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, LLC, a Michigan limited liability company;

Plaintiffs,

v

PENINSULA TOWNSHIP, a Michigan municipal corporation,

Defendant,

and

PROTECT THE PENINSULA, INC.,

Intervenor-Defendant.

Case No. 1:20-cv-01008

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

DEFENDANTS' JOINT NOTICE OF OBJECTIONS

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DEFENDANTS' JOINT NOTICE OF OBJECTIONS

Trial begins Monday, April 29, 2024. On Tuesday, April 23, Plaintiffs filed their *Trial Brief and Proposed Findings of Fact and Conclusions of Law* (Plaintiffs' Trial Brief). Plaintiffs' Trial Brief indicates they intend to try to prove again at trial claims grounded in their theory that zoning sections curtailing "agritourism" regulate commercial speech, which the Court already rejected in summary judgment. Therefore, Defendants file this joint notice of their objections to preserve procedural protections, to avoid surprise at trial, and to elevate this threshold issue for the Court's early consideration at trial, given the sweeping impact Plaintiffs' "agritourism is commercial speech" theory will have on trial. The evidence Plaintiffs would present in support of this theory is irrelevant to any issue remaining for trial and therefore inadmissible. Fed. R. Evid. 402. Even if admissible, it is needlessly cumulative of evidence already considered on summary judgment and its presentation would waste time. Fed. R. Evid. 403. Expanding the scope of trial to assert arguments resolved in summary judgment would also substantially and unfairly prejudice Defendants. Fed. R. Evid. 403. Plaintiffs' Trial Brief Section IV.A.1.b is also an improper motion for reconsideration. W.D. Mich. LCivR 7.4.

The Court resolved cross summary judgment motions on Plaintiffs' First Amendment claims in ECF 559. The Court rejected Plaintiffs' argument that zoning regulations addressing "hosting events" restrict protected commercial speech because events are "agritourism, which is advertising and then speech." (ECF 559, PageID.21903-21906). The Court found only two relevant PTZO provisions (§§ 6.7.2(19) and 8.7.3(10)(u)(2)(d)) would curtail agritourism but concluded agritourism "contains insufficient elements of speech, if any." (ECF 559, PageID.21906) The Court unequivocally concluded that § 6.7.2(19)(a) (which applies to Farm Processing Facilities and provides that "[a]ctivities such as weddings, receptions and other social

functions for hire are not allowed, however, participation in approved township wide events is allowed") and § 8.7.3(10)(u)(2)(d) (which applies to Winery-Chateaus approved for Guest Activity Uses and provides that "Guest Activity Uses do not include entertainment, weddings, wedding receptions, family reunions or sale of wine by the glass") "do not implicate First Amendment protection." (ECF 559, PageID.21906) Plaintiffs ignore this and instead falsely assert the Court found "a question of fact" whether these two sections of the PTZO implicate speech: "Therefore, the question of whether Sections 6.7.2(19)(a) . . . [and] 8.7.3(10)(u)(2)(d) . . . implicate commercial speech is an issue for trial." (ECF 580, PageID.22597-22598).

Also in summary judgment, the Court considered other subsections alleged to regulate commercial speech. (ECF 559, PageID.21916-21921) The Court found 5 "relate to and regulate speech on their face – generally through advertising;" the parties agree trial will address how those 5 subsections fare under *Central Hudson's* tailoring test. But Plaintiffs failed to identify, and the Court did not find, any speech regulated by the others. (ECF 559, PageID.21918) There is no unresolved fact issue.

Now Plaintiffs present a trial issue on 8 provisions they say curtail agritourism so implicate commercial speech – §§ 6.7.2(19) and 8.7.3(10)(u)(2)(d) (discussed above) plus these 6:

8.7.3(10)(m)	Allows accessory uses of meeting rooms, food, beverage services for registered guests
8.7.3(10)(u)(1)(d)	Allows use of tasting room for political rallies, winery tours, free entertainment
8.7.3(10)(2)(a)	Allows wine and food seminars, cooking classes as GAUs
8.7.3(10)(u)(2)(b)	Allows 501(c)(3) non-profit group meetings as GAUs
8.7.3(10)(u)(2)(c)	Allows ag-related group meetings as GAUs
8.7.3(10)(u)(5)(a)	Promote Peninsula ag during GAUs

(ECF 580, PageID.22597-22603)

The Court considered 3 of these and did not find they regulate or relate to speech (§§ 8.7.3(10)(m), 8.7.3(10)(u)(1)(d), 8.7.3(10)(u)(2)(a)), ECF 559, PageID.21918); the remaining 3 are brand new to the "agritourism is commercial speech" theory – Plaintiffs never identified them

in discovery as commercial speech restrictions (§§ 8.7.3(10)(u)(2)(b), 8.7.3(10)(u)(2)(c), 8.7.3(10)(u)(5)(a)[1]). These 6 sections don't curtail but allow agritourism-like activities, consistent with the Court's finding that "[t]wo *relevant* PTZO provisions would *curtail* agritourism: [§§6.7.2(19), 8.7.3(10)(u)(2)(d)]." (ECF 559, PageID.21905, emphases added) And even if they did curtail agritourism, "grafting an 'agritourism' label" onto "commerce-oriented activities" does not convert them into speech. (ECF 559, PageID.21905-21906, 21918) The Court has rejected Plaintiffs' "agritourism is commercial speech" argument; there is nothing more for trial. The Court found 5 sections related to advertising implicate commercial speech, and Defendants are preparing for trial accordingly.

Plaintiffs identify no facts or new evidence supporting their re-packaged argument. Nor could they introduce at trial new evidence since they failed to proffer it in response to PTP's summary judgment motion on these sections. Fed. R. Civ. P. 56(e); ECF 517, PageID.20044-20048. At best, winery representatives will testify about "experiential advertising" and corporate promotional opportunities as in depositions. (ECF 469, PageID.16954-16955, quoting Black Star, Two Lads depositions) This was insufficient to convert agritourism into speech in summary judgment and will remain so at trial. There is no need to repeat it.

Plaintiffs' Trial Brief repackaged verbatim their summary judgment legal arguments:

[1] No Plaintiff asserted in discovery that these sections restricted their commercial speech. (ECF 457-4, PageID.16085, 16091, 16095, 16101, 16105, 16105, 16118, 16129, 16133, 16136, 16150, 16155, 16157, 16162, 16165, 16171, 16175, 16178, 16185)

ECF 469 –Summary Judgment Motion	ECF 580 – Plaintiffs Pretrial Brief
"[E]ven a communication that does no more than propose a commercial transaction is entitled to the coverage of the First Amendment." *Edenfield v. Fane*, 507 U.S. 761, 767 (1993). But speech can also be commercial even if it does not propose a commercial transaction. *Bolger v. Youngs Drug Prods. Corp*., 463 U.S. 60 (1983). If any of the three *Bolger* factors are present the speech is likely commercial: (1) is the speech an advertisement; (2) does the speech refer to a specific product or service; and (3) does the speaker have an economic motivation for the speech. *See Greater Baltimore Ctr. for Pregnancy Concerns, Inc. v. Mayor & City Council of Baltimore,* 721 F.3d 264, 285 (4th Cir. 2013); *U.S. Healthcare, Inc. v. Blue Cross of Greater Phila*., 898 F.2d 914, 933 (3d Cir. 1990)). ***(PageID.16952-16953)***	"[E]ven a communication that does no more than propose a commercial transaction is entitled to the coverage of the First Amendment." *Edenfield v. Fane*, 507 U.S. 761, 767 (1993). But speech can also be commercial even if it does not propose a commercial transaction. *Bolger v. Youngs Drug Prods. Corp*., 463 U.S. 60 (1983). If any of the three *Bolger* factors are present the speech is likely commercial: (1) is the speech an advertisement; (2) does the speech refer to a specific product or service; and (3) does the speaker have an economic motivation for the speech. *See Greater Baltimore Ctr. for Pregnancy Concerns, Inc. v. Mayor & City Council of Baltimore,* 721 F.3d 264, 285 (4th Cir. 2013); *U.S. Healthcare, Inc. v. Blue Cross of Greater Phila*., 898 F.2d914, 933 (3d Cir. 1990)). (***PageID.22599-22600)***
Commercial speech is not subject to "rigid classifications" dependent on any definite set of characteristics. *Bolger*, 463 U.S. at 81, (1983) (Stevens, J., concurring). ***(PageID.16953)***	Commercial speech is not subject to "rigid classifications" dependent on any definite set of characteristics. *Bolger*, 463 U.S. at 81, (1983) (Stevens, J., concurring). ***(PageID.22600)***
In *Board of Trustees of State University of New York v. Fox*, 492 U.S. 469 (1989), the Supreme Court determined that Tupperware parties were commercial speech because they "propose a commercial transaction." These "Tupperware parties…consist[] of demonstrating and offering products for sale to groups of 10 or more prospective buyers at gatherings assembled and hosted by one of those prospective buyers (for which the host or hostess stands to receive some bonus or reward)." *Id*. at 472. The Court concluded that "[t]here is no doubt that the AFS 'Tupperware parties' the students seek to hold 'propose a commercial transaction.'" *Id*. at 473. ***(PageID.16953)***	In *Board of Trustees of State University of New York v. Fox*, 492 U.S. 469 (1989), the Supreme Court determined that Tupperware parties were commercial speech because they "propose a commercial transaction." These "Tupperware parties…consist[] of demonstrating and offering products for sale to groups of 10 or more prospective buyers at gatherings assembled and hosted by one of those prospective buyers (for which the host or hostess stands to receive some bonus or reward)." *Id*. at 472. The Court concluded that "[t]here is no doubt that the AFS 'Tupperware parties' the students seek to hold 'propose a commercial transaction.'" *Id*. at 473. ***(PageID.22600)***
Activities which seek to "have prospects enter their stores and purchase Plaintiffs' products…is commercial speech." *FF Cosmetics FL Inc. v. City of Miami Beach, Florida*, 129 F. Supp. 3d 1316, 1321 (S.D. Fla. 2015). [n.7 *See also Nordyke v. Santa Clara County*, 110 F.3d 707, 710 (9th Cir. 1997) (guns shows are commercial speech); *Northern Indiana Gun & Outdoor Shows*, *Inc. v. Hedman*, 104 F. Supp. 2d 1009 (N.D. Ind. 2000) (same).] ***(PageID.16953)***	activities which seek to "have prospects enter their stores and purchase Plaintiffs' products . . [are] commercial speech." *FF Cosmetics FL Inc. v. City of Miami Beach, Florida*, 129 F. Supp. 3d 1316, 1321 (S.D. Fla. 2015) [n.5 *See also Nordyke v. Santa Clara County*, 110 F.3d 707, 710 (9th Cir. 1997) (guns shows are commercial speech); *Northern Indiana Gun & Outdoor Shows*, *Inc. v. Hedman*, 104 F. Supp. 2d 1009 (N.D. Ind. 2000) (same).] ***(PageID.22600)***

The Court already considered and rejected these arguments. (*See* ECF 488, PageID.18924-18930; ECF 485, PageID.85532-18524) There is simply nothing new to be heard or considered at trial related on Plaintiffs' novel First Amendment agritourism theory, which this Court found "approaches the 'limitless' view of speech the Supreme Court has expressly disavowed." (ECF 559, PageID.21905-21906)

Anticipating Defendants would take issue with their effort to revive "agritourism is commercial speech" at trial, Plaintiffs assert the summary judgment order was "nothing more than an interlocutory order denying the Wineries' summary judgment motion." (ECF 580, PageID.22602) They pull a quote from *Hill v. Homeward Residential* indicating that, when summary judgment is denied "because of a material issue of fact," denial means the issue goes to trial. 799 F.3d 544, 550 (6th Cir. 2015). That case involved unresolved *fact* issues for a jury trial; the appellate court considered its jurisdiction over a pre-trial (interlocutory) order denying both movants summary judgment. Here, there are no fact issues – Plaintiffs seek to relitigate an already-decided legal issue. While the Order may be interlocutory for appellate purposes, it is dispositive in its effect on Plaintiffs' agritourism as commercial speech argument.

The purpose of summary judgment is to promote judicial economy by narrowing trial issues. *Cloverdale Equipment Co. v. Simon Aerials, Inc*., 869 F.2d 934, 937 (6th Cir. 1989) (summary judgment motion may be an "appropriate avenue for the 'just, speedy and inexpensive determination' of a matter.") (quoting *Celotex Corp. v. Catrett,* 477 U.S. 317, 327 (1986)); *Pahuta v. Massey-Ferguson, Inc.,* 170 F.3d 125, 130 (2d Cir. 1999) ("It is axiomatic that the purpose of summary judgment is to prevent trials that are unnecessary.") Defendants are entitled to proceed to trial in reliance on the Court's summary judgment order rejecting Plaintiffs' argument that various sections of the PTZO curtail "agritourism" and thus commercial speech. *See Arizona v.*

California, 460 U.S. 605, 618 (1983) ("when a court decides upon a rule of law, that decision should continue to govern the same issues in subsequent stages in the same case.") (citation omitted); *United States v. Todd,* 920 F.2d 399, 403 (6th Cir. 1990) (purpose of law of the case doctrine is "to prevent the continued litigation of settled issues"). Plaintiffs' attempt to reassert this legal argument after the Court rejected it wastes judicial and party resources.

Defendants are materially harmed by Plaintiffs' attempt to resurrect their argument and present evidence relating to it at trial. Plaintiffs have more than doubled the number of zoning provisions to pass through the *Central Hudson* test at trial. The 8 additional provisions were enacted by Peninsula Township at different times and each applied uniquely (if at all) to each Plaintiff. These were tailored to address particular zoning considerations, so the *Central Hudson* test must be tailored accordingly, necessitating additional proofs. PTP disclosed that its expert Dr. Daniels will testify regarding the *Central Hudson* tailoring of 5 subsections identified in the Court's summary judgment order as regulating or relating to speech; he must substantially expand his scope of preparation and testimony if required to address 12 instead of 5 subsections. These 8 new sections implicate additional claims for damages; litigating them will necessitate substantial additional lay and expert evidence at trial. Defendants filed their trial brief and proposed findings of fact and conclusions of law addressing only issues *un*resolved in summary judgment. (ECF 581, 583) The prejudice is compounded because Plaintiffs would sweep in provisions on the eve of trial they never previously identified as commercial speech during discovery. With 11 Wineries and numerous trial issues, Plaintiffs' attempt to relitigate agritourism as commercial speech for 8 additional provisions will significantly lengthen an already long trial and prejudice Defendants.

Defendants file this pre-trial notice of their threshold and continuing objections to the issues asserted in Section IV.A.1.b of Plaintiffs' Trial Brief.

Respectfully submitted,

Date: April 25, 2024

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CERTIFICATE OF SERVICE

I, Tracy Jane Andrews hereby certify that on the 25th day of April 2024, I electronically filed the foregoing document with the ECF system which will send a notification of such to all parties of record.

By: /s/ Tracy Jane Andrews
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