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' SECOND MOTION TO COMPEL PRODUCTION OF DOCUMENTS (ECF 417)

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' SECOND MOTION TO COMPEL PRODUCTION OF DOCUMENTS (ECF 417)

I. INTRODUCTION

This case has been pending for nearly three years. The second phase of fact discovery is complete. After nearly 40,000 pages of exchanged documents and 38 depositions, Plaintiffs have yet to establish any facts supporting their claims that the Peninsula Township Zoning Ordinance (PTZO) violates the First Amendment or works a takings.[1] Their case rests entirely on concessions and waivers by the Township's former attorney and the misplaced deposition of its former supervisor. Foremost is the former Township attorney's unsubstantiated memo concluding PTZO provisions are unlawful and should be loosened to further Plaintiffs' entrepreneurial pursuits. Plaintiffs' complaint starts by quoting that memo, and it features prominently in their recent recitation of "facts" supporting claimed injuries. Before PTP intervened, the only opposition to Plaintiffs' puny claims was the Township's puny defense, as evidenced by the Court's summary judgment order last June.

Since then, PTP succeeded in its effort to intervene. On mandate from the Sixth Circuit, this Court recognized PTP intervention is meaningful, vacated much of the summary judgment order, and re-opened discovery.

Seemingly aware their claims are rice-paper thin, Plaintiffs' strategy appears focused on attacking PTP. This motion is their latest effort. They want to peek into PTP's legal strategy through its emails with Township counsel. They want PTP's meeting minutes and donor list to stifle PTP's organizational effectiveness.

PTP has provided everything Plaintiffs are entitled to and more. Plaintiffs fail to articulate, let alone demonstrate, how minutes, donor information, and attorney emails are relevant to claims

[1] Plaintiffs pursue their state preemption theory as questions of law.

or defenses and why they need them. The Court thus need not even reach privilege questions, but if it does, these items clearly are protected. The Court should deny Plaintiffs' motion.

II. BACKGROUND

PTP responds summarily here to Plaintiffs' unsupported and irrelevant *Background* accusations. In Parts A and B, Plaintiffs accuse PTP of misleading the Sixth Circuit by not volunteering the existence of a Joint Defense Agreement (JDA) executed after the district court denied PTP intervention. They suggest it was deceptive to sign a JDA with the Township then argue the Township does not adequately represent PTP's interests. As discussed below, Plaintiffs misunderstand the joint defense privilege and intervention. The JDA permits PTP and Township attorneys to communicate freely, without waiving attached privileges, to further their clients' common interest in defending the PTZO.

Plaintiffs assert PTP and the Township collaborated and mounted a "joint defense," and that PTP counsel was untruthful when she told the Sixth Circuit, "[PTP] didn't know what arguments the Township wouldn't make. How could we?" Frankly, these accusations are absurd given the Township's inept defense and consequent threat to PTP interests. Below is a sampling of arguments the Township did not make, which still baffles PTP.

The Township did not:

- Challenge as untimely claims that accrued decades ago;
- Challenge federal jurisdiction over state and local matters;
- Pursue standing defenses against Plaintiffs claiming injury from provisions never applied to them;
- Challenge Bonobo and Black Star's right to relief precluded by sale of their development rights to the Township;
- Challenge Plaintiffs' claim to invalidate an outdated zoning provision, which it amended pre-litigation to meet Plaintiffs' demands;
- Depose necessary witnesses, including representatives of corporate Plaintiffs;

- Identify multiple Plaintiffs' relevant special use permits, with terms contradicting their claims;
- Name a rebuttal expert to counter Plaintiffs' $203 million damages analysis;
- Challenge Plaintiffs' designation of its damages analysis as "Attorney Eyes Only" – off-limits even to responsible Township elected officials;
- Argue the First Amendment is inapplicable to zoning that does not regulate speech or expressive conduct; or
- Respond to Plaintiffs' novel argument that the Township supervisor – who lacks legal authority over zoning interpretation and administration – effectively and single-handedly modified decades-old zoning law in deposition.

In Part C, Plaintiffs note PTP's privilege log covering pre-JDA communications differs from PTP's post-JDA log. The differences are meaningless, both logs are sufficient, and Plaintiffs have no valid claim to any underlying communications. Plaintiffs allege, without support, that the first log shows PTP and the Township "collaborated significantly" pre-intervention. Pre-intervention, PTP was a non-party, absent from depositions, blocked from discovery, excluded from settlement negotiations, and unable to defend against Plaintiffs' baseless claims. But even if true (which PTP denies), why would it matter?

In Part D, Plaintiffs assert continued interest in PTP donors. Mr. Jacob's deposition is consistent with his affidavit and statements by PTP's counsel. In deposition and affidavit, Mr. Jacobs testified he keeps PTP donor information confidential, he lets directors know when donations they solicit come in, and Mr. Nadolski sees checks to PTP. (ECF 364-5, PageID.13396; ECF 418-5, PageID.14015-16) In deposition, he said Mr. Dettmer knows some Preserve Old Mission donors because he sees some checks come in. (ECF 418-5, PageID.14015-16) PTP counsel stated only the Treasurer knows who is funding this case. (ECF 378, PageID.14092) There is no contradiction. The Treasurer alone sees the full picture – all donations to both organizations by check and electronic deposit. Even if there were contradiction (there is not), what legitimate need do Plaintiffs have for PTP donor lists? To the extent Plaintiffs renew their original motion to compel based on supposed contradiction, it fails. Such "contradiction" (there is none) would be no

basis to order PTP to disclose non-relevant and highly sensitive, privileged information. PTP incorporates its original response by reference. (ECF 364, PageID.13313-14)

III. PLAINTIFFS' MOTION TO COMPEL FAILS KEY LEGAL STANDARDS

Plaintiffs' motion to compel is noncompliant with three legal requirements: per W.D. Mich. LCivR 7.1(b), they must provide or replicate the discovery requests; per Fed. R. Civ. P. 26(b)(1), they must show the information sought is relevant; and per Fed. R. Civ. P. 37(a)(1) and W.D. Mich. LCivR 7.1(d), they must confer in good faith to resolve issues without judicial recourse.

First, Plaintiffs ignore W.D. Mich. LCivR 7.1(b), which requires a party filing a discovery motion to include the request and associated answer or objection. Plaintiffs did not, nor do they even identify the pertinent requests. Plaintiffs appear to seek an order compelling production of (a) unredacted meeting minutes and (b) more details about communications between PTP and Township attorneys about this lawsuit – or the communications themselves. Their motion seemingly relates to their Requests to Produce (RFP) 4 (minutes) and 13 (attorney communications about the lawsuit), but that is unclear. (ECF 364-2, PageID.13338-39, 13346-47).

Second, Plaintiffs have never shown their requests seek discoverable information. Rule 26(b) permits discovery "regarding any nonprivileged matter that is *relevant to any party's claim or defense*[.]" Fed. R. Civ. P. 26(b)(1) (emphasis added). "The proponent of a motion to compel discovery bears the initial burden of proving that the information sought is relevant." *Williams v. Unknown Belanger,* Case No. 2:18-cv-00144 (W.D. Mich. April 17, 2020) (citation omitted); *Alexander v. Fed. Bureau of Investigation*, 186 F.R.D. 154, 159 (D.D.C. 1999). Relevance means making a consequential fact more or less probable. Fed. R. Evid. 401. Plaintiffs may access information necessary to establish their claims but may not "go fishing." *Surles v. Greyhound*

Lines, Inc., 474 F.3d 288, 305 (6th Cr. 2007) (citation omitted). To be discoverable, "the information sought must have more than minimal relevance to the claims or defenses" and "negligibly relevant or minimally important" information "will not satisfy the standard." *Safelite Group Inc. v. Lockridge,* Case No. 2:21-cv-4558 (S.D. Ohio July 25, 2023) (citations and internal quotations omitted).

Neither RFP 4 nor 13 seeks information relevant to Plaintiffs' claims that zoning provisions are unconstitutional or PTP defenses, including that Plaintiffs lack standing, waived their claims, and waited too long to sue. PTP has consistently maintained that its minutes are non-relevant. (ECF 364-2, PageID.13338; ECF 364, PageID.13312-13) Plaintiffs previously advanced a frivolous theory that the dearth of *historic*[2] PTP minutes suggests PTP may be uncollectible for Plaintiffs' attorneys' fees. (ECF 347, PageID.12573-74; ECF 364, PageID.13312-13) At the hearing on their prior motion to compel, Plaintiffs argued historic minutes might substantiate PTP members' reliance on zoning. (ECF 378, PageID.1406-65) Regarding *post-litigation* minutes, PTP noted they are highly sensitive, Plaintiffs were silent, and the Court directed PTP to log them without addressing relevance. (*Id.* at 14065) Now Plaintiffs jump to privilege, again without explaining relevance. (ECF 418, PageID.14932-35) How do PTP minutes about fundraising, communications, recruitment, or other organizational strategies make consequential facts about zoning lawfulness more or less probable? To the extent Plaintiffs imagine minutes could shed light on witnesses who joined PTP after Plaintiffs sued, Plaintiffs have already deposed those witnesses.

Similarly, Plaintiffs have not articulated the relevance of litigation-related communications between PTP and Township counsel, which are by definition work product. Though PTP repeatedly objected they are non-relevant (ECF 364-2, PageID.13346-47; ECF 364, PageID.13311; ECF 388,

[2] PTP located no formal meeting minutes from 2000 to 2020. (ECF 364, PageID.13313)

PageID.14195), this Court ordered them logged without addressing relevance. (ECF 378, PageID.44071-74; ECF 411, 14875-76) Plaintiffs are entitled to no further information about these communications – or the communications themselves – without demonstrating relevance. The threshold question is not whether the communications are protected but why Plaintiffs need them. Plaintiffs surmise they may facilitate relitigating PTP intervention by showing defense collaboration. (ECF 418, PageID.14922-24) But intervention is settled and counsels' emails do not change that.

Third, Plaintiffs made no good faith effort to resolve this dispute, as required by Rule 37(a)(1) and W.D. Mich. LCivR. 7.1(d). Plaintiffs emailed a letter Friday, July 28, listing supposed discovery deficiencies and inviting PTP to "withdraw from this case or produce all communications with the Township's counsel" and "produce a revised log and unredacted minutes" by noon Monday else threatening a motion. (**Ex 1**) PTP timely responded with full factual and legal explanations, *e.g.*, why certain participants in PTP meetings and emails destroyed no privilege and providing caselaw on associational privilege in civil discovery. (**Ex 2**) Two days later, Plaintiffs filed their motion, asserting the letter's frivolous arguments virtually unchanged. Plaintiffs' correspondence involved no conference or meaningful discussion. *See Shuffle Master, Inc. v. Progressive Games, Inc*., 170 F.R.D. 166, 171 (D.Nev. 1996) (sending demand letters and placing one call is insufficient to constitute "conferment"); *Cannon v. Cherry Hill Toyota*, 190 F.R.D. 147, 153 (D. N.J. 1999) (sending fax and demanding response by next business day and threatening to file motion to compel is token not sincere effort); *see also* W.D. Mich. Admin. Order No. 23-RL-068 (proposed rule amendments to promote more meaningful consultation regarding discovery disputes).

The Court should not countenance Plaintiffs' disregard for these requirements in their misguided pursuit of non-relevant but confidential and highly sensitive information.

IV. PLAINTIFFS' MOTION IS MERITLESS

A. PTP produced sufficient logs.

Plaintiffs argue PTP's post-JDA communications log is deficient. (ECF 418, PageID.14926-28) Rule 26(b)(5) requires the withholding party to state the applicable privilege and describe the nature of the documents to enable assessment of the claim "without revealing information itself privileged or protected." As Plaintiffs requested (RFP 13), all documents are litigation-related emails between PTP and Township counsel. The log identifies each email thread's most recent sender and recipients and all other participants – mostly known litigation counsel – and describes the date range, purpose, subject matter (*e.g.*, "discussion related to litigation-related communications"), and applicable privileges. This is all a log must include. *See Carhartt, Inc. v. Innovative Textiles, Inc.*, 333 F.R.D. 118, 120-21 (E.D. Mich. 2019) ("The entries clearly state who authored the document, the date it was created, the recipients, including carbon copies, whether the sender or recipient is an attorney, the type of document (e.g., an email chain), the privilege claimed (e.g., attorney-client and/or work product), and a description of why privilege is claimed (e.g., it discusses or contains reflections on confidential legal advice or work product.)").

Plaintiffs complain the log lacks subject lines but cite no case requiring them. (ECF 418, PageID.14927, ECF 418-3) This does not impair Plaintiffs' ability to assess privilege. Subject lines may be uninformative and/or not align with message content. (**Ex 3,** WOMP Privilege log, subject "Peninsula Township") Here, many reveal protected information, which is presumably why Plaintiffs want them.

Plaintiffs complain about emails spanning multiple days. This also does not impair their ability to assess privilege. Whether an email thread continues over hours or days, it is who it is

between (attorneys), what it relates to (this litigation), and its purpose (fact investigations, planning discovery, etc.) that impact privilege.

Plaintiffs complain about some descriptions. PTP's descriptions indicate the communications are protected by the work product privilege, which "protects the files and the mental impressions of an attorney reflected, of course, in interviews, statements, memoranda, correspondence, briefs, mental impressions, personal beliefs, and countless other tangible and intangible ways prepared in anticipation of litigation." *U.S. v. One Tract of Real Property,* 95 F.3d 422, 427 (citations and internal quotations omitted). The work product test is met because all email correspondence was "because of" this litigation. *Cooey v. Strickland,* 269 F.R.D 643, 647 (S.D. Ohio 2010) (citation omitted). Plaintiffs are entitled to no more detail about PTP work product emails. Also, PTP's descriptions are more informative than Plaintiffs'. (**Ex 3**)

Plaintiffs complain PTP invokes attorney-client (*and* work product) privilege without clients as senders/recipients. The descriptions say messages "*contain[]* Attorney Client Communication." Counsel may share attorney-client communications without copying the client.

Plaintiffs complain the log lacks information regarding attachments. The attachments are covered by the same privilege as the parent emails; no more description is required. *Carhartt,* 333 F.R.D. 121 (log sufficient where confidential attachments were "simply listed under the principal document without any additional and superfluous description."). Plaintiffs' reliance on *Cooey* is misplaced. ECF 418, PageID.14927-28. *Cooey* never addressed attachments. At the page Plaintiffs cite, it assessed a log of attorney-client communications, distinguishing them from work product because they are only privileged when they seek legal advice so may require more log detail. F.R.D. at 647-49.

At bottom, Plaintiffs want a revised log – not to assess privilege – but to get more details about their opponents' work product or divert PTP resources away from dismantling their case (or both). They provide no legitimate basis to order PTP to prepare another log.

B. PTP claims proper privileges for communications including non-members.

Plaintiffs wrongly assert that "[c]ommunications with third parties are not privileged." (ECF 418, PageID.14928) Many communications besides those exclusively between attorneys and clients may be privileged or otherwise protected, including work product and communications shared to further a common interest. *See Miller v. Haulmark Transp. Sys.*, 104 F.R.D. 442, 445 (E.D. Pa. 1984) ("It is well established . . . that the mere presence of someone other than the client at a meeting between an attorney and his or her client does not void the confidentiality required to give rise to a valid claim of privilege."); *U.S. v. Nobles*, 422 U.S. 225, 238-239 (1975) (attorneys often rely on assistance of agents in preparing for trial); *In re Grand Jury Subpoenas, 89-3 & 89-4, John Doe 89-129*, 902 F.2d 244, 248–49 (4th Cir. 1990) (recognizing common interest privilege as exception to general rule that disclosure to third party waives privilege). Moreover, for organizations, attorney-client privilege is not limited to directors and members but extends to agents and other representatives of the organization. *See Reed Dairy Farm v. Consumers Power Co.*, 227 Mich. App 614, 618; 576 NW2d 709 (1998).

Plaintiffs claim nothing is privileged in minutes of meetings that someone other than PTP members and attorneys attended. (ECF 418, PageID.14928) None is a "third party." Besides members and attorneys, PTP has volunteers and committee members who may act on its behalf, including Mr. Taft. Mr. Taft need not be a member or attorney for his and PTP's First Amendment associational rights to be protected or for communications among him, PTP members, and PTP counsel to be privileged or otherwise protected. Mr. Parsons is a PTP volunteer and also serves as

PTP counsel. (**Ex 4**) PTP properly asserted privileges over communications involving Mr. Taft and Mr. Parsons.

Plaintiffs' argument that Township attorney emails copying people associated with insurers besides Argonaut, who must be "third parties" else proof the Township is in contempt for nonproduction of insurance policies, is moot. (ECF 422, 426).

C. PTP communications with Township attorneys are non-relevant and privileged.

Plaintiffs' novel theory that the joint defense privilege is unavailable to co-defendants if one is an intervenor jumbles the standards for intervention and privilege. The privilege allows parties with a common interest to share communications to further that interest without waiving underlying privileges or protections. To intervene by right, a party must demonstrate a substantial interest in the subject matter of the litigation, the potential impairment of its interests, and that its interests would not be adequately represented if denied intervention. *WOMP v. Peninsula Twp*, 41 F.4th 767, 771 (6th Cir., 2022). A common interest for privilege does not equal adequate representation for intervention.

The Sixth Circuit discussed PTP and the Township's common interest in defending the PTZO at length, noting a presumption of adequate representation did arise from it but expressly finding PTP overcame it. *Id*. at 774-777. Nothing has changed. The Township still represents all constituents' interests, not just PTP, and its potential liability for damages remains. It is also stuck with its concessions and waivers, leaving PTP interests inadequately represented then and now.

The joint defense privilege is unrelated to intervention and allows PTP and the Township to share information to further their common interest in defending the PTZO without waiving

underlying privileges and protections. It does not, and cannot, transmute the Township's inadequate representation of PTP's interests for intervention purposes.

The joint defense privilege does not require a written agreement, although PTP provided the redacted JDA to corroborate its existence. (ECF 395-1) *See In re Pac. Pictures Corp.*, 679 F.3d 1121, 1129 (9th Cir. 2012) (agreement can be unwritten). Plaintiffs need nothing more. This Court has not "deferred a resolution" regarding the JDA as Plaintiffs claim, but recognized the joint defense privilege, found the requested documents need not be produced, and ordered them logged because Plaintiffs expressed intent to press the issue. (ECF 378, PageID.14073; ECF 411, pageID.14875-76)

Plaintiffs mischaracterize *Allendale Mutual*, and the quote they emphasized supports PTP's position when placed in context. The court was explaining that the common interest doctrine applies to attorney-client communications under circumstances like those required to establish work product privilege. Immediately following the sentence Plaintiffs quoted, the court said:

> The doctrine exists *to enable counsel for clients facing a common litigation opponent to exchange privileged documents and information, including attorney work product, in order to adequately prepare a defense without waiving any privilege*. In other words, like the work product privilege, a necessary precondition for the common interest doctrine to apply is that the common interest arise as a result of impending or anticipated litigation, and not in the ordinary course of business. The privilege reflects a policy favoring exchange of information between attorneys representing parties sharing a common interest in litigation.

Allendale Mut. Ins. Co. v. Bull Data Sys., Inc., 152 F.R.D. 132, 140-141 (N.D. Ill. 1993) (citations and quotations omitted; emphasis added).

Plaintiffs cite additional cases that do not apply here, like *In re Pacific Pictures Corp.*, 679 F.3d 1121 (declining to apply common interest privilege to communications that were not between co-litigants' counsel but potential evidence provided by crime victim to prosecution) and *in Re Urethane Antitrust Litig.* (ECF 418-10, PageID.15070) (unaligned parties did not share common

interests). Or they support PTP's position. *Miami Valley Fair Housing, Inc.* (ECF 418-10, PageID.15067) (applying common interest privilege to materials shared between buyer and seller with opposite business interests in real estate transaction but sufficiently similar interest in anticipated litigation where both would be defendants). Further, Plaintiffs rely mostly on cases addressing attorney-client communications, not work product, which is the protection that unquestionably applies to every email between PTP and Township counsel about this litigation.

PTP's legal interests in this litigation *are* identical to the Township's for privilege purposes – both parties are co-defendants opposing the exact same claims. The fact that the Township does not adequately represent PTP and its members' broader interests in the subject matter of the litigation for intervention purposes has no effect on privilege.

D. PTP minutes are non-relevant and privileged.

1. PTP did not waive any privilege.

In its initial response, PTP generally objected to Plaintiffs' RFPs to the extent they sought privileged or otherwise protected information, and specifically objected to RFP 4 because PTP meeting minutes are not relevant to this case and therefore not discoverable. (ECF 347-1) A party need only assert privilege when withholding otherwise discoverable information. Rule 26(b)(1). After Plaintiffs indicated they would pursue non-relevant discovery (ECF 347-3), PTP supplemented its response to RFP 4 to assert specific privileges and protections. (ECF 364-2)

Plaintiffs mischaracterize the one case they cite to support their assertion that privilege is waived if not raised in the 30-day discovery response period. In *Richmark Corp. v. Timber Falling Consultants*, the Ninth Circuit found a corporate arm of the People's Republic of China has waived an objection based on Chinese law because, not only had it not raised it during the discovery response period, it had not raised it in its response to a motion to compel, its own motion to stay

discovery, or on appeal, and *only* raised it for the first time in response to a motion for contempt sanctions. 959 F.2d 1468, 1473 (9th Cir. 1992). PTP properly and timely asserted the privileges and protections applicable to its minutes.

2. The associational privilege applies.

Associational privileges may protect communications against disclosure even to private parties. The Court is the government, and compelled disclosure *by the government* of confidential and sensitive information about PTP advocacy, communications, fundraising, and recruitment would infringe on associational rights of PTP and its members, donors, supporters, and volunteers. *See Buckley v. Valeo*, 424 U.S. 1, 64 (1976) ("[W]e have repeatedly found that compelled disclosure, in itself, can seriously infringe on privacy of association and belief guaranteed by the First Amendment.") (superseded by statute on other grounds); *Grandbouche v. Clancy,* 825 F.2d 1463, 1466 ("Although the First Amendment does not normally restrict the actions of purely private individuals, the amendment may be applicable in the context of discovery orders, even if all of the litigants are private entities."); *Hale v. State Farm Mut. Ins.*, Case No. 12-cv-660-DRH-SCW (S.D. Ill., Dec. 5, 2014) (applying associational privilege to prevent forced disclosure among private parties); *NRDC Inc. v. Ill. Power Res., LLC* (C. D. Ill. May 12, 2015) (same).

Plaintiffs misread *NAACP v Alabama* and misleadingly quote only the first part of a sentence that upholds PTP's position: "The crucial factor is the interplay of governmental and private action, *for it is only after the initial exertion of state power represented by the production order that private action takes hold*." 357 U.S. 449, 463 (1958) (emphasis added to portion of sentence Plaintiffs omitted). *NAACP* is precisely on point in that it concerns a court order to produce membership information. Rejecting the idea that there were no First Amendment concerns if Alabama did not act directly to restrict free association, the Court recognized that compelled

disclosure of affiliation among groups engaged in advocacy "may constitute as effective a restraint on freedom of association as the forms of governmental action in the cases above were thought likely to produce upon the particular constitutional rights there involved." *Id.* at 462.

Plaintiffs argue PTP cannot assert associational privilege after putting its membership at issue, but PTP's membership is *not* at issue. To support their argument, Plaintiffs cite only *Light of the World Gospel Ministries, Inc. v. Village of Walthill*, where the plaintiff sought to avoid disclosing membership information *after bringing a claim for damages from decreasing membership*. 336 F.R.D. 567, 572 (D. Neb. 2020). PTP is not a plaintiff, brings no claims, and need not prove standing. (ECF 319, PageID. 11881) Besides, PTP identified its members, and Plaintiffs deposed them.

Finally, Plaintiffs speculate that information in PTP minutes might pertain to witness credibility and asserts they are "entitled to assess PTP's recruitment efforts." (ECF 418, PAgeiD.14935) Plaintiffs never explain *how* recruitment bears on witness credibility – it doesn't. Plaintiffs had sufficient opportunity to assess PTP witnesses' credibility and more in depositions – Plaintiffs could and did inquire into how and why witnesses joined PTP, their business and other financial interests, and their relationships with other PTP members and the Township. Anything more would be unreasonably duplicative. Fed. R. Civ. P. 26(b)(2)(C)(i)-(ii). PTP appears to be on a fishing expedition, hoping *something* in PTP minutes might bear on *something* they want to prove or disprove in this case.

While minutes would shed no light on credibility or other relevant issues, they do contain sensitive and confidential information identifying PTP members and supporters and about PTP decision-making on advocacy, communications, fundraising, spending, organizing, and more; their disclosure threatens harm to the associational rights of PTP and its members, donors, volunteers,

and supporters. (**Ex 5**; ECF 364-5**)** It is Plaintiffs' burden to show these minutes are "highly relevant to claims or defenses in litigation" and necessary to support a "crucial element" of their claims. *Perry v. Schwarzenegger,* 591 F.3d 1147, 1160-61 (9th Cir. 2010); *Ohio A. Philip Randolph Inst. v. Larose*, 761 Fed. Appx. 506, 514 (6th Cir. 2019); *Dole v. Service Empl. Union,* 950 F.2d 1456, 1460-61 (9th Cir. 1991).

PTP minutes cover all PTP organizational efforts, from litigation planning to taking out advertisements. Plaintiffs have not challenged attorney client or work product privileges, and they are not entitled to see records of non-relevant PTP activities. Particularly in this contentious case, Plaintiffs' specious speculation that minutes might support a witness credibility theory is too weak, and the minutes too sensitive, to support compelling their disclosure. Plaintiffs are entitled to no more than PTP already provided.

V. CONCLUSION

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

Respectfully submitted,

Date: August 16, 2023

By: /s/ Tracy Jane Andrews

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

Date: August 16, 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 16th day of August, 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 365 and has a word count of 4,287 words.

Respectfully submitted,

Date: August 16, 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

EXHIBIT LIST

1. **WOMP letter dated July 28, 2023**

2. **PTP response letter dated July 30, 2023**

3. **WOMP Privilege log**

4. **Excerpt from Nadolski Deposition Transcript**

5. **Affidavit of Michael Dettmer**

6. **Unpublished cases**
   Hale v. State Farm Mut. Ins., Case No. 12-cv-660-DRH-SCW (S.D. Ill., Dec. 5, 2014
   NRDC Inc. v. Ill. Power Res., LLC (C. D. Ill. May 12, 2015)
   Safelite Group Inc. v. Lockridge, Case No. 2:21-cv-4558 (S.D. Ohio July 25, 2023)
   Williams v. Unknown Belanger, Case No. 2:18-cv-00144 (W.D. Mich. April 17, 2020)