UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WASHINGTON
AT TACOMA

LIGHTHOUSE RESOURCES, INC., *et al.*,

Plaintiffs,

and

BNSF RAILWAY COMPANY,

Plaintiff-Intervenor,

v.

JAY INSLEE, *et al.*,

Defendants,

and

WASHINGTON ENVIRONMENTAL COUNCIL, *et al.*,

Defendant-Intervenors.

No. 3:18-cv-05005-RJB

MOTION FOR PROTECTIVE ORDER

NOTE ON MOTION CALENDAR:
July 20, 2018

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INTRODUCTION

Pursuant to Fed. R. Civ. P. 26(c) and L.R. 7(d)(2)(b), Defendant-Intervenors Washington Environmental Council *et al.* (collectively "WEC") respectfully move for a protective order. The purpose of this motion is to seek relief from discovery that is (1) irrelevant to the issues in this litigation, (2) highly burdensome to Defendant-Intervenors, and (3) seeks information that is constitutionally privileged. As required, this motion is accompanied by a certification from WEC's counsel that he has conferred in good faith with opposing counsel to resolve the dispute without the involvement of the Court. *See* Declaration of Jan Hasselman, ¶ 7 (June 29, 2018). Because the parties have been unable to reach agreement, WEC turns to this Court for relief.[1]

Plaintiffs Lighthouse Resources *et al.*, proponents of a major coal transloading project in Longview, Washington, brought this action against the Governor of Washington and two state agency directors who, they allege, have violated their constitutional rights. The claims arise from actions that defendants have taken to deny a regulatory permit and a real estate lease that Lighthouse needs in order to construct and operate the project. WEC, a coalition of public-interest organizations opposed to the terminal due to its adverse impacts to human health and the environment, intervened to defend the state. This Court granted WEC permissive intervention with some limitations, observing: "because the Intervenors have alleged no claims and have no claims or cross-claims alleged against them, they are functionally amici to the case, except that they may participate in discovery." Order on WEC Motion to Intervene at 2 (March 26, 2018), ECF 48.

On June 21, 2018, Lighthouse served WEC with sets of interrogatories and requests for production. *See* Hasselman Decl., Ex. 1. The discovery is sweeping in scope and deeply intrusive

[1] The parties have agreed to a modification of the default briefing schedule for this motion. Opposition to this motion will be filed July 16, 2018, and a reply filed on or before July 20, 2018.

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in nature. It demands that Defendant-Intervenors identify and produce, among other things, all documents relating to their "strategies, campaigns, plans or policies regarding the Project," including all communications among themselves and with other non-governmental organizations. It further seeks communications with Defendant-Intervenors' boards of directors regarding the Project. WEC's counsel wrote Lighthouse's counsel explaining that the material requested was not relevant to the issues in the case and was privileged under the U.S. Constitution's guarantee of free association. Hasselman Decl. Ex. 2. In the discussion that ensued, the parties narrowed the issues, but were unable to resolve the issue presented here. Hasselman Decl. ¶ 6.

ARGUMENT

"The court may, for good cause, issue an order to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense," including by prohibiting disclosure or discovery, or by preventing inquiry into certain matters. Fed. R. Civ. P. 26(c)(1). Federal Rule 26 "confers broad discretion on the trial court to decide when a protective order is appropriate and what degree of protection is required." *Seattle Times Co. v. Rhinehart*, 467 U.S. 20, 36 (1984). WEC is entitled to a protective order from Lighthouse's overreaching discovery for three independent reasons, any one of which would suffice to grant this motion.

I. THE CONTESTED DISCOVERY SEEKS INFORMATION THAT IS NOT RELEVANT TO LIGHTHOUSE'S CLAIMS.

It is well established that a "protective order can be properly issued where the discovery requests seek information that is not relevant." *F.D.I.C. v. Killinger*, 2011 WL 4440410, at *1 (W.D. Wash. Sept. 21, 2011); Fed. R. Civ. P. 26(b)(1) (discovery allowed on any nonprivileged matter that is "relevant to any party's claim or defense and proportional to the needs of the case"). WEC's internal strategy documents and campaign communications are not even remotely relevant to plaintiffs' claims.

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Lighthouse's complaint asserts that the state's routine denial of a regulatory permit under state and federal environmental statutes, and its rejection of a real estate authorization under the state's land management authorities, violates the foreign and domestic dormant commerce clause. To prevail on such a claim, Lighthouse must show that the challenged decision discriminates against out-of-state interests in favor of in-state interests, i.e., constitutes "economic protectionism." *Pacific Northwest Venison Producers v. Smitch*, 20 F.3d 1008, 1012 (9th Cir. 1994). Alternatively, in some cases, a violation of the dormant commerce clause can be established where the "burden imposed on…commerce is clearly excessive in relation to the putative local benefits." *Pike v. Bruce Church*, 397 U.S. 137, 142 (1970). The analysis under the foreign commerce clause is largely similar. *Smitch*, 20 F.3d at 1014. Plaintiffs also claim that the state's actions are pre-empted by federal laws governing railroad and waterways transportation. As explained in Defendants' and Defendant-Intervenors' Motions to Dismiss, the preemption claims turn on the primarily legal question of whether Lighthouse is engaged in an activity subject to the exclusive jurisdiction of the Surface Transportation Board. *See* Defendants' Motion for Dismissal and Motion for Abstention at 10 (April 24, 2018), ECF 62.

It is difficult to fathom how *Defendant-Intervenors'* internal communications and strategies, and their discussions with other entities, could conceivably be relevant to meeting these standards. WEC does not dispute that they (and many others) openly advocated that the state deny regulatory permits and authorizations for the project. In contrast, Lighthouse and other entities and organizations vigorously advocated that permits be granted. That's how advocacy works on issues of public concern. But it is the state's decisions, not the internal communications and strategies of the conservation groups engaged with this project, that is being challenged. WEC is a group of intervenors—their actions are not being challenged, nor do they

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raise any claims of its own. Their deliberations and communications are immaterial to Lighthouse's burden of proof for any of the claims asserted.

In a letter to WEC's counsel, Lighthouse explained that it believed that WEC "worked with the state defendants to develop pretextual reasons for their actions that could be used to defend against claims that they were violating federal law, including the dormant commerce clause." *See* Hasselman Decl. Ex. 3. The letter then asserted, illogically, that WEC's *internal* strategy documents "will reveal that the state defendants took your clients' advice about ways to block" the terminal. This far-fetched theory makes little sense and does not entitle Lighthouse to engage in a sweeping fishing expedition into Defendant-Intervenors' non-public activities.

As a threshold matter, WEC is unaware of any case in which a court held that a defendants' *mens rea* was deemed pertinent to a commerce clause or federal preemption challenge. State action either constitutes economic protectionism, or it does not; a decision has impacts on commerce that are excessive in relationship to its benefits, or it does not. Whether a state defendant harbored some secret animus towards Lighthouse's coal customers, as it seems to believe, has nothing to do with the Lighthouse's burden of proof in this case under the commerce clause and federal preemption.

Second, even if defendants' motives or intentions were relevant to this case, which they are not, they can be discovered through multiple other avenues besides WEC's *internal* strategy and communications. WEC has told Lighthouse that it will provide it with all *external* communications (whether by letter, email, or otherwise) it has had with state defendants and other regulatory agencies. Hasselman Decl. Ex. 2. Lighthouse also has the opportunity to pursue discovery of the defendants themselves, via interrogatory, deposition, or requests for admissions, about the extent to which their decisions were pretextual. It can also seek discovery

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from defendants as to as the nature of their communications with WEC and other advocacy groups. Indeed, it has already done so, by serving the state defendants with discovery seeking all communications with non-governmental organizations. *See* Hasselman Decl. Ex. 5. Lighthouse has no need to comb through nearly a decade's worth of Defendant-Intervenor's privileged internal communications in order to support its theory.

Finally, the allegation that WEC colluded with the state defendants to circumvent the law and develop a "pretext" for permit denial is simply and flatly false. *See* Declaration of Cesia Kearns, ¶ 11 (June 29, 2018). Consistent with its mission, charter, and values, WEC vigorously advocated for the rejection of regulatory permits for this project consistent with governing law. *Id*. ("I have never been a part of any discussion, either internal or external, regarding the development of "pretextual reasons" for permit denial, nor have I ever heard any person involved with this campaign discuss any such pretextual reasons."). In short, the evidence that Lighthouse evidently hopes to find with this discovery simply does not exist, and would be irrelevant to the burden of proof that it must meet in this case in any event. A protective order should be granted.

II. THE CONTESTED DISCOVERY IMPOSES AN UNDUE BURDEN ON DEFENDANT-INTERVENORS.

Rule 26 provides, "the court must limit the frequency or extent of discovery otherwise allowed by these rules ... if it determines that ... the burden or expense of the proposed discovery outweighs its likely benefit." Fed. R. Civ. P. 26(b)(2)(C). In making such a determination, the Court should consider "the needs of the case, the amount in controversy, the parties' resources, the importance of the issues at stake in the action, and the importance of the discovery in resolving the issues." *Id.* The court may fashion any order which justice requires to protect a party from undue burden, oppression, or expense. *United States v. Columbia Broadcasting Sys.*, 666 F.2d 364, 369 (9th Cir.1982).

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Here, the scope of the discovery is sweeping and the potential burden on WEC is potentially staggering. Plaintiffs (or their corporate predecessors) originally proposed this project in the fall of 2010, resulting in litigation in 2011 challenging its initial set of local land use permits. WEC and many other groups have been advocating against the project for almost eight years in multiple fora. As explained in the declaration of the campaign's co-director, intervenor groups are among roughly 100 organizations that joined together under an informal campaign to advocate against coal transloading terminals in Washington and Oregon. Kearns Decl. ¶ 3. Dozens of staff people have worked on the campaign for almost eight years, to say nothing of volunteers, activists, board members, allies and others involved in the effort. *Id*. Lighthouse asks WEC to identify every meeting or communication between *any* person affiliated with *any* intervenor and *any* state or federal agency employee or *any* person "affiliated with any other non-governmental organization." Hasselman Decl. Ex. 1 (Interrogatory No. 3). It asks WEC to identify all communications or meetings "with any non-governmental organization." *Id*. (Interrogatory No. 9). It demands WEC produce all of its "strategies, campaigns, plans or policies" and any communication with virtually anyone about the Project. *Id*. (Request for Production No. 1). The amount of material sought is potentially staggering, and the burden on Defendant-Intervenors and their counsel to locate and sift through all this material potentially enormous. Kearns Decl. ¶ 7.[2]

The Court should step in to prevent this overreaching effort. Not only is the request an extraordinary burden on Defendant-Intervenors, it is so tenuously related to the legal claims in this case that its burden vastly outweighs any potential benefit.

[2] In the discussions between the parties preceding this motion, Lighthouse counsel indicated a willingness to work with WEC to prevent the discovery from becoming unduly burdensome, but no specific agreement was reached.

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III. THE CONTESTED DISCOVERY SEEKS MATERIAL THAT IS CONSTITUTIONALLY PRIVILEGED.

Finally, Lighthouse's effort to obtain WEC's internal strategies, communications, and deliberations must fail because such information is protected by the First Amendment's guarantee of free association. *Perry v. Schwarzenegger*, 591 F.3d 1126, 1140 (9th Cir. 2009). In *Perry*, the Ninth Circuit addressed a situation comparable to the one here: a plaintiff sought internal campaign strategy and communications from an advocacy group that had intervened in a lawsuit challenging a statute prohibiting same-sex marriage. Finding that "the freedom to associate with others for the common advancement of political beliefs and ideas lies at the heart of the First Amendment," the Ninth Circuit held that the organization's internal campaign communications and strategies were constitutionally privileged. *Id*. at 1152; *citing N.A.A.C.P. v. Alabama*, 357 U.S. 449, 460 (1958) ("Effective advocacy of both public and private points of view, particularly controversial ones, is undeniably enhanced by group association.").

The *Perry* court established a two-part framework for examining whether such privileged materials were discoverable in litigation. First, the party asserting the privilege must make a *prima facie* showing of arguable First Amendment infringement, such as a "chilling effect" on associational rights. *Perry*, 591 F.3d at 1140. The bar is a low one: the evidence offered need only demonstrate that some infringement is reasonably probable to result from compelled disclosure. *Id.; Black Panther Party v. Smith*, 661 F.2d 1243, 1268 (D.C. Cir. 1981) (party asserting privilege "need only show that there is some probability that disclosure will lead" to a chilling effect).

Once the party asserting the privilege makes the necessary showing, then the burden shifts to the opposing party to demonstrate that the interest in disclosure of the information sought outweighs the harm of compelling such disclosure. *Sierra Club v. BNSF Railway Co.*,

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2016 WL 4528452, at *2 (W.D. Wash. Aug. 30, 2016); *Perry*, 591 F.3d at 1140. Under this standard, "the party seeking the discovery must show that the information sought is *highly relevant* to the claims or defenses in the litigation—a more demanding standard of relevance than that under Federal Rule of Civil Procedure 26(b)(1)." *Perry*, 591 F.3d at 1140–41 (emphasis added). Applying these principles, the *Perry* Court found both that the organization's internal communications were protected by the First Amendment and that they did not meet the high threshold for relevance. Notably, the Court observed that the requested information *would* have met the general Civil Rule 26 standard for relevance—but not the higher showing required of First Amendment privileged material. *Id*. at 1164.

Courts following this framework have consistently found that internal strategies and discussions that occur among organizations—especially public advocacy organizations like WEC—are precisely the kind of communications that are protected by the First Amendment's guarantees of free association. Courts find that disclosure of non-public discussions and dialogue in advocacy campaigns could have a "chilling effect" on association, and would inhibit the full and free expression of political speech. *Perry*, 591 F.3d at 1162 ("We have little difficulty concluding that disclosure of internal campaign communications can have such an effect on the exercise of protected activities.") (emphasis in original). For example, in *Muslim Community Ass'n v. Pittsfield Twp.*, 2014 WL 10319321 (E.D. Mich July 2, 2014), the court found that:

> Under these indelible principles it is clear that permitting third-party discovery into a private citizen's lawful actions on a matter of public debate would clearly cause her and other individuals to be hesitant about becoming involved in the political process. Indeed, protecting against such a chilling effect is one of the First Amendment's very purposes.

2014 WL 10319321, at *5-6 (E.D. Mich. July 2, 2014); *citing Australia/Eastern U.S.A. Shipping*

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Conference v. United States, 537 F. Supp. 807, 810 (D.D.C.1982) ("[T]here is no doubt that the overwhelming weight of authority is to the effect that forced disclosure of first amendment activities creates a chilling effect …."); *see also N.A.A.C.P. v. Claiborne Hardware Co*., 458 U.S. 886, 913 (1982) ("[S]peech concerning public affairs is more than self-expression; it is the essence of self-government."). Similarly, another district court facing this issue found that "[i]f a person knows that her communications will be disclosed to an unintended audience in the future, she may be more cautious in her statements or refrain from speaking entirely. In the same way, a person who belongs to a group that is required to disclose its internal communications in civil litigation may decide that the invasiveness of the disclosure outweighs the benefit of belonging to or participating in the group." *Pulte Home Corp. v. Montgomery Cty. Md.*, 2017 WL 1104670, at *8 (D. Md. Mar. 24, 2017).

Once such a *prima facie* case has been made, courts demand the strictest justification for mandating the disclosure of such information. As the *Pulte* court observed, "the burden is largely on the party seeking disclosure to prove that the information sought is of crucial relevance to its case; that the information is actually needed to prove its claims; that the information is not available from an alternative source; and that the request is the least restrictive way to obtain the information." *Id*. at *4. "Mere speculation that information might be useful will not suffice; litigants seeking to compel discovery must describe the information they hope to obtain and its importance to their case with a reasonable degree of specificity." *Black Panther Party*, 661 F.2d at 1268; *see also id.* (the "interest in disclosure will be relatively weak unless the information goes to the heart of the matter, that is, unless it is crucial to the party's case"); *Wyoming v. U.S. Dep't of Agric*., 208 F.R.D. 449, 455 (D.D.C. 2002) (no discovery where internal information from organizations does not go to the "heart of the lawsuit").

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Applying these principles to this case is not difficult. Disclosure of internal campaign strategies and communications would have a deeply corrosive effect on WEC's rights to associate—both in and among staff and boards, and in associating with other campaign partners and like-minded allies. Kearns Decl. ¶ 8 ("if we knew that an adversary could gain access to these strategies and conversations, it would severely chill our ability to associate with each other in support of our respective missions."). Advocacy campaigns involving scores of groups and many individuals rely on regular communication and the free flow of ideas and strategies—exposing all of that communication to the target of the advocacy would inhibit the ability of these organizations (many of whom are not parties) to function. *Id*. This is more than sufficient for the *prima facie* showing of constitutionally protected material. *Perry*, 591 F.3d at 1163 (disclosure of personal, non-public communications in advocacy campaign would make individuals less willing to engage in such communications).

Moreover, release of internal discussions and communications would likely expose the names of, and may inhibit the participation of, the many volunteers and activists who participate in WEC's advocacy efforts, or even inhibit them from being members of intervenor organizations entirely. Kearns Decl. ¶ 9. Again, such a showing easily suffices to deem the information protected. *See N.A.A.C.P. v. Alabama*, 357 U.S. at 462 ("Compelled disclosure of membership in an organization engaged in advocacy of particular beliefs is of the same order" of interference with the freedom of association as other forms of suppression); *Perry*, 591 F.3d at 1162 ("disclosure of such information can have a deterrent effect on participation in campaigns"). WEC has made its *prima facie* showing of that the information sought is privileged.

Applying the second part of the *Perry* analysis is even simpler. As discussed above,

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Defendant-Intervenors' internal strategy documents do not meet a Rule 26 standard of relevancy to the constitutional claims in this case. Plainly, they cannot meet the significantly heightened standard applicable to privileged information. In *Muslim Community Association*, for example, the district court protected from discovery a citizen who advocated to the city council on a political dispute, finding that her actions were "at least twice removed from the ultimate decisionmakers," i.e. the government defendants. *Muslim Community Ass'n*, 2014 WL 10319321, at *6. Lighthouse cannot possibly argue that Defendant-Intervenors' internal strategies and communications are "crucial" to its case, *i.e.*, that they cannot prevail without such evidence. *Pulte Home Corp.*, 2017 WL 1104670, at *8. Moreover, as noted above, Lighthouse has other avenues to press its view that defendants engaged in some subversive conspiracy to circumvent the law—specifically, discovery of the state defendants themselves. *Wyoming*, 208 F.R.D.at 455 (no "compelling" argument that discovery of privileged matter is warranted when party seeking discovery hasn't shown it is unavailable through other means). Indeed, Lighthouse is already doing so.

In sum, the challenged discovery constitutes nothing more than a massive and unwarranted fishing expedition into Defendant-Intervenors' private files. It is not designed to lead to discoverable evidence: it is designed to oppress and intimidate public interest advocacy organizations who have proven effective in raising environmental concerns about plaintiffs' business plans. If there are constitutional values that need to be protected in this case, they are WEC's rights to freely associate with others in support of their missions and values. *See Adolph Coors v. Wallace*, 570 F. Supp. 202, 209 (N.D. Cal. 1983) ("enhanced scrutiny" of First Amendment issues "is appropriate since civil lawsuits could be misused as coercive devices to cripple, or subdue, vocal opponents").

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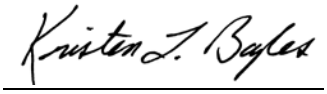
CONCLUSION

For the foregoing reasons, WEC respectfully asks the Court to grant the motion for protective order.

Respectfully submitted this 3rd day of July, 2018.



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CERTIFICATE OF SERVICE

I hereby certify that on July 3, 2018, I electronically filed the foregoing document with the Clerk of the Court using the CM/ECF system, which will send notification of this filing to the attorneys of record and all registered participants.

Dated this 3rd day of July, 2018.

s/ Kristen L. Boyles
Kristen L. Boyles, WSBA #23806
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