UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MICHIGAN

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

Plaintiffs,

v.

PENINSULA TOWNSHIP, Michigan Municipal Corporation,

Defendant,

and

PROTECT THE PENINSULA,

Intervenor-Defendant.

Case No: 1:20-cv-01008

Honorable Paul L. Maloney
Magistrate Judge Ray S. Kent

PLAINTIFFS' BRIEF IN OPPOSITION TO PTP'S MOTION FOR ACCESS TO CERTAIN WITHHELD DOCUMENTS

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

Cases

Court Rules

I. INTRODUCTION

This Court already set the table with the presumption that PTP has no role to play on the issue of the Wineries' damages. "[A]s far as I'm concerned, PTP is out of the damages in this case for now. Now, if subsequently somebody wants to file a motion on that issue, but the damages issue as far as the Court is concerned vis-à-vis PTP is off the table." (ECF No. 302, PageID.10831.) This Court got it right from the start—PTP is not liable for damages, so there is no need for PTP, who literally describes itself as the "political enemy" of the Wineries, or its attorneys, to see the Wineries' confidential information.

II. BACKGROUND

During a hearing before this Court on November 17, 2022, the issue of PTP's access to records was brought before this Court. In an effort to avoid further delay of the case, the Wineries voluntarily agreed to provide to PTP all discovery records except those records which related to the Wineries' damages. (ECF No. 302, PageID.10821-10822.) This Court accepted that concession. Thus, when producing its documents to PTP, and given this Court's direction, the Wineries removed those documents they provided to their expert, Eric Larson. PTP has filed the current motion seeking those records which relate to the Wineries' damages. For this Court's reference, the Wineries have prepared a chart of the documents at issue identified by Bates number. **See Exhibit 1**.

PTP's request for documents can be broken down into three buckets. First, PTP wants access to everything having to do with the Wineries' damages expert, Eric Larson. This includes Larson's initial and supplemental "reports, schedules, deposition transcripts, and deposition exhibits." (ECF No. 326, PageID.11923.) The Wineries do not believe PTP should have access to this information because it is not relevant to PTP's defenses and PTP has stated that it has no intention of deposing Mr. Larson. (ECF No. 326, PageID.11922.) Thus, Mr. Larson's calculation

of the various categories of damages and his deposition testimony regarding the basis for his opinions is not germane to PTP's case.

Second, PTP wants access to the documents Larson considered when making his report, including the Wineries' confidential merchandise and food sales data, their confidential grape sales and purchases, and their event information. To streamline this dispute, the Wineries will voluntarily produce the event information and other documents identified as "YES" in the fifth column of **Exhibit 1** ("Wineries to Product to PTP?"), even though they believe it has no relevance to PTP's defenses. Much of this information is publicly available on the individual Winery websites, anyway. However, the Wineries' grape, merchandise, event, and food sales data is confidential. PTP has no need for this information and it should not produced. The "political enemy" of the Wineries could cause all sorts of harm to the Wineries if they were allowed to have this information.[1]

Third, PTP suggests—without fully committing to a position—that it does not need access to the Wineries' confidential tax returns and profit and loss statements because Larson did not consider them. However, PTP still lumps these documents in with the general range of documents that were withheld and about which it complains. (*See* ECF No. 326, PageID.11923.) Therefore, the Wineries would like to make clear that they object to the production of the tax returns and profit and loss statements to PTP because they are not relevant to PTP's defenses and were not

[1] When reviewing these documents, counsel for the Wineries discovered that they inadvertently applied the same Bates labels to two different sets of documents labeled 8785–9540. These documents are highlighted in blue on **Exhibit 1**. Counsel for the Wineries will reproduce the documents identified as "2 Lads Tax Returns and P&Ls," "2 Lads Social Media Posts," "BSF Tax Returns and P&Ls," "BSF Facebook Posts," and "Bonobo Tax Returns and P&Ls" to Peninsula Township with updated Bates labeling. From that set, counsel for the Wineries will produce "2 Lads Social Media Posts" and "BSF Facebook Posts" to PTP because they do not contain confidential financial information.

used by Larson in calculating the Wineries' damages. When preparing this case for trial in August of 2022, tax returns, P&L's and other similar financial data were not trial exhibits proposed by either the Wineries or the Township as they were not relevant. Whether there is a dispute here is up to PTP.

III. ANALYSIS

Two principles and one practical consideration point this Court to deny PTP's motion. First, under Federal Rule of Civil Procedure 24, intervenors may be subject to conditions to limit their participation. This includes restrictions on the ability to take or receive discovery and the ability to litigate certain issues. Second, PTP is not liable for damages, and the documents PTP wants are not relevant to PTP's defenses. Finally, PTP has openly called itself the "political enemy" of the Wineries. Its members are apparently farmers who compete with—and could benefit from—the Wineries' financial documents. There also may be unknown members of PTP who could benefit from the Wineries' proposed pricing information.[2] And PTP's attorney is a Grand Traverse County Commissioner who could base votes or other decisions upon the information she learns from the Wineries' confidential financial information. Taken together, PTP's motion should be denied.

A. This Court has the authority to restrict PTP's access to discovery.

"An intervention of right under the amended rule may be subject to appropriate conditions or restrictions responsive among other things to the requirements of efficient conduct of the proceedings." Fed. R. Civ. P. 24, Notes of Advisory Committee on Rules – 1966 Amendment. Courts have adopted the Advisory Committee Notes to confirm the authority to place limitations

[2] The Wineries have served discovery on PTP that, among other topics, seeks disclosure of PTP's members. PTP's responses to that discovery are not yet due as of the date this brief is being submitted.

on intervenors. "[R]estrictions on participation may also be placed on an intervenor of right and on an original party." *Stringfellow v. Concerned Neighbors in Action*, 480 U.S. 370, 383 (1987) (Brennan, J., concurring). *See also Friends of Tims Ford v. Tennessee Valley Auth.*, 585 F.3d 955, 963 n.1 (6th Cir. 2009) ("Federal courts have the authority to apply appropriate conditions or restrictions on an intervention as of right.").[3] "Intervention may also be limited to 'claims raised by the original parties,' subject to a bar to raising 'collateral issues.'" *United States v. City of Detroit*, 712 F.3d 925, 932 (6th Cir. 2013) (citation omitted).

Courts have applied broad limitations to intervenors as of right. For example, an intervenor can be subjected to an existing discovery schedule and limited in what types of discovery it may take. *United States v. Duke Energy Corp.*, 171 F. Supp. 2d 560, 565 (M.D.N.C. 2001). These limitations extend to issues as well. "A nonparty may have a sufficient interest for some issues in a case but not others, and the court may limit intervention accordingly." *United States v. S. Fla. Water Mgmt. Dist.*, 922 F.2d 704, 707 (11th Cir. 1991). "Restricting intervention to the particular issues for which the proposed intervenor has a sufficient interest accords with standard party practice." *Id.* at n.4. *See also Bradley v. Milliken*, 620 F.2d 1141, 1142 (6th Cir. 1980) (limiting intervention "for the limited purpose of presenting evidence" on a single question); *Harris v. Pernsley*, 820 F.2d 592, 599 (3d Cir. 1987) (explaining an intervenor "may have a sufficient interest to intervene as to certain issues in an action without having an interest in the litigation as a whole").

Under this authority, district courts frequently limit discovery for intervenors. *See, e.g., Equal Emp. Opportunity Comm'n v. JBS USA, LLC*, 2011 WL 13077480, at *1 (D. Colo. Dec. 28,

[3] It does not matter that the Court did not impose these limitations originally. "What the court could do at the time when intervention was sought it could do later[.]" *Stewart-Warner Corp. v. Westinghouse Elec. Corp.*, 325 F.2d 822, 827 (2d Cir. 1963).

2011) (preventing intervenors from initiating discovery, "either in writing or by deposition"); *Billitteri v. Sec. Am., Inc.*, 2011 WL 13228268, at *1 (N.D. Tex. Apr. 4, 2011) (denying motion for compliance with discovery order and explaining that "the Court's intent was to compel discovery of information that would be relevant to the Campen Intervenors' specific claims, defenses, or arguments. A broader interpretation of the Court's Order is unwarranted, and could prompt the kind of expansive discovery that would not only significantly distract from matters upon which the Court's consideration turns, but create significant expenses and voluminous discovery that would be time-consuming and financially burdensome on both parties").

B. PTP is not responsible to pay damages and the documents it wants are not relevant to its defenses.

The Sixth Circuit was clear: "The Township faces the possibility of damages. Protect the Peninsula's members do not." *Wineries of the Old Mission Peninsula Ass'n v. Twp. of Peninsula, Michigan*, 41 F.4th 767, 777 (6th Cir. 2022). That difference was one of the fundamental reasons why the Sixth Circuit concluded PTP's interests diverged from the Township's. Without that distinction, PTP would not have been allowed to intervene in the first place. *See id.* at 774–75 (explaining that while both Peninsula Township and PTP want to defend the Winery Ordinances, the Township "presumably has another interest: protecting the fisc" while PTP "is not subject to money damages").

Despite that clear statement, PTP asserts an attenuated possibility that its members will ultimately be responsible to pay the eventual damages award against Peninsula Township. According to PTP, the damages will eventually be passed on to Peninsula Township residents through taxes or other assessments, so it needs to see the Wineries' financial documents. But there are several problems with PTP's position. First, this is a concern that any taxpayer might have, but PTP was not granted intervention because it or its members are taxpayers. The fact that a non-

party has an economic interest in the outcome of litigation does not mean that the party is thereby entitled to intervene in the litigation. *See Bay Mills Indian Cmty. v. Snyder*, 2017 WL 7736934, at *2 (W.D. Mich. Mar. 8, 2017) ("In general, a mere economic interest in the outcome of the litigation is insufficient to support a motion to intervene." (quoting *Mountain Top Condo. Ass'n v. Dave Stabbert Master Builder, Inc.*, 72 F.3d 361, 318–19 (3d Cir. 1995)), aff'd, 720 F. App'x 754 (6th Cir. 2018)). Second, there is no evidence that PTP speaks for Peninsula Township taxpayers—to the contrary, it represents only its members. Peninsula Township, presumably, speaks for the taxpayers and it already has the Wineries' damages documents. Third, the Wineries are also residents of Peninsula Township. Finally, because PTP cannot challenge the Wineries' damages at trial there is no reason for PTP to see the Wineries' damages documents during discovery.

C. The requested documents are not relevant to PTP's claims or defenses.

PTP argues that the requested documents are relevant to the Wineries' standing, PTP's laches and statute of limitations defenses, the *Central Hudson* factors, and "the appropriate contours of injunctive relief." (ECF No. 362, PageID.11925-11927.) These documents have nothing to do with PTP's defenses in those areas.

1. The Wineries have standing.

PTP contends that the requested documents may allow it to argue that certain Wineries lack standing. (ECF No. 326, PageID.11925.) This Court already rejected this argument once. (ECF No. 319, PageID.11888.) It should do so again because the argument lacks merit.

The Wineries have sufficiently alleged and proven that they are unconstitutionally regulated by ordinances that violate the United States Constitution and are preempted by the Michigan Liquor Control Code. (ECF No. 29., PageID.1091, PageID.1113-1114, PageID.1125-1126; ECF No. 162, PageID.5991-5995.) The Wineries have been prevented from, among other restrictions, buying grapes from outside Peninsula Township, catering and operating restaurants,

staying open until 2:00 a.m., playing amplified music, hosting events and weddings, advertising in the newspaper and posting signs on their property. Therefore, they have alleged and proven an injury in fact—an invasion of a legally protected interest which is both "concrete and particularized" and "actual or imminent, not conjectural or hypothetical." *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560 (1992) (internal citations and quotations omitted). And if that were not enough, the Winery Ordinances impose fines, or the possible revocation of special use permits, as penalties for violations. (ECF No. 29-17, PageID.1096, 1102, 1119 and 1562; *see also* Ordinance Section 4.2.1 (attached as **Exhibit 2**): Violation of the Winery Ordinances shall be a "municipal civil infraction as defined by Michigan statute, which shall be punishable by a civil fine for each violation to be determined by the Court, along with costs[.]"; Section 11.1 (***Id.***): "Any person who shall violate any provision of this Ordinance in any particular, or who fails to comply with any of the regulatory measures or conditions of the Board of Appeals adopted pursuant hereto, shall, upon conviction thereof, be fined not to exceed $100.00 or may be imprisoned not to exceed ninety (90) days, or may be both fined and imprisoned in the discretion of the Court, and each day such violation continues shall be deemed a separate offense.")).

To the extent PTP argues that the Wineries must prove damages in order to challenge the constitutionality of the Ordinances, PTP is wrong. It is not necessary for the Wineries to claim damages from an unconstitutional ordinance to have standing to challenge it. A party has "an injury-in-fact sufficient to support standing" when it "refrained from protected speech in response to the [municipality's] unconstitutional ordinances." *Six Star Holdings, LLC v. City of Milwaukee*, 821 F.3d 795, 803 (7th Cir. 2016). And while the Wineries are seeking compensatory damages for certain constitutional and preemption violations, they do not need to request compensatory damages on every claim because "Section 1983, however, allows for the recovery of nominal

damages where the plaintiff's constitutional rights were violated but the violation did not result in any injury giving rise to compensatory damages." *Amnesty Int'l, USA v. Battle*, 559 F.3d 1170, 1177 (11th Cir. 2009).

Finally, PTP does not need discovery to determine which Wineries are regulated by specific provisions of the Winery Ordinances because this Court was very explicit in its summary judgment ruling about the claims applied to each Winery. (*See generally* ECF No. 162.) And to the extent that PTP is going to argue that existing easements prevent the Wineries from challenging the Winery Ordinances, nothing in the documents PTP is requesting now relates to that argument.

2. Laches is inapplicable.

PTP contends that the requested documents may have information relevant to the affirmative defense of laches. "A party asserting laches must show: (1) lack of diligence by the party against whom the defense is asserted, and (2) prejudice to the party asserting it." *Nartron Corp. v. STMicroelectronics, Inc.*, 305 F.3d 397, 408 (6th Cir. 2002).

This Court already recognized that "laches is not an absolute defense, nor is it a defense to injunctive relief." (ECF No. 211, PageID.7807.) That's because "[l]aches only bars damages that occurred before the filing date of the lawsuit. It does not prevent plaintiff from obtaining injunctive relief or post-filing damages." *Nartron*, 305 F.3d at 412 (internal citation omitted). PTP contends that the Wineries' claims accrued when the Winery Ordinances passed but because the Winery Ordinances operate as a continuing violation of the Wineries' constitutional rights, PTP's position is incorrect and PTP cannot hide behind the passage of time to defend the Winery Ordinances. *See Kuhnle Bros., Inc. v. Cnty. of Geauga*, 103 F.3d 516, 522 (6th Cir. 1997) ("The resolution, however, barred Kuhnle from using the roads in question on an ongoing basis, and thus actively deprived Kuhnle of its asserted constitutional rights every day that it remained in effect. A law that works an ongoing violation of constitutional rights does not become immunized from legal

challenge for all time merely because no one challenges it within two years of its enactment.").

It is unclear how any financial documents would show a lack of diligence by the Wineries and PTP has not made any attempt to explain this supposed connection. Additionally, the Wineries' documents do not contain information relevant in any way to how *PTP* alleges it was prejudiced. And, at bottom, the Winery Ordinances serve as a continuing violation of the Wineries' constitutional rights. In all, PTP's argument is little more than a fishing expedition for information it can use against its "political enemy."

3. The *Central Hudson* factors are determined from the Winery Ordinances and Township meeting minutes.

PTP suggests that the requested financial documents may have some bearing on the *Central Hudson* analysis because "[d]efending the merits of challenged provisions requires consideration of the extent to which those provisions advance governmental interests and burden constitutionally protected speech or conduct." (ECF No. 326, PageID.11925.) That sort of post hoc rationalization is not allowed. The only relevant information is "objective information presented to the [Township] at the time of enactment of the ordinance." *Keego Harbor Co. v. City of Keego Harbor*, 657 F.2d 94, 98 (6th Cir. 1981). This evidence must be reflected in the meeting minutes *before* the Winery Ordinances were enacted. *CLR Corp. v. Henline*, 702 F.2d 637, 639 (6th Cir. 1983). *See also CLR Corp. v. Henline*, 520 F. Supp. 760, 768 (W.D. Mich. 1981) (explaining that constitutional scrutiny "requires actual state interests, actually considered upon a factual basis before the legislative body at the time the action is taken, not speculation in the course of subsequent litigation"), aff'd, 702 F.2d 637 (6th Cir. 1983).

The requested documents do not contain any relevant information like meeting minutes or studies that would be relevant to constitutional scrutiny. PTP cannot use after-the-fact financial documents to justify Peninsula Township's enactment of the Ordinances years earlier.

4. Injunctive relief should be simple.

Finally, PTP argues that the Wineries' financial information is relevant to "the appropriate contours of injunctive relief." In effect, PTP is teeing up an argument that this Court must look at every Winery and determine the number and type of events that will be allowed based upon the Wineries' geography and the proximity of neighbors. Stated another way, PTP is asking this Court to engage in precisely the sort of "spot zoning" that PTP so vehemently decries. (ECF No. 304, Page ID.10850.)

The Wineries believe that injunctive relief will be simple. If a section of the Winery Ordinances violates the United States Constitution or is preempted by Michigan law, Peninsula Township must be enjoined from enforcing it. "An unconstitutional act is not a law; it confers no rights; it imposes no duties; it affords no protection; it creates no office; it is, in legal contemplation, as inoperative as though it had never been passed." *Norton v. Shelby Cnty.*, 118 U.S. 425, 442 (1886). *See also Dascola v. City of Ann Arbor*, 22 F. Supp. 3d 736, 743 (E.D. Mich. 2014) ("[I]f a law is unconstitutional, it is void and of no effect, and it cannot alter an otherwise valid obligation of a governmental officer to a citizen."). The proper remedy, therefore, when an ordinance is unconstitutional is to enjoin its future enforcement so that the Township cannot reenact the offending provision. *See Schwartz v Flint*, 395 N.W.2d 678 (Mich. 1986) ("After a zoning ordinance has been declared unconstitutional, in addition to that declaration, a judge may provide relief in the form of a declaration that the plaintiff's proposed use is reasonable, assuming the plaintiff's burden has been met, and an injunction preventing the defendant from interfering with that use.")." That's exactly what this Court did when it entered an injunction the first time, and that's exactly what this Court should do again. Nothing in the documents PTP is requesting has any bearing on that decision.

D. PTP's members compete with the Wineries.

There are other good reasons to keep these documents from PTP. PTP asserts that it, as an entity, is "not a competitor of the Wineries." (ECF No. 326, PageID.11931.) However, the Wineries know for sure that PTP is their "political enemy" because PTP's lawyer said so during oral argument at the Sixth Circuit. The Wineries also know that at least one of PTP's members has expressed public disdain for this Court's rulings. (ECF No. 237-2, PageID.8596 ("I find it crushing that with one flick of a pen a federal court in Kalamazoo could undermine so much of the work and the collective policy direction of the community.").) And the Wineries assume that PTP was telling the truth when it alleged that its members consist of farmers residing in Peninsula Township. *See WOMP*, 41 F.4th at 775 (PTP's members are concerned with "preserving the viability of their farms."). So it is very possible that some of PTP's members compete with the Wineries, even if PTP as an entity does not—and PTP was granted intervention because of its members.

But beyond that, the Wineries have little information on PTP. PTP has a seven-member Board of Directors.[4] It has submitted affidavits from five individuals, three of whom are also on PTP's Board. (ECF No. 304 , PageID.10866-10950.) Does PTP consist of just these nine people, or does PTP have other unknown members? PTP may provide some of this information in response to the Wineries' recent discovery, but it has not done so yet.

E. Discovery is not conducted in public.

Finally, PTP incorrectly asserts that discovery is conducted in public. (ECF No. 326, PageID.11929.) PTP cites a series of cases from the 1970s, 1980s, and 1990s for that proposition. Those cases, however, relied on the old Federal Rule of Civil Procedure 5(d).

[4] http://protectthepeninsula.com/board-of-directors/.

Originally, Rule 5(d) required all discovery materials to be filed with the Court. Over time, that requirement evolved. In 1980, Rule 5(d) was amended to "continue the requirement of filing but make it subject to an order of the court that discovery materials not be filed unless filing is requested by the court or is effected by parties who wish to use the materials in the proceeding." Fed. R. Civ. P. 5(d) cmt. to 1980 amendment. In 1991, Rule 5(d) was amended again "to require that the person making service under the rule certify that service has been affected." Fed. R. Civ. P. 5(d) cmt. to 1991 amendment. And in 2000, Rule 5(d) was amended yet again "to provide that disclosures under Rule 26(a)(1) and (2), and discovery requests and responses under Rules 30, 31, 33, 34, and 36 must not be filed until they are used in the action." Fed. R. Civ. P. 5(d) cmt. to 2000 amendment.

Case law evolved over time with these changes. As the Seventh Circuit explained:

> Many of our decisions—as well as decisions from other circuits—speak broadly about a "presumption of public access to discovery materials." To the extent that this language suggests the existence of a general public right to access the materials that litigating parties exchange in response to discovery requests, it sweeps too broadly. As we will explain, while the public has a presumptive right to access discovery materials that are filed with the court, used in a judicial proceeding, or otherwise constitute "judicial records," the same is not true of materials produced during discovery but not filed with the court. Generally speaking, the public has no constitutional, statutory (rule-based), or common-law right of access to *unfiled* discovery.

Bond v. Utreras, 585 F.3d 1061, 1073 (7th Cir. 2009) (internal citations omitted). Today, the presumption is that the public has no right to discovery materials unless and until they are filed with the Court. *See, e.g., Seattle Times Co. v. Rhinehart*, 467 U.S. 20, 33 (1984) ("Moreover, pretrial depositions and interrogatories are not public components of a civil trial. Such proceedings were not open to the public at common law, and, in general, they are conducted in private as a matter of modern practice." (internal citation omitted)); *Pub. Citizen v. Liggett Grp., Inc.*, 858 F.2d

775, 780 (1st Cir. 1988) ("Certainly the public has no right to demand access to discovery materials which are solely in the hands of private party litigants.").

It is true that, eventually, some or all of these documents may be introduced as trial exhibits. But perhaps not. PTP's intervention has pushed back trial, and the Wineries' proposed trial exhibits may change. Alternatively, this case may settle, which would mean these documents never become public. At this stage, PTP does not need to see documents that are not relevant to its defenses, and which may end up giving PTP members a competitive advantage over the Wineries. That one day they may be trial exhibits does not mean that PTP has a right to see them now.

IV. CONCLUSION

PTP has not established a credible reason for seeing the Wineries' damages documents and confidential financial information, at least at this stage of the litigation. PTP cannot be liable for any damages in this action and has no other valid reason why it needs to see the documents at issue. The Wineries are willing to provide PTP limited documents which are already publicly available but in all other respects PTP's motion should be denied.

Respectfully submitted,

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

By: /s/ Joseph M. Infante

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Dated: April 24, 2023

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

This Brief complies with the type-volume limitation of L. Civ. R. 7.3(b)(i) because this Brief contains 4,190 words.

/s/ Joseph M. Infante
Joseph M. Infante

CERTIFICATE OF SERVICE

I hereby certify that on April 24, 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
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