

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,

**ORAL ARGUMENT REQUESTED**

and

PROTECT THE PENINSULA,

Intervenor-Defendant.

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**PLAINTIFFS' BRIEF IN SUPPORT OF MOTION FOR ORDER TO SHOW CAUSE  
WHY PENINSULA TOWNSHIP SHOULD NOT BE HELD IN CONTEMPT OF COURT**

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## INTRODUCTION

Peninsula Township still refuses to produce all applicable policies of insurance as required by Fed. R. Civ. P. 26 and a September 28, 2021, Order of this Court. ECF No. 94. Presumably, Peninsula Township believes withholding this required information will provide it with a strategic advantage in settlement discussions as well as in public opinion given statements made to residents of Peninsula Township. Peninsula Township's gamesmanship must come to an end and, apparently, a contempt finding from this Court is the only thing that will work.

## 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.)**

On August 17, 2021, not having received any potentially applicable insurance policy, 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.<sup>1</sup> **(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,

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<sup>1</sup> Rule 26(e)(A) further prescribes that a party must "supplement or correct its disclosure or response: in a timely manner if the party learns that in some material respect the disclosure or response is incomplete or incorrect, and if the additional or corrective information has not otherwise been made known to the other parties during the discovery process or in writing."

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**.)

Eighteen months later, on April 13, 2023, Peninsula Township filed a Motion to Stay wherein it represented to this Court that Peninsula Township had obtained insurance through an unnamed insurance company which, presumably, was not Argonaut. *See* ECF No. 329.<sup>2</sup> In denying the Township’s Motion to Stay, this Court noted that the “terms of this so-called insurance policy – and whether the MTPP policy would even insure some of the damages sought in this case – are unknown to the Wineries and the Court, however, because the Township has not provided the insurance policy to the Wineries nor attached it as an exhibit to the motion.” ECF No. 342, PageID.12538. Further, this Court noted that it was “troubled by the fact that Peninsula Township’s assertion of an alleged conflict may have uncovered Peninsula Township’s violation of Magistrate Judge Kent’s order compelling Peninsula Township to produce ‘a copy of any insurance policy covering Peninsula Township’s litigation expenses in this Lawsuit.’” *Id.* at 12541-12542.

At a later hearing and as noted by this Court in its Opinion and Order Denying Motion to Intervene, MTPP, the alleged insurer of Peninsula Township, “conceded for the first time that it is not an insurance company and that it merely ‘brings townships to an insurance company.’” ECF No. 357, PageID.14626. But, this Court did recognize that it was still “unclear” whether Peninsula

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<sup>2</sup> During a March 28, 2023, Town Board meeting, the Township Supervisor stated that the Township had “been negotiating with our insurance carriers to provide some stepped-up legal coverage. Marge and I discussed it and are comfortable significantly reducing the legal budget for next year because we feel we have better insurance coverage now.” **Exhibit J**.

Township had insurance which had not been produced to the Wineries or the Court. *Id.* A privileged log recently produced by Protect the Peninsula (“PTP”) appears to confirm that Peninsula Township is insured by companies other than Argonaut. (**Exhibit K.**) Specifically, the log contains an entry from June 7, 2022, regarding an email communication involving Peninsula Township offices, Peninsula Township attorneys, an attorney for Protect the Peninsula and two individuals with the following email addresses: [Robert.StJean@sedgwick.com](mailto:Robert.StJean@sedgwick.com) and [WRIVARD@tmhcc.com](mailto:WRIVARD@tmhcc.com). The domain names for these email addresses relate to Sedgwick, a claims-management company, and Tokio Marine HCC, an insurance company. The description of this email is as follows: “Discussion about court order impressions and reactions; legal advice regarding communication about litigation; reflects Attorney-Client Communications.” *Id.* The log also contains a July 20, 2022, email including additional Township attorneys, counsel for PTP as well as the two above individuals. The description of that email is as follows: “Discussion about trial strategy; discussion about briefing strategy; discussion about witness preparation; discussion related to litigation meeting planning.” *Id.*

Peninsula Township has never produced an insurance policy from Sedgwick or Tokio Marine. The Wineries suspect that Sedgwick *might be* performing claims work for Argonaut, but Tokio Marine appears to be an entirely separate insurance company that is involved with Peninsula Township’s defense of this case.

Finally, during a meet and confer on this Motion, counsel for Peninsula Township informed counsel for the Wineries that it will consider producing the withheld insurance policies but has yet to make that decision. Because the decision whether to produce an insurance policy is not left to counsel for Peninsula Township, and a production at this late stage still does not address the Township’s utter indifference to Magistrate Judge Kent’s September 28, 2021 Order, the Wineries



bring this Motion.

### ARGUMENT

Under Rule 37(b)(2)(A) of the Federal Rules of Civil Procedure, “a district court may sanction parties who fail to comply with its orders in a variety of ways.” *Bass v. Jostens, Inc.*, 71 F.3d 237, 241 (6<sup>th</sup> Cir. 1995). “Such sanctions may include limiting the disobedient party’s proofs or testimony, striking pleadings, monetary sanctions, and dismissing an action when it is the plaintiff who has failed to comply.” *O’Dell v. Kelly Services, Inc.*, 334 F.R.D. 486, 490 (E.D. Mich. 2020). The sanction imposed is vested in the court’s discretion. *National Hockey League v. Metropolitan Hockey Club, Inc.*, 427 U.S. 639, 643 (1976). Granting dispositive relief—either dismissal or default judgment—for failure to cooperate in discovery “is a sanction of last resort,” and may not be imposed unless noncompliance was due to “willfulness, bad faith, or fault.” *Bank One of Cleveland, N.A. v. Abbe*, 916 F.2d 1067, 1073 (6<sup>th</sup> Cir. 1990) (citations omitted). *See also Grange Mut. Cas. Co. v. Mack*, 270 Fed. Appx. 372, 376 (6<sup>th</sup> Cir. 2008) (explaining that default judgment, and by implication dismissal of a complaint, is the court’s most severe discovery sanction).

The Court's charge on an application for sanctions under Rule 37 is to determine whether the failure to adhere to discovery obligations was “substantially justified.” *See Design Strategy, Inc. v. Davis*, 469 F.3d 284, 296 (2d Cir. 2006) (holding that “[s]ince Rule 37(c)(1) by its terms does not require a showing of bad faith... such requirement should not be read into the Rule.”); *Gittins v. Gateway Clipper, Inc.*, 2021 WL 1232421, at \*13 (W.D. Pa. Mar. 12, 2021) (citing same). The 1993 amendments to Rule 37, which incorporated the “without substantial justification” standard, were “designed to strengthen the incentive to be forthcoming in the

disclosures mandated by Rule 26 by penalizing those who fail to comply with the requirements.” *Husaini v. The Paul Revere Life Ins. Co.*, 2016 WL 6948401, at \*5 (W.D. Pa. Nov. 28, 2016).

“Every violation of the Rules has consequences; the question is who will bear them. Too often the consequences are borne only by the innocent party, who must live with the violation ... or else pay to brief and argue a motion to compel the offending party to do what the Rules required it to do all along.” *R.C. Olmstead, Inc. v. CU Interface, LLC*, 606 F.3d 262, 277–78 (6th Cir. 2010) (concurring opinion). Here, the Wineries are certainly the innocent party and have thus far bore the consequences for Peninsula Township’s refusal to comply with its discovery obligations and this Court’s Order.

**1. Peninsula Township’s Conduct was not Substantially Justified.**

The Wineries have spent over two years trying to obtain insurance information from Peninsula Township despite the Township’s obligation to produce, without request, under Rule 26. Instead, the Wineries were forced to get an order from this Court before Peninsula Township would produce one of its policies: the Argonaut policy. Then, more than a year later, Peninsula Township disclosed to this Court, and by inference the Wineries, that there appears to be at least one more applicable insurance policy, but Peninsula Township will not name the insurance company or provide a copy of that policy.

The Township has offered no justification for refusing to produce this information, let alone “substantial justification,” and federal courts around the country have not hesitated to sanction defendants and/or their counsel who refuse to produce insurance information mandated by Rule 26. *See, e.g., Sun River Energy, Inc. v. Nelson*, 800 F.3d 1219 (10th Cir. 2015) (affirming award of sanctions against counsel for failing to disclose the company's D&O insurance policy in its initial disclosures on the grounds that defendants' counsel never “took a serious look at whether

there was applicable insurance” and “exhibited deliberate indifference to the obligation of providing relevant insurance information under Rule 26.”); *Palacino v. Beech Mountain Resort*, 2015 WL 8731779, at \* 2 (W.D.N.C. Dec. 11, 2015) (sanctioning defendant and its counsel for failing to properly disclose applicable insurance policies and noting that a violation of Rule 26 had occurred because “[d]efendant was legally obligated to disclose both policies in its Initial Disclosures, and its failure to do so violated its obligations under the Federal Rules of Civil Procedure and the Court's Pretrial Order.”); *Hopkins AG Supply LLC v. First Mountain Bancorp*, 2017 WL 2937713, at \*2 (W.D. Okla. July 10, 2017) (sanctioning defendant and granting plaintiff's request for attorneys' fee because the non-disclosure of an E&O policy was “not substantially justified” and the “lack of full discovery [into insurance] rendered the [settlement] conference a sham.”); *Eshelman v. Puma Biotechnology, Inc.*, 2019 WL 1779572 (E.D.N.C. Apr. 23, 2019) (sanctioning defendant for refusing to turn over excess insurance policies); *Webster v. Psychiatric Medical Care, LLC*, 386 F. Supp. 3d 1358, 1366 (D. Mon. 2019) (awarding costs and fees as sanction for party to “unquestionably failed to fulfill its discovery obligations” by withholding insurance policy for 10 months.)

Peninsula Township may claim that the Declaration page it filed with this Court on April 25, 2023 is sufficient. (ECF No. 341, PageID.12536.) This is incorrect for several reasons. The most obvious of which is that when Peninsula Township filed that document it represented to the Court that the insurance policy was between Peninsula Township and MTPP. During a meet and confer on the current Motion, counsel for Peninsula Township now represents that the policy is between Peninsula Township and U.S. Specialty Insurance, which appears to be affiliated with Tokio Marine. Regardless of Peninsula Township's “Who's on first?” gamesmanship, production of a declaration page is not sufficient: “[T]he plain language of the rule requires a party to disclose,

and to provide for inspection, ‘any insurance agreement’, not just the declarations page of the policy.” *Wolk v. Green*, 2008 WL 298757, \*2 (N.D. Cal. Feb. 1, 2008) (citing Fed. R. Civ. P. 26(a)(1)(A)(iv)); *see also Morock v. Chautauqua Airlines, Inc.*, 2007 WL 2875223, \*1 (M.D. Fla. 2007) (disclosure of declarations page and assurance that policy would adequately cover plaintiff’s claims insufficient); *Boyer v. Riverhead Cent. School Dist.*, 2006 WL 3833040, \*2-3 (E.D.N.Y. 2006) (summaries of policies insufficient).

Further, reviewing the policy itself, as opposed to just the declarations page, is critical in evaluating whether coverage exists. What are the triggers for coverage in the policy? How does the policy insure ongoing injuries like those that have occurred in this case? Does the payment of defense costs erode the policy limits? What defenses might exist to coverage? The answers to these questions cannot be found in the declarations alone.

In meeting and conferring with counsel on this Motion, Peninsula Township did not provide any substantial justification for withholding applicable insurance policies. Instead, its counsel took the position that it would consider the Wineries’ request for the policies and make a decision on whether to produce the policies. Not only is such a position not substantially justified, it is willful, wanton and done in bad faith given this Court’s Order, from two years ago, requiring production of all policies.

## **2. Peninsula Township Must be Sanctioned.**

Peninsula Township’s bad faith disregard of its discovery obligations and the orders of this Court has created an unnecessary consumption of time and expense on the part of the Wineries, not to mention the strain it has put on this Court’s resources. Notably, earlier this year Peninsula Township and a third party, MTPP, orchestrated a side show centered around an alleged insurance policy issued by MTPP which did not even exist and could not exist because MTPP is admittedly

not an insurer. If Peninsula Township had complied with Judge Kent's Order, then all applicable insurance policies would already have been produced and the parties would never have taken a detour down the MTPP rabbit hole.

In addition, the Wineries and Peninsula Township engaged in more than 25 hours of mediation and numerous settlement conferences with Magistrate Judge Kent. Now it appears the Wineries were handicapped in preparing for these sessions by not knowing the full scope of the Township's insurance coverage.

Fed. R. Civ. P. 37(b)(2)(C) provides that in addition to any other sanctions that may be imposed,

“the court must order the disobedient party, the attorney advising that party, or both to pay the reasonable expenses, including attorney fees, caused by the failure, unless the failure was substantially justified or other circumstances make an award of expenses unjust.”

*See also PML North America, LLC v. Hartford Underwriters Ins. Co.*, 2006 WL 3759914, \*6 (E.D.Mich.2006)

Every litigant is prejudiced if it is not provided discovery from the other side. *O'Dell*, 334 F.R.D. at 491. In *Harmon*, the Court noted that a party is prejudiced when it is “unable to secure the information requested” and “required to waste time, money, and effort in pursuit of cooperation which [the responding party] was legally obligated to provide.” 110 F.3d at 368. Sanctions are particularly appropriate in those cases where, as here, a refusal to turn over insurance information affected plaintiff's ability to “properly assess litigation strategy, to properly value [defendant's] ability to pay any potential judgment, and to properly determine [his] mediation strategy.” *Palacino*, 2015 WL 8731779, at \*3.

Here, the Wineries have faced wave after wave of discovery motions and roadblocks from Peninsula Township. Notably as it relates to insurance, while on the one hand refusing to provide

the Wineries with all applicable insurance policies, Peninsula Township was informing residents of Peninsula Township not to worry because it had insurance. (**Exhibits E, F, G.**) This prejudiced the Wineries in the court of public opinion but also hampered the Wineries in settlement discussions as it is yet unclear whether the Township has the funds to pay any judgment in this case or what the Township has available for settlement purposes. Recently, Peninsula Township has resorted to fearmongering to attempt to sway public opinion. The Township recently mailed a newsletter to every Township resident which stated that the Township had insurance coverage but stating that “insurance coverage would be insufficient...and every property owner in Peninsula Township could be subjected to a sizeable special assessment to pay for damages not covered by insurance.” (**Exhibit L.**) By withholding the insurance policies, Peninsula Township is able to make statements to the public attacking the Wineries without the Wineries having sufficient information to respond.

### **3. Counsel for Peninsula Township Should Also be Sanctioned.**

Where a party fails to obey a discovery order, “the court must order the disobedient party, the attorney advising that party, or both to pay the reasonable expenses, including attorney’s fees, caused by the failure, unless the failure was substantially justified or other circumstance make an award of expenses unjust.” Fed. R. Civ. P. 37 (b)(2)(C). Given the plethora of attorneys who have represented Peninsula Township in this case, this Court has several options for which attorney or attorneys to sanction. The Wineries contend that all attorneys of record for Peninsula Township should bear the sanction as all had the opportunity to remedy the violation of Judge Kent’s Order but none chose to do so. Certainly, Greg Meihn was lead counsel when Judge Kent ordered Peninsula Township to produce all insurance policies. Further, additional attorneys have appeared for Peninsula Township and include Tom McGraw who was counsel for Peninsula Township at

the time this Court expressed its concern that Peninsula Township had violated Judge Kent's Order. Despite this, Mr. McGraw *still* has not caused his client to produce the policy. As discussed above, PTP's privilege log contains several emails which included individuals from Sedgwick and Tokio Marine HCC. Several Township attorneys also participated in these emails and, thus, were aware of these non-disclosed insurance companies and had an opportunity to comply with Judge Kent's Order but chose not to. These attorneys include Eric Conn, Christopher Patterson, Timothy Diemer, William Fahey and Matthew Wise. (**Exhibit K.**) Each of these individuals should be ordered to show cause why they should not be sanctioned along with Peninsula Township.

Sanctions are further warranted under Fed. R. Civ. P. 26(g). When Peninsula Township served its Initial Disclosures, its counsel was required to certify that the information contained within the disclosures was "complete and correct as of the time it is made." Fed. R. Civ. P. 26(g)(1)(A). "If a certification violates this rule without substantial justification, the court, on motion or on its own, must impose an appropriate sanction on the signer, the party on whose behalf the signer was acting, or both. The sanction may include an order to pay the reasonable expenses, including attorney's fees, caused by the violation." Fed. R. Civ. P. 26(g)(3); *see also Aecon Bldgs., Inc. v. Zurich North Amer.*, 2008 WL 3927797, \*5 (W.D. Wash., August 21, 2008) (finding sanctions under Rule 26(g) appropriate where "counsel's certification falls below an objective standard of reasonableness [and] counsel should have disclosed the policies."). Peninsula Township served its Initial Disclosures on March 17, 2021, wherein it represented that it was not aware of any applicable insurance policies. (**Exhibit D.**) This representation was clearly incorrect and Attorney Greg Meihn's certification was clearly false. On October 21, 2021, Peninsula Township served a supplemental Rule 26 Disclosure also signed by Attorney Meihn which represented that it had produced a potentially applicable insurance policy. Again, this certification

appears to be false as the records noted above appear to show that Peninsula Township has at least two insurance companies providing or having provided coverage in this case: Argonaut and Tokio Marine.

### **CONCLUSION**

The Wineries request that this Court grant its motion to compel and award the following sanctions:

1. Order Peninsula Township and its counsel to reimburse the Wineries for their costs and fees incurred in bringing this Motion;
2. Order Peninsula Township and its counsel to reimburse the Wineries for their costs and fees incurred related to all mediation sessions and settlement conferences conducted prior to the production of all potentially applicable insurance policies;
3. Order that Peninsula Township has waived any privilege related to communication with its insurance carriers and order Peninsula Township to produce within seven days all communications between the Township and its insurance carriers, including counsel, or minimally to log each and every communication and identify the persons and roles of each participant and company party to those communications;
4. Order Peninsula Township to file a statement definitively stating the amount of insurance coverage it has remaining related to any judgment, broken down on a policy-by-policy basis and, if appropriate, further by policy period.
5. Any other sanctions this Court determines are appropriate.



Respectfully submitted,

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

By: /s/ Joseph M. Infante

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Dated: August 3, 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 3,687 words.

/s/ Joseph M. Infante  
Joseph M. Infante

**CERTIFICATE OF SERVICE**

I hereby certify that on August 3, 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