

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, L.L.C., a Michigan limited
liability company,
Plaintiffs,

Case No. 1:20-cv-01008

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

ORAL ARGUMENT REQUESTED

DEFENDANT PENINSULA TOWNSHIP'S
MOTION TO AMEND THE CASE
MANAGEMENT ORDER OR IN THE
ALTERNATIVE FOR LEAVE TO DISCLOSE
MICHAEL "MICK" KAHAIAN AS AN
EXPERT WITNESS

v
PENINSULA TOWNSHIP, a Michigan
municipal corporation,
Defendant,

PROTECT THE PENINSULA,
Intervenor-Defendant.

Joseph M. Infante (P68719)
Christopher J. Gartman (P83286)
Miller, Canfield, Paddock
Attorneys for Plaintiffs
99 Monroe Ave., NW, Suite 1200
Grand Rapids, MI 49503
(616) 776-6333
infante@millercanfield.com
gartman@millercanfield.com

Gregory M. Meihn (P38939)
Matthew T. Wise (P76794)
Attorneys for Defendant
37000 Woodward Avenue
Suite 225
Bloomfield Hills, MI 48304
313-756-6428
gmeihn@grsm.com
mwise@grsm.com

Timothy A. Diemer (P65084)
Eric P. Conn (P64500)
Jacobs and Diemer, P.C.
Of Counsel for Defendant
The Guardian Building
500 Griswold Street, Ste. 2825
Detroit, MI 48226
(313) 965-1900
tad@jacobsdiemer.com
econn@jacobsdiemer.com

LAW OFFICE OF TRACY J. ANDREWS
TRACY J. ANDREWS (P67467)
Attorney for Intervening
Defendant Protect the Peninsula
619 Webster Street
Traverse City, MI 49686
(231) 714-9402
tjandrews@envlaw.com

William K. Fahey (P27745)
John S. Brennan (P55431)
Christopher S. Patterson
(P74350)
*Fahey Schultz Burzych Rhodes
PLC*
Co-Counsel for Defendant
4151 Okemos Road
Okemos, MI 48864
(517) 381-0100
wfahey@fsbriaw.com
jbrennan@fsbriaw.com
cpatterson@fsbriaw.com

OLSON, BZDOK & HOWARD, P.C.
HOLLY L. HILLYER (P85318)
Attorney for Intervening
Defendant Protect the
Peninsula
420 E. Front Street
Traverse City, MI 49686
(231) 946-0044
holly@envlaw.com

PENINSULA TOWNSHIP'S MOTION TO AMEND THE CASE MANAGEMENT ORDER
OR IN THE ALTERNATIVE FOR LEAVE TO DISCLOSE
MICHAEL "MICK" KAHAIAN AS AN EXPERT WITNESS

NOW COMES the Defendant, Township of Peninsula, by and through Undersigned Counsel, and in support of its Motion to Amend the Case Management Order or in the alternative, for Leave to Disclose Michael "Mick" Kahaian as an Expert Witness, states as follows:

1. For the reasons set forth in the Brief in Support of this Motion, the Defendant, Township of Peninsula, respectfully requests that this Honorable Court grant its Motion to Amend the Case Management Order or in the alternative, for Leave to Disclose Michael "Mick" Kahaian as an Expert Witness;

2. Under Local Rule 7.1(d), the Defendant, Township of Peninsula sought concurrence from Plaintiffs' counsel and Intervenor Defendant's counsel on November 2, 2022, which was not granted.

WHEREFORE, Defendant Peninsula Township respectfully requests that this Honorable Court grant its Motion to Amend the Case Management Order or in the alternative, for Leave to Disclose Michael "Mick" Kahaian as an Expert Witness, and award any other relief that is appropriate and just under the circumstances.

Respectfully Submitted,

/s/Eric P. Conn

Timothy A. Diemer (P65084)

Eric P. Conn (P64500)

Jacobs and Diemer PC

"Of Counsel" for Defendant

500 Griswold St., Ste 2825

Detroit, MI 48226

(313) 965-1900

tad@jacobsdiemer.com

econn@jacobsdiemer.com

Dated: November 2, 2022

**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, L.L.C., a Michigan limited liability company,
Plaintiffs,

v

PENINSULA TOWNSHIP, a Michigan municipal corporation,
Defendant,

PROTECT THE PENINSULA,
Intervenor-Defendant.

Case No. 1:20-cv-01008

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

ORAL ARGUMENT REQUESTED

**DEFENDANT PENINSULA TOWNSHIP'S
MOTION TO AMEND THE CASE
MANAGEMENT ORDER OR IN THE
ALTERNATIVE FOR LEAVE TO DISCLOSE
MICHAEL "MICK" KAHAIAN AS AN
EXPERT WITNESS**

Joseph M. Infante (P68719)
Christopher J. Gartman (P83286)
Miller, Canfield, Paddock
Attorneys for Plaintiffs
99 Monroe Ave., NW, Suite 1200
Grand Rapids, MI 49503
(616) 776-6333
infante@millercanfield.com
gartman@millercanfield.com

Gregory M. Meihn (P38939)
Matthew T. Wise (P76794)
Attorneys for Defendant
37000 Woodward Avenue
Suite 225
Bloomfield Hills, MI 48304
313-756-6428
gmeihn@grsm.com
mwise@grsm.com

Timothy A. Diemer (P65084)
Eric P. Conn (P64500)
Jacobs and Diemer, P.C.
Of Counsel for Defendant
The Guardian Building
500 Griswold Street, Ste. 2825
Detroit, MI 48226
(313) 965-1900
tad@jacobsdiemer.com
econn@jacobsdiemer.com

LAW OFFICE OF TRACY J. ANDREWS
TRACY J. ANDREWS (P67467)
Attorney for Intervening
Defendant Protect the Peninsula
619 Webster Street
Traverse City, MI 49686
(231) 714-9402
tjandrews@envlaw.com

William K. Fahey (P27745)
John S. Brennan (P55431)
Christopher S. Patterson
(P74350)
*Fahey Schultz Burzych Rhodes
PLC*
Co-Counsel for Defendant
4151 Okemos Road
Okemos, MI 48864
(517) 381-0100
wfahey@fsbriaw.com
jbrennan@fsbriaw.com
cpatterson@fsbriaw.com

OLSON, BZDOK & HOWARD, P.C.
HOLLY L. HILLYER (P85318)
Attorney for Intervening
Defendant Protect the
Peninsula
420 E. Front Street
Traverse City, MI 49686
(231) 946-0044
holly@envlaw.com

TABLE OF CONTENTS

INDEX OF AUTHORITIES..... ii

INTRODUCTION..... 1

BACKGROUND INFORMATION..... 2

ARGUMENT..... 3

 I. LEAVE TO AMEND THE CASE MANAGEMENT ORDER IS PROPER
 GIVEN THE CIRCUMSTANCES..... 3

 II. THE TOWNSHIP IS SUBSTANTIALLY JUSTIFIED IN PRESENTING
 MR. KAHAIAN AS AN EXPERT PER HOWE V CITY OF AKRON..... 6

 1. There is No Surprise..... 6

 2. The Wineries Can Cure Any Surprise..... 8

 3. There Will be No Trial Disruption..... 9

 4. Mr. Kahaian’s Testimony is Important..... 9

 5. The Township’s Failure to Disclose is Reasonable . 10

 III. A REPLY TO THE WINERIES’ RESPONSE..... 12

 1. This is Not a Do-Over..... 12

 2. When Changes to the Record are Created by PTP’S
 Discovery, the Township Must Protect its
 Substantive Rights..... 12

 3. This is Second-Guessing but a Judicially Permitted
 Preservation of Rights..... 13

CONCLUSION..... 14

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

CERTIFICATE OF SERVICE

INDEX OF AUTHORITIES

	<u>Page No</u>
<u>CASES</u>	
<u>Abernathy v. Superior Hardwoods, Inc,</u> 704 F.2d 963 (7th Cir, 1983).....	6
<u>Bisig v Time Warner Cable, Inc,</u> 940 F3d 205 (6th Cir, 2019).....	6
<u>Howe v City of Akron,</u> 801 F3d 718 (6th Cir, 2015).....	6
<u>Shannon v Murray,</u> 948 F2d 1292 (7th Cir, 1991).....	7
<u>United States ex rel Morsell v NortonLifeLock, Inc,</u> 2021 WL 7540297 (DDC, 2021).....	10
<u>FEDERAL RULES OF CIVIL PROCEDURE</u>	
Fed R Civ P 60.....	1
Fed R Civ P 60(b).....	4
Fed R Civ P 60(b)(6).....	4

Introduction

Federal Rule of Civil Procedure 60 permits relief from an order under exceptional circumstances such as these, where the Sixth Circuit has allowed a party to intervene and where this Court will likely allow the intervenor discovery, and thereafter, reconsider its ruling on a prior summary judgment motion. The case record is about to change, and all parties should be allowed access to discovery to protect their substantive rights, be it PTP, the Wineries, or the Township.

With the present motion, the Township is not seeking a “do-over” despite the premature allegations by the Wineries. The Township is also not seeking to “get-one-over” on the Wineries and is not planning to re-depose every witness that has testified to date. Instead, the Township has been plainly clear on its desire to continue the deposition of CPA Eric Larson, the Wineries’ expert who issued a supplemental report after the conclusion of his initial deposition. The Township is also seeking to disclose its own expert CPA, Mr. Michael “Mick” Kahaian, whose report and opinions have already been produced. This motion seeks that relief, and the right to participate in whatever other discovery is ordered by the Court to either PTP or the Wineries.

In the alternative, the Township seeks leave to identify Mr. Kahaian as an expert witness in accordance with Sixth Circuit precedent that permits it to do so where the Wineries are not

surprised by the disclosure, they can cure any surprise that may exist, and the disclosure will not delay or otherwise impact trial, among other factors.

The relief requested is warranted given the unique procedural history this case has had, and the metamorphosis that it is about to undergo. The Court has already accepted PTP's Motion to Amend the Case Management Order yet has suggested that the Township is "stuck" with its record (ECF 239, PageID 8710), two conclusions we contend are at odds with each other. Instead, the Court should allow the parties to jointly create a single record, so if the Court reconsiders its June 3, 2022 Order as suggested by the Sixth Circuit, the Court can do so on the basis of one consistent record that applies the Township's Ordinances fairly and uniformly.

Background Information

On October 21, 2022 the Court entered its Order Resolving Objections to Magistrate Judge's Orders (ECF 284). In it, the Court stated the Township "never moved to amend the Case Management Order" and therefore was unable to present a rebuttal expert. As noted in the Court's October 21, 2022 Order, the Township sought to rebut the supplemental expert report of CPA Eric Larson, which was disclosed approximately one month before trial. The Court determined "Mr. Larson's supplemental report does not give the Township-which entirely failed to identify a rebuttal expert witness-the opportunity to file an unauthorized and untimely

rebuttal expert report” (ECF 284, PageID 10195). On the basis of the Court’s Order denying the Township’s rebuttal expert and his report, the Township seeks leave to amend the Case Management Order to allow for the addition of Michael “Mick” Kahaian as an expert on the issue of damages.

The Township is also requesting the continued deposition of Mr. Larson, who issued a supplemental report after his initial deposition wherein he admits errors were committed in calculating damages in his initial report. The Township should be given leave to continue Mr. Larson’s deposition because there were other errors identified in Mr. Larson’s deposition that he did not change. Further, his report is incomplete because it contains a placeholder for the future reduction of damages based on “fixed asset investments required” to be purchased by the Wineries if they proceed with, for example, catering or restaurant operations.

Argument

I. Leave to Amend the Case Management Order is Proper Given the Circumstances.

On August 22, 2022 the Court accepted PTP’s Motion to Amend the Case Management Order and to Stay Trial (ECF 249). Oral argument has been set on that motion for November 17, 2022 (ECF 269). Through its motion, PTP seeks to engage in discovery, including retaining experts and the filing of dispositive motions, among other things (ECF 249). To that end, the Court stated on

August 8, 2022 that the parties should plan to discuss the scope of PTP's right to engage in discovery moving forward (ECF 239, PageID 8708-8709, 8711).

Fed R Civ P 60(b)(6) allows relief from an Order where there are reasons that justify relief. In advance of the November 17, 2022 hearing, and in hopes of avoiding multiple amendments to the Case Management Order, the Township has filed the present motion seeking the right to amend the Case Management Order so that it can participate in discovery concurrently with the Wineries and PTP.

The Township argues that this relief is justified because the factual record that had been developed is about to change. As noted above, PTP has requested an amended Case Management Order because of its intervention, and the Wineries have also sought that right.¹ If both PTP and the Wineries believe they are entitled to amend the Case Management Order (and the Township agrees they are) there is no reason why that right should not extend to the Township.

Indeed, all parties are entitled to the relief permitted under Rule 60(b) because of the extraordinary circumstances that the Sixth Circuit's ruling inserted into this case when it overruled the Court and permitted PTP to intervene as an original party (ECF

¹ Even though the Wineries have not filed a motion to do so, they have encouraged the Court to reconsider its June 3, 2022 state law preemption rulings (ECF 263, PageID 9462-9465).

215). Those extraordinary circumstances continued when the Sixth Circuit entered an order reversing the Court's injunction and also noted that the Court's June 3, 2022 Order will likely need to be reconsidered (ECF 251).

Meanwhile, practical considerations also warrant an amendment of the Case Management Order that permits access to discovery for all parties. On August 8, 2022 the Court stated that "The Township, in my judgment, is stuck with the record that you've made on certain issues." (ECF 239, PageID 8710). If that were the case, reconsideration of the June 3, 2022 Order, as has been suggested by the Court, would be based on separate records: 1) the record the Township is "stuck" with, 2) the record PTP is allowed to develop, and 3) the portions of the record the Wineries feel best apply to it. That, we contend, would be error.

The better plan is to amend the Case Management Order for all parties and for all purposes for a limited timeframe, order dispositive motions to be filed by a date certain, and to move forward with trial thereafter. This will ensure a consistent ruling that applies the Township's Ordinance equally to its local residents.

II. The Township is Substantially Justified in Presenting Mr. Kahaian as an Expert per Howe v City of Akron.

The Sixth Circuit, in Howe v City of Akron, adopted the Fourth Circuit's five factor test to determine whether a late expert disclosure is substantially justified. 801 F3d 718, 747-748 (6th Cir, 2015). Those factors are:

1. The surprise to the party against whom the evidence would be offered;
2. The ability of that party to cure the surprise;
3. The extent to which allowing the evidence would disrupt trial;
4. The importance of the evidence; and
5. The nondisclosing party's explanation for its failure to disclose the evidence.

Thought not all factors must be favorable to the Township's position for the Court to determine substantial justification, Bisig v Time Warner Cable, Inc, 940 F3d 205, 219-220 (6th Cir, 2019), they all establish that the Township is substantially justified in its disclosure of Mr. Kahaian as rebuttal expert at this juncture.

1. There is No Surprise.

The Wineries may have been surprised by the late disclosure on the eve of trial, but they can no longer be. There is no trial date set, the Court is very likely going to re-open a portion of discovery and will likely re-entertain dispositive motions. Regardless, "surprise is poor reason to exclude expert testimony." Abernathy v. Superior Hardwoods, Inc, 704 F.2d 963, 970 (7th Cir,

1983). See also, Shannon v Murray, 948 F2d 1292, *2 (7th Cir, 1991).

Given the circumstances, there is no surprise here. While the Township admits it did inform the Wineries that it did not have a “testifying” expert, the Wineries were aware that this meant the Township had a consulting expert. In fact, the Township’s counsel made the Wineries aware of that fact when they informed them that the consulting expert would appear at Mr. Larson’s deposition (Ex A, email to counsel regarding consulting expert). Thus, the Wineries and their counsel knew that Mr. Larson’s methodology, which had previously not been disclosed, was under scrutiny. The Township’s retention of a consulting expert placed the Wineries on notice that a rebuttal expert on Mr. Larson’s practices and methodology could be forthcoming. This is more so the case after the Wineries received a direct and specific interrogatory on damages methodology that they promised to supplement yet still have not done so to date (Ex B, Wineries answers to interrogatories).

Meanwhile, the Joint Final Pretrial Report (ECF 190) places the Wineries on notice that the Township could call a rebuttal expert. If the Joint Final Pretrial Report did not, the Wineries knew as of July 22, 2022 when counsel made them aware that a rebuttal expert had been retained and that Mr. Larson’s methodology

was going to be challenged, meaning that the Wineries have known this for months, if not longer (Ex C, letter to counsel).

2. The Wineries can Cure any Surprise.

To the extent the Court finds that the Wineries were surprised, they can certainly cure it. While they have not yet asked, the Township is willing to produce Mr. Kahaian for a deposition. Further, the Township is willing to produce Mr. Kahaian in the Wineries' counsel's office at a date that is mutually convenient. If these terms are unacceptable, Mr. Kahaian can also be produced via video conference or telephone.

As for the documentation Mr. Kahaian relied on, all of it came from the Wineries during discovery. Thus, there is no surprise as to what Kahaian has reviewed. In fact, he is quite specific about what he has reviewed in his report. Further, Mr. Kahaian's report has already been produced, therefore that information is in the Wineries' possession.

Meanwhile, there is ample time for the Wineries to conduct discovery on Mr. Kahaian because, 1) there is currently no trial date, 2) PTP is very likely to engage in at least some discovery, which will provide the Wineries time to do their own, and 3) there is likely a need to reconsider dispositive motions based on the Sixth Circuit's most recent orders (ECF 251).

3. There Will be No Trial Disruption.

The addition of a rebuttal expert will not disrupt or delay trial. In fact, based on PTP's intervention trial will likely take place in 2023. Consequently, not only will the Wineries have sufficient time to take the deposition of Mr. Kahaian, but his inclusion as a rebuttal expert will not delay trial and will aid the Court in ruling on damages.

4. Mr. Kahaian's Testimony is Important.

The evidence and testimony on Mr. Larson's improper practices and methodology that Mr. Kahaian will provide to the Court at trial will shine a light on the sham damages the Wineries are pursuing. And, while those damages are a sham, they are a \$135 million sham that presents an existential moment for the Township. The enormity of the damages warrants a vetting of them even more now than before, since Mr. Larson and the Wineries have admitted their prior \$203 Million damages claim was disastrously unreliable.

Meanwhile, Mr. Kahaian's testimony is based in part on Mr. Larson's methods and how he has been forced to speculate whether the Wineries have suffered damages given what little information is known about their financial situations. And Mr. Kahaian is prepared to offer that testimony having looked at **more documents** than Larson has. Thus, not only will Mr. Kahaian's testimony be relevant to the Wineries' grossly overestimated damages claim and Mr. Larson's bogus report, it also will be much easier for the

Wineries to take his deposition and testimony given its relationship to Mr. Larson's report and testimony. United States ex rel Morsell v NortonLifeLock, Inc, 2021 WL 7540297 (DDC, 2021) (finding no prejudice where an expert's testimony is on the "same subject matter.").

5. The Township's Failure to Disclose is Reasonable.

The Township is justified in its delay in producing Mr. Kahaian's report. As noted above, while the Township did not make a challenge to Mr. Larson's initial report, we contend it failed to meet the requirements of Rule 26. Mr. Larson's supplemental report also does. Neither report provides: 1) Mr. Larson's methodology, 2) the facts and basis for Mr. Larson's opinion, or 3) the type of specificity required by Rule 26 regarding the documents Mr. Larson reviewed.

On that last point, when Mr. Larson's report does identify what he looked at, he did not include the "backbone" of his report (i.e., the damages matrix), or identify the "additional factors" he used to prepare his supplemental report (ECF __, p __). In fact, even after his deposition it is unclear how the single conversation Mr. Larson had with each of the Wineries caused him to change his report since he testified they all agreed the numbers he was using were correct (Larson dep, p 51-52, 56).

The Wineries have argued that the Township should have known about Mr. Larson's improper methodology and disclosed them to the

Court sooner than it did. However, the Township is not charged with clairvoyance, the parties stipulated to put off Larson's deposition until June 2022, and Larson's report does not explain his methodology. The Wineries cannot simply hide behind a *mutual* agreement and a violation of Rule 26 to block Mr. Kahaian's report. Taking the Wineries' argument and disallowing a rebuttal expert at trial would render the Sixth Circuit's substantially justified standard meaningless. Further, it would force litigants to file Rule 26 motions as a matter of course to preserve arguments that may not be necessary. This is not an efficient use of Court time or litigant expense. The better rule looks at the facts and determines on a case-by-case basis whether a litigant delayed for the sake of delay.

Here, it cannot be said that the Township was asleep at the wheel. The Township advised the Wineries that they had retained a consulting expert (who appeared at Mr. Larson's deposition). The Township listed the potential for a rebuttal expert in the Final Pretrial Order. The Township sent a letter notifying the Wineries on the day it determined it should retain a rebuttal expert to advise of same (which was 16 days after Mr. Larson's supplemental report). And the Township sent Mr. Kahaian's report to the Wineries on the day it was received.

III. A Reply to the Wineries' Response.

1. This is Not a Do-Over

On August 8, 2022 the Wineries foreshadowed their response to a motion from the Township to amend the Case Management Order: "I'm anticipating that the Township is going to say we get to start over as well." (ECF 239, PageID 8709).

The Township is not seeking a do-over and agrees that a significant portion of the record has already been established. While PTP has, for example, asked for the ability to question witnesses that have already testified, unless those witnesses raise new issues, the Township is not requesting the right to re-depose them. In fact, as has been noted in prior filings, other than naming Mr. Kahaian as a rebuttal expert witness and continuing the deposition of Mr. Larson because of his supplemental report, the Township is not presently requesting anything "new" be done. Thus, this is not a "do-over" but instead a response to Mr. Larson's supplemental report and an assurance that the Township can participate in PTP's discovery.

2. When Changes to the Record are Created by PTP's Discovery, the Township must Protect its Substantive Rights

The Township's position recognizes that there has been an intervening change in circumstance that requires the relief requested. PTP is going to alter the record, and in doing so, it is going to inevitably alter the Wineries' and the Township's

argument for summary judgment. That substantial change in circumstance arises because of the Wineries' decision to file a response in opposition to PTP's Motion to Intervene and its subsequent denial to PTP of a seat at the table while discovery was conducted. To the extent that the Wineries do not like that circumstances have changed, they have only their March 2, 2021 Response in Opposition to PTP's Motion to Intervene to thank for it (ECF 46).

3. This is Second-Guessing but a Judicially Permitted Preservation of Rights

The Wineries will also argue that the Township should not be allowed to rethink its litigation strategy and choose to name an expert now where it previously declined to do so. Such an argument is not the standard that the Township must meet to obtain an amended scheduling order or, in the alternative, leave to disclose Mr. Kahaian. The Wineries should not be permitted to move the goal posts by focusing this Court's attention on what the Township *could* have done previously; instead, the Court should recognize that the primary consideration is whether the Wineries are prejudiced (they are not) and whether they can cure any prejudice they may have (they can). That is the standard endorsed by the Sixth Circuit and is the only standard the Court should follow.

Conclusion

WHEREFORE, Peninsula Township respectfully requests that this Honorable Court grant its Motion to Amend the Case Management Order or in the Alternative for Leave to Disclose Michael "Mick" Kahaian as an Expert Witness and award any other relief that is appropriate and just under the circumstances.

Respectfully Submitted,

/s/Eric P. Conn
Timothy A. Diemer (P65084)
Eric P. Conn (P64500)
Jacobs and Diemer PC
"Of Counsel" for Defendant
500 Griswold St., Ste 2825
Detroit, MI 48226
(313) 965-1900
tad@jacobsdiemer.com
econn@jacobsdiemer.com

Dated: November 2, 2022

CERTIFICATE OF COMPLIANCE

PURSUANT TO LOCAL RULE 7.3(b)(i)

1. This brief complies with the type-volume limitation of Local Rule 7.3 because:
X this brief contains 2998 words, excluding the parts exempted by Local Rule 7.3(b)(i)
2. This Brief was prepared using Microsoft Word.

Respectfully Submitted,

/s/Eric P. Conn

Timothy A. Diemer (P65084)

Eric P. Conn (P64500)

Jacobs and Diemer PC

"Of Counsel" for Defendant

500 Griswold St., Ste 2825

Detroit, MI 48226

(313) 965-1900

tad@jacobsdiemer.com

econn@jacobsdiemer.com

Dated: November 2, 2022

CERTIFICATE OF SERVICE

I hereby certify that on November 2, 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:

MILLER, CANFIELD,
PADDOCK & STONE, PLC
JOSEPH M. INFANTE (P68719)
CHRISTOPHER J. GARTMAN (P83286)
Attorneys for Plaintiffs
99 Monroe Avenue NW, Suite 1200
Grand Rapids, MI 49503
(616) 776-6333
infante@millercanfield.com
gartman@millercanfield.com

GORDON, REES, SCULLY, MANSUKHANI
GREGORY M. MEIHN (P38939)
MATTHEW T. WISE (P76794)
Attorneys for Defendant
37000 Woodward Ave Ste 225
Bloomfield Hills, MI 48304-0925
(248) 756-6428
gmeihn@grsm.com
mwise@grsm.com

FAHEY SCHULTZ BURZYCH RHODES
WILLIAM K. FAHEY (P27745)
JOHN S. BRENNAN (P55431)
CHRISTOPHER S. PATTERSON (P74350)
Attorneys for Defendant
4151 Okemos Rd
Okemos, MI 48864
(517) 381-3150 Office
wfahey@fsbriaw.com
jbrennan@fsbriaw.com
cpatterson@fsbriaw.com

LAW OFFICE OF TRACY J. ANDREWS
TRACY J. ANDREWS (P67467)
Attorney for Intervenor-
Defendant *Protect the Peninsula*
619 Webster Street
Traverse City, MI 49686
(231) 946-0044
tjandrews@envlaw.com

OLSON, BZDOK & HOWARD, P.C.
Holly L. Hillyer (P85318)
Attorney for Intervenor-
Defendant *Protect the Peninsula*
420 E. Front Street
Traverse City, MI 49686
(231) 946-0044
holly@envlaw.com

Respectfully Submitted,

/s/Eric P. Conn
Eric P. Conn (P64500)
Jacobs and Diemer PC
"Of Counsel" for Defendant
econn@jacobsdiemer.com

Dated: November 2, 2022