

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 SUPPORT OF MOTION TO COMPEL DISCOVERY
RESPONSES FROM INTERVENOR-DEFENDANT PROTECT THE PENINSULA**

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I. INTRODUCTION

Once PTP was allowed to intervene, it has repeatedly demanded that it be treated as a full participant in this lawsuit so it can protect the interests of its members. Yet now, PTP claims it does not know who its members are and that the interests of its members are not relevant to this case. In answering Plaintiffs' First Amended Complaint, PTP raised 64 affirmative defenses, many of which suggest harms to property values, farming operations, and quiet enjoyment that its members allegedly will suffer if the Wineries prevail in this lawsuit. And PTP has repeatedly insisted that the scope of injunctive relief awarded in this case, if any, be tailored to protect its members' interests.

The Wineries, naturally, want to rebut those affirmative defenses. They served discovery on PTP, asking for basic information like who are PTP's members, what property do those members own in Peninsula Township, and farming schedules that PTP's members follow. The Wineries also asked for communications that PTP's members had about the Wineries and this lawsuit. PTP refused to produce the requested information.

II. BACKGROUND

“[PTP] is comprised of members who are focused on the effects this litigation will have on their properties.” *Wineries of the Old Mission Peninsula Ass'n v. Twp. of Peninsula, Michigan*, 41 F.4th 767, 774 (6th Cir. 2022) (emphasis added). “[T]hese members are primarily concerned with safeguarding their land values, ensuring the quiet enjoyment of their homes, and preserving the viability of their farms.” *Id.* In allowing intervention, the Sixth Circuit noted that PTP's members, in theory, could bring a nuisance claim to preserve its alleged interests. *Id.* at 773. But to have standing to do that, PTP's members must “show damages of a special character distinct and different from the injury suffered by the public generally.” *Towne v. Harr*, 460 N.W.2d 596,

597 (Mich. Ct. App. 1990). These “special damages” are an essential element of proof to a nuisance claim. *Morse v. Liquor Control Comm’n*, 29 N.W.2d 316, 319 (Mich. 1947).

That’s likely why PTP raised 64 affirmative defenses in its First Amended Answer to the Wineries’ First Amended Complaint. (ECF No. 291, PageID.10328-10336.) These affirmative defenses include:

Q. Granting injunctive relief as sought by Plaintiffs would cause immediate irreparable **harm to PTP and its members**, including neighbors who live near existing wineries.

R. Granting injunctive relief as sought by Plaintiffs would cause substantial harm to the public interest, as well as to **cognizable interests of PTP members** and Township residents and voters.

AAA. Plaintiffs’ delay in bringing these claims **prejudiced PTP and its members** because records and witnesses of legislative history regarding the governmental interests advanced by the zoning provisions and the Township’s consideration of less restrictive alternatives are no longer available, impairing PTP’s ability to defend the challenged zoning provisions.

BBB. Plaintiffs’ delay in bringing these claims **prejudiced PTP and its members** because PTP’s members have relied for decades on reasonable investment-backed expectations that the zoning provisions would remain in place subject to a process to amend the Zoning Ordinance established in the Michigan Zoning Enabling Act, including public hearings, compliance with the standards to amend an ordinance, recommendations by the Planning Commission, approval by the Township Board, and the right of voter referendum.

CCC. Plaintiffs’ delay in bringing these claims **prejudiced PTP and its members** because, had Plaintiffs raised or challenged the zoning provisions and SUPs promptly, then Plaintiffs, PTP and the Township could have effectively sought amendments or solutions when there were fewer existing wineries operating under the challenged winery provisions.

DDD. Plaintiffs’ own actions, including by requesting, promoting, drafting, supporting, advocating, accepting, and failing to bring timely challenges to the very zoning provisions they challenge in this case have **prejudiced PTP and its members by inducing PTP and its members** to rely on the zoning provisions and invest in accordance with them.

JJJ. Plaintiffs’ intended engagement in commercial activity **near the homes and farms of PTP members** without the limitations established by the challenged

zoning provisions **would be injurious to PTP and its members**, and therefore would constitute private nuisances.

(*See id.* (emphasis added).) Thus, in a least seven of its affirmative defenses, PTP has placed the interests of its members, and its members' homes and farms, directly at issue. The Wineries are entitled to discovery on those elements of proof—whether cast as a nuisance action or an affirmative defense.

On April 3, 2023, Plaintiffs served PTP with requests to produce and interrogatories. (ECF No. 322.) PTP responded on May 3, 2023. A copy of PTP's responses are attached as **Exhibits A and B**, respectively. PTP repeatedly raised relevance and proportionality objections to nearly every request. PTP also invoked privilege in response to at least 17 different requests but did not produce a privilege log. PTP's objections were so voluminous that one of its responses covered nearly two pages. (*See, e.g.*, **Exhibit B** at Response to Interrogatory 9.)

On May 5, 2023, counsel for the Wineries sent a letter detailing the deficiencies in PTP's production to PTP's counsel. **Exhibit C**. On May 11, 2023, counsel for the Wineries and PTP held a meet and confer in which they resolved a few, but not many, of the issues.

Specifically, PTP agreed to produce a privilege log for privileged communications that pre-date this lawsuit. PTP also agreed to search the social media site NextDoor for communications to or from its members regarding this lawsuit or the Wineries. Finally, PTP agreed to supplement a few of its responses to make clear that PTP does not have responsive documents.

The Wineries now bring this motion to compel to address Requests for Production 1-15 and 22-32 and Interrogatories 1 and 3-9.

III. ANALYSIS

“Having elected to enter this case as parties, rather than as amici, Defendant Intervenors cannot avoid their discovery obligations merely because participating in this litigation is

inconvenient.” *La Union Del Pueblo Entero v. Abbott*, 2022 WL 17574079, *5 (W.D. Tex. Dec. 9, 2022). “Once a party has intervened, it is subject to discovery obligations under Rules 30 and 34 just like a party.” *Fujikura Ltd. v. Finisar Corporation*, 2015 WL 5782351, *4 (N.D. Cal. Oct. 5, 2015).

The Wineries “may obtain discovery regarding any nonprivileged matter that is relevant to any party’s claim or defense and proportional to the needs of the case[.]” Fed. R. Civ. P. 26(b)(1). “Rule 26 embodies a liberal approach to discovery, and ‘relevance’ is construed broadly for discovery purposes.” *MD Auto Grp., LLC v. Nissan N. Am., Inc.*, 2023 WL 3251218, at *1 (N.D. Ohio May 4, 2023). Where a party fails to provide appropriate discovery responses, the party serving discovery may move for an order compelling that discovery. Fed. R. Civ. P. 37(a)(1).

Objections to discovery must be made with specificity, and the responding party has the obligation to explain and support its objections. Fed. R. Civ. P. 34(b)(2)(C) (“An objection must state whether any responsive materials are being withheld on the basis of that objection. An objection to part of a request must specify the part and permit inspection of the rest.”); Fed R. Civ. P. 33(b)(4) (“The grounds for objecting to an interrogatory must be stated with specificity.”).

PTP has not provided any information to substantiate its claim that the requests are unduly burdensome. Of course, counsel has admitted that she has not even engaged in a complete search of all possible recordkeepers, so PTP cannot claim in good faith to even know the universe of discoverable documents.

- A. PTP should be compelled to produce documents relevant to the Wineries’ claims and PTP’s affirmative defenses.**
 - 1. The identity of PTP’s members is relevant to PTP’s affirmative defenses.**

In Requests to Produce 1-3, the Wineries asked for PTP’s current membership list, its former membership lists, and its mailing/emailing lists. PTP refused to produce this information,

stating that it (1) does not keep formal membership lists and (2) does not know who its members are. During the meet and confer, counsel for the Wineries questioned how PTP could intervene to protect its members' interests if PTP does not know the identity of all its members. Counsel for PTP contended that some people could self-identify as PTP members; however, counsel for PTP refused to provide a list of known members of PTP. Counsel for the Wineries further questioned how PTP could have conducted a legitimate search for all relevant documents when counsel for PTP conceded that she did not know the identity of all PTP's members and, thus, did not gather potentially responsive documents from those individuals.

PTP has put the interests of its members directly at issue in its affirmative defenses Q, R, AAA, BBB, CCC, DDD, and JJJ. The Wineries may take discovery on PTP's affirmative defenses. The Wineries submit this should not be a controversial issue—PTP knows who its members are, has intervened on behalf of those members, and has raised affirmative defenses invoking those members' interests. PTP must disclose the identities of those members to the Wineries.

PTP's claim that it does not know its own members is particularly curious given that, shortly after this lawsuit was filed, on December 8, 2020, PTP amended its bylaws to add litigation as one of its purposes. That amendment required "the written consent of all the shareholders or members entitled to vote" on the amendment. (**Exhibit D: Restated Articles of Incorporation, at 3.**) So there must have been a vote taken by PTP's shareholders and members. Also, if PTP does not know who its members are, how did PTP know from whom to obtain the affidavits it has already submitted in this action, and with whom is PTP's attorney communicating?

2. PTP's property interests are directly relevant to the harms PTP has alleged.

Flowing directly from PTP's identification of its members are **Requests to Produce 22-**

25. For each of PTP's members identified from PTP's membership list, the Wineries asked for specific information about those members' specific interests that PTP placed at issue.

Request to Produce 22: “[E]very deed, lease, mortgage, or other instrument demonstrating that the member has an interest in real property located within Peninsula Township.”

Request to Produce 23: “[E]very appraisal, offer for sale, or offer for purchase since January 1, 1980 for the land in which that member has an interest in Peninsula Township.”

Request to Produce 24: “[A]ll trucking records for transporting produce within or outside Peninsula Township.”

Request to Produce 25: “[A]ll spray schedules and records.”

PTP objected that it does not have a membership list, so it could not respond to these requests. During their meet and confer, counsel for the Wineries requested that PTP produce this information for the members of which it was aware. PTP's counsel refused, again arguing that these requests are not relevant.

These requests are directly relevant to PTP's affirmative defenses Q, BBB, and JJJ.

Q. Granting injunctive relief as sought by Plaintiffs would cause immediate irreparable **harm to PTP and its members**, including neighbors **who live near existing wineries**.

BBB. Plaintiffs' delay in bringing these claims **prejudiced PTP and its members** because PTP's members have relied for decades on reasonable investment-backed expectations that the zoning provisions would remain in place subject to a process to amend the Zoning Ordinance established in the Michigan Zoning Enabling Act, including public hearings, compliance with the standards to amend an ordinance, recommendations by the Planning Commission, approval by the Township Board, and the right of voter referendum.

JJJ. Plaintiffs' intended engagement in commercial activity **near the homes and farms of PTP members** without the limitations established by the challenged zoning provisions **would be injurious to PTP and its members**, and therefore would constitute private nuisances.

Consistent with those affirmative defenses, PTP members Mark Nadolski and John Jacobs submitted affidavits in which they allege that their property values would be negatively affected if

the Wineries prevail. (ECF No. 304-1, PageID.10871 (“I also believe my property values will decline if traffic increases notably as a result of more non-agricultural commercial activities being allowed on the peninsula[.]”); ECF No. 304-2, PageID.10876 (Winery activity “would adversely affect [his] property interests, including [his] property values[.]”).) To rebut affirmative defenses Q, BBB, and JJJ, the Wineries need to know where PTP’s members live and what those properties are worth. PTP cannot claim that the location and value of its members’ property is relevant for purposes of its affirmative defenses but not discoverable.

Similarly, PTP’s members have alleged in affidavits that their ability to transport produce on Old Mission Peninsula and spray their crops would be impacted by commercial activity at the Wineries. (ECF No. 304-4, PageID.10915, .10917, .10923.) Again, these members put their farming operations at issue when they submitted affidavits, yet PTP has refused to produce any requested records. **Requests to Produce 24 and 25** are directly targeted to those allegations, and PTP should be compelled to respond to them.

3. Communications to and from PTP’s members regarding the Wineries and this lawsuit are relevant and proportional.

Requests to Produce 5-15 asked for communications between PTP’s members and various other individuals. These requests were limited to communications discussing this lawsuit or the Wineries.

PTP objected that communications about this lawsuit and about the Wineries were not relevant to this lawsuit. Any communications that PTP’s members had with each other or third parties about this lawsuit or the Wineries are clearly relevant to the proceedings. And, as noted above, in order to sustain a private nuisance action the PTP members would be required to show that the Wineries’ actions unreasonably interfered with the quiet enjoyment of their property. Certainly, communications amongst PTP members or to Township officials complaining about the

Wineries, or the lack of such communication, bears on both the Wineries' claims and PTP's defenses.

Another issue is the scope of PTP's search. During the meet and confer PTP's attorney stated that she did not know the identity of PTP's members and, thus, she did not gather responsive documents from these unknown members. The documents PTP did produce clearly demonstrate that PTP put little effort into responding. PTP produced 35 email messages and not a single text message or social media message. It is unbelievable that members of PTP were so upset with the conduct of the Wineries that they intervened in this lawsuit but that they, collectively, would produce only 35 emails, no text messages, and no social media posts about the Wineries or this lawsuit.

PTP has an obligation to produce documents within its "possession, custody, or control." Fed. R. Civ. P. 34(a)(1). PTP has "possession, custody, or control" of its members emails, text messages, and social media posts. *See, e.g., Robert Wigington v. Metro. Nashville Airport Auth.*, No. 3:17-CV-01523, 2019 WL 12096809, at *4 (M.D. Tenn. May 31, 2019) (compelling disclosure of communications from personal devices of individual commissioners over objection that association did not have control over those devices because "[a]ny official communication possessed by a commissioner is necessarily also in MNAA's possession, custody, or control").

PTP cannot intervene to defend its members' interests, raise at least seven affirmative defenses invoking those members' interests specifically, and then play dumb when asked to identify those members and information to substantiate those members' interests.

4. PTP's meeting minutes contain information about its membership and may have information related to this lawsuit.

In **Request to Produce 4**, the Wineries asked for PTP's meeting minutes. During the meet and confer counsel for PTP said she was unaware whether PTP maintains any sort of meeting

minutes. The lack of meeting minutes may have ramifications later in this case. The Wineries fully intend to seek reimbursement of their attorneys' fees from PTP as well as Peninsula Township. *See, e.g., Akron Ctr. for Reprod. Health v. City of Akron*, 604 F. Supp. 1268, 1274 (N.D. Ohio 1984) (concluding award of attorney fees was appropriate against intervening defendant). PTP's lack of corporate formality (counsel for PTP stated that PTP does not even collect member dues) leads to serious questions as to whether PTP is simply a fiction and is, in reality, nothing more than a marketing tool for a handful of individuals. This marketing tool appears to not have any assets, notably this case is being funded by a second entity, which might make it uncollectable. Then, it might be more appropriate to assess the Wineries' attorneys' fees against the individual members and pierce the corporate veil. *See United States v. Buaziz*, 2010 WL 3517075, at *8 (E.D. Tenn. Sept. 3, 2010) (piercing the corporate veil to reach the assets of a not-for-profit corporation controlled by its principal).

5. Donations to PTP are relevant to witness credibility and bias.

In **Request to Produce 26**, the Wineries asked for "a copy of all receipts of donations and/or contributions that PTP has received from Preserve Old Mission since October 2020." PTP objected that this request was not relevant.

According to PTP's website, Preserve Old Mission is "a Michigan 501(c)(3) tax-exempt organization affiliated with Protect The Peninsula" collecting donations to fund PTP's efforts in this case.¹ Evidence of these donations is relevant because it bears upon the credibility of PTP's witnesses at trial. If these donations are coming from outside of Old Mission Peninsula, and especially if they are coming from other wineries outside of Old Mission Peninsula or from

¹ <http://protectthepeninsula.com/donate/> and <http://protectthepeninsula.com/protect-the-peninsula-position/>

township farmers looking to drive down the value of competing businesses, then the Wineries may use them to impeach PTP's witnesses. "Rule 26 further permits the discovery of information which may simply relate to the credibility of a witness or other evidence in the case." *Ragge v. MCA/Universal Studios*, 165 F.R.D. 601, 603 (C.D. Cal. 1995). Therefore, "[i]nquiries concerning a witnesses' credibility are relevant and thus reasonably calculated to lead to the discovery of admissible evidence[.]" *Cabana v. Forcier*, 200 F.R.D. 9, 17 (D. Mass. 2001). PTP must produce this evidence.

6. Discovery into the intervention factors is relevant because the Wineries may challenge intervention again.

When it moved to intervene, PTP generally alleged that its members would suffer harm from increased commercial activity, increased events, increased commercial sales and decreased property values. Therefore, in **Requests to Produce 27, 28, 29, 30, 31, and 32**, the Wineries sought information on these allegations:

Request to Produce 27: Documents supporting PTP's contention that "invalidation of 6.7.2(19)(a), 6.7.2(19)(b)(1)(v), or 6.7.2(19)(b)(6) and any resulting expansion of these contours will harm PTP's members" including but not limited to PTP's allegation that "Farm Processing Facilities will become far more intense commercial land uses."

Request to Produce 28: Documents supporting PTP's contention that "Invalidation of [Section 8.7.3(10)(m)] resulting in the removal of those limitations and expansion of events at Winery-Chateaus would harm PTP's members[.]"

Request to Produce 29: Documents supporting PTP's contention that "Limiting merchandise sales to items promoting local agriculture or the winery keeps Remote Winery Tasting Rooms from becoming general convenience stores or souvenir shops" and that "removal of these limitations would harm PTP's members[.]"

Request to Produce 30: Documents supporting PTP's contention that "Invalidation of [the seven subsections of 8.7.3(10)(u)] resulting in increased commercial activity at Winery-Chateaus for reasons unrelated to agriculture and the principal winery uses of wine production, sales, and tasting, would harm PTP's members."

Request to Produce 31: Documents supporting PTP’s contention that “if GAUs are unlimited as a result of invalidation of any one of them, that would likely lead to more commercial activities” which would “in turn adversely impact PTP members’ property values and use and enjoyment of property” as well as “increase the potential for nuisance and conflict with nearby farm activities.”

Request to Produce 32: Documents supporting PTP’s contention that “The proximity of an industrial/commercial enterprise at Black Star that may import all produce from beyond its own operations and the peninsula would reduce the value and desirability of my property.”

PTP objected that this information was not relevant because the Sixth Circuit has allowed it to intervene. These documents are relevant for two reasons.

First, intervention is not settled. “When a party that has been granted intervention as of right no longer meets the requirements for such intervention, a court properly dismisses that party from the case.” *Coalition to Defend Affirmative Action v. Regents of University of Mich.*, 539 F. Supp. 2d 960 (E.D. Mich. 2008) (reversed on other grounds) (citing *Morgan v. McDonough*, 726 F.2d 11, 14 (1st Cir. 1984). Even where a party is granted intervention, “it would have gained no absolute entitlement to continue as a party until termination of the suit.” *Morgan*, 726 F.2d at 14. That’s because “[t]he district court needs the power to dismiss in order to manage complicated drawn-out proceedings efficiently.” *Id.* (citing Notes on Advisory Committee to Fed. R. Civ. P. 24). The Wineries may file a motion to revoke PTP’s intervenor status. *See, e.g., Mishewal Wappo Tribe of Alexander Valley v. Salazar*, 2012 WL 4717814 (N.D. Cal. Sept. 28, 2012) (granting motion revoke intervenor status); *Gay-Lesbian-Bisexual-Transgender Pride/Twin Cities v. Minneapolis Park and Recreation Bd.*, 2011 WL 1300381, *3 (D. Minn. April 4, 2011) (ordering permissive intervenor to show cause why it had a right to intervene or face dismissal). The Wineries are thus entitled to discovery into PTP’s interests to see if they are true and whether they have changed over time.

Second, these documents also relate to PTP’s affirmative defenses. In Requests to Produce

27-32, the Wineries are asking PTP for evidence of how it will be harmed. PTP's affirmative defense JJJ states that "Plaintiffs' intended engagement in commercial activity near the homes and farms of PTP members without the limitations established by the challenged zoning provisions would be injurious to PTP and its members, and therefore would constitute private nuisances." The Wineries requests are directly targeted to discover evidence about the scope of the harms PTP's members believe they will suffer, as stated in affirmative defense JJJ. The requests are proper.

B. PTP should be compelled to supplement its interrogatory responses with relevant information.

The Wineries also served interrogatories targeted specifically to PTP's affirmative defenses. PTP's interrogatory responses are littered with rambling objections and are not responsive to the Wineries' requests. PTP's counsel refused to discuss these during the meet and confer because she believes the Wineries do not have any right to serve interrogatories. PTP takes this position because a Second Amended Case Management Order was issued related to PTP's discovery, the Wineries may not take discovery of PTP. However, that Order does not say that the Wineries cannot engage in reciprocal discovery of PTP. Notably, in its Second Order Setting Rule 16 Scheduling Conference, this Court stated that "Defendant Peninsula Township is not permitted to pursue discovery." ECF No. 320, PageID.11893, fn. 3. No such restriction was placed on the Wineries. Thus, the Wineries have engaged in discovery subject to the restriction placed on them by the Court's Amended Case Management Order which allowed the Wineries to serve 25 interrogatories. See ECF No. 72, PageID.3183. Ironically, PTP took the position in the parties Joint Status Report that the Wineries would be "limited to 25 interrogatories." See ECF No. 323, PageID.11903. The Wineries served the Township with thirteen interrogatories and PTP with eleven interrogatories.

Interrogatory 1 related to PTP's affirmative defense E and asked PTP to identify the claims PTP believes are preempted by state or federal law and the "applicable state or federal law" that PTP believes preempts the claims. PTP identified three claims that may be preempted but did not identify which state or federal law would preempt them.

Interrogatory 3 related to PTP's affirmative defense NN and asked PTP to identify which "Plaintiffs have waived their ability to challenge the zoning conditions placed upon their special use permits," when that waiver occurred, and the manner in which it was made. PTP's response is generic and does not identify the time or manner of specific alleged waivers.

Interrogatory 6 related to PTP's contention that the actions of the Wineries have harmed the land values of its members. PTP refused to provide an answer.

Interrogatory 7 related to PTP's contention that the actions of the Wineries have impaired the viability of PTP's farming operations. PTP refused to provide an answer.

Interrogatory 8 related to PTP's contention that the actions of the Wineries have impaired the quiet enjoyment of PTP's members. PTP refused to provide an answer.

Interrogatory 9 asked PTP to identify, by each subsection of the Winery Ordinances at issues, which governmental interests applied to support those subsections and how those subsections furthered the governmental interests, as required by *Central Hudson*. PTP referenced the general interests in the Peninsula Township ordinance, but refused to specify which interests apply to which subsection. That is directly relevant for litigation on the *Central Hudson* factors, and if PTP intends to defend on that issue, it must provide a response.

C. PTP should be compelled to produce a privilege log.

PTP invoked attorney-client privilege and/or work product privilege in response to **Requests to Produce 5-15, 27-32**. However, PTP did not produce a privilege log as required by Federal Rule of Civil Procedure 26(b)(5). The Wineries agree that PTP need not produce a

privilege log for communications between PTP's attorneys and PTP's members (assuming they can be identified) after PTP moved to intervene in this case. But to the extent PTP is claiming privilege for any other documents, a privilege log must be produced.

IV. CONCLUSION

PTP asked to be a party to this case but wants its participation to be completely one sided. The Wineries are entitled to inquire into PTP's arguments and defenses otherwise the Wineries cannot fully litigate this case. The Court should order PTP to fully respond to the Wineries' discovery requests and order PTP to reimburse the Wineries for their costs and attorneys' fees incurred in bringing this motion. *See* Fed. R. Civ. P. 37(5) (court "must" require non-movant or its attorney to pay movant's costs and reasonable attorneys' fees.)

Respectfully submitted,

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

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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 4,298 words.

/s/ Joseph M. Infante
Joseph M. Infante

CERTIFICATE OF SERVICE

I hereby certify that on May 12, 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