

UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF MICHIGAN  
SOUTHERN DIVISION

WINERIES OF THE OLD MISSION  
PENINSULA (WOMP) ASSOC.,  
a Michigan Nonprofit Corporation,  
BOWERS HARBOR VINEYARD &  
WINERY, INC., a Michigan Corporation,  
BRY'S 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,

Case No. 1:20-cv-01008

Hon. Paul L. Maloney

Mag. Judge Ray S. Kent

**DEFENDANT'S BRIEF IN  
SUPPORT OF PROTECT THE  
PENINSULA'S MOTION TO  
DISMISS STATE LAW CLAIMS  
(ECF 250)**

Plaintiffs,

v

TOWNSHIP OF PENINSULA,  
a Michigan Municipal Corporation,

Defendant,

and

PROTECT THE PENINSULA, INC.,

Intervenor-Defendant.

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**DEFENDANT'S BRIEF IN SUPPORT OF PROTECT THE PENINSULA'S MOTION TO  
DISMISS STATE LAW CLAIMS (ECF 250)**

**TABLE OF CONTENTS**

INDEX OF AUTHORITIES. . . . . ii

INTRODUCTION. . . . . 1

ARGUMENT. . . . . 3

I. THE COURT SHOULD DISMISS PLAINTIFFS' STATE LAW CLAIMS ON  
GROUNDS THAT THE COURT LACKS SUPPLEMENTAL JURISDICTION . . 3

    Introduction . . . . . 3

    Standard of Review . . . . . 5

    A. The Court Lacks Supplemental Subject Matter  
        Jurisdiction over the Wineries' State Law Claims under  
        28 U.S.C. § 1367(a) . . . . . 6

    B. The Court Should Decline to Exercise Discretionary  
        Jurisdiction over the Wineries' State Law Claims under  
        the Multi-Factorial Test of 28 U.S.C. § 1367(c) . . . 9

        (1) Michigan Courts Have Not Passed on the Validity of  
            the Wineries' State Law Claims . . . . . 10

        (2) The Wineries' Damages Requests Clearly Demonstrate  
            the Predominance of the State Law Claims . . . . 16

        (3) The Wineries Would Not Be Harmed By Delay Because  
            They Are Asking For A Reconsideration of State Law  
            Issues . . . . . 19

CONCLUSION AND RELIEF REQUESTED . . . . . 20

CERTIFICATE OF COMPLIANCE PURSUANT TO LOCAL RULE 7.3(b)(1)

CERTIFICATE OF SERVICE

**INDEX OF AUTHORITIES**

**Page No:**

**CASES:**

Angelotta v American Broadcasting Corp,  
820 F2d 806 (CA6 1987) . . . . . 10

Beechy v Cent Michigan Dist Health Dept,  
274 Fed Appx 481 (CA6 2008). . . . . 13

Carnegie-Mellon Univ v Cohill,  
484 US 343 (1988). . . . . 5

Centeno-Bernuy v Becker Farms,  
564 F Supp 2d 166 (WDNY 2008). . . . . 15

Chelsea Condo Unit Owners Ass’n v 1815 A St, Condo Grp, LLC,  
468 FSupp2d 136 (DDC 2007) . . . . . 7

Dean v Dean,  
821 F2d 279 (CA 1987) . . . . . 11

Doe v Sundquist,  
106 F3d 702 (CA6 1997) . . . . . 13

Dream Palace v Cnty. of Maricopa,  
384 F3d 990 (CA9 2004) . . . . . 13

Forrester v Clarenceville School District,  
(ED Mich 2021) 2021 WL 1812700 . . . . . 14

Franco v Lee,  
316 F3d 299 (CA2 2003) . . . . . 15

Gamel v City of Cincinnati,  
625 F3d 949 (CA6 2010) . . . . . 2,13

Grubb v W A Foote Memorial Hosp, Inc,  
741 F2d 1486 (CA6 1984)  
vacated on other grounds, 759 F2d 546 (1985) . . . . . 10

Hankins v The Gap, Inc,  
84 F3d 797 (CA6 1996). . . . . 13

Harris Corp v Comair, Inc,  
712 F2d 1069 (CA6 1983). . . . . 11

Horn v City of Mackinac Island,  
938 F Supp 2d 712 (WD Mich 2013) . . . . . 15

James v Hampton,  
592 F App'x 449 (CA6 2015) . . . . . 12

Jean-Laurent v Wilkerson,  
863 F Supp 2d 350 (SDNY 2012). . . . . 16

Johnson v City of Detroit,  
446 F3d 614 (CA6 2006) . . . . . 12

Landefeld v Marion General Hosp, Inc,  
994 F2d 1178 (CA6 1993) . . . . . 2,13

Lyndonville Sav Bank & Trust Co v Lussier,  
211 F3d 697 (CA2 2000) . . . . . 6

Moir v Greater Cleveland Reg'l Transit Auth,  
895 F 2d 266 (CA6 1990). . . . . 5

Palmer v Hosp Auth of Randolph Cty,  
22 F3d 1559 (CA11 1994). . . . . 6

Province v Cleveland Press Pub Co,  
787 F 2d 1047 (CA6 1986) . . . . . 7

Richard v Oak Tree Group, Inc,  
614 F Supp 2d 814 (WD Mich 2008) . . . . . 14

Rockey v.Courtesy Motors, Inc.,  
199 FRD 578 (WD Mich 2001) . . . . . 14

Salei v Boardwalk Regency Corp,  
913 F Supp 993 (ED Mich 1996). . . . . 9

Sanford v Mullins,  
No. 1:16-CV-1431, 2017 WL 82598 (WD Mich, 1/10/17) . . 14,15

Transcontinental Leasing, Inc v Michigan Nat'l Bank of Detroit,  
738 F2d 163 (CA6 1984) . . . . . 5,10

United Mine Workers of Am v Gibbs,  
383 US 715 (1996). . . . . 6,10

Williams v Van Buren Twp,  
925 F Supp 1231 (ED Mich 1996) . . . . . 14

**FEDERAL STATUTES:**

28 U.S.C. § 1367(a) . . . . . 6  
28 U.S.C. § 1367(c) . . . . . 1,3,9  
28 U.S.C. § 1367(c) (2) . . . . . 16  
42 U.S.C. § 1983. . . . . 11,12

**MICHIGAN STATUTES:**

Michigan Zoning Enabling Act, MCL 125.3101. . . . . 7,15  
Michigan Liquor Control Code, MCL 436.1101. . . . . 7,8,15

**LOCAL RULES:**

Local Rule 7.3(b) (i) . . . . . Certificate  
Local Rule 12(b) (1) . . . . . 5

**MICHIGAN COURT RULES**

MCR 7.308 (A) (2) . . . . . 3,20

**Introduction**

"Plaintiffs can recover damages for state law violations. . . parties can recover damages in preemption cases . . . Michigan law allows for recovery of damages when a statute has been declared unenforceable." [ECF 213, Page ID# 7833.]

"we [the Wineries] aren't seeking damages on the preempted issues." [ECF 239 Page ID#8700.]

"the remedy sought is a permanent injunction against enforcement of certain provisions of the Winery Ordinances through both constitutional and state law means." [ECF 263, Page ID# 9445.]

Which is it?

In the last two months, the Wineries have taken three different positions on whether they would be seeking money damages under state law. Each successive change of position has been offered to satisfy whatever short term interest the Wineries were advancing at the time, but at some point, the Wineries need to commit to one position or another and because the Court will be deciding the viability of supplementary jurisdiction over the state law claims, we say the time is now.

The Wineries' current iteration that damages will not be sought under the state law claims is a recognition by the Wineries that the availability of such damages is an open question, presenting a novel and complex issue of Michigan law that jeopardizes if not eliminates the viability of supplemental jurisdiction under 28 U.S.C. § 1367(c). The availability of damages under the state law claims has already been raised by the Township

and in response (ECF 213), the Wineries offered no authority to support their view, or the lost profits projection of their damages expert, that tens of millions of dollars could be awarded for their causes of action that present pure questions under Michigan statutory authority.

The current flip-flop, in response to PTP's Motion to Dismiss State Law Claims (ECF 250), portends a temporary minimization of the open question on damages in favor of an exclusive claim for injunctive relief, as a method to distract the Court from the serious defects in supplemental jurisdiction. The Wineries should not get away with blatant flip-flopping because there is no doubt that if the Court does exercise jurisdiction over the state law claims, the wildly outrageous damages request will surface once again at trial.

Unless the Wineries unequivocally state once and for all that they will not request damages for their state law claims, the Court should decline to exercise supplementary jurisdiction over Counts 8 and 9 of the Wineries' Complaint on foundational principles of federalism and comity. Federal courts are an improper venue for the Wineries to seek to create remedies or liabilities not previously recognized under state law. See Gamel v City of Cincinnati, 625 F3d 949, 953 (CA6 2010) (exercising jurisdiction would result in an unnecessary resolution of state law); Landefeld v Marion General Hosp, Inc, 994 F2d 1178, 1182 (CA6 1993) (same). The Court should



either certify the novel state law damages questions to the Michigan Supreme Court under Michigan Court Rule 7.308(A)(2) or take the more efficient route of a dismissal of the state law claims.

Furthermore, the Court's exercise of discretionary jurisdiction under 28 U.S.C. § 1367(c) presupposes that it has jurisdiction under subsection (a) in the first place, a doubtful proposition as argued in PTP's Motion to Dismiss the State Law Claims, relief in which the Township concurs.

### **ARGUMENT**

#### **I. THE COURT SHOULD DISMISS PLAINTIFFS' STATE LAW CLAIMS ON GROUNDS THAT THE COURT LACKS SUPPLEMENTAL JURISDICTION**

##### **Introduction**

The Wineries' Response to PTP's Motion to Dismiss the State Law claims starts from a false premise that because the Court has already addressed issues of state law, "There is no reason to change course now." (ECF 263, Page ID# 9437.) The Sixth Circuit Court of Appeals has provided two reasons to change course, and the Wineries' Proposed Damages Expert has given 203,000,000 reasons to re-examine whether the novel state law claims and remedies should be decided in the federal system.

First, the Sixth Circuit Court of Appeals instructed the Court to decide the Motion to Dismiss on Remand, a step the Court has already taken by accepting the Motion as filed and scheduling a hearing for November 17, 2022 (ECF 247). The Wineries have pointed

to alleged concessions to jurisdiction by the Township which, even if true, is no longer a ground to accept jurisdiction given the Court's tasks on remand and given the inflated damages projection issued long after the complaint was filed.

Second, since the initial filing of the Complaint which posited 8 federal claims and 2 state law claims, it has become clear that the state law claims are the predominant focus of this lawsuit. The Wineries' latest suggestions that they are only seeking damages for violations of federal law is a recent position that is likely temporary and will be back-tracked at trial.

The predominance of the state law claims is borne out objectively: the damages claimed for the alleged constitutional violations are a tiny fraction of the overall damages asserted, which have ranged from \$135 million to \$203 million, and were not known at the onset of litigation but are known now. As argued below, a comparison of the damages projected for federal or state law claims shows that the latter claims clearly predominate.

Furthermore, the Wineries, themselves, have also asked the Court to change course and re-examine the state law claims in their Response Brief (ECF 263 Page ID# 9458: "This Court should revisit its decision related to preemption and hours of service as its prior determination is inconsistent with Michigan law."; see also, Page ID# 9462 seeking Summary Judgment on preemption grounds as to other sections of the ordinance that the Wineries did not address

in their first amended complaint).

The Wineries are dissatisfied with this Court's decision-making on the state law claims and the entire second half of their Response to PTP's Motion to Dismiss is dedicated to a request for a do-over, including an untimely Reconsideration Motion asking the Court to amend its Summary Judgment ruling on state law preemption grounds (Page ID# 9468). The Wineries' own request for a re-examination on the state law claims is all the more reason for the Court to Grant PTP's Motion to Dismiss the State Law Claims so that a state court can decide these non-federal questions that are best answered by a Michigan Tribunal.

#### **Standard of Review**

A federal court should consider and weigh in each case, and at every stage of litigation, the values of judicial economy, convenience, fairness, and comity in order to decide whether to exercise jurisdiction over a case brought in that court involving supplemental state-law claims. Generally, supplemental jurisdiction is a doctrine of discretion, not of plaintiff's right. Carnegie-Mellon Univ v Cohill, 484 US 343 (1988). A district court has discretion in deciding whether to exercise supplemental jurisdiction over state law claims. Transcontinental Leasing, Inc v Michigan Nat'l Bank of Detroit, 738 F2d 163, 166 (CA6 1984). In Moir v Greater Cleveland Reg'l Transit Auth, 895 F 2d 266, 269 (CA6 1990), the Court reaffirmed that where subject matter jurisdiction

is challenged pursuant to 12(b)(1), the plaintiff has the burden of proving jurisdiction to survive the motion.

**A. The Court Lacks Supplemental Subject Matter Jurisdiction over the Wineries' State Law Claims under 28 U.S.C. § 1367(a)**

PTP has challenged whether the Court has supplemental jurisdiction over the Wineries' state law claims under subsection (a). The Township concurs and rather than repeat each of PTP's arguments offers the following support in favor of PTP's motion.

Under 28 U.S.C. § 1367(a) district courts "shall have supplemental jurisdiction over all other claims that are so related claims in the action within such original jurisdiction that they form part of the same case or controversy under Article III of the United States Constitution." To exercise supplemental jurisdiction over state law claims, the state and federal claims must derive from a common nucleus of operative facts. Moreover, if it appears that the state issues substantially predominate, whether in terms of proof, of the scope of the issues raised, or of the comprehensiveness of the remedy sought, the state claims may be dismissed without prejudice and left for resolution to state tribunals. United Mine Workers of Am V Gibbs, 383 US 715, 725 (1996).

Generally, claims arise out of a common nucleus of operative fact when they "involve the same witnesses, presentation of the same evidence, and determination of the same, or very similar, facts." Palmer v Hosp Auth of Randolph Cty, 22 F3d 1559, 1563-64

(CA11 1994); see also Lyndonville Sav Bank & Trust Co v Lussier, 211 F3d 697, 704 (CA2 2000) (a sufficient relationship will be found if "the facts underlying the federal and state claims substantially overlap [ ] ... or where presentation of the federal claim necessarily b[rings] the facts underlying the state claim before the court"). However, state-law claims that only "relate generally" to federal claims through a broader dispute and do not share any operative facts and are insufficient for supplemental jurisdiction. Chelsea Condo Unit Owners Ass'n v 1815 A St, Condo Grp, LLC, 468 FSupp2d 136, 141 (DDC 2007).

In Province v Cleveland Press Pub Co, 787 F 2d 1047, 1055 (CA6 1986), the Court found that supplemental jurisdiction is proper when there is "substantial similarity between predicate factual findings necessary to the resolution of both the federal and state law claims." In the case at bar, Plaintiffs' state law claims pertaining to violation of Michigan Zoning Enabling Act, MCL 125.3101, and state law preemption under the Michigan Liquor Control Code, MCL 436.1101, do not form the same case or controversy or share substantially similar facts as the federal constitutional claims.

For example, whether the Wineries should be allowed to conduct off-site catering, a state law claim under the MLCC, has utterly nothing to do with the Township's rule that 85% of grapes must be grown on Old Mission Peninsula, a Constitutional claim. There would

be no overlap in proofs on these two divergent questions. Similarly, whether the Wineries should be allowed to stay open later than 9:30 p.m. has no overlap with whether labeling and logo requirements constitute a prior restraint on speech other than an identity of parties; the evidence and legal bases bear no relation.

The Wineries have hedged their bets on whether these claims arise under federal or state law by arguing that various ordinances are preempted by state law and are also unconstitutionally vague (e.g., ECF 263, Page ID# 9446). Again, however, the Wineries are simultaneously asking this Court to re-examine the state law basis of each of these claims, an admission that state law claims predominate, and an unnecessary argument if the Wineries truly believed their claims to present federal questions of vagueness.

Plaintiffs' MZEA claim challenges the parameters of local zoning authority and does not involve operative facts regarding the federal claims because this looks strictly to whether the Michigan Legislature granted Peninsula Township the authority to enact the winery rules at issue. In addition, Plaintiffs' state law preemption claims challenge whether a local municipality may regulate or prohibit conduct related to the sale of alcohol which the Wineries claim they can perform under the Michigan Liquor Control Code, MCL 436.1101.

The Michigan Liquor Control Code is a comprehensive set of statutes which regulate the sale of alcohol in the state. The

Wineries allege that the Township zoning ordinances conflict with state law. This matter directly involves a close examination of the MLCC and the ordinances to determine whether the Wineries' conduct is protected by state law, thus this is better heard in state court. Since the constitutional claims involve an alleged violation of the Commerce Clause and other claims (related to commercial speech, religious ceremonies, and takings), the operative facts do not involve the State Preemption issue under a state liquor code. The shared operative facts may include only similar identities of the parties, the properties involved and agreements made, but the causes of action and remedy for each injury are distinct. This is insufficient to find that the claims share operative facts because where the facts relevant to resolution of each state and federal claims are separate and distinct, the claims do not share a common nucleus of operative fact. Salei v Boardwalk Regency Corp, 913 F Supp 993, 999 (ED Mich 1996).

**B. The Court Should Decline to Exercise Discretionary Jurisdiction over the Wineries' State Law Claims under the Multi-Factorial Test of 28 U.S.C. § 1367(c)**

If the Court does not dismiss the state law claims under subsection (a) of the statute, it should exercise its discretion and decline to exercise supplemental jurisdiction under subsection (c), which provides:

The district courts may decline to exercise supplemental jurisdiction over a claim under subsection (a) if--  
(1) the claim raises a novel or complex issue of State law,  
(2) the claim substantially predominates over the claim or

- claims over which the district court has original jurisdiction,
- (3) the district court has dismissed all claims over which it has original jurisdiction, or
  - (4) in exceptional circumstances, there are other compelling reasons for declining jurisdiction.

All factors, other than (3) which is an open question at this juncture, warrant a declination of supplementary jurisdiction.<sup>1</sup>

Supplemental jurisdiction is a doctrine of discretion, not of right and a district court has discretion in deciding whether to exercise supplemental jurisdiction over state law claims. Transcontinental Leasing, Inc v Michigan Nat'l Bank of Detroit, 738 F2d 163, 166 (CA6 1984). Courts should hesitate to exercise jurisdiction over state claims when judicial economy, convenience and fairness are not present. Gibbs, 383 U.S. at 726.

**(1) Michigan Courts Have Not Passed on the Validity of the Wineries' State Law Claims**

Fundamental principles of federalism and comity strongly weigh against, if not prohibit, an exercise of supplemental jurisdiction because the availability of money damages for Plaintiffs' state law claims has never been decided by a Michigan court. It is improper for the federal courts to create new liabilities and remedies under

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1. On previous briefing, the Court denied Summary Judgment on the Wineries' federal claims. Following the Sixth Circuit Court of Appeals' subsequent decisions, the viability of the June 3 Summary Judgment Opinion and Order is doubtful (and the subject of a future Rule 60 motion) which would render (3) an open question rather than a factor in favor of jurisdiction, as the Wineries are also asking for a "do-over" (ECF 263 Page ID# 9458). Indeed, the Wineries continue to challenge aspects of the June 3 ruling they do not like.



state law. See, for example, Angelotta v American Broadcasting Corp, 820 F2d 806, 809 (CA6 1987) (refusal to recognize new claim for damages under Ohio law); see also, Grubb v W A Foote Memorial Hosp, Inc, 741 F2d 1486, 1500 (CA6 1984) ("Our respect for the role of the state courts as the principal expositors of state law counsels restraint by the federal court in announcing new state-law principles...."), vacated on other grounds, 759 F2d 546 (1985); Harris Corp v Comair, Inc, 712 F2d 1069, 1071 (CA6 1983) ("We deem it inappropriate for a federal court sitting in diversity to add a new cause of action to state law."); Dean v Dean, 821 F2d 279, 284 (CA5 1987) ("Moreover, as a federal court attempting to determine state law, we are especially hesitant to invent a new cause of action or even to extend the existing case law and establish a right to recover damages for mental anguish in the situation presented here.")

Plaintiffs' First Amended Complaint includes two claims arising under Michigan law: (1) preemption by the Michigan Liquor Control Commission, and (2) violations of Michigan's Zoning Enabling Act. Plaintiffs' Prayer for Relief includes a damages request for each count but there is no basis under the law to award money damages for these claims.

The Township previously sought a dismissal of any damages claim under state law, a position forcefully opposed by the Wineries who insisted that money damages were appropriate for the

state law claims (ECF 213, Page ID# 7833: "**B. Plaintiffs can recover damages for state law violations.**") The Wineries successfully convinced Magistrate Kent to deny the Township's motion, and objections to the magistrate's order under FRCP 72 remain pending and set for hearing on November 17, 2022. The Wineries' current position, if it is to be believed that it will hold in the long-term, is all the more reason the Court should sustain the Township's objections based on the current assurances (i.e., concessions) that damages will not be sought for alleged state law violations. If the Wineries truly intend to only seek injunctive relief, the Wineries should withdraw their response to the Township's objections which should be sustained by the Court.

Plaintiffs' Complaint only invokes state law for its preemption claim (**Count VIII STATE LAW PREEMPTION**) while Count IX alleges a (**VIOLATION OF MICHIGAN ZONING ENABLING ACT**). Neither claim can be pursued for money damages by 42 U.S.C. § 1983 which is limited to rights secured by federal law. Johnson v City of Detroit, 446 F3d 614, 618 (CA6 2006). Plaintiffs' Complaint requests money damages for these claims, but Michigan case law does not support a claim for money damages on a preemption theory or a claim under Michigan's Zoning Enabling Act and the federal system is not the appropriate forum in which to seek an expansion of remedies under state law.

With no Michigan state law recognizing a claim for damages

under either count, this Court would be called upon to break new ground to establish this right, an invitation the Court should reject. See James v Hampton, 592 F App'x 449, 462 (CA6 2015) (proper to decline supplemental jurisdiction over claim which would create a new cause of action under Michigan law); Landefeld v Marion General Hosp, Inc, 994 F2d 1178, 1182 (CA6 1993) (same); Gamel v City of Cincinnati, 625 F3d 949, 953 (CA6 2010) (exercising jurisdiction would not advance judicial economy and would result in an unnecessary resolution of Ohio law); Beechy v Cent Michigan Dist Health Dept, 274 Fed Appx 481, 483 (CA6 2008) (proper to decline supplemental jurisdiction "[g]iven the paucity of decisions interpreting the Michigan Right to Farm Act and our 'interest in avoiding the unnecessary resolution of state law issues'"), quoting Hankins v The Gap, Inc, 84 F3d 797, 803 (CA6 1996); Doe v Sundquist, 106 F3d 702, 708 (CA6 1997) (holding that due to novel Tennessee state law issues and comity concerns, supplemental jurisdiction for a claim that a statute violated the state constitution, can be refused, stating, "[f]rom respect for the right of a state court system to construe that state's own constitution and adoption statute, we choose not to rule on the merits of the state claims."); Dream Palace v Cnty. of Maricopa, 384 F3d 990 (CA9 2004) (proper to decline supplemental jurisdiction over challenges to a California county ordinance because the state law claims addressed the "balance of power between state and local

authorities" and "involve delicate issues of state law.")

In deciding whether to exercise discretionary jurisdiction, a number of factors guide the court's decision, including "federal-state comity, judicial expertise, the need to avoid unnecessary resolution of novel and complex issues of state law, and fairness to the parties." Forrester v Clarenceville School District, (ED Mich 2021) 2021 WL 1812700. See Richard v Oak Tree Group, Inc, 614 F Supp 2d 814 (WD Mich 2008) (proper to decline supplemental jurisdiction over novel issues of substantive state law because neither party cites any Michigan case law interpreting the statutes at issue and "[c]omity cautions that this court should not create new state-law liability in this case"); Rockey v. Courtesy Motors, Inc., 199 FRD 578 (WD Mich 2001) (same).

In Williams v Van Buren Twp, 925 F Supp 1231, 1233 (ED Mich 1996), the court based its decision on the exercise of supplemental jurisdiction over state law claims on federalism and the respect for Michigan courts:

Because federal and state law each have a different focus, and because the two bodies of law have evolved at different times and in different legislative and judicial systems, in almost every case with pendent state claims, the courts and counsel are unduly preoccupied with substantive and procedural problems in reconciling the two bodies of law and providing a fair and meaningful proceeding.

In a previous case, this Court took the precise approach offered by PTP and the Township by declining to exercise supplemental jurisdiction over a complaint that proposed to create

a new cause of action for violation of a Michigan statute, the precise situation here. See Sanford v Mullins, No. 1:16-CV-1431, 2017 WL 82598, at \*4 (WD Mich, January 10, 2017). In declining to exercise supplemental jurisdiction, this Court stated: "Plaintiff essentially asks this Court to create a new cause of action for violation of a Michigan statute. This Court must decline Plaintiff's invitation to exercise supplemental jurisdiction over such a novel claim." Here, the Wineries are asking to create a new cause of action for money damages for alleged violations of MCL 125.3101 and MCL 436.1101.

This Court's ruling in Sanford quoted from and followed a similar decision of the Second Circuit Court of Appeals, Franco v Lee, 316 F3d 299, 306 (CA2 2003), which held: "Where a pendent state claim turns on novel or unresolved questions of state law, especially where those questions concern the state's interest in the administration of its government, principles of federalism and comity may dictate that these questions be left for decision by the state courts." A deference to state courts to decide issues of governance is a well-recognized ground for a declination of supplemental jurisdiction. See Horn v City of Mackinac Island, 938 F Supp 2d 712, 724 (WD Mich 2013) (exercise of supplemental jurisdiction was not warranted over claim that city zoning ordinance that violated state licensing statute and that challenged the an zoning ordinance's constitutionality because the claim

addressed "somewhat" novel issues of state law); Centeno-Bernuy v Becker Farms, 564 F Supp 2d 166 (WDNY 2008) (proper to decline the exercise of supplemental jurisdiction because there was no clear authority surrounding the application of New York state municipal law); Jean-Laurent v Wilkerson, 863 F Supp 2d 350 (SDNY 2012) (proper to decline to exercise supplemental jurisdiction over novel state law issue when the parties had not cited nor had the court found any case, federal or state, directly addressing the issue.)

**(2) The Wineries' Damages Requests Clearly Demonstrate the Predominance of the State Law Claims**

Under 28 U.S.C. § 1367(c)(2) a district court may decline to exercise supplemental jurisdiction over state law claims where the state claims predominate over the federal claims. The predominance of the state law claims is established by objective measures: WOMP's most recent damages projection seeks less than \$1 million in damages for alleged constitutional violations, including the Dormant Commerce Clause and First Amendment claims. The pure state law claims, on the other hand, seek more than \$70 million in damages.

The other damages schedules relate to lost profits for the inability to host events. The theories underlying these claims overlap between federal and state law claims but, the federal bases for these claims, the First Amendment, have been the subject of previous abandonment and do not appear to be a focus of the Wineries' trial strategy as repeatedly stated (i.e., conceded) on

the record of August 8, 2022 (ECF 239 Page ID # 8670, 8672, 8699, 8700).<sup>2</sup>

A breakdown of the various schedules of damages projected by the Wineries' damages experts demonstrates the predominance of the state law claims. The Wineries' schedule one damages seek damages for the excess cost of having to purchase non-Peninsula grapes. Their summary judgment motion bases those claims exclusively on federal claims (ECF 136, pp 12-16).

The Wineries' schedule two damages seeks monetary damages based on an inability to run a catering business from their property. "Catering" is found only once in the Wineries motion for summary judgment (ECF 136, p 10), but the Court's June 3, 2022 Opinion and Order found the Ordinance preempted under State law (ECF 162, p 12). Thus, schedule two damages fall under the scope of the state law claims.

The Wineries' schedule three damages seek monetary damages based on a limitation on the hours of operation of the Wineries. The Wineries reaffirmation of their hours claim makes it abundantly clear that they view it as a State law claim and not a Federal law claim (ECF 263, PageID 9458). Therefore, schedule three damages

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2. While the Wineries have amended their complaint, the specificity required still leaves something to be desired. In a glaring omission, the Wineries have failed to state which portions of the Ordinances are subject to each of the claims they bring (ECF 29). Thus, the only record evidence of how the Wineries plan to pursue their claims is contained in their summary judgment briefing.

fall under the scope of the state law claims.

The Wineries' schedule four damages seek monetary damages based on their desire to open restaurants. However, the Wineries have again reaffirmed that these claims rely in part on state law claims (ECF 263, Page ID 9465). Thus, schedule four damages fall under the scope of state law claims.

In schedule five, the Wineries seek monetary damages for an alleged inability to commercially sell merchandise. The Wineries' motion for summary judgment relied on commercial speech and prior restraint as a reason for these claims. Thus, schedule five damages are purely federal claims.

The Wineries' schedule six and seven damages are related, and seek monetary damages for an alleged inability to host small and large events on their agriculturally-zoned land. The theories underlying these claims overlap between federal and state law claims but as noted above, the federal bases for these claims, the First Amendment, have been the subject of previous abandonment and do not appear to be a focus of the Wineries' trial strategy.

Using the lost profits projection under the Wineries' expert's supplemental report (previously filed under seal), the following characterization of damages by the Wineries' themselves confirm the predominance of the state law theories.



<b>Damage Schedule</b>	<b>Basis of claim</b>	<b>Value of claim</b>
One	Federal	\$213,847
Two	State	\$1,306,965
Three	State	\$20,692,571
Four	State	\$47,982,263
Five	Federal	\$524,686
Six	Hybrid	\$6,126,651
Seven	Hybrid	\$58,555,119

Objectively, the Wineries state law claims account for \$134,663,569, or 99% of their claim for monetary damages. Even taking out the hybrid claims in Schedules Six and Seven, the state law claims are more than half of the Wineries total claim, and clearly predominate.

**(3) The Wineries Would Not Be Harmed By Delay Because They Are Asking For A Reconsideration of State Law Issues**

The Wineries themselves are asking for a re-examination of their state law claims and if the state law claims are going to be decided anew, a state court should decide these questions of pure Michigan law. The Wineries' request for a re-assessment of state law issues, if accepted, would ensure delay, rendering any harm self-inflicted.

On the one hand, the Wineries have argued: "Given this Court's discretion of whether to exercise supplemental jurisdiction, it would seem a significant waste of resources for the Court to now decide to abandon the rulings it has already made on this issue."

(Page ID# 8495.) On the other hand, the Wineries now argue: "This Court should revisit its decision related to preemption and hours of service as its prior determination is inconsistent with Michigan law." (Page ID# 9458.)

Just today, the Wineries once again take a contrary position by claiming that the Township should not get to re-examine the Summary Judgment ruling, a right the Wineries wish to reserve for only themselves: "Additionally, the Township has argued the issues on summary judgment and again through its motion to alter or amend judgment. There is no need for this Court to hear from the Township a third time" (ECF 271, Page ID# 9758). But there is apparently a need for the Court to hear from the Wineries a third time, a dizzying inconsistency.

The Wineries believe that the state law issues should be re-examined. If the Wineries get their wish, the state courts should be tasked with deciding this novel issue of Michigan law. The Court could certify this issue to the Michigan Supreme Court under Michigan Court Rule 7.308(A)(2), but a more direct and efficient approach is for the Court to dismiss the state law claims and allow the Wineries to pursue state law claims and remedies in state court.

**Conclusion and Relief Requested**

WHEREFORE, for the above stated reasons, Defendant Peninsula Township agrees that PTP's Motion to Dismiss the Wineries' State Law Claims should be Granted.

Respectfully Submitted,

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Dated: September 20, 2022

**CERTIFICATE OF COMPLIANCE**  
**PURSUANT TO LOCAL RULE 7.2(b)(i)**

1. This brief complies with the type-volume limitation of Local Rule 7.2 because:  
X this brief contains 4765 words, excluding the parts exempted by Local Rule 7.3(b)(i)
2. This Brief was prepared using Word Perfect 2021.

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**CERTIFICATE OF SERVICE**

I hereby certify that on September 20, 2022, I electronically filed the foregoing paper with the Clerk of the Court using the CM-ECF system which will send notification of such filing to the following:

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