UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MICHIGAN - SOUTHERN DIVISION

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

Plaintiffs,

v.

PENINSULA TOWNSHIP, a Michigan Municipal Corporation,

Defendant,

and

PROTECT THE PENINSULA,

Intervenor-Defendant.

Case No.: 1:20-cv-1008-PLM
Honorable Paul L. Maloney
Magistrate Judge Ray S. Kent

Peninsula Township's Response to Plaintiffs' Second Motion to Compel (ECF No. 417)

Oral Argument Requested

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PENINSULA TOWNSHIP'S RESPONSE TO PLAINTIFFS' SECOND MOTION TO COMPEL PRODUCTION OF DOCUMENTS FROM PROTECT THE PENINSULA

ORAL ARGUMENT REQUESTED

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- *Burkhead & Scott, Inc. v. City of Hopkinsville*, 2014 WL 6751205 (W.D. Ky., Dec. 1, 2014)
- *Miami Valley Fair Housing Center Inc. v. Metro Development LLC*, 2018 WL 558942 (S.D. Ohio, Jan. 25, 2018)

I. INTRODUCTION

Plaintiffs file yet another motion to compel against Intervening Defendant Protect the Peninsula ("PTP") arising out Plaintiffs' unreasonable desire to delve into privileged communications and obtain protected work product. The Court should not indulge Plaintiffs' demands.

Defendant Peninsula Township wades into the fray and files this response to protect its interests in avoiding the disclosure of materials protected by the attorney-client privilege and work-product doctrine. Peninsula Township's involvement in this motion is limited and it will, therefore, not address each of Plaintiffs' arguments, several of which are strictly between PTP and Plaintiffs. Peninsula Township responds to avoid disclosure of: (1) communications between counsel for Peninsula Township and its insurance representatives that constitutes protected work product under the Federal Rules of Civil Procedure and (2) production of all communications between counsel for Peninsula Township and counsel for PTP that is protected by the joint defense privilege under a Joint Defense Agreement between PTP and Peninsula Township.

First, Plaintiffs assert that communications involving insurance representatives administering the claim related to this lawsuit are communications with "third parties" and therefore not privileged. Plaintiffs' argument is without merit. The communications involving insurance representatives are work product protected from discovery under Fed. R. Civ. P. 26(b)(3)(A).

Second, Plaintiffs are not entitled to discovery of all communications between counsel for PTP and Peninsula Township. The Court has already rejected this argument and recognized the joint defense privilege. Plaintiffs did not appeal this decision or otherwise seek reconsideration in a timely manner. Nevertheless, Plaintiffs, under the misapprehension that the common defense

privilege is predicated upon a complete overlap of interests, claim the existence of a Joint Defense Agreement between Peninsula Township and PTP means PTP must either be compelled to produce the communications or withdraw from the case. This argument is incorrect from its inception. The common-interest doctrine does not require a complete overlap in interests. To the contrary, Peninsula Township and PTP need not have completely overlapping interest (and can even have conflicting interests on certain points) so long as the subject communications deal with an issue upon which Peninsula Township and PTP are working toward a mutually beneficial goal.

Plaintiffs' motion should be denied.

II. RELEVANT BACKGROUND

On April 3, 2023, Plaintiffs served on PTP interrogatories, requests for production, and requests to admit. (ECF No. 321). PTP provided timely responses to Plaintiffs' requests on May 3, 2023. Plaintiffs took issue with PTP's responses, and on May 5, 2023, requested to meet and confer with counsel for PTP regarding alleged deficiencies in PTP's responses. (ECF No. 347-3). One of the issues arose out of Plaintiffs' Request to Produce #13, which demanded that PTP, "Produce all communications between PTP's attorney(s) and Peninsula Township's attorney(s) (past or present) referring or relating to this Lawsuit." (ECF No. 347-1, PageID.12596). PTP objected to this request:

> PTP objects to this request to the extent it seeks information that is not relevant to any party's claims or defenses. PTP further objects to this request to the extent that it requests documents prepared in anticipation of litigation or for trial or documents protected from disclosure by the attorney-client privilege, deliberative process privilege, work product doctrine, or any other applicable privilege. PTP further objects on the basis this request appears intended to harass PTP.

(*Id.*).

On May 12, 2023, Plaintiffs filed a motion to compel, which among many other things, requested that PTP be compelled to produce documents responsive to Request for Production #13 or that PTP be required to log privileged communications/documents. (ECF No. 346).

On June 8, 2023, the Court held oral argument regarding Plaintiffs' Motion to Compel. (ECF No. 378). During oral argument, the issue of communications between counsel for PTP and Peninsula Township was addressed. The Court rejected Plaintiffs' argument that they should be entitled to communications between counsel for PTP and Peninsula Township and recognized the joint defense privilege:

> Mr. Infante: -- they have to log. But what they're going to log and what they're not going to log because we don't believe that communication – communications with the members of PTP, sure, privileged. Communications with the – between Ms. Andrews and the Township, not privileged. Andrews and the Township attorneys, not privileged.
> Ms. Andrews: Well, why would communications between me and the Township – we have a joint defense agreement. We have a common interest in defending this litigation.
> Mr. Infante: Well, if that's the case, then I'll move to have their intervention dismissed because one of the intervention factors is that the Township is unable to represent their interest because they don't share an interest.
> Ms. Andrews: We do have common interests, Your Honor.
> The Court: You can – you can file the motion, but I'm going to protect the communications between the lawyers under the joint defense privilege.
> Mr. Infante: Since – since – starting at what date?
> The Court: Good question. Thoughts on that?
> Ms. Andrews: Your Honor, we can do it from the –
> The Court: When did you execute the joint defense agreement?
> Ms. Andrews: Well before we intervened in this case.
> The Court: It would be from that date.
> Mr. Infante: Well, then I'm certainly going to file a motion to dismiss the – can we get the – can we get the joint defense agreement produced?
> Ms. Andrews: Your Honor, Your Honor, PTP intervened because the – the intervention does involve overlap and it involves differences and the Sixth Circuit –
> The Court: Well, you know what, I'm not deciding that issue today. I mean, you're asking for communications between PTP's lawyers and the Township's lawyers, and I'm saying those communications are – accepting your representation as an officer of the court, Ms. Andrews, that there's a joint

> defense agreement, I'm recognizing the joint defense privilege and saying that those documents do not have to be produced. I suppose we could log them.

(*Id.* at PageID.14071-14073).

Consistent with its ruling, on June 16, 2023, the Court entered its Order on Plaintiffs' motion to compel, and granted in part Plaintiffs' motion with respect to Request to Produce #13, simply ordering that PTP must log its communications with counsel for Peninsula Township. (ECF No. 380). PTP produced its privilege log on July 16, 2023. (ECF No. 418-3).

PTP produced to Plaintiffs a reasonable privilege log as required by this Court's Order following the June 8, 2023 motion hearing. (ECF No. 418-2). That privilege log leads to the present motion.

III. LAW AND ARGUMENT

As discussed above, Peninsula Township responds to this motion to protect its interests, which are limited with respect to this motion. Specifically, Peninsula Township responds to address Plaintiffs' demand that: (1) PTP produce several emails cloaked in privilege and/or work product status because they allegedly involve "third parties" and (2) PTP produce **all** emails between counsel for PTP and Peninsula Township, despite the Court already honoring the joint defense privilege between PTP and Peninsula Township and rejecting Plaintiffs' very same argument.

A. Plaintiffs Are Not Entitled to Communications Involving Insurance Representatives Which Constitute Protected Work-Product Under Fed. R. Civ. P. 26(b)(3)(A).

In Section III(B) of Plaintiffs' Brief in Support, Plaintiffs argue the Court should compel production of communications involving Robert St. Jean and William Rivard, Jr. Mr. St. Jean and Mr. Rivard are both claims professionals – in Mr. Rivard's case, a licensed attorney employed as a claims attorney. Mr. St. Jean is an employee of Sedgwick, a third-party administrator handling

the claim on behalf of Argonaut. Mr. Rivard is an employee of Tokio Marine – HCC, handling the claim on behalf of U.S. Specialty Insurance. Both policies have been produced to Plaintiffs. (ECF No. 426, PageID.15307-15309; ECF No. 425-1). The communications Plaintiffs seek involving insurance representatives constitute work product under Fed. R. Civ. P. 26(b)(3)(A).

Plaintiffs seek disclosure of the documents identified in the following log entries:

- PTP Priv Log 00224 – Email correspondence involving counsel for Defendant, counsel for PTP, Mr. Rivard, and Mr. St. Jean – discussion about trial strategy, briefing strategy, witness preparation, and litigation planning – protected by work product and joint defense privilege.
- PTP Priv Log 00237 – Email correspondence involving Peninsula Township representatives, counsel for Defendant, counsel for PTP, Mr. Rivard, and Mr. St. Jean – discussion about court order impressions and reactions and legal advice regarding communication about litigation – protected by attorney-client privilege, work product, and joint defense privilege.
- PTP Priv Log 00238 – Email correspondence involving Peninsula Township representatives, counsel for Defendant, counsel for PTP, and Mr. St. Jean – this involves legal advice regarding litigation documents – protected as attorney-client communication, work product, and joint defense privilege.

(ECF No. 418, PageID.14929; ECF No. 418-2, PageID.14963, 14965).

Plaintiffs assert Peninsula Township has waived privilege with respect to any emails involving Mr. St. Jean and Mr. Rivard. Plaintiffs offer no legal support for their argument that involving insurance representatives somehow destroys privilege and/or removes the documents from the protection of the work product doctrine. To the contrary, communications involving insurers are routine and are protected as a matter of course by the Federal Rules of Civil Procedure.

Questions of privilege must be assessed under federal common law in federal questions cases, *Reed v. Baxter*, 134 F.3d 351, 355 (6th Cir. 1998), and courts are generally guided by federal common law in cases involving both federal and state law claims. *See Zamorano v. Wayne State Univ.*, No. 07-12943, 2008 WL 2067005, at *4 (E.D. Mich. May 15, 2008) ("[W]here the plaintiffs are alleging violations of state law in addition to violations of federal law, federal courts look to

federal law to determine the applicable privileges.") (quoting *Jenkins v. DeKalb Cty., Georgia*, 242 F.R.D. 652, 655 (N.D. Ga. 2007)).

The work product doctrine is a procedural rule of federal law that protects an attorney's "trial preparation materials" from discovery by another party. *In re Professionals Direct Ins. Co.*, 578 F.3d 432, 439 (6th Cir. 2009). It protects (1) "documents and tangible things" that are (2) "prepared in anticipation of litigation or for trial" (3) "by or for another party or its representative." Fed. R. Civ. P. 26(b)(3)(A). Rule 26(b)(3)(A) expressly recognizes that "representative" include a "consultant, surety, indemnitor, insurer, or agent".

In analyzing whether work product is discoverable, the party seeking discovery must first establish the materials sought are relevant, then the party opposing production must demonstrate that the materials were prepared "in anticipation of litigation." *Guardsmark, Inc. v. Blue Cross & Blue Shield of Tennessee*, 206 F.R.D. 202, 206-07 (W.D. Tenn. 2002). If the opposing party meets this burden, the party seeking discovery must then show that it has substantial need of the materials and is unable without undue hardship to obtain the substantial equivalent of the materials by other means. *In re OM Sec. Litig.*, 226 F.R.D. 579, 584 (N.D. Ohio 2005). Even then the material will still be protected from disclosure if the opposing party demonstrates the materials in question represent "mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of the party concerning the litigation." *Id.*

This issue need not be overly complex. First, Plaintiffs have not even attempted to show the materials they seek are relevant. Even if they had, the materials involved are documents prepared for trial by counsel for Peninsula Township and its representatives, satisfying Peninsula Township's burden. Rule 26(b)(3)(A) provides protections to third parties: it expressly contemplates that the work product covers attorneys, sureties, indemnitors, **insurers**, and agents.

Mr. St. Jean and Mr. Rivard are representatives for Peninsula Township, inasmuch that they are acting on behalf of Peninsula Township's insurer(s). As will be discussed further *infra*, counsel for PTP's involvement in those emails does not alter this analysis as PTP and Peninsula Township have entered into a Joint Defense Agreement. The documents that underlie entries PTP Priv Log 00223, 00224, 00226, and 00237 are protected work product.

Plaintiffs have not even attempted to argue that these materials protected by the work product doctrine are: (1) otherwise discoverable and (2) that Plaintiffs have "substantial need for the materials to prepare [their] case and cannot, without undue hardship, obtain their substantial equivalent by other means."

Plaintiffs are not entitled to production of the documents contained in PTP Priv Log 00224, 00237, and 00238 as they constitute protected work product.

B. Communications Between Counsel for Peninsula Township and PTP are Properly Protected from Disclosure by a Joint Defense Agreement.

In Section III(C) of Plaintiffs' Brief in Support Plaintiffs argue communications between counsel for Peninsula Township and counsel for PTP are not privileged. This is incorrect.

Peninsula Township and PTP have entered into a Joint Defense Agreement in this matter. The Court was apprised of this during oral argument on Plaintiffs' first motion to compel in June. At that hearing, Plaintiffs argued they should be entitled to the production of all communications between counsel for PTP and Peninsula Township. The Court rejected Plaintiffs' argument, recognized the joint defense privilege, and ordered only that PTP log the communications. (ECF No. 378, PageID.14073 "[Y]ou're asking for communications between PTP's lawyers and the Township's lawyers, and I'm saying those communications are – accepting your representation as an officer of the court, Ms. Andrews, that there's a joint defense agreement, I'm recognizing the

joint defense privilege and saying that those documents do not have to be produced. I suppose we could log them.").

This issue has, therefore, been definitively resolved. Plaintiffs did not object to the Court's ruling and the relevant appeal period has long since passed. Despite that, in a motion that is ostensibly geared at challenging designations in PTP's privilege log, Plaintiffs have returned for another bite at the apple.

Even if Plaintiffs' pending motion was not a circuitous attempt at a motion for reconsideration of the Court's previous denial of Plaintiffs' motion to compel the production of all communications between counsel for PTP and Peninsula Township, the current motion is devoid of legal merit. Plaintiffs' argument is based upon the ill-conceived notion that a Joint Defense Agreement requires PTP and Peninsula Township have completely overlapping interests. This is incorrect. PTP and Peninsula Township need not have identical interests for a Joint Defense Agreement. To the contrary, PTP and Peninsula Township may enter into a joint defense even if they have conflicting interests on certain issues, so long as they are working toward a mutually beneficial goal.

The Joint Defense Agreement between Peninsula Township and PTP stems from the common-interest doctrine. The Southern District of Ohio, in an oft-cited common-interest doctrine case from a district court in the Sixth Circuit explained, "[t]he common-interest doctrine also operates to protect information disclosed to other parties, expanding coverage of the attorney-client privilege to include situations in which two or more clients with a common interest in a matter agree to exchange information regarding the matter." *Cooey v. Strickland*, 269 F.R.D. 643, 652 (S.D. Ohio 2010) (citing *Reed v. Baxter*, 134 F.3d 351, 357 (6th Cir. 1998)). The common-interest doctrine can arise when the parties have separate representation but the same goals in the litigation.

Cooey, 269 F.R.D. at 652. "'Under those circumstances, [parties] may freely share otherwise privileged communications without waiving the privilege.' *Id.* Each client and each attorney become part of the protected attorney-client 'unit', so that parties may pool their information in order to facilitate effective representation. 2–501 Federal Rules of Evidence Manual 501.02(5)(e)(ii)." *Id.* The Court in *Cooey* explained that parties to a joint defense agreement need not have completely overlapping interests, "**it is not necessary that parties be in agreement on every point**; a communication is privileged as long as it deals with a matter on which parties have agreed to work toward a mutually beneficial goal, even if parties are in conflict on some points. 2–501 Federal Rules of Evidence Manual 501.02(5)(e)(ii)." *Id.*

Despite this clear explanation of the common-interest doctrine, Plaintiffs arrive at a mutually-exclusive conclusion that PTP either has a right to intervene in this case or a joint defense privilege with Peninsula Township. (*See* ECF No. 418, PageID.14931). To arrive at this faulty conclusion, Plaintiffs rely on a bizarre amalgamation of in-circuit and out-of-circuit cases, of which the in-circuit cases cited all reach the complete opposite conclusion for which Plaintiffs cite them.

At the beginning of their argument, Plaintiffs make the (literal) bold assertion that "'[t]he interest **must be identical, not similar**, and be legal, not solely commercial.' *Allendale Mut. Ins. Co. v. Bull Data Sys., Inc.*, 152 F.R.D. 132, 140 (N.D. Ill. 1993 (emphasis added)." (ECF No. 418, PageID.14930). This initial assertion is incorrect and all that follows in Plaintiffs' argument flows from this incorrect premise.

PTP and Peninsula Township need not have identical interests. To the contrary, PTP and Peninsula Township can even have opposing interests and still enter into a joint defense agreement – so long as PTP and Peninsula Township are working toward a mutually beneficial goal.

Interestingly, the cases Plaintiffs rely upon next – from courts within the Sixth Circuit – demonstrate as much. *See Cooey*; *see also Burkhead & Scott, Inc. v. City of Hopkinsville*, 2014 WL 6751205 (W.D. Ky., Dec. 1, 2014); *Miami Valley Fair Housing Center Inc. v. Metro Development LLC*, 2018 WL 558942 (S.D. Ohio, Jan. 25, 2018).

Cooey was the initial guidepost that PTP's and Peninsula Township's interests need not completely overlap (and in fact can be conflicting on certain points) for the common-interest doctrine to apply. *See Cooey*, 269 F.R.D. at 652. Next, the Southern District of Ohio in *Miami Valley Fair Housing Center* rejected the argument that a defendant and interested third-party being in an "adversarial relationship" would result in a waiver of privilege:

> Further, the Court agrees that there has been no waiver of work-product protection because CMHA and Defendants had a common interest, i.e., they likely faced a common litigation opponent in Plaintiffs. Plaintiffs argue that CMHA and Defendants were in an adversarial relationship, and thus waived work product protection. Plaintiffs also argue that "anticipation of a dispute between CMHA and Defendants appears to have been the motivating force for most, if not all, of the withheld documents." (Doc. 89, App. at 10). The Court does not agree with these assertions. Rather, CMHA and Defendants' took steps to align their interests in this litigation when they amended their Agreement and Defendants agreed to indemnify CMHA and its lender (PNC Bank) for potential liability arising from the transaction. The Court recognizes that there is some potential for an adversarial relationship between Defendants and CMHA, but that risk is unrelated to the disclosures made by Defendants to CMHA and is "insufficient to destroy the common interest." (Doc. 88, Ord. at 5 (citing *Cooey v. Strickland*, 269 F.R.D. 643, 652 (S.D. Ohio 2010) (Frost, J.) ("it is not necessary that parties be in agreement on every point; a communication is privileged as long as it deals with a matter on which parties have agreed to work toward a mutually beneficial goal, even if parties are in conflict on some points.")). This Court finds no reason to discourage the types of communications CMHA and Defendants partook in in because, if anything, they only serve to eliminate the possibility of future litigation.

2018 WL 558942 at *3.

Finally, in *Burkhead & Scott, Inc.*, the Western District of Kentucky similarly rejected the argument that litigants must have identical interests for the common interest doctrine to apply:

> The plaintiff argues the defendants must have identical legal interests for the common interest doctrine to apply. Their interests are not identical because the two defendants might be adverse in a damages assessment should the plaintiff's prevail on the state law claim. However, courts that have held identical interests are necessary have done so when one party was a non-litigant. *See generally, Paul Rice*, *supra*; *see also Duplan*, *supra*; *In re Rivastigmine Patent Litigation*, No. 05 MD 1661 (HB/JCF), 2005 WL 2319005 (S.D.N.Y. Sept. 22, 2005); *North Carolina Elec. Membership Corp. v. Carolina Power & Light Co.*, 110 F.R.D. 511 (M.D.N.C.1986); *Stavanger Prince K/S v. M/V JOSEPH PATRICK ECKSTEIN*, Civ. A. Nos. 92–0983, Civ. A. 92–0990, 1993 WL 35174 (E.D.La. Feb. 10, 1993); *Heidelberg Harris, Inc. v. Mitsubishi Heavy Industries, Ltd.*, No. 95 C 0673, 1996 WL 514993 (N.D.Ill. Sept. 6, 1996). District courts in the Sixth Circuit have found common interests even absent identical interests. *Broessel v. Triad Guar. Ins. Corp.*, 238 F.R.D. 215 (W.D.Ky.2006) (J. Goebel); *Travelers Cas. & Sur. Co. v. Excess Ins. Co.*, 197 F.R.D. 601 (S.D.Ohio 2000); *United States v. Lucas*, No. 1:09 CR 222, 2009 WL 5205374 (N.D.Ohio Dec. 23, 2009) (finding common interest in a criminal context). Following this precedent, this court finds identical interests unnecessary in this context.

2014 WL 6751205 at *4.

PTP and Peninsula Township need not have identical interests in order for the common interest doctrine to apply. Instead, so long as PTP and Peninsula Township have agreed to work toward a common goal, and the communications are made as part of that effort, the common interest doctrine applies even if PTP and Peninsula Township have conflicting interests in some respects. Here, PTP and Peninsula Township have agreed to work toward a common goal. The communications sought were made as part of that effort. It is possible PTP and Peninsula Township have conflicting interests on certain points, but there can be no doubt they have agreed to work toward a mutually beneficial goal – protecting the Peninsula Township Zoning Ordinance from invalidation.

PTP need not choose between producing materials protected by privilege and/or the work product doctrine or facing dismissal due to the existence of a Joint Defense Agreement. Similarly, Peninsula Township should not be potentially exposed to Plaintiffs rummaging through materials protected by work product because Plaintiffs are under the misapprehension that PTP and

Peninsula Township must have completely overlapping interests for the common interest doctrine to apply.

The Court should (yet again) recognize the Joint Defense Agreement and deny Plaintiffs' motion to the extent it seeks the production of all communications between counsel for PTP and Peninsula Township.

IV. CONCLUSION AND RELIEF REQUESTED

For the reasons summarized above, Peninsula Township respectfully requests that this Honorable Court deny Plaintiffs' motion to compel.

Respectfully Submitted,

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Dated: August 16, 2023

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