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; BRYS 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.

Case No. 1:20-cv-01008

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

PROTECT THE PENINSULA'S REPLY TO PLAINTIFFS' RESPONSE TO PTP'S MOTION FOR RELIEF FROM CASE MANAGEMENT ORDERS

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PROTECT THE PENINSULA'S REPLY TO PLAINTIFFS' RESPONSE TO PTP'S MOTION FOR RELIEF FROM CASE MANAGEMENT ORDERS

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PROTECT THE PENINSULA'S REPLY TO PLAINTIFFS' RESPONSE TO PTP'S MOTION FOR RELIEF FROM CASE MANAGEMENT ORDERS

Per the Court's August 22 Order (ECF No. 246), Protect the Peninsula, Inc. (PTP) replies to Plaintiffs' response (ECF No. 234) to PTP's motion for relief from the case management orders (ECF No. 249) and addresses its role in this litigation.

INTRODUCTION

As outlined in PTP's motion, in this Court, PTP timely moved to intervene then attempted to respond to the first summary judgment motion from Plaintiffs Wineries of Old Mission Peninsula Assoc. *et al* (Wineries). (ECF No. 249, PageID.8899-8900) After intervention was denied, PTP appealed, and the Wineries and Defendant Peninsula Township (Township) pursued discovery, depositions, and dispositive motions. On June 3, this Court invalidated and enjoined enforcement of numerous zoning provisions. On July 27, the Sixth Circuit granted PTP intervention. On August 4, PTP requested relief from the case management orders, including staying trial. (ECF No. 249) After the Sixth Circuit mandate issued August 18, this Court directed PTP to file this reply and accepted PTP's proposed Answer (ECF No. 248) and proposed Motion to Dismiss Plaintiffs' state law claims (ECF No. 250). On August 24, the Sixth Circuit vacated the June 3 and July 19 injunctions and remanded for further consistent proceedings. (ECF No. 251)

At issue now is PTP's role here. (ECF No. 246, PageID.8809) In Part 1, PTP outlines what it seeks to do and why. PTP offers a proposed timeline in **Exhibit A,** its supplemental Rule 26(f) report. Part 2 outlines caselaw confirming a party who meets the Rule 24(a) standards to intervene is an original party effective when it moved to intervene – here, at the pleadings stage. The Wineries' contrary argument is misleading and misplaced, and Part 3 sets the record straight.

ARGUMENT

1. PTP may fully defend the challenged zoning provisions and shape any appropriate remedies, which requires supplemental discovery and motion practice.

This Court's prior invalidation of zoning provisions was based substantially on default by the Township, which does not adequately represent PTP's interests. (ECF No. 215, PageID.8187-8192). The Township's apparent "failures"[1] and "concessions"[2] underlie the June 3 summary judgment opinion on every pertinent issue, and the Court relied heavily on testimony of witnesses PTP has not had the opportunity to examine.[3] PTP has not had the opportunity to assert defenses, make or receive disclosures and productions, identify witnesses, engage in discovery, pursue motions, or prepare for trial.

The Sixth Circuit confirmed PTP is entitled to defend its interests in this case. In its opinion vacating the injunctions, the Sixth Circuit recognized PTP's intervention "will fundamentally alter the district court's evaluation of its decision on summary judgment." (ECF No. 251, PageID.8978) It recognized this Court initially found the Wineries' constitutional arguments "unpersuasive," but "eventually invalidated numerous subsections of the ordinance based not on the merits of the legal

[1] The June 3 Opinion says 18 times that the Township failed (or "fails") to address numerous legal issues. (ECF No. 162, PageID.6001, 6005-6006, 6008, 2014-6016, 6021-6024, 6026)

[2] The June 3 Opinion refers 10 times to the Township's "concessions" (or says the Township "conceded" or "admits" or "admitted" points). (ECF No. 162, PageID.6004-6005, 6008, 6019-6021)

[3] The June 3 Opinion cites: Robert Manigold regarding the governmental interests advanced by the zoning provisions and whether the Township considered less restrictive alternatives (ECF No. 162, PageID.6000, 6006-6007), and whether the provisions were unconstitutionally vague (*Id*. at PageID.6017-6018); Christina Deeren as evidence of the Township "conced[ing]" it improperly restricted weddings and events (*Id*. at PageID.6005), and the Court's findings on prior restraint (*Id*. at PageID.6012-6013), compelled speech (*Id*. at PageID.6015), and vagueness (*Id*. at PageID.6017, 6019); and Gordon Hayward in support of its vagueness finding (*Id*. at PageID.6017).

arguments, but on the Township's waivers, defaults, and/or concessions." (*Id.*) The Sixth Circuit found "serious questions regarding the merits" of the injunction. (*Id.*) It expressly found that, regarding laches, PTP's "substantial interests" in this case "certainly bear on any prejudice suffered by the Wineries' delay" in bringing their claims. (*Id*. at 8980) It vacated the injunction partly "because PTP's intervention changes the landscape and requires reconsideration of the district court's partial grant of summary judgment and issuance of an injunction." (*Id*. at 8982) The Sixth Circuit ordered "further proceedings in accordance with" its opinion. Implementing that order, and the one granting PTP intervention, requires allowing PTP to fully litigate this case.

To defend its interests, PTP requires the opportunity to challenge the sufficiency of the Wineries' case; to develop and present legal, expert, and factual evidence in defense of the validity of all challenged zoning provisions; and to develop and present defenses that preclude some or all Plaintiffs from obtaining the relief they seek. PTP outlines the steps it must take to defend its interests, with a proposed timeline in **Exhibit A**.

a. Amend its Answer to Add Defenses to the Wineries' Claims

Since drafting its Proposed Answer and Affirmative Defenses in February 2021, PTP identified additional defenses, which may narrow the litigation and conserve resources. For example, several Plaintiffs (*e.g.*, Brys, Tabone, 2 Lads) do not own the land their wineries sit on, which limits their available claims and relief and creates other problems. Some wineries (*e.g.*, Bonobo, Black Star) sit on land under conservation easements or other restrictions prohibiting non-agricultural commercial activity regardless of litigation success. Some Plaintiffs (*e.g.*, WOMP, Chateau Chantal) previously litigated issues they raise again in these proceedings. Some Plaintiffs accepted Special Use Permits (SUPs) (*e.g.*, Chateau Grand Traverse, Bowers Harbor) that limit their activities, irrespective of the challenged zoning provisions.

No parties would be prejudiced by PTP adding defenses, and no good would come of excluding relevant defenses. Courts "should freely give leave [to amend pleadings] when justice so requires." Fed. R. Civ. P. 15(a)(2); *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))). Adding defenses will not expand this litigation – just the opposite, it limits Plaintiffs' claims and relief. The Wineries and Township had four months to amend pleadings. (ECF No. 45, PageID.2126) PTP should be able to do so, too.

b. Review Disclosures and Productions, Make Disclosures, Identify Witnesses

PTP needs access to the full evidentiary record, including disclosures, document productions, interrogatories, and documents exchanged or filed under seal. Confidential materials may be produced per the protective order.[4] (ECF No. 75) PTP has reason to believe the existing record is incomplete. For example, some zoning provisions and SUPs have been amended but not addressed in public filings,[5] conservation easements and other parcel restrictions appear absent,[6]

[4] The Court should reject the Wineries' position that financial information should be categorically off-limits to PTP because damages are irrelevant to PTP defenses and PTP is unaffected by them. (ECF No. 234, PageID.8495) This position misunderstands that damages are an element of some of Plaintiffs' claims, including takings and Section 1983. It misunderstands PTP's defenses, which include that, even if successful, some or all Plaintiffs may be entitled to limited relief. It misunderstands that PTP is a full party, and while not liable for damages, it does not follow that damages information is irrelevant to PTP. Finally, it misunderstands the protective order, which guards against potential misuse of sensitive information.

[5] For example, the Wineries complained Section 6.7.2(19)(b)(6) limits their production area to 6,000 square feet (ECF No. 29-1, PageID.1297), and the Court invalidated it. Yet the Township amended it January 22, 2019, to increase production area to 30,000 square feet.

[6] For example, it appears Bonobo sits upon land subject to an easement perpetually restricting it to "solely agricultural and open spaces uses," which include sales of agricultural products "grown on the farm," roadside stands, processing agricultural products if a majority are grown on the farm,

and contradictory statements and outcomes from prior litigation seem missing.[7] PTP seeks to disclose its own documents and identify fact and expert witnesses to supplement the record and support its case.

c. Pursue Discovery and Take Depositions

PTP seeks to pursue reasonable discovery relevant to its defenses and to allow the other parties to conduct discovery related to its identified witnesses and disclosures. PTP does not intend to pursue discovery redundant of what already occurred, once PTP has a reasonable opportunity to review it. PTP will seek legislative history records related to the purposes and intent of zoning provisions as well as more or less stringent alternative provisions proposed, considered, rejected, amended, or overturned by referendum. Such records are likely more reliable evidence than selective witnesses' recollections in depositions taken 20-30 years after provisions were enacted.

PTP seeks to depose witnesses necessary to undermine the Wineries' claims or support PTP's defenses, including the following:

i. Township officials, including former Supervisor Robert Manigold, Zoning Administrator Christina Deeren, Zoning Enforcement Officer David Sanger, and Planner Jennifer Cram, regarding their respective roles in administering and/or interpreting the Zoning Ordinance. The Wineries relied extensively on Mr. Manigold's and Ms. Deeren's depositions in their summary judgment motion, as did the Court in its June 3 order. PTP would pursue matters not already addressed,

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and other "Agricultural Practices" as determined by the Township in conjunction with others. Deed of Conservation Easement, Jan. 5, 1998 (Liber 1196, Page 0885 *et seq*).

[7] For example, WOMP averred in 2007 litigation against the Township and Black Star Farms that zoning provisions requiring local production provide for fair development of the wine industry, inconsistent with its present position that the same provisions are economic protectionism for local farmers.

including foundation, basis of recollection, bias, and conflicts of interest. PTP understands Mr. Sanger was deposed but his deposition is not publicly available.

ii. Winery representatives, including a representative of WOMP, pursuant to Fed. R. Civ. P. 30(b)(6), regarding topics including but not limited to their relationship to landowners, their understanding of SUPs authorizing and limiting land uses, conservation easements and other non-zoning restrictions that limit winery activities on properties, prior litigation on issues raised here, and knowledge of the intent, meaning, and alternative zoning provisions considered. PTP understands these topics were not previously addressed.

d. File and Respond to Dispositive Motions

PTP seeks to respond to the Wineries' summary judgment motions and file its own dispositive motions. Alternatively, or additionally, PTP would seek relief under Fed. R. Civ. P. 60(b) from the June 3 summary judgment order, which impairs the interests it intervened to protect. PTP would raise defenses the Township failed to raise, like the numerous challenged zoning provisions that are not speech restrictions but instead traditional zoning of compatible land uses by district. PTP would oppose the Wineries' effort to invalidate lawfully enacted zoning on the basis of select Township deponents' limited testimony.

The Wineries seem to take the position PTP may *only* file its supplemental jurisdiction dispositive motion (ECF No. 250). (ECF No. 234, PageID.8495) There is no basis to limit PTP to its jurisdiction motion. The Sixth Circuit said reviving jurisdiction challenges is "the very least" PTP may do, but it may "achieve more" once it has the chance to defend the ordinances this Court initially found unpersuasive, which PTP "has not *yet* been able to" do. (ECF No. 251, PageID.8978, emphasis added) The Wineries' state law claims were the only ones raised before

PTP was denied intervention. While PTP's intervention motion was pending, the Wineries and Township delayed depositions and instead pursued settlement talks. (ECF Nos. 71, 101.) There is no basis to limit the scope of PTP's right to file and respond to motions, dispositive or otherwise.

e. Fully Participate in Mediation, Trial, and Development of Remedies

PTP is willing to participate in facilitated mediation. If any Wineries' claims survive summary judgment, PTP should be allowed to prepare and present at trial its defenses, witnesses, and evidence and cross-examine witnesses or oppose evidence offered by others. If injunctive or other relief is warranted, PTP should be heard on the parameters.

2. <u>By filing to intervene in the pleadings stage, PTP preserved its rights to participate as an original party defending against the Wineries' claims.</u>

Ample caselaw confirms that Rule 24(a) authorizes an entity meeting the standards to intervene by right to participate as "an original party." (ECF No. 249, PageID.8902-8903, citing cases); *see also United States v. Oregon*, 657 F.2d 1009, 1014 (9th Cir. 1981) ("Intervenors under Fed.R.Civ.P. 24(a)(2), [] enter the suit with the status of original parties and are fully bound by all future court orders."); *Marcaida v. Rascoe,* 569 F.2d 828, 831 (5th Cir. 1978) ("an intervenor is treated as if he were an original party and has equal standing with the original parties.") (citations omitted); *United States v. Board of Education*, 605 F.2d 573, 576 (2nd Cir. 1979) ("The very purpose of intervention, whether of right or permissive, is to enable those satisfying the requirements of Rule 24 to assert their interests in all pending aspects of the lawsuit, within the limitations of purpose imposed at the time of intervention.") (citations omitted).

The stage of proceedings is a relevant inquiry into the *timeliness* of a motion to intervene, but it does not bear on the *scope of rights* an intervener enjoys. *See* ECF No. 249, PageID.8903-8905, citing cases. Even regarding intervention motion timeliness – a far more discretionary

inquiry than the other Rule 24(a) standards and one all here concede was met here – prejudice to original parties from late-stage intervention is relevant only insofar as the would-be intervener watched from the sidelines. *See Davis v. Lifetime Capital Inc.,* 560 Fed. Appx. 477, 493 (6th Cir. 2014) ("The only prejudice relevant to the timeliness determination is incremental prejudice from a would-be intervener's delay in intervening, not prejudice from the intervention in and of itself.") (citations omitted); *United States v. Detroit,* 712 F.3d 925, 933 (6th Cir. 2013) (to the extent intervention may cause delay, that is not grounds for denial of intervention: "the analysis must be limited to the prejudice caused by *untimeliness*, not the intervention itself.") (emphasis in original) (citing *Stallworth v. Monsanto Co.*, 558 F.2d 257, 265 (5th Cir. 1977) (prejudice to existing parties is not relevant in Rule 24(a) "other than that caused by the would-be intervenor's failure to act promptly.") So long as interveners acted promptly when they knew of their interest in the case, the fact that their intervention may prejudice original parties is not a relevant basis to reject intervention. That was precisely the harm the Sixth Circuit sought to avoid in *Grubbs v. Norris,* 870 F.2d 343 (6th Cir. 1989). There, the proposed intervener filed for intervention early in the case, which was denied because it was premature before the intervener had yet suffered harm. *Id.* at 346. The intervener filed again after the district court imposed a remedy, but intervention was again denied, this time as too late. *Id.* The Sixth Circuit thus found the intervener was unacceptably "squeezed from both ends in its effort to intervene." *Id.*

Here, PTP filed early, its motion languished by no fault of PTP's, was denied, then reversed on appeal. PTP is not bound by the record developed in the interim – between when PTP timely filed to intervene at the pleadings stage and when it was finally granted. This would be contrary to caselaw and render intervention pointless – a judicial "squeeze," a "gotcha" tactic, "heads you lose, tails I win." PTP is an original party in this litigation from the pleadings stage onwards. Even

so, as discussed above, PTP seeks only to supplement the record and fill defensive gaps.

3. The Wineries' argument that PTP has limited rights is meritless.

There is no basis under Rule 24(a), caselaw, or the Sixth Circuit's opinions in this matter, to stick PTP with the case developed after it filed to intervene and without its involvement. The Wineries' contrary position is based on misleading quotes from inapposite cases. (ECF No. 234, PageID.8488-8493) PTP marches through key misstatements, though all cited cases suffer fatal flaws as precedent here.

In *United States v. California Coop. Canneries,* the Supreme Court declined to vacate a consent decree challenged by a would-be permissive intervener whose attempt at intervention came *five years* after its entry. 279 U.S. 553, 555-56 (1929).

In *Vinson v. Washington Gas Light Co.,* the federal Price Administrator *was* an early intervener who participated fully in a rate case proceeding, from prehearing through trial, but he was denied the right to attempt subsequently, in court, to invalidate the final rate order. 321 U.S. 489, 493, 498 (1944).

PTP already addressed *Hartley* – a case considering jurisdictional limitations on an intervener asserting new cross-claims against new defendants. *See* ECF No. 249, PageID.8904-8905. PTP is not expanding the scope of claims by raising more defenses and invoking additional evidence to the Wineries' claims.

Reliance on *Newport News Shipbuilding & Drydock Co. v. Peninsula Shipbuilders' Assoc.* is misplaced here. 646 F.2d 117 (4th Cir. 1981). That case involved parallel legal proceedings on the same issue arising under a collective bargaining agreement, one in district court, one before the National Labor Relations Board (NLRB). *Id.* at 120-21. NLRB moved to intervene in district court, participated as *amicus curiae*, but was denied intervention. The Fourth Circuit reversed

because NLRB met Rule 24(a) standards to intervene by right and *amicus* status does not substitute. *Id.* at 121. As *amicus,* NLRB was prevented from attacking certain contract provisions and appealing the decision because it "was deemed to lack standing." *Id.* After finding NLRB met Rule 24(a) to protect its jurisdiction and processes and preclude conflict over the same contract provisions, the Fourth Circuit allowed it to proceed to appeal but not to reopen the record. *Id.* at 122-23. All NLRB issues were questions of law, which "could not be significantly improved by [NLRB's] participation as a party in an evidentiary proceeding. The relevant facts are sufficiently developed on the existing record and appear undisputed." *Id.* at n. 9. This case bears little resemblance where there are no parallel proceedings, PTP did not participate in case development and presentation, and legal and factual considerations intertwine in the Wineries' claims and PTP's defenses.

Next up is *Florida Medical Assoc. Inc. v. Dept. of Health, Educ. & Welfare.* (ECF No. 234-1) The case was initiated in 1978 and a final injunction issued in 1979; then in *2011*, parties tried to intervene, vacate the injunction, and start over. The Florida district court found the motion untimely but did not purport to limit *intervener* participation. Instead, it recognized interveners of right "are to be treated as if they were an original party, having equal standing with the original parties." *Id.* at *14. The problem there was that *no* party – original or intervening – could, "32 years after entry of final judgment, reopen this proceeding to re-litigate old claims or raise new claims much less seek access to a particular [historic document collections]." *Id.* at *14. The case is simply inapposite here.

Moore v. Rees does not help the Wineries. (ECF No. 234, PageID.8489) The Kentucky district court granted permissive intervention to a death row inmate in a case challenging lethal injection protocols. The district court rejected an argument that interveners are different from any

other party, holding an intervener is an "ordinary party" with "the same rights and obligations as the existing plaintiffs." *Id.* at *7-*8.

Donahoe v. Arpaio is also unhelpful. (ECF No. 234, PageID.8489) It involved the plaintiff's motion to enforce a settlement for damages resolving claims against the county. The county treasurer charged with cutting the check sought late intervention, claiming an interest in ensuring proper use of county funds and arguing the payment required "verification" before he could cut the check. The Arizona district court denied intervention because both the county and court had already determined verification was inapplicable, and decision sheds no relevant light here.

McBean v. City of New York, which involved a class action where the interveners waited four years before attempting to enlarge the class, also bears no relevance nor resemblance here. 260 F.R.D. 120, 123–24 (S.D.N.Y. 2009).

Alsaada v. City of Columbus fares no better. (ECF No. 234, PageID.8490) That case involved claims of excessive police force, and the police union intervened to protect collective bargaining and mutual-aid agreement terms. The union sought intervention before a preliminary injunction hearing, and intervention was granted after the preliminary injunction issued. The Ohio district court noted "[c]ounsel has represented an ongoing interest in intervention, regardless of the fact that the preliminary injunction hearing has concluded and the motion has been ruled on." *Id*. at *12. Thereafter, the docket shows ongoing litigation, injunction modifications, stays, and a settlement agreement and permanent injunction entered eight months later. Unlike here, the initial preliminary injunction had little apparent impact on the intervener-union's interests.

The Wineries get *Tropical Cruise Lines v. Vesta Ins. Co.* all wrong. (ECF No. 234, PageID.8490) A stay entered January 6, 1992, for the original parties to arbitrate, *then* intervention

was sought March 2, 1992. The Mississippi district court reserved intervention pending the stay and lacked authority to order the proposed intervener into arbitration.

Leary v. United States actually undermines the Wineries' position. 224 U.S. 567, 576 (1912). That case was filed in December 1903, evidence taken, and a judgment issued in January 1908. Then the movant sought intervention in April 1908. The Supreme Court not only granted intervention *after* judgment issued, but agreed the intervener should be able to prove her case, reopening it to allow the intervener to recall and cross-examine witnesses.

The Wineries try but fail to distinguish cases PTP presented to support its position. They acknowledge the *Wolpe* and *Midwest Realty* appellate courts "rewound the case" to when the intervenors filed their motions," but argue that is unnecessary here because PTP was granted intervention before trial and "its right to appeal is preserved." (ECF No. 234, PageID.8491) Their argument was mooted when the Sixth Circuit vacated the injunction so PTP may be heard. The Wineries' assertion that *Stupak-Thrall* means this Court "has the Sixth Circuit's approval to keep its deadlines intact" is erroneous and also mooted by the vacation order. (*Id.* at PageID.8491-8492) And the Sixth Circuit disagreed that *Sanguine II* was so "unique" that it "should have no impact here." (*Id.* at PageID.8493) The Sixth Circuit cited *Sanguine II* approvingly in concluding that "PTP's intervention changes the landscape and requires reconsideration of the district court's partial grant of summary judgment and issuance of injunction." (ECF No. 251, PageID.8982). The opinion recites the same quote the Wineries used to try to distinguish it, indicating <u>*this case*</u> is a "'unique situation in which prejudice to the intervenors can be avoided only be setting aside the prior judgment and allowing the opportunity to litigate the merits of the case'" and that "res judicata does not bind the intervenors, who 'were not adequately represented in the first instance.'" (*Id.*) The Wineries' assertion that, unlike in *Sanguine II*, the Township "has not conceded . . .

anything," is contrary to their previous assertions and this Court's and the Sixth Court's interpretations of the record. (ECF No. 251, Page.ID.8978) And contrary to the Wineries' claim, *Johnson v. Lodge #93* did not hold or suggest that *Sanguine II* applies only when interveners file after final judgment. 393 F.3d 1096, 1109 (10th Cir. 2004).

The Wineries' request to limit the scope of PTP's intervention is untimely, misplaced, and invites error. (ECF No. 234, PageID.8494-8495) They failed to raise this argument in opposing PTP's intervention in this Court or the Sixth Circuit. They cite cases that imposed limits on late-filed interveners or those seeking limited intervention or asserting limited interests, which is not this case. The Wineries' claims are sweeping in scope and broadly threaten PTP members' property interests and their quiet use and enjoyment of property. The Sixth Circuit was fully aware of proceedings here and the claims' substantial impairment of PTP's interests. It declined to limit PTP intervention to particular issues or claims, and it would be error do so now.

The Wineries consistently misinterpret cited cases, and they also inconsistently interpret what PTP may do as an intervener. They previously recognized intervention means PTP may depose witnesses, including those already deposed. (ECF No. 71, PageID.3180, "[P]laintiffs and Defendant have delayed taking depositions with the intention of avoiding the possibility that witnesses will need to be deposed twice should the Court grant [PTP intervention].") Now they argue PTP has no meaningful litigation rights, including to depose witnesses previously deposed. (ECF No. 234, PageID.8497.) They previously argued PTP was powerless to file *anything* after its initial motion to intervene and before a ruling, else face sanctions. (ECF No. 60, PageID.2731.) They now argue PTP is *bound* by all proceedings that transpired while PTP's intervention motion was pending and on appeal, and all additional defenses should be deemed waived. (ECF No. 234, PageID.8488-8493, 8496.) They also previously recognized that, after intervention is granted, PTP

would be "entitled to litigate fully on the merits and be considered a party for all purposes." (ECF No. 60, PageID.2728-2729, internal quotations and citations omitted) They now ask this Court to limit PTP's litigation rights. (ECF No. 231, PageID.8495-8498) These positions are irreconcilable except in attempting to silence PTP.

CONCLUSION

PTP does not seek unlimited reopening but instead seeks reasonable time to develop and present its case showing the Wineries' claims fail, the zoning provisions are valid, and the Wineries are not entitled to sweeping relief. Preventing PTP from doing so in a reasonable and meaningful way would undermine its intervention and contradict the Sixth Circuit decisions in this case.

Respectfully submitted,

Date: September 6, 2022

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CERTIFICATE OF COMPLIANCE WITH RULE 32(A)

This Brief complies with the word count limit of L. Ci. R. 7.3(b)(i). This brief was written using Microsoft Word version 2016 and has a word count of 4,261 words.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Tracy Jane Andrews, hereby certify that on the 6th 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)

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; BRYS 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.

Case No. 1:20-cv-01008

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

PROTECT THE PENINSULA'S SUPPLEMENT TO JOINT REPORT OF THE PARTIES' RULE 26(f) CONFERENCE REPORT (ECF 37)

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PROTECT THE PENINSULA'S SUPPLEMENT TO JOINT REPORT OF THE PARTIES' RULE 26(f) CONFERENCE REPORT (ECF 37)

With the recent addition of Intervening Defendant Protect the Peninsula (PTP) in this litigation, PTP provides its supplement to the joint Fed. R. Civ. P. 26(f) report filed by Plaintiffs Wineries of Old Mission Peninsula Assoc. *et al* (Plaintiffs) and Defendant Peninsula Township (Township). (ECF No. 37)

1. **Jurisdiction**: PTP contests the Court's jurisdiction over the state law claims, as addressed in its Motion to Dismiss (ECF No. 250)

2. **Jury or Non-Jury**: The case is a non-jury case.

3. **Statement of the Case**: PTP's position is that the challenged Zoning Ordinance provisions are not unconstitutional violations of freedom of speech, freedom of expression, free exercise of religion, or freedom of association under the First and Fourteenth Amendments to the United States Constitution. The challenged Zoning Ordinance provisions also do not violate the Dormant Commerce Clause, do not constitute a regulatory taking, do not violate due process of law, are not preempted by state law, and do not violate the Michigan Zoning Enabling Act. PTP's position is also that the federal courts lack jurisdiction over Plaintiffs' state law claims.

PTP asserts that the claims of some or all Plaintiffs are barred by affirmative defenses including but not limited to estoppel, res judicata, failure to exhaust administrative and legal remedies, waiver, statute of limitations, and laches. Plaintiffs have also failed to join necessary parties including the owners of the real property upon which wineries are located and also the holders of

the Special Use Permits authorizing their use of that property for winery purposes. Some or all Plaintiffs lack standing and/or their claims are moot because the real property on which their wineries are located is subject to conservation easements or other restrictions prohibiting them from engaging in the same activities they allege the Zoning Ordinance unlawfully prohibit. PTP further asserts that Special Use Permits, conservation easements, and other parcel and zoning restrictions, which Plaintiffs do not challenge in this litigation, may practically or legally limit some or all activities that Plaintiffs seek the right or ability through this litigation to undertake, which impacts the relief and remedies available to Plaintiffs in this court in the unlikely case they are successful in their claims.

4. **Joinder of Parties and Amendment of Pleadings:** PTP expects to amend its answer and affirmative defenses by September 14, 2022.

5. **Disclosures, Exchanges and Discovery:** PTP proposes as follows:

ACTION	DATE
Parties to make initial disclosures pursuant to Fed. R. Civ. P. 26(a)(1)	PTP will make initial disclosures 30 days after review of Plaintiffs' and Township's initial disclosures and documents exchanged between Plaintiffs and Township in prior discovery
Fed. R. Civ. P. 33, 34, 36 and fact witness depositions deadline.	60 days after receipt of Plaintiffs' and Township's initial disclosures and documents exchanged in discovery, or 60 days after the Court issues an amended scheduling order, whichever is later
Deadline for identification of categories of experts, disclosure of opening expert reports pursuant to Fed. R. Civ. P. 26(a)(2) on which that party bears the burden of proof.	30 days after the Court issues an amended scheduling order
Deadline for disclosure of rebuttal expert testimony.	60 days after the Court issues an amended scheduling order
Deadline for completion of expert discovery including depositions.	90 days after the Court issues an amended scheduling order
Deadline for submission of summary judgment motions.	PTP will file motions, and respond to Plaintiffs' and Township's constitutional summary judgment motions, 120 days after the Court issues an amended scheduling order

Parties to file Proposed Joint Final Pretrial Order and Motions in Limine.	To be determined by the Court
Pretrial conference.	To be determined by the Court
Trial Date.	To be determined by the Court

PTP does not seek changes to the limitations on discovery imposed by the Federal Rules of Civil Procedure or the local rules of this Court, except as to depositions of previously deposed witnesses. The parties previously deposed 20 witnesses, and PTP was unrepresented at 18 of those. PTP requests the right to depose the witnesses who were previously deposed without PTP's presence in order to ask supplemental questions, and without further leave from the Court under Rule 30(a)(2)(A)(ii). However, PTP anticipates that initial disclosures, document exchanges, and other discovery methods will obviate the need to reopen and ask supplemental questions for many previously deposed witnesses.

PTP requests that all discovery exchanged to date, including all documents filed under seal, be shared immediately. PTP is willing to abide by the terms of the protective order the Court entered in this case. (ECF No. 75)

The parties previously agreed to produce all documents electronically in pdf or common computer- readable imaging format, and sought to reserve the right to request examination of original paper documents, and the exchange of computerized source documents (such as emails, spreadsheets or word processing documents) where the circumstances reasonably show the need to review document creation dates, metadata and the like. The parties proposed this structure in lieu of a more formal ESI protocol based on the needs of this case. PTP is agreeable to these terms for the exchange of documents.

6. **Motions**: PTP anticipates that it will respond to the Plaintiffs' and Township's previously filed dispositive constitutional motions, and file its own dispositive motions, within 120 days after the Court issues an amended scheduling order.

PTP acknowledges that it is the policy of this Court, consistent with W.D. Mich. LCivR 7.1(d), to prohibit consideration of non-dispositive discovery motions unless accompanied by a certification that the moving party has made a reasonable and good faith effort to reach agreement with opposing counsel on the matters set forth in the motion.

7. **Alternative Dispute Resolution**: PTP is willing to participate in facilitated mediation with the parties as directed by the Court.

8. **Length of Trial**: PTP estimates that it will add up to 3 days for trial.

9. **Prospects of Settlement:** Unknown.

10. **Electronic Document Filing System**: PTP understands that W.D. Mich. LCivR 5.7(a) requires attorneys to file and serve all documents electronically, by means of the Court's CM/ECF system, unless the attorney has been specifically exempted by the Court for cause or a particular document is not eligible for electronic filing under the rule. PTP is represented by counsel who have been using the ECF system.

11. **Other**: PTP has no additional matters for the Court at this time.

Respectfully submitted,

Date: September 6, 2022

By: _____

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Date: September 6, 2022

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