

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' TRIAL BRIEF AND PROPOSED FINDINGS OF FACT AND  
CONCLUSIONS OF LAW**

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Here, Plaintiffs seek damages across five categories.<sup>6</sup> These damages are authorized because Plaintiffs have proven numerous constitutional violations under 42 U.S.C. § 1983. Plaintiffs will testify that their damages were caused by the constitutional violations because, absent the unconstitutional restrictions, they would have engaged in the activities barred by the Winery Ordinances. Therefore, their damages were caused by the constitutional violations.

Each category and amount of damages is assessed in turn.

**1. Lost profits from increased cost of grapes due to requirement of grapes grown on the Peninsula (Schedule 1).**

Witnesses for Tabone Vineyards and Two Lads will testify that Sections 6.7.2(19)(a), 6.7.2(19)(b)(1)(ii), 6.7.2(19)(b)(1)(iii), 6.7.2(19)(b)(2)(i), and 6.7.2(19)(b)(2)(v) from the Farm Processing Facility Ordinance required them to source grapes from inside Peninsula Township where they could have been sourced at a lower price from elsewhere. Witnesses for Bonobo, Bowers Harbor, and Chateau Chantal will testify that Sections 8.7.3(10)(u)(2)(e) and 8.7.3(10)(u)(3) from the Winery Chateau Ordinance required them to source grapes inside Peninsula Township where they could have been sourced at a lower price from elsewhere. These witnesses will testify that the respective sections of the Peninsula Township Ordinances caused them to incur these increased grape costs. The Court already ruled that these Sections violated the dormant Commerce Clause. (ECF No. 162, PageID.6001.) Compensatory damages are recoverable under § 1983 for dormant Commerce Clause violations. *See, e.g., Fla. Transp. Servs.*, 703 F.3d at 1234.

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<sup>6</sup> Following this Court's ruling that preemption claims under Michigan law do not give rise to damages because of the Michigan Government Tort Liability Act, Mich. Comp. Laws § 691.1401, *et seq.* (ECF No. 525, PageID.21134-21136), Plaintiffs are not seeking damages for catering (Schedule 2 of Larson's supplemental report, Exhibit 194) or restaurant/prepacked food sales (Schedule 4).

As outlined in Schedule 1 of Eric Larson’s Supplemental Report (Exhibit 194), witnesses for these Plaintiffs and Eric Larson will testify that these Plaintiffs suffered the following damages:

<b>Plaintiff</b>	<b>Damages from Increased Grape Costs</b>
OV the Farm, LLC	\$24,138
Bowers Harbor Vineyard & Winery, Inc.	\$5,325
Chateau Operations, Ltd	\$85,450
Tabone Vineyards, LLC	\$4,000
Two Lads, LLC	\$66,655
<b>Total Grape Cost Damages</b>	<b>\$185,568</b>

## **2. Lost profits from limited hours of service (Schedule 3).**

This Court ruled that § 8.7.3(10)(u)(5)(b), which imposed a 9:30 PM closing time on Guest Activities, is unconstitutionally vague and unenforceable because it includes uses the vague term “Guest Activity.” (ECF No. 162, PageID.6019.) Rob Manigold, the former Township Supervisor, testified that although the PTZO didn’t require all wineries to close at 9:30 PM, the hours restriction in 8.7.3(10)(u)(5)(b) “inferred” a 9:30 closing time on all Plaintiffs’ businesses and that is what the Township enforced. Therefore, Plaintiffs proved that the 9:30 PM closing time was unconstitutionally vague in violation of the Due Process Clause and that the closing time was enforced against all Plaintiffs. Witnesses for the Plaintiffs will testify that, but for Peninsula Township’s enforcement of a vague closing time in § 8.7.3(10)(u)(5)(b), they would have stayed open later and made more money. Damages are recoverable for due process violations when a law is void for vagueness. *See, e.g., Kolender v. Lawson*, 461 U.S. 352, 362 (1983) (affirming statute is unconstitutionally vague and remanding for trial on damages); *Chalmers*, 762 F. 2d. 753 (awarding lost profits suffered by t-shirt vendor due to vague ordinance.) Plaintiffs and Eric Larson

will testify that Plaintiffs suffered the following annual damages due to early closing hours:

<b>Plaintiff</b>	<b>Annual Lost Profit Damages for Limited Hours of Service</b>
OV the Farm, LLC	\$328,500
Winery at Black Star Farms, LLC	\$492,750
Bowers Harbor Vineyard & Winery, Inc.	\$492,750
Brys Winery, LLC	\$854,100
Chateau Operations, Ltd	\$394,200
Chateau Grand Traverse, Ltd	\$328,500
Grape Harbor, Inc	\$394,200
Montague Development, LLC	\$100,193
Tabone Vineyards, LLC	\$133,042.50
Two Lads, LLC	\$241,448
Villa Mari, LLC	\$492,750
Total Annual Lost-Profit Damages	\$4,252,433.50
<b>Total Damages over 6 ½ year damages period, less \$2,319,867 COVID impact adjustment<sup>7</sup></b>	<b>\$27,241,690.25</b>

### 3. Lost profits from lost merchandise sales (Schedule 5).

This Court ruled that “Sections 6.7.2(19)(b)(1)(v) (regulating logos and merchandise), 8.7.3(10)(u)(1)(b) (promotion of Peninsula Township), 8.7.3(10)(u)(5)(h) (outdoor displays), 8.7.3(12)(i) (regulating logo size), and 8.7.3(12)(k) (promotion of food on signs) relate to and

<sup>7</sup> These calculations reflect only 3.5 years for Tabone given that it was not open for business during the entire damages period.

regulate speech on their face—generally through limits on advertising.” (ECF No. 559, PageID.21918.) At trial, Peninsula Township and PTP bear the burden to show under *Central Hudson* that these sections advance Peninsula Township’s stated governmental interest of preserving agriculture and are the least restrictive means to do so. (*See id.* at PageID.21918-21921.) As explained above, Peninsula Township and PTP cannot meet that burden.

These sections relate to the sale of merchandise by Farm Processing Facilities (Winery at Black Star Farms, LLC; Tabone Vineyards, LLC; and Two Lads, LLC) and Remote Winery Tasting Rooms (Grape Harbor, Inc.). Representatives from these Plaintiffs will testify that these Sections caused them to lose out on merchandise sales. Representatives from these Plaintiffs and Eric Larson will testify that these Plaintiffs suffered the following total damages:

<b>Plaintiff</b>	<b>Annual Lost Profit Damages for Merchandise Sales Restrictions</b>
Winery at Black Star Farms, LLC	\$30,000
Grape Harbor, Inc.	\$27,500
Tabone Vineyards, LLC	\$15,000
Two Lads, LLC	\$17,907
Total Annual Lost-Profit Damages	\$90,407
<b>Total Damages over 6 ½ year damages period including (\$64,849) COVID impact adjustment<sup>8</sup></b>	<b>\$542,645.50</b>

**4. Lost profits from lost event hosting of small events and meetings (Schedule 6).**

This Court has invalidated multiple unconstitutional barriers preventing the Wineries from hosting small events and meetings.

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<sup>8</sup> These calculations reflect only 3.5 years for Tabone given that it was not open for business during the entire damages period.

For the Winery-Chateaus, this Court has already ruled that the entire “Guest Activity Use” scheme is vague and unenforceable. (ECF No. 162, PageID.6019.) Witnesses from Bonobo, Bowers Harbor, Brys, Chateau Chantal, Chateau Grand Traverse, Hawthorne, and Villa Mari will testify that the vagueness of the “Guest Activity Use” language and the Township’s varying and inconsistent interpretations caused them to refrain from engaging hosting small events and meetings for fear of Township enforcement.

Relatedly, this Court has ruled that Sections 8.7.3(10)(u)(2)(b) (regulations on 501(c)(3) groups) and 8.7.3(10)(u)(2)(c) (meetings of agricultural related groups) are an unlawful prior restraint. (ECF No. 559, PageID.21910.) Witnesses from Bonobo, Bowers Harbor, Brys, Chateau Chantal, Chateau Grand Traverse, Hawthorne, and Villa Mari will testify that the prior restraint, including the lack of a definition of “agricultural” group, caused them to refrain from engaging hosting small events and meetings for various groups for fear of Township enforcement.

Also, for the Winery-Chateaus, this Court has ruled that the 1.25 ton per-guest requirement for Guest Activity Uses in Section 8.7.3(10)(u)(3) violates the dormant Commerce Clause. (ECF No. 162, PageID.6001.) Section 8.7.3(10)(u)(3) required the Winery-Chateaus to purchase grapes from Peninsula Township farmers to qualify for the vague “Guest Activity Uses.” Representatives from Bonobo, Bowers Harbor, Brys, Chateau Chantal, Chateau Grand Traverse, Hawthorne, and Villa Mari will testify that they prioritize selling their own estate grown wine and/or sourcing grapes, juice, or wine from grape varieties that cannot be grown within Peninsula Township. These representatives will testify that the Township’s requirement to purchase grapes from other vineyards in Peninsula Township limited their ability to host small events and meetings.

This Court may also invalidate additional barriers as unlawful restrictions on Plaintiffs’ commercial speech. As explained above, representatives from Plaintiffs will testify that Sections



6.7.2(19)(a), 8.7.3(10)(m) 8.7.3(10)(u)(1)(d), 8.7.3(10)(u)(2)(a), 8.7.3(10)(u)(2)(b), 8.7.3(10)(u)(2)(c), 8.7.3(u)(2)(d), and 8.7.3(10)(u)(5)(a) unconstitutionally restrict their commercial speech by limiting the ways in which they advertise their wine for sale and to whom they may advertise. Representatives from these Plaintiffs will testify that these sections caused them to lose profits from wine sales during accessory uses like small events and meetings.

Without those unconstitutional barriers, the Wineries would have been left with the traditional “principal” and “accessory” uses allowed by the Peninsula Township Zoning Ordinance. Under the PTZO, a “winery” is defined as a “state licensed facility where agricultural fruit production is maintained, juice is processed into wine, stored in bulk, packaged, and sold at retail or wholesale to the public with or without the use of a wine tasting facility. The site and buildings are used principally for the production of wine.” (Exhibit 1 at 17.) The Winery-Chateau Ordinance states that “The principal use permitted upon the site shall be a winery.” Therefore, the principal uses at Winery-Chateaus are growing grapes, making wine, and selling wine.

The PTZO allows “accessory uses,” which are defined as a “use customarily incidental and subordinate to the principal use or building located on the same lot as the principal use or building.” (Exhibit 1 at 2.) The Winery-Chateau Ordinance allows for accessory uses. “In addition to the principal and support uses, accessory uses for each such use shall be permitted provided, that all such accessory uses shall be no greater in extent than those reasonably necessary to serve the principal use.” Section 8.7.3(1)(d)(1).<sup>9</sup> Representatives from these Plaintiffs will testify that small events and meetings would be “accessory uses” because they are customarily incidental and subordinate to the primary uses of growing grapes, making wine, and selling wine. This is

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<sup>9</sup> “Support uses” are “[g]uest rooms, manager’s residence, and single family residences.” Section 8.7.3(10)(d). These are distinct from accessory uses.

consistent with the Michigan Farm Market GAAMPs promulgated pursuant to Michigan’s Right to Farm act which allows farm, like the Plaintiffs, the host on-farm “Promotional and educational activities at the farm market incidental to farm products with the intention of selling more farm products. These activities include, but are not limited to, farm tours (walking or motorized), demonstrations, cooking and other classes utilizing farm products, and farm-to-table dinners.” Specifically, the winery witnesses will testify that small events and meetings help the wineries sell more wine which, in turn, allows the wineries to reinvest money into their grape growing and wine-making operations. Each representative will also testify that they would host small events and meetings no more than reasonably necessary to aid in their principal uses. Ultimately, representatives from these Plaintiffs will testify that the unconstitutional ordinances outlined above caused them to refrain from engaging in these accessory uses.

Plaintiffs and Eric Larson will testify that Plaintiffs suffered the following annual damages due to their inability to host small events and meetings typically involving approximately twenty customers:

<b>Plaintiff</b>	<b>Annual Lost Profit Damages Small Events</b>
OV the Farm, LLC	\$108,160
Winery at Black Star Farms, LLC	\$54,080
Bowers Harbor Vineyard & Winery, Inc.	\$208,208
Brys Winery, LLC	\$163,592
Chateau Operations, Ltd	\$106,470
Chateau Grand Traverse, Ltd	\$22,308
Grape Harbor, Inc	\$53,235
Montague Development, LLC	\$54,080

Tabone Vineyards, LLC	\$182,182
Two Lads, LLC	\$260,260
Villa Mari, LLC	\$218,855
Total Annual Lost-Profit Damages	\$1,431,430
<b>Total Damages over 6 ½ year damages period, less \$757,226 COVID impact adjustment<sup>10</sup></b>	<b>\$8,757,749</b>

**5. Lost profits from lost event hosting of large events and weddings (Schedule 7).**

Plaintiffs have broken out their damages claim to separately distinguish larger events, that may be things like corporate retreats, rehearsal dinners, retirement parties, wedding receptions and similar activities which would include more than the twenty or so customers that constitute a smaller event. For the same reasons stated above with respect to small events and meetings from Schedule 6, Plaintiffs and Eric Larson will testify that Plaintiffs suffered the following annual damages due to their inability to host large events and weddings:

<b>Plaintiff</b>	<b>Annual Lost Profit Damages Large Events</b>
OV the Farm, LLC	\$1,267,500
Winery at Black Star Farms, LLC	\$1,344,200
Bowers Harbor Vineyard & Winery, Inc.	\$2,184,000
Brys Winery, LLC	\$1,394,250
Chateau Operations, Ltd	\$2,281,500
Chateau Grand Traverse, Ltd	\$612,625
Grape Harbor, Inc	\$163,719

<sup>10</sup> These calculations reflect only 3.5 years for Tabone given that it was not open for business during the entire damages period.

Montague Development, LLC	\$422,500
Tabone Vineyards, LLC	\$572,910
Two Lads, LLC	\$1,901,250
Villa Mari, LLC	\$1,014,000
Total Annual Lost-Profit Damages	\$13,158,454
<b>Total Damages over 6 ½ year damages period, less \$7,237,150 COVID impact adjustment<sup>11</sup></b>	<b>\$83,811,221</b>

**6. Alternatively, this Court could award the Wineries general damages.**

Alternatively, this Court could award the Wineries “general damages.” “[G]eneral damages represent compensatory damages for a harm so frequently resulting from the tort that it is the very basis of the cause of action, Restatement (Second) of Torts § 904 (1979); that is, in these cases, the major purpose of the suit may be to obtain a public declaration that the plaintiff was improperly treated and general damages serve the purpose of vindicating the injured party.” *Walje*, 773 F.2d at 731. As the Sixth Circuit has explained, “general damages are appropriate where the very violation itself causes harm, so too must Section 1983 permit the recovery of general damages for First Amendment violations, which by their very nature weaken and damage the guarantee of free speech.” *Id.* at 732. General damages may be “necessary in order to fully vindicate the challenged substantive right and to deter future conduct that threatens its practical significance.” *Id.*

In sum, this Court could award the Wineries general damages to fully vindicate their rights and deter Peninsula Township from repeating unconstitutional conduct (like Amendment 201).

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<sup>11</sup> These calculations reflect only 3.5 years for Tabone given that it was not open for business during the entire damages period.