UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

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

Plaintiffs,

v

PENINSULA TOWNSHIP, a Michigan municipal corporation,

Defendant,

and

PROTECT THE PENINSULA, INC.,

Intervenor-Defendant.

Case No. 1:20-cv-01008

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

PROTECT THE PENINSULA'S RESPONSE TO PLAINTIFFS' MOTION TO COMPEL DISCOVERY RESPONSES (ECF 346)

Joseph M. Infante (P68719)
Christopher J. Gartman (P83286)
Stephen Michael Ragatzki (P81952)
Miller, Canfield, Paddock
Attorneys for Plaintiffs
99 Monroe Ave., NW, Suite 1200
Grand Rapids, MI 49503
(616) 776-6333
infante@millercanfield.com
gartman@millercanfield.com
ragatzki@millercanfield.com

Barry Kaltenbach
Miller, Canfield, Paddock
Attorneys for Plaintiffs
227 Monroe Street, Ste 3600
Chicago, IL 60606
(312) 460-4200
kaltenbach@millercanfield.com

Scott Robert Eldridge (P66452)
Miller, Canfield, Paddock
Attorneys for Plaintiffs
One E. Michigan Avenue, Ste 900
Lansing, MI 48933
(517) 487-2070
eldridge@millercanfield.com

Thomas J. McGraw (P48817)
Bogomir Rajsic, III (P79191)
McGraw Morris, P.C.
Attorneys for Defendant
2075 W. Big Beaver Road, Ste 750
Troy, MI 48084
(248) 502-4000
tmcgraw@mcgrawmorris.com
brajsic@mcgrawmorris.com

William K. Fahey (P27745)
John S. Brennan (P55431)
Christopher S. Patterson (P74350)
Fahey Schultz Burzych Rhodes PLC
Co-Counsel for Defendant
4151 Okemos Road
Okemos, MI 48864
(517) 381-0100
wfahey@fsbrlaw.com
jbrennan@fsbrlaw.com
cpatterson@fsbrlaw.com

Tracy Jane Andrews (P67467)
Law Office of Tracy Jane Andrews, PLLC
Attorneys for Intervenor-Defendant
420 East Front Street
Traverse City, MI 49686
(231) 946-0044
tjandrews@envlaw.com

Holly L. Hillyer (P85318)
Olson, Bzdok & Howard, P.C.
Co-Counsel for Intervenor-Defendant
420 East Front Street
Traverse City, MI 49686
(231) 946-0044
holly@envlaw.com

PROTECT THE PENINSULA'S RESPONSE TO PLAINTIFFS' MOTION TO COMPEL DISCOVERY RESPONSES (ECF 346)

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I. INTRODUCTION

The Court should deny Plaintiffs' motion to compel and instead issue a protective order to PTP and grant PTP its expenses and attorney fees incurred in responding to Plaintiffs' motion. Plaintiffs seek documents that do not exist and are not relevant to any claims or defenses. Plaintiffs' requests overtly attempt to relitigate PTP intervention, which is settled. Plaintiffs ignore this Court's direction reopening discovery for PTP alone to undertake discovery on limited issues. Plaintiffs' motion relies on outdated caselaw, speculation, and illogical arguments. Plaintiffs seek disclosure of highly sensitive, non-relevant documents that would infringe on well-established freedom of association rights. Plaintiffs' requests are also excessively burdensome and appear designed to punish PTP for intervening, distract PTP from conducting discovery, or both.

II. BACKGROUND

After PTP was granted intervention, the Court considered motions to address the changed landscape, from adjourning trial to vacating prior orders to considering what issues PTP may litigate. Then the Court considered what schedule modifications were necessary for PTP to be heard. Its order on PTP's motion to amend the Case Management Order (CMO) says which party can do what:

> Considering the reason why PTP has been permitted to intervene in this matter and how its intervention requires this case to move forward, the Court will (1) **allow *PTP* to conduct limited discovery;** (2) permit *PTP* to file a motion for summary judgment, limited to the issues that it has an interest in, to which both the *Wineries and the Township* may respond; (3) permit the *Wineries* to file a new motion for summary judgment discussing any issue that is still live due to the setting aside of the June 3 Order; (4) permit the *Township* to file a new motion for summary judgment limited to the preemption claim; and (5) determine exactly which issues *PTP* has an interest in and consequently, which claims *PTP* may defend against.

(ECF 301, PageID.10700) (emphasis added) Under "**Limited Discovery**," the Court explained the post-PTP discovery phase:

> As for discovery that PTP seeks to pursue, such discovery will be limited to the issues that PTP has an interest in. That is, PTP may pursue discovery related to the nine issues that the Court indicated PTP has an interest in. And depending on the outcome of the Court's decision on the remaining three issues, PTP may be able to pursue discovery related to those issues. As the Court indicated in the previous subsection, after the Court explicitly determines the claims that PTP may defend against, the Court will order the parties to confer. After they confer and file a joint status report, the Court will issue an amended CMO.

(ECF 301, PageID.10704) The Court subsequently found PTP may litigate the remaining three issues. (ECF 319, PageID.11882, 11890)

The Court then issued its Second Order Setting Rule 16 Scheduling Conference. (ECF 320) It set a scheduling conference for April 21, 2023, and ordered the parties to confer "[a]t least seven days before" (by April 14) and file a joint report. (*Id.*, PageID.11892) Plaintiffs pushed for an early conference on April 3. (ECF 323, PageID.11903). Little was agreed upon except dates for PTP initial disclosures. (*Id.*) Less than two hours later, Plaintiffs sent PTP 11 interrogatories, 45 requests for production (RFPs), and 37 requests to admit. (ECF 321)

Four days later, on April 7, as agreed, PTP served its Initial Disclosures and identified PTP members and directors likely to have discoverable information. **(Ex A)** A week later, on April 14, as agreed, PTP produced PTP documents it may use to support its defenses.

The Court issued the Second CMO on May 2. (ECF 343) Consistent with the order limiting discovery, it says PTP may serve up to 25 interrogatories and take up to 12 depositions; "[t]here shall be no deviations from this order without prior approval of the court upon good cause." (ECF 343, PageID.12547) Fact discovery closes July 21, 2023.

The next day, on May 3, PTP served timely and comprehensive responses to Plaintiffs' requests. On May 5, Plaintiffs' counsel sent a letter complaining about PTP's responses. (ECF

347-3) On May 11, counsel for Plaintiffs and PTP discussed Plaintiffs' concerns. PTP's counsel notified Plaintiffs' counsel that PTP was still collecting documents from several custodians and that a supplemental production was forthcoming. PTP also agreed to clarify some responses. (ECF 347, PageID.12568) The next day, Plaintiffs filed this motion challenging 25 RFP responses and 8 interrogatory responses. PTP served amended responses May 24. (**Ex B**)

III. ANALYSIS

A. Plaintiffs' discovery period is closed.

For the original parties, fact discovery closed November 15, 2021. (ECF 72) Since then, the Sixth Circuit found the possibility "[t]hat the ordinances might not survive is sufficient for [PTP] to satisfy the substantial-interest requirement" for intervention by right, and this Court has determined the issues PTP may litigate and the judicial process going forward. (ECF 215, PageID.8186) The Court stated PTP may conduct discovery into issues it has an interest in (ECF 301, PageID.10700) and issued the Second CMO limiting the timeframe for PTP to do so. (ECF 343) The Court considered but declined to adopt the parties' positions on various issues, including discovery. (ECF 323, ECF 343) The Court's declining to reopen discovery for Plaintiffs and the Township is reasonable because Plaintiffs' claims and PTP defenses rise and fall on Township ordinances and the actions and inactions of the Township and Plaintiffs, and they have completed discovery. There is also slim risk PTP could surprise Plaintiffs at trial; Rule 26(a) addresses that concern.

Plaintiffs disregard the order limiting discovery, instead addressing the order setting the scheduling conference. (ECF 347, PageID.12577, addressing ECF 320). Plaintiffs also selectively use the prior CMO (ECF 72) to justify using their 11 remaining interrogatories on PTP, disregarding their November 2021 fact discovery deadline. (ECF 347, PageID.12577)

Plaintiffs' discovery and this motion are contrary to clear Court orders and should be rejected so PTP may complete discovery without further distraction and delay.

B. PTP made a good faith effort to respond to Plaintiffs' discovery.

Early in this case, PTP gathered historic documents related to Township zoning. Relevant documents were timely disclosed. Upon receipt of Plaintiffs' discovery requests, PTP asked all known custodians of potentially responsive documents – PTP directors, members, and others – to search for responsive information. (**Ex C,** Gerds Aff.) PTP's legal team assisted with searches, gathered documents, reviewed them, and produced responsive non-privileged documents. PTP withheld limited categories of documents due to serious concerns about disclosing highly sensitive irrelevant documents – mailing and donor lists, property appraisal and mortgage documents, and trucking and spray records. (*Id.*) PTP produced responses on May 3, and supplemental responses on May 25. Plaintiffs knew PTP had ongoing searches but filed this motion regardless. PTP counsel's paralegal spent over 60 hours finding and reviewing documents responsive to Plaintiffs' requests, and counsel has spent about as many as well. (*Id.*) PTP has more than complied with its discovery obligations. It is not clear what else PTP could do.

C. Plaintiffs seek irrelevant information through burdensome requests.

Discovery must be relevant to claims or defenses and proportional to the needs of the case. Fed. R. Civ. P. 26(b)(1). Relevance means making a consequential fact more or less probable. Fed. R. Evid. 401. Plaintiffs must establish the information they seek is relevant.

The information Plaintiffs seek is not relevant to their claims or PTP's defenses. Plaintiffs sued Peninsula Township alleging parts of its Zoning Ordinance (PTZO) are preempted or

unconstitutional. (ECF 29, PageID.1116-1127) They mount facial attacks on the lawfulness of the PTZO. (ECF 28, PageID.1070; ECF 46, PageID.2136). They seek to enjoin Township enforcement of the PTZO and more than $100 million in damages. (ECF 303, PagID.10839) PTP intervened to defend the lawfulness of the PTZO to maintain the status quo, with continued zoning stability and consistency for Township property owners. *See Raabe v. Walker*, 383 Mich. 165, 177 (1970). Plaintiffs seek to upend decades-long zoning; PTP seeks to defend it.

Plaintiffs mischaracterize PTP's interests to justify improper discovery. (ECF 347, PageID.12566-12568) PTP has not brought nuisance claims. PTP does not seek damages for diminished property values. PTP is not seeking to curtail Plaintiffs' authorized activities. PTP is not seeking change. PTP is defending the PTZO because the Township did not. *See WOMP v. Peninsula Twp. (WOMP II),* Case No. 22-1534 (Aug. 23, 2022) (vacating injunction after PTP intervention in part because district court invalidated zoning "based not on the merits of the legal arguments, but on the Township's waivers, defaults, and/or concessions") (ECF 251, PageID.8978) The relevant documents in this case are mainly Plaintiffs' and the Township's, not PTP's. Plaintiffs have not established their requests are relevant.

Even relevant information may not be discoverable if the discovery is not proportional to the needs of the case, considering the importance of the issues and the discovery in resolving them, amount in controversy, party resources, and other factors. Fed. R. Civ. P. 26(b)(2). Here, those factors weigh heavily against Plaintiffs' requests. While the issues are highly important, the discovery Plaintiffs seek from PTP is scarcely important to resolving them. Plaintiffs already filed for summary judgment once on most of their constitutional claims (ECF 136) and twice on preemption (ECF 53, ECF 334). Plaintiffs were prepared – and eager – to go to trial with the record they had built before discovery ended in November 2021. (ECF 190, 234)

Similarly, while the amount in controversy is significant, there is none in controversy with PTP. PTP has no information bearing on this factor and may not even see evidence supporting Plaintiffs' damages claims – Plaintiffs convinced the Court PTP has no interest in it and might wield it for political advantage. (ECF 345)

Regarding resources, Plaintiffs are 11 for-profit winery businesses and their trade association, while PTP is a nonprofit organization reliant on donations and volunteers. (ECF 41-2, PageID.2069) The burden and expense of this discovery on PTP far outweigh whatever marginal benefit it might produce.

Plaintiffs' requests are disproportionate to what came before and what lies ahead. Throughout the 11-month original discovery period, Plaintiffs served 38 RFPs and 13 interrogatories to the Township – the party that, over decades, adopted the challenged provisions, enforced them, and supposedly caused more than $100 million in lost profits. Now, when PTP has less than 3 months for its own discovery, Plaintiffs served 45 RFPs and 11 interrogatories to the party who did *none* of the things they complain about. Throughout this litigation, Plaintiffs insisted PTP has nothing relevant to contribute (ECF 46, 60, 183, 234, 256, 275, 294, 310, 311) Plaintiffs say PTP efforts to defend the PTZO are futile and add nothing new. (ECF 234, PageID.8497; ECF 275, PageID.10042; ECF 294, PageID.10399; ECF 310, PageID.11448) Now they pretend PTP guards troves of invaluable documents. Relevant evidence is in Plaintiffs' and the Township's collections, not PTP's.

D. <u>PTP's responses are sufficient</u>.

1. RFP 1-3 - membership and mailing lists

Plaintiffs seek PTP's membership and mailing lists. (ECF 347, PageID.12569-12570)

PTP does not maintain "membership list[s]." (**Ex. D,** Nadolski Aff.) PTP cannot produce or be forced to create what does not exist. Fed. R. Civ. P. 34(a)(1). PTP identified in its initial disclosures the six PTP members who may have knowledge relevant to this case. (**Ex A**; **Ex C,** Gerds Aff.) No more was necessary.

PTP membership information is not relevant – it sheds no light on zoning constitutionality, the timeliness of Plaintiffs' claims, or otherwise. Moreover, this litigation is extremely divisive, and PTP supporters have real fears of repercussions for openly associating with PTP. (**Ex E,** Jacobs Aff.) So PTP recognizes only a small subset of supporters as members – its directors, whose identities are publicly available in PTP's annual reports to the Michigan Department of Licensing and Regulatory Affairs, and the affiants in this case. (*Id.*; **Ex D,** Nadolksi Aff.)

Plaintiffs' assertion that PTP "amended its bylaws to add litigation as one its purposes" is false. (ECF 347, PageID.12570) PTP has litigated Township land use matters since 1988. (ECF 41-2, PageID.2070) PTP restated its Articles of Incorporation in late 2020 to align with state law changes since its 1988 incorporation. **(Ex D,** Nadolksi Aff.) While PTP does not keep membership lists, it knows its members who voted to restate. (*Id*.)

Plaintiffs also request PTP's mailing list without explaining its relevance. There is no valid reason for Plaintiffs to have it.

PTP's membership and mailing lists are protected by the First Amendment right of association. *See Americans for Prosperity Foundation v. Bonta (APF)*, 593 U.S. __, 141 S.Ct. 2373, 2382-83 (2021) (First Amendment right of association invoked by forced disclosure of charitable organization's donors); *Shelton v. Tucker,* 364 U.S. 479, 486 (1960) (First Amendment protects against disclosure of associational ties because even non-public disclosure imposes fear

that association may displease others); *NAACP v. Alabama*, 357 U. S. 449, 462 (1958) (compelled disclosure of affiliation with groups engaged in advocacy may restrain freedom of association); *Talley v. California*, 362 U. S. 60, 65 (1960) ("identification and fear of reprisal might deter perfectly peaceful discussions of public matters of importance"). The freedom to associate includes the freedom to join and contribute to organizations in furtherance of a common goal; compelled disclosure of members' identity may lead to economic reprisal, threats, and hostility to the members, and may impair the organization's ability to pursue its mission or induce members to withdraw. *NAACP,* 357 U.S. at 462-63.

PTP maintains the anonymity of its supporters, including those on its mailing list. (**Ex E,** Jacobs Aff.) Disclosing its mailing list is likely to cause supporters to withdraw, decline to donate, or disassociate. (*Id.*) This is highly charged litigation in a small community; PTP supporters have reasonable concerns about financial and other repercussions if their PTP affiliation is disclosed. (*Id.*) *See Ohio Org. Collaborative v. Husted,* Case No. 2:15-cv-01802 (S.D. Ohio Nov. 12, 2015) **(Ex G)** ("The Court has no doubt that the compelled disclosure of such sensitive information in the context of highly charged litigation involving issues of great political controversy would have a chilling effect on plaintiffs' freedom of association by adversely impacting their ability to organize, promote their message(s), and conduct their affairs.") (citation omitted).

Where a party seeks disclosure of information that may have a deterrent effect on the freedom of association, the requester must show the information is "highly relevant to claims or defenses in litigation" and it must support "a crucial element" of plaintiffs' claim. *Perry v. Schwarzenegger,* 591 F.3d 1147, 1160-61 (9th Cir. 2010). *See also Ohio A. Philip Randolph Inst. v. Larose*, 761 Fed. Appx. 506, 514 (6th Cir. 2019) (district court properly addressed

associational privilege in discovery dispute; requester "must show that the information sought is *highly relevant* to the *claims or defenses* in the litigation") (emphasis in original, citing *Perry*); *Grandbouche v. Clancy,* 825 F.2d 1463, 1466 (10th Cir. 1987) (order compelling discovery of organization's mailing and membership lists triggers first amendment privilege and requires balancing test to consider relevance, necessity, alternative sources, and nature of information). Plaintiffs made no attempt to show how PTP's mailing list is relevant to *anything* in this case – let alone highly relevant to crucial elements of claims or defenses. Plaintiffs are not entitled to PTP's mailing list.

2. RFP 22-25 – property documents, trucking and spray records

Plaintiffs seek PTP members' historic deeds, leases, mortgages, and appraisals on the basis PTP put its members property values at issue by intervention affidavits. Plaintiffs also contrive arguments that they need historic trucking and spraying records to rebut PTP affirmative defenses and that PTP members "put their farming interests at issue when they submitted affidavits" supporting intervention. (ECF 347, PageID.12571-12572) Plaintiffs misunderstand that the elements of intervention are not elements of claims or defenses, and intervention is settled. As for PTP's affirmative defenses, they address the nuisance-like harms the PTZO reasonably avoided in the *past* and that Plaintiffs' requested changes may cause in the *future*. Historic appraisals, mortgages, trucking and spray records are highly private and proprietary to PTP members, but Plaintiffs have not shown they are important to resolving Plaintiffs claims or PTP defenses. PTP members produced records corroborating their property interests (**Ex B**); nothing more is relevant or necessary.

3. RFP 5-15 – communications about this lawsuit

Plaintiffs request PTP communications about this Lawsuit or any Winery. (ECF 347, PageID.12572-12573) PTP objected because the communications are irrelevant, but nevertheless searched for and produced all non-privileged responsive documents. (**Ex B**; **Ex C**, Gerds Aff.) Discussing this Lawsuit does not bear on Plaintiffs' claims or PTP's defenses any more than discussing a criminal case makes those discussing it complicit. Plaintiffs insist the communications relate to PTP's "private nuisance action." (ECF 347, PageID.12572) But there is no nuisance action; PTP seeks to maintain *current* zoning to avoid *future* nuisances.

Plaintiffs are apparently underwhelmed by the responses, speculating PTP conducted an inadequate search. PTP conducted a thorough search of each PTP director and member. (**Ex C,** Gerds Aff.) As shared during the meet-and-confer, PTP's search of some custodians was ongoing, and PTP agreed to (and did) produce screenshots of social media platforms. PTP counsel candidly admitted that PTP did not do the impossible – gather documents from supporters who might self-identify as members without PTP's knowledge or recognition. Non-privileged responsive documents have been produced; there is nothing to compel.

The reason there are few responsive, non-privileged communications is obvious: Plaintiffs requested communications about litigation from represented litigants. Unsurprisingly, counsel was typically involved and PTP properly withheld privileged communications.

PTP did not search PTP members' texts. PTP spent over 60 hours searching and reviewing emails that resulted in extremely few responsive documents with extremely attenuated relevance to this case. (**Ex C,** Gerds Aff.) PTP reasonably concluded text messages would be even less fruitful and more labor-intensive. Moreover, Plaintiffs and the Township produced no texts in discovery. Searching texts for gripes about wineries would be a waste of resources.

4. RFP 4 – meeting minutes

Plaintiffs want the minutes of PTP meetings for the last 23 years. (ECF 347, PageID.12573-12574) Here is their logic: Plaintiffs intend to seek attorney fees from PTP; Plaintiffs are concerned PTP is not sufficiently formal, does not collect membership dues, may be a "fiction," and hence may be uncollectible; Plaintiffs may need to pierce PTP's corporate veil to assess attorney fees against PTP members. (*Id.*)

First, this retributive threat of financial liability against PTP members is harassment. Such unwarranted aggression cements PTP's reluctance to produce sensitive information.

Second, PTP is no fiction. It was incorporated in 1988 and has remained a lawful corporate entity ever since. (ECF 42-2) Minutes of PTP meetings dating back 23 years make it no more or less likely PTP is a proper Michigan corporation.

Third, Plaintiffs' illogical argument rests on overturned non-precedential caselaw. (ECF 347, PageID.12574) (citing *Akron Ctr. for Reprod. Health v. Akron*, 604 F.Supp. 1268, 1274 (N.D. Ohio 1984)). Since 1984, courts reject the argument that a non-liable party (intervener) is responsible for attorney fees awarded under Section 1988. *Indep. Fed'n of Flight Attendants v. Zipes,* 491 U.S. 754 (1989); *Heald v. Granholm,* 457 F.Supp.2d 790, 791-93 (E.D. Mich. 2006) (post-*Zipes*, prevailing plaintiff may not obtain attorney fees from losing intervening defendant under fee-shifting statute unless intervening defendant's position was frivolous, unreasonable, or without foundation); *Bogaert v. Land*, Case No. 1:08-CV-687 (W.D. Mich. April 14, 2009) (**Ex G**) (no basis for attorney fees from intervener where intervention by right under Rule 24(a)(2) demonstrated intervention was not "frivolous, unreasonable, or without foundation").

Fourth, PTP meeting minutes are not relevant, but they are sensitive. Since late 2020, PTP meetings routinely address PTP fundraising, litigation, and communication strategies. (**Ex E**,

Jacobs Aff.) Disclosure would lead to slimmer notes and chilled discussions. *See Perry,* 591 F.3d at 1162-63 (disclosure of internal communications may chill participation, mute internal exchange of ideas, infringing on First Amendment rights). Moreover, PTP's legal counsel attends meetings for legal strategy discussions, so the minutes are protected work product and attorney-client communications.

PTP notified Plaintiffs that it found no minutes from 2000 to late 2020 and will provide a privilege log of minutes since October 2020. Plaintiffs are entitled to no more.

5. RPF 26 - donor information

Plaintiffs request information about PTP's donors, speculating that it may bear on PTP witness credibility without plausibly explaining how. (ECF 347, PageID.12574)

PTP cannot provide donor information because it is highly sensitive and PTP has pledged to keep it private. (**Ex E,** Jacobs Aff.) PTP maintains donor information in strictest confidence; PTP's treasurer shares it with no one except the president. (*Id.*) PTP genuinely and reasonably fears that producing donor information would have devastating impacts on its ability to secure donations to sustain its advocacy. (*Id*.) Disclosure would also likely have negative repercussions for PTP donors who are friends, investors, employees, or have other relationships with Plaintiffs in this small community. (*Id*.) Donor disclosure adversely impacts the protected freedom of association rights of PTP and its donors. *APF*, 141 S. Ct. at 2383 (disclosure of organization's donor information presumptively burdens freedom of association, requiring highest level of scrutiny to ensure protection); *Perry*, 591 F.3d at 1161 (requestor must show information is highly relevant to claims or defenses); *Black Panther Party v. Smith*, 661 F.2d 1243, 1264 (D.C. Cir. 1981), cert. granted and vacated as moot, 458 U.S. 1118 (1982) ("Mere speculation that

information might be useful will not suffice; litigants seeking to compel discovery must describe the information they hope to obtain and its importance to their case with a reasonable degree of specificity.").

Recognizing PTP donor information does not bear on any claims nor defenses, Plaintiffs suggest it might bear on PTP witness credibility or bias. (ECF 347, PageID.12574) This is specious speculation and also baseless since PTP keeps its donor information confidential even within PTP. (**Ex. E**, Jacobs Aff.) The weakness of Plaintiffs' justification suggests its motion to compel disclosure of PTP's donor information is aimed instead at harassing PTP and scaring its donors. Plaintiffs' request and motion are invasive and frivolous.

6. RFP 27-32 – intervention

Plaintiffs request discovery to relitigate PTP intervention, claiming it is not settled. (ECF 347, PageID.12576). PTP intervention is decided and nothing has changed. Plaintiffs' cited cases say intervention may end when the case or facts shift. *See Coalition to Defend Affirmative Action v. Regents of Univ. of Mich.,* 539 F.Supp.2d 960, 968 (E.D. Mich 2008) (intervener in affirmative action litigation lost intervention interest after being denied admission for undisputedly legitimate reasons); *Morgan v. McDonough,* 726 F.3d 11, 14 (1st Cir. 1984) (intervener in school desegregation case dismissed after new committee formed to represent their interests and school abandoned anti-desegregation stance); *Mishewal Wappo Tribe of Alexander Valley v. Salazar,* Case No. ___ (N.D.Cal., Sept. 28, 2012) (intervention interests nullified after complaint amended to avoid intervener concerns); *Gay-Lesbian-Bisexual-Transgender Pride/Twin Cities v. Minneapolis Park & Rec. Bd,* Case No. 10-2579 (D. Minn. April 4, 2011) (permissive intervention revoked after operative complaint amended and interest dissolved; "While a rare action, courts

have been known to revoke intervenor status, and dismiss a defendant from a case who had been allowed to intervene, when the underlying circumstances of a case had changed.") So long as Plaintiffs seek to invalidate zoning, PTP's interests remain unchanged. There is nothing Plaintiffs might learn through these requests that would support terminating PTP intervention.

PTP agreed to identify where it has no responsive documents. (ECF 347, PageID.12568) For these RFPs, PTP identified responsive documents and confirmed it has no more. (**Ex B,** First Am Resp) There is nothing more to produce.

E. Plaintiffs' Interrogatories are unauthorized.

Plaintiffs object to some interrogatory responses. (ECF 347, PageID.12577). PTP makes two points. First, PTP's responses reflect good faith efforts to respond fairly and fully to Plaintiffs' argumentative, misplaced, and counter-factual interrogatories. It is not clear what more could be said in response.

Second, Plaintiffs are not permitted to send any interrogatories to PTP. (ECF 343, PageID.12547). PTP gratuitously responded anyway. If Plaintiffs remain dissatisfied, then to avoid further dispute, PTP would agree to withdraw them.

F. Logging confidential pre-litigation communications is acceptable but limited.

Plaintiffs request a privilege log for PTP attorney-member communications before PTP moved to intervene. (ECF 347, PageID.12579) But PTP obtained counsel months before it intervened, just weeks after Plaintiffs filed this case. (**Ex F,** Nov. 3, 2020, letter) There is no practical reason for PTP to log attorney-client communications between late-October 2020 and when it moved to intervene in February 2021.

Most of the RFPs seeking PTP communications limit the request to communications either about "this Lawsuit" or "since October 1, 2020." (RFPs 7-13) For those RFPs seeking

communications pre-dating litigation (RFPs 6, 14, 15), PTP searched its members' records but did not identify pre-October 2020 privileged documents responsive to those two requests.

G. The Court should issue PTP a protective order and award PTP's expenses incurred.

Discovery is closed for Plaintiffs, its motion to compel was premature, many of Plaintiffs' theories are contrary to well-established law, Plaintiffs' requests are excessive and irrelevant, and they seek PTP's highly sensitive and constitutionally-protected materials without even colorable justification. PTP requests the Court issue a protective order to prevent further unnecessary delays that distract PTP from engaging in productive discovery into the basis of Plaintiffs' claims and support for its defenses. Fed. R. Civ. P. 37(b)(5)(B). PTP further requests the Court award PTP its expenses including attorney fees incurred in opposing this motion.

IV. CONCLUSION

The Court should reject Plaintiffs' motion, issue a protective order, and award PTP its expenses and attorney fees.

Respectfully submitted,

Date: May 26, 2023

By: /s/ Tracy Jane Andrews

Tracy Jane Andrews (P67467)
Law Office of Tracy Jane Andrews, PLLC
Attorney for Intervener
420 East Front Street
Traverse City, MI 49686
(231) 946-0044
tjandrews@envlaw.com

Date: May 26, 2023

By: /s/ Holly L. Hillyer

Holly L. Hillyer (P85318)
Olson, Bzdok & Howard, P.C.
Co-Counsel for Intervener
420 East Front Street
Traverse City, MI 49686
(231) 946-0044
holly@envlaw.com

CERTIFICATE OF SERVICE

I, Tracy Jane Andrews, hereby certify that on the 26th day of May, 2023, I electronically filed the foregoing document with the ECF system which will send a notification of such to all parties of record.

By: /s/ Tracy Jane Andrews
Tracy Jane Andrews (P67467)

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

This Brief complies with the word count limit of L. Ci. R. 7.3(b)(i). This brief was written using Microsoft Word version 2016 and has a word count of 4,234 words.

Respectfully submitted,

Date: May 26, 2023

By: /s/ Tracy Jane Andrews

Tracy Jane Andrews (P67467)
Law Office of Tracy Jane Andrews, PLLC
Attorney for Intervener
420 East Front Street
Traverse City, MI 49686
(231) 946-0044
tjandrews@envlaw.com

Date: May 26, 2023

By: /s/ Holly L. Hillyer

Holly L. Hillyer (P85318)
Olson, Bzdok & Howard, P.C.
Co-Counsel for Intervener
420 East Front Street
Traverse City, MI 49686
(231) 946-0044
holly@envlaw.com