

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.

**EXPEDITED CONSIDERATION  
REQUESTED**

---

**PLAINTIFFS' BRIEF IN SUPPORT OF MOTION TO STRIKE PENINSULA  
TOWNSHIP'S RESPONSE TO PLAINTIFFS' MOTION FOR PARTIAL SUMMARY  
JUDGMENT, ECF 485**

**1. INTRODUCTION**

This Court has been very clear over the past year that Peninsula Township had its opportunity to defend against the constitutional claims in this case and that time is long over. This Court has repeatedly ordered that the Township could not defend against the Wineries' constitutional claims as it already had its chance and would not "get a second bite at the apple." Despite this, the Township has filed a response to the Wineries Motion for Partial Summary Judgment on the constitutional issues and reargues issues it previously argued. This Court should strike this improper filing because it is direct violation of this Court's orders.

**2. BACKGROUND**

When this Court adjourned the August 2022 trial to allow PTP to participate in this case, it also determined that "[t]he 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 response brief to a motion for summary judgment on the constitutional issues was also discussed during the Rule 16 Conference on April 23, 2023. Counsel for the Wineries asked this Court, in reference to ECF No. 303, “did you intend to allow Peninsula Township to respond on the constitutional claims if we file a motion for summary judgment on those claims? Because that would allow them a second bite at the apple of the constitutional claims where you said they don’t get a second bite of the apple.” ECF No. 385, PageID.14166. This Court responded: “Well, they don’t get a second bite of the apple, that’s for sure.” *Id.* Counsel for the Township then argued that his reading of ECF No. 303 was that “the order does allow us the right to respond to any and all motions for summary judgment.” *Id.* at PageID.14167. This Court answered, “Well, I’m going to stick with my order. If there’s a bona fide dispute or a lack of understanding as to what I meant, you want to bring that to my attention, file the appropriate motion.” *Id.* The Township did not file any motion and, instead, filed a response brief without leave from this Court to do so.

Further, 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 responding to any summary judgment motion filed by the Wineries on their constitutional claims.

### 3. ANALYSIS

Pursuant to Rule 16, a “court may issue any just orders ... if a party or its attorney fails to obey a scheduling or other pretrial order,” Fed. R. Civ. P. 16(f)(1)(C). Here, this Court ordered that Peninsula “will not get a second bite at the apple in defending against the Wineries’ constitutional claims” and its response brief, ECF No. 485, does just that. Even a cursory review of ECF No. 485 demonstrates that Peninsula Township is seeking a do over where it previously failed to sufficiently defend against the Wineries’ constitutional arguments. Notably, a “district court does not have to accept every filing submitted by a party.” *Ross, Brovins & Oehmke, P.C. v. LEXIS/NEXIS Group*, 463 F.3d 478, 488–89 (6th Cir.2006). For example, where a party files an unauthorized supplemental brief, courts in this District have no issue striking the brief. *See Harshaw v. Bethany Christian Services*, 2010 WL 610262 (W.D. Mich. Feb. 19, 2010.)

In the alternative, this Court should clarify the scope of its prior order regarding the extent to which Peninsula Township gets a second bite at the apple on the Wineries’ constitutional claims. *United States v. Troutman*, 2022 WL 326523, at \*1 (N.D. Ohio Feb. 3, 2022), *aff’d*, 2022 WL 18836539 (6th Cir. Sept. 19, 2022)( “[A] motion for clarification is properly used to clarify the scope of a district court's prior order.); *United States v. Riley*, 609 F. App'x 837, 841 n.2 (6th Cir. 2015). In fact, this Court directed the Township to file such a motion if “there’s a bona fide dispute or a lack of understanding as to what I meant, you want to bring that to my attention, file the appropriate motion.” ECF No. 303, PageID.14167. The Township did not file such a motion and, instead, just filed its unauthorized response brief.

**a. The Township Relies of Discovery Conducted by PTP**

This Court ordered that “[t]he 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. Further, this Court determined that “[t]he Township, in my judgment, is stuck with the record that [it] made on certain issues.” ECF No. 239, PageID.8710. Yet, the Township’s Response Brief relies heavily on discovery conducted by PTP. Exhibits 1-12 of the Township’s Response Brief are responses to discovery served by PTP. See ECF. No. 485-2 through ECF No. 485-12. Exhibits 13-19 of the Township’s Response Brief are transcripts of depositions taken by PTP. See ECF No. 485-13 through ECF No. 485-19.

**b. For the First Time Peninsula Township Argues That the First Amendment Does Not Apply to the Wineries’ Claims.**

In initially defending against the Wineries First Amendment claims, Peninsula Township argued that weddings were not commercial speech. See ECF No. 143, PageID.5373-5374. At no time did Peninsula Township argue that the other activities the Wineries allege are commercial speech were not commercial speech. This Court explicitly determined that while the Township challenged weddings as being commercial speech, “the Township has conceded that the *Central Hudson* test is applicable in determining if the remaining sections constitute unlawful violations of commercial speech.” ECF No. 162, PageID.6004. This Court later pointed out that “[i]n response to Plaintiffs’ motion for summary judgment, the Township completely ignored the *Central Hudson* test (see ECF No. 143 at PageID.5373-75), and in its own motion for summary judgment, the Township’s analysis of the *Central Hudson* test was limited to about two pages (see ECF No. 142 at PageID.4983-85).” *Id.* at PageID.6005.

Now, in seeking a second chance to avoid summary judgment, Peninsula Township dedicates eight pages arguing why the Winery Ordinances do not regulate speech. See ECF No. 485, PageID.18518-18527. But the Township already “conceded” that these provisions do regulate speech. Switching course and arguing a position which is 180 degrees from its prior position is certainly a result this Court sought to avoid when it stated that “The Township, in my judgment, is stuck with the record that [it] made on certain issues,” ECF No. 239, PageID.8710, and that “[t]he 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. Previously, the “Township completely ignored the *Central Hudson* test” and now the Township dedicated eight pages arguing that the Winery Ordinances do not regulate commercial speech and another eight pages discussing the *Central Hudson* test. See ECF No. 485, PageID.18527-18534.

The breadth of the Township’s second argument can also be seen by the caselaw it cited. The Township’s prior response brief was so superficial that it only cited to ten total cases with three of those cases relating to the standard of review. ECF No. 143, PageID.5347, 5358. The Township’s second attempt at defending against summary judgment on the constitutional claims cites to fifty-eight cases. ECF No. 485, PageID.18509-18510. In its recent filing, the Township only cites to two cases it previously relied upon. Compare ECF No. 485, PageID.18517-18 and ECF No. 143, PageID.5358.

The Township’s argument that the Winery Ordinances regulated conduct is not entirely new and a pivot it tried once before. In seeking reconsideration of this Court’s Summary Judgment Opinion, the Township argued that the Winery Ordinances regulate conduct. See ECF No. 174, PageID.6581-6591. The Township dedicated tens pages to arguing that the ordinances do not

regulate commercial speech and, even if they did, the ordinances pass the *Central Hudson* test. This Court rejected the Township’s new argument that “many of the sections of the Ordinances challenged in this claim regulate conduct, not speech, and thus do not constitute regulations of commercial speech.” ECF No. 211, PageID.7809. “The Court rejects the Township’s first argument because even though it may *now* believe that several of the stricken sections do not constitute regulations of commercial speech, in its response to the Wineries’ motion for summary judgment, the Township previously challenged only two sections—those restricting weddings and large gatherings—as sections that do not regulate commercial speech.” *Id.* at PageID.7810. “Thus, the Township effectively conceded that the remainder of the challenged sections under this claim do indeed regulate commercial speech and that the *Central Hudson* test is applicable.” *Id.*

By arguing this issue again in its Response Brief, the Township is effectively looking for a third bite at the apple.

**c. The Township’s *Central Hudson* Discussion is Strikingly Different Than its Prior Argument.**

The Township’s prior argument regarding the *Central Hudson* factors was very brief. But, in arguing the Township alleged substantial interest, the Township identified four interests which related to agriculture. ECF No. 142, PageID.4982-4984. As this Court put it, “[i]n a nutshell, these stated interests are “to preserve the agricultural environment in the Agricultural district of the Township.” ECF No. 162, PageID.6006. But agricultural preservation did not carry the day on summary judgment, so the Township changed course in its recent response brief to allege a different substantial interest: “protecting the health, safety, morals and general welfare of its residents.” ECF No.485, PageID.18528. This is a completely new position for the Township. It is also a position that would put the Township in contempt of Judge Kent’s order directing Peninsula Township to identify the governmental interests underlying the Winery Ordinances.

ECF No. 68, PageID.3115, ECF No. 69. In response, Peninsula Township did not identify “protecting the health, safety, morals and general welfare of its residents” as a governmental interest behind the Winery Ordinances. *See* ECF No. 136-8, PageID.4840-4846. Peninsula Township must be bound to its prior position and cannot change course at this late stage.

As for the last two prongs of the *Central Hudson* test, as this Court previously noted, “[n]ot only does the Township’s motion completely fail to address the last two prongs of the Central Hudson test, but Supervisor Manigold’s deposition also confirms that these challenged sections of the Township Ordinances likely do not advance the stated interests, and that the Township never considered less-restrictive means.” ECF No. 162, PageID.6006. Peninsula Township now dedicates five pages of its response brief to arguing the last two *Central Hudson* factors. ECF No. 485, PageID.18530-18534. In arguing the third factor, Peninsula Township seeks to discredit the Township Supervisor and instead have this Court rely on the testimony of two member of PTP and a former zoning official who was not even a member of the Township Board that passed the Winery Ordinances. *Id.* at PageID.18531-18532. Regardless, this testimony was available to the Township prior to this Court ruling on summary judgment and the Township decided not to use it. It doesn’t get a second chance to try a new tactic. On the final prong, the Township also asks this Court to rely on the same irrelevant witnesses and ignore the testimony of the Township Supervisor. Further, the Township fails to cite to any evidence of less restrictive means considered but simply asks the Court to infer other restrictions were considered. The Township’s opportunity to make this argument was nearly two years ago, not today.

**d. Peninsula Township Substantially Expands its Prior Restraint Argument.**

In both moving for summary judgment and responding to the Wineries’ motion for summary judgment on the issue of prior restraint, the Township’s arguments were brief. This

Court noted that “[t]he Township makes no attempt to carry its burden under strict scrutiny in its response to the Plaintiffs’ motion.” ECF No. 162, PageID.6013, n. 22; citing ECF No. 143 at PageID.5376-77). As for the Township’s motion for summary judgment, this Court determined that the Township’s “meager argument is not enough to carry the Township’s burden under strict scrutiny. Not only does the Township fail to explain how these sections are narrowly tailored (it simply makes that conclusion), but the Township also provided no evidence in support of its statement that these events are not entirely precluded. Plaintiffs provided multiple examples of events that they were prohibited from holding, while the Township did not provide examples of any events it permitted Plaintiffs to hold.” ECF No. 162, PageID.6014. In fact, the Township’s entire argument on this issue was approximately one page. See ECF No. 142, PageID4985-4986.

Because it completely failed to argue this issue the first time around, the Township seeks a do over and dedicates nearly four pages to the issue. ECF No. 485, PageID.18537-18540. The Township oddly argues that the Winery Ordinances are not prior restraints because they only apply to agricultural groups. But that is the point, when a Winery seeks to hold an event, the Township determines whether the group is an agricultural group and denies the event if it is not. This Court even noted “Director Deeren determines whether an activity is ‘agriculturally related’ based on what information the winery-host provides ([ECF No. 143] at PageID.4743). There does not appear to be any definite criteria or definition to determine what type of activity is ‘agriculturally related.’ Instead, Director Deeren makes that determination, and she has regularly denied many events, such as Yoga in the Vines, Painting in the Vines, and snow shoeing (Id.)” ECF No. 162, PageID.6012. This Court continued that the “Ordinances fail to define ‘agriculturally related,’ leaving room for Director Deeren to make that determination. Plaintiffs have provided multiple examples where they have applied to host a certain Guest Activity and Director Deeren has denied



their application to do so.” ECF No. 162, PageID.6013 (citing ECF No. 136, PageID.4743-44). Thus, not only is Peninsula Township seeking a second bite at the apple on this issue, but it is also seeking to make the same argument this Court already rejected.

**e. Peninsula Township Substantially Expands its Compelled Speech Argument.**

When this issue was brought before the Court during the initial round of summary judgment motions, the Township failed to defend this argument. This Court explained: “the Township failed to carry its burden under strict scrutiny. In its response to Plaintiffs’ motion for summary judgment, the Township failed altogether to raise an argument that these sections do not compel speech (see ECF No. 143). In its own motion for summary judgment, the Township argues, in six sentences, that these sections do not compel speech because these provisions describe the Township Ordinances’ intent rather than mandate speech.” ECF No. 162, PageID.6016; citing (ECF No. 142 at PageID.4986). As this Court pointed out, the Township’s summary judgment response brief, ECF No. 143, does not even contain an argument on compelled speech and its own summary judgment brief contains just six sentences on the issue. ECF No. 142, PageID.4986. That argument was, in a nutshell, that the ordinance did not actually require the Wineries to do anything. *Id.*

Now, when trying to get a second chance, the Township dedicated three pages on the issue. ECF No. 485, PageID.18540-18543. The Township has shifted to try a new argument: that the Wineries do not object to the message; and the Township also rolled out its prior argument that the ordinances do not actually require the Wineries to do anything. *Id.* at PageID.18541. Again, the Township is seeking a second bite at the apple on this issue, but it is also seeking to make the same argument this Court already rejected.

## 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 No. 485 should be stricken from the record.

Respectfully submitted,

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

By: /s/ Joseph M. Infante

Joseph M. Infante (P68719)

Stephen M. Ragatzki (P81952)

Christopher J. Gartman (P83286)

99 Monroe Avenue NW, Suite 1200

Grand Rapids, MI 49503

(616) 776-6333

Dated: November 8, 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 2,802 words.

/s/ Joseph M. Infante  
Joseph M. Infante

**CERTIFICATE OF SERVICE**

I hereby certify that on November 8, 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