

**UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION**

WINERIES OF THE OLD MISSION PENINSULA ASSOC (WOMP), a Michigan nonprofit corporation; BOWERS HARBOR VINEYARD & WINERY, INC., a Michigan corporation; BRYN WINERY, LC, a Michigan corporation; CHATEAU GRAND TRAVERSE, LTD, a Michigan corporation; CHATEAU OPERATIONS, LTD, a Michigan corporation; GRAPE HARBOR, INC., a Michigan corporation; MONTAGUE DEVELOPMENT, LLC, a Michigan limited liability company; OV THE FARM, LLC; a Michigan limited liability company; TABONE VINEYARDS, LLC, a Michigan limited liability company; TWO LADS, LLC, a Michigan limited liability company; VILLA MARI LLC, a Michigan limited liability company; WINERY AT BLACK STAR FARMS, LLC., a Michigan limited liability company,

Plaintiffs,

v

PENINSULA TOWNSHIP, a Michigan municipal corporation,

Defendant,

and

PROTECT THE PENINSULA, INC.,

Intervenor-Defendant.

Case No. 1:20-cv-01008

HON. PAUL L. MALONEY
MAG. JUDGE RAY S. KENT

**PROTECT THE PENINSULA'S
MOTION FOR LEAVE TO AMEND ITS
ANSWER AND AFFIRMATIVE DEFENSES**

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**PROTECT THE PENINSULA'S MOTION FOR LEAVE
TO AMEND ITS ANSWER AND AFFIRMATIVE DEFENSES**

Intervening Defendant Protect the Peninsula, Inc. (PTP), by undersigned counsel, pursuant to Fed. R. Civ. P. 15(a), respectfully moves this Court for leave to amend their original Answer and Affirmative Defenses (original Answer, ECF No. 248). The proposed Amended Answer and Affirmative Defenses (Amended Answer), attached as **Exhibit A**, would add affirmative defenses.

Per Fed. R. Civ. P. 24(c), with PTP's motion to intervene filed in February 2021, PTP included its original Answer. (ECF No. 41-1) This Court accepted PTP's Answer on August 22,

2022, after the Sixth Circuit issued its mandate granting PTP the right to intervene. (ECF No. 246) PTP's original Answer was formally filed in this Court on August 24, 2022. (ECF No. 248) This motion is filed within 21 days after the original Answer was formally filed, so leave to amend is technically unnecessary. However, Defendant Wineries of Old Mission Assoc. *et al* (Wineries) opposes amendment, and this Court has not yet ruled on PTP's role in this litigation, except to confirm PTP may file motions in this matter. (ECF No. 246) Thus, PTP files for leave out of an abundance of caution and to avoid a motion to strike.

Even when leave is required, pleading amendments should be freely given when justice requires. Fed. R. Civ. P. 15(a)(2). Due to no fault of PTP, there was a substantial passage of time between when PTP drafted its original Answer (February 2021) and when it was formally filed (August 2022). In between, PTP was effectively unable to amend it. Since February 2021, PTP has identified additional affirmative defenses that avoid the Wineries' claims, including estoppel, res judicata, standing, unjust enrichment, and others. The federal rules favor (but do not require) asserting affirmative defenses by answer. Fed. R. Civ. P. 8(c). Again out of abundance of caution and to avoid a waiver argument, PTP seeks to assert these affirmative defenses by answer. There is no additional delay that will result from raising these defenses, which are based on facts and events already known to the Wineries. There is no prejudice to the Wineries in knowing early what affirmative defenses PTP will raise.

For these reasons, and as discussed in the Brief below, PTP respectfully requests leave from this Court to file the attached Amended Answer.

BRIEF IN SUPPORT

PTP requests leave to file the attached Amended Answer (**Exhibit A**). The Court is aware of the procedural context around PTP's involvement in this case. (*See* ECF No. 249, PageID.8899-8900 and ECF No. 262, PageID.9411, providing relevant timeline) While the Court has not yet ruled specifically on how and when PTP may proceed, PTP may file motions. (ECF No. 246)

1. PTP files for leave to amend, though it is within the period to amend by right.

The federal rules favor amending pleadings, if necessary, within 21 days after the original pleading. Fed. R. Civ. P. 15(a)(1)(A) ("A party may amend its pleading once as a matter of course within: (A) 21 days after serving it.") PTP interprets Rule 15(a)(1)(A) to permit this filing by right because it is filed within 21 days after PTP's original Answer was formally filed in this case on August 24, 2022. (ECF No. 248)

Even so, PTP moves for leave to amend its Answer for two reasons. *First*, PTP anticipated the Wineries would oppose PTP's attempt to amend its answer. As required by the local rules, PTP counsel requested concurrence from counsel for the Wineries and Defendant Peninsula Township (Township) to seek leave to amend PTP's answer. The Township concurred, but the Wineries opposed.

Although the Wineries have not indicated the basis for their opposition, PTP anticipates they will argue it is untimely because PTP "served" its original Answer under Rule 15(a)(1)(a) in February 2021, when it was included as an attachment to PTP's Motion to Intervene. (ECF No. 41-1) Under this interpretation, the 21-day "by right" period to amend that answer ran in March 2021. That would be an unreasonable application of Rule 15(a) in this case. PTP was not formally considered a full party in this Court who could file motions until after the Sixth Circuit mandate

granting intervention – August 18, 2022. The Wineries have repeatedly asserted as much. In opposing PTP’s motion for leave to amend the case management orders after the Sixth Circuit opinion granting intervention, the Wineries argued this Court lacked jurisdiction over PTP before the mandate issued. (ECF No. 234, PageID.8488) The Wineries also opposed PTP’s efforts to file anything between its original motion to intervene (with the original Answer) and a decision on its motion to intervene. (ECF No. 60-1) They argued PTP lacked standing to file any motions in the case, and sought sanctions against PTP for frivolous pleadings and wasting judicial and parties’ resources for attempting to do so. (ECF No. 60, PageID.2724) The Court decided PTP was not a party, but instead “merely a proposed intervenor” during the time between when it filed to intervene and intervention decided. (ECF No. 108, PageID.4172) It would be unreasonable now to conclude the 21-day amend-by-right clock ran against PTP in March 2021, while PTP was a proposed intervenor. Even so, PTP is seeking leave to avoid another round of motions to strike.

Second, PTP moves for leave to amend its Answer because the Court has not yet ruled on PTP’s role in this case. The Court will decide that in the coming weeks. The Wineries have taken the position that PTP’s role should be extremely limited. (ECF No. 234) PTP opposes that approach and asserts the right to fully defend against the Wineries’ claims, as laid out in its reply to the Wineries’ opposition and in its Rule 26(f) report. (ECF No. 262, 261-1) The Wineries have not yet replied to PTP’s proposal, which should be informed by the interim Sixth Circuit decision vacating the injunction and discussing PTP’s role. (ECF 252) PTP and the Wineries might be far apart on what PTP may do in this case, and the Court has not yet provided direction. Even so, PTP asserts that at a very bare minimum, the grant of intervention by right to PTP includes the right to amend its answer to add affirmative defenses. (*See* ECF Nos. 249, PageID.8901-8908 and 262, PageID.9417-9418, discussing caselaw on what interveners may do). Instead of assuming the

Court will permit PTP to amend its answer by right, PTP seeks leave to do so.

At bottom, even though PTP is technically within the period to amend its answer by right, PTP brings this motion for leave to amend because this case is not typical.

2. The Court should grant PTP leave to amend under Rule 15(a).

Rule 15(a)(1)(B) favors granting leave to amend pleadings “when justice so requires.” This rule is to be construed liberally, with a presumption in favor of the moving party. *Foman v. Davis*, 371 U.S. 178, 182 (1962) (“In the absence of any apparent or declared reason . . . the leave sought should, as the rules require, be ‘freely given.’”). A court should deny a motion for leave only when “the amendment is brought in bad faith, for dilatory purposes, results in undue delay or prejudice to the opposing party, or would be futile. . . .” *See Crawford v. Roane*, 53 F.3d 750, 753 (6th Cir. 1995). The liberal rule for amending pleadings applies equally to answers adding affirmative defenses. *Kontrick v. Ryan*, 540 U.S. 443, 445 (2004) (“An answer may be amended to include an inadvertently omitted affirmative defense, and even after the time to amend ‘of course’ has passed, ‘leave [to amend] shall be freely given when justice so requires.’” (quoting Fed. R. Civ. P. 15(a))).

PTP seeks leave to add to its answer affirmative defenses that were not previously listed. These are in **Exhibit A**, starting on page 80, with item QQ¹. For example:

- Plaintiffs have failed to join parties who are necessary to accord complete relief. Several Plaintiffs do not own the property where their winery operation is located, or are not the permit holding under the zoning ordinance. As a result, among other defenses, PTP may face future challenges by entities who are not parties, and who may

¹ PTP also slightly amended its Answer in response to Paragraph 63 (page 17). PTP has since discovered that the parties were working from an outdated version of the zoning ordinance.

argue they are not bound by the outcome in this case.

- Some Plaintiffs lack standing because the land upon which their winery operation is located is subject to terms in conservation easements, special use permits, and otherwise that limit their activities to an even greater degree than the challenged zoning provisions.
- Plaintiffs delay in bringing these claims substantially prejudice PTP and its members in various ways, including by loss of records and witnesses and reliance on the zoning.
- Some claims Plaintiffs are collaterally estopped or subject to res judicata to bring some claims as a result of prior litigation and administrative proceedings.

Affirmative defenses should be asserted in an answer. Fed. R. Civ. P. 8(c). The purpose of this requirement is to protect the opposing party from surprise by putting them on notice of the affirmative defense and to offer an opportunity to rebut it. *Blonder-Tongue Labs., Inc. v. Univ. of Ill. Found.*, 402 U.S. 313, 350 (1971). However, the failure to raise an affirmative defense in an answer does not result in waiver of the defense if the opposing party has notice of the defense. *See Moore, Owen, Thomas & Co. v. Coffey*, 992 F.2d 1439, 1445 (6th Cir. 1993); *Griffin v. Reznick*, 609 F. Supp. 2d 695, 708-709 (W.D. Mich. 2008) (discussing and citing cases that unlisted affirmative defenses are not necessarily waived). The point of including affirmative defenses in the answer is to clearly put the opposing party on notice of the defense and to avoid unfair prejudice. *See id.* It is proper to permit PTP the right to list identified affirmative defenses, which were not previously raised, in an amended answer now in order to avoid later surprise to the Wineries when PTP develops them in discovery or presents them in motions. More to the point, PTP seeks to list the affirmative defenses in its answer to avoid arguments and motions from the Wineries later that PTP waived these affirmative defenses.

None of the circumstances for disallowing pleading amendments are present here. There is no basis to accuse PTP of bad faith; PTP seeks simply to develop and present proper affirmative defenses that were not previously asserted. PTP obtains no litigation advantage by identifying these defenses, other than to fully preserve them.

This motion is not an effort to delay the case. To the contrary, PTP brings this motion within a month after the mandate issued that granted it the right to participate as a party in this case. While the case between the Wineries and Township progressed substantially, PTP only became a full party on August 18, 2022, and resolution of this case is necessarily delayed for PTP to defend against the Wineries' claims, as ordered by the Sixth Circuit. (ECF Nos. 215, 251) Amending the answer to identify affirmative defenses at this stage is unlikely to add any additional delay to the litigation. To the contrary, if the affirmative defenses are salient (they are), they will lead to dismissal of some or all of claims of some or all Wineries, thus ultimately reducing the litigation.

Finally, any prejudice to the Wineries is minimal because the defenses arise out of facts uniquely known to the Wineries – prior litigation they were part of (estoppel), easements attached to property where their wineries are located, and their own delays in asserting their claims. They will have the opportunity in due course to try to refute any affirmative defenses that PTP develops through discovery and presents in motions.

There is no reasonable basis to limit PTP's answer to the affirmative defenses PTP identified as of February 2021, more than a year before PTP was considered a full party in this case. Allowing PTP to amend its answer now to raise additional affirmative defenses is fair, consistent with Rules 8(c) and 15(a), and reasonable under the circumstances in this case. PTP respectfully requests that the Court grant its motion for leave to amend its answer.

Respectfully submitted,

Date: September 14, 2022

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Date: September 14, 2022

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CERTIFICATE OF SERVICE

I, Tracy Jane Andrews, hereby certify that on the 14th day of September, 2022, I electronically filed the foregoing document with the ECF system which will send a notification of such to all parties of record.

By: _____
Tracy Jane Andrews (P67467)

CERTIFICATE OF COMPLIANCE WITH LOCAL RULE 7.3(b)(i)

The attached Motion and Brief comply with the word count limit of L. Ci. R. 7.3(b)(i). They were written using Microsoft Word version 2016 and have a word count of 2,046 words.

Respectfully submitted,

Date: September 14, 2022

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EXHIBIT A

**UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION**

WINERIES OF THE OLD MISSION PENINSULA ASSOC (WOMP), a Michigan nonprofit corporation; BOWERS HARBOR VINEYARD & WINERY, INC., a Michigan corporation; BRYN WINERY, LC, a Michigan corporation; CHATEAU GRAND TRAVERSE, LTD, a Michigan corporation; CHATEAU OPERATIONS, LTD, a Michigan corporation; GRAPE HARBOR, INC., a Michigan corporation; MONTAGUE DEVELOPMENT, LLC, a Michigan limited liability company; OV THE FARM, LLC; a Michigan limited liability company; TABONE VINEYARDS, LLC, a Michigan limited liability company; TWO LADS, LLC, a Michigan limited liability company; VILLA MARI LLC, a Michigan limited liability company; WINERY AT BLACK STAR FARMS, LLC., a Michigan limited liability company,

Plaintiffs,

v

PENINSULA TOWNSHIP, a Michigan municipal corporation,

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and

PROTECT THE PENINSULA, INC.,

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Case No. 1:20-cv-01008

HON. PAUL L. MALONEY
MAG. JUDGE RAY S. KENT

**INTERVENING DEFENDANT
PROTECT THE PENINSULA'S
FIRST AMENDED ANSWER TO
PLAINTIFFS' FIRST AMENDED
COMPLAINT**

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**INTERVENING DEFENDANT PROTECT THE PENINSULA'S FIRST AMENDED
ANSWER TO PLAINTIFFS' FIRST AMENDED COMPLAINT**

Intervening Defendant, PROTECT THE PENINSULA INC (Intervening Defendant),
by its attorneys, Law Office of Tracy Jane Andrews, PLLC, and Olson, Bzdok & Howard, P.C.,
and in Answer to the First Amended Complaint filed by Plaintiffs, WINERIES OF THE OLD
MISSION PENINSULA (WOMP) ASSOC; BOWERS HARBOR VINEYARD & WINERY,
INC; BRY'S WINERY, LC; CHATEAU GRAND TRAVERSE, LTD; CHATEAU
OPERATIONS, LTD; GRAPE HARBOR, INC; MONTAGUE DEVELOPMENT, LLC; OV

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THE FARM, LLC; TABONE VINEYARDS, LLC; TWO LADS LLC; VILLA MARI, LLC;
and WINERY AT BLACK STAR FARMS, LLC (collectively, Plaintiffs), states as follows:

INTRODUCTION

1. This matter relates to a set of ordinances governing the operation of wineries enacted by Peninsula Township which violate Plaintiffs' Federal constitutional rights and violate Michigan law.

RESPONSE: Intervening Defendant admits that Peninsula Township has adopted zoning ordinances that include provisions applicable to, among other activities, the location and operation of wineries, but denies that the provisions violate Plaintiffs' Federal constitutional rights or violate Michigan law for the reason that it is untrue.

2. For more than a year, Plaintiffs and their counsel have attempted to work with Peninsula Township on these issues and Peninsula Township has admitted that the ordinances discussed below violate Plaintiffs' constitutional rights and are preempted by Michigan law.

RESPONSE: Intervening Defendant neither admits nor denies whether Plaintiffs and their counsel attempted to work with Peninsula Township regarding the subject ordinances nor whether counsel for Peninsula Township admitted that the ordinances violate Plaintiffs' constitutional rights or are preempted by Michigan law for the reason that Intervening Defendant lacks information or knowledge sufficient to form a belief as to the truth of the allegations. Intervening Defendant further denies that the zoning ordinances violate Plaintiffs' Federal constitutional rights or violate Michigan law for the reason that it is untrue.

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3. In the words of Defendant Peninsula Township’s attorney, the portions of the ordinances at issue “should be revised as it is, under the First Amendment standards, an invalid suppression of the Wineries’ First Amendment rights.”

RESPONSE: Intervening Defendant neither admits nor denies the content of Peninsula Township’s attorney’s opinions for the reason that Intervening Defendant lacks information or knowledge sufficient to form a belief as to the truth of the allegations. Intervening Defendant further denies that the zoning ordinances violate the First Amendment standards or constitute an invalid suppression of Plaintiffs’ First Amendment Rights because these assertions are vague, untrue, and constitute legal conclusions that are unsupported and contrary to law. Intervening Defendant further denies that the ordinances should be revised accordingly.

4. He also concluded that portions of the ordinances “violate[] the Commerce Clause.”

RESPONSE: Intervening Defendant neither admits nor denies the content of Peninsula Township’s attorney’s opinions for the reason that Intervening Defendant lacks information or knowledge sufficient to form a belief as to the truth of the allegations. Intervening Defendant further denies that the zoning ordinances violate the Commerce Clause for the reason that this assertion is vague, untrue, and further constitutes a legal conclusion that is unsupported and contrary to law.

5. Finally, he concluded that portions of the ordinance are preempted by Michigan law.

RESPONSE: Intervening Defendant neither admits nor denies the content of Peninsula Township’s attorney’s opinions for the reason that Intervening Defendant lacks information or knowledge sufficient to form a belief as to the truth of the allegations. Intervening Defendant

EXHIBIT A

further denies that portion of the zoning ordinances are preempted by Michigan law for the reason that this assertion is vague, untrue, and further constitute a legal conclusion that is unsupported and contrary to law.

6. More than a year after this opinion was given, the illegal ordinances are still on the books and being enforced by Peninsula Township.

RESPONSE: Intervening Defendant neither admits nor denies the content of Peninsula Township's attorney's opinions for the reason that Intervening Defendant lacks information or knowledge sufficient to form a belief as to the truth of the allegations. Intervening Defendant further denies that the ordinances are illegal for the reason that this assertion is vague, untrue, and constitutes a legal conclusion that is unsupported and contrary to law. Intervening Defendant admits that the ordinances are still effective and applicable to the Plaintiff wineries. Intervening Defendant neither admits nor denies whether the ordinances are being enforced by Peninsula Township because this assertion is vague, unclear, calls for a legal conclusion, and Intervening Defendant lacks information or knowledge sufficient to form a belief as to the truth of the allegations.

JURISDICTION AND VENUE

7. This action arises under the United States Constitution and 42 U.S.C. § 1983.

RESPONSE: Intervening Defendant lacks knowledge or information sufficient to form a belief as to the truth of the allegations in Paragraph 7.

8. The Court has subject-matter jurisdiction under 28 U.S.C. §§ 1331 and 1343.

RESPONSE: Intervening Defendant lacks knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 8.

9. This Court has supplemental jurisdiction over the state law claims under 28

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U.S.C. § 1367.

RESPONSE: Intervening Defendant lacks knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 9.

10. This Court has the authority to grant declaratory relief under 28 U.S.C. §§ 2201 and 2202.

RESPONSE: Intervening Defendant lacks knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 10.

11. This Court has the authority to grant injunctive relief by Federal Rules of Civil Procedure 57 and 65.

RESPONSE: Intervening Defendant lacks knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 11.

12. Venue is proper in this Court under 28 U.S.C. § 1391(b) because (i) Peninsula Township is located in Grand Traverse County which is in this judicial district, and (ii) the events or omissions giving rise to Plaintiffs' claims occurred in this judicial district.

RESPONSE: Intervening Defendant admits that Peninsula Township is located in Grand Traverse County but lacks knowledge or information sufficient to form a belief as to the truth of the remaining allegations of paragraph 12.

13. Plaintiffs' claim for attorneys' fees and costs is authorized by 42 U.S.C. § 1988.

RESPONSE: Intervening Defendant denies as untrue the allegations in paragraph 13 and leaves the Plaintiffs to their proofs.

THE PARTIES

14. Wineries of Old Mission Peninsula (WOMP) Assoc. ("WOMP") is a Michigan

EXHIBIT A

non-profit corporation with its principal place of business in Peninsula Township, Grand Traverse County, located in the Western District of Michigan.

RESPONSE: Intervening Defendant lacks knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 14.

15. Bowers Harbor Vineyard & Winery, Inc. (“Bowers Harbor”) is a Michigan Corporation with its principal place of business in Peninsula Township, Grand Traverse County, located in the Western District of Michigan.

RESPONSE: Intervening Defendant lacks knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 15.

16. Brys Winery, LC (“Brys”) is a Michigan Corporation with its principal place of business in Peninsula Township, Grand Traverse County, located in the Western District of Michigan.

RESPONSE: Intervening Defendant lacks knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 16.

17. Chateau Grand Traverse, LTD, (“Grand Traverse”) is a Michigan Corporation with its principal place of business in Peninsula Township, Grand Traverse County, located in the Western District of Michigan.

RESPONSE: Intervening Defendant lacks knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 17.

18. Chateau Operations, LTD, is a Michigan Corporation which operates a winery under the trade name Chateau Chantal (“Chateau Chantal”) with its principal place of business in Peninsula Township, Grand Traverse County, located in the Western District of Michigan.

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RESPONSE: Intervening Defendant lacks knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 18.

19. Grape Harbor, Inc. is a Michigan Corporation which operates a winery under the trade name Peninsula Cellars (“Peninsula Cellars”) with its principal place of business in Peninsula Township, Grand Traverse County, located in the Western District of Michigan.

RESPONSE: Intervening Defendant lacks knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 19.

20. Montague Development, LLC is a Michigan Limited Liability Company, operating under the trade name Hawthorne Vineyards (“Hawthorne”) with its principal place of business in Peninsula Township, Grand Traverse County, located in the Western District of Michigan.

RESPONSE: Intervening Defendant lacks knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 20.

21. OV the Farm, LLC is a Michigan limited liability company which operates a winery under the trade name Bonobo Winery (“Bonobo”) with its principal place of business in Peninsula Township, Grand Traverse County, located in the Western District of Michigan.

RESPONSE: Intervening Defendant lacks knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 21.

22. Tabone Vineyards, LLC (“Tabone”) is a Michigan Limited Liability Company with its principal place of business in Peninsula Township, Grand Traverse County, located in the Western District of Michigan.

RESPONSE: Intervening Defendant lacks knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 22.

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23. Two Lads, LLC, (“Two Lads”) is a Michigan Limited Liability company with its principal place of business in Peninsula Township, Grand Traverse County, located in the Western District of Michigan.

RESPONSE: Intervening Defendant lacks knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 23.

24. Winery at Black Star Farms, L.L.C. (“Black Star”) is a Michigan Limited Liability Company with its principal place of business in Peninsula Township, Grand Traverse County, located in the Western District of Michigan.

RESPONSE: Intervening Defendant lacks knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 24.

25. Villa Mari LLC is a Michigan Limited Liability Company which operates a winery under the trade name Mari Vineyard (“Mari”) with its principal place of business in Peninsula Township, Grand Traverse County, located in the Western District of Michigan.

RESPONSE: Intervening Defendant lacks knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 25.

26. Peninsula Township is located in Grand Traverse County, Michigan, with its offices located at 13235 Center Rd., Traverse City, MI 49686.

RESPONSE: Intervening Defendant admits the allegations in paragraph 26.

FACTUAL ALLEGATIONS

27. Peninsula Township is located near Traverse City, Michigan, and comprises Old Mission Peninsula.

RESPONSE: Intervening Defendant admits that Peninsula Township is located near

EXHIBIT A

Traverse City, Michigan, and that Peninsula Township comprises part of Old Mission Peninsula but denies the allegation to the extent that part of the Old Mission Peninsula may be considered to be located in the City of Traverse City.

28. Peninsula Township has adopted various ordinances directed at wineries located within the township which control all aspects of the business including the content of commercial speech, restrictions on the free exercise of religion, groups and organizations that may use winery facilities, hours of operation, dictating that wineries use in-township suppliers, requiring commercial speech to favor local businesses and requiring pre-approval of commercial speech.

RESPONSE: Intervening Defendant admits that Peninsula Township has adopted zoning ordinances, which include provisions that regulate the location and some aspects of the operations of wineries that are located within agricultural districts within the township. Intervening Defendant denies the ordinances control all aspects of the businesses for the reason this assertion is untrue. Intervening Defendant neither admits nor denies the remainder of the allegations in paragraph 28 for the reasons that these assertions constitute conclusions of law and further because the language of the ordinances speaks for itself.

29. The Peninsula Township ordinances also arbitrarily dictate the maximum number of guests a winery may have not based on objective criteria like fire code considerations or acreage, but based on the size of one local winery's dining room.

RESPONSE: Intervening Defendant admits that Peninsula Township has adopted zoning ordinances, which include provisions that regulate the location and some aspects of the operations of wineries that are located within agricultural districts within the township. Intervening Defendant denies the ordinances are arbitrary in any regard, including in number of guests, for the reason this

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assertion is untrue. Intervening Defendant neither admits nor denies the remainder of the allegations in paragraph 29 for the reasons that these assertions constitute conclusions of law and further because the language of the ordinances speak for themselves.

30. The Peninsula Township ordinances also have placed an arbitrary financial barrier to operating a winery in the township.

RESPONSE: Intervening Defendant admits that Peninsula Township has adopted zoning ordinances, which include provisions that regulate the location and some aspects of the operations of wineries that are located within agricultural districts within the township. Intervening Defendant denies the ordinances are arbitrary in any regard, and also that the ordinances have placed a financial barrier to operating a winery in the township, for the reason these assertions are untrue.

31. As noted above, over the past year, Peninsula Township has admitted that many provisions of its winery ordinances violate the First Amendment to the United States Constitution, violate the Commerce Clause and are preempted by Michigan law, yet the ordinances are still in effect.

RESPONSE: Intervening Defendant neither admits nor denies the content of Peninsula Township's attorney's opinions for the reason that Intervening Defendant lacks information or knowledge sufficient to form a belief as to the truth of the allegations. Intervening Defendant further denies that portions of the zoning ordinances violate the First Amendment or the Commerce Clause or are preempted by Michigan law for the reason that these assertions are vague, untrue, and constitute legal conclusions that are unsupported and contrary to law. Intervening Defendant admits that the ordinances are still effective and applicable to Plaintiffs. Intervening Defendant neither admits nor denies whether the ordinances are being enforced by Peninsula Township because this assertion is vague, unclear, calls for a legal conclusion, and Intervening Defendant

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lacks knowledge or information sufficient to form a belief as to the truth of the allegation.

WOMP's Membership, Purpose and Mission.

32. WOMP is voluntary membership trade association of licensed winery operations located on Peninsula Township's Old Mission Peninsula.

RESPONSE: Intervening Defendant lacks knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 32.

33. Old Mission Peninsula's wine industry is a specialized segment of Michigan's larger economic community.

RESPONSE: Intervening Defendant lacks knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 33.

34. WOMP represents the unique interests of its Winery-Chateau members Bowers Harbor, Grand Traverse, Chateau Chantal, Hawthorne and Mari; its Farm Processing Facility members Black Star, Two Lads and Tabone and its Remote Winery Tasting Room member, Peninsula Cellars.

RESPONSE: Intervening Defendant lacks knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 34.

35. WOMP's officers must be a WOMP member representative and officers are voted upon by WOMP members.

RESPONSE: Intervening Defendant lacks knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 35.

36. WOMP's current President is Chris Baldyga who is also the owner of WOMP member Two Lads.

RESPONSE: Intervening Defendant lacks knowledge or information sufficient to form a

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belief as to the truth of the allegations in paragraph 36.

37. Every WOMP members is suffering immediate injury and will continue to suffer losses as a result of Peninsula Township's Winery Ordinance enforcement.

RESPONSE: Intervening Defendant denies as untrue the allegations in paragraph 37 and leaves the Plaintiffs to their proofs.

38. Of the named plaintiffs, only Bonobo is not a WOMP member.

RESPONSE: Intervening Defendant lacks knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 38.

39. WOMP's purpose is to protect and promote the Old Mission Peninsula wine industry.

RESPONSE: Intervening Defendant lacks knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 39.

40. To that end, WOMP provides services to its members including advertising its members' services and products and organizing events at its members' locations all to increase tourist traffic for its members and for Old Mission Peninsula as a whole.

RESPONSE: Intervening Defendant lacks knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 40.

41. WOMP also exists to harmonize and advocate for its members' interests related to Peninsula Township's insistence on continued enforcement of the illegal Winery Ordinances.

RESPONSE: Intervening Defendant lacks knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 41.

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The Peninsula Township Zoning Ordinance.

42. Peninsula Township adopted its Zoning Ordinance on June 5, 1972.

RESPONSE: Intervening Defendant lacks knowledge or information sufficient to form a belief as to the truth of the allegations of paragraph 42.

43. The Zoning Ordinance has been amended since that time with various winery related ordinances added.

RESPONSE: Intervening Defendant admits the allegations of paragraph 43.

44. Currently, Peninsula Township’s regulation of wineries is found in three sections of the Zoning Ordinance: Section 6.7.2(19) Use by Right – Farm Processing Facility; Section 8.7.3(10) Winery-Chateau; Section 8.7.3(12) Remote Winery Tasting Room. (collectively the “Winery Ordinances”). (Exhibit 1.)

RESPONSE: Intervening Defendant admits that the cited ordinances are some of the zoning ordinance provisions applicable to wineries located within the agricultural districts in the township, provided that not all wineries located in the agricultural districts are subject to all of the listed provisions.

Section 6.7.2(19): Use by Right – Farm Processing Facility

45. Black Star, Two Lads and Tabone have licenses to operate Farm Processing Facilities.

RESPONSE: Intervening Defendant lacks knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 45. Intervening Defendant further states that the meaning of the term license as used in this context is unclear and vague.

46. Black Star, Two Lads and Tabone’s operations are affected by the restrictive Winery Ordinances as they relate to Farm Processing Facilities.

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RESPONSE: Intervening Defendant admits that these wineries are subject to Farm Processing Facilities provisions in the zoning ordinance but denies as untrue the remaining allegations in paragraph 46 and leaves Plaintiffs to their proofs.

47. Peninsula Township’s intent in enacting the Farm Processing Facility ordinance was “to promote a thriving local agricultural production industry and preservation of rural character by allowing construction and use of a Farm Processing Facility.” Section 6.7.2(19)(a).

RESPONSE: Intervening Defendant admits that Plaintiffs have quoted, in part, Section 6.7.2(19)(a) of its Zoning Ordinances and otherwise states that the ordinance speaks for itself.

48. Under this ordinance, “[t]he majority of the produce sold fresh or processed has to be grown on the specific farm operation (land owned or leased for the specific farm operation) of the party owning and operating the Specific Farm Processing Facility.” *Id.*

RESPONSE: Intervening Defendant admits that Plaintiffs have quoted, in part, Section 6.7.2(19)(a) of the Zoning Ordinances and otherwise states that the ordinance speaks for itself.

49. Further, “[e]ighty-five (85) percent of the produce sold fresh or processed has to be grown on Old Mission Peninsula.” *Id.*

RESPONSE: Intervening Defendant admits that Plaintiffs have quoted, in part, Section 6.7.2(19)(a) of the Zoning Ordinances and otherwise states that the ordinance speaks for itself.

50..... Activities such as weddings, receptions and other social functions for hire are not allowed....” *Id.*

RESPONSE: Intervening Defendant admits that Plaintiffs have quoted, in part, Section 6.7.2(19)(a) of the Zoning Ordinances and otherwise states that the ordinance speaks for itself.

51..... A Farm Processing Facility is allowed to sell grape wine, but “[g]rape wine

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that is processed, tasted and sold in a Farm Processing Facility under this section is limited to ‘Old Mission Peninsula’ appellation wine meaning 85% of the juice will be from fruit grown on Old Mission Peninsula.” Section 6.7.2(19)(b)(1)(ii).

RESPONSE: Intervening Defendant admits that Plaintiffs have quoted, in part, Section 6.7.2(19)(b)(1)(ii) of the Zoning Ordinances and otherwise states that the ordinance speaks for itself.

52..... For other types of wine, “wine, that is processed, tasted and sold in a Farm Processing Facility under this section is limited to wine bearing a label identifying that 85% of the juice is from fruit grown on Old Mission Peninsula.” Section 6.7.2(19)(b)(1)(iii).

RESPONSE: Intervening Defendant admits that Plaintiffs have quoted, in part, Section 6.7.2(19)(b)(1)(iii) of the Zoning Ordinances and otherwise states that the ordinance speaks for itself.

53..... Thus, a winery operating under the Farm Processing Facility ordinance cannot purchase more than 15% of the fruit it uses to produce wine from anyone outside of Peninsula Township.

RESPONSE: Intervening Defendant lacks knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 53.

54. A Farm Processing Facility may only sell merchandise which “is directly related to the consumption and use of the fresh and/or processed agricultural produce.” Section 6.7.2(19)(b)(1)(v)(1).

RESPONSE: Intervening Defendant admits that Plaintiffs have quoted, in part, Section 6.7.2(19)(b)(1)(v)(1) of the Zoning Ordinances and otherwise states that the ordinance speaks for itself.

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55. Examples of merchandise which is not allowed are “a) Clothing; b) Coffee Cups; c) Bumper Stickers.” Section 6.7.2(19)(b)(1)(v)(4).

RESPONSE: Intervening Defendant admits that Plaintiffs have quoted, in part, Section 6.7.2(19)(b)(1)(v)(4) of the Zoning Ordinances and otherwise states that the ordinance speaks for itself.

56. Thus, a winery operating under the Farm Processing Facility ordinance cannot sell a t-shirt bearing its logo.

RESPONSE: Intervening Defendant lacks knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 56.

57. But, a Farm Processing Facility could sell a wine glass so long as it bore the logo of the winery.

RESPONSE: Intervening Defendant lacks knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 57.

58. In addition to dictating that 85% of the fruit used in wine sold come from Old Mission Peninsula, the Farm Processing Facility ordinance mandates that 85% of all agricultural produce sold, whether fresh or processed, must have been grown on Old Mission Peninsula and only land owned or leased by the facility owner. Section 6.7.2(19)(b)(2)(I).

RESPONSE: Intervening Defendant admits that Plaintiffs have paraphrased, in part, Section 6.7.2(19)(b)(2)(I) of the Zoning Ordinances and otherwise states that the ordinance speaks for itself

59. Thus, a winery operating under the Farm Processing Facility ordinance cannot purchase more than 15% of produce it uses in its products from anyone outside of Peninsula Township.

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RESPONSE: Intervening Defendant lacks knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 59.

60. If a Farm Processing Facility sells dried fruit, “a minimum of 85% by weight which is grown on Old Mission Peninsula and a minimum of 50% by weight which is grown on the farm, may be dried off premises and sold in the Farm Processing Facility retail room, provided, no more than the amount of fruit sent out for this processing is returned for retail sale.” Section 6.7.2(19)(b)(2)(V).

RESPONSE: Intervening Defendant admits that Plaintiffs have quoted, in part, Section 6.7.2(19)(b)(2)(V) of the Zoning Ordinances and otherwise states that the ordinance speaks for itself.

61. A Farm Processing Facility must annually provide data and records to Peninsula Township to substantiate compliance with the requirement that produce used has been grown on land in Peninsula Township. Section 6.7.2(19)(b)(13).

RESPONSE: Intervening Defendant admits that Plaintiffs have paraphrased, in part, Section 6.7.2(19)(b)(13) of the Zoning Ordinances and otherwise states that the ordinance speaks for itself.

62. The Farm Processing Facility ordinance also dictates parcel size and use in the following ways:

- (a) “A total of forty (40) acres of land are required to be devoted to the operation of a farm processing facility.”**
- (b) “The parcel containing the specific Farm Processing Facility shall have a minimum area of 20 acres and a minimum parcel width of 330 feet.”**
- (c) “There shall be no more than one house on the 20 acre parcel containing the Farm Processing Facility and no more than one house on the remaining required 20 acres.”**

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(d) “If property is leased, the lease shall be for a minimum of one year.”

(e) “There shall be a minimum of 5 acres of crops grown on the same parcel as the Farm Processing Facility.” Section 6.7.2(19)(b)(4).

RESPONSE: Intervening Defendant admits that Plaintiffs have quoted, in part, Section 6.7.2(19)(b)(2)(I) of the Zoning Ordinances and otherwise states that the ordinance speaks for itself.

63. The retail space at a Farm Processing Facility cannot be more than 6,000 square feet or one-half of the parcel size, whichever is less. Section 6.7.2(19)(b)(6).

RESPONSE: Intervening Defendant admits that Plaintiffs have paraphrased, in part, a previous version of Section 6.7.2(19)(b)(6) of the Zoning Ordinances, but denies that this quote accurately reflects the current version of the Zoning Ordinances, which were amended to change 6,000 to 30,000 on or about January 22, 2019, and otherwise states that the ordinance speaks for itself.

64. Any violation of these ordinances “serve[s] as grounds for closing the retail operations, including tasting, portions of the use by the Township Board.” Section 6.7.2(19)(b)(15).

RESPONSE: Intervening Defendant admits that Plaintiffs have quoted, in part, Section 6.7.2(19)(b)(15) of the Zoning Ordinances and otherwise states that the ordinance speaks for itself.

65. A person who violates the Farm Processing Facility is also subject to “a civil fine for each violation to be determined by the Court, along with costs which may include all expenses, direct and indirect, to which the Township has been put in connection with municipal infraction. Costs of not more than \$500.00 shall be ordered.” Section 4.2.1 Violations and Penalties.

RESPONSE: Intervening Defendant admits that Plaintiffs have quoted, in part, Section

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6.7.2(19)(b)(2)(I) of the Zoning Ordinances and otherwise states that the ordinance speaks for itself.

66. Each of Black Star, 2 Lads and Tabone have been harmed by the restrictions in the Ordinances. Some, but not all, of those harms are described in the following paragraphs.

RESPONSE: Intervening Defendant lacks knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 66.

Some of the Harms Experienced by Black Star.

67. Black Star routinely receives requests from individuals seeking to use its facilities to hold weddings and other social events. See Exhibit 2.

RESPONSE: Intervening Defendant lacks knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 67.

68. Black Star has been prohibited by Peninsula Township from hosting weddings, having live music, having temporary structures and hosting corporate events. *Id.* at ¶5.

RESPONSE: Intervening Defendant admits that its Zoning Ordinances speak for themselves and otherwise leave Plaintiffs to their proofs.

69. Often, Black Star has refrained from expanding their service offerings to include after-hours tastings, educational experiences, private dinner events, tours and business meetings and must direct the potential customers elsewhere. *Id.* at ¶6.

RESPONSE: Intervening Defendant lacks knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 69.

70. The Winery Ordinances also prevent Black Star from taking advantage of its marketing creativity because of the advertising restrictions, this limited ability to advertise

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harms Black Star's ability to grow and promote its business. *Id.* at ¶9.

RESPONSE: Intervening Defendant lacks knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 70.

71. Often, and especially in the summertime, customers wish to engage Black Star tasting room and property into the evening. But, because the Winery Ordinances force the business to close at 9:30 p.m., Black Star is forced to ask these customers to leave and lose additional revenue for the evening. *Id.* at ¶10.

RESPONSE: Intervening Defendant lacks knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 71.

72. Further, the Winery Ordinances have prevented Black Star from expanding its wine production facility. This inability to streamline its operations has resulted in increased trucking of product into and out of its facility and has cost Black Star thousands of dollars due to inefficiencies and lost opportunities. *Id.* at ¶8.

RESPONSE: Intervening Defendant lacks knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 72.

73. Collectively, the restrictive Winery Ordinances have caused tens of thousands of dollars in lost revenue to Black Star. *Id.* at ¶7.

RESPONSE: Intervening Defendant lacks knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 73.

Some of the Harms Experienced by Two Lads.

74. Two Lads routinely receives requests from individuals seeking to use its facilities to hold weddings and other social events. See Exhibit 3.

RESPONSE: Defendant lacks knowledge or information sufficient to form a belief as to

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the truth of the allegations in paragraph 74.

75. Two Lads has been prohibited by Peninsula Township from hosting weddings, having live music, having temporary structures and hosting corporate events. *Id.* at ¶5.

RESPONSE: Intervening Defendant admits that its Zoning Ordinances speak for themselves and otherwise leave Plaintiffs to their proofs.

76. Often, Two Lads declines wedding and event inquiries and must direct the potential customers elsewhere. *Id.* at ¶8.

RESPONSE: Intervening Defendant lacks knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 76.

77. When Two Lads turns customers away, Two Lads suffers injury to its goodwill and reputation. *Id.* at ¶9.

RESPONSE: Intervening Defendant lacks knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 77.

78. When Two Lads has planned events, it has received numerous phone calls and letters form Peninsula Township demanding that events be cancelled or subject to penalties. *Id.* at ¶ 6.

RESPONSE: Intervening Defendant admits that its Zoning Ordinances speak for themselves and otherwise leave Plaintiffs to their proofs.

79. The Winery Ordinances also prevent Two Lads from taking advantage of its marketing creativity because of the advertising restrictions, this limited ability to advertise harms Two Lads' ability to grow and promote its business. *Id.* at ¶10.

RESPONSE: Intervening Defendant lacks knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 79.

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80. Often, and especially in the summertime, customers wish to engage Two Lads tasting room and property into the evening. But, because the Winery Ordinances force the business to close at 9:30 p.m., Two Lads is forced to ask these customers to leave and lose additional revenue for the evening. *Id.* at ¶11.

RESPONSE: Intervening Defendant lacks knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 80.

81. Collectively, the restrictive Winery Ordinances have caused hundreds of thousands of dollars in lost revenue to Two Lads. *Id.* at ¶7.

RESPONSE: Intervening Defendant lacks knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 81.

Some of the Harms Experienced by Tabone.

82. Tabone routinely receives requests from individuals seeking to use its facilities to hold weddings, provide food truck services and other social events. See Exhibit 4.

RESPONSE: Defendant lacks knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 82.

83. Tabone has been prohibited by Peninsula Township from hosting weddings, having live music, hosting food trucks, selling bottled wine for on-premises consumption, hosing wine-themed dinners and ticketed events, having temporary structures and hosting corporate events. *Id.* at ¶5.

RESPONSE: Intervening Defendant admits that its Zoning Ordinances speak for themselves and otherwise leave Plaintiffs to their proofs.

84. Tabone receives frequent requests from individuals seeking to use its facilities to hold weddings and other private social events. *Id.* at ¶9.

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RESPONSE: Intervening Defendant lacks knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 84.

85. Often, Tabone declines wedding and event inquiries and must direct the potential customers elsewhere. *Id.* at ¶9.

RESPONSE: Intervening Defendant lacks knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 85.

86. When Tabone turns customers away, Tabone suffers injury to its reputation and goodwill. *Id.* at ¶9.

RESPONSE: Intervening Defendant lacks knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 86.

87. The Winery Ordinances also restrict Tabone's ability to process, sell and offer tastings of any wine that does not contain at least 85% of juice from fruit grown on Old Mission Peninsula. *Id.* at ¶6.

RESPONSE: Intervening Defendant admits that its Zoning Ordinances speak for themselves and otherwise leave Plaintiffs to their proofs.

88. Tabone is also prevented from selling merchandise bearing its logo, including clothing, coffee cups and bumper stickers. *Id.* at ¶7.

RESPONSE: Intervening Defendant admits that its Zoning Ordinances speak for themselves and otherwise leave Plaintiffs to their proofs.

89. Collectively, the restrictive Winery Ordinances have caused tens of thousands of dollars in lost revenue to Tabone. *Id.* at ¶8.

RESPONSE: Intervening Defendant lacks knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 89.

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Section 8.7.3(10): Winery-Chateau

90. Bowers Harbor, Brys, Grand Traverse, Chateau Chantal, Bonobo and Mari have licenses to operate Winery-Chateaus.

RESPONSE: Intervening Defendant lacks knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 90. Intervening Defendant further states that the meaning of the term license as used in this context is unclear and vague.

91. Peninsula Township’s intent in enacting its Winery-Chateau ordinance was to “permit construction and use of a winery, guest rooms, and single-family residences as a part of a single site subject to the provisions of this ordinance.” Section 8.7.3(10)(a).

RESPONSE: Intervening Defendant admits that Plaintiffs have quoted, in part, Section 8.7.3(10)(a) of the Zoning Ordinances and otherwise states that the ordinance speaks for itself.

92. The Winery-Chateau ordinance mandates that the minimum parcel size under the ordinance is fifty (50) acres. Section 8.7.3(10)(c).

RESPONSE: Intervening Defendant admits that Plaintiffs have paraphrased, in part, Section 8.7.3(10)(c) of the Zoning Ordinances and otherwise states that the ordinance speaks for itself.

93. The principal use of the property under the ordinance must be a winery. Section 8.7.3(10)(d).

RESPONSE: Intervening Defendant admits that Plaintiffs have paraphrased, in part, Section 8.7.3(10)(d) of the Zoning Ordinances and otherwise states that the ordinance speaks for itself.

94. In addition to a minimum lot size of fifty acres, the Winery-Chateau ordinance mandates that at least “seventy-five (75%) percent of the site shall be used for the active

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production of crops that can be used for wine production, such as fruit growing on vines or trees.” Section 8.7.3(10)(h).

RESPONSE: Intervening Defendant admits that Plaintiffs have quoted, in part, Section 8.7.3(10)(h) of the Zoning Ordinances and otherwise states that the ordinance speaks for itself.

95. While the Winery-Chateau ordinance allows for accessory uses in addition to the principal winery use, “[a]ccessory uses such as facilities, meeting rooms, and food and beverage services shall be for registered guests only.” Section 8.7.3(10)(m).

RESPONSE: Intervening Defendant admits that Plaintiffs have quoted, in part, Section 8.7.3(10)(m) of the Zoning Ordinances and otherwise states that the ordinance speaks for itself.

96. Upon prior approval of the Peninsula Township Board, use of the Winery-Chateau by persons other than registered occupants, defined at “Guest Activity Uses”, may be allowed. Section 8.7.3(10)(m).

RESPONSE: Intervening Defendant admits that Plaintiffs have paraphrased, in part, Section 8.7.3(10)(m) of the Zoning Ordinances and otherwise states that the ordinance speaks for itself.

97. In limiting Guest Activity Uses and requiring prior Peninsula Township Board approval of such activities, Peninsula Township specifically states in its ordinance that its intent was to “assure that, in addition to the minimum parcel size required for a Winery-Chateau, there is additional farm land in wine fruit production in Peninsula Township if Guest Activity Uses are allowed to take place at a Winery-Chateau facility.” Section 8.7.3(10)(u)1(a).

RESPONSE: Intervening Defendant admits that Plaintiffs have quoted, in part, Section 8.7.3(10)(u)(1)(a) of the Zoning Ordinances and otherwise states that the ordinance speaks for

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itself.

98. As the ordinance further explains, this is because “[t]he current Winery-Chateau section of the ordinance requires 75% of the site to be used for the active production of crops that can be used for wine production such as fruit growing on vines or trees, but does not require that any of the wine produced on the site be made from wine fruit grown on Old Mission Peninsula.” *Id.*

RESPONSE: Intervening Defendant admits that Plaintiffs have quoted, in part, Section 8.7.3(10)(u)(1)(a) of the Zoning Ordinances and otherwise states that the ordinance speaks for itself.

99. Thus, for the right to have Guest Activities at their winery, Plaintiffs are required to either grow on acreage other than the winery acreage or purchase from a grape grower in Peninsula Township 1.25 tons of grapes for each person participating in a Guest Activity. Section 8.7.3(10)(u)3.

RESPONSE: Intervening Defendant admits that Plaintiffs have paraphrased, in part, Section 8.7.3(10)(u)(3) of the Zoning Ordinances and otherwise states that the ordinance speaks for itself.

100. The Winery-Chateau ordinance also states that “Guest Activity Uses are intended to help in the promotion of Peninsula agriculture by: a) identifying ‘Peninsula Produced’ food or beverage for consumption by the attendees; b) providing ‘Peninsula Agriculture’ promotional brochures, maps and awards; and/or c) including tours through the winery and/or other Peninsula agriculture locations. Section 8.7.3(10)(u)1(b).

RESPONSE: Intervening Defendant admits that Plaintiffs have quoted, in part, Section 8.7.3(10)(u)(1)(b) of the Zoning Ordinances and otherwise states that the ordinance speaks for

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itself.

101. Plaintiffs are required under the Winery Ordinances to advertise in support of Peninsula Township agriculture.

RESPONSE: Intervening Defendant lacks knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 101.

102. In order to have a Guest Activity, the ordinance requires prior approval of the Peninsula Township Board. Section 8.7.3(10)(u)2.

RESPONSE: Intervening Defendant admits that Plaintiffs have paraphrased, in part, Section 8.7.3(10)(u)(2) of the Zoning Ordinances and otherwise states that the ordinance speaks for itself.

103. These Guest Activities are limited to the following:

- (a) **“Wine and food seminars and cooking classes that are scheduled at least thirty days in advance with notice provided to the Zoning Administrator.” Section 8.7.3(10)(u)2(a);**
- (b) **Meetings of 501- (C)(3) non-profit groups within Grand Traverse County but full course meals are not allowed. Section 8.7.3(10)(u)2(b);**
- (c) **Meetings of Agricultural related groups that have a direct relationship to agricultural production provided that one month notice is given and the zoning administrator pre-approves the meeting after determining that the group has a “direct relationship to agricultural production.” Section8.7.3(10)(u)2(c)**

RESPONSE: Intervening Defendant admits that Plaintiffs have paraphrased and quoted, in part, Section 8.7.3(10)(u)(2) of the Zoning Ordinances and otherwise states that the ordinance speaks for itself.

104. Plaintiffs are prohibited under the ordinance, for example, from hosting a meeting of the United Way, Specials Olympics, American Heart Association, etc.

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RESPONSE: Intervening Defendant lacks knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 104.

105. Guest Activities also “do not include entertainment, weddings, wedding receptions, family reunions or sale of wine by the glass.” Section 8.7.3(10)(u)2(d). This places a burden on the free exercise of religion.

RESPONSE: Intervening Defendant admits that Plaintiffs have quoted, in part, Section 8.7.3(10)(u)2(d) of the Zoning Ordinances and otherwise states that the ordinance speaks for itself.

106. At a Guest Activity, if wine is served “it must be served with food and shall be limited to Old Mission Peninsula appellation wine produced at the Winery.” Section 8.7.3(10)(u)2(e).

RESPONSE: Intervening Defendant admits that Plaintiffs have quoted, in part, Section 8.7.3(10)(u)2(e) of the Zoning Ordinances and otherwise states that the ordinance speaks for itself.

107. The above appellation requirement, given federal law governing wine appellations, limits service of wine at Guest Activities only to wine where not less than 75% of the wine was produced from grapes grown in Peninsula Township.

RESPONSE: Intervening Defendant lacks knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 107.

108. The purchase of grapes from places like California or other states is incredibly common in the wine industry.

RESPONSE: Intervening Defendant lacks knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 108.

109. Plaintiffs cannot serve wine made from California or other states’ grapes at

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Guest Activities.

RESPONSE: I Intervening Defendant lacks knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 109.

110. The number of persons each Plaintiff may have at a Guest Activity is limited to one person per 15 square feet of rooms for Guest Activities. But in no case may the number of persons exceed 111 or the Fire Marshall maximum occupancy, whichever is less. Section 8.7.3(10)(u)4.

RESPONSE: Intervening Defendant admits that Plaintiffs have paraphrased, in part, Section 8.7.3(10)(u)(4) of the Zoning Ordinances and otherwise states that the ordinance speaks for itself.

111. Upon information and belief, the 111 number contained in Section 8.7.3(10)(u)4 was decided upon in the ordinance as it is the occupancy of Plaintiff Chateau Chantal's dining room.

RESPONSE: Intervening Defendant lacks knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 111.

112. At all Guest Activities, Plaintiffs are required to promote agricultural production and, specifically, must:

- (a) "Identify 'Peninsula Produced' food or beverage that is consumed by the attendees;**
- (b) "Provide 'Peninsula Agriculture' promotional materials; and**
- (c) "Include tours through the winery and/or other Peninsula agricultural locations." Section 8.7.3(10)(u)5**

RESPONSE: Intervening Defendant admits that Plaintiffs have paraphrased and quoted, in part, Section 8.7.3(10)(u)(5) of the Zoning Ordinances and otherwise states that the ordinance

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speaks for itself.

113. The Winery-Chateau requirements dictate with whom Winery-Chateau Plaintiffs may freely associate and also compels their advertising and promotional content and directly restrains their ability to engage in interstate and intrastate trade of food and fruit.

RESPONSE: Intervening Defendant denies as untrue the allegations of Paragraph 113.

114. Hours of operation for Guest Activities are left to the discretion of the Town Board, but can be no later than 9:30 p.m. Section 8.7.3(10)(u)5(b).

RESPONSE: Intervening Defendant admits that Plaintiffs have paraphrased, in part, Section 8.7.3(10)(u)(5)(b) of the Zoning Ordinances and otherwise states that the ordinance speaks for itself.

115. Section 8.7.3(10)(u)5(b) is inapposite to and conflicts with Michigan law which explicitly allows Michigan wineries to serve food and alcohol until 2:00 a.m., daily. MCL 436.2113.

RESPONSE: Intervening Defendant neither admits nor denies the allegations in Paragraph 115 to the extent the paragraph recites state law, so no response is required. Moreover, the allegations in this paragraph form conclusions of law for which no response is required. To the extent a response is required, Intervening Defendant admits that MCL 436.2113 speaks for itself. Intervening Defendant denies the applicable Zoning Ordinances are preempted by that statute for this reason this assertion is untrue.

116. The Winery Ordinances limit alcohol sales to only those that are produced on site. Section 8.7.3(10)(u)5(c).

RESPONSE: Intervening Defendant admits that Plaintiffs have paraphrased, in part,

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Section 8.7.3(10)(u)(5)(c) of the Zoning Ordinances and otherwise states that the ordinance speaks for itself.

117. Under Michigan law, an entity with a catering permit is allowed to serve alcohol on the winery premises, with certain escrow requirements, regardless of where the alcohol is produced.

RESPONSE: Intervening Defendant neither admits nor denies the allegations in Paragraph 116 to the extent the paragraph paraphrases state law without legal citation, so no response is required. Moreover, this paragraph contains interpretations of law for which no response is required. Intervening Defendant further denies as untrue the assertion Michigan law allows an entity with a catering permit to serve alcohol on winery premises without regard to zoning restrictions. To the extent a response is required, Intervening Defendant admits that state law speaks for itself. Intervening Defendant further lacks knowledge or information sufficient to form a belief as to the truth of the allegations in this paragraph.

118. The Winery Ordinances prohibits amplified music and allows only amplified voice and recorded background noise so long as the amplification level is no greater than normal conversation levels. Section 8.7.3(10)(u)(5)(g).

RESPONSE: Intervening Defendant admits that Plaintiffs have paraphrased, in part, Section 8.7.3(10)(u)(5)(g) of the Zoning Ordinances and otherwise states that the ordinance speaks for itself

119. However, MCL 436.1916(11) explicitly allows Michigan licensed wineries to have music and singing.

RESPONSE: Intervening Defendant neither admits nor denies the allegations in Paragraph 119 to the extent the paragraph recites and characterizes state law, so no response is required.

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Moreover, the allegations in this paragraph form conclusions of law for which no response is required. To the extent a response is required, Intervening Defendant admits that MCL 436.1916(11) speaks for itself.

120. The Winery Ordinances prohibit the Plaintiffs from using their kitchen facilities for off-site catering. Section 8.7.3(10)(u)5(i).

RESPONSE: Intervening Defendant admits that Plaintiffs have paraphrased, in part, Section 8.7.3(10)(u)(5)(i) of the Zoning Ordinances and otherwise states that the ordinance speaks for itself. Intervening Defendant further denies as untrue the assertion that, but for the wineries provisions in the zoning ordinances, Plaintiffs otherwise would have the right to use their facilities for catering.

121. MCL 436.1547 explicitly allows a winery to obtain a catering permit which allows it to serve food and drinks off its premises.

RESPONSE: Intervening Defendant neither admits nor denies the allegations in Paragraph 121 to the extent the paragraph recites and characterizes state law, so no response is required. Moreover, the allegations in this paragraph form conclusions of law for which no response is required. Intervening Defendant further denies as untrue the assertion that the cited statute allows an entity to obtain a catering permit without regard to zoning restrictions. To the extent a response is required, Intervening Defendant admits that MCL 436.1547 speaks for itself.

122. Any violation of these ordinances “serve[s] as grounds for closing the Guest Activity Uses by the Township Board.” Section 8.7.3(10)(u)8(d).

RESPONSE: Intervening Defendant admits that Plaintiffs have quoted, in part, Section 8.7.3(10)(u)(8)(d) of its Zoning Ordinances and otherwise states that the ordinance speaks for itself.

123. A person who violates the Winery Chateau Ordinance is also subject to “a civil

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fine for each violation to be determined by the Court, along with costs which may include all expenses, direct and indirect, to which the Township has been put in connection with municipal infraction. Costs of not more than \$500.00 shall be ordered.” Section 4.2.1 Violations and Penalties.

RESPONSE: Intervening Defendant admits that Plaintiffs have paraphrased, in part, Section 4.2.1 of the Zoning Ordinances and otherwise states that the ordinance speaks for itself.

124. Each of Bowers Harbor, Brys, Grand Traverse, Chateau Chantal, Bonobo, Mari and Hawthorne have been harmed by the restriction in the Ordinances. Some, but not all, of those harms are described in the following paragraphs.

RESPONSE: Intervening Defendant lacks knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 124.

Some of the Harms Experienced by Bowers Harbor.

125. Peninsula Township has prohibited Bowers Harbor hosting weddings, having live music, having temporary structures, hosting corporate and other social events. See Exhibit 5.

RESPONSE: Intervening Defendant lacks knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 125.

126. Bowers Harbor has received letters and telephone calls from Peninsula Township demanding that it cancel planned events or be subject to penalties. *Id.* at ¶6.

RESPONSE: Intervening Defendant lacks knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 126.

127. Bowers Harbor has received violations and fines from Peninsula Township after events have occurred. *Id.* at ¶7.

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RESPONSE: Intervening Defendant lacks knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 127.

128. Often, Bowers Harbor declines wedding and event inquiries and must direct the potential customers elsewhere. *Id.* at ¶9.

RESPONSE: Intervening Defendant lacks knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 128.

129. When Bowers Harbor turns customers away it suffers injury to its goodwill and reputation. *Id.* at ¶10.

RESPONSE: Intervening Defendant lacks knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 129.

130. The Winery Ordinances also prevent Bowers Harbor from taking advantage of its marketing creativity because of the advertising restrictions, this limited ability to advertise harms Bowers Harbor's ability to grow and promote its business. *Id.* at ¶13.

RESPONSE: Intervening Defendant lacks knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 130.

131. Often, and especially in the summertime, customers wish to engage the Bowers Harbor tasting room and property into the evening. But, because the Winery Ordinances force the business to close at 9:30 p.m., Bowers Harbor is forced to ask these customers to leave and lose additional revenue for the evening. *Id.* at ¶14.

RESPONSE: Intervening Defendant lacks knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 131.

132. In addition to lost revenue, the Winery Ordinances force Bowers Harbor to spend money for the few events it can to have. *Id.* at ¶11.

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RESPONSE: Intervening Defendant lacks knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 132.

133. Specifically, Bowers Harbor is forced to purchase fruit from farmers in Peninsula Township to comply with the tonnage requirement in the Winery Ordinances. *Id.* at ¶12.

RESPONSE: Intervening Defendant lacks knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 133.

134. Collectively, the restrictive Winery Ordinances have caused at least several hundred thousand dollars in lost revenue to Bowers Harbor. *Id.* at ¶8.

RESPONSE: Intervening Defendant lacks knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 134.

Some of the Harms Experienced by Brys.

135. Peninsula Township has prohibited Brys hosting weddings, having live music, having temporary structures, hosting corporate and other social events. See Exhibit 6.

RESPONSE: Defendant admits that its Zoning Ordinances speak for themselves and otherwise leave Plaintiffs to their proofs.

136. Brys has received letters and telephone calls from Peninsula Township demanding that it cancel planned events or be subject to penalties. *Id.* at ¶6.

RESPONSE: Intervening Defendant lacks knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 136.

137. Often, Brys declines wedding and event inquiries and must direct the potential customers elsewhere. *Id.* at ¶8.

RESPONSE: Intervening Defendant lacks knowledge or information sufficient to form a

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belief as to the truth of the allegations in paragraph 137.

138. When Brys turns customers away, these customers are typically unhappy and Brys suffers injury to its goodwill and reputation. *Id.* at ¶8.

RESPONSE: Intervening Defendant lacks knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 138.

139. The Winery Ordinances also prevent Brys from taking advantage of its marketing creativity because of the advertising restrictions, this limited ability to advertise harms Brys's ability to grow and promote its business. *Id.* at ¶9.

RESPONSE: Intervening Defendant lacks knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 139.

140. Often, and especially in the summertime, customers wish to engage the Brys tasting room and property into the evening. But, because the Winery Ordinances force the business to close at 9:30 p.m., Brys is forced to ask these customers to leave and lose additional revenue for the evening. *Id.* at ¶10.

RESPONSE: Intervening Defendant lacks knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 140.

141. Collectively, the restrictive Winery Ordinances have caused at least several hundred thousand dollars in lost revenue to Brys. *Id.* at ¶7.

RESPONSE: Intervening Defendant lacks knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 141.

Some of the Harms Experienced by Grand Traverse.

142. Grand Traverse has been subjected to Peninsula Township's enforcement of the Winery Ordinances. See Exhibit 7.

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RESPONSE: Intervening Defendant lacks knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 142.

143. These enforcement efforts have caused Grand Traverse to forego business opportunities for fear of violating the Winery Ordinances even where the business opportunity is constitutional. *Id.* at ¶5-6.

RESPONSE: Intervening Defendant lacks knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 143.

144. Peninsula Township has prohibited Grand Traverse hosting weddings, having live music for over seventy customers, having temporary structures, hosting corporate and other social events. *Id.* at ¶6-7.

RESPONSE: Intervening Defendant lacks knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 144.

145. Grand Traverse has received letters and telephone calls from Peninsula Township regarding the size of planned guests and threatening penalties. *Id.* at ¶8.

RESPONSE: Intervening Defendant lacks knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 145.

146. The Winery Ordinances and Peninsula Township's enforcement of those ordinances has cost Grand Traverse customers over the years. *Id.* at ¶9.

RESPONSE: Intervening Defendant lacks knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 146.

147. Often, Grand Traverse declines wedding and event inquiries and must direct the potential customers elsewhere. *Id.* at ¶9.

RESPONSE: Intervening Defendant lacks knowledge or information sufficient to form a

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belief as to the truth of the allegations in paragraph 147.

Some of the Harm Experienced by Chateau Chantal.

148. Peninsula Township has prohibited Chateau Chantal from hosting weddings over a certain size, having live music, having temporary structures, hosting corporate and other social events. See Exhibit 8.

RESPONSE: Intervening Defendant lacks knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 148.

149. Often, Chateau Chantal has abided by the Winery Ordinances and declined wedding and event inquiries and must direct the potential customers elsewhere. *Id.* at ¶6, 9.

RESPONSE: Intervening Defendant lacks knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 149.

150. When Chateau Chantal turns customers away, these customers are typically unhappy and Chateau Chantal suffers injury to its goodwill and reputation. *Id.* at ¶9.

RESPONSE: Intervening Defendant lacks knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 150.

151. Other times, Chateau Chantal has received violations from Peninsula Township after erecting temporary structures. *Id.* at ¶7.

RESPONSE: Intervening Defendant lacks knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 151.

152. The Winery Ordinances also prevent Chateau Chantal from taking advantage of its marketing creativity because of the advertising restrictions, this limited ability to advertise harms Chateau Chantal's ability to grow and promote its business. *Id.* at ¶12.

RESPONSE: Intervening Defendant lacks knowledge or information sufficient to form a

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belief as to the truth of the allegations in paragraph 152.

153. Often, and especially in the summertime, customers wish to engage the Chateau Chantal tasting room and property into the evening. But, because the Winery Ordinances force the business to close at 9:30 p.m., Chateau Chantal is forced to ask these customers to leave and lose additional revenue for the evening. *Id.* at ¶13.

RESPONSE: Intervening Defendant lacks knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 153.

154. In addition to lost revenue, the Winery Ordinances force Chateau Chantal to spend money for the few events it can to have. *Id.* at ¶10.

RESPONSE: Intervening Defendant lacks knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 154.

155. Specifically, Chateau Chantal is forced to purchase fruit from farmers in Peninsula Township to comply with the tonnage requirement in the Winery Ordinances. *Id.* at ¶11.

RESPONSE: Intervening Defendant lacks knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 155.

156. Collectively, the restrictive Winery Ordinances have caused at least several hundred thousand dollars in lost revenue to Chateau Chantal. *Id.* at ¶8.

RESPONSE: Intervening Defendant lacks knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 156.

Some of the Harms Experienced by Bonobo.

157. Peninsula Township has prohibited Bonobo hosting weddings, having live music, having temporary structures, hosting corporate and other social events. See Exhibit

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9.

RESPONSE: Intervening Defendant lacks knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 157.

158. Bonobo has received letters and telephone calls from Peninsula Township demanding that it cancel planned events or be subject to penalties. *Id.* at ¶6.

RESPONSE: Intervening Defendant lacks knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 158.

159. Bonobo has received violations and fines from Peninsula Township after events have occurred. *Id.* at ¶7.

RESPONSE: Intervening Defendant lacks knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 159.

160. Often, Bonobo declines wedding and event inquiries and must direct the potential customers elsewhere. *Id.* at ¶9.

RESPONSE: Intervening Defendant lacks knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 160.

161. When Bonobo turns customers away, these customers are typically unhappy, and Bonobo suffers injury to its goodwill and reputation. *Id.* at ¶9.

RESPONSE: Intervening Defendant lacks knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 161.

162. The Winery Ordinances also prevent Bonobo from taking advantage of its marketing creativity because of the advertising restrictions, this limited ability to advertise harms Bonobo's ability to grow and promote its business. *Id.* at ¶12.

RESPONSE: Intervening Defendant lacks knowledge or information sufficient to form a

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belief as to the truth of the allegations in paragraph 162.

163. Often, and especially in the summertime, customers wish to engage the Bonobo tasting room and property into the evening. But, because the Winery Ordinances force the business to close at 9:30 p.m., Bonobo is forced to ask these customers to leave and lose additional revenue for the evening. *Id.* at ¶13.

RESPONSE: Intervening Defendant lacks knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 163.

164. In addition to lost revenue, the Winery Ordinances force Bonobo to spend money for the few events it can to have. *Id.* at ¶11.

RESPONSE: Intervening Defendant lacks knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 164.

165. Specifically, Bonobo is forced to purchase fruit from farmers in Peninsula Township to comply with the tonnage requirement in the Winery Ordinances. *Id.* at ¶10, 11.

RESPONSE: Intervening Defendant lacks knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 165.

166. Collectively, the restrictive Winery Ordinances have caused at least several hundred thousand dollars in lost revenue to Bonobo. *Id.* at ¶8.

RESPONSE: Intervening Defendant lacks knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 166.

Some of the Harms Experienced by Mari

167. Peninsula Township has prohibited Mari from hosting weddings, having live music, having temporary structures, hosting corporate and other social events. See Exhibit 10.

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RESPONSE: Intervening Defendant lacks knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 167.

168. Mari has received letters, emails and telephone calls from Peninsula Township demanding that it cancel planned events or be subject to penalties. *Id.* at ¶6.

RESPONSE: Intervening Defendant lacks knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 168.

169. Often, Mari declines wedding and event inquiries and must direct the potential customers elsewhere. *Id.* at ¶8.

RESPONSE: Intervening Defendant lacks knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 169.

170. When Mari turns customers away, these customers are typically unhappy, and Mari suffers injury to its goodwill and reputation. *Id.* at ¶8.

RESPONSE: Intervening Defendant lacks knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 170.

171. Often, and especially in the summertime, customers wish to engage the Mari tasting room and property into the evening. But, because the Winery Ordinances force the business to close at 9:30 p.m., Mari is forced to ask these customers to leave and lose additional revenue for the evening. *Id.* at ¶11.

RESPONSE: Intervening Defendant lacks knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 171.

172. In addition to lost revenue, Mari is forced to spend money by purchasing a certain amount of fruit grown on Old Mission Peninsula in order to qualify for the events that Mari is allowed to have. *Id.* at ¶9, 10.

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RESPONSE: Intervening Defendant lacks knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 172.

173. Collectively, the restrictive Winery Ordinances have caused at least several hundred thousand dollars in lost revenue to Mari. *Id.* at ¶7.

RESPONSE: Intervening Defendant lacks knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 173.

Some of the Harms Experienced by Hawthorne.

174. Hawthorne owns real estate, buildings and wine making equipment located at 1000 Camino Maria in Traverse City, Michigan, which is located within Peninsula Township.

RESPONSE: Intervening Defendant lacks knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 174.

175. Pursuant to a Joint Venture and Lease Agreements between Hawthorne and Chateau Chantal, Chateau Chantal conducts licensed Winery-Chateau operations under the Winery Ordinances on Hawthorne's property. See Exhibit 11.

RESPONSE: Intervening Defendant lacks knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 175. Intervening Defendant further states that the meaning of the term license as used in this context is unclear and vague.

176. This joint-venture Winery-Chateau operation is branded as Hawthorne Winery. *Id.* at ¶6, 7.

RESPONSE: Intervening Defendant lacks knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 176.

177. Pursuant to the Joint Venture Agreement, Hawthorne is entitled to a certain

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percentage of the revenue generated from the Winery-Chateau operations on an annual basis. *Id.* at ¶4.

RESPONSE: Intervening Defendant lacks knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 177.

178. Hawthorne’s revenue entitlement is directly impacted by the restrictions placed upon the joint-venture Winery-Chateau operation on its property by the Winery Ordinances as detailed in paragraphs 88-112, above.

RESPONSE: Intervening Defendant lacks knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 178.

179. The restrictions also inhibit the growth of the Hawthorne brand.

RESPONSE: Intervening Defendant lacks knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 179.

180. Peninsula Township has prohibited Hawthorne/Chateau Chantal from hosting weddings, having live music, having temporary structures, hosting corporate and other social events. *Id.* at ¶8.

RESPONSE: Intervening Defendant lacks knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 180.

181. Often, Hawthorne/Chateau Chantal declines wedding and event inquiries and must direct the potential customers elsewhere. *Id.* at ¶9.

RESPONSE: Intervening Defendant lacks knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 181.

182. When Hawthorne/Chateau Chantal turns customers away, these customers are typically unhappy, and Hawthorne/Chateau Chantal suffers injury to its goodwill and

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reputation. *Id.* at ¶9.

RESPONSE: Intervening Defendant lacks knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 182.

183. The Winery Ordinances also prevent Hawthorne/Chateau Chantal from taking advantage of its marketing creativity because of the advertising restrictions, this limited ability to advertise harms Hawthorne/Chateau Chantal’s ability to grow and promote its business. *Id.* at ¶10.

RESPONSE: Intervening Defendant lacks knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 183..

184. Often, and especially in the summertime, customers wish to engage the Hawthorne/Chateau Chantal tasting room and property into the evening. But, because the Winery Ordinances force the business to close at 9:30 p.m., Hawthorne/Chateau Chantal is forced to ask these customers to leave and lose additional revenue for the evening. *Id.* at ¶11.

RESPONSE: Intervening Defendant lacks knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 184.

Section 8.7.3(12): Remote Winery Tasting Room

185. Peninsula Cellars has a license to operate a Remote Winery Tasting Room.

RESPONSE: Intervening Defendant lacks knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 185. Intervening Defendant further states that the meaning of the term license as used in this context is unclear and vague.

186. Peninsula Township’s intent in passing the Remote Winery Tasting Room Ordinance was to “allow wine tasting in a tasting room that is not on the same property as the winery with which is associated.”

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RESPONSE: Intervening Defendant admits that Plaintiffs have paraphrased and quoted, in part, Section 8.7.3(12)(a) of the Zoning Ordinances and otherwise states that the ordinance speaks for itself.

187. At a Remote Winery Tasting Room, sales by the bottle for consumption on the premises is not allowed. Section 8.7.3(12)(g).

RESPONSE: Intervening Defendant denies the allegations of paragraph 187 because Section 8.7.3(12)(g) states that “Tasting of wine produced at the winery shall be the only wine tasted in the Tasting Room.”

188. Michigan law explicitly allows sales by the bottle for consumption on the premises.

RESPONSE: Intervening Defendant neither admits nor denies the allegations in Paragraph 188 to the extent the paragraph paraphrases and characterizes state law, without citation, so no response is required. Moreover, the allegations in this paragraph form conclusions of law for which no response is required. Intervening Defendant further denies as untrue the assertion Michigan law allows sales by the bottle for on-premises consumption without regard to zoning restrictions. To the extent a response is required, Intervening Defendant admits that state law speaks for itself.

189. Remote Winery Tasting Room is not allowed to offer a full food menu. Section 8.7.3(12)(h).

RESPONSE: Intervening Defendant admits that Section 8.7.3(12)(h) permits the sales of limited food items in accordance with applicable Michigan laws.

190. Under Michigan law, a winery tasting room is allowed to operate a restaurant with a full menu.

RESPONSE: Intervening Defendant neither admits nor denies the allegations in Paragraph

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190 to the extent the paragraph paraphrases and characterizes state law, without citation, so no response is required. Moreover, the allegations in this paragraph form conclusions of law for which no response is required. Intervening Defendant further denies as untrue the assertion Michigan law allows a winery tasting room to operate a restaurant with a full menu without regard to zoning restrictions. Intervening Defendant further denies as untrue the assertion Michigan law addresses the extent of menu offerings at winery tasting rooms. To the extent a response is required, Intervening Defendant admits that state law speaks for itself.

191. A Remote Winery Tasting Room may only sell non-food items which promote the winery of Peninsula Township agriculture and has the logo of the winery permanently affixed to the product. Non-logoed products are not allowed to be sold. Promotional items are limited to “corkscrews, wine glasses, gifts boxes, t-shirts, bumper stickers, etc.” Section 8.7.3(12)(i).

RESPONSE: Intervening Defendant admits that Plaintiffs have quoted, in part, Section 8.7.3(12)(i) and otherwise state the ordinance speaks for itself. Defendant admits any obligations imposed upon it by law, and specifically denies as untrue all other allegations.

192. A Remote Winery Tasting Room is not allowed to sell packaged food items unless the food item contains wine or fruit produced in Peninsula Township and bears the winery logo. The food can only be for off-premises consumption and includes, as examples, “mustard, vinegar, non-carbonated beverages, etc.” Section 8.7.3(12)(j).

RESPONSE: Intervening Defendant admits that Plaintiffs have paraphrased and quoted, in part, Section 8.7.3(12)(j) of the Zoning Ordinances and otherwise states that the ordinance speaks for itself.

193. A Remote Winery Tasting Room’s “signs and other advertising may not

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promote, list or in any way identify any of the food or non food items allowed for sale in the tasting room.” Section 8.7.3(12)(k).

RESPONSE: Intervening Defendant admits that Plaintiffs have quoted, in part, Section 8.7.3(12)(k) of the Zoning Ordinances and otherwise states that the ordinance speaks for itself.

194. Peninsula Cellars has been harmed by the restriction in the Ordinances. Some, but not all, of those harms are described in the following paragraphs.

RESPONSE: Intervening Defendant lacks knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 194.

195. Peninsula Township has prohibited Peninsula Cellars from hosting weddings, having live music, having temporary structures, hosting corporate and other social events. See Exhibit 12.

RESPONSE: Intervening Defendant lacks knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 195.

196. Often, Peninsula Cellars declines wedding and event inquiries and must direct the potential customers elsewhere. *Id.* at ¶7.

RESPONSE: Intervening Defendant lacks knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 196.

197. When Peninsula Cellars turns customers away, these customers are typically unhappy and Peninsula Cellars suffers injury to its goodwill and reputation. *Id.* at ¶7.

RESPONSE: Intervening Defendant lacks knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 197.

198. Collectively, the restrictive Winery Ordinances have caused tens of thousands of dollars in lost revenue to Peninsula Cellars. *Id.* at ¶6.

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RESPONSE: Intervening Defendant lacks knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 198.

Peninsula Township Ordinance Enforcement

199. To enforce its ordinances, Peninsula Township employs an Ordinance Enforcement Officer.

RESPONSE: Intervening Defendant lacks knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 199.

200. This person is empowered with the authority to determine, based on his subjective opinion, what activities are and are not allowed at wineries in Peninsula Township.

RESPONSE: Intervening Defendant lacks knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 200.

201. Over the years, this has included:

- (a) Refusing to allow weddings;**
- (b) Refusing to allow political fundraisers;**
- (c) Refusing to allow meetings of books clubs;**
- (d) Refusing to allow a wine tasting and painting events (See Exhibit 17);**
- (e) Prohibiting a winery from hosting a corporate Holiday party because the company was not a non-profit nor an agricultural entity.**
- (f) Threatened an ordinance violation if a winery held a wine tasting event with local health and wellness companies as they did not promote local agriculture.**
- (g) Allowed some temporary structures deemed acceptable to the enforcement official but not allowing other temporary structures;**
- (h) Allowed food trucks for events deemed acceptable to the enforcement official but not allowing food trucks at other events;**
- (i) Refusing to allow live music;**

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- (j) **Refusing to allow activities such as yoga, painting and flower arranging outside in the grape vines. (See e.g. Exhibits 2, 3, 4, 5, 6, 7, 8, 9, 10, 11 and 12.)**

RESPONSE: Intervening Defendant lacks knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 201.

202. Peninsula Township's Winery Ordinances and subjective enforcement activities have caused substantial harm to Plaintiffs.

RESPONSE: Intervening Defendant lacks knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 202

203. Plaintiffs are routinely approached to host weddings, corporate events, political events and similar activities which they either must turn down or, if they attempt to hold such events, are forced to cancel the events.

RESPONSE: Intervening Defendant lacks knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 203.

204. Each of these events could mean tens of thousands of dollars in revenue to Plaintiffs.

RESPONSE: Intervening Defendant lacks knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 204.

205. In addition to lost revenue, Plaintiffs lose customer good will when they regularly have to turn down these events.

RESPONSE: Intervening Defendant lacks knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 205.

206. Plaintiffs receives calls almost daily about hosting weddings. When the brides and grooms are turned away, their business goes to other wineries outside of Peninsula

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Township who are glad to receive this much needed revenue.

RESPONSE: Intervening Defendant lacks knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 206.

207. Each of the Plaintiffs, each year, loses hundreds of thousands of dollars in revenue because of the limitations in the Winery Ordinances.

RESPONSE: Intervening Defendant lacks knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 207.

208. In total, the Plaintiffs own or lease more than 1,400 acres of land in Peninsula Township with more than 900 of those acres in active agriculture production.

RESPONSE: Intervening Defendant lacks knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 208.

209. Plaintiffs are forced to own and lease this property because of Peninsula Township's illegal ordinances which damage the Plaintiffs.

RESPONSE: Intervening Defendant denies that the township zoning ordinance provisions at issue are illegal because this assertion is untrue. Intervening Defendant further states that this paragraph contains legal conclusions for which no responses are required. Intervening Defendant otherwise lacks knowledge or information sufficient to form a belief as to the truth of the remaining allegations in paragraph 209.

210. In addition, to comply with the Winery Ordinances' requirements to purchase fruit from other property owners in Peninsula Township, Plaintiffs purchase fruit from Peninsula Township landowners covering more than 220 acres.

RESPONSE: Intervening Defendant lacks knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 210.

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211. These monies that Plaintiffs are forced to spend on fruit from local farmers could be spent in other areas of the businesses or to purchase fruit from farmers outside of Peninsula Township, or Michigan.

RESPONSE: Intervening Defendant lacks knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 211.

WOMP's Associational Interests and Exposure to Unconstitutional Winery Ordinances Restrictions.

212. WOMP's advertising efforts are always subject to the unconstitutionally suppressive and compelling restrictions on free speech levied by the Winery Ordinances.

RESPONSE: Intervening Defendant denies that the township zoning ordinance provisions at issue are unconstitutional because this assertion is untrue. Intervening Defendant further states that this paragraph contains legal conclusions for which no responses are required. Intervening Defendant otherwise lacks knowledge or information sufficient to form a belief as to the truth of the remaining allegations in paragraph 212.

213. The messaging and free associations of WOMP's organized events held at the various member properties are equally restricted, suppressed and compelled. Each and every event's ability to effectively promote its members' products are restricted by the Winery Ordinances.

RESPONSE: Intervening Defendant denies that the township zoning ordinance provisions at issue are in any way unconstitutional because this assertion is untrue. Intervening Defendant further states that this paragraph contains legal conclusions for which no response is required. Intervening Defendant otherwise lacks knowledge or information sufficient to form a belief as to the truth of the remaining allegations in paragraph 213.

214. WOMP's claims and request for injunctive relief do not require

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individualized proofs and WOMP could assert these claims with or without its membership's involvement as co-plaintiffs.

RESPONSE: Intervening Defendant denies the allegations of Paragraph 214 as untrue as written, but otherwise respond that this Court has already denied Plaintiffs' request for a preliminary injunction.

215. Only the amount of damages sustained by each plaintiff will require individualized proofs.

RESPONSE: Intervening Defendant admits that any damages sustained by each Plaintiff will require individualized proofs. Intervening Defendant denies as untrue that the only element of Plaintiffs' claims requiring individualized proofs is the amount of damages.

216. WOMP's existence depends on the members' continued viability and profitability and faces an existential threat from the continued enforcement of Peninsula Township's facially unconstitutional Winery Ordinances.

RESPONSE: Intervening Defendant denies that the township zoning ordinance provisions at issue are in any way unconstitutional because this assertion is untrue. Intervening Defendant further states that this paragraph contains legal conclusions for which no response is required. Intervening Defendant otherwise lacks knowledge or information sufficient to form a belief as to the truth of the remaining allegations in paragraph 216.

217. The Winery Ordinances not only have the practical effect of burdening interstate sales of fruit, wine and merchandise, but also discriminates against WOMP's members because of their chosen industry.

RESPONSE: Intervening Defendant lacks knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 217.

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218. These burdens and discrimination take various forms, as outlined in this Amended Complaint.

RESPONSE: Intervening Defendant lacks knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 218.

219. As an advocate for its members' interests, WOMP has coordinated an extensive back and forth with Peninsula Township to privately resolve its members' concerns and the injuries sustained by the Winery Ordinances.

RESPONSE: Intervening Defendant lacks knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 219.

Plaintiffs Attempt to Prompt Change.

220. In early 2019, and after years of restrictions, a group of the Plaintiffs attempted to work with Peninsula Township to re-write the Winery Ordinances.

RESPONSE: Intervening Defendant lacks knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 220.

221. During a Township meeting, the winery owners advised Peninsula Township that much of its Winery Ordinances were preempted by Michigan law, and specifically the Michigan Liquor Control Code, which completely regulated the areas Peninsula Township attempted to regulate.

RESPONSE: Intervening Defendant denies that the township zoning ordinance provisions at issue are preempted by Michigan Law, specifically the Michigan Liquor Control Code, because this assertion is untrue. Intervening Defendant further states that this paragraph contains legal conclusions for which no response is required. Intervening Defendant lacks knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 221.

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222. In response, on May 30, 2019, Peninsula Township’s attorney provided a memorandum to Peninsula Township, which was provided to the winery owners, wherein he concluded that the Michigan Liquor Control Code did not preempt the Peninsula Township Zoning Ordinance. See Exhibit 14.

RESPONSE: Intervening Defendant denies that the township zoning ordinance provisions at issue are preempted by the Michigan Liquor Control Code because this assertion is untrue. Intervening Defendant further states that this paragraph contains legal conclusions for which no response is required. Intervening Defendant lacks knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 222.

223. In response, a group of the Plaintiffs had the Winery Ordinances reviewed by an attorney and, on July 9, 2019, presented Peninsula Township with a detailed letter and memorandum which included a line by line review of the Winery Ordinances and outlined how the Winery Ordinances violated the First Amendment to the United States Constitution, the Commerce Clause and were also preempted by Michigan law. See Exhibit 15.

RESPONSE: Intervening Defendant denies that the township zoning ordinance provisions at issue violate the constitution or are unconstitutional or preempted by Michigan law because these assertions are untrue. Intervening Defendant further states that this paragraph contains legal conclusions for which no response is required. Intervening Defendant lacks knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 223.

224. The letter and memorandum were detailed to the point of including case law which was directly on point and dealt with similar issues.

RESPONSE: Intervening Defendant lacks knowledge or information sufficient to form a

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belief as to the truth of the allegations in paragraph 224.

225. On August 23, 2019, Peninsula Township’s attorney responded to the July 9, 2019, letter and conceded that the majority of the legal points were accurate and that his prior memorandum was incorrect. See Exhibit 16.

RESPONSE: Intervening Defendant lacks knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 225.

226. While in his May 30, 2019, letter, the Peninsula Township attorney dismissed the concerns of the winery owners and concluded there were no issues with the Winery Ordinances related to preemption, his tune changes and the following admissions were made:

- (a) The portions of the Winery Ordinances which prohibit wineries from operating a restaurant should be revised to comply with MCL 436.1536 which expressly preempts the Winery Ordinances on this issue;**
- (b) The portions of the Winery Ordinances which prohibit wineries from using their kitchen facilities to engage in off-site catering should be revised to comply with MCL 436.1547 which expressly preempts the Winery Ordinances on this issue;**
- (c) The restriction on amplified music should be revisited;**
- (d) The portion of the Winery Ordinances which require wineries to close at 9:30 p.m. should be revisited as it is expressly preempted by MCL 436.1403, a Michigan Supreme Court case and a Sixth Circuit Court of Appeals case directly on point. See Exhibit 16.**

RESPONSE: Intervening Defendant denies that the township zoning ordinance provisions at issue are preempted by Michigan law because this assertion is untrue. Intervening Defendant further states that this paragraph contains legal conclusions for which no response is required. Intervening Defendant further denies as untrue the assertion that the township attorney’s opinion is legally binding on the Township nor constitutes an admission in this litigation. Intervening

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Defendant lacks knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 226.

227. As for the Commerce Clause, the Peninsula Township attorney admitted that “[t]here are issues with the Commerce Clause that should be considered in the future revisions to the Township’s winery ordinances.” He admitted that these issues included:

- (a) The portion of the Winery Ordinances which prohibit meetings of organizations other than Grand Traverse County non-profits should be amended to allow out-of-county non-profits to hold meeting as otherwise the ordinance violates the Commerce Clause;**
- (b) The portion of the Winery Ordinances which allow only meetings of agricultural related groups that have a direct relationship to agricultural production should be revised to allow other groups to hold meetings as otherwise the ordinance violates the Commerce Clause.**
- (c) The portion of the Winery Ordinances which limit wine served to only Old Mission Peninsula appellation wine “violates the Commerce Clause unless the Township can demonstrate that it has no impact on out-of-state interest and that the Township has no other reasonable means in which to advance its local interest of wine sales”;**
- (d) The portion of the Winery Ordinances which require a winery to grow or purchase 1.25 tons of grapes from another farm in Peninsula Township for each person at a Guest Activity “violates the Commerce Clause unless the Township can demonstrate that it has no impact on out-of-state interest and that the Township has no other reasonable means in which to advance its local interest of wine sales”;**
- (e) The portion of the Winery Ordinances which restrict the use of out-of- states grapes “is, arguably, a restriction on interstate commerce”. See Exhibit 16.**

RESPONSE: Intervening Defendant denies that the township zoning ordinance provisions at issue violate the constitution because this assertion is untrue. Intervening Defendant further states that this paragraph contains legal conclusions for which no response is required. Intervening

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Defendant further denies as untrue the assertion that the township attorney's opinion is legally binding on the Township nor constitutes an admission in this litigation. Intervening Defendant lacks knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 227.

228. As for the First Amendment, the Peninsula Township attorney was clear in his conclusion that “[t]hese ordinances should be also be revised as they would most likely be viewed as constitutionally invalid suppressions of First Amendment rights.” His conclusions included the following:

- (a) The Township Ordinances which require winery logos on products, restrict the products that may be sold specifically does not allow the sale of clothing, coffee cups, bumper stickers, etc, “should be revised as it is, under the First Amendment standards, an invalid suppression of the Wineries’ First Amendment rights”;**
- (b) The Township Ordinances which restrict the sale of non-food items, require certain logos, restrict others, restrict the sale of certain items and which prohibit the advertising and promotion of food and non-food items “should be revised as they would most likely be viewed as constitutionally invalid suppression of First Amendment rights”;**
- (c) As for the section of the Township Ordinance which limits capacity to 111 persons based on the capacity of one winery’s dining room, the Peninsula Township attorney concluded that it was “arguably not unconstitutionally vague.” See Exhibit 16.**

RESPONSE: Intervening Defendant denies that the township zoning ordinance provisions at issue violate the constitution because this assertion is untrue. Intervening Defendant further states that this paragraph contains legal conclusions for which no response is required. Intervening Defendant further denies as untrue the assertion that the township attorney's opinion is legally binding on the Township nor constitutes an admission in this litigation. Intervening Defendant lacks knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 228.

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229. The Peninsula Township attorney concluded his letter by stating that at the next Township Board meeting “the Township will be taking prompt action” “regarding some of the items I mention on my opinion letter to ensure compliance.” Exhibit 16.

RESPONSE: Intervening Defendant lacks knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 229.

230. Given that the Peninsula Township attorney admitted that the Winery Ordinances violate the First Amendment, violate the Commerce Clause and are preempted by Michigan law, one would expect that this “prompt action” would be to rescind these illegal ordinances. Exhibit 16.

RESPONSE: Intervening Defendant denies that the township zoning ordinance provisions at issue violate the constitution or are preempted by Michigan law because these assertions are untrue. Intervening Defendant further states that this paragraph contains legal conclusions for which no response is required. Intervening Defendant further denies that the township attorney’s opinion is legally binding on the Township in this litigation because this assertion is untrue. Intervening Defendant lacks knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 230.

231. Instead, more than a year later, these illegal ordinances are still in effect in Peninsula Township and still causing damage to Plaintiffs.

RESPONSE: Intervening Defendant denies that the township zoning ordinance provisions at issue are illegal because these assertions are untrue. Intervening Defendant admits the zoning ordinances provisions at issue are still in effect. Intervening Defendant lacks knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 231.

232. In fact, Peninsula Township, on September 21, 2020, published a proposed

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redraft of its Zoning Ordinances which contain the same Winery Ordinances their attorney stated were illegal. (Exhibit 17).

RESPONSE: Intervening Defendant denies that the township zoning ordinance provisions at issue are illegal because these assertions are untrue. Intervening Defendant further denies as untrue the assertion that the township attorney's opinion is legally binding on the Township in this litigation. Intervening Defendant admits the zoning ordinances winery provisions at issue are still in effect. Intervening Defendant lacks knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 232.

233. While the majority of the redraft only made grammatical changes, Peninsula Township actually used the redraft to take away additional rights from the Wineries.

RESPONSE: Intervening Defendant lacks knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 233.

234. In the redraft, Peninsula Township stated that wine tastings, winery tours, political rallies and free entertainment without fee are now Guest Activities subject to the restrictions discussed above when the current ordinances state these are not Guest Activities. *Id.* at 6-32.

RESPONSE: Intervening Defendant lacks knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 234.

235. The United States Constitution and Michigan law explicitly allows these types of activities in the Michigan Liquor Control Code which preempts this revision.

RESPONSE: Intervening Defendant denies that the adopted township zoning ordinance nor the draft proposed amended zoning ordinance are preempted by the Michigan Liquor Control Code because this assertion is untrue. Intervening Defendant further states that this paragraph

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contains legal conclusions for which no response is required. Intervening Defendant further denies as untrue the assertion that the constitution and Michigan law authorize activities to take place without regard to local zoning. Intervening Defendant lacks knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 235.

236. Presumably, Peninsula Township seeks to punish the Wineries for challenging the Winery Ordinances.

RESPONSE: Intervening Defendant lacks knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 235.

237. Thus, this lawsuit is necessary.

RESPONSE: Intervening Defendant denies the allegations of paragraph 237 as untrue.

238. The letters and memorandums from counsel for Plaintiffs and Peninsula Township's own attorney put Peninsula Township on notice in the summer of 2019 that its Winery Ordinances were, in part, illegal.

RESPONSE: Intervening Defendant denies that the township zoning ordinance provisions at issue are illegal because these assertions are untrue. Intervening Defendant lacks knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 238.

**COUNT I
FACIAL CHALLENGE TO VIOLATION OF FREEDOM OF SPEECH, FREEDOM OF
EXPRESSION AND FREE EXERCISE OF RELIGION UNDER THE FIRST AND
FOURTEENTH AMENDMENTS (42 U.S.C. § 1983)**

239. Plaintiffs incorporate and reallege the preceding paragraphs as if fully restated herein.

RESPONSE: Intervening Defendant reincorporates each and every previous answer as if fully stated herein.

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240. The First Amendment to the United States Constitution prohibits the abridgement of the freedom of speech.

RESPONSE: Paragraph 240 is an attempt to cite federal law to which no response is required. To the extent a response is required, Intervening Defendant admits that the First Amendment protects some forms of speech.

241. Political, religious, commercial, and artistic speech are the highest and most important forms of speech protected by the First Amendment to the United States Constitution.

RESPONSE: Paragraph 241 is an attempt to cite federal law for which no response is required. To the extent a response is required, Intervening Defendant admits the First Amendment provides for protections of some forms of speech.

242. Charitable and political events are forms of speech protected by the First Amendment to the United States Constitution.

RESPONSE: Paragraph 242 is an attempt to cite federal law for which no response is required. To the extent a response is required, Intervening Defendant admits that the First Amendment provides for protection of some forms of speech.

243. The protections of the First Amendment have been extended through the Fourteenth Amendment to prohibit the abridgement of the freedom of speech, freedom of expression and of the free exercise of religion by state and local governments.

RESPONSE: Paragraph 243 is an attempt to cite federal law for which no response is required. To the extent a response is required, Intervening Defendant admits that the First Amendment provides for some protections of speech and the exercise of religion.

244. Persons violating the First and Fourteenth Amendments under color of state

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law are liable under 42 U.S.C. § 1983.

RESPONSE: Paragraph 244 is an attempt to cite federal law for which no response is required. To the extent a response is required, Intervening Defendant admits that the First Amendment provides for some protections of speech.

245. Peninsula Township’s Winery Ordinances are a content-based restriction on speech.

RESPONSE: Intervening Defendant denies the allegations of paragraph 245 as untrue.

246. Peninsula Township’s Winery Ordinances are not narrowly tailored to advance any compelling government interest.

RESPONSE: Intervening Defendant denies the allegations of paragraph 246 as untrue.

247. In addition, Peninsula Township’s Winery Ordinances are a prior restraint on speech and the exercise of religion because they require a winery to receive prior approval from the government before certain types of speech or religious ceremonies are allowed.

RESPONSE: Intervening Defendant denies the allegations of paragraph 247 as untrue.

248. Peninsula Township has unfettered discretion in interpreting the meaning of the definition of Event and in limiting the number of times that a winery can use its land to engage in certain types of protected speech, including religious and political speech.

RESPONSE: Intervening Defendant denies the allegations of paragraph 248 as untrue.

249. Even if the Winery Ordinances were a content-neutral restriction on speech, they would still be unconstitutionally overbroad because (i) the rationales explicitly provided for the Winery Ordinance provisions do not advance a substantial government interest and (ii) the Winery Ordinances are not narrowly tailored to meet those rationales.

RESPONSE: Intervening Defendant denies the allegations of paragraph 249 as untrue.

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250. Through the Winery Ordinances, Peninsula Township is acting under color of law to deprive Plaintiffs of their constitutional rights, in violation of 42 U.S.C. § 1983.

RESPONSE: Intervening Defendant denies the allegations of paragraph 250 as untrue.

251. Through the Winery Ordinances, Peninsula Township further deprives the general public of their constitutional rights to engage in protected speech and the free exercise of religion, also in violation of 42 U.S.C. § 1983.

RESPONSE: Intervening Defendant denies the allegations of paragraph 251 as untrue.

252. Peninsula Township's violations of the First Amendment are even more egregious given that its own attorney concluded more than a year ago that portions of the Winery Ordinances are unconstitutional.

RESPONSE: Intervening Defendant denies the allegations of paragraph 252 as untrue.

253. Plaintiffs have suffered damages due to the unconstitutional Winery Ordinances.

RESPONSE: Intervening Defendant denies the allegations of paragraph 253 as untrue.

WHEREFORE, Defendant respectfully requests that this Honorable Court dismiss Plaintiffs' First Amended Complaint with prejudice and grant Defendant such other relief as this Court deems just and proper.

COUNT II

AS-APPLIED CHALLENGE TO VIOLATION OF PLAINTIFFS' FREEDOM OF SPEECH UNDER THE FIRST AND FOURTEENTH AMENDMENTS (42 U.S.C. § 1983)

254. Plaintiffs incorporate and reallege the preceding paragraphs as if fully restated herein.

RESPONSE: Intervening Defendant reincorporates each and every previous answer as if

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fully stated herein.

255. The Winery Ordinances restrict Plaintiffs' speech based on its content, specifically by disallowing Plaintiffs from certain political, religious and commercial speech.

RESPONSE: Intervening Defendant denies the allegations of paragraph 255 as untrue.

256. For example, the Winery Ordinances prohibit Plaintiffs from hosting a campaign event for a United State President candidate, prohibit Plaintiffs from hosting a religious service such as a wedding, funeral or Sunday service, and prohibit Plaintiffs from advertising their nonagricultural products.

RESPONSE: Intervening Defendant denies the allegations of paragraph 256 as untrue.

257. The Winery Ordinances are unconstitutional as applied to Plaintiffs because they face the imminent threat of being fined if they engage in constitutionally protected speech, because Plaintiffs' speech has been chilled, and because they has been forced to incur significant expense to undertake the Peninsula Township Guest Activity application process pursuant to the unconstitutional Winery Ordinances.

RESPONSE: Intervening Defendant denies the allegations of paragraph 257 as untrue.

258. Peninsula Township's violations of the First Amendment are even more egregious given that its own attorney concluded more than a year ago that portions of the Winery Ordinances are unconstitutional.

RESPONSE: Intervening Defendant denies the allegations of paragraph 258 as untrue.

259. Plaintiffs have suffered damages due to the unconstitutional Winery Ordinances.

RESPONSE: Intervening Defendant denies the allegations of paragraph 148 as untrue as written.

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WHEREFORE, Defendant respectfully requests that this Honorable Court dismiss Plaintiffs' First Amended Complaint with prejudice and grant Defendant such other relief as this Court deems just and proper.

**COUNT III
VIOLATION OF FREEDOM OF ASSOCIATION UNDER THE FIRST AND
FOURTEENTH AMENDMENTS (42 U.S.C. § 1983)**

260. Plaintiffs incorporate and reallege the preceding paragraphs as if fully restated herein.

RESPONSE: Intervening Defendant reincorporates each and every previous answer as if fully stated herein.

261. The First Amendment to the United States Constitution protects the right to peaceably assemble and associate with others in pursuit of a wide variety of political, social, economic, educational, religious, and cultural ends.

RESPONSE: Paragraph 261 is an attempt to cite federal law for which no response is required. To the extent a response is required, Intervening Defendant admits that the First Amendment provides for some rights to peaceably assemble and associate with others.

262. The right to peaceably assemble and the freedom of expressive association applies to state and local governments through the Fourteenth Amendment.

RESPONSE: Paragraph 262 is an attempt to cite federal law for which no response is required. To the extent a response is required, Intervening Defendant admits Defendant admits that the First Amendment provides for some rights to peaceably assemble and associate with others.

263. The constitutional right to peaceably assemble and to the freedom of expressive association is directly and substantially burdened by the Winery Ordinances.

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Plaintiffs cannot gather or host gatherings on their property which express a political, religious or commercial view and the limited ability to host Guest Activities on their property are subject to prior approval of Peninsula Township.

RESPONSE: Intervening Defendant denies the allegations of paragraph 263 as untrue.

264. The Winery Ordinances are unconstitutional because, among other things, the burdens imposed by the Winery Ordinances are not narrowly tailored, necessary, or even substantially related to any compelling government interest.

RESPONSE: Intervening Defendant denies the allegations of paragraph 264 as untrue.

265. The Winery Ordinances are unconstitutionally overbroad because the total ban on Guest Activity uses outside of the targeted allowance for local non-profit organizations and agricultural organizations is not narrowly tailored to achieve any purportedly compelling state interests.

RESPONSE: Intervening Defendant denies the allegations of paragraph 265 as untrue.

266. The Winery Ordinances burden substantially more constitutionally protected activities than necessary to achieve the government's interests in the Winery Ordinances.

RESPONSE: Intervening Defendant denies the allegations of paragraph 266 as untrue.

267. Plaintiffs have suffered damages due to the unconstitutional Winery Ordinances.

RESPONSE: Intervening Defendant denies the allegations of paragraph 267 as untrue as written.

WHEREFORE, Defendant respectfully requests that this Honorable Court dismiss Plaintiffs' First Amended Complaint with prejudice and grant Defendant such other relief as this Court deems just and proper.

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**COUNT IV
VIOLATION OF DUE PROCESS (42 U.S.C. § 1983)**

268. Plaintiffs incorporate and reallege the preceding paragraphs as if fully restated herein.

RESPONSE: Intervening Defendant reincorporates each and every previous answer as if fully stated herein.

269. The Winery Ordinances proscribe constitutionally protected speech and expressive association.

RESPONSE: Intervening Defendant denies the allegations of paragraph 269 as untrue.

270. The Winery Ordinances are unconstitutionally vague because the person of average intelligence cannot tell from the face of the Winery Ordinances what constitutes a “Guest Activity” prohibited under the Winery Ordinances and cannot govern his or her behavior to comply with the Winery Ordinances.

RESPONSE: Intervening Defendant denies the allegations of paragraph 270 as untrue.

271. This vagueness will chill, and is currently chilling, the speech and expressive association of the residents of Peninsula Township, including Plaintiffs.

RESPONSE: Intervening Defendant denies the allegations of paragraph 271 as untrue.

272. The facial unconstitutionality of the Winery Ordinances entitles Plaintiffs to declaratory relief as to their unconstitutionality and injunctive relief against their enforcement by Peninsula Township.

RESPONSE: Intervening Defendant denies the allegations of paragraph 272 as untrue.

273. Plaintiffs have suffered damages due to the unconstitutional Winery Ordinances.

RESPONSE: Intervening Defendant denies the allegations of paragraph 273 as untrue as

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written.

WHEREFORE, Intervening Defendant respectfully requests that this Honorable Court dismiss Plaintiffs' First Amended Complaint with prejudice and grant Defendant such other relief as this Court deems just and proper.

**COUNT V
DORMANT COMMERCE CLAUSE
(Discrimination Against Interstate Commerce)**

274. Plaintiffs incorporate and reallege the preceding paragraphs as if fully restated herein.

RESPONSE: Intervening Defendant reincorporates each and every previous answer as if fully stated herein.

275. As discussed above, the Winery Ordinances discriminate against interstate commerce in violation of the Commerce Clause, Article I, § 8, Clause 3, of the United States Constitution, by favoring, and mandating in Township products and persons over out-of-township products and persons.

RESPONSE: Intervening Defendant denies the allegations of paragraph 275 as untrue.

276. Plaintiffs are therefore entitled to a declaratory judgment that the Winery Ordinances discriminate against out-of-Township products and persons are unconstitutional under the Commerce Clause.

RESPONSE: Intervening Defendant denies the allegations of paragraph 276 as untrue.

277. Plaintiffs will suffer irreparable harm if Peninsula Township is allowed to enforce the unconstitutional Winery Ordinances.

RESPONSE: Intervening Defendant denies the allegations of paragraph 277 as untrue.

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WHEREFORE, Intervening Defendant respectfully requests that this Honorable Court dismiss Plaintiffs' First Amended Complaint with prejudice and grant Defendant such other relief as this Court deems just and proper.

**COUNT VI
DORMANT COMMERCE CLAUSE
(Excessive Burden on Interstate Commerce)**

278. Plaintiffs incorporate and reallege the preceding paragraphs as if fully restated herein.

RESPONSE: Intervening Defendant reincorporates each and every previous answer as if fully stated herein.

279. As discussed above, the Winery Ordinances place an excessive burden on interstate commerce in excess of the putative benefit to Peninsula Township in violation of the Commerce Clause, Article I, § 8, Clause 3, of the United States Constitution, by favoring, and mandating in Township products and persons over out-of-township products and persons.

RESPONSE: Intervening Defendant denies the allegations of paragraph 279 as untrue.

280. Plaintiffs are therefore entitled to a declaratory judgment that the Winery Ordinances discriminate against out-of-Township products and persons are unconstitutional under the Commerce Clause.

RESPONSE: Intervening Defendant denies the allegations of paragraph 280 as untrue.

281. Plaintiffs will suffer irreparable harm if Peninsula Township is allowed to enforce the unconstitutional Winery Ordinances.

RESPONSE: Intervening Defendant denies the allegations of paragraph 281 as untrue.

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WHEREFORE, Intervening Defendant respectfully requests that this Honorable Court dismiss Plaintiffs' First Amended Complaint with prejudice and grant Defendant such other relief as this Court deems just and proper.

**COUNT VII
REGULATOR TAKING
(Fifth and Fourteenth Amendment)**

282. Plaintiffs incorporate and reallege the preceding paragraphs as if fully restated herein.

RESPONSE: Intervening Defendant reincorporates each and every previous answer as if fully stated herein.

283. As discussed above, Peninsula Township has enacted a series of Winery Ordinances which deprive Plaintiffs of the full use of their property.

RESPONSE: Intervening Defendant denies the allegations of paragraph 283 as untrue.

284. The Winery Ordinances are “not reasonably necessary to the effectuation of a substantial public purpose.” *Penn Cent. Transp. Co. v. City of New York*, 438 U.S. 104, 127 (1978.)

RESPONSE: Intervening Defendant denies the allegations of paragraph 284 as untrue.

285. As discussed above, the stated purposes for the Winery Ordinances are themselves violations of Plaintiffs' First Amendment rights and the Commerce Clause.

RESPONSE: Intervening Defendant denies the allegations of paragraph 285 as untrue.

286. Plaintiffs will suffer irreparable harm if Peninsula Township is allowed to enforce the unconstitutional Winery Ordinances.

RESPONSE: Intervening Defendant denies the allegations of paragraph 286 as untrue.

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WHEREFORE, Intervening Defendant respectfully requests that this Honorable Court dismiss Plaintiffs' First Amended Complaint with prejudice and grant Defendant such other relief as this Court deems just and proper.

**COUNT VIII
STATE LAW PREEMPTION**

287. Plaintiffs incorporate and reallege the preceding paragraphs as if fully restated herein.

RESPONSE: Intervening Defendant reincorporates each and every previous answer as if fully stated herein.

288. The Michigan Liquor Control Code, MCL 436.110, et sec, is a comprehensive set of statutes which regulate the sale of alcohol in this State.

RESPONSE: Paragraph 288 is an apparent statement of law for which no response is required. To the extent a response is required, Intervening Defendant admits that the Michigan Liquor Control Code regulates the sale of alcohol in Michigan, but denies as untrue the assertion that the Code is comprehensive to the exclusion of any other regulations and ordinances, including local zoning.

289. The Winery Ordinances prohibit conduct which is expressly allowed by the Michigan Liquor Control Code.

RESPONSE: Intervening Defendant denies the allegations of paragraph 289 as untrue.

290. Section 8.7.3(10)(u)(5)(b) conflicts with Mich. Admin Code R. 436.1403(1), which allows wineries to serve alcohol until 2:00 AM every night.

RESPONSE: Intervening Defendant admits that Plaintiffs have cited, in part, Section 8.7.3(10)(u)(5)(b) of the Zoning Ordinances and otherwise states that the ordinance speaks for

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itself. To the extent a response is required, Intervening Defendant admits that Mich. Admin Code R. 436.1403(1) speaks for itself and permits that certain liquor licensees may sell alcohol during the hours proscribed therein. Intervening Defendant denies that the township zoning ordinance provisions at issue are preempted by the same as untrue.

291. Section 8.7.3(10)(u)5(g) conflicts with MCL 436.1916(11), which grants wineries the right to hose “[t]he performance or playing of an orchestra, piano, or other types of musical instruments, or singing” without a permit.

RESPONSE: Intervening Defendant admits that MCL 436.1916(11) speaks for itself and permits “the performance or playing of an orchestra, piano or other types of musical instruments, or singing.” Intervening Defendant denies as untrue the assertion that the cited township zoning ordinance provision conflicts with the cited statute.

292. The Winery Ordinances, including Section 8.7.3(10)(u)5(i), conflict with MCL 436.1536, which states a “wine maker [or] small wine maker . . . may own and operate a restaurant . . . as part of the on-premises tasting room . . .,” and with MCL 436.1547, which allows Plaintiffs to a restaurant to cater private events off their premises where they may serve food and alcohol they manufacture.

RESPONSE: Intervening Defendant admits that MCL 436.1536 and MCL 436.1547 speak for themselves and denies as untrue that the cited township zoning ordinance provision conflicts with the cited statutes.

293. The Winery Ordinances conflict with, and are preempted by, Michigan law.

RESPONSE: Intervening Defendant denies the allegations of paragraph 293 as untrue.

294. Plaintiffs have suffered damages due Peninsula Township’s

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enforcement of ordinances which are preempted by Michigan law.

RESPONSE: Intervening Defendant denies the allegations of paragraph 294 as untrue as written.

WHEREFORE, Intervening Defendant respectfully requests that this Honorable Court dismiss Plaintiffs' First Amended Complaint with prejudice and grant Defendant such other relief as this Court deems just and proper.

**COUNT IX
VIOLATION OF MICHIGAN ZONING ENABLING ACT**

295. Plaintiffs incorporate and reallege the preceding paragraphs as if fully restated herein.

RESPONSE: Intervening Defendant reincorporates each and every previous answer as if fully stated herein.

296. Under Michigan's Zoning Enabling Act, MCL 125.3101 et seq, local units of government are authorized to enact zoning ordinances "to promote public health, safety, and welfare."

RESPONSE: Paragraph 296 is an apparent statement of law for which no response is required. To the extent a response is required, Intervening Defendant admits Plaintiffs have partially quoted Michigan's Zoning Enabling Act and that this statute speaks for itself.

297. Peninsula Township's Winery Ordinances do not promote public health, safety, and welfare.

RESPONSE: Intervening Defendant denies the allegations of paragraph 297 as untrue.

298. Therefore, Peninsula Township has exceeded its authority under Michigan's Zoning Enabling Act which renders the Winery Ordinances void.

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RESPONSE: Intervening Defendant denies the allegations of paragraph 298 as untrue.

WHEREFORE, Intervening Defendant respectfully requests that this Honorable Court dismiss Plaintiffs' First Amended Complaint with prejudice and grant Defendant such other relief as this Court deems just and proper.

**COUNT X
INJUNCTIVE RELIEF**

299. Plaintiffs incorporate and reallege the preceding paragraphs as if fully restated herein.

RESPONSE: Intervening Defendant reincorporates each and every previous answer as if fully stated herein.

300. Plaintiffs are likely to succeed on the merits of their lawsuit.

RESPONSE: Intervening Defendant denies the allegations of paragraph 300 as untrue.

301. Plaintiffs will be irreparably harmed if an injunction does not issue preventing Peninsula Township from continuing to enforce the Winery Ordinance.

RESPONSE: Intervening Defendant denies the allegations of paragraph 301 as untrue.

302. Peninsula Township will not be harmed if it is prohibited from enforcing its illegal Winery Ordinances.

RESPONSE: Intervening Defendant denies the allegations of paragraph 302 as untrue.

303. Issuance of a preliminary injunction preventing Peninsula Township from continuing to enforce its illegal Winery Ordinances will serve the public interest.

RESPONSE: Intervening Defendant denies the allegations of paragraph 303 as untrue and the Court has already denied this request. (ECF No. 34).

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304. Plaintiffs have no adequate remedy at law.

RESPONSE: Intervening Defendant denies the allegations of paragraph 304 as untrue.

305. On October 21, 2020, Plaintiffs filed an attendant Motion for Preliminary Injunction. (ECF No. 2 PageID.435-437). Plaintiffs' Motion for Preliminary Injunction is fully briefed and this First Amended Complaint does nothing to change the merits of Plaintiffs' claims and requests for relief. Plaintiffs hereby expressly adopt and incorporate its Motion for Preliminary Injunction with the claims and requests in this First Amended Complaint.

RESPONSE: Intervening Defendant admits Plaintiffs filed a Motion for Preliminary Injunction and that the Motion was denied by this Court (See ECF No. 34). Intervening Defendant denies as untrue that Plaintiffs are entitled to preliminary injunctive relief.

306. Also, on October 21, 2020, Plaintiffs filed a Brief in Support of their Motion for Preliminary Injunction. (ECF No. 3 PageID.438-884). Plaintiffs hereby expressly adopt and incorporate their Brief in Support of their Motion for Preliminary injunction with the claims and requests in this First Amended Complaint.

RESPONSE: Intervening Defendant admits Plaintiffs filed a Brief in Support of its Motion for Preliminary Injunction and that the Motion was denied by this Court (See ECF No. 34). Intervening Defendant denies as untrue that Plaintiffs are entitled to preliminary injunctive relief.

307. On December 28, 2020, Plaintiffs filed a Reply Brief in Support of their Motion for Preliminary Injunction (ECF No 28, Page ID.1065-1085). Plaintiffs hereby expressly adopt and incorporate their Reply Brief in Support of their Motion for Preliminary Injunction with the claims and requests in this First Amended Complaint.

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RESPONSE: Intervening Defendant admits Plaintiffs has filed a Reply Brief in Support of Motion for Preliminary Injunction and that the Motion was denied by this Court (See ECF No. 34). Intervening Defendant denies as untrue that Plaintiffs are entitled to preliminary injunctive relief.

WHEREFORE, Intervening Defendant respectfully requests that this Honorable Court dismiss Plaintiffs' First Amended Complaint with prejudice and grant Defendant such other relief as this Court deems just and proper.

INTERVENING DEFENDANT PTP'S FIRST AMENDED AFFIRMATIVE DEFENSES

Intervening Defendant, Protect the Peninsula (PTP), by and through its attorneys, states the following Affirmative Defenses to Plaintiffs' First Amended Complaint:

- A. Plaintiffs have failed to state a claim upon which relief can be granted.
- B. Plaintiffs' claims are barred in whole or in part as a result of the expiration of the applicable statute of limitations.
- C. Plaintiffs have failed, neglected and/or refused to properly and adequately mitigate the damages they claim to have suffered.
- D. Some or all of Plaintiffs' claims are barred because of their failure to exhaust administrative or other remedies or to satisfy jurisdictional requirements.
- E. Some or all of Plaintiffs' claims are preempted by applicable state or federal law.
- F. Plaintiffs have failed to identify any Michigan or federal law in which zoning ordinance provisions were invalidated for restrictions placed on liquor-license holders.
- G. Plaintiffs have prayed for damages that are not awardable under controlling law.
- H. Plaintiffs have failed to follow the statutorily prescribed process for amending a

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zoning ordinance under the Michigan Zoning Enabling Act.

I. Plaintiffs' reliance on the legal opinions rendered by Defendant Peninsula Township's attorney during pre-litigation negotiations in this matter is inadmissible evidence.

J. Defendant Peninsula Township's attorney lacked authority from the Township Board to negotiate with Plaintiffs for zoning ordinance amendments.

K. Defendant Peninsula Township's attorney lacked authority under Michigan law to negotiate with Plaintiffs for zoning ordinance amendments.

L. Defendant Peninsula Township has not made any binding or admissible admissions, nor has the Township otherwise adopted its attorney's pre-litigation legal opinions upon which Plaintiffs' claims rely.

M. Plaintiff seeks relief in this case that neither Defendant Peninsula Township nor this court can provide under Michigan zoning law.

N. Modifications to the Peninsula Township zoning ordinance sought by Plaintiffs would be subject to the voters' right of referendum guaranteed by the Michigan Zoning Enabling Act, MCL 125.3042.

O. Plaintiffs do not have a strong likelihood of success on the merits of their claims such that injunctive relief is improper.

P. Plaintiffs have failed to identify irreparable injury such that their claim for injunctive relief is improper.

Q. Granting injunctive relief as sought by Plaintiffs would cause immediate irreparable harm to PTP and its members, including neighbors who live near existing wineries.

R. Granting injunctive relief as sought by Plaintiffs would cause substantial harm to the public interest, as well as to cognizable interests of PTP members and Township residents and

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voters.

S. Granting injunctive relief as sought by Plaintiffs would undermine reasonable investment-backed expectations that the zoning ordinance provisions would remain in place subject to a process to amend the zoning ordinance established in the Michigan Zoning Enabling Act, including public hearings, compliance with the standards to amend an ordinance, approvals by the Planning Commission and Township Board, and the right of voter referendum.

T. Plaintiffs have failed to identify the damage claims for violation of the First and Fourteenth Amendments in which they state zoning ordinance provisions were unconstitutional.

U. Plaintiffs have failed to identify any provision of Peninsula Township's zoning ordinances that compel or suppress their speech in violation of the First or Fourteenth Amendments.

V. Plaintiffs have failed to identify any provision of Peninsula Township's zoning ordinances that constitute prior restraints or are unconstitutionally vague.

W. The Peninsula Township zoning ordinance winery provisions applicable to Plaintiffs' logo placements and limited products for retail sales directly and narrowly advance substantial local governmental interests in preserving agricultural activities in agricultural zoning districts.

X. The Peninsula Township zoning ordinance winery provisions that limit weddings and other events at wineries located in the agricultural district directly and narrowly advance substantial local governmental interests in preserving agricultural activities in agricultural zoning districts.

Y. The Peninsula Township zoning ordinance winery provisions applicable to Plaintiffs' commercial events do not burden Plaintiffs' religious practices.

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Z. Plaintiff have received adequate due process with respect to the claims made in this matter.

AA. Plaintiffs have failed to identify any provision of the Peninsula Township zoning ordinances that violate the dormant Commerce Clause.

BB. The Peninsula Township zoning ordinance winery provisions advance strong and legitimate local interests.

CC. The Peninsula Township zoning ordinances have not resulted in any regulatory taking as to the Plaintiffs.

DD. The Michigan Liquor Control Code does not expressly preempt any portion of the Peninsula Township zoning ordinances.

EE. The Peninsula Township zoning ordinances are not subject to field preemption by the Michigan Liquor Control Code.

FF. The Michigan Liquor Control Commission rules require liquor- license-holders, including Plaintiff wineries, to comply with local zoning, Mich Admin Code R. 436.1003, 436.1105(3).

GG. Plaintiffs are legally required to comply with both liquor laws and their liquor licenses, and also with the zoning ordinance and their special use permits.

HH. Plaintiffs unreasonably failed to take advantage of preventative and corrective opportunities provided.

II. Plaintiffs' claims may be barred by the doctrine of laches.

JJ. Plaintiffs' claims are barred by their own voluntary acknowledgement and agreement to the terms of special use permits issued by Peninsula Township.

KK. Plaintiffs' claims are barred by basic principles of contract law.

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LL. Plaintiffs' claims may be barred by the doctrine of abstention.

MM. Plaintiffs' claims may be barred by the doctrine of unclean hands, given potential violations by one or more Plaintiff wineries of the terms of their special use permits and zoning requirements.

NN. Plaintiffs have waived their ability to challenge the zoning conditions placed upon their special use permits.

OO. This Court has preliminarily determined that the Plaintiffs have not suffered irreparable harm.

PP. This Court has preliminarily determined that the Plaintiffs have not established a strong likelihood of success on the merits of their claims in the First Amended Complaint.

QQ. All or some of Plaintiffs' claims are barred by immunity conferred by law.

RR. The Court lacks subject matter jurisdiction over Plaintiffs' state law claims for preemption and for alleged violation of the Michigan Zoning Enabling Act.

SS. Plaintiffs have failed to join a party required by Fed. R. Civ. P. 19, namely the owners of the land upon which Plaintiff wineries sit and/or the holders of the Special Use Permits (SUPs) authorizing and establishing the terms and conditions of Plaintiff winery uses.

TT. Winery land owners and winery SUP holders are necessary because this Court cannot accord complete relief without them. For example, even if successful, the Township and PTP could be subject to a substantially similar future challenge by a winery land owner or SUP holder not a party to this litigation.

UU. The winery land owners and SUP holders are necessary because disposing of this action in their absence may leave them subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations. For example, if Plaintiffs are successful, a winery land owner

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or SUP holder may face inconsistent obligations between terms of a conservation easement, land use restrictions, SUP, or otherwise.

VV. All or some Plaintiffs lack standing because they have not alleged an injury that can be fairly traced to the Township's conduct and/or be redressed by the courts because they do not own the land upon which their wineries sit and/or do not hold the SUPs for the winery uses upon that land.

WW. All or some Plaintiffs lack standing because they have not alleged an injury that can be fairly traced to the Township's conduct and/or be redressed by the courts because the activities they seek to conduct are located upon land under conservation easements and other restrictions that prohibit them from engaging in activities to the same or greater extent as the challenged Zoning Ordinance provisions.

XX. Plaintiffs who are not winery land owners or SUP holders lack standing to assert the constitutional rights of third parties through facial challenges to the Zoning Ordinances where they themselves have not been injured by conduct fairly traceable to the Township and redressable by the courts.

YY. Plaintiffs' claims are unripe to the extent they have failed to apply for SUPs, site plan review, variances, and/or zoning permits for the land uses they seek to undertake or pursue through their Complaint.

ZZ. Plaintiffs' claims are barred by laches because they unreasonably delayed, failed, refused, and/or neglected to challenge or contest the validity of the zoning provisions for decades after their enactment or after applied to the Plaintiff, and long after they and/or their predecessors in interest knew or should have known about any actual or threatened injury, resulting in prejudice to PTP and its members.

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AAA. Plaintiffs' delay in bringing these claims prejudiced PTP and its members because records and witnesses of legislative history regarding the governmental interests advanced by the zoning provisions and the Township's consideration of less restrictive alternatives are no longer available, impairing PTP's ability to defend the challenged zoning provisions.

BBB. Plaintiffs' delay in bringing these claims prejudiced PTP and its members because PTP's members have relied for decades on reasonable investment-backed expectations that the zoning provisions would remain in place subject to a process to amend the Zoning Ordinance established in the Michigan Zoning Enabling Act, including public hearings, compliance with the standards to amend an ordinance, recommendations by the Planning Commission, approval by the Township Board, and the right of voter referendum.

CCC. Plaintiffs' delay in bringing these claims prejudiced PTP and its members because, had Plaintiffs raised or challenged the zoning provisions and SUPs promptly, then Plaintiffs, PTP and the Township could have effectively sought amendments or solutions when there were fewer existing wineries operating under the challenged winery provisions.

DDD. Plaintiffs' own actions, including by requesting, promoting, drafting, supporting, advocating, accepting, and failing to bring timely challenges to the very zoning provisions they challenge in this case have prejudiced PTP and its members by inducing PTP and its members to rely on the zoning provisions and invest in accordance with them.

EEE. All or some of Plaintiffs' claims are barred by equitable estoppel and/or waiver because Plaintiffs and/or their predecessors and/or representatives requested, proposed, negotiated, drafted, promoted, supported, and advocated for the adoption of the zoning provisions they now challenge.

FFF. All or some of Plaintiffs' claims are barred by equitable estoppel, waiver, and/or

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failure to exhaust administrative and/or judicial remedies because Plaintiffs voluntarily requested, applied for, accepted, and engaged in winery uses authorized by zoning, SUPs and/or land use permits containing or incorporating the standards of the Zoning Ordinances and/or agreeing to other terms and conditions that prevent or limit commercial uses of Plaintiffs' properties, and Plaintiffs did not object or appeal the Township's decisions regarding their applications in the manner or within the time required by law.

GGG. All or some of Plaintiffs' claims are barred by collateral estoppel and/or res judicata, due to prior litigation, prior adjudications, and prior resolutions involving one or more of Plaintiffs. This includes, without limit, 1998 litigation by Chateau Operations Ltd and Bob Begin against Peninsula Township in Michigan 13th Circuit Court; 2007 litigation by Old Mission Peninsula Winery Growers against Peninsula Township and Winery at Black Star Farms in Michigan 13th Circuit Court; and violations alleged by Peninsula Township against Oosterhouse Vineyards in 2016 and 2017. There may be others.

HHH. All or some of Plaintiffs' claims are barred by estoppel or judicial estoppel, due to their taking positions in prior litigation and proceedings inconsistent with their positions in this litigation. This may include, without limit, 2007 proceedings and litigation by Plaintiffs involving a variance and activities by Winery at Black Star Farms;

III. Plaintiffs' intended engagement in commercial activity in the A-1 Agricultural district without the limitations established by the challenged zoning provisions would be injurious to the public and the surrounding land uses, and therefore would constitute public nuisances in fact and per se.

JJJ. Plaintiffs' intended engagement in commercial activity near the homes and farms of PTP members without the limitations established by the challenged zoning provisions would be

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injurious to PTP and its members, and therefore would constitute private nuisances.

KKK. Plaintiffs' claims may be barred by the doctrine of unjust enrichment, given that they profited from land uses and activities otherwise prohibited in the A-1 Agricultural District except as the benefit/privilege of challenged provisions, where such authorized uses and activities otherwise were limited to the commercial district.

LLL. Intervening Defendant reserves the right to file further affirmative defenses and to amend its affirmative defenses upon the completion of discovery.

WHEREFORE, Intervening Defendant PTP respectfully requests that this Honorable Court dismiss Plaintiffs' First Amended Complaint with prejudice and grant Intervening Defendant such other and further relief as this Court deems just and proper.

Date: September 14, 2022

By: _____
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Date: September 14, 2022

By: _____
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