

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MAINE

ASSOCIATION TO PRESERVE AND)
PROTECT LOCAL LIVELIHOODS, et al.,)

Plaintiffs,)

Civil Action No. 1:22-cv-416

PENOBSCOT BAY AND RIVER PILOTS)
ASSOCIATION,)

Plaintiff-Intervenor,)

v.)

TOWN OF BAR HARBOR, a municipal)
corporation of the State of Maine,)

Defendant,)

CHARLES SIDMAN,)

Defendant-Intervenor.)

DEFENDANT-INTERVENOR CHARLES SIDMAN’S
OBJECTION TO MAGISTRATE JUDGE’S DISCOVERY ORDER

Defendant-Intervenor Charles Sidman (“Mr. Sidman”), by and through undersigned counsel, respectfully objects to Magistrate Judge Wolf’s Order Re: Discovery Dispute (Dkt. No. 131) pursuant to Federal Rule of Civil Procedure 72(a) and Local Rule 72.1, and states as follows:

INTRODUCTION

In the June 12, 2023 discovery hearing before Magistrate Judge Wolf, Mr. Sidman sought to compel Plaintiffs to (1) disclose the identity of members of the Association to Preserve and Protect Local Livelihoods (“APPLL”); (2) produce financial records relevant to Plaintiffs’ claims of economic harm; (3) produce unredacted financial records; and (4) remove the

Attorneys Eyes Only (“AEO”) designation from their productions. Judge Wolf denied Mr. Sidman the relief he requested in its entirety. Dkt. No. 131.

Judge Wolf entirely failed to consider that the requested discovery could lead to admissible evidence. Despite “recogniz[ing] that general notions of economic harm permeate this case,” Judge Wolf undervalued the importance of this evidence in finding “that the burden of producing [the requested] sensitive information outweighs its likely benefit.” Dkt. No. 131 at 2-3. Judge Wolf also denied Mr. Sidman’s request to remove Attorneys Eyes Only while speculating that he has “ulterior motives in seeking this information” and improperly opining on his qualifications as an expert, which is the province of a *Daubert* motion. Dkt. No. 131 at 3.

Legal Argument¹

- a. *APPLL membership is relevant evidence to rebut Plaintiffs’ allegations and is not protected information.*

During discovery, APPLL refused to disclose relevant information concerning the identity of its members. *See, e.g.*, (Ex. A, Pl. Objection to Request No. 1); Ex. B (APPLL Objection to Interrogatory No. 1). Federal Rule of Civil Procedure 26(b) permits “discovery regarding any nonprivileged matter that is relevant to any party’s claim or defense.” Rule 26(b)(1) “generally permits liberal discovery of relevant information.” *Enargy Power (Shenzhen) Co. Ltd. v. Xiaolong Wang*, 2014 WL 4687784 at *2 (D. Mass. Sept. 17, 2014) (citing *Baker v. Liggett Group, Inc.*, 132 F.R.D. 123, 125 (D. Mass. 1990)). Accordingly, Rule 26 must be “construed broadly to encompass any matter that bears on, or that reasonably could lead to other matters that could bear on, any issue that is or may be in the case.” *Oppenheimer Fund, Inc. v. Sanders*, 437 U.S. 340, 351 (1978). “Relevant information need not be admissible

¹ The District Court reviews a Magistrate Judge’s nondispositive pretrial orders if timely challenged and must “set aside any part of the order that is clearly erroneous or is contrary to law.” Fed. R. Civ. P. 72(a).

at the trial if the discovery appears reasonably calculated to lead to the discovery of admissible evidence.” *Brown v. Wal-Mart Assocs., Inc.*, 616 F.Supp.3d 137, 141 (D. Mass. 2022) (quoting *Gericke v. Begin*, 2012 WL 4340520 at *1 (D.N.H. Sep. 20, 2012)).

Mr. Sidman’s discovery requests bear on APPLL’s allegations that the Ordinance will result in economic harm to their businesses. *See* Dkt. No. 1 (Verified Complaint) at ¶ 64 (“APPLL Members’ businesses and the other Plaintiffs’ businesses, which include barge work, tendering, restaurants, tour businesses, retail businesses, and Coast Guard-approved related facilities, will be severely damaged by the Initiated Ordinance and its implementation will harm the ability of their employees to earn a living.”); *see also id.* ¶ 89 (“The exclusion of cruise vessels from the port of Bar Harbor will also cause immediate, substantial, and deleterious economic disruption to the businesses of APPLL’s members.”). The identity of *who* will be harmed is plainly relevant to these allegations. For instance, the identity of APPLL members could lead to the disclosure of financial records of those members to support or rebut their claims of economic harm. Similarly, disclosure could result in the discovery of additional fact witnesses to support or rebut claims of economic harm.

Plaintiffs’ claims that disclosure of APPLL’s membership would result in harassment are without merit. In order to withhold member lists, an organization must make “a colorable claim that their First Amendment rights of free association are threatened by harassment that might follow disclosure.” *Nat’l Org. for Marriage v. McKee*, 666 F. Supp. 2d 193, 206 n.74 (D. Me. 2009). APPLL cannot provide any evidence “upon which this court could find that disclosing [member names] in discovery . . . would impair any expressive conduct” by APPLL. *See Bourne v. Arruda*, 2012 WL 2891110 at *3 (D.N.H July 16, 2012). Fears of local residents refusing to patronize members’ businesses, while unfounded, do not constitute harassment and are not

protected by the First Amendment. *See Miura Corp. v. Davis*, 2020 WL 5224348 at *4 (C.D. Cal. June 25, 2020) (“[T]he patronage of local businesses does not involve any political activity” effecting the disclosure of membership lists).

b. Plaintiffs’ financial records are relevant evidence necessary to defend against allegations of economic harm.

Relatedly, Plaintiffs have refused, on relevancy grounds, to produce financial records. *See, e.g.*, Ex. A (Pl. Objection to Request Nos. 5, 18, 19, 20); Ex. B (APPLL Objection and Response to Interrogatory Nos. 11). However, Plaintiffs’ “members [and financial records] are of consequence in this case because [Plaintiffs] made them so.” *See Light of the World Gospel Ministries, Inc. v. Vill. of Walthill, Nebraska*, 336 F.R.D. 567, 571–72 (D. Neb. 2020). Although Plaintiffs claim that their financial documents are not relevant—somehow tying these requests to their failure to seek damages and motion for preliminary injunction—their Verified Complaint, own discovery requests, and proffer of expert studies “belies the arguments of its counsel.” *See id.*

Plaintiffs’ Verified Complaint is replete with allegations of economic harm. *See* Dkt. No. 1 at ¶¶ 3, 30, 31, 32, 33, 59, 62, 64, 89, 115. Importantly, Plaintiffs themselves requested financial information “that establish the annual revenue of Mr. Sidman’s fine art business in Bar Harbor for each of the past twenty-eight years, including, but not limited to, earnings statements, tax records, or any other evidence that Mr. Sidman’s business has been financially affected by the cruise ship industry in Bar Harbor.” Ex. E (Pl’s First Set of Requests for Production of Documents to Defendant-Intervenor Charles Sidman No. 18). Moreover, Plaintiffs’ expert, Dr. Todd Gabe, has furnished reports about the economic impact of cruise ships visiting Bar Harbor. Although Judge Wolf noted that Gabe did not rely on any financial information from Plaintiffs to

make his findings, that does not mean Plaintiffs' financial information is not relevant to *rebut* Gabe's findings. Again, Judge Wolf neglected the relevant standard, which is to allow the discovery of information that "reasonably could lead to other matters that could bear on [] any issue that is or may be in the case." *Oppenheimer Fund, Inc.*, 437 U.S. at 351. Financial records are directly relevant to the historic economic impact of cruise ships on Bar Harbor, and the effect the Ordinance may have on Plaintiffs and their member businesses. Plaintiffs cannot allege that its members are "severely damaged" and in the same breath refuse to identify its members or produce evidence of how they will be harmed. Defendant-Intervenor cannot mount a defense to the economic harm alleged by Plaintiffs without knowing *who* is allegedly harmed and *how* they are allegedly harmed. Although Plaintiffs have provided certain, limited, and redacted financial information, this information is handpicked by Plaintiffs to support their claims. Discovery entitles Mr. Sidman to more evidence than Plaintiffs' cherrypicked financial documents.

c. *Plaintiffs' unredacted, non-privileged, relevant financial information is necessary to defend against allegations of economic harm.*

Plaintiffs' attempts to disclose only financial information that is helpful to them, while redacting all information that may undermine their claims, makes a mockery of the discovery process. *See* Exs. C (APPL008-0062) (AEO), D (PIER1379-1446) (AEO). Unilateral redaction of relevant information is only permissible if the information is privileged. *John Wiley & Sons, Inc. v. Book Dog Books, LLC*, 298 F.R.D. 184, 186 (S.D.N.Y. 2014) ("[R]edactions of portions of a document are normally impermissible unless the redactions are based on a legal privilege."); *see also* *Berney v. Apple Inc.*, 2021 WL 6334985 at *2-*3 (D. Conn. May 27, 2021) (collecting cases and holding that plaintiffs are entitled to redacted information to determine relevancy for themselves). Even if the Court finds that the redacted information is not relevant, a party

“cannot unilaterally redact portions of documents based on relevancy grounds.” *Engage Healthcare Comms., LLC v. Intellisphere, LLC*, 2017 WL 3624262 at *3-*4 (D.N.J. Apr. 26, 2017) (collecting cases); *accord Sexual Minorities of Uganda v. Lively*, 2015 WL 4750931 at *4 (D. Mass. Aug. 10, 2015) (“Redaction of documents that are responsive and contain some relevant information should be limited to redactions of privileged information when . . . there is a protective order restricting the use and dissemination of other sensitive information.”). There is no agreement by the parties that permits Plaintiffs to unilaterally redact relevant or nonrelevant information. *See* Dkt. No. 110 (Confidentiality Order).

Judge Wolf stated that Mr. Sidman did not “meaningfully challenge” Plaintiffs’ redactions. This is not correct. Counsel for Mr. Sidman explained at the hearing that the redactions hid all evidence of Plaintiffs’ revenues and only revealed their expenses, resulting in “lopsided” evidence that makes Mr. Sidman’s counsel unable to properly defend the Ordinance against Plaintiffs’ claims of economic harm.²

d. *Plaintiffs improperly designated documents Attorneys Eyes Only, preventing Mr. Sidman from properly preparing for trial.*

Plaintiffs’ AEO designations are unsupportable under the law. To be clear – there are *no* documents that Plaintiffs have designated AEO that would not be sufficiently protected by a Confidential designation. *See* Exs. C (APPL008-0062) (AEO), D (PIER1379-1446) (AEO), F (APPL00063-114) (AEO), G (APPL000115) (AEO), H (APPL000116-374) (AEO), I (APPL000432) (AEO), J (APPL000375-431) (AEO). “Attorneys’ eyes only disclosure is

² Although our original Request for Hearing included a three-page memorandum, the Court did not accept the filing. Judge Wolf only heard oral argument at the June 12, 2023 hearing. Contemporaneously with this filing, undersigned counsel has ordered a transcript of the June 12, 2023 hearing. Counsel is filing this Objection now to meet the deadline to file objections. As soon as the transcript is produced, counsel will furnish the transcript to the Court.

appropriate only in limited circumstances, such as cases involving trade secrets, because it hinders the plaintiff's ability to aid counsel in the review of the evidence and to determine her litigation strategy in light of it." *Theidon v. Harvard Univ.*, 314 F.R.D. 333, 336 (D. Mass. 2016); *accord Ragland v. Blue Cross Blue Shield of North Dakota*, 2013 WL 3776495 at *1 (D.N.D. June 25, 2013) ("[Attorneys' Eyes Only designation] is a drastic remedy given its impact on the party entitled to the information [because] it limits the ability of the receiving party to view the relevant evidence, fully discuss it with counsel, and make intelligent litigation decisions . . . [and] limits the ability of a party to provide needed assistance to counsel.").

As the proponent of a designation, Plaintiffs bear the burden to justify their Attorneys Eyes Only designations. *See Lobster 207, LLC, v. Pettegrow*, WL 5371551 at *1 (D. Me. Nov. 17, 2021). Plaintiffs do not allege that their documents contain trade secrets or proprietary information of any kind. Plaintiffs only claim that their documents contain "highly sensitive business information," but do not further describe that business information or explain why the parties, who are not competitors, should not be entitled to review these documents.

A Confidential designation sufficiently protects the business information Plaintiffs seek to withhold from Mr. Sidman. "The protective order provides that material designated as confidential can only be used for purposes of this litigation, will remain confidential after this case is concluded, and must be destroyed or returned to the producing party at the conclusion of the case." *Sexual Minorities of Uganda*, 2015 WL 4750931 at *5; *accord* Dkt. No. 110 (Confidentiality Order). Plaintiffs' sole basis for this request is that they do not trust the parties to abide by a Confidential designation. Plaintiffs provide no reason for believing that the parties will flout a Confidentiality designation and misuse evidence. Nor do Plaintiffs point to any cases or law suggesting that the mere possibility for misuse of future evidence warrants an Attorneys'

Eyes Only designation. *See Philips Medical Sys. Puerto Rico Inc. v. Alpha Biomedical and Diagnostic Corp.*, 2021 WL 5782486, at *5 (D. P.R. Dec. 7, 2021) (failing to provide support “suggesting that the mere possibility of future evidence tampering is of substantially justifiable concern with the discovery process to warrant an Attorney Eyes Only designation”). Contrary to the Judge Wolf’s reading of Mr. Sidman’s editorials, Mr. Sidman makes no indication that he is willing to disregard the Court’s Confidentiality Order or misuse evidence disclosed to him. *See* Dkt. Nos. 127-1, 127-2, 127-3. He was a candidate for Town Council and dependent on the complained of rhetoric as part of his campaign platform. And as discussed in his *Daubert* briefing, Mr. Sidman is eminently qualified to speak about the economic impact of cruise ship passengers in Bar Harbor. *See* Dkt. No. 136.

Plaintiffs’ AEO designations undervalue the role that a client plays in litigation. Mr. Sidman, “like many clients, serves as both h[is] counsel’s guide to understanding the facts and expert consultant.” *Theidon*, 314 F.R.D. at 337. Denying Mr. Sidman the ability to review financial documents “unduly hampers h[is] ability to assist counsel.” *Id.* Mr. Sidman is an integral part of this action and needs to be able to review evidence that may inform his trial strategy. Indeed, Mr. Sidman has been designated as a rebuttal expert to refute Plaintiffs’ expert studies, which includes cruise ship passengers’ economic impact on Bar Harbor. As discussed above, the full, unredacted contents of Plaintiffs’ financial documents is necessary to rebut Gabe’s studies.

WHEREFORE, Mr. Sidman objects to Magistrate Judge Wolf’s Order Re: Discovery Dispute and respectfully asks this Court to vacate the Order and compel Plaintiffs to produce the requested information and documents in unredacted form, without an Attorneys Eyes Only designation.

Respectfully submitted,

Dated: June 23, 2023

/s/ Robert Papazian

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CERTIFICATE OF SERVICE

I hereby certify that on June 23, 2023, the foregoing was electronically filed with the Clerk of this Court using the CM/ECF system, which will send notification of such filing to all counsel of record.

Dated: June 23, 2023

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