted as legal counsel to MTPP in certain areas, and readily assisted with legal requests when they were posed. It has no obligation to assist with every single request made by a client.” ECF No. 329-11, PageID.12004. Ms. Mithani further responded: “We concluded that MTPP was not directly adverse in the litigation and the litigation did not materially limit our current representation of MTPP. MTPP is not a party to the litigation, is not an identified witness in the litigation, is not an agency or department of Peninsula Township, and has not been identified by Peninsula Township as an insurer providing coverage for acts and omissions or Peninsula Township, who, according to its

counsel, was not even a member of MTPP during the relevant period at issue in the litigation. MTPP is not directly or indirectly involved in the litigation.” *Id.*

Ms. Mithani further noted that Miller Canfield contacted the Board Chair of MTPP “to verify our understanding of the facts underlying our analysis that no conflict of interest exists... [and] instead of providing us with any verification of this information (or supplementing our understanding with additional information that we might be unaware of), MTPP directed a third party, non-client of the firm [*i.e.*, Tokio Marine] to respond on its behalf with an email that did not address our original request.” *Id.* at PageID.12004-12005. Ms. Mithani concluded by reiterating that Miller Canfield’s withdrawal from representing MTPP was “not necessitated by any previously missed or undisclosed conflict of interest. Rather, it was based on MTPP’s failure to confirm our understanding of the facts.” *Id.* at PageID.12005. Finally, she noted that Miller Canfield has “received no meaningful response to our inquiry for more facts, and none are contained in your February 15, 2023, response, suggesting that there are no other facts that would alter our original conflict analysis.” *Id.*

Thereafter, on February 28, 2023, Miller Canfield again requested any further information which might support the assertion that a conflict existed. **Exhibit L**. Ms. Mithani also directed counsel for MTPP to information regarding the Wineries claim for damages. *Id.* In response, counsel for MTPP did not provide any additional information showing how there was a conflict, and further stated “If your Plaintiff’s group seeks damages beginning in 2015, then *I would agree that there appears to be no conflict of interest for Miller Canfield.*” **Exhibit M** (emphasis added).

To date, Peninsula Township *still* has not produced a copy of any insurance policy issued by MTPP. Of course, as noted in the preceding paragraph, even if there were an insurance policy involving MTPP, it would not mean that MTPP would be insuring the damages sought in this case.

And, even if it were the insurer, that would *not* mean that a conflict of interest existed. Even assuming that MTPP was Peninsula Township's liability insurer, MTPP would not be an adverse party to the Wineries within the meaning of Rule 1.7, because "[a]lthough a liability insurer has an economic interest in the litigation that ordinarily is aligned with the interests of its insured, economic adversity alone between the insurer and the plaintiff in the second action is not, in the opinion of the [American Bar Association] Committee, the sort of direct adversity that constitutes a concurrent conflict of interest under the Model Rules." **Exhibit N**, ABA Formal Op. 05-435 (2004).

Nonetheless, although they represent only Peninsula Township, the Township's new attorneys have inserted themselves into this issue, including by brazenly suggesting that perhaps the Wineries might wish to object to Miller Canfield being their attorney. See ECF No. 329, PageID.11972. Peninsula Township and its counsel have no business inserting themselves into the relationship between the Wineries and their counsel of choice. The entire motion is not well-founded in law or fact and should be denied.

ARGUMENT

The sole issue before the Court is whether to exercise its discretion and stay this case to permit a non-party, MTPP, time to decide if it somehow wants to try to insert itself in this lawsuit. Miller Canfield does not believe there is a conflict of interest and neither Peninsula Township nor MTPP have ever provided evidence that there is – there are vague assertions that MTPP is Peninsula Township's insurer, yet a policy of insurance has never been produced. Presumably, if there was such a policy, it would have been easily produced. If it only now gets produced, then Peninsula Township will have to also address why it is not in contempt of this Court's September

28, 2021 order directing Peninsula Township to produce applicable insurance policies.³ The Wineries reserve their right to file appropriate motions, including seeking relief under Fed. R. Civ. P. 37(c)(1).

Beyond that, the issue of whether there is a conflict that would require disqualification of the Wineries' chosen counsel is not before this Court. To be clear, Miller Canfield denies that it failed to perform, or failed to perform adequately, a conflict check. Miller Canfield also denies that it has access to any confidential MTPP information pertaining to this action or that it ever accessed such information. While Peninsula Township accuses Miller Canfield of gaining knowledge of MTPP's operations and reviewing MTPP's audited financial statements, see ECF No. 329, PageID.11970, the fact is that MTPP publishes its audited financials, as well as other information concerning its operations, on its website and when MTPP refused to provide information to Miller Canfield it accessed this publicly available information. A brief discussion of the standard governing a motion to disqualify counsel, however, is appropriate if only to demonstrate why Peninsula Township's motion to stay is particularly baseless.

A. Peninsula Township does not have standing to assert a conflict of interest.

“Motions to disqualify are ‘viewed with disfavor,’ and a party seeking to disqualify opposing counsel carries a heavy burden and must satisfy a high standard of proof.” *Courser v. Allard*, 2016 WL 10520134, at *1 (W.D. Mich. Nov. 28, 2016) (quoting *In re Valley-Vulcan Mold Co.*, 237 B.R. 322, 337 (B.A.P. 6th Cir. 1999)). While motions to disqualify can have a legitimate purpose, “such motions are closely scrutinized because the ‘ability to deny one’s opponent the

³ Peninsula Township also argues that there might be a conflict because “the Plaintiffs – by and through Miller Canfield – have taken [the position] in this case that the MZEA is preempted by the MLCC.” (ECF No. 329, PageID.11972.) This is false. The Wineries take the position that the Ordinances are preempted by state law, to be sure, but they have not advocated that the Michigan Zoning Enabling Act is wholesale preempted by the Michigan Liquor Control Code.

services of capable counsel is a potent weapon.” *Id.* (quoting *Manning v. Waring, Cox, James, Sklar & Allen*, 849 F.2d 222, 224 (6th Cir. 1988)). “A party’s right to have counsel of choice is a fundamental tenet of American jurisprudence, and therefore a court may not lightly deprive a party of its chosen counsel.” *Id.* (quoting *Am. Special Risk Ins. Co. ex rel. S. Macomb Disposal Auth. v. City of Centerline*, 69 F. Supp. 2d 944, 953 (E.D. Mich. 1999)).

The Sixth Circuit has set forth a three-part test to use in evaluating a motion to disqualify counsel:

- (1) whether a past attorney-client relationship existed between the party seeking disqualification and the subject attorney;
- (2) whether the subject matter of that relationship was or is substantially related to the representation at issue; and
- (3) whether the attorney acquired confidential information from the prior relationship relevant to the representation at issue.

Dana Corp. v. Blue Cross & Blue Shield Mut. of N. Ohio, 900 F.2d 882, 889 (6th Cir. 1990); *see also S.D. Warren Co. v. Duff-Norton*, 302 F. Supp. 2d 762, 766-74 (W.D. Mich. 2004) (explaining test). Miller Canfield certainly does not believe any of these factors are satisfied here, but most germanely to the Township’s motion, the Township cannot satisfy the first factor.

“[C]ourts generally require the moving party to have had an attorney-client relationship with the attorney it seeks to disqualify.” *Courser*, 2016 WL 10520132, at *1 (citing *Dana Corp.*, 900 F.2d at 889, *Bialik v. Raddatz*, 2012 WL 2913201, at *2 (W.D. Mich. June 6, 2012), and *Factory Mut. Ins. Co. v. APComPower, Inc.*, 662 F. Supp. 2d 896, 898 (W.D. Mich. 2009)). *See also Bialik*, 2012 WL 2913201, at *2 (“The threshold requirement of the existence of an attorney-client relationship between plaintiff and the Vogelzang law firm does not exist in this case.”) Peninsula Township does not claim that it now has or has ever had an attorney-client relationship with Miller Canfield. It is immediately apparent, therefore, that Peninsula Township would never

have standing to move to disqualify Miller Canfield. Given this, there is no sense in granting a stay to permit Peninsula Township to “consider its options” with respect to a motion it cannot bring. Of course, as explained below, that is not the only reason a stay is unwarranted.

Peninsula Township also argues that perhaps MTPP might wish to somehow insert itself into this case. First, Peninsula Township’s attorneys do not, to the Wineries’ knowledge, represent MTPP and have no standing themselves to make arguments or file motions on MTPP’s behalf. Second, MTPP would not have standing to intervene in this case because MTPP is not adverse to the Wineries or Miller Canfield merely because MTPP might theoretically be the Township’s liability insurer – bearing in mind there is no evidence that MTPP is the Township’s liability insurer. *See* ABA Formal Op. 05-435 (explaining that liability insurer’s economic interest in outcome of lawsuit does not trigger Rule 1.7); *Stonebridge Cas. Ins. v. D.W. Van Dyke & Co.*, 2015 WL 8330980, at *1 (S.D. Fla. Oct. 23, 2015) (relying on the ABA Formal Opinion in denying liability insurer’s motion to intervene to seek disqualification of the plaintiff’s law firm, who also represented the liability insurer on other matters).

B. Peninsula Township does not carry its burden to establish need for a stay and further delay in this case is not warranted.

As Peninsula Township notes, whether to issue a stay is within this Court’s discretion; notably, however, in every case Peninsula Township relies upon, the court either denied a motion to stay, or it granted a stay only for the stay to be found to be an abuse of discretion on appeal. *See Landis v. N. Am. Co.*, 299 U.S. 248, 256 (1936) (vacating stay and determining its entry was an abuse of discretion); *Clinton v. Jones*, 520 U.S. 681, 706-07 (1997) (holding district court abused its discretion in entering stay); *F.T.C. v. E.M.A. Nationwide, Inc.*, 767 F.3d 611, 627-28 (6th Cir. 2014) (affirming district court’s denial of motion to stay); *Ohio Env’tl. Council v. U.S. District Court, S. Dist. of Ohio, E. Div.*, 565 F.2d 393, 396 (6th Cir. 1977) (holding that stay was an abuse

of discretion); *Ferrell v. Wyeth-Ayerst Labs., Inc.*, 2005 WL 2709623, at *1 (“Plaintiff’s motion is not well taken and is DENIED”) (emphasis in original); *Int’l Watchman Inc. v. Barton Watchbands Holdco, LLC* 2021 WL 855119, at *5 (N.D. Ohio Mar. 8, 2021) (denying motion to stay).

Peninsula Township barely discusses the relevant factors or how those factors have been interpreted within this Circuit. This is because a closer examination of the relevant standard demonstrates that a stay is not warranted here. Although different opinions describe the factors slightly differently, it is Peninsula Township’s burden to demonstrate that a stay is warranted. *Magna Elecs., Inc. v. Valeo, Inc.*, 2015 WL 10911274, at *1 (W.D. Mich. Sept. 30, 2015). The factors to be considered are: “1) the stage of the litigation; 2) whether the stay will simplify the issues or present a clear tactical advantage to the non-moving party; and 3) whether a stay would unduly prejudice the nonmoving party.” *Id.* (citing *Regents of the Univ. of Mich. v. St. Judge Med., Inc.*, 2013 WL 2393340, at *4 (E.D. Mich. May 31, 2013)). The factors weigh against a stay.

As to the first factor, being in “the early stages of litigation...weighs in favor of a stay.” *Int’l Watchman*, 2021 WL 855119, at *3. This case, however, is not in the “early stages of litigation.” This case was filed in 2020, discovery between Peninsula Township and the Wineries was long-ago completed and absent PTP’s intervention this case would have been tried last summer. PTP has a limited role to play in discovery on certain issues, but this case should still go to trial well within the next year. Further, summary judgment has already been granted to the Wineries on two of its constitutional claims. The work to be undertaken over the next several months is discovery between the Wineries and PTP. Staying discovery between the Wineries and PTP, so that Peninsula Township can evaluate a motion it has no standing to bring, makes no sense. This factor weighs against a stay.

As to the second factor, a stay will not simplify the issues in this case – the issues remain whether the Wineries will prevail on their remaining constitutional and state-law preemption claims and what amount of damages will fairly compensate the Wineries. A stay is not going to change that analysis, so this weighs against a stay. Further, the Wineries do not gain a tactical advantage here, no matter what.

Finally, as to the third factor, a stay would unduly prejudice the Wineries because they have already demonstrated a right to relief, with this Court granting (and declining to vacate or reconsider) entry of summary judgment in favor of the Wineries on their dormant Commerce Clause and vagueness/due process claims. Although this Court previously entered an injunction preventing the Township from enforcing the Ordinances, this Court subsequently vacated that injunction at the urging of the Defendants. Accordingly, the Wineries are still being governed by an ordinance that this Court has already found violates their Constitutional rights. “When constitutional rights are threatened or impaired, irreparable injury is presumed.” *Obama for America v. Husted*, 697 F.3d 423, 436 (6th Cir. 2012). “The existence of a continuing constitutional violation constitutes proof of an irreparable harm, and its remedy certainly would serve the public interest and this principle of law applies to violations of the Commerce Clause.” *Indiana Fine Wine & Spirits, LLC v. Cook*, 459 F. Supp 3d 1157, 1170 (S.D. In. 2020) (internal quotations and citations omitted)). Delaying a resolution of this action unduly prejudices the Wineries and continues to deprive them of their constitutional rights.

CONCLUSION

Peninsula Township motion is not well founded in fact or law. It asserts that non-party MTPP – against whom no claims have ever been asserted – might wish to insert itself into this lawsuit, on the basis of a conflict of which there is no evidence, and by bringing a motion MTPP would not have standing to file. Alternatively, the Township wants to consider its options, which it suggests might lead to its own motion to disqualify, on the basis of a conflict of which there is no evidence and despite the fact that Peninsula Township would utterly fail to satisfy the Sixth Circuit’s test to determine whether there is a conflict. The rest of the Township’s motion is just an attempt to smear the Wineries’ attorneys and, it would seem, drive a wedge between the Wineries and their attorneys as part of desperate attempt to gain an advantage in this action. The motion should be denied.

If, for some reason, this Court is inclined to grant a stay, however, then this Court should take steps to ensure that the stay is exceedingly short and not let this matter drag on. Accordingly, if this Court grants a stay, this Court should: (a) order that any motion seeking to disqualify Miller Canfield be filed within fourteen days, so that it may be promptly decided; (b) order Peninsula Township to immediately produce a copy of any liability policy through which MTPP has or may have liability, and take the failure to produce such as a policy as an admission that the MTPP is the Township’s liability insurer; and (c) enter an order requiring Peninsula Township to show cause why they should not be held in contempt of this Court’s order of September 28, 2021, for failing to produce the rumored MTPP policy at that time, or since, unless the Township candidly and directly admits that no such policy exists.

Respectfully submitted,

MILLER, CANFIELD, PADDOCK AND STONE, P.L.C.

By: /s/ Joseph M. Infante
Joseph M. Infante (P68719)
Stephen M. Ragatzki (P81952)
Christopher J. Gartman (P83286)
99 Monroe Avenue NW, Suite 1200
Grand Rapids, MI 49503
(616) 776-6333

Dated: April 18, 2023

CERTIFICATE OF COMPLIANCE WITH LOCAL CIVIL RULE 7.3(B)(I)

1. This Brief complies with the type-volume limitation of L. Civ. R. 7.3(b)(i) because this Brief contains 5,253 words.

/s/ Joseph M. Infante
Joseph M. Infante

CERTIFICATE OF SERVICE

I hereby certify that on April 18, 2023, I filed the foregoing via the Court's CM/ECF System, which will automatically provide notice of the filing to all registered participants in this matter.

/s/ Joseph M. Infante
Joseph M. Infante