UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MICHIGAN

WINERIES OF THE OLD MISSION PENINSULA ASSOCIATION, *et al.*,

Plaintiffs,

v.

PENINSULA TOWNSHIP, Michigan Municipal Corporation,

Defendant,

and

PROTECT THE PENINSULA,

Intervenor-Defendant.

Case No: 1:20-cv-01008

Honorable Paul L. Maloney
Magistrate Judge Ray S. Kent

ORAL ARGUMENT REQUESTED

PLAINTIFFS' REPLY IN SUPPORT OF ITS MOTION FOR PARTIAL SUMMARY JUDGMENT ON PROTECT THE PENINSULA'S AFFIRMATIVE DEFENSES

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I. INTRODUCTION

The Wineries' motion for summary judgment implicates basic principles of Rule 56. In response, PTP must "put up or shut up" by identifying facts in support of its affirmative defenses. PTP cannot rely on the hope that facts supporting its defenses will come out at trial. Yet PTP's response is rife with just that—hollow statements of defenses it may raise depending on the Wineries' proofs at trial. Because PTP has not met its burden of proof for its affirmative defenses under Rule 56, and because PTP abandoned other defenses, the Wineries are entitled to summary judgment on those affirmative defenses.

II. ANALYSIS

The party asserting an affirmative defense bears the burden of proof. *Buntin v. Breathitt Cnty. Bd. of Educ.*, 134 F.3d 796, 799 (6th Cir. 1998). As the moving parties, the Wineries have "the initial burden of proving that no genuine issue of material fact exists and that [they are] entitled to judgment as a matter of law." *Cox v. Ky. Dep't of Transp.*, 53 F.3d 146, 149 (6th Cir. 1995). By doing so, the Wineries "challenge the opposing party to put up or shut up on a critical issue." *Id*. (internal quotations omitted). PTP, in response, "must do more than simply show that there is some metaphysical doubt as to the material facts." *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586 (1986). PTP must show by affidavits, depositions, answers to interrogatories, and admissions that specific facts exist demonstrating a genuine issue for trial. *See* Fed. R. Civ. P. 56(c), (e); *see also Celotex Corp. v. Catrett*, 477 U.S. 317, 323-24 (1986). "Rule 56(c) mandates the entry of summary judgment . . . against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." *Celotex*, 477 U.S. at 322.

PTP suggests the Wineries should have moved to strike its affirmative defenses instead of for summary judgment. However, the better time to attack affirmative defenses is on a developed

record. *See Street v. J.C. Bradford & Co.*, 886 F.2d 1472, 1478 (6th Cir. 1989) ("the movant could challenge the opposing party to 'put up or shup up' on a critical issue. After being afforded sufficient time for discovery, as required by Fed. R. Civ. P. 56(f), if the respondent did not 'put up,' summary judgment was proper."). PTP cannot cling to the "hope" that something may develop at trial; if PTP has evidence its affirmative defenses are supportable, it must bring that evidence now. *See id.* at 1479 (explaining a non-movant cannot rely on "hope" that the trier of fact will disbelieve the movant come trial, but rather "must present affirmative evidence in order to defeat a properly supported motion for summary judgment." (Internal quotations omitted)).

Finally, when a party mislabels an element of proof as an affirmative defense, summary judgment is appropriate. *See Design Basics, LLC v. Ashford Homes, LLC*, 2018 WL 6620438, at *9 (S.D. Ohio Dec. 18, 2018) ("These purported defenses address elements of copyright infringement upon which Plaintiffs will bear the burden of proof. Defendants erred in labeling these as affirmative defenses pursuant to Federal Rule of Civil Procedure 8(c). The Court will grant summary judgment [on the] Affirmative Defenses only insofar as they are not affirmative defenses at all.").

A. PTP cited no authority allowing it to expand the scope of affirmative defenses.

PTP is incorrect that it may enlarge the scope of affirmative defenses and its citations are not relevant. For example, PTP quotes 59 Am. Jur. 2d Parties 227[1] as authority for alleging its own affirmative defenses. But that treatise was citing to state court cases from Missouri and North Carolina which are inapplicable to intervention in Federal Court. Another case, *Alvarado v. J.C. Penney Co., Inc.*, 997 F.2d 803 (10th Cir. 1993), did not involve an intervenor raising additional affirmative defenses. PTP does not cite any case to counter the rule that adding affirmative

[1] PTP's brief contains a reference to the incorrect section.

defenses "not challenged by either of the primary parties [] goes beyond the scope of the original litigation" and are precluded. *Torrington Co. v. U.S.*, 731 F. Supp. 1073 (C.I.T. 1990.)

B. PTP conceded several of its affirmative defenses.

PTP does not intend to pursue affirmative defenses E, HH, KK, and QQ (ECF No. 457, PageID.16055 and 16062). PTP has conceded affirmatives defenses O, OO and PP as stale (ECF No. 457, PageID.16062). Although not specifically referenced in PTP's response, PTP also conceded affirmative defense LLL. PTP concurs that "pleading additional affirmative defenses requires leave to amend." (See ECF No. 457, PageID.16072).

This Court should grant Plaintiffs' motion with respect to these affirmative defenses.

C. PTP agrees that A, F-H, M-R, T-EE, OO, PP, BBB are not affirmative defenses.

PTP "concurs that [A, F-G, M, O-R, T-EE, OO and PP][2] are not 'affirmative defenses'[.]" (ECF No. 457, PageID.16063). Accordingly, "affirmative defenses" A, F-G, M, O-R, T-EE and OO-PP must be ruled out as operating as total bars to Plaintiffs' claims. Similarly, PTP admits that "Defenses H, N and BBB . . . are not affirmative defenses." (ECF No. 457, PageID.16071). Additionally, PTP "concurs that the admissibility of pre-litigation correspondence is an evidentiary question" such that affirmative defenses I and L are not affirmative defenses. (ECF No. 457, PageID.16062).

The Wineries are entitled to summary judgment on these defenses because they are not affirmative defenses. *Design Basics*, 2018 WL 6620438, at *9; see also *Navarro v. Procter & Gamble Company*, 515 F. Supp. 3d. 718 (S.D. Oh. 2021).

[2] PTP also conceded O, OO and PP as stale. (ECF No. 457, PageID.16062)

D. The Wineries are entitled to summary judgment on affirmative defenses I-L and GGG-HHH.

Affirmative Defenses GGG and HHH assert that the Wineries' claims are barred by res judicata, collateral estoppel and/or judicial estoppel due to prior litigation. PTP's primary argument to avoid summary judgment is that these are "non-affirmative defenses[.]" (ECF No. 457, PageID.16065). But res judicata and estoppel are listed as affirmative defenses in Fed. R. Civ. P. 8(c)(1). Therefore, PTP bears the burden of proof.

Substantively, PTP's response merely claims an entitlement to assert res judicata and estoppel without connecting the dots as to why prior litigation bars certain claims. Instead, PTP offers "may" or "may not" and "either/or" scenarios where previous litigation may have a bearing on this case. PTP goes so far as to say "[t]here may be others" without identifying what those "others" may be. This invocation of "metaphysical doubt" is improper at the Rule 56 stage. *Matsushita*, 475 U.S. at 586. PTP was required to "put up or shut up" on res judicata and estoppel. *Cox*, 53 F.3d at 149. It did not, so the Wineries are entitled to summary judgment on GGG and HHH.

PTP's affirmative defenses I-L suffer from the same flaw. PTP pins the survival of J and K, just like I and L, on whether and to what extent Plaintiffs' may offer admissions by the Township's agents as evidence. PTP's response really means that I, J, K and L are not affirmative defenses but evidentiary objections that are properly left for a motion *in limine*.

E. Plaintiffs are entitled to summary judgment on PTP's remaining affirmative defenses.

1. This Court already resolved affirmative defenses V and AA.

Plaintiffs are entitled to summary judgment on PTP's affirmative defenses V and AA because this Court has already determined that the Winery Ordinances are unconstitutionally vague and violate the dormant Commerce Clause. (ECF No. 162, PageID.5995-6001,

PageID.6016-6019.)

2. PTP's affirmative defenses B, C, G and T relate to damages for which PTP is not liable.

Despite the Sixth Circuit determining that PTP cannot be liable for money damages, PTP responds that it has not been prevented from pleading damage defenses. (*See* ECF 457, PageID.16045. But the Wineries' motion is not about pleading practice. PTP also appears to argue that evidence on the Wineries' damages might be relevant for some other purpose. *See id*. ("PTP may present contrary evidence, and that contrary evidence may relate to these defenses and others."). But if PTP seeks to introduce damages evidence at trial, the Wineries can object, and this Court will then decide whether the evidence is admissible for that other purpose. The Wineries have moved for summary judgment, not filed a motion *in limine*.

With respect to affirmative defense B (statute of limitations), this Court has already held that "PTP's assertion that the Wineries' Commerce Clause claims are time-barred ignores the fact that, for claims brought via § 1983 for alleged 'ongoing' constitutional violations from an unconstitutional statute, a new claim arises and a new statute of limitations period commences with each new injury. *See Kuhnle Bros. Inc. v. Cty. of Geauga*, 103 F.3d 516, 522-23 (6th Cir. 1997)." (ECF No. 319, PageID.11888.)

PTP functionally seeks further reconsideration, urging this Court to ignore *Kuhnle*, and instead follow a Ninth Circuit case, *Bird v. State*, 935 F.3d 738 (9th Cir. 2019). This Court got this issue correct the first time. The effect of the limitations period is to limit the Wineries' damages. In *Kuhnle*, the Sixth Circuit analyzed the application of the statute of limitations on a county resolution that barred truck traffic on certain roads. 103 F.3d at 518. The court applied the continuing violations doctrine and found that a facial challenge was not time barred. The court noted this was because the county's ban continued after the date the resolution was enacted, injury

to the trucking firm continued to accrue, and further injury could have been avoided if the county repealed the resolution. *Id*. at 522. These facts appropriately mirror this case—the Township's restrictions continued after the Winery Ordinances were enacted (and indeed the Township continued to enforce its restrictions), injury to the Wineries continued to accrue, and further injury could have been avoided if the Township repealed the Ordinances.

Unlike *Kuhnle*, *Bird* did not involve continuing enforcement of an unconstitutional ordinance. In *Bird*, a mother was placed on the Hawaii Central Child Abuse Registry but did not file suit until after the limitations period had run. 935 F.3d at 739. She alleged that her placement on the Registry violated due process. *Id*. at 748. The Ninth Circuit distinguished *Kuhnle* and found her claim barred by the limitation period because there was one wrongdoing—placing her on the Registry—and that the continuing effect thereof did not constitute a continuing violation. *Id*. The Sixth Circuit has not adopted, or even cited favorably to, *Bird* and its facts are distinguishable.

3. PTP's laches and equitable time-based theories (II, ZZ, AAA, CCC and DDD) are inapplicable.

PTP's response superficially states that "Courts throughout the Sixth Circuit have consistently applied laches to claims for equitable relief." (ECF No. 466, PageID.16845.) But PTP does not argue why this Court should apply laches to this case, only that it can apply laches. However, "[c]ourts in the Sixth Circuit consistently hold that the doctrine of laches does not bar prospective injunctive relief, such as that sought in this case." *McKeon Products, Inc. v. Honeywell Safety Products USA, Inc.*, 2021 WL 287729, *5 (E.D. Mich. Jan. 28, 2021) (citing *Nartron Corp. v. STMicroelectronics, Inc.*, 305 F.3d 397, 408 (6th Cir. 2002)); *Kellogg Co. v. Exxon Corp.*, 209 F.3d 562, 568-69 (6th Cir. 2000) (laches "precludes a plaintiff from recovering damages, it does not bar injunctive relief"); *Cernelle v. Graminex, LLC*, 437 F. Supp. 3d 574, 603 (E.D. Mich. 2020)

("laches does not foreclose the plaintiff's right to injunctive relief and post-filing damages").

The cases PTP cites are in accord or inapplicable. In *Lichtenstein v. Hargett*, 489 F. Supp. 3d 742, 752 (M.D. Tenn. 2020), the court determined that it "will not apply laches" to bar a motion for a preliminary injunction regarding an election statute. *Obiukwu v. U.S.*, 2001 WL 856987 (6th Cir. June 19, 2001), was a criminal case where a defendant, eight years after his property was seized, brought an equitable claim for return of property which had been destroyed. *Johnson v. Indresco, Inc.*, 1997 WL 468329 (6th Cir. Aug. 13, 1997) involved a claim for "nuisance, negligence, and trespass" related to pollution from a neighbor over a thirty-year period. *Id*. at *1. The Court determined that such a long delay prohibited any injunctive relief because the defendant could have improved its emission controls. *Id*. at *3. But the court also determined that there was a "continuing violation" and that the "district court properly followed the prevailing rule in Michigan" and allowed damages for the three-year limitations period. *Id*. Finally, *Eason v. Whitmer*, 485 F. Supp. 3d 876, 880 (E.D. Mich. Sept. 9, 2020) was an election case, requiring "extreme diligence and promptness."

PTP also asserts "zoning-related challenges may be time barred and dally may foreclose injunction." (ECF No. 457, PageID.16049.) But unlike the constitutional challenges here, PTP cites cases asking whether a municipality's failure to follow procedures like publishing its proposed ordinance in a newspaper render an ordinance void. *See Thatcher Enterprises v. Cache Cnty. Corp.*, 902 F.2d 1472, 1474 (10th Cir. 1990) (applying laches to claim that county zoning ordinance was void because it was not published in the county's ordinance book 17 years prior); *Richmond Twp. v. Erbes*, 489 N.W.2d 504, 508 (Mich. Ct. App. 1992) (failure to follow procedural requirements); *Edel v. Filer Twp., Manistee Cnty.*, 211 N.W.2d 547, 548 (Mich. Ct. App. 973) (applying laches on same theory as *Erbes*); *Northville Area Non-Profit Hous. Corp. v. City of*

Walled Lake, 204 N.W.2d 274, 280 (Mich. Ct. App. 1972) (denying attempt to invalidate ordinance on theory that it was not published in newspaper 4 years prior).

The only case PTP cites concerning constitutional issues is *Bylinski v. City of Allen Park*, 8 F. Supp. 2d 965 (E.D. Mich. 1998). There, taxpayers sued the City to get a refund for property taxes allegedly levied in violation of Michigan's Headlee Amendment. *Id.* at 967. The court ruled that laches barred the suit because the taxpayers "did not bring this suit until three years after first being assessed for the cost of the sewer and waste water treatment improvements, after more than $220 million in bonds had been sold, and after the improvement project was 85% completed." *Id.* at 972. *Bylinski* is distinct from this case.

Finally, even if laches were applicable, "dismissal under the laches doctrine is not mandatory and is appropriate only in the sound discretion of the court." *Memphis A. Phillip Randolph Institute v. Hargett*, 473 F. Supp 3d 789 (M.D. Tenn. 2020.) (internal quotations omitted.)

4. The Wineries did not waive their right to challenge unconstitutional restrictions as asserted in affirmative defense NN.

PTP's affirmative defense NN states the Wineries "have waived their ability to challenge the zoning conditions placed upon their [SUPs]." (ECF No. 291, PageID.10332.) "Waivers of constitutional rights not only must be voluntary but must be knowing, intelligent acts done with sufficient awareness of the relevant circumstances and likely consequences." *Brady v. United States*, 397 U.S. 742, 748 (1970). Therefore, in their original motion, the Wineries squarely put PTP's waiver defense at issue. "There is simply no evidence that the Wineries did, or could have, waived their right to challenge the Ordinances as violating the Constitution and Michigan law." (ECF No. 442, PageID.15645.) Stated another way, the Wineries have asked PTP to "put up or

shut up" by identifying the alleged waivers. PTP's scattered response does not identify the alleged waivers.

First, PTP appears to argue that zoning is a superior law to the United States Constitution. This position has been wrong for more than 200 years because the Constitution is the "fundamental and paramount law of the nation." *Marbury v Madison*, 5 U.S. 137, 177 (1803).

Next, PTP alleges that its members "may enforce SUP violations, if harmed, if they are nuisance *per se* or in fact." (ECF No. 457, PageID.16057.) But this presupposes that the Ordinances are constitutional, which this Court has already declared are not. (*See* ECF 162 regarding vagueness and commerce clause.) Further, this speculation as to "if" a future event might occur is nothing more than "metaphysical doubt" as PTP has admitted that none of their members have been harmed to date. (See Exhibit 1: Rogg Resp. 6-7.)

PTP also argues that parties can waive constitutional rights. In those cases—waiving rights to jury trials, confronting witnesses, and counsel—courts still require the waiver to be knowing and intelligent. PTP does not respond to the caselaw cited by the Wineries holding that "courts are loath to find that parties have waived their constitutional rights," (ECF No. 442, PageID.15644), nor does PTP provide evidence of such waivers or respond to the fact that, even if the SUPs contained waivers, how such a waiver would not violate the unconstitutional conditions doctrine. (*Id*. at PageID.15644-15645.) By not responding, PTP has conceded this issue.

At most, PTP alleges that Plaintiff Bonobo waived its right to conduct guest activities. This Court has already held that the term "guest activities" is vague. (ECF No. 162, PageID.6019.) If the term is vague, then how could Bonobo waive its right to engage in activities that the Township cannot even define? PTP does not explain. And, regardless, the Wineries' claim in this case is not that they have rights to engage in guest activities, whatever those are, but that they have First

Amendment rights to engage in speech activities and that they have rights granted by the Michigan Liquor Control Code to engage in other activities. Whether Bonobo waived its rights to engage in vague guest activities is immaterial.

5. PTP's public and private nuisance affirmative defenses III and JJJ fail.

The Wineries asserted that they could not locate a single case where public or private nuisances were held to be an affirmative defense, and PTP does not dispute that assertion. Nor does PTP dispute that Michigan law describes public and private nuisances as causes of actions and not defenses. *See Adkins v. Thomas Solvent Co.*, 487 N.W.2d 715, 719-23 (Mich. 1992) (explaining nuisance actions). This alone warrants disposing of III and JJJ.

PTP does not have a response to the Wineries' ripeness argument, either. It does not allege that the Wineries are presently engaged in a nuisance, but rather that they might be so engaged in the future if they engage in certain uses. This is the hallmark of speculation and demonstrates a claim of nuisance is not ripe. *See Winget v. JP Morgan Chase Bank, N.A.*, 537 F.3d 565, 581-82 (6th Cir. 2008) ("A claim is not ripe for adjudication if it rests upon contingent future events that may not occur as anticipated, or indeed may not occur at all") (cleaned up and citations omitted)). PTP appears to be arguing that any such use would constitute a nuisance per se, but PTP does not develop this point or cite to authority for this proposition.

PTP's primary response is that land-use law allows some uses to be regulated or prohibited—but this misses the point. There is no dispute that the Winery Ordinances regulate or prohibit uses the Wineries would like to make of their properties; the question is whether those regulations or prohibitions violate the laws and Constitution of the State of Michigan or of the United States. If they do, the fact that they are "zoning regulations" does not save them. If zoning regulations were so exempt, this would stand the Supremacy Clause and the doctrines of preemption on their heads.

This Court's Summary Judgment Opinion already explains that local regulation cannot violate the United States Constitution. (*See* ECF 162, PageID.5995-6001 (finding parts of the Ordinances violative of the dormant Commerce Claus and PageID.6016-6019 (finding parts void for vagueness under the Due Process Clause.)) And, likewise, local regulations may be preempted by the laws and Constitution of the State of Michigan. *See Ter Beek v. City of Wyoming (Ter Beek II)*, 846 N.W.2d 531, 541 (Mich. 2014) ("Under the Michigan Constitution, the City's 'power to adopt resolutions and ordinances relating to its municipal concerns' is 'subject to the constitution and the law'" (quoting Mich. Const. 1963, art. 7, § 22).

Village of Euclid v. Ambler Realty Co., 272 U.S. 365 (1926), does not save PTP as the Court found that local authorities had the power to enact zoning regulations—something that the Wineries do not contest. *Id*. at 390. Local zoning ordinances, however, are still subject to the Constitution. *See, e.g., Christy v. City of Ann Arbor*, 824 F.2d 489, 491 (6th Cir. 1987) (summarizing cases striking down zoning ordinances as unconstitutional).

6. PTP's assertion that the SUPs are contracts does not make them so and affirmative defense JJ fails.

PTP's response did not establish the elements of a contract that could form a basis for Affirmative Defense JJ. This Court has already determined that the SUPs are not contracts. (ECF No. 162, PageID.5994.) Accordingly, this Court should grant summary judgment in Plaintiffs favor.

7. Despite PTP's assertion to the contrary, standing is not an affirmative defense.

Just as this Court should dispose of the Affirmative Defenses that PTP agrees are not affirmative defenses, it should dispose of Affirmative Defenses VV, WW and XX.

Despite this Court's finding that each Winery has standing to bring its claims, (see ECF No. 442, PageID.15637), PTP nevertheless raises this non-affirmative defense to support its

Motion for Summary Judgment. (*See* ECF 470-2.). Should this Court grant PTP's motion for leave to exceed word and page counts, briefing related to PTP's Motion for Summary Judgment is the proper forum to address these non-affirmative defenses.

F. PTP failed to meaningfully respond to the remaining arguments.

1. PTP Affirmative Defenses D, H, J, K, N, LL, YY and BBB cannot proceed.

At best, PTP has abandoned these affirmative defenses; at worst, they were conditionally pleaded. In either case, they cannot stand.

PTP's failure to respond adequately to the Wineries' arguments on many of the affirmative defenses only establishes that the Wineries are entitled to summary judgment on them. *See, e.g.*, *U.S. v. Michigan*, 2023 WL 5444315, at *9 (W.D. Mich. Aug. 24, 2023) (perfunctory treatment of arguments are deemed waived); *Blair v PNC Fin. Servs. Grp., Inc.*, 2015 WL 13037267, at *2 (E.D. Mich. Apr. 24, 2015 (failing to respond to summary judgment argument concedes there is no genuine dispute).

PTP's brief reveals that Affirmative Defenses H, J, K, N, LL and BBB were conditionally pleaded. A party must have a good faith basis to assert an affirmative defense. *See Greenspan v. Platinum Healthcare Grp., LLC*, 2021 WL 978899, at *1 (E.D. Pa. Mar. 16, 2021) (striking affirmative defenses where defendant conditionally pleaded them without performing good faith investigation into relative facts and law). Many of PTP's defenses are simply denials and appear to have been asserted to avoid waiver. Now that discovery is closed, PTP has all the facts and law in hand to articulate the basis for its defenses. It cannot continue to wait for trial in the "hope" that the basis for its defenses will materialize. *J.C. Bradford*, 886 F.2d at 1479.

In Affirmative Defense LL, PTP vaguely asserts that the Wineries' claims "may be barred by the doctrine of abstention." (ECF No. 291, PageID.10332.) PTP posits that "[o]nce the

Wineries present their claims and evidence . . . it *may become evident* that abstention is appropriate[.] *At that time*, PTP may request appropriate relief." (ECF No. 457, PageID.16072 (emphasis added).). This is not "putting up" at the summary judgment stage.

PTP's response similarly characterizes Affirmative Defenses H, N and BBB as "not-yet-ripe defenses." (ECF No. 457, PageID.16071.) PTP takes the same approach to Affirmative Defenses D and YY: "PTP will similarly assess exhaustion and other jurisdictional defenses, as appropriate once the Wineries fully present their case." (ECF No. 457, PageID.16055). PTP's conditional pleading is improper.

PTP improperly asserts that it should be entitled to keep Affirmative Defenses J and K holstered for trial, which both relate to the Township attorney's authority to negotiate zoning ordinance amendments, because "[t]he Wineries have not yet presented their case relying on these 'admissions', so there is presently no basis to assess their viability." (ECF No. 457, PageID.16062). It is precisely this lack of basis that warrants granting the Wineries' motion.

This Court should grant Plaintiffs' summary judgement on these Affirmative Defenses because PTP does not assert a factual or legal basis for them.

2. PTP failed to respond to arguments against Affirmative Defenses S, FF, GG, MM, RR-UU, EEE, FFF and KKK.

In Section II.B of Plaintiffs' opening brief, Plaintiffs identified 38 affirmative defenses that improperly expanded the scope of this case. PTP defended some and agreed others were not affirmative defenses.[3] But, of the 38-scope expanding affirmative defenses, PTP failed to respond to 11: S, FF, GG, RR-UU, EEE, FFF and KKK. PTP's response asserts that these affirmative defenses, if proven, would knock out only elements of Plaintiffs' claims. As discussed above, this

[3] See Sections II.B, II.C.4 and II.C.5.a, above.

means they are not affirmative defenses and summary judgment should be granted in Plaintiffs' favor.

This Court should treat PTP's failure to offer any response specific to these affirmative defenses as abandonment and award summary judgment in Plaintiffs' favor.

III. CONCLUSION

Plaintiffs respectfully requests that this Court enter summary judgment in their favor on PTP's Affirmative Defenses. Plaintiffs further request that this Court award them their cost and attorneys' fees incurred in this action pursuant to 42 U.S.C. § 1988 as well as the damages (against Peninsula Township) they have incurred due to the Township's conduct in an amount to be determined at trial.

Respectfully submitted,

MILLER, CANFIELD, PADDOCK AND STONE, P.L.C.

By: /s/ Joseph M. Infante

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Dated: October 20, 2023

CERTIFICATE OF COMPLIANCE WITH LOCAL CIVIL RULE 7.2(B)(I)

1. This Brief complies with the type-volume limitation of L. Civ. R. 7.2(b)(i) because this Brief contains 4,269 words.

/s/ Joseph M. Infante
Joseph M. Infante

CERTIFICATE OF SERVICE

I hereby certify that on October 20, 2023, I filed the foregoing Reply in Support of its Motion for Partial Summary Judgment on Protect the Peninsula's Affirmative Defenses via the Court's CM/ECF System, which will automatically provide notice of the filing to all registered participants in this matter.

/s/ Joseph M. Infante
Joseph M. Infante