STATE OF WISCONSIN CIRCUIT COURT VILAS COUNTY

KRIST OIL COMPANY, and ROBERT LOTTO Case No. 16-CV-117

Plaintiffs,

-vs-

BEN BRANCEL, Secretary, Wisconsin Department of Agriculture, Trade and Consumer Protection,

Defendant,

and

WISCONSIN PETROLEUM MARKETERS AND CONVENIENCE STORE ASSOCIATION,

Intervenor-Defendant.

PLAINTIFFS' BRIEF SUPPORTING MOTION TO COMPEL DOCUMENT PRODUCTION FROM THE INTERVENOR-DEFENDANT WISCONSIN PETROLEUM MARKETERS AND CONVENIENCE STORE ASSOCIATION

INTRODUCTION

Plaintiffs filed this lawsuit against Defendant Ben Brancel on August 22, 2016. (Taylor Aff. ¶3.) On October 20, 2016, the Wisconsin Petroleum Marketers and Convenience Store Association (the "WPMCA") filed a notice of motion and motion to intervene. (Taylor Aff. Ex. E.) In their brief supporting their motion to intervene, WPMCA stated, "WPMCA is in the best position to provide the Court with evidence necessary for its analysis and to efficiently represent the interests of the thousands of petroleum retailers who will be directly affected by the outcome of this case." (Taylor Aff. Ex. F at 13.) WPMCA then states that "WPMCA **and its members** have accumulated significant evidence demonstrating the wisdom of those provisions, and WPMCA has access to and familiarity with a wealth of relevant economic data and analysis concerning the Act's effects on fuel prices and competition." (*Id.* at 14.) (emphasis added)

WPMCA then lists nine types of evidence that WPMCA and its members "could marshal and clearly present" in order to support their argument for the rationality of the legislative scheme at issue in this case. (*Id.* at 14-15.) Based upon those representations, neither the Defendant nor the Plaintiffs opposed WPMCA's motion, and on April 6, 2017, the Court granted the motion. (Taylor Aff. Ex. G.)

In a timely and properly served discovery request dated April 28, 2017, Plaintiffs made a document request to WPMCA for "Documents sufficient to identify the members of WPMCA." (Taylor Aff. ¶4; Taylor Aff. Ex. A.) WPMCA has refused to provide the information without a protective order. WPMCA states that "the requested information is proprietary, confidential, and subject to misuse." (*Id.*) WPMCA has set forth no explanation why their membership list is any of those things and has instead argued that the list is protected by their members' First Amendment right to association. (Taylor Aff. Ex. D (Jeffrey Simmons email dated August 11, 2017).) The single issue involved in this motion is whether, under the circumstances, the WPMCA's members' right to associate can legitimately be used to shield their identity during these court proceedings.

In their response to Plaintiffs' April 28, 2017 discovery request, WPMCA stated that they did not object to providing a list of their regular and associate members, "so long as the information is used for the purposes of this litigation – and nothing more." (Taylor Aff. ¶5; Taylor Aff. Ex. B.) WPMCA then requested that Plaintiffs agree to three provisions, including "Plaintiffs' representations that "(1) they will not disclose that information to anyone other than their lawyers and expert witnesses in this litigation; (2) it will not be used for any purpose other than this litigation; and (3) if the list or its contents must be disclosed to any court in this litigation, then that disclosure will be made under seal." (*Id.*)

On June 16, 2017, Plaintiffs responded to WPMCA stating they would agree to the first provision "provided the disclosure is permitted to all Plaintiffs' witnesses, not just expert witnesses." (Taylor Aff. ¶6.) The Plaintiffs further stated that they would also agree to the second provision – that the information be used solely for purposes of this lawsuit. (*Id.*) But the Plaintiffs do not agree to the third provision, noting, "Court proceedings are presumed to be open and WPMCA's membership list does not represent any proprietary, sensitive, or otherwise privileged information. Furthermore, WPMCA sought to intervene in this case and should not be permitted to shield their membership from identification during the court proceedings." (*Id.*)

Since that time Plaintiffs and WPMCA have exchanged a series of emails in an attempt to reach agreement but have been unsuccessful in doing so. (Taylor Aff. ¶¶ 7, 9.) Plaintiffs then filed this motion on August 21, 2017.

I. Court Proceedings are Presumed to be Open

In Wisconsin state courts, as in all state and federal courts in the United States, court proceedings are presumed to be open to the public. *See Craig v. Harney*, 331 U.S. 367, 374 (1947) ("A trial is a public event. What transpires in the court room is public property."); *State v. Paulick*, 210 Wis.2d 500 (1997) ("Court proceedings are generally open to the public unless otherwise provided by law."); *State ex rel. La Crosse Tribune v. Circuit Court for Lacrosse County*, 115 Wis.2d 220 (1983) (there is presumption that courtrooms are open and "reasons for such closing must be substantial"). *See also* Wis. Stat. 757.14 ("Sittings of every court shall be public and every citizen may freely attend the same.").

This principle was illustrated by the Wisconsin Supreme Court in *State ex rel. Newspapers, Inc. v. Circuit Court for Milwaukee County*, 124 Wis.2d 499 (1985), involving whether judicial proceedings involving an alleged sexual assault by two Green Bay Packers

players could be closed to the public. After concluding that Sec. 968.02(3) hearings were presumptively open to the public like other court proceedings, the court overruled the circuit court's decision to close the proceedings. The circuit court judge offered five different reasons for closing the proceedings, including that "revelation of the details of the incident to the public would cause defendants unnecessary agony or suffering." *Id*. at 504 (internal quotations omitted). The Wisconsin Supreme Court overruled the circuit court judge on each of the five rationales, noting that "none is sufficiently supported by the record in this case to provide a basis for her discretionary action." *Id*. at 509. In other words, shielding all or part of a judicial proceeding from the public view must be based on a conclusion "reached on specific facts of record or which are reasonably derived by inference from the record." *Id*. at 508. Holding that "[t]here were insufficient facts of record to justify [the] judge's decision," the court ruled the closure an abuse of the judge's discretion and overruled her. *Id.* at 513. *See also Lassa v. Rongstad*, 294 Wis.2d 187, 718 N.W.2d 673, 2006 WI 105 ¶ 64 ("subjective fear of reprisal is insufficient to invoke first amendment protection against a disclosure requirement") (citations omitted).

These principles and the presumption for open court proceedings should adhere even more strongly when applied against a litigant who willfully interjects herself into a case like WPMCA has done here.

II. WPMCA Represents Their Members' Interests and Offers Their Members' Evidence in this Litigation

As stated above, in their pleadings before this court WPMCA repeatedly asserts the interests of their members (Taylor Aff. Ex. F, 13-15) as well as the relevancy of evidence possessed by their members (*Id.* at 14-15). Specifically, WPMCA catalogues nine types of

evidence that they ***and their members*** are prepared to offer the court in defense of Wisconsin's Unfair Sales Act. (*Id.*) WPMCA has no interests in this litigation other than the interests of its members.

Based on the Wisconsin provisions governing discovery promulgated by statute, Plaintiffs are specifically entitled to discovery of this information. Wis. Stat. 804.01(2)(a) provides:

> Parties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action, whether it relates to the claim or defense of the party seeking discovery or to the claim or defense of any other party, including the existence, description, nature, custody, condition and location of any books, documents, or other tangible things ***and the identity and location of persons having knowledge of any discoverable matter.*** (emphasis added)

WPMCA has stated clearly in their pleadings before this court that its members have knowledge of relevant and discoverable evidence. (Taylor Aff. Ex. F at 14-15.) Under the Wisconsin provisions for discovery, Plaintiffs are entitled to discover the identity of WPMCA's members.

The Plaintiffs are entitled to know the identities of WMPCA's members for additional reasons. Which of its members have filed complaints against Plaintiff Krist Oil in the past under the Unfair Sales Act? This would show bias. Which of the WMPCA members are actual competitors of Plaintiff Krist Oil based upon their geographic location? This would again show bias. Those particular members would also have pricing information that would be relevant to this dispute.

Moreover, without knowing the identity of WPMCA's members, Plaintiffs will be unable to seek discovery from those specific members that Plaintiffs believe are most relevant to this dispute or depose representatives of those members claiming to have knowledge of the Unfair Sales Act, "the wisdom of those provisions," and "familiarity with a wealth of relevant economic data and analysis concerning the Act's effects on fuel prices and competition." (Taylor Aff. Ex.

F at 14.) WPMCA's desire to shield the identity of their members allows them the advantage of putting forth evidence and knowledge possessed by those members and their representatives without providing Plaintiffs the opportunity to confront them, thus providing Defendants an unfair advantage in this case.

III. WPMCA Offers No Reasons Why the Identity of their Members Should be Shielded from the Public

In their response to Plaintiffs' discovery request for a copy of their membership list, WPMCA stated that "the requested information is proprietary, confidential, and subject to misuse." (Taylor Aff. Ex. B at 4.) WPMCA argues that the confidentiality of the identity of their members is protected by their members' First Amendment right to associate. (Exhibit D (Jeffrey Simmons email dated August 11, 2017).) There is no basis for WPMCA's argument.

The sole case WPMCA offers for the confidentiality they seek for their members is *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449 (1958). That WMPCA compares itself to the NAACP in Alabama in 1958 is astonishing. In the *NAACP* case the Supreme Court found that there was an "uncontroverted showing that on past occasions revelation of the identity of its rank-and-file members has exposed these members to economic reprisal, loss of employment, threat of physical coercion, and other manifestations of public hostility." *Id.* at 462. WPMCA has offered no evidence that its members have been subjected to similar reprisals from anyone, anywhere, ever.

Cases subsequent to *NAACP* have declined to extend it to disclosure requirements, absent a reasonable probability that disclosure would subject the parties to threats, harassment or reprisals. *See California Pro-Life Council, Inc. v. Randolph*, 507 F.3d 1172, 1189 (9th Cir. 2007) (requiring disclosure of names of Plaintiff's contributors based on failure to show threats, harassment or reprisals from Government officials or private parties); *McConnell v. Federal*

Election Com'n, 540 U.S. 93, 199 (2003) (upholding disclosure requirements for electioneering communications based on lack of evidence of reasonable probability of harm to any plaintiff group or its members); *Ambassador College v. Geotzke*, 675 F.2d 662, 665 (5th Cir. 1982) (upholding disclosure of list of persons donating land to church based on relevancy of list and unlikelihood that release of information would chill membership in church); *Doe v. Reed*, 823 F. Supp. 2d 1195, 1212 (W.D. Wash. 2011) (requiring disclosure of signers of referendum petition supporting popular vote on state law extending benefits to same-sex couple, based on lack of likelihood of reprisals from disclosure).

Furthermore, Wisconsin case law is directly against WPMCA on this point. In *Lassa v. Rongstad*, 294 Wis.2d 187, 718 N.W.2d 673, 2006 WI 105 (2006), the Wisconsin Supreme Court addressed a discovery dispute between a candidate for state legislature and a political organization in which the candidate sought discovery of the organization's membership list. The Supreme Court rejected Rongstad's appeal of the circuit court decision compelling discovery, holding that "The circuit court properly rejected Rongstad's assertion of privilege under the balancing test of the *NAACP* line of cases because Rongstad failed to make the required preliminary factual showing to support his assertion." *Id.* at ¶5. The preliminary factual showings required were those "sufficient to demonstrate a reasonable probability of threats, harassment, or reprisals" examples of which included "specific evidence of past or present harassment of members due to their associational ties, or of harassment directed against the organization itself." *Id.* at ¶62 (quoting *Buckley v. Valeo*, 424 U.S. 1 (1976)).

Here, the members of the WMPCA are members of a well-known business association. They typically sell popular brands of gasoline and presumably have loyal customer followings. They are not a discriminated against minority. They are a powerful lobby that has succeeded in

keeping the Unfair Sales Act on the books for decades. There is nothing about membership in the WMPCA that fits within the NAACP paradigm.

What WMPCA would have to show to justify a protective order was laid out in *Rongstad* at ¶70 as follows:

> *Brown v. Socialist Workers '74 Campaign Comm.,* 459 U.S. 87, 98–99 (1982) (evidence of threatening phone calls and hate mail, burning of group's literature, destruction of members' property, police harassment, firing of shots at the group's office, and termination of members' employment); *Familias Unidas v. Briscoe,* 619 F.2d 391, 395–96, 399 (5th Cir.1980) (evidence of previous arrests, letters warning of liability for fines, and other public opprobrium and threats of reprisals); *Wisconsin Socialist Workers 1976 Campaign Comm. v. McCann*, 433 F.Supp. 540, 547–48 (E.D.Wis.1977) (series of affidavits showing potential contributors' reluctance to contribute, specific instances of harassment, and widespread surveillance); *In re Bay Area Citizens Against Lawsuit Abuse,* 982 S.W.2d 371, 376–77 (Tex.1998) (testimonial and other evidence was sufficient when it demonstrated specific instances when individuals opposed to group had boycotted affiliated members or encouraged others to do the same); *Crocker, v. Revolutionary Communist Progressive Labor Party*, 127 Ill.Dec. 572, 533 N.E.2d at 447–48 (allegations of surveillance, intimidation, job firings, disciplinary actions, and other reprisals were sufficient where the party seeking discovery had position of authority over party asserting privilege). *Id.* at ¶ 70

Absent such evidence WPMCA is not entitled to a protective order of any kind. The Wisconsin courts are open forums and WPMCA has chosen to be involved in this case. WPMCA should be compelled to provide the membership information in response to the Plaintiffs' discovery request.

CONCLUSION

WPMCA has offered no reason why this court should not adhere to the longstanding presumption of openness in judicial proceedings. The members of WPMCA are the real parties in interest in this case, and the parties that will be most affected by the outcome. They are the supporters of Wisconsin's Unfair Sales Act and they are the firms who may be using the law as a

shield from legitimate competition. WPMCA has asserted their members' interests as well as signaled their intent to offer evidence possessed by their members' during the course of this litigation. To shield these members' identity significantly disadvantages the Plaintiffs while allowing the real parties in interest to remain hidden from public view. The Plaintiffs, the court, and eventually the jury are entitled to know who they are.

Dated this 21st day of August, 2017.

Respectfully submitted,
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