

UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF MICHIGAN

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

Plaintiffs,

Case No: 1:20-cv-01008

v

PENINSULA TOWNSHIP, Michigan Municipal  
Corporation,

Honorable Paul L. Maloney  
Magistrate Judge Ray S. Kent

Defendant.

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**PLAINTIFFS' BRIEF IN SUPPORT OF MOTION TO STRIKE PENINSULA  
TOWNSHIP'S MOTIONS TO DISMISS PLAINTIFFS' CLAIMS PURSUANT TO  
RULES 12(b)(1) AND 12 (h)(3) FOR LACK OF SUBJECT MATTER JURISDICTION  
(ECF NO. 458, 459, 462 AND 463.)**

**INTRODUCTION**

This Court has been very clear over the past year that Peninsula Township had its opportunity to argue the constitutional claims in this case and that time is now over. This Court was explicit when it ordered that the Township could not file a motion for summary judgment on the constitutional claims. Despite this Order, the Township has filed two motions for summary judgment related to the Wineries' constitutional claims. This Court should strike these improper pleadings because they are in the direct violation of this Court's Order.

**BACKGROUND**

When this Court adjourned the August 2022 trial to allow PTP to participate in this case, it also determined that "The Township, in my judgment, is stuck with the record that [it] made on certain issues." ECF No. 239, PageID.8710. Thereafter, the Township sought permission from this Court to "participate in renewed summary judgment proceedings" related to the constitutional

claims in this case. ECF No. 288. This Court denied this request determining that “[t]o the extent the Township seeks to re-file its summary judgment motion regarding the constitutional issues, the Court will not entertain such a motion. The Township will not get a second bite at the apple in defending against the Wineries’ constitutional claims – which it utterly failed to do the first time around – simply because PTP has now been permitted to intervene in this matter.” ECF No. 303, PageID.10837-10838.

The issue of the Township filing a motion for summary judgment on the constitutional issues was also discussed during the Rule 16 Conference held on April 23, 2023. This Court stated: “Well, they don’t get a second bite of the apple, that’s for sure.” ECF No. 385, PageID.14166. In issuing the Second Amended Case Management Order, this Court determined that the parties’ ability to engage in summary judgment briefing was “in accordance w/parameter outlined in ECF Nos. 301 and 303.” ECF No. 343, PageID.12547. In other words, that the Township was not given a second bite at the apple and was precluded from filing a motion for summary judgment related to the Wineries’ constitutional claims.

## **ANALYSIS**

Rule 12(f) states allows this Court to “order stricken from any pleading any insufficient defense or any redundant, immaterial, impertinent or scandalous matter.” A motion to strike is appropriate when “no evidence in support of the allegation would be admissible.” *Lipsky v. Com. United Corp.*, 551 F.2d 887, 893 (2d Cir. 1976). Applying Rule 12(f), courts will strike a pleading “when it appears beyond peradventure that it is a sham and false and that its allegation are devoid of factual basis.” *Salzmann v. Prudential Securities Inc.*, 1994 WL 191855, at \* 13 (S.D.N.Y. May 16, 1994) (citations omitted).

“Courts are given considerable discretion in deciding whether to strike portions of pleadings under 12(f).” *Thomson v. Hartford Life & Accident Ins. Co.*, 270 F.R.D. 277, 279 (W.D.

Ky. 2010) (citing Fed. R. Civ. R. 12(f); *Delta Consulting Grp., Inc. v. R. Randle Constr., Inc.*, 554 F.3d 1133, 1141 (7th Cir. 2009)). “A motion to strike under Rule 12(f) is proper where it will eliminate spurious issues before trial and streamline the litigation.” *Ameriwood Industries Intern. Corp. v. Arthur Anderson & Co.*, 961 F. Supp. 1078 (W.D. Mich. 1997) (citing *Kelley v. Thomas Solvent Co.*, 714 F. Supp. 1439, 1442 (W.D. Mich. 1989)).

Here, this Court ordered that Peninsula Township could not file the pleadings contained in ECF Nos. 458, 459, 462, and 463. Despite the clear order, Peninsula Township filed the pleadings anyway. This Court should strike the pleadings from the record.

## **CONCLUSION**

The Township had its chance to defend against the Wineries’ constitutional claims and “utterly failed to do so” and the “Township will not get a second bite at the apple in defending against the Wineries’ constitutional claims.” ECF Nos. 458, 459, 462 and 463 should be stricken from the record.

Respectfully submitted,

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

By:  /s/ Joseph M. Infante

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Dated: November 2, 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 643 words.

/s/ Joseph M. Infante  
Joseph M. Infante

**CERTIFICATE OF SERVICE**

I hereby certify that on November 2, 2023, I filed the foregoing Motion to Strike Peninsula Township's Motions to Dismiss Plaintiffs' Claims Pursuant to Rules 12(b)(1) AND 12 (h)(3) for Lack of Subject Matter Jurisdiction (ECF No. 458, 459, 462 and 463.) 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