

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
WESTERN DIVISION**

DREWES FARMS PARTNERSHIP,

Plaintiff,

v.

THE CITY OF TOLEDO, OHIO,

Defendant.

:
: **Civil Action No. 3:19-cv-00434**
:
: **Judge Jack Zouhary**
:
: **Magistrate Judge James R. Knepp, II**
:
:

**PLAINTIFF DREWES FARMS PARTNERSHIP’S BRIEF IN OPPOSITION
TO MOTION TO STAY (ECF NO. 25).**

I. INTRODUCTION

Plaintiff Drewes Farm Partnership brought this suit in an effort to vindicate its rights under the United States Constitution, Ohio Constitution, and other federal and state laws in the face of an unconstitutional and unlawful City of Toledo charter amendment, the Lake Erie Bill of Rights (LEBOR). Non-parties Lake Erie Ecosystem and Toledoans for Safe Water (TSW) (collectively, “Applicants”) sought to intervene in support of the charter amendment. (ECF No. 10). This Court, recognizing that the motion to intervene rested on a legal theory directly contravened by Sixth Circuit precedent, denied that request and held further that the Ecosystem lacked standing. (ECF No. 23). Applicants now ask that this Court stay the entire litigation pending resolution of their appeal to the Sixth Circuit of the Order Denying Intervention. (ECF No. 25). Given the gravity of Drewes Farms’ claims, this case should proceed as swiftly as possible to adjudication on the merits; it should not be further delayed by Applicants’ efforts to

resuscitate rejected and meritless arguments. This Court should therefore deny the Motion to Stay and allow the case to proceed according to schedule.

II. ARGUMENT OF LAW

A. Applicable Legal Standards

In deciding a motion for a stay pending appeal, a court will consider:

(1) the likelihood that the party seeking the stay will prevail on the merits; (2) the likelihood that the moving party will be irreparably harmed; (3) the prospect that others will be harmed by the stay; and (4) the public interest in the stay.

Crookston v. Johnson, 841 F.3d 396, 398 (6th Cir. 2016). The moving party has the burden of showing that a stay is warranted. *SEIU Local 1 v. Husted*, 698 F.3d 341, 343 (6th Cir. 2012).

B. Applicants have not demonstrated likelihood of success on the merits.

A movant seeking a stay must establish a probability—“more than [a] mere ‘possibility’”—of success on the merits. *Mich. Coal. of Radioactive Material Users, Inc. v. Griepentrog*, 945 F.2d 150, 153-54 (6th Cir. 1991) (quoting *Mason County Medical Ass’n v. Knebel*, 563 F.2d 256, 261 n. 4 (6th Cir. 1977)). “In essence, a party seeking a stay must ordinarily demonstrate to a reviewing court that there is a likelihood of reversal.” *Id.* at 153. Applicants must therefore demonstrate a likelihood that their petition for intervention will succeed on appeal, which, in turn, requires that they establish that: “(1) the motion to intervene is timely; (2) the proposed intervenor has a substantial legal interest in the subject matter of the case; (3) the proposed intervenor’s ability to protect their interest may be impaired in the absence of intervention; and (4) the parties already before the court cannot adequately protect the proposed intervenor’s interest.” *Coal. to Defend Affirmative Action v. Granholm*, 501 F.3d 775, 779 (6th Cir. 2007).

Applicants do not even attempt to aver that they are likely to succeed on the merits as to the Ecosystem's ability to intervene. Nor could they: this Court already determined that the Ecosystem's request was both "unusual" and "meritless" (ECF No. 23 at 5). Other courts that have considered this precise issue have reached the same conclusion. *Seneca Res. Corp. v. Highland Twp.*, No. 16-cv-289, 2017 U.S. Dist. LEXIS 152737, at *6 n.5 (W.D. Pa. Sep. 20, 2017) ("An ecosystem is not an appropriate party under Federal Rule of Civil Procedure 17.") (citing *Pa. Gen. Energy Co. v. Grant Township*, 658 Fed. Appx. 37 n. 2 (3rd Cir. 2016) ("We do not see, however, how a watershed could be considered a proper party under Rule 17. . . . The plain language of Rule 17 does not permit an ecosystem such as the Little Mahoning Watershed to sue anyone or be sued by anyone")).

As this Court aptly observed, it cannot confer legal standing upon a natural feature because it is bound by Congress and higher courts, and even LEBOR itself does not permit the Ecosystem to intervene in federal court. (ECF No. 23 at 5). That analysis does not, as Applicants seem to assert, weigh in favor of granting a stay. (ECF No. 25 at 4). It militates against it: Applicants may *wish* to expand Rule 17 to include flora and fauna, but they have a vanishing likelihood of success in asking the Sixth Circuit to unilaterally make such a substantive amendment to the Federal Rules of Civil Procedure.

As for TSW, this Court determined in its Order Denying the Motion to Intervene that TSW's failure to establish a substantial legal interest in the subject matter of the case was dispositive. (ECF No. 23 at 2-3). It further observed that neither the role TSW played in LEBOR's enactment nor LEBOR's purported endowment of TSW members' right to sue was sufficient to meet Rule 24's requirements. (*Id.*). Applicants now argue that, in so holding, the Court misread Sixth Circuit precedent as to Rule 24's requirements. (ECF No. 25 at 6-7).

It did not. In *Granholm*, the Sixth Circuit explained that, where an organization “has only a general ideological interest in [a] lawsuit—like seeing that the government zealously enforces some piece of legislation that the organization supports—and the lawsuit does not involve the regulation of the organization’s conduct, without more, such an organization’s interest in the lawsuit cannot be deemed substantial.” *Coal. to Defend Affirmative Action v. Granholm*, 501 F.3d 775, 782 (6th Cir. 2007). Thus, where an organization supports the enactment of a statute, the moment the statute is enacted, the organization’s “interest in a suit challenging the enforcement of the statute bec[omes] insubstantial ‘due to the state’s responsibilities in enforcing and defending it as it is written.’” *Id.* at 781 (quoting *Northland Family Planning Clinic, Inc. v. Cox*, 487 F.3d 323, 346 (6th Cir. 2007)). *Granholm* is therefore directly on-point and controlling: TSW has no substantial legal interest in this litigation.

Contrary to TSW’s assertion, it is of no import to the substantial-legal-interest analysis that its members have a “real, physical interest” in Lake Erie. (ECF No. 25 at 6). The Sixth Circuit’s analysis in *Northland Family Planning* is instructive. There, the court upheld the denial of a motion to intervene filed by a group called “Standing Together to Oppose Partial-Birth-Abortion” (STTOP), an organization formed to promote passage of a Michigan law that endowed partially-delivered fetuses with protected legal status. *Northland Family Planning*, 487 F.3d 323 at 328. The court upheld an order denying STTOP’s motion to intervene in the litigation because the organization’s interest was merely ideological: STTOP was “created for only one specific ballot initiative” and was not regulated by the challenged laws “in any respect.” *Id.* at 345. The Sixth Circuit reached this conclusion even though STTOP’s interest in partially-delivered fetuses is “physical” in the same way TSW’s interest in Lake Erie is “physical”—as with virtually all litigation, the outcome of this case and of *Northland Family Planning* concerns tangible entities

in the physical world. But that does not endow either organization with a substantial *legal* interest in the outcome of the respective cases. What matters is that the organization is not a repeat player and that it is not, itself, regulated by the challenged law. *Id.*

TSW's argument that the law regulates TSW's conduct because it "regulates where [TSW members] may bring an action" is fatally flawed for reasons this Court has already identified: "The Nonprofit members do have a right to sue polluters under the amendment's language—but so does every other Toledo resident. Just as the *Granholm* movants had no right to intervene based on an interest shared by 'the entire Michigan citizenry,' 501 F.3d at 782, the Nonprofit has no right to intervene based on an interest shared by all Toledoans." (ECF No. 23 at 4).

Applicants' appeal has a slim likelihood of success for an independent and alternative reason: their interests are adequately protected by the City. *See Purnell v. Akron*, 925 F.2d 941, 949 (6th Cir. 1991) ("The proposed intervenors bear the burden of demonstrating inadequate representation."). Applicants claim that the City of Toledo opposes LEBOR, but that claim is belied by the record in this case: the City and Applicants share the same goal of defending the lawfulness of LEBOR. (*See generally* ECF No. 12; *see also id.* at ¶¶ 140-155 (setting forth affirmative defenses to the Complaint)). Contrary to the misleading statements made by the Applicants to the United States Sixth Circuit Court of Appeals in their May 13, 2019, Motion to Stay (copy attached as Exhibit A), even now, Toledo continues to vigorously defend against Drewes Farms' efforts to obtain finality on the merits of its claims. Toledo opposes Drewes Farms' ability even to *file* a Motion for Judgment on the Pleadings and, in doing so, it champions the continued validity of LEBOR. *See* Exhibit B (copies of letters exchanged by the parties).

To the extent Applicants object to the City's decision to consent to a preliminary injunction, that is an inadequate basis upon which to intervene: differences in temporary litigation strategy do not demonstrate inadequacy of representation. *See Geier v. Sundquist*, NO. 95-5844, 1996 U.S. App. LEXIS 22376, at *7 (6th Cir. Aug. 14, 1996) (citing *Bradley v. Milliken*, 828 F.2d 1186, 1192 (6th Cir. 1987) ("A mere disagreement over litigation strategy or individual aspects of a remediation plan does not, in and of itself, establish inadequacy of representation"))).

Because Applicants have not carried their burden of showing that they are likely to succeed in demonstrating a substantial legal interest in the litigation or in demonstrating that their interests are inadequately protected by the City, this Court need not analyze the other factors: it should reject Applicants' motion to stay the litigation.

C. Applicants have not demonstrated irreparable injury absent a stay.

Applicants' motion also fails to establish that they would be irreparably injured absent a stay. "In evaluating the harm which will occur both if the stay is issued and if it is not, [courts] look to three factors: (1) the substantiality of the injury alleged, (2) the likelihood of its occurrence, and (3) the adequacy of the proof provided." *Ohio ex rel. Celebrezze v. Nuclear Regulatory Com.*, 812 F.2d 288, 290 (6th Cir. 1987). Applicants must allege a harm that is "both certain and great, rather than speculative or theoretical." *Id.* They have not done so. As discussed above, Applicants have not identified a substantial legal interest that would be impacted at all—they therefore cannot claim that they have any interest that would be irreparably injured absent a stay.

Moreover, the entirety of the Applicants' irreparable injury analysis is predicated upon an unspoken assumption: but for a stay, Lake Erie will suffer diminished water quality. (ECF No.

25 at 7-10). This assumption has no basis in reality: as Applicants themselves later concede, this Court has already enjoined enforcement of LEBOR until a final decision on the merits of the action. (*Id.* at 10-11 (noting that Drewes Farms and the City of Toledo “have stipulated to, and this Court has signed, an order preventing the City from enforcing LEBOR against anyone” pending determination of this litigation on the merits). To the extent Drewes Farms’ farming or other non-parties’ farming or industrial operations impact Lake Erie watershed’s water quality, a stay of the litigation would afford Applicants no relief: the stay does not obviate the injunction, so the claimed harm will continue regardless of whether litigation is stayed pending interlocutory appeal. In fact, a stay could only make Applicants’ claimed injury *worse* because it would delay any eventual enforcement of LEBOR (were LEBOR found to be valid at all) pending a meritless appeal of the denial of intervention.

To the extent that Applicants claim that harm may befall them because their arguments in favor of LEBOR will not be heard, that fear has been demonstrably proven to be unfounded. The City of Toledo continues to defend LEBOR and continues to attempt to avoid a ruling on its merits. *See* Exhibit B. Further, this Court has invited Applicants to seek leave to file amicus briefs if they believe their viewpoints will be helpful to the Court. (ECF No. 23 at 5).

D. Unlike the lack of harm to Applicants, others will be harmed by a stay.

On the other side of the ledger, harm would redound to every other party to this case—Drewes Farms, the City of Toledo, and the State of Ohio—if litigation on the merits is needlessly stalled. As a general proposition, federal courts seek to avoid permitting parties to use interlocutory appeals to stall litigation. *Mason v. Massie*, 335 B.R. 362, 367 (N.D. Ohio 2005). That concern is particularly acute here because, in other “rights of nature” cases, attorneys for natural objects and features have pursued a strategy that includes “vexatiously multipl[y] the

litigation” of the underlying matter. *Pa. Gen. Energy Co., LLC v. Grant Twp.*, No. 14-209ERIE, 2018 U.S. Dist. LEXIS 2069, at *33-34 (W.D. Pa. Jan. 5, 2018). Moreover, Plaintiff brought this action to vindicate its constitutional rights. This Court has temporarily enjoined LEBOR’s enforcement, but the continued existence of LEBOR’s vague and unconstitutional terms engenders great uncertainty as Drewes Farms enters planting season and begins planning and investing in future seasons. This case must be decided fully on the merits before Drewes Farms, and other entities potentially impacted by LEBOR, can know what actions they may or may not take. Because every party to this case has an interest in prompt resolution on the merits, this Court should not permit Applicants’ delay strategy to unfold here.

E. Applicants have not demonstrated public interest in a stay.

Next, Applicants must demonstrate that the public interest favors granting a stay. *Griepentrog*, 945 F.2d 150, 155 (6th Cir. 1991). Applicants argue that the public interest lies in the will of the people of Toledo being effected. (ECF No. 25 at 13). Not only do they fail to establish that granting a stay of litigation on the merits would comport with that will, but also they elide entirely the question whether effectuating that will would be unconstitutional. In reality, “the public interest lies in a correct application” of the United States Constitution and with local law “being effected *in accordance with*” the Constitution. *Coal. to Defend Affirmative Action v. Granholm*, 473 F.3d 237, 252 (6th Cir. 2006) (emphasis added) (quoting *Americans United for Separation of Church & State v. City of Grand Rapids*, 922 F.2d 303, 306 (6th Cir. 1990)). Put simply: there is no public interest in enforcing an unconstitutional law. To the contrary, the very purpose of Section 1983 is to empower the federal courts to protect individuals from unconstitutional deprivations made under the color of law. *See, e.g., Mitchum v. Foster*, 407 U.S. 225, 242 (1972). To stay the litigation would frustrate the Court’s ability to do so in this case.

F. To grant a stay would result in the waste of judicial resources.

Courts also consider whether granting a stay would ““further the interest in economical use of judicial time and resources.”” *FTC v. E.M.A. Nationwide, Inc.*, 767 F.3d 611, 628 (6th Cir. 2014) (quoting *Int’l Bhd. of Elec. Workers v. AT&T Network Sys.*, 879 F.2d 864, at *8 (6th Cir. Jul. 17, 1989)). Applicants argue that a stay would conserve judicial resources because, should the Sixth Circuit reverse this Court’s order denying intervention, Applicants will file their own dispositive motions. (ECF No. 25 at 14). But it is no additional strain on the Court to adjudicate dispositive motions serially instead of all at once. If that were sufficient rationale for a stay, district courts would grant them every time an interlocutory appeal was taken from an order denying a motion to intervene. The result of applying this rule would be a docket cluttered with litigation stalled by would-be intervenors. This Court should avoid such inefficiencies. And, again, this Court has invited Applicants to seek leave to file amicus briefs if Applicants believe it would be helpful to the Court, so the Court will have the opportunity to consider Applicants’ arguments (if appropriate and helpful) if this case proceeds on the merits.

G. This Court should require Applicants to post a supersedeas bond.

As Applicants recognize, Rule 62(d) of the Federal Rules of Civil Procedure counsels that “a full supersedeas bond should almost always be required.” (*Id.* at 14-15 (quoting *Hamlin v. Charter Twp. of Flint*, 181 F.R.D. 348, 351 (E.D. Mich. 1998))). Generally, the amount of the bond should include any judgment, “together with costs, interest, and damages for delay” *United States v. GE*, 397 F. App’x 144, 151 (6th Cir. 2010) (quoting 11 CHARLES WRIGHT, ET AL., *FEDERAL PRACTICE & PROCEDURE* § 2905, at 522 (4th ed. 2008))). Here, the cost has *already* been high: Applicants continue to advance arguments that have already been determined to lack merit, and other courts have assessed sanctions based on parties making the very same arguments. *See Pa. Gen. Energy Co., LLC v. Grant Twp.*, No. 14-209ERIE, 2018 U.S. Dist.

LEXIS 2069, at *19, 33-34 (W.D. Pa. Jan. 5, 2018) (assessing sanctions against attorneys representing a purported ecosystem in a motion to intervene because “no reasonable interpretation of existing case law rendered such motion appropriate”). And Applicants have now filed a parallel and similarly non-meritorious motion for a stay in the Sixth Circuit. (*See* Exhibit A). Thus, should this Court determine that a stay is necessary, it should order Applicants to post a bond sufficient to account for the time and resources needed to defend this Court’s Order. *Cf. In re Humbert*, 567 B.R. 512, 521 (Bankr. N.D. Ohio 2017) (observing that a supersedeas bond may include attorney’s fees sustained on appeal). Drewes Farms requests at a minimum a bond of \$100,000.00.

III. CONCLUSION

As the Supreme Court has observed, “[a] stay is an intrusion into the ordinary processes of administration and judicial review.” *Nken v. Holder*, 556 U.S. 418, 427 (2009). Applicants have provided this Court with no basis for such an intrusion. Drewes Farms therefore respectfully requests that the Court deny Lake Erie Ecosystem and Toledoans for Safe Water’s Motion for a Stay Pending Appeal.

Respectfully submitted,

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CERTIFICATE OF MEMORANDUM LENGTH

Pursuant to Local Rule 7.1(f)'s requirements, this memorandum does not exceed 15 pages.

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CERTIFICATE OF SERVICE

The undersigned certifies that the foregoing was served electronically through this Court's electronic service system upon all parties and/or counsel of record on this 14th day of May, 2019. Notice of this filing is sent by operation of the Court's electronic filing system to all parties indicated on the electronic filing receipt. Parties may access this filing through the Court's system.

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IN THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Drewes Farms Partnership,

Plaintiff - Appellee,

v.

City of Toledo,

Defendant - Appellee,

State of Ohio,

Intervenor - Appellee,

and

Lake Erie Ecosystem;

Toledoans for Safe Water, Inc.,

Proposed Intervenor - Appellants.

6th Cir. No. 19-3435

N.D. Ohio No. 3:19-cv-00434-JZ

**Appellant Intervenor's Motion to
Stay District Court Proceeding
Pending Intervention Appeal**

*Decision requested by 4:15 pm on
Friday, May 17, 2019*

**APPELLANT INTERVENORS' MOTION TO STAY DISTRICT COURT PROCEEDING
PENDING INTERVENTION APPEAL**

May 13, 2019

EXHIBIT A

Table of Contents

Procedural History.....	3
Jurisdiction.....	5
Argument.....	5
I. Proposed Intervenors have standing to appeal the intervention denial.....	6
II. Standard for Staying Trial Court.....	7
A. It is likely the Lake Erie Ecosystem and Toledoans for Safe Water will prevail on the merits of the appeal.....	8
B. If the stay is not granted, the Lake Erie Ecosystem and Toledoans for Safe Water will be irreparably harmed.....	10
C. If the stay is granted, Drewes Farms Partnership will not be irreparably harmed.....	13
D. Granting the stay is clearly in the public interest.....	14
E. Granting the stay is the best use of judicial resources.....	16
III. Proposed Intervenors Should Not Be Required To Post An Appeal Bond.....	17
Conclusion.....	17
Certificate of Motion Length.....	19
Certificate of Service.....	20

Appellant Proposed Intervenor-Defendants Lake Erie Ecosystem and Toledoans for Safe Water, Inc., are appealing the District Court’s denial of their Motion for Intervention (Dkt. 23, 26), and hereby seek a Stay of the District Court proceeding pending resolution of this appeal before this Court.

Immediately after denying Proposed Intervenor’s Motion to Intervene, the District Court ordered letter briefing on Motion for Judgment on the Pleadings and scheduled a record phone conference for Friday, May 17, 2019, beginning at 4:15 pm. (Dkt. 24) It is highly likely that the District Court will issue a dispositive order following this conference, and thus Proposed Intervenor respectfully request a decision by this Court on this Stay Motion prior to 4:15 pm on Friday, May 17.

Procedural History

Toledo voters amended the City of Toledo municipal charter to include the Lake Erie Bill of Rights (LEBOR) in a February 2019 special election. (Dkt. 1-1, LEBOR text.) Immediately afterward, Plaintiff Drewes Farms Partnership (DFP) brought suit against Defendant City of Toledo in the United States District Court for the Northern District of Ohio, Western Division seeking a ruling that LEBOR is invalid.

DFP and the City stipulated to a Preliminary Injunction Order entered on March 18, 2019, to preserve the status quo until the merits of the action can be decided. The parties agreed that the City is enjoined from enforcing LEBOR. (Dkt. 9, PI Order)

Proposed Intervenor, Toledoans for Safe Water (“TSW”) and Lake Erie Ecosystem (“Lake Erie”) sought to intervene under Federal Rule of Civil Procedure 24 because their rights were at stake, their interests in enforcing the law at issue were at stake, and because the City has expressed opposition to LEBOR and an unwillingness to defend it. In their Motion to Intervene, Proposed Intervenor argued that the City is not an adequate representative of LEBOR. (Dkt.

10.) The City did not refute this proposition, and did not oppose intervention by the Proposed Intervenor. (Dkt. 15.) DFP opposes TSW's and Lake Erie's intervention. (Dkt. 16.) In sum, without Proposed Intervenor, there is no party to the case that supports LEBOR, will argue on the side of its legality, and can appeal any decision adverse to it.

On Tuesday, May 7, 2019, the District Court denied Proposed Intervenor's Motion to Intervene. (Dkt. 23.) Pursuant to FRAP 8(a)(1), Proposed Intervenor moved first in the District Court for a stay pending appeal of the Order Denying Intervention ("Order"), filing it on Wednesday, May 8. (Dkt. 25.) As of the filing of this Motion on Monday morning, May 13, the District Court has not ruled on the Stay Motion.

Immediately after denying Proposed Intervenor's party status, the District Court issued an Order that stated in full:

Counsel shall forward to this Court their respective letters in a joint filing regarding a Motion for Judgment on the Pleadings by **May 10, 2019**. This Court will then hold a Record Phone Conference on **Friday, May 17, 2019 at 4:15 PM**. At that time counsel shall call the District Court conference line. IT IS SO ORDERED.

(Dkt. 24.)

There was no docket activity for the extant parties' "respective letters in a joint filing regarding a Motion for Judgment on the Pleadings," and thus presumably the parties submitted this "joint filing" in a private communication to the District Court. Thus, the people of Toledo will not know how or whether their own government defended the law that the people enacted.

Proposed Intervenor filed a Notice of Appeal of the denial on intervention on May 13, 2019. (Dkt. 26.) Now, Proposed Intervenor, by their undersigned counsel, respectfully request an unsecured stay of this case under Federal Rule of Appellate Procedure 8 pending the resolution of their appeal of the District Court's Order Denying Intervention. Proposed Intervenor request this Stay so that they (as the only parties who have indicated their intention

to defend the Lake Erie Bill of Rights (LEBOR)) can preserve their right to participate in the District Court proceeding, as without a Stay the District Court will surely issue a deposition ruling before resolution of this appeal.

Jurisdiction

This Court has jurisdiction of appeals from all final decisions of the District Court. 28 U.S.C. § 1291. “It is fairly well established that denial of a motion to intervene as of right, i.e. one based on Rule 24(a)(2) is an appealable order.” *Purnell v. City of Akron*, 925 F.2d 941, 944 (6th Cir. 1991). “[A]n order denying intervention is an immediately appealable ‘final decision’ under 28 U.S.C. § 1291 even if the rest of the case remains pending and unfinished in the district court.” *CE Design, Ltd. v. Cy’s Crab House North, Inc.*, 731 F.3d 725, 728 (7th Cir. 2013); accord *United States EPA v. City of Green Forest*, 921 F.2d 1394, 1401 (8th Cir. 1990) (“It is well-settled that an order denying a motion to intervene as of right is a final appealable order.” (citations omitted)); *California v. Block*, 690 F.2d 753, 776 (9th Cir. 1982) (“The order denying intervention as of right . . . was a final appealable order.” (citing *County of Fresno v. Andrus*, 622 F.2d 436, 438 (9th Cir. 1980))).

Argument

Proposed Intervenor’s appeal is restricted to whether they have a right to be Intervenor in the case and not whether they are justified in their defense of LEBOR. The District Court’s Order Denying Intervention was contrary to this Circuit’s precedents and without support in the laws of the United States. Specifically, the District Court did not consider the full rule governing intervention by right as articulated in *Coalition to Defend Affirmative Action v. Granholm*, 501 F.3d 775 (6th Cir. 2007) and, thus, misapplied that case to deny intervention. Meanwhile, the Proposed Intervenor will be irreparably harmed absent a stay as the validity of LEBOR will be

1 decided in their absence. Existing parties will not suffer any harm in delaying the resolution of
2 this case as there is a preliminary injunction order in place preserving the status quo. Finally, the
3 public interest is best served by allowing a full adjudication of the merits of LEBOR before the
4 District Court, which will happen best when all parties who have an interest are before the Court.
5 Given that the City did not oppose the Proposed Intervenors intervention motion, especially
6 given that the City did not refute the proposition that it does not adequately represent the
7 Proposed Intervenors' interests, allowing the case to proceed before resolution of the instant
8 appeal means adjudication will happen without a single party arguing in favor of LEBOR.

9 The District Court's Preliminary Injunction Order – preventing the City's enforcement of
10 LEBOR and preserving the status quo until the merits of this action can be decided – ensures that
11 the costs of appeal will be minimal so an appeal bond is unnecessary to protect the parties.
12 Therefore, it is in the interests of all parties that this case be stayed without appeal bond so that,
13 once intervention is granted by the Court of Appeals, any delay and prejudice to Lake Erie and
14 TSW, or the parties, is diminished due to the improper denial of intervention.

15 **I. Proposed Intervenors have standing to appeal the intervention denial.**

16 Article III of the Constitution requires a “litigant to prove that he has suffered a concrete
17 and particularized injury that is fairly traceable to the challenged conduct, and is likely to be
18 redressed by a favorable judicial decision.” *Hollingsworth v. Perry*, 133 S. Ct. 2652, 2661 (2013)
19 (citing *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992)).

20 Here, Proposed Intervenors suffered a concrete and particularized injury when the District
21 Court denied their intervention. By denying their intervention, the District Court prevents the
22 Proposed Intervenors from arguing in defense of LEBOR despite Proposed Intervenors
23 possessing a right to intervention under Fed. R. Civ. Pro. 24(a)(2). A decision by this Court
24 allowing TSW and Lake Erie to intervene and defend LEBOR in the District Court would redress

1 this injury.

2 In anticipation of the argument that Proposed Intervenor should be denied standing
3 under the Supreme Court's decision in *Hollingsworth v. Perry*, 133 S. Ct. 2652 (2013), Proposed
4 Intervenor asserts that this case is distinguishable from *Hollingsworth* because the principal issue
5 before this Court is not the constitutionality of the local law at issue in the underlying case, but
6 rather the denial of Proposed Intervenor's right to intervene and protect their interests.

7 **II. Standard for Staying Trial Court**

8 In considering whether a stay pending appeal should issue, the court considers four
9 factors: "(1) the likelihood that the party seeking the stay will prevail on the merits of the appeal;
10 (2) the likelihood that the moving party will be irreparably harmed absent a stay; (3) the prospect
11 that others will be harmed if the court grants the stay; and (4) the public interest in granting the
12 stay." *Coal. to Defend Affirmative Action v. Granholm*, 473 F.3d 237, 244 (6th Cir. 2006) (citing
13 *Mich. Coal. of Radioactive Material Users, Inc. v. Griepentrog*, 945 F.2d 150, 153 (6th Cir.
14 1991). "All four factors are not prerequisites but are interconnected considerations that must be
15 balanced together." *Id.* Additionally, a strong showing of one factor may overcome any
16 weaknesses of the others. *Id.* at 252.

17 It is also well established that "the power to stay proceedings is incidental to the power
18 inherent in every court to control the disposition of the causes on its docket with economy of
19 time and effort for itself, for counsel, and for litigants. How this can best be done calls for the
20 exercise of judgment, which must weigh competing interests and maintain an even balance."
21 *Landis v. North American Co.*, 299 U.S. 248, 254-55 (1936). "The most important factor is the
22 balance of the hardships, but the district court must also consider whether granting the stay will
23 further the interest in economical use of judicial time and resources." *F.T.C v. E.M.A.*
24 *Nationwide, Inc.*, 767 F.3d 611, 627-28 (6th Cir. 2014) (internal citations omitted).

A. It is likely the Lake Erie Ecosystem and Toledoans for Safe Water will prevail on the merits of the appeal.

“To justify the granting of a stay...a movant need not always establish a high probability of success on the merits.” *Mich. Coal. of Radioactive Material Users, Inc. v. Griepentrog*, 945 F.2d 150 at 153 (citing *Ohio ex rel. Celebrezze v. Nuclear Regulatory Comm’n*, 812 F.2d 288, 290 (6th Cir. 1987)). “The probability of success that must be demonstrated is inversely proportional to the amount of irreparable injury plaintiffs will suffer absent the stay.” *Id.*

Here, Proposed Intervenor Lake Erie Ecosystem’s very legal existence is at stake, for its rights to exist, flourish, and naturally evolve are recognized in the Toledo City Charter Amendment that DFP seeks to nullify. Toledoans for Safe Water is seeking the right to fight for the validity of a law that they themselves can choose to enforce, not simply a law that the City has exclusive prosecutorial discretion to enforce. LEBOR § 3(b) provides “The City of Toledo, or any resident of the City, may enforce the rights and prohibitions of this law through an action brought in the Lucas County Court of Common Pleas, General Division” (emphasis added). (Dkt. 1-1, at 3.)

Proposed Intervenor should have the opportunity to distinguish *Granholm*, which did not involve a law that the intervenors themselves would be enforcing. (See Order at 3-4.) The Court has ruled that TSW may not intervene by right under Federal Rule of Civil Procedure 24(a)(2). To intervene under that subsection, a proposed intervenor must demonstrate that

(1) the motion to intervene is timely; (2) the proposed intervenor has a substantial legal interest in the subject matter of the case; (3) the proposed intervenor’s ability to protect [its] interest may be impaired in the absence of intervention; and (4) the parties already before the court cannot adequately protect the proposed intervenor’s interest.

Coalition to Defend Affirmative Action v. Granholm, 501 F.3d 775, 779 (6th Cir. 2007) (quoted in Order at 2).

Here, the District Court has ruled that Toledoans for Safe Water fails the “substantial-legal-interest” factor. Despite the District Court’s reliance on discrete passages from *Granholm*, Proposed Intervenor asserts that the pertinent rule from *Granholm* is, in its entirety:

This is not to say that all organizations that advocate for the passage of a law lack a substantial legal interest in a suit challenging the government’s subsequent enforcement of that law. Indeed, we have held that where a group is regulated by the new law, or similarly, whose members are affected by the law, may likely have an ongoing legal interest in its enforcement after it is enacted...Where, however, an organization has only a general ideological interest in the lawsuit – like seeing that the government zealously enforces some piece of legislation that the organization supports – and the lawsuit does not involve the regulation of the organization’s conduct, without more, such an organization’s interest in the lawsuit cannot be deemed substantial (internal citations omitted).

Granholm, 501 F.3d at 782.

TSW formed in response to the notorious harmful algal bloom that poisoned Toledo’s drinking water in August, 2014. (See Dkt. 10-2, Durback Decl., ¶ 2.) TSW did not form specifically to pass LEBOR, it formed to secure meaningful protections for Lake Erie and all those who depend on its water. TSW plans on using LEBOR in the future to secure these protections.

TSW and its members have much more than a “general ideological interest” in the law. This case involves TSW’s and its members ability to effectively protect Lake Erie, a major source of life, not to mention drinking water, in the region. Instead of being an ideological interest, this is a real, physical interest. It would not be too much to say that the interest in clean drinking water is among the most fundamental interests humans possess. Additionally, at this point, TSW is not seeking that the government zealously enforce legislation the organization supports. Right now, TSW is only seeking to be allowed to defend the law from invalidation.

Finally, the law does regulate TSW’s conduct. For, if TSW or its members seek to implement the amendment, LEBOR regulates where they may bring an action (Lucas County

Court of Common Pleas, General Division) as well as who may be named as the real party in interest (the Lake Erie Ecosystem). So, Proposed Intervenor contend, TSW is a group regulated by the new law, its members are affected by the law, it has more than a general ideological interest in the law, and, instead of pushing for zealous enforcement of the law, TSW merely seeks to defend the law because the City will not adequately represent, never mind enforce, LEBOR. Therefore, contrary to the District Court's ruling, the *Granholm* rule supports TSW's and Lake Erie's intervention in this case.

B. If the stay is not granted, the Lake Erie Ecosystem and Toledoans for Safe Water will be irreparably harmed.

In the context of a motion to stay pending an appeal, three factors govern whether a party will be irreparably harmed: "(1) the substantiality of the injury alleged; (2) the likelihood of its occurrence; and (3) the adequacy of the proof provided." *Michigan Coalition of Radioactive Material Users, Inc. v. Griepentrog*, 945 F.2d 150, 154 (6th Cir. 1991). "In addition, the harm alleged must be both certain and immediate, rather than speculative or theoretical." *Id.*

Here, absent a stay, LEBOR will be adjudicated without participation by a party that supports it. That is the immediate harm. DFP and the State are actively trying to strike LEBOR, and with the City opposed to LEBOR and not saying it will represent the Intervenor's interest, the harm is a one-sided adjudication of LEBOR. (Whether the District Court actually retains jurisdiction of the case without a "case or controversy" is a larger question here, but as the City's letter brief on Motion for Judgment on the Pleadings was not submitted on the docket, Proposed Intervenor can only speculate about the City's actual position.)

Beyond the procedural harm done by adjudicating the constitutionality of a law absent a genuine dispute, there is the underlying environmental harm suffered by all the 11 million people who depend on a healthy Lake Erie. There is no need more fundamental to all life than the need

1 for clean water. In Northern Ohio, the Lake Erie Ecosystem and Watershed fulfill this need. The
2 continued pollution of Lake Erie, then, is not just a substantial injury, it could very well prove to
3 be a *mortal* one. And, the seriousness of this threat to all life in Northern Ohio is precisely what
4 Lake Erie and TSW allege.

5 Specifically, Lake Erie and TSW allege that, if the Lake Erie Bill of Rights is invalidated,
6 the Lake Erie Ecosystem will continue to be “subject to an array of polluting events causing
7 multiple water quality issues which degrade and destroy the viability of water and economic
8 sustainability of the region.” (Dkt. 10, Motion for Leave to Intervene of Lake Erie Ecosystem
9 and Toledoans for Safe Water, Inc., ¶ 3). Lake Erie and TSW have also alleged that “[t]he City
10 water utility has no other good source of water and will suffer real and substantial harm if the
11 Lake Erie Bill of Rights is invalidated and residents of the City of Toledo are deprived of a vital
12 means of protecting the Lake Erie Ecosystem.” (*Id.*, ¶ 4). Lake Erie and TSW allege that “If
13 LEBOR is invalidated, the Lake Erie Ecosystem will lose the rights to exist, flourish, and
14 naturally evolve, and will suffer the harms prevented by LEBOR’s recognition.” (*Id.*, ¶ 9).

15 This Court has clarified the second “irreparably harmed” factor explaining, “In order to
16 substantiate a claim that irreparable injury is likely to occur, a movant must provide some
17 evidence that the harm has occurred in the past and is likely to occur again.” *State of Ohio ex rel.*
18 *Celebrezze v. NRC*, 812 F.2d 288, 290 (6th Cir. 1987). The history of Lake Erie’s pollution
19 demonstrates not only that these injuries are likely, but that they are nearly certain, to continue.
20 This Court anticipated claims that parties have not alleged enough purely scientific proof in
21 *Celebrezze* when it wrote, “We require that the record contain evidence from which we can make
22 specific findings. It should be presented in a non-technical format, allowing the average adult
23 reader to make a reasonable determination.” 812 F.2d 288, 291 (6th Cir. 1987).

24 In a non-technical format, allowing the average adult reader to make a reasonable

determination, Lake Erie and TSW have alleged that Toledo's 2014 water crisis is likely to occur again. They cite scientific reports including one by the National Center for Water Quality Research at Heidelberg University which concluded: "Decades of monitoring have led to an inescapable conclusion: phosphorous runoff, primarily from agricultural lands, is feeding explosive cyanobacterial growth in the warm, shallow waters of the western basin." (Dkt. 10-1, Memorandum in Support of Motion to Intervene, at 6, 11-14). Additionally, despite a state task force declaring that the amount of phosphorous from treatment plants and fertilizers needs to be scaled back by 40 percent, Lake Erie and TSW allege that governments have failed to reach this goal, explaining that governments "have failed to offer workable solutions necessary to reduce phosphorous pollution and shrink the algal blooms." (*Id.* at 7, 1-3.)

Lake Erie and TSW also offer statements from U.S. District Judge James Carr who has taken note of, "Ohio's long-standing, persistent reluctance and, on occasion, refusal to comply with the CWA. As a result of the State's inattention to the need, too long manifest, to take effective steps to ensure that Lake Erie (the Lake) will dependably provide clean, healthful water, the risk remains that sometime in the future, upwards of 500,000 Northwest Ohio residents will again, as they did in August 2014, be deprived of clean, safe water for drinking, bathing, and other normal and necessary uses." (*Id.* at 10, 6-12).

The proof that Lake Erie and TSW provide is more than adequate. In addition to the allegations provided above, Lake Erie and TSW provide statements by three Toledo citizens and members of TSW who describe how the City's water problems have personally affected them. One of these statements comes from Markie Miller who graduated from the University of Toledo with a Masters Degree in Environmental Science. Miller explains, "Large scale industrial agriculture and confined animal feeding operations ('CAFOS') that create, store, and apply manure (often in liquid form) are contributing to the problem in a major way." (Dkt. 10-3, Miller

Decl., ¶ 17).

In fact, Lake Erie and TSW remind us that “[n]early half a million people in northwestern Ohio” experienced this proof firsthand when they awoke one Saturday morning in August, 2014, to dire warnings “from Toledo city officials: ‘don’t drink water from the tap. Don’t give it to pets. Don’t boil or cook with it, and restaurants should remain closed until further notice.’” (Dkt. 10-1, Memo in Support, at 5, 20-22.) To drive this point home, Lake Erie and TSW cite a city-issued notice which said “Seek medical attention if you feel you have been exposed” to water from the tap. (*Id.* at 5, 23-25.)

Lake Erie and TSW allege very substantial injuries that are both certain and immediate rather than speculative or theoretical and that are nearly certain to continue. They support their allegations with more than adequate proof. Therefore, they demonstrate that if the stay is not granted, Lake Erie and TSW will be irreparably harmed.

C. If the stay is granted, Drewes Farms Partnership will not be irreparably harmed.

The same three factors that govern whether a movant will be irreparably harmed if the motion is not granted are applied in determining whether nonmoving parties will be irreparably harmed if the motion is granted. *See Cuomo v. United States Nuclear Regulatory Commission*, 772 F.2d 972, 977 (D.C. Cir. 1985) “[E]conomic loss does not constitute irreparable harm, in and of itself.” *Ohio ex rel. Celebrezze v. Nuclear Regulatory Comm’n*, 812 F.2d 288, 290 (6th Cir. 1987). Furthermore, “...the harm alleged must be both certain and great, rather than speculative or theoretical.” *Id.*

In evaluating the degree of injury, the Supreme Court has explained:

[t]he key word in this consideration is irreparable. Mere injuries, however substantial, in terms of money, time, and energy necessarily expended in the absence of a stay, are not enough. The possibility that adequate compensatory or other corrective relief will be available at a later date, in the ordinary course of litigation, weighs heavily against a claim of irreparable harm.

1 *Sampson v. Murray*, 415 US 61, 90 (1974).

2 First, if the stay is granted, DFP will not be harmed at all, let alone irreparably harmed,
3 because DFP and the City of Toledo have stipulated to, and the District Court has signed, an
4 order preventing the City from enforcing LEBOR against anyone. The District Court noted that
5 the purpose of a preliminary injunction under Federal Civil Rule 65, is “to preserve the relative
6 positions of the parties until a trial on the merits can be held.” (Dkt. 9, PI Order, at 2 (internal
7 quotation and citation omitted).) And, indeed, this preliminary injunction was ordered “[t]o
8 preserve the status quo until the merits of this action can be decided...” (*Id.* at 2.) The
9 Preliminary Injunction Order will stand while the Court of Appeals decides whether Lake Erie
10 and TSW will be allowed to intervene. So, DFP may continue with business as usual during the
11 pendency of the case.

12 Without more, DFP fails to allege that LEBOR causes it an injury in fact, in the first place
13 – let alone a substantial injury or an injury that can be exacerbated to the level of irreparable
14 harm by granting this motion to stay. There is no underlying injury in fact, as LEBOR is not
15 being enforced against DFP or preventing DFP from engaging in any activity of any kind, so this
16 motion to stay cannot irreparably harm DFP. Similarly, because DFP fails to allege an injury in
17 fact, there are no grounds to assess whether any injury to DFP is likely to occur or whether DFP
18 has provided adequate proof of an injury. Thus, DFP will not be harmed by granting the motion
19 to stay.

20 **D. Granting the stay is clearly in the public interest.**

21 In evaluating whether granting a stay is in the public interest, “[t]he interests of private
22 litigants must give way to the realization of public purposes.” *Virginia Petroleum Jobbers*
23 *Association v. FPC*, 259 F.2d 921, 925 (D.C. Cir. 1958). Denying this motion to stay would be a
24 text book example of the interests of private litigants trumping the realization of public purposes.

1 That fair adjudication with parties genuinely opposed to each other is likely not happening
2 currently in the District Court, and unless this Court issues a Stay by this Friday, the District
3 Court will issue a ruling without the people ever seeing what their own City said in defense of
4 the law they passed. LEBOR is a tool protecting everyone in northern Ohio's water and it should
5 have its day in court.

6 At this stage of the proceedings, this Court is not being asked to define LEBOR's role in
7 protecting the region's water. Instead, after the District Court barred the most essential ecosystem
8 to life in the region (Lake Erie) and the group responsible for placing LEBOR on the ballot and
9 invested in their ability to use LEBOR in the future, this Court is simply being asked to pause the
10 proceedings so that Lake Erie and LEBOR can ask the opinion of the Court on whether they
11 have a right to be parties in the case.

12 The public interest favors settling Lake Erie's and TSW's status as a party now. In
13 *Coalition to Defend Affirmative Action v. Granholm*, the people of Michigan approved a
14 statewide ballot initiative which amended the Michigan Constitution to prohibit discrimination or
15 preferential treatment based on race or gender in the operation of public employment, public
16 education, or public contracting in the State. 473 F.3d 237 (6th Cir. 2006). Several organizations
17 and individuals opposed to the initiative filed suit against the Governor of Michigan and the
18 regents or boards of several Michigan universities. The Attorney General also successfully
19 intervened. Then, all the parties – the Governor, Attorney General, the Universities, and the
20 plaintiffs – stipulated to a “temporary injunction.” Later, a white man who had applied to the
21 University of Michigan law school successfully intervened and filed an “Emergency Motion for
22 a Stay Pending Appeal” of the temporary injunction.

23 In a similar situation to the one at hand, this Court applied the four factors governing a
24 motion to stay appending appeal to ultimately grant the stay preventing the stipulated temporary

1 injunction from taking effect. The Court wrote about the public interest factor: “[T]he public
2 interest lies...ultimately...upon the will of the people of Michigan being effected in accordance
3 with Michigan law.” *Coalition to Defend Affirmative Action*, 473 F.3d at 252 (internal quotation
4 and citation omitted).

5 The will of the people of Toledo is reflected in LEBOR’s election results. Ohio’s ballot
6 initiative process represents the most directly democratic process available to Ohio citizens.
7 Nowhere else may the public participate so directly in lawmaking. Meanwhile, the City of
8 Toledo has a long record of expressing opposition to LEBOR. And, with the City consenting to a
9 preliminary injunction in this case, it appears that the City is well on its way to refusing to
10 enforce LEBOR. If this Court does not grant this motion to stay, then no one will represent the
11 interests of the voting public. To lose on the merits is one thing, but to never even gain the
12 chance to argue on the merits is quite another.

13 **E. Granting the stay is the best use of judicial resources.**

14 This Court often grants motions to stay pending an appeal. *See American Civil Liberties*
15 *Union v. National Security Agency/Central Security Service*, 467 F.3d 590 (6th Cir. 2006);
16 *Coalition to Defend Affirmative Action v. Granholm*, 473 F.3d 237 (6th Cir. 2006); *Michigan*
17 *Coalition of Radioactive Material Users, Inc. v. Griepentrog*, 945 F.2d 150 (6th Cir. 1991); *State*
18 *of Ohio ex rel. Celebrezze v. NRC*, 812 F.2d 288 (6th Cir. 1987).

19 This Court should stay the litigation pending the outcome of Proposed Intervenor’s appeal
20 to preserve judicial resources. Denying this motion to stay would likely result in this case
21 progressing to a dispositive ruling without Lake Erie having any input on a new tool that could
22 be used to help it recover. Denying this motion to stay would also bar Toledoans from
23 contributing input, too.

III. Proposed Intervenors Should Not Be Required To Post An Appeal Bond.

Federal Rule of Appellate Procedure 7 provides, “[i]n a civil case, the district court may require an appellant to file a bond or provide other security in any form and amount necessary to ensure payment of costs on appeal.” Courts consider several factors when deciding whether to grant an appeal bond including: “(1) the appellant’s financial ability to post a bond, (2) the risk that the appellant would not pay appellee’s costs if the appeal loses, (3) the merits of the appeal, and (4) whether the appellant has shown any bad faith or vexatious conduct.” *Emanuel v. County of Wayne*, No. 13-13175 (E.D. Mich. 2015) (citing *Harris v. Members of Bd. of Governors of Wayne State Univ.*, No. 10-11384, 2011 WL 4632864, at *2 (E.D. Mich. 2011)).

TSW is a very popular grassroots 501c3 nonprofit operated by an all-volunteer staff in northwest Ohio. TSW has minor funds available sufficient to pay appellee’s costs if the appeal loses. *In re Polyurethane Foam Antitrust Litigation*, 178 F. Supp. 3d 635 (N.D. Ohio 2016) the district court noted that the fact that three appellants lived outside of the court’s jurisdiction weighed in favor of requiring a bond. The fact that Lake Erie and TSW reside in this Court’s jurisdiction, conversely, weighs in favor of not requiring a bond. Finally, Lake Erie and TSW have never shown any bad faith or vexatious conduct.

Again, the District Court’s Preliminary Injunction Order (Dkt. 9) controls during the pendency of Proposed Intervenors’ appeal, thus ensuring that DFP suffers no harm during this appeal.

Conclusion

This Court should stay this case pending a decision on whether the Proposed Intervenors have a right to intervene because the District Court’s Order did not consider the full *Granholtz* rule and thus misapplied that case to deny intervention, the Proposed Intervenors will be irreparably harmed absent a stay as the validity of LEBOR will be decided in their absence,

1 existing parties will not suffer any harm in delaying the resolution of this case as there is a
2 preliminary injunction order in place preserving the status quo, and the public interest is
3 supported by allowing a full discussion of the merits of LEBOR before the District Court, which
4 will happen best when all parties who have an interest are before the Court.

5 As the District Court has scheduled a Conference on letter filings regarding judgment on
6 the pleadings for this Friday, May 17, at 4:15 pm, Proposed Intervenor respectfully request a
7 decision by this Court prior to that time.

Respectfully submitted this May 13, 2019.

/s/ Lindsey Schromen-Wawrin

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Certificate of Motion Length

Pursuant to F. R. App. Proc. 27(d)(2) and 32(f), limiting the content of this motion to 5,200 words, this brief contains 5,176 words.

Dated: May 13, 2019.

/s/ Lindsey Schromen-Wawrin

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Certificate of Service

I certify that I electronically filed this document with the Clerk of the Court for the United States Sixth Circuit Court of Appeals by using the Court's CM/ECF system. The other parties are Filing Users and are served electronically with this document as of the date of filing by the Notice of Docket Activity.

Date: May 13, 2019

/s/ Lindsey Schromen-Wawrin

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April 9, 2019

VIA E-MAIL ONLY

Gerald R. Kowalski
Sarah K. Skow
Spengler Nathanson P.L.L.
900 Adams Street
Toledo, Ohio 43604-5505

Re: *Drewes Farms Partnership v. Toledo* - Pre-Dispositive Motion
Correspondence

Dear Counsel:

We write in accordance with Section 3 of Judge Zouhary's Civil Case Management Procedures (ECF No. 4), which requires parties to confer in good faith and exchange letters prior to filing a dispositive motion. We intend to file a Rule 12(c) motion for judgment on the pleadings. Not only do we write to comply with the Court's procedures, but to make another attempt to limit Toledo's exposure under 42 U.S.C. § 1988, to preserve the Court's and parties' time and resources, and to obtain a resolution before the growing season is in full swing.

Drewes Farms' complaint raises facial challenges to Toledo's Lake Erie Bill of Rights Charter Amendment under the United States Constitution, federal law, and state law. In its Answer, Toledo repeatedly agreed that "LEBOR" speaks for itself. Thus, we can agree that Drewes Farms' facial challenges can appropriately be addressed by a motion for judgment on the pleadings.

Although we look forward to receiving your position in response generally, we raise the following issues to determine whether there is a way to amicably resolve this matter without dispositive motions or, at least to reduce the number of disputed issues that are raised to the Court. Therefore, for each of the numbered issues below, please indicate whether: "Yes" the City will stipulate to it as correct, or "No" the City will dispute it:

EXHIBIT B



Gerald R. Kowalski
Sarah K. Skow
April 9, 2019
Page 2

- 1) LEBOR violates the First Amendment by stripping “corporations” (defined in LEBOR as “any business entity”) of their First Amendment right to seek relief from the judiciary branch to pursue specific, and otherwise-valid claims in court.
- 2) LEBOR violates the First Amendment because it is a viewpoint restriction.
- 3) LEBOR violates the First Amendment’s prohibition against laws that abridge the right to “petition the Government for redress of grievances.”
- 4) LEBOR violates the Equal Protection Clause because it denies “corporations” equal protection of the laws.
- 5) LEBOR is void for its vagueness.
- 6) LEBOR violates procedural due process.
- 7) LEBOR violates substantive due process rights of “corporations” by denying “corporations” their rights under the First, Fifth, and Fourteenth Amendments.
- 8) LEBOR is preempted by federal law including that it attempts to regulate foreign affairs.
- 9) LEBOR regulates the portion of Lake Erie within Canada.
- 10) LEBOR regulates the portion of Lake Erie within New York.
- 11) LEBOR regulates the portion of Lake Erie within Pennsylvania.
- 12) LEBOR regulates the portion of Lake Erie within Michigan.
- 13) LEBOR regulates the portion of Lake Erie within Ohio that is outside of Lucas County, Ohio.
- 14) LEBOR regulates the portion of Lake Erie within Ohio that is outside of Toledo, Ohio.
- 15) LEBOR is preempted by Article XVIII, Section 3 of the Ohio Constitution because it conflicts with general laws of Ohio.



Gerald R. Kowalski
Sarah K. Skow
April 9, 2019
Page 3

- 16) LEBOR is preempted by Article XVIII, Section 3 of the Ohio Constitution because it purports to nullify state authorizations to “corporations.”
- 17) LEBOR is preempted by Ohio Revised Code Section 1506.10.
- 18) LEBOR’s attempt to create new causes of action is invalid and unenforceable under the Ohio Constitution, Article XVIII, Section 3.
- 19) LEBOR violates Ohio Constitution, Article XVIII, Section 3 by attempting to create statutory standing to the “Lake Erie Ecosystem” by giving it the power to sue in the Court of Common Pleas in Lucas County, Ohio.
- 20) LEBOR violates Article XIII, Section 2 of the Ohio Constitution by attempting to diminish the “rights, powers, privileges, immunities, [and] duties” of “corporations.”
- 21) LEBOR unlawfully denies privileges issued by agencies of the State of Ohio to “corporations.”
- 22) LEBOR unlawfully denies privileges issued by agencies of the United States of America.
- 23) LEBOR must be permanently enjoined in its entirety as a matter of law.
- 24) The entirety of LEBOR must be invalidated as a matter of law.

Based on case law, common sense, and the history of similar litigation, it is hard to imagine that any of the foregoing issues can be seriously disputed. The State of Ohio’s recent motion to intervene only adds additional credibility to Drewes Farms’ position. We therefore encourage the City of Toledo to agree to resolve this matter short of additional litigation through a consent decree. Indeed, if the City agrees that any of the above issues are correct, it is in the best interest of Toledo to negotiate a consent decree as soon as possible with Drewes Farms.

Doing so will not only protect Toledo from incurring its own additional legal expenses and from being sued in a LEBOR suit by a citizen disgruntled with the City’s own impact on the Lake Erie Ecosystem, but will also minimize the City’s obligations to pay Drewes Farms’ attorneys’ fees under § 1988. As you may be aware, on March 31, 2019, the Western District of Pennsylvania required Grant Township to pay plaintiffs’ attorneys’ fees after one of CELDF’s other local laws similar to LEBOR was found unlawful and unconstitutional. *See*



Gerald R. Kowalski
Sarah K. Skow
April 9, 2019
Page 4

Pennsylvania General Energy Co., LLC v. Grant Township, Case No. 1:14-cv-00209,
Memorandum Opinion (W.D. Penn. March 31, 2019).

We request Toledo's response by April 16, 2019, so that we can either move promptly to file a Rule 12(c) motion or negotiate the terms of a consent decree for the Court's consideration and approval.

Very truly yours,

A handwritten signature in blue ink, appearing to read "Thomas H. Fusonie". The signature is stylized with large loops and flourishes.

Thomas H. Fusonie

THF/gjs

cc: Kimberly Herlihy
Daniel Shuey



May 9, 2019

Via Electronic Mail Only

Thomas H. Fusonie
Kimberly Herlihy
Daniel Shuey
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RE: Drewes Farms Partnership's Intention to file a Rule 12(C) Motion
Drewes Farms Partnership v. City of Toledo, Case No. 3:19-cv-00434

Dear Counsel,

Pursuant to the Court's May 7, 2019 Order (Doc #23) and in accordance with the Court's local practice, we write in response to your letter dated April 9, 2019, and to again explain the City of Toledo's position regarding your intention to seek leave to file a Rule 12(C) motion at this stage of the litigation.

During our April 23, 2019 telephone call, Gerry explained the various factors as to why the City of Toledo cannot agree to the 24 issues to which you have proposed the City stipulate. As you are aware, the Lake Erie Bill of Rights Charter Amendment ("LEBOR") was passed by a duly-authorized citizens' initiative petition, and is now part of the City's Charter. Accordingly, the City cannot agree to the 24 issues you have proposed for a consent decree, because that would improperly amend or repeal LEBOR without a general vote of the people of Toledo on the same. See, Ohio Constitution, Article XVIII, §9, and City of Toledo Charter, Chapter V.

During our April 12th and 23rd phone calls, we explained the City's position that dispositive motions would be procedurally premature before all potential parties had entered the case. At the time you sent your April 9th letter and during the April 12th and 23rd telephone calls, motions to intervene had been filed by potential intervening defendant Toledoans for Safe Water ("TSW") and Lake Erie and then-potential intervening plaintiff State of Ohio.

Thomas H. Fusonie
Kimberly Herlihy
Daniel Shuey
May 9, 2019
Page 2

As you know, the Court has since granted the State of Ohio's motion to intervene. But the State of Ohio has not filed its required pleading setting out its claims. See Doc. #21 at 2. And while the Court excused the State of Ohio's failure to submit its pleading along with its motion to intervene for purposes of deciding that motion, the record still does not contain the State of Ohio's required pleading. The State's Motion to Intervene establishes that the State of Ohio has different and divergent interests from Drewes Farms Partnership ("DFP"), and the State of Ohio must submit its pleading in the record so that the City may respond to it. The City should be able to respond to all claims against it before proceeding to any motion practice.

In light of the Court's May 7th ruling denying TSW and Lake Erie's motion to intervene, TSW and Lake Erie have now filed a motion to stay indicating they will appeal the Court's denial of their intervention. See Doc. #25. In the event that TSW and Lake Erie's appeal is successful, they too will have an interest in responding to and defending against your client's complaint and the State of Ohio's eventual complaint. The City does not believe it is in any party's interest to engage on the issues related to LEBOR in various courts or in piecemeal motion practice. Rather, to conserve the parties' and the Court's resources, the City believes that motion practice on pleadings should not be considered until all parties and all pleadings are before the Court.

Given the Stipulated Preliminary Injunction, DFP will not suffer any prejudice by not proceeding to submit a motion for judgment on the pleadings until all of the parties and their respective pleadings are before the Court.

In addition to the procedural reasons a motion on the pleadings is unwarranted at this juncture, the questions about whether DFP has standing to assert the claims in its complaint further establish that a Rule 12(C) motion is inappropriate.

DFP's complaint does not allege an injury in fact necessary to establish standing to pursue its claims; it fails to allege an actual or imminent, concrete and particularized injury. Rather, DFP repeatedly alleges that its farming practices are compliant with regulations and best practices, and that DFP takes extra measures beyond state and federal regulations to minimize runoff and pollution. It has not alleged that it has violated LEBOR in order to establish that any injury would be redressed by a favorable decision from this Court. DFP also cannot proceed on its foreign affairs preemption claim. It does not allege that it is a Canadian corporate citizen or that it even has Canadian operations. Accordingly, DFP fails to establish an injury of fact necessary to assert those claims in Count VI of the complaint. See Doc. #1 at ¶¶91-99. DFP's conclusory and speculative allegations that its constitutional rights are somehow violated by LEBOR do not sufficiently establish an injury in fact or otherwise satisfy standing requirements. *See Valley Forge Christian College v. Americans United for*

Thomas H. Fusonie
Kimberly Herlihy
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May 9, 2019
Page 3

Separation of Church and State, 454 US 464, 472-75, 482-86 (1982). At least some discovery is needed to establish whether DFP has standing, whether DFP's status as a partnership precludes it from asserting the constitutional claims in its complaint, and whether DFP is the real party in interest for the attorney fee claim.

For the foregoing reasons, the City does not agree that the alleged facial challenges in DFP's complaint can or should be decided now under Rule 12(C).

Respectfully submitted,

SPENGLER NATHANSON, P.L.L.

A handwritten signature in blue ink that reads "Gerald R. Kowalski".

Gerald R. Kowalski

A handwritten signature in black ink that reads "Sarah K. Skow".

Sarah K. Skow

cc: Daniel J. Martin, Esq. (via email)
Amanda M. Ferguson, Esq. (via email)
Gregg H. Bachmann, Esq. (via email)

GRK/SKS:acs



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May 9, 2019

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Dear Counsel:

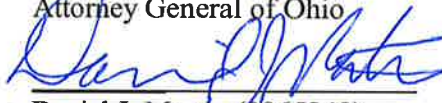
Per the Court's May 7, 2019 Order, we submit to you the State's letter as part of a joint filing regarding a motion for judgment on the pleadings.

Filing a Fed. Rule Civ. P. 12 (c) motion for judgment on the pleadings would afford an effective path forward in this litigation. As the issues center upon the lawfulness of the Toledo Charter Amendment under federal and Ohio law and their respective constitutions, resolution of those issues can be made by the Court upon the pleadings. Further, since the issues are rooted in law rather than fact, fact discovery is unnecessary, would unduly prolong this matter, and would not assist the Court in reaching a resolution. Thus, discovery and a dispositive motion deadline should not be needed. We request that the Court set a deadline for when all pleadings and/or amended pleadings must be submitted.

As always, we are willing to mutually resolve this case via consent order approved by the Court. Please let us know if your clients are interested in resolving the case in that manner.

Respectfully yours,

DAVE YOST
Attorney General of Ohio



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