

## STATE OF MICHIGAN

## SIXTEENTH JUDICIAL CIRCUIT COURT

SEAFOOD OF DETROIT, LLC,

Plaintiff,

vs.

Case No. 2017-920-CB

MUER'S TABLE + BAR, LLC, MUER'S  
SEAFOOD, LLC, KARET PROJECTS, LLC,  
DAVID MUER, THOMAS J. LEFEVRE, and  
JEROME T. MOFFITT,Defendants.  

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OPINION AND ORDER

Plaintiff has filed a motion to compel discovery. Defendant has also filed a motion to compel discovery. Each side has filed a response to the opposing side's motion. On March 19, 2018, the Court held a hearing in connection with the motions. Following the hearing, the Court took Plaintiff's request to compel the point of sale data and all financials of the restaurant from January 1, 2017 to the present under advisement. In addition, the Court took Defendants' request to compel a supplemental answer to request for production #20 of Defendants' first discovery requests under advisement. The Court will address each issue in turn.

## I. Standard of Review

A motion to compel discovery is a matter within the trial court's discretion, and the court's decision to grant or deny a discovery motion will be reversed only if there has been an abuse of that discretion. *Linebaugh v Sheraton Michigan Corp*, 198 Mich App 335, 343-346; 497 NW2d 585 (1993). Generally, parties

may obtain discovery regarding any matter not privileged that is relevant to the subject matter involved in the pending action. *Id.*; MCR 2.302(B)(1). MCR 2.313(A)(2)(a) permits the Court to enter an order compelling discovery if a deponent fails to answer a question made during a deposition. Although broad discovery is encouraged, a party opposing discovery must not be subject to "excessive, abusive, irrelevant or unduly burdensome discovery requests." *Hamed v Wayne County*, 271 Mich App 106, 110; 719 NW2d 612 (2006) (internal citation omitted). As such, a court may issue "any order that justice requires to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense." MCR 2.302(C). Furthermore, discovery should not be extended merely to allow a "fishing expedition." *VanVorous v Burmeister*, 262 Mich App 467, 477; 687 NW2d 132 (2004).

## II. Arguments and Analysis

The Court will first address Plaintiff's request to compel Defendants to produce the point of sale information and financials of the restaurant from January 1, 2017 to present. In their response, Defendant argues that the information requested is not relevant in this case, has not been requested in any discovery response(s), and does not exist. Further, even if requested, Defendants argue that any profits earned by M's Table and Bar were earned by operating a non-infringing business. As a result, Defendants maintain that the financials of a non-infringing business are not relevant.

Our court rules implement "an open, broad discovery policy...." *Cabrera v. Ekema*, 265 Mich App 402, 406; 695 NW2d 78 (2005). MCR 2.302(B)(1)

provides, in relevant part, that “[p]arties 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 another party....” However, a trial court should also protect the interests of a party opposing a discovery request so as not to subject that party to excessive, abusive, or irrelevant discovery requests. *Bronson Methodist Hosp v. Auto–Owners Ins Co*, 295 Mich App 431, 443; 814 NW2d 670 (2012), quoting *Cabrera*, 265 Mich App at 407. Evidence is relevant if it has “any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.” MRE 401. The party seeking discovery has the burden of establishing that the materials sought are relevant. *Gilbert v DaimlerChrysler Corp*, 470 Mich 749, 781; 685 NW2d 391 (2004).

In its motion, Plaintiff failed to identify what discovery request(s) it is seeking to compel supplemental answers/documents in connection with. Moreover, even if the materials in question were requested, Defendants have maintained that no such financials exist. While the existence of a point of sale system may allow for financial reports to be generated, Plaintiff has failed to establish that Defendants have any duty to generate otherwise non-existent reports for the purpose of providing such reports. Finally, Plaintiff has failed to demonstrate how financial information of a business, being operated under a name the parties stipulated was acceptable, is relevant to its claims in this case. For these reasons, Plaintiff’s request to compel must be denied.

Turning to Defendants' motion, Defendants seek to compel a supplemental response in connection with their request for production #20. Request #20 seeks: "All communications with any representative of the owner of Partridge Creek Mall concerning Defendants." In response, Plaintiff argues that the materials in question are protected by the work product and/or common defense privilege. Defendants avers that the communications it seeks to compel are not subject to the work product privilege and/or common defense privilege because they were made to a third party.

In its response, Plaintiff maintains that the fact that the statements were made to a third party is not determinative. In support of its position, Plaintiff relies on *D'Alessandro Contracting Grp., LLC v Wright*, 308 Mich App 71, 78; 862 NW2d 466 (2014). In that case, the Michigan Court of Appeals was presented with the issue of whether a report shared by a party with its indemnitor was protected by the work-product and/or common-interest doctrine. In holding that the work-product privilege had not been waived, the Court adopted the following reasoning from the Court in *United States v Deloitte LLP*, 391 US App DC 318, 330; 610 F3d 129 (2010):

A reasonable expectation of confidentiality may derive from common litigation interests between the disclosing party and the recipient.... [T]he existence of common interests between transferor and transferee is relevant to deciding whether the disclosure is consistent with the nature of the work product privilege. This is true because when common litigation interests are present, the transferee is not at all likely to disclose the work product material to the adversary.

*D'Alessandro*, 308 Mich App at 83.

Applying the reasoning set forth in *Deloitte*, the Court in *D'Alessandro* held that the defendants did not waive the work-product privilege by sharing the report in question with its indemnitor because their interests were in line with one another. *Id.* at 84-85.

In this case, Defendants seek to overcome Plaintiff's objection, and establish that the privileged nature of the communication was waived, by arguing that Plaintiff's counsel's discussions with the landlord's counsel regarding strategy are unprotected because the landlord is not a party to this case. However, under *D'Allesandro*, such discussions retain their privileged nature where the parties to the discussion have common interests which make it unlikely that the third party will disclose the contents of the discussion to the adversary. In this case, Defendants do not appear to dispute that Plaintiff and the landlord have a common interest in that they are pursuing separate cases against Defendants in connection with the operation of the M's Table and Bar. As a result, the Court is convinced that Defendants have failed to establish that Plaintiff waived its privilege by discussing its strategy with the landlord's counsel. Consequently, Defendants' motion to compel a supplemental answer to request #20 must be denied.

### III. Conclusion

Based upon the reasons set forth above, Plaintiff's request to compel the point of sale data and all financials of the restaurant from January 1, 2017 to the present is DENIED. In addition, Defendants' request to compel a supplemental answer to request for production #20 of Defendants' first discovery requests is

DENIED. In compliance with MCR 2.602(A)(3), the Court states this Opinion and Order does not resolve the last claim and does not close the case.

IT IS SO ORDERED.

Date: MAR 22 2018

Kathryn A. Viviano  
Hon. Kathryn A. Viviano, Circuit Court Judge