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

REPLY BRIEF IN SUPPORT OF PLAINTIFFS' MOTION FOR PARTIAL SUMMARY JUDGMENT AND OPPOSITION TO PENINSULA TOWNSHIP'S RESPONSE BRIEF (ECF NO. 485)

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I. INTRODUCTION

This Court has already rejected the Township's argument and the Township does not bring forth any admissible evidence sufficient to carry its burden. Summary judgment is warranted.

II. ARGUMENT

A. Enforcement of the Ordinances.

The Township's argument that it has never enforced the Ordinances is absurd. Ms. Deeren testified on this issue and the Township conceded in discovery that it has done so. (*See* ECF No. 485-20.) The Wineries identified dozens of enforcement instances. (ECF No. 487, PageID.18740-18743.)

B. The Ordinances unlawfully regulate commercial speech.

1. The Township conceded *Central Hudson* applies.

"[T]he 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 also noted "[i]n response to Plaintiffs' motion for summary judgment, the Township completely ignored the *Central Hudson* test." (*Id*., PageID.6005.)

In seeking reconsideration of this Court's Summary Judgment Opinion, the Township argued that the Ordinances regulate conduct. (*See* ECF No. 174, PageID.6581-6591.) This Court rejected that argument. (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*.)

2. Peninsula Township is incorrect that the Ordinances do not regulate speech.

The Township cites *Blau v. Ft. Thomas Public School District*, 401 F.3d 381 (6th Cir. 2005), for its conduct argument. But *Blau* stated that "[t]he threshold is not a difficult one, as a narrow, succinctly articulable message is not a condition of constitutional protection. Otherwise, the First Amendment would never reach the unquestionably shielded painting of Jackson Pollack, music of Arnold Schoenberg, or Jabberwocky verse of Lewis Carroll." *Id*. at 388 (quotations omitted).

The Township incorrectly argues the Wineries are not expressing any views by seeking to host music, entertainment, or events for profit. This argument was rejected in *Cinevision Corp. v. City of Burbank*, 725 F.2d 560 (9th Cir. 1984), a case brought by a concert promoter.[1] "Entertainment, as well as political and ideological speech, is protected; motion pictures, programs broadcast by radio and television, and live entertainment, such as musical and dramatic works, fall within the First Amendment guarantee." *Id*. at 567 (citing *Schad v. Borough of Mount Ephraim*, 452 U.S. 61, 65 (1981)). And "even though concert promoters generally promote concerts for profit, they still enjoy the protections of the first amendment." *Id*. (citing *Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495, 501-02 (1952)).

Similarly, in *McCray v. City of Citrus Heights*, 2000 WL 1174828 (E.D. Cal. Aug. 7, 2000), a bar owner brought a First Amendment challenge to an ordinance which required a permit for certain amplified music. *Id*. at *1. "Even though plaintiffs are not themselves performing the music, but are playing pre-recorded music, they are nonetheless engaging in constitutionally-protected speech…plaintiffs are engaging in constitutionally-protected speech by playing pre-

[1] Even if the Wineries were not speaking, "they are entitled to rely on the impact of the ordinance on the expressive activities of others as well as their own." *Schad*, 452 U.S. at 66.

recorded music…." *Id*. at **1, 5. *Reed v. Village of Shorewood*, 704 F.2d 943, 950 (7th Cir. 1983) also involved bars being precluded from playing certain music. *Id*. at 950. The court declared that "[i]f the defendants passed an ordinance forbidding the playing of rock and roll music in the [village], they would be infringing a First Amendment right." *Id*. The court also opined that a substantial justification would be needed, for example, "to yank a liquor license because the licensee allowed the reading of the New York Times in his bar…[or] to justify restrictions on entertainment in places where liquor is served." *Id*. at 951.

3. The Wineries' promotional activities are protected by the First Amendment.

To the extent the Township alleges that promotional activities are not speech, the Township is incorrect. The word "speech" in the First Amendment "is not construed literally, or even limited to the use of words." *Tenafly Eruv Ass'n, Inc. v. Borough of Tenafly*, 309 F.3d 144, 158 (3rd Cir. 2002). "'The entire commercial speech doctrine, after all, represents an accommodation between the right to speak and hear expression about goods and services and the right of government to regulate the sales of such goods and services.'" *44 Liquormart, Inc. Rhode Island*, 517 U.S. 484, 499 (1996) (plurality opinion) (quoting L. Tribe, American Constitutional Law § 12–15, p. 903 (2d ed.1988)).

Further, the Township's allegation that *City of Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410 (1993) requires an explicit offer to sell a product is incorrect. (ECF No. 485, PageID.18526). "*Discovery Network* does not stand for the proposition that only an offer to sell X at the Y price qualifies as commercial speech." *Campbell v. Robb*, 162 F. App'x. 460, 470 (6th Cir. 2006). Instead, "*Discovery Network* left undisturbed the somewhat larger category of commercial speech that does not, strictly speaking, propose a commercial transaction but is nonetheless linked inextricably to an underlying commercial transaction." *Id*. at 471 (cleaned up).

Commercial speech includes a broad range of commercial-related expression. *See, e.g.*, *Valle Del Sol Inc. v. Whiting*, 709 F.3d 808, 818-19 (9th Cir. 2013) (soliciting work from a car); *Campbell v. Robb*, 162 F. App'x 460, 469-70 (6th Cir. 2006) (describing condition of an apartment); *New York State Restaurant Ass'n v. N.Y. City Bd. of Health*, 556 F.3d 114, 131–32 (2d Cir. 2009) (posting nutritional information.); *Jordan v. Jewel Food Stores, Inc.*, 743 F.3d 509 (7th Cir. 2014) (brand improvement); *Facenda v. N.F.L. Films, Inc.*, 542 F.3d 1007, 1017 (3d Cir. 2008) (product exposure); *American Future Systems, Inc. v. State University of New York College of Cortland*, 565 F. Supp. 754 (S.D.N.Y. 1983) (product demonstrations); *Anabell's Ice Cream Corp. v. Town of Glocester*, 925 F. Supp. 920 (D. R.I. 1996) (amplified music to entice sales).

"Other communications also may constitute commercial speech notwithstanding the fact that they contain discussions of important public issues." *Jordan*, 743 F.3d at 516; *see also Conn. Bar Ass'n v. United States*, 620 F.3d 81, 93–94 (2d Cir. 2010) (doctrine encompasses more than the core notion of "speech which does 'no more than propose a commercial transaction'") (quoting *Bolger*, 463 U.S. at 66); *Semco, Inc. v. Amcast*, Inc., 52 F.3d 108, 112 (6th Cir. 1995) (noting "core" definition of commercial speech but observing that commercial speech is not limited to speech that does no more than propose a commercial transaction). Relevant considerations include "whether: (1) the speech is an advertisement; (2) the speech refers to a specific product; and (3) the speaker has an economic motivation for the speech." *United States v. Benson*, 561 F.3d 718, 725 (7th Cir. 2009) (citing *Bolger*, 463 U.S. at 66–67). No one factor is sufficient, and not all are necessary. *Jordan*, 743 F.3d at 517. *Jordan* discussed how modern marketing has expanded commercial speech:

> The notion that an advertisement counts as "commercial" only if it makes an appeal to purchase a particular product makes no sense today, and we doubt that it ever did. An advertisement is no less "commercial" because it promotes brand awareness or loyalty rather than explicitly proposing a transaction in a specific

> product or service. Applying the "core" definition of commercial speech too rigidly ignores this reality. Very often the commercial message is general and implicit rather than specific and explicit.

Id. at 518. Part of the Wineries' marking strategy includes experiential marketing, which connects a brand and its customers through events and performances. (*See* ECF No. 469, PageID.16954.)[2] The Township's response simply, and without support, argues that live music, group meetings, events and similar activities are not marketing.

In the agritourism context, a Fourth Circuit case from earlier this year is instructive. *Alive Church of the Nazarene, Inc. v. Prince William County, Virginia*, 59 F. 4th 92 (4th Cir. 2023), involved a church seeking the same privileges as farm wineries to host special events, including "meetings, conferences, banquets, dinners, wedding receptions, private parties and other events conducted for the purpose of marketing wine, mead, cider and similar beverages and/or beer, produced on the premises" and other "agritourism events" which are usual and customary at wineries and promote the stated interest of preserving agricultural land. *Alive Church of Nazarene, Inc. v. Prince William County, Virginia*, 2021 WL 5237238, *1-2 (E.D. Va. Nov. 10, 2021). Like Peninsula Township's alleged interest, the county sought to "create an environment favorable for the continuation [of] farming and other agricultural pursuits" and to "preserve prime agricultural land." *Id*. at *1. On appeal, the Fourth Circuit extensively discussed how events at wineries promote the sale of farm products and preserve agricultural land:

> [S]pecial events…further agricultural activity. Farm wineries [] remain profitable by selling their products directly to the public. Hosting special events enhances the ability to market and sell products and therefore increase their economic viability. Put simply, the more profitable farm wineries [] are, the more likely they will continue in operation and draw more investment in the same industry. Because farm wineries [] must be located on producing farms, vineyards, or orchards, investment

[2] The Supreme Court has stated that "even when the holding forth for sale relies upon no more than word-of-mouth advertising, a marketing of goods is in process." *Asgrow Seed Co. v. Winterboer*, 513 U.S. 179 (1995).

in their continued success directly advances the promotion of farming.

Alive Church, 59 F. 4th at 104. Winery events attract customers so Wineries can sell products. That is consistent with the Township's Master Plan, (ECF No. 142-2, PageID.5040), Governor Whitmer's policy directive, (ECF No. 469-7), and the Michigan Department of Agriculture, (ECF No. 501-1).[3]

As *Alive Church* recognized, hospitality businesses host events to sell more products and services and to introduce them to a broader customer group. *See*, *e.g.*, *Am. Future Sys., Inc. v. Pennsylvania State University*, 752 F.2d 854, 862 n.26 (3rd Cir. 1984) ("The critical question would be whether the primary purpose [is the] activity or to sell."). One Massachusetts court stated: "It cannot reasonably be questioned that the plaintiff was exposing its wines for sale at wine tasting sessions. This method of operation was an integral part of the marketing strategy…." *Cellarmasters Wine of Massachusetts, Inc. v. Alcoholic Beverages Control Comm'n*, 534 N.E.2d 21, 24 (Mass. App. Ct. 1989).[4] Like in *IMS Health Inc. v. Sorrell*, 630 F. 3d 263, 273 (2nd Cir. 2010), the Ordinances "prevent willing sellers and willing buyers from completing a sale." The Township's arguments are like the argument made in *Pagan v. Fruchey*, 492 F.3d 766, 772 (6th Cir. 2007), that the court determined was "not well taken". There, the city unsuccessfully argued an ordinance restricting parked cars displaying for-sale signs regulated only the conduct of parking. *Id.*

[3] A recently enacted New Jersey law allows farm weddings to preserve farmland. (ECF No. 501-2.)

[4] The Township attempts to dismiss the holding in *FF Cosmetics FL Inc. v. City of Miami Beach Florida*, 129 F. Supp. 3d 1316 (S.D. Fl. 2015), that seeking "to have prospects enter their stores and purchase Plaintiffs' products" is not commercial speech. This shows that the Township has no understanding of Plaintiffs' businesses. When a customer enters a Winery, its employees seek to educate those customers about the Winery its products.

4. The Township misapplied the *Central Hudson* factors.

The Township's *Central Hudson* argument either re-argues what this Court already rejected or newly argues what the Township already conceded.

a. Peninsula Township impermissibly relies on speculation and conjecture.

The Township must show that a regulation advances a substantial government interest "in a direct and material way" and this "is not satisfied by mere speculation or conjecture; rather, a government body seeking to sustain a restriction on commercial speech must demonstrate that the harms it recites are real and that its restrictions will alleviate them to a material degree.'" *Rubin*, 514 U.S. at 487 (quoting *Edenfield v. Fane*, 507 U.S. 761, 770-71 (1993)). "[T]he government must come forward with some quantum of evidence, beyond its own belief in the necessity for regulation, that the harms it seeks to remedy are concrete and that its regulatory regime advances the stated goals." *Pagan*, 492 F.3d at 771. The Township's brief is devoid of evidence and relies on speculative statements by PTP members. "[S]uch lay opinions are not helpful" because "rendering an opinion as to the anticipated deterrent effect of the challenged ordinances entails much more than drawing conclusions from physical manifestations." *National Paint & Coating Ass'n v. City of Chicago*, 835 F. Supp 414, 419 (N.D. Ill. 1993) (striking proffered testimony).

b. Peninsula Township's newly conjured interest is not substantial.

The Township previously identified four alleged interests relating 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.) Now the Township changes course 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 new position that would put the Township in contempt of Magistrate

Judge Kent's order directing it to identify the governmental interests underlying the Ordinances. (ECF No. 68, PageID.3115, ECF No. 69.) In response to that order, Peninsula Township did not identify "protecting the health, safety, morals and general welfare of its residents" as its interest. (*See* ECF No. 136-8, PageID.4840-4846.)

The Township, citing PTZO §2.1, attempts to shoehorn this interest. At the first summary judgment hearing, this Court pointed out that this section was "boilerplate". (ECF No. 159, PageID.5966.) Further, this cannot carry the day without more specificity as to the problem being fixed. For example, in *Utah Licensed Beverage Ass'n v. Leavitt*, 256 F. 3d 1061 (10th Cir. 2001), a law was challenged which restricted how alcoholic beverages could be advertised. *Id*. at 1069.[5] The state alleged it had a substantial interest in "public welfare, including temperance, health, and safety." *Id*. The court concluded that, possibly, temperance could be a substantial interest, but did not find the other interests substantial. *Id*. at 1070.

Here, Peninsula Township does not explain why its boilerplate interests are substantial as they relate to restricting speech. An interest is "substantial" only when the government shows a problem actually exists. *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525, 561 (2001). Peninsula Township "must do more than simply 'posit the existence of the disease sought to be cured.'" *Turner Broad. Sys., Inc. v. F.C.C.*, 512 U.S. 622, 664 (1994) (internal citations omitted). Evidence, "such as studies, empirical data or professional literature" are necessary "to substantiate the connection between the government interest and the regulation at issue." *Interstate Outdoor Advert. v. Zoning Bd. of Tp. of Cherry Hill*, 672 F. Supp. 2d 675 (D.N.J. 2009); s*ee also Edenfield*, 507 U.S. at 770-71; *Burkow v. City of Los Angeles*, 119 F. Supp. 2d 1076, 1080 (C.D. Cal. 2000).

[5] This unconstitutional statute is very similar to Section 8.7.3(12)(k) which prohibits signs that list or identify food or non-food items for sale.

The Township has presented no evidence demonstrating the Ordinances respond to real problems. Instead, it just falls back on the position that it has authority to zone. (ECF No. 485, PageID.18529.) The Township claims it "has provided interrogatory responses further explaining its substantial governmental interests," but those responses simply contain the Township's prior claim that it has a substantial interest in preserving agriculture. (ECF No. 485-20, PageID.18638-18643.)

"In light of the absence of any appropriate data, reports, or even anecdotal evidence on this issue, the Court cannot conclude that Defendant's articulated interests are based on 'a problem that exists in fact' as opposed to 'mere speculation or conjecture.'" *Norwegian Cruise Line Holdings, Ltd. v. Rivkees*, 2021 WL 3471585, *13 (S.D. Fla. Aug. 8, 2021) (quoting *FF Cosmetics*, 866 F.3d at 1298 and *Edenfield*, 507 U.S. at 770).

5. The Ordinances hinder, rather than advance, any alleged government interest.

The Township completely failed to address this prong earlier. (ECF No. 162, PageID.6006.) Now, the Township contends it is not required to provide data showing its Ordinances advance, rather than hinder its governmental interest, citing *Lamar Company, LLC v. Lexington-Fayette Urban County Government*, 2023 WL 3956149 (E.D. Ky. June 12, 2023). Setting aside that *Lamar* is unpublished and contrary to Supreme Court precedent like *44 Liquormart, Pagan*, and *Edenfield*, the Township is also wrong. In *Lamar*, the Court noted that the defendant provided sufficient evidence to support its claimed interests and cited to pertinent meeting minutes. *Id*. at *13. The Township "must come forward with some quantum of evidence, beyond its own belief in the necessity of the regulation, that the harms it seeks to remedy are concrete and that its regulatory regime advances the stated goals." *Pagan*, 492 F.3d at 771 (citing *Edenfield*, 507 U.S. at 770–72.)

Here, the Township simply cites its zoning ordinances as generally advancing its interest to ensure agricultural land "is not converted into commercially-used land." (ECF No. 485, PageID.18531.) This does not carry its burden. The Township needed to come forth with "some quantum of evidence" that the operations of the Wineries cause the conversion of agricultural land to commercial land. The Fourth Circuit has already explained that "meetings, conferences, banquets, dinners, wedding receptions, private parties and other events conducted for the purpose of marketing wine…produced on the premises" and other "agritourism events" advance the preservation of agriculture and farming. *Alive Church*, 59 F. 4th at 104.

Finally, the Township cites to PTP member testimony. "Without "concrete evidence of relevant complaints, the fact that some of [the citizens] may feel 'anxious' is woefully insufficient to demonstrate that [the Township] 'faces real harms, which are materially palliated by the [Ordinances].'" *Aptive Environmental, LLC v. Town of Castle Rock, Colorado*, 959 F.3d 961, 996 (10th Cir. 2020).[6]

Lacking evidence, the Township does not meet its burden. *See, e.g.*, *Rubin*, 514 U.S. at 490 ("The Government did not offer any convincing evidence that the labeling ban has inhibited strength wars."); *Edenfield*, 507 U.S. at 771 ("The Board has not demonstrated that, as applied in the business context, the ban on CPA solicitation advances its asserted interests in any direct and material way.").

6. The Ordinances restrict more speech than necessary.

The Township, again, earlier failed to defend this prong. (ECF No. 162, PageID.6006.) The burden to establish a "reasonable fit" between the government's substantial interest and the Ordinance provision rests with the Township. *Discovery Network*, 507 U.S. at 416. The Township

[6] It is notable that the Township does not even address many of the cases cited by WOMP wherein courts found similar speculative harms not substantial.

must establish that it has "carefully calculated the costs and benefits associated with the burden on speech imposed." *Id.* at 417. The Township now claims that "[t]he Planning Commission, when drafting the GAU amendment to the Winery-Chateau ordinance, tailored the language of the ordinance to minimize potential effects" and cites to meeting minutes without further explanation. (ECF No. 485, PageID.18533.) That document does not discuss reasonable fit or other restrictions that were considered and why they were not utilized. (*See* ECF No. 485-24.)

The Township alleges that "significant consideration" was given to tailoring the Ordinances and mentions Gordon Hayward and Grant Parsons. Mr. Hayward's testimony, which the Township does not attach, was limited to restrictions on logoed merchandise and non-Peninsula agriculture and did not contain any testimony that less restrictive means were considered. (*See* ECF NO. 488-5, PageID.19128.) Mr. Parsons, as a lay citizen, simply testified he approved of the same restrictions. This is not sufficient evidence. *See Kimberly-Clark Corp. v. District of Columbia*, 286 F. Supp. 3d 128 (D.D.C.).

7. The Ordinances are not content or viewpoint neutral.

According to the Township, it is permissible for an agricultural group to have an event at a winery and discuss "politics, new crop rotations, or whether the College Football Playoff should be expanded to 12 teams." (ECF No. 485, PageID.18535.) But what is an agricultural group? Presumably, Future Farmers of America is one; but could a group of bankers have a meeting to discuss college football, or do they have to discuss crop rotations? The Township both regulates speakers and the content of the speech, so the Wineries can host agricultural groups if they talk banking, and bankers only if they talk agriculture. The Township "enforcement authorities must examine the content of the message that is conveyed' to know whether the law has been violated…. That's about as content based as it gets." *Otto v. City of Boca Raton, Florida*, 981 F.3d 854, 862 (11th Cir. 2020) (internal quotation and citation omitted).

2. Peninsula Township's requirements for conducting "Guest Activities" are unconstitutional prior restraints.

As to prior restraint, 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.) Because it earlier failed to argue this issue, the Township seeks a redo. It oddly argues that the 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 agricultural 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 [.] There does not appear to be any definite criteria or definition to determine what activities are '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." (ECF No. 162, PageID.6012.) "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.)

The Township did not provide any contrary evidence. (ECF No. 162, PageID.6014.) The Wineries have again provided this Court with a mountain of evidence. (*See, e.g.*, ECF No. 469, PageID.16970-16971, ECF No. 487, PageID.18740-18743.) The Township again has provided no contrary evidence. Instead, the Township states there is no evidence the Township ever denied a request to host an agricultural group. (ECF No. 485, PageID.18539.) While this misses the point, it also cannot be proven given no one knows what an agricultural event might be. (ECF No. 162, PageID.6013.)

3. The Ordinances compel speech.

The Township previously failed to defend this argument. (*See* ECF No. 162, PageID.6016.) Now, the Township argues 8.7.3(10)(u)(5)(a) is not a mandate but, instead, just a recommendation. That is not true. Section 8.7.3(u)(10)(5) lists the requirements for guest activities and states the Wineries "shall include Agricultural Production Promotion as part of the activity." "Shall" is mandatory. *AFSCME v. Detroit*, 704 NW2d 712 (Mich. Ct. App. 2005). It then states the Wineries must "identify," "provide" and "include" specific promotional items. The section does not use disjunctive term "or," so all three promotional items are required. *See, e.g., Yankee Springs Twp v. Fox*, 692 N.W.2d 728, 732 (Mich. Ct. App. 2004).

The Township also now argues that the Wineries do not object to the compelled message. This argument misstates applicable law and fails to advise that *Glickman v. Wileman Brothers & Elliott*, 521 U.S. 457 (1997), was distinguished in *United States v. United Foods, Inc.*, 533 U.S. 405 (2001). The distinction between *Glickman* and *United Foods* is "clear and easy to apply:"

> If the generic advertising assessment is part of a "comprehensive program" that "displace[s] many aspects of independent business activity," exempts the firms within its scope from the antitrust laws, and makes them "part of a broader collective enterprise," the assessment does not violate the First Amendment. If the program is, in the main, simply an assessment of independent and competing firms to pay for generic advertising, it does violate the First Amendment. Collectivization of the industry eliminates the otherwise extant First Amendment protection for firms' commercial speech.

Delano Farms Co. v. California Table Grapes Comm'n, 318 F.3d 895, 898-899 (9th Cir. 2003.) Here, the Wineries are independent and competing businesses and not part of a comprehensive program.

4. The Township concedes the Ordinances fail strict scrutiny.

The Township did not argue the Ordinances pass strict scrutiny.

C. The Township concedes that Wineries may host weddings, receptions and family reunions and there is no explicit closing time.

The Township's Response does not address, and therefore concedes, the Wineries' argument that the Ordinances do not restrict the Wineries from hosting weddings, receptions, or family reunions, and that the Ordinance do not contain any explicit closing times.

D. After finding liability, this Court should award the Wineries damages and declare their uses allowed.

Peninsula Township does not dispute that local governments are liable under 42 U.S.C. § 1983 for money damages, that lost profits properly measure the damages or that awarding attorneys' fees is proper.

As for uses allowed, Peninsula Township misunderstands this case. The Wineries seek a declaration from this Court that the prohibited activities are constitutionally protected, and the Township must be enjoined from infringing on the Wineries' rights in the future.

III. CONCLUSION

Plaintiffs respectfully requests that this Court enter a judgment in their favor on Counts I, II, IV, and X, and declare the Winery Ordinances[7] are unconstitutional, award Plaintiffs damages to be determined at trial, and award Plaintiffs' their costs and attorneys' fees incurred.

[7] While discussed in the opening brief, 6.7.2(a) and 8.7.3(10)(u)(5)(g), were inadvertently omitted from the prayer for relief.

Respectfully submitted,

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

By: /s/ Joseph M. Infante

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Dated: November 17, 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 4,290 words.

/s/ Joseph M. Infante
Joseph M. Infante

CERTIFICATE OF SERVICE

I hereby certify that on November 17, 2023, I filed the foregoing Motion for Partial Summary Judgment and Brief in Support 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