

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MICHIGAN

WINERIES OF THE OLD MISSION
PENINSULA (WOMP) ASSOC., a Michigan
Nonprofit Corporation, et al.,

Case No: 1:20-cv-01008

Plaintiffs,

v

PENINSULA TOWNSHIP, Michigan Municipal
Corporation,

Honorable Paul L. Maloney
Magistrate Ray S. Kent

Defendant.

PROTECT THE PENINSULA,

Intervenor-Defendant.

PLAINTIFFS' POST TRIAL BRIEF

TABLE OF CONTENTS

	Page
I. INTRODUCTION	1
II. ISSUES RESOLVED PRIOR TO TRIAL	1
A. Local grape purchase requirements violate the dormant Commerce Clause	1
B. The term “Guest Activity” violates the Due Process Clause because it is unconstitutionally vague	1
C. Sections 8.7.3(10)(u)(1)(b) and 8.7.3(10)(5)(a) violate the First Amendment by compelling speech	2
D. Sections 8.7.3(10)(u)(2)(b) and 8.7.3(10)(u)(2)(c) violate the First Amendment through prior restraint on speech	2
E. Section 8.7.3(10)(u)(5)(i)’s ban on catering is preempted	2
F. Section 8.7.3(10)(u)(5)(g)’s ban on amplified music is preempted	2
G. This Court intends to issue an injunction	3
III. FACTS	3
A. The Wineries presented twelve fact witnesses whose testimony was consistent and un rebutted	3
1. OV the Farm, LLC (“Bonobo”)	3
2. Villa Mari LLC (“Villa Mari” or “Mari”)	4
3. Brys Winery, LC (“Brys Estate”)	4
4. Tabone Vineyards, LLC (“Tabone”)	5
5. Bowers Harbor Vineyard & Winery, Inc. (“Bowers Harbor”)	6
6. Montague Development, LLC (“Hawthorne”)	7
7. Grape Harbor, Inc. (“Peninsula Cellars”)	8
8. Chateau Operations, Ltd. (“Chateau Chantal”)	8
9. Chateau Grand Traverse, Ltd. (“Chateau Grand Traverse”)	9
10. Two Lads, LLC (“Two Lads”)	10
11. Winery at Black Star Farms, LLC (“Black Star”)	10
B. The Wineries consistently testified regarding the need more customers in their tasting rooms to preserve their farms	12
1. The Wineries are farms and comply with Michigan’s Generally Accepted Agricultural Management Practices (“GAAMPs”)	12
2. Vineyard and winery operations are enormously expensive and time consuming to monetize	13

TABLE OF CONTENTS
(continued)

	Page
3. Just growing grapes is not a profitable business.....	14
C. To preserve their agricultural businesses, the Wineries need to attract more customers to their tasting rooms	15
1. Tasting room sales are the most profitable sales channel for the Wineries and in-person marketing is the most effective.....	15
2. The Wineries rely on wine club memberships which derive from tasting room visits	18
3. Winery events focus on marketing and advertising to drive sales.....	20
4. Events are, at their core, product demonstrations	24
5. The Wineries’ ability to keep their farms in agriculture is at risk without value-added agriculture	26
6. PTP’s lone witness purposefully ignored relevant information and his opinion does not rebut the factual evidence at trial.....	28
D. Peninsula Township enforced every section of the Winery Ordinances	37
1. The Township admitted that it enforced the Winery Ordinances	37
2. The Wineries provided specific examples of enforcement.....	43
3. The Township enforced a made-up 9:30 p.m. closing time.....	51
4. The Wineries feared, and the Township never disavowed, enforcement.....	52
E. The Wineries presented evidence that they suffered damages due to the Township’s enforcement.....	53
1. Some Wineries incurred damages from complying with grape-source requirements	53
2. Closing time restrictions caused damages to all Wineries.....	55
3. Four Wineries were damaged by the Township’s restrictions on merchandise sales.....	59
4. All Wineries were damaged by the Township’s enforcement of vague and unconstitutional restrictions on events and product demonstrations	60
IV. APPLICATION OF TRIAL EVIDENCE TO LEGAL ISSUES.....	75
A. Peninsula Township enforced restrictions on the Wineries which were not found in the text of the Winery Ordinances.....	75

TABLE OF CONTENTS
(continued)

	Page
B. Sections 6.7.2(19)(a), 6.7.2(19)(b)(1)(v), 8.7.3(10)(m), 8.7.3(10)(u)(1)(b), 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(10)(u)(2)(d), 8.7.3(10)(u)(5)(a), 8.7.3(10)(u)(5)(h), 8.7.3(12)(i), and 8.7.3(12)(k) violate the Wineries’ First Amendment rights to engage in commercial speech	78
1. Defendants did not carry their burden to prove that preserving agriculture was a substantial governmental interest	85
2. Even if any interests were substantial, the challenged sections do not preserve agriculture.....	87
3. The challenged sections are not the least restrictive means to preserve agriculture.....	92
V. APPLICATION OF TRIAL EVIDENCE TO PLAINTIFFS’ CLAIMS FOR DAMAGES AND OTHER FORMS OF RELIEF	94
A. The Wineries are entitled to recover lost profits caused by the constitutional violations.....	94
B. Plaintiff’s expert, Eric Larson, calculated the Wineries’ damages across five separate schedules.....	96
1. Schedule 1: Five Wineries suffered damages from increased grape costs from Peninsula Township’s grape source requirements	98
2. Schedule 3: All Wineries lost profits from Peninsula Township’s arbitrary enforcement of a 9:30 p.m. closing time.....	100
3. Schedule 5: Four Wineries lost profits from lost merchandise sales	105
4. Schedules 6 and 7 - All Wineries lost profits from the inability to host events.....	106
C. Total damages calculations	114
1. OV the Farm, LLC / Bonobo	114
2. Villa Mari, LLC	114
3. Chateau Operations, Ltd. / Chateau Chantal.....	115
4. Chateau Grand Traverse, Ltd.....	115
5. Brys Winery, LLC	115
6. Tabone Vineyards, LLC.....	116
7. Two Lads, LLC.....	116
8. Grape Harbor, Inc. / Peninsula Cellars	117
9. Montague Development, LLC / Hawthorne	117

TABLE OF CONTENTS
(continued)

	Page
10. Bowers Harbor Vineyards & Winery, Inc.	117
11. Winery at Black Star Farms, LLC	118
D. Larson correctly used gross profits to calculate damages.....	118
E. Peninsula Township and PTP “opened the door” to this Court addressing state law preemption of restaurants.....	120
F. This Court should enjoin Peninsula Township from further unlawful acts	123
G. The Wineries are entitled to recover their costs and attorneys’ fees incurred in this matter	126
VI. PENINSULA TOWNSHIP AND PTP DID NOT PROVE THEIR REMAINING AFFIRMATIVE DEFENSES	126
A. Peninsula Township failed to carry its burden of proof on laches.....	127
1. The Township did not provide evidence that the Wineries were not diligent in pursuing their claims	128
2. Neither Peninsula Township nor PTP identified any prejudice or presented evidence of prejudice to support laches.....	129
B. Peninsula Township and PTP did not present evidence of waiver, estoppel, or unclean hands	130
C. Peninsula Township and PTP abandoned their remaining affirmative defenses by not presenting evidence supporting them at trial	132
D. Most of Peninsula Township’s defense rests on evidence it never produced in discovery	134
E. Conservation easements do not affect the injunctive relief this Court can award Bonobo and Black Star.....	136
F. The Wineries’ injuries are redressable through monetary damages and injunctive relief	139
G. The Chateau Chantal consent judgment does not limit its recovery.....	141
VII. THIS COURT SHOULD REVOKE PTP’S INTERVENOR STATUS	142
VIII. CONCLUSION.....	144

TABLE OF AUTHORITIES

	Page(s)
Cases	
<i>21st Century Premier Ins. Co. v. Zufelt</i> , 889 N.W.2d 759 (Mich. App. Ct. 2016)	132
<i>44 Liquormart, Inc. v Rhode Island</i> , 517 U.S. 484	92
<i>Adam v. Barr</i> , 792 Fed. App’x 20 (2nd Cir. 2019).....	52
<i>Alive Church of the Nazarene, Inc. v. Prince William County</i> , 59 F.4th 92 (4th Cir. 2023)	125
<i>Am. C.L. Union of Nevada v. Lomax</i> , 471 F.3d 1010 (9th Cir. 2006)	140
<i>Am. Future Sys., Inc. v. Pennsylvania State Univ.</i> , 752 F.2d 854 (3d Cir. 1984).....	82, 84
<i>American Canoe Ass’n v. Murphy Farms, Inc.</i> , 326 F.3d 505 (4th Cir. 2003)	81
<i>Art & Antique Dealers League of America, Inc. v. Seggos</i> , 394 F. Supp. 3d 447 (S.D.N.Y. 2019).....	82
<i>Atlas Flooring, LLC v. Porcelanite S.A. DE C.V.</i> , 425 Fed. App’x. 629 (9th Cir. 2011)	104
<i>Aware Woman Clinic v Cocoa Beach</i> , 629 F. 2d 1146 (5th Cir. 1980)	126
<i>In re Beaty</i> , 306 F.3d 914 (9th Cir. 2002)	129, 130
<i>Bennett v. Spear</i> , 520 U.S. 154 (1997).....	140
<i>Benson v. City of Wellston</i> , 201 F. App’x 350 (6th Cir. 2006)	95, 120
<i>Board of Trustees of State University of New York v. Fox</i> , 492 U.S. 469 (1989).....	82, 84, 85

TABLE OF AUTHORITIES
(continued)

	Page(s)
<i>Bolger v. Youngs Drug Prods. Corp.</i> , 463 U.S. 60 (1983).....	81, 83
<i>Bonnell v. Lorenzo</i> , 241 F.3d 800 (6th Cir. 2001)	123
<i>Bonnichsen v. United States</i> , 367 F.3d 864 (9th Cir. 2004)	139
<i>Boston–Edison Protective Association v. Paulist Fathers, Inc.</i> , 10 N.W.2d 847 (Mich. 1943).....	138
<i>Bridgeport Music, Inc. v. Justin Combs Publ’g</i> , 507 F.3d 470 (6th Cir. 2007)	128
<i>Burkow v. City of Los Angeles</i> , 119 F. Supp. 2d 1076 (C.D. Cal. 2000)	85
<i>Carlton & Harris Chiropractic, Inc. v. PDR Network, LLC</i> , 80 F.4th 466 (4th Cir. 2023)	82
<i>Carrol v. City of Detroit</i> , 410 F. Supp. 2d 615 (E.D. Mich. 2006).....	86
<i>Cayuga Nation v. Tanner</i> , 824 F.3d 321	52
<i>Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm’n of New York</i> , 447 U.S. 557 (1980).....	78, 79, 87
<i>Chalmers v. City of Los Angeles</i> , 762 F.2d 753 (9th Cir. 1985)	76, 95, 101
<i>Chappel v. Boss Rain Forest Pet Resort, Inc.</i> , 2018 WL 7365237 (S.D. Fl. Mar. 15, 2018).....	134
<i>City of Cincinnati v. Discovery Network, Inc.</i> , 507 U.S. 410 (1993).....	79
<i>City of Detroit v. Qualls</i> , 434 Mich. 340 (1990)	122
<i>City of Livonia v. Dep’t of Social Services</i> , 378 N.W.2d 402 (Mich. 1985).....	138

TABLE OF AUTHORITIES**(continued)**

	Page(s)
<i>Coal. to Defend Affirmative Action v. Regents of Univ. of Mich.</i> , 539 F. Supp.2d 960 (E.D. Mich. 2008).....	143
<i>Commonwealth v. Biden</i> , 57 F. 4th 545 (6th Cir. 2023)	77, 101
<i>Communities for Equity v. Michigan High Sch. Athletic Ass’n</i> , 459 F.3d 676 (6th Cir. 2006)	94
<i>Concord Boat Corp. v. Brunswick Corp.</i> , 207 F.3d 1030 (8th Cir. 2000)	28
<i>Contract Design Group, Inc. v. Wayne State University</i> , 635 F. App’x 222 (6th Cir. 2015)	119
<i>Coyne’s & Co. v. Enesco, LLC</i> , 2010 WL 3269977 (D. Minn. Aug. 16, 2010)	97
<i>Davidson v. Gen. Motors Corp.</i> , 357 N.W.2d 59 (Mich. Ct. App. 1984).....	120
<i>DeRuiter v. Township of Byron</i> , 505 Mich. 130 (2020)	121
<i>DXS, Inc. v. Siemens Med. Sys., Inc.</i> , 100 F.3d 462 (6th Cir. 1996)	119, 120
<i>E.E.O.C. v. Freeman</i> , 778 F.3d 463 (4th Cir. 2015)	28
<i>eBay Inc. v. MercExchange, L.L.C.</i> , 547 U.S. 388 (2006).....	123
<i>Edenfield v. Fane</i> , 507 U.S. 761 (1993).....	<i>passim</i>
<i>EFCO Corp. v. Symons Corp.</i> , 219 F.3d 734 (8th Cir. 2000)	97
<i>Elrod v. Burns</i> , 427 U.S. 347 (1976).....	123
<i>English v. Augusta Township</i> , 514 N.W.2d 172 (Mich. App. Ct. 1994)	124

TABLE OF AUTHORITIES**(continued)**

	Page(s)
<i>Farrar v. Hobby</i> , 506 U.S. 103 (1992).....	120
<i>Fayetteville Investors v. Commercial Builders, Inc.</i> , 936 F.2d 1462 (4th Cir. 1991)	80
<i>Fedders Corp. v. Taylor</i> , 473 F. Supp. 961 (D. Minn. 1979).....	134
<i>FF Cosmetics FL Inc. v. City of Miami Beach, Florida</i> , 129 F. Supp. 3d 1316 (S.D. Fla. 2015)	81, 84, 85
<i>Fla. Transp. Servs., Inc. v. Miami-Dade Cnty.</i> , 703 F.3d 1230 (11th Cir. 2012) (§ 1983 dormant Commerce Clause).....	95
<i>Flajole v. Gallaher</i> , 93 N.W.2d 249 (Mich. 1958).....	138
<i>Franklin Am. Mortg. Co. v. Univ. Nat’l Bank of Lawrence</i> , 910 F.3d 270 (6th Cir. 2018)	127
<i>Friends of Yamhill County, Inc. v. Board of Commissioners of Yamhill County</i> , 2021 WL 5237238, at *1-2 (E.D. Va. Nov. 10, 2021),	125
<i>Fuller v. GEICO Indem. Co.</i> , 872 N.W.2d 504 (Mich. App. Ct. 2015)	132
<i>In re Genetically Modified Rice Litigation</i> , 2009 WL 3336086 (E.D. Mo. Oct. 6, 2009).....	104
<i>Grantham & Mann, Inc. v. Am. Safety Prod., Inc.</i> , 831 F.2d 596 (6th Cir. 1987)	95, 120
<i>Greater Baltimore Ctr. for Pregnancy Concerns, Inc. v. Mayor & City Council of Baltimore</i> , 721 F.3d 264 (4th Cir. 2013)	81, 83
<i>H.D.V.-Greektown, LLC v. City of Detroit</i> , 568 F.3d 609 (6th Cir. 2009)	123
<i>Halpern 2012, LLC v. City of Ctr. Line</i> , 404 F. Supp. 3d 1109 (E.D. Mich. 2019), <i>aff’d sub nom. Halpern 2012, LLC v. City of Ctr. Line, Michigan</i> , 806 F. App’x 390 (6th Cir. 2020).....	94
<i>Hedges v. Obama</i> , 724 F.3d 170 (2d Cir. 2013).....	53

TABLE OF AUTHORITIES
(continued)

	Page(s)
<i>Holt Civic Club v. City of Tuscaloosa</i> , 439 U.S. 60 (1978).....	120
<i>Interstate Outdoor Advertising v. Zoning Bd. of Tp. Of Cherry Hill</i> , 672 F. Supp. 2d 675 (D.N.J. 2009).....	85, 88
<i>JDC Mgmt., LLC v. Reich</i> , 644 F. Supp. 2d 905 (W.D. Mich. 2009)	123
<i>Johnson v. Zerbst</i> , 204 U.S. 458	131
<i>Junior Sports Magazines Inc. v. Bonta</i> , 80 F. 4th 1109 (9th Cir. 2023)	85, 91
<i>KH Outdoor, LLC v. City of Trussville</i> , 458 F.3d 1261 (11th Cir. 2006)	124
<i>Koontz v. St. Johns River Water Mgmt. Dist.</i> , 570 U.S. 595 (2013).....	131
<i>Lawrence v. Pelton</i> , 2021 WL 1511664 (6th Cir. April 9, 2021).....	76, 101
<i>League to Save Lake Tahoe v. Crystal Enterp.</i> , 685 F.2d 1142 (9th Cir. 1982)	90
<i>LeClercq v. The Lockformer Co.</i> , 2005 WL 1162979 (N.D. Ill. Apr. 28, 2005)	28
<i>Linmark Associates Inc. v. Willingboro</i> , 431 U.S. 85 (1977).....	84
<i>Lorillard Tobacco Co. v. Reilly</i> , 533 U.S. 525 (2001).....	85, 92
<i>Lujan v. Defenders of Wildlife</i> , 504 U.S. 555 (1992).....	140
<i>M.S. v. Brown</i> , 902 F.3d 1076 (9th Cir. 2018)	140
<i>Maguire v. City of American Canyon</i> , 2007 WL 1875974 (N.D. Cal. June 28, 2007)	53

TABLE OF AUTHORITIES
(continued)

	Page(s)
<i>McPherson v. Kelsey</i> , 125 F.3d 989 (6th Cir. 1997)	127
<i>MedImmune, Inc. v. Genentech, Inc.</i> , 549 U.S. 118 (2007).....	52
<i>Meyers v. Asics Corp.</i> , 974 F.2d 1304 (Fed. Cir. 1992).....	130
<i>Mich. Chamber of Commerce v. Land</i> , 725 F. Supp. 2d 665 (W.D. Mich. 2010)	128
<i>Mishewal Wappo Tribe of Alexander Valley v. Salazar</i> , 2012 WL 4717814 (N.D. Cal. Sept. 28, 2012), <i>aff'd</i> , 534 F. Appx (9th Cir. 2013)	143
<i>Mockeridge v. Alcona Cnty. by Bd. of Commissioners</i> , 696 F. Supp. 3d 303 (E.D. Mich. 2023).....	132
<i>Mohney v. U.S. Hockey, Inc.</i> , 300 F. Supp. 2d 556 (N.D. Ohio 2004).....	28
<i>Montgomery v. Kitsap Cnty.</i> , 2006 WL 1785846 (W.D. Wash. June 23, 2006) <i>aff'd</i> , 297 Fed. App'x 613 (9th Cir. 2008).....	130
<i>Morgan Guar. Tr. Co. v. Hellenic Lines Ltd.</i> , 621 F. Supp. 198 (S.D.N.Y. 1985)	135
<i>Morgan v. McDonough</i> , 726 F.2d 11 (1st Cir. 1984).....	143
<i>Moses H. Cone Mem. Hosp. v. Mercury Const. Corp.</i> , 460 U.S. 1 (1983).....	80
<i>National Advertising Co. v. Town of Babylon</i> , 900 F.2d 551 (2d Cir.1990).....	86
<i>Nationwide Transp. Fin. v. Cass Info. Sys., Inc.</i> 523 F.3d 1051 (9th Cir. 2008)	90
<i>New York State Rest. Ass'n v. N.Y. City Bd. of Health</i> , 556 F.3d 114 (2d Cir. 2009).....	79
<i>Nobby Lobby, Inc. v. City of Dallas</i> , 767 F. Supp. 801 (N.D. Tex. 1991)	131

TABLE OF AUTHORITIES
(continued)

	Page(s)
<i>Nobby Lobby, Inc. v. City of Dallas</i> , 970 F.2d 82 (5th Cir. 1992)	131
<i>Nordyke v. Santa Clara County</i> , 110 F.3d 707 (9th Cir. 1997)	82
<i>Northern Indiana Gun & Outdoor Shows, Inc. v. Hedman</i> , 104 F. Supp. 2d 1009 (N.D. Ind. 2000)	82
<i>Northwoods Mfg., Inc. v. Linsmeyer</i> , 2016 WL 3004419 (Mich. Ct. App. May 24, 2016)	120
<i>Pagan v. Fruchey</i> , 492 F.3d 766 (6th Cir. 2007)	87
<i>Perdue v Kenny A. ex rel. Winn</i> , 559 U.S. 542 (2010).....	126
<i>Planned Parenthood of Central New Jersey v. Attorney General of State of New Jersey</i> , 297 F.3d 253, 264-65 (3rd Cir. 2002).....	126
<i>Powers v. Hamilton Cnty. Pub. Def. Comm’n</i> , 501 F.3d 592 (6th Cir. 2007)	94, 95
<i>Rubin v. Coors Brewing Co.</i> , 514 U.S. 476 (1995).....	78, 87, 90
<i>Samaritan Inns, Inc. v. District of Columbia</i> , 114 F.3d 1227 (D.C. Cir. 1997)	96
<i>Sanderson v. Village of Greenhills</i> , 726 F.2d 284 (6th Cir. 1984)	75, 76, 101
<i>Sandusky Wellness Center, LLC v. Medco Health Solutions, Inc.</i> , 788 F3d 218 (6th Cir. 2015)	83
<i>Schwartz v. Flint</i> , 395 N.W.2d 678 (Mich. 1986).....	124
<i>Sejman v. Warner–Lambert Co., Inc.</i> , 845 F.2d 66 (4th Cir. 1988)	81
<i>Small v. United States</i> , 333 F.2d 702 (3d Cir. 1964).....	76, 101

TABLE OF AUTHORITIES
(continued)

	Page(s)
<i>Snodgrass–King Pediatric Dental Assocs., P.C. v. DentaQuest USA Ins. Co.</i> , 295 F. Supp. 3d 843 (M.D. Tenn. 2018).....	95
<i>Southland Sod Farms v. Stover Seed Co.</i> , 108 F.3d 1134 (9th Cir. 1997)	97
<i>Susan B. Anthony List v. Driehaus</i> , 573 U.S. 149 (2014).....	52, 140
<i>Tasby v. Wright</i> , 109 F.R.D. 296 (N.D. Tex. 1984)	143
<i>Tri-County Industries, Inc. v. District of Columbia</i> , 200 F.3d 836 (D.C. Cir. 2000)	95, 96
<i>Tucson v. City of Seattle</i> , 914 F. 4th 1318 (9th Cir. 2024)	140
<i>Turner Broad. Sys., Inc. v. FCC</i> , 512 U.S. 622 (1994).....	85
<i>U.S. Healthcare, Inc. v. Blue Cross of Greater Phila.</i> , 898 F.2d 914 (3d Cir. 1990).....	81
<i>U.S. v. Beasley</i> , 513 F.2d 309 (5th Cir. 1975)	135
<i>U.S. v. Royster</i> , 204 F. Supp. 750 (N.D. Ohio 1961).....	131
<i>United States v. Bohn</i> , 622 F.3d 1129 (9th Cir. 2010)	90
<i>United States v. Tropiano</i> , 418 F.2d 1069 (2d Cir. 1969).....	76, 101
<i>Utex Industries, Inc. v. Weigand</i> , 2020 WL 873985 (S.D. Tex. Feb. 21, 2020)	104
<i>Versatile Helicopters, Inc. v. City of Columbus, Ohio</i> , 548 F. Appx. 337 (6th Cir. 2013).....	121
<i>Vineberg v. Bissonette</i> , 548 F.3d 50 (1st Cir. 2008).....	130

TABLE OF AUTHORITIES
(continued)

	Page(s)
<i>Vinny’s Landscaping, Inc. v. United Auto Credit Corp.</i> , 207 F. Supp. 3d 746 (E.D. Mich. 2016).....	83
<i>Washington Env’t Council v. Bellon</i> , 732 F.3d 1131 (9th Cir. 2013)	140
<i>Westside Mothers v. Olszewski</i> , 454 F.3d 532 (6th Cir. 2006)	81
<i>Williams v Hanover Hous. Auth.</i> , 113 F. 3d 1294 (1st Cir. 1997).....	126
<i>Wineries of the Old Mission Peninsula Ass’n v. Twp. of Peninsula, Michigan</i> , 41 F. 4th 767 (6th Cir. 2022)	142, 143
<i>Women’s Med. Prof’l Corp. v. Baird</i> , 438 F. 595 (6th Cir. 2006)	76, 101
<i>Zelazny v. Lyng</i> , 853 F.2d 540 (7th Cir. 1988)	127
 Statutes	
42 U.S.C. § 1983.....	<i>passim</i>
42 U.S.C. § 1988.....	126
Mich. Comp. Laws § 286.472(a), (b).....	138
Mich. Comp. Laws § 436.1536(7)(h)	122, 123, 142
Mich. Comp. Laws § 436.1537(7)	33
Mich. Comp. Laws § 436.1547.....	2
Mich. Comp. Laws § 436.1916(11).....	2
Mich. Comp. Laws § 691.1401, <i>et seq.</i>	96
 Court Rules	
Fed. R. Civ. P. 15(b)	120, 121
Fed. R. Civ. P. 24.....	143, 144
Fed. R. Civ. P. 54.....	<i>passim</i>

TABLE OF AUTHORITIES
(continued)

	Page(s)
Fed. R. Evid. 701	90
Fed. R. Evid. 702	28
Fed. R. Evid. 703	28
 Other Authorities	
11 Moore’s Federal Practice § 56.40[3]	80
10 Wright & Miller, Fed. Prac. & Proc. Civ. § 2662 (4th ed.)	120

I. INTRODUCTION

At trial, Plaintiffs called twelve fact witnesses, one damages expert and two rebuttal experts. Peninsula Township did not call a single witness. Protect the Peninsula (“PTP”) did not call a single fact witness and only called a professor from Pennsylvania to opine on the purported reasonableness of the Peninsula Township Zoning Ordinance (“PTZO”). That testimony, as discussed below, was not credible because the expert purposefully blinded himself to relevant facts and applicable Michigan law. In the end, after years of litigation, Plaintiffs’ case was un rebutted, and judgment should be entered in favor of Plaintiffs.

II. ISSUES RESOLVED PRIOR TO TRIAL

This Court has already found that many sections of the Winery Ordinances¹ are unconstitutional, preempted or otherwise unenforceable. ECF Nos. 162, 525, 559. Plaintiffs summarize the Court’s prior findings here for the Court’s convenience.

A. Local grape purchase requirements violate the dormant Commerce Clause.

The following sections of the Winery Ordinance violate the dormant Commerce Clause because they require Farm Processing Facilities and Winery Chateaus to use a certain percentage of Peninsula Township sourced grapes: 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); 6.7.2(19)(b)(2)(v); 8.7.3(10)(u)(2)(e); 8.7.3(10)(u)(3); 8.7.3(10)(u)(5)(c); and 8.7.3(10)(u)(5)(d). ECF No. 162, PageID.60010.

B. The term “Guest Activity” violates the Due Process Clause because it is unconstitutionally vague.

This Court ruled that “any subsection of Section 8.7.3(10) that uses the term ‘Guest Activity’ is unconstitutional and must be stricken from the Township Ordinances.” ECF No. 162,

¹ The “Winery Ordinances” (or just “Ordinances” at times) collectively are the “Farm Processing Facility Ordinance” (Section 6.7.2(19)), “Winery Chateau Ordinance” (Section 8.7.3(10)) and “Remote Winery Tasting Room Ordinance” (Section 8.7.3(12)) of the PTZO.

PageID.6019. This ruling strikes Section 8.7.3(10)(u) and every subsection as unconstitutional: 8.7.3(10)(u); 8.7.3(10)(u)(1)(a)-(g); 8.7.3(10)(u)(2); 8.7.3(10)(u)(2)(a)-(c); 8.7.3(10)(u)(2)(c)(i)-(iv); 8.7.3(10)(u)(2)(d)-(e); 8.7.3(10)(u)(3); 8.7.3(10)(u)(4); 8.7.3(10)(u)(4)(a)(i)-(iii); 8.7.3(10)(u)(5); 8.7.3(10)(u)(5)(a); 8.7.3(10)(u)(5)(a)(i)-(iii); 8.7.3(10)(u)(5)(b); 8.7.3(10)(u)(5)(c)-(k); 8.7.3(10)(u)(6); 8.7.3(10)(u)(7); 8.7.3(10)(u)(7)(a)-(b); 8.7.3(10)(u)(8); 8.7.3(10)(u)(8)(a)-(d).

C. Sections 8.7.3(10)(u)(1)(b) and 8.7.3(10)(5)(a) violate the First Amendment by compelling speech.

Sections 8.7.3(10)(u)(1)(b) and 8.7.3(10)(5)(a) are unconstitutional as they “compel speech because they require a Winery Chateau to promote Township agriculture at all Guest Activities by doing one of the following: (1) identifying ‘Peninsula Produced’ food or beverages, (2) providing ‘Peninsula Agriculture’ promotional materials, or (3) including tours through the Wineries or other agricultural locations.” ECF No. 559, PageID.21911.

D. Sections 8.7.3(10)(u)(2)(b) and 8.7.3(10)(u)(2)(c) violate the First Amendment through prior restraint on speech.

Sections 8.7.3(10)(u)(2)(b) and 8.7.3(10)(u)(2)(c) are unconstitutional prior restraints on speech as they require Township approval for the Wineries to host 501(c)(3) or agricultural related groups without providing definite criteria for that determination. ECF No. 559, PageID.21910.

E. Section 8.7.3(10)(u)(5)(i)’s ban on catering is preempted.

Mich. Comp. Laws § 436.1547 preempts Section 8.7.3(10)(u)(5)(i), which provides, “Kitchen facilities may be used for on-site food service related to Guest Activity Uses but not for off site catering.” ECF No. 525, PageID.21134.

F. Section 8.7.3(10)(u)(5)(g)’s ban on amplified music is preempted.

This Court ruled that “the ‘No amplified instrumental music is allowed’ language [of Section 8.7.3(10)(u)(5)(g)] is preempted by Mich. Comp. Laws § 436.1916(11)” ECF No.

525, PageID.21133. However, “the regulation of the amplification level of music—a mere limitation—is not preempted.” *Id.*

G. This Court intends to issue an injunction.

This Court has stated its intent to “enjoin the Township from enforcing all of the sections of the Township Ordinance that the Court has found unconstitutional or contrary to law.” ECF No. 559, PageID.21922.

III. FACTS

A. The Wineries presented twelve fact witnesses whose testimony was consistent and unrebutted.

1. OV the Farm, LLC (“Bonobo”).

Bonobo called Todd Oosterhouse, its owner and General Manager. ECF No. 600, PageID.22992-93. Bonobo planted its first vines in 2010 and opened to the public in 2014. *Id.*, PageID.22992, PageID.23002-03. Bonobo’s winery property consists of 50 acres, with 23 acres of vines. *Id.*, PageID.22994-95, PageID.23002. Bonobo harvests 45-80 tons of grapes annually. *Id.*, PageID.23003. Bonobo leases its property from a related entity, Oosterhouse Vineyards, LLC. ECF No. 601, PageID.23208-09. Bonobo was a Winery Chateau and holds licenses and permits from the Michigan Liquor Control Commission (“MLCC”). ECF No. 573, PageID.22361, PageID.22364.

At trial, the Township focused on whether Bonobo was qualified for “Guest Activity Uses.” The Township questioned whether Bonobo had planted sufficient acreage to comply with the Winery Chateau Ordinance. ECF No. 601, PageID.23181-83. While there initially was a dispute between the parties on this issue, it was resolved by a settlement agreement requiring Bonobo to plant an additional 5.95 acres of vines. *Id.*, PageID.23185-86. Bonobo then planted a further 7.95 acres and “the terms of the settlement agreement ha[d] been met” *Id.*, PageID.23188.

With this issue resolved, David Sanger, the Township's enforcement officer, told Bonobo it could have Guest Activity Uses if Bonobo submitted grape tonnage reports. ECF No. 600, PageID.23038; Exhibit 43, ECF No. 611-35, PageID.25837. Bonobo provided its tonnage reports, Exhibit 42, ECF No. 611-34, PageID.25836; ECF No. 600, PageID.23025, and was told it was approved for Guest Activity Uses. *Id.*, PageID.23038-39; ECF No. 601, PageID.23217-18; Exhibit 43, ECF No. 611-35, PageID.25837.

2. Villa Mari LLC (“Villa Mari” or “Mari”).

Mari called its Vice President and General Manager, Alexander Lagina. ECF 601, PageID.23229. After a few years of preparation, Mari opened its doors to the public in 2016. *Id.* Mari's winery sits on 50 acres, although Mari has 80 acres in Peninsula Township planted with grapes. *Id.*, PageID.23232. Mari's principal own approximately 500 acres of land in Peninsula Township. *Id.*, PageID.23233. Mari harvests 80-150 tons of grapes annually. *Id.*, PageID.23249. Mari's winery building has multiple tasting rooms and large caves available for tastings, spread over four levels. *Id.*, PageID.23237-38. Mari was a Winery Chateau and holds MLCC licenses and permits. ECF No. 573, PageID.22361, PageID.22364.

3. Brys Winery, LC (“Brys Estate”).

Brys Estate called Patrick Brys, its President and CEO, who also owns the winery with his mother. ECF No. 603, PageID.23713-14. His parents started the winery in 2000 when they purchased an abandoned cherry orchard, and they opened the winery to the public in 2005. *Id.*, PageID.23714-16. Brys Estate leases its property from Brys Realty, LLC, which the Brys family also owns. ECF No. 602, PageID.23715; ECF No. 603, PageID.23850.

Brys Estate is the largest contiguous winery on Old Mission at 155 acres, with approximately 44 acres planted with grapes. ECF No. 603, PageID.23716. It harvests approximately 120 tons of grapes annually. *Id.*, PageID.23719. It also has 900 apple trees and a

“secret garden” on the property on which lavender is grown. *Id.*, PageID.23716-17. Brys Estate has another 30-40 acres that are suitable for planting grapes, but it needs to sell more wine to make planting more grapes a worthwhile investment. *Id.*, PageID.23717-18. Brys Estate started as a Farm Processing Facility but became a Winery Chateau in roughly 2011. *Id.*, PageID.23721. Brys Estate holds MLCC licenses and permits. ECF No. 573, PageID.22360.

4. Tabone Vineyards, LLC (“Tabone”).

Tabone called its owner, sole officer and winemaker, Mario Tabone. ECF No. 602, PageID.23592; ECF No. 603, PageID.23662. Mr. Tabone’s family acquired the property in the early 2000s and initially grew and sold grapes to other wineries. ECF No. 602, PageID.23592-93. Tabone opened its tasting room in 2018. *Id.*, PageID.23593. Mr. Tabone owns the land today, subject to his mother’s life estate. ECF No. 603, PageID.23662.

Tabone has been operating as a Farm Processing Facility and was regulated by the Farm Processing Facility Ordinance. ECF No. 602, PageID.23593, PageID.23614-15; ECF No. 603, PageID.23628. At trial, the Township sought to elicit testimony that Tabone was never approved as a Farm Processing Facility, but this Court previously ruled that the Township “regulated Tabone as if it were a Farm Processing Facility” ECF No. 559, PageID.21902. This ruling was further supported by evidence that Tabone has been operating with the Township’s knowledge and approval. ECF No. 603, PageID.23628, PageID.23630-3, PageID.23711; Exhibit 187, ECF No. 611-139, PageID.27646. The Township recommended the MLCC approve Tabone’s application for a Small Wine Maker License and Tabone holds MLCC licenses and permits. ECF No. 573, PageID.22361.

Tabone’s primary location is approximately 30 acres, of which roughly 20 are vines. ECF No. 602, PageID.23596, PageID.23603. Tabone has another 20 acres in Peninsula Township that it acquired specifically to have enough acreage to qualify as a Farm Processing Facility. *Id.*; *see*

also ECF No. 603, PageID.23662. Tabone harvests approximately 15 tons of grapes each year. ECF No. 602, PageID.23604.

At trial, Peninsula Township confused Mr. Tabone with his father, also named Mario Tabone, who does not have an interest in the business. *See* ECF No. 603, PageID.23669-77. For example, the Township asserted that Special Use Permit 73 was transferred to “Tabone Vineyard” in 2004, but Tabone (the plaintiff here) did not exist in 2004. *Id.*, PageID.23680-84. It relied on another land use document, Exhibit YYYYYYYYYY (9xY), ECF No. 615-26, PageID.30481, but that document was from 2016, more than 2 years before Tabone began operating as a Farm Processing Facility. *Id.*, PageID.23710-12.

5. Bowers Harbor Vineyard & Winery, Inc. (“Bowers Harbor”).

Bowers Harbor called Spencer Stegenga, its owner. ECF No. 604, PageID.24045. Bowers Harbor began as a “gentleman farm” founded by Mr. Stegenga’s parents in the 1980s before becoming a winery and opening its tasting room in 1992. *Id.*, PageID.24045-47; ECF No. 605, PageID.24146. Mr. Stegenga took the lead role in 1996 when he became an owner and its head of marketing and sales. ECF No. 605, PageID.24149.

The Bowers Harbor property has a primary tasting room (an old horse barn) and Mr. Stegenga and his mother each own a house on the property. ECF No. 604, PageID.24050. Bowers Harbor sits on roughly 48 acres and it leases its property from two entities owned by Mr. Stegenga’s family members. *Id.*, PageID.24054; ECF No. 605, PageID.24150. Bowers Harbor has approximately 15 acres of vines on its property, all of which it planted. ECF No. 604, PageID.24061-62. It has contract for another 65-80 acres of Peninsula Township grapes. *Id.*, PageID.24062. Bowers Harbor harvests around 200 tons of grapes annually. *Id.*, PageID.24063. Bowers Harbor contracts with other wineries to processes most of its wine off site. *Id.*, PageID.24063-64.

When it started as a winery, Bowers Harbor's initial special use permit ("SUP") classified it as a "roadside stand" but the Township "essentially forced" it to become a Winery Chateau in 2019. ECF No. 604, PageID.24047-48; ECF No. 605, PageID.24145-46. Bowers Harbor has MLCC licenses and permits. ECF No. 573, PageID.22360.

6. Montague Development, LLC ("Hawthorne").

Montague Development, LLC owns HV Holdings, LLC, which owns Hawthorne Vineyards, LLC, *i.e.*, the winery known to the public as Hawthorne. ECF No. 605, PageID.24228-29. Montague Development, LLC also owns the winery's land, buildings, grapes and equipment. *Id.* Hawthorne called Bill Maier, who works for Montague Development, LLC and also is the Chief Operating Officer for the winery. *Id.* Mr. Maier explained that the other companies are "disregarded entities, so ultimately everything rolls up under the Montague Development, LLC entity." *Id.*; ECF No. 606, PageID.24297. When this lawsuit was filed, the winery was a joint venture with Chateau Operations, Ltd. ECF No. 605, PageID.24229-30. In 2022, Hawthorne Vineyards, LLC effectively replaced Chateau Operations as the joint venture partner. *Id.*, PageID.24230. It has licenses and permits issued by the MLCC. ECF No. 573, PageID.22360.

From 2013 until 2020, the winery was classified as a Farm Processing Facility. ECF No. 606, PageID.24299-302. It became a Winery Chateau to host events, but Mr. Maier's confusion regarding the term "guest activities" scrapped those plans. ECF No. 605, PageID.24231, PageID.24254; ECF No. 606, PageID.24267.

Hawthorne's building is a two-level walkout built into a hill. ECF No. 605, PageID.24234. It has around 30 acres of grapes and would like to expand its acreage if growing more grapes becomes financially viable by having events. *Id.*, PageID.24239.

7. Grape Harbor, Inc. (“Peninsula Cellars”).

Peninsula Cellars, the only Winery governed by the Remote Winery Tasting Room Ordinance, called its owner and General Manager, John Kroupa, a sixth-generation Peninsula Township farmer. ECF No. 606, PageID.24339-40. He has worked at Peninsula Cellars since it began making wine in 1994. *Id.*, PageID.24340-41. Peninsula Cellars received an SUP to operate a remote tasting room in 1998 and opened its doors in 1999. *Id.*, PageID.24417-18. It has licenses and permits issued by the MLCC. ECF No. 573, PageID.22360.

The remote tasting room is located on Center Road, but its wine production facility is several miles to the north, on Kroupa Road (named after the family). ECF No. 606, PageID.24342. This facility sits on over 300 acres, of which 40 acres are grapevines, and it harvests around 150 tons of grapes annually; it also grows apples and cherries. *Id.*, PageID.24348-50. Mr. Kroupa planted the majority of those acres. *Id.*, PageID.24349-50. The winery is an old schoolhouse (constructed in 1896) on a five-acre parcel, where some grapes are also grown. *Id.*, PageID.24344.

8. Chateau Operations, Ltd. (“Chateau Chantal”).

Chateau Chantal called Marie Chantal Dalese, its President, CEO and co-owner. ECF No. 606, PageID.24460-61. It is a family business that planted its first vines in 1986 before opening its doors to the public in 1993. *Id.*, PageID.22462-63. It was classified as a Winery Chateau and holds licenses and permits from the MLCC. ECF No. 573, PageID.22360, PageID.22363.

Chateau Chantal’s SUP encompasses 65 acres, of which 48 acres are grapevines, and owns another 10 acres outside of its SUP. ECF No. 606, PageID.22465, PageID.24476. It farms another 30 acres in Peninsula Township and purchases fruit from a further 40 acres. *Id.*, PageID.24476. Chateau Chantal processes 300 tons of grapes each year. *Id.*, PageID.24477. The winery has one main building with numerous tasting areas, a 12-room bed and breakfast and an upstairs “manager’s residence” for Ms. Dalese’s father, the winery’s founder. *Id.*, PageID.22465-66.

The Township suggested that Chateau Chantal was not harmed by Guest Activity Use restrictions since it has hosted some weddings. *Id.*, PageID.24495. But all guests at these weddings must spend the night at its 12-room bed and breakfast which lead to “minimal success” and maybe 3 weddings per year. *Id.*, PageID.24495-96. The Township also asserted that Chateau Chantal can host corporate retreats; but it could do so only if all participants spent the night. *Id.*, PageID.24625-26. Given it only has 12 rooms, this would make for a strange corporate retreat, and there was no evidence that it has hosted corporate retreats. Chateau Chantal has hosted food and wine pairing dinners, and it tried to host local 501(c)(3) and agricultural related groups. *Id.*, PageID.24496. They are not a big audience, however, and do not usually want to spend funds meeting at a winery. *Id.*, PageID.24496.

9. Chateau Grand Traverse, Ltd. (“Chateau Grand Traverse”).

Chateau Grand Traverse called Edward O’Keefe, its President since the mid-1990s. ECF No. 607, PageID.24655-56. Chateau Grand Traverse started in 1974 when Mr. O’Keefe’s father, “a cantankerous Irish guy from Philadelphia,” decided to open a winery in northwest Michigan. *Id.*, PageID.24656-57, PageID.24790. The winery sits on around 84 acres of land. *Id.*, PageID.24668. Chateau Grand Traverse, or the O’Keefe family, controls approximately 113 acres of planted grapes, which produce an average of 350 tons of grapes. *Id.*, PageID.24670. Chateau Grand Traverse also buys 200-400 tons of grapes annually from other Township farmers, including 80-100 tons of grapes from former Township Supervisor Rob Manigold. *Id.*, PageID.24670-72. (Chateau Chantal also purchased a significant amount of grapes from Mr. Manigold. ECF No. 606, PageID.24510-11.) It has MLCC licenses and permits. ECF No. 573, PageID.22360.

Chateau Grand Traverse predates the Winery Chateau Ordinance, ECF No. 607, PageID.24694-95, PageID.24791, yet its SUP refers to it as a “winery chateau,” which creates confusion whether it is subject to the Winery Chateau Ordinance. *Id.*, PageID.24695-701; *see also*

Exhibit 137, ECF No. 611-94, PageID.26868, and Exhibit OOOOOOO (7xO), ECF No. 615-18, PageID.29913. The SUP is further confusing in that it allows “outdoor functions such as wine tasting parties, festivals, etc.,” but require a special permit if these are likely to involve more than 75 people. ECF No. 607, PageID.24696. Chateau Grand Traverse would like to be able to host more than 75 people. *Id.*, PageID.24726-27. The “etc.” has always mystified Mr. O’Keefe and he has no idea if the SUP allows him to hold indoor functions. *Id.*, PageID.24696-97. It also allows “low-level mood music” but Mr. O’Keefe has no idea what that means. *Id.*, PageID.24697-98.

10. Two Lads, LLC (“Two Lads”).

Two Lads called Chris Baldyga, its co-founder and co-owner. ECF No. 608, PageID.24846-49. Mr. Baldyga grew up in the wine business, working at Chateau Grand Traverse (where his mother works) and Brys Estate. *Id.*, PageID.24847-48. Two Lads leases its property from BOQ, LLC, which Mr. Baldyga and his wife own. *Id.*, PageID.24949, PageID.24954-55. Two Lads was formed in 2007 before opening its doors to the public in 2008. *Id.*, PageID.24849. When the land was purchased, it had 12.5 acres of grapes and Two Lads planted another 10.5 acres. *Id.*, PageID.24863. Two Lads harvests 60-70 tons of grapes annually and purchases another 40-50 tons from other farmers. *Id.*, PageID.24863-64.

Two Lads was classified as a Farm Processing Facility. *Id.*, PageID.24851; Exhibit 10, ECF No. 611-10, PageID.25430. It holds MLCC license and permits. ECF No. 573, PageID.22361. Mr. Baldyga has been the president of WOMP since 2020. ECF No.608, PageID.24848, PageID.24999.

11. Winery at Black Star Farms, LLC (“Black Star”).

Black Star called Sherri Fenton and Lee Lutes. Ms. Fenton is the managing owner and oversees its hospitality programs. ECF 602, PageID.23427. Mr. Lutes is the managing member and its director for winery operations. *Id.*, PageID.23496. Mr. Lutes has been in the wine industry

for over 30 years and helped found Peninsula Cellars in 1994. *Id.*, PageID.23499-500. Black Star was created because its farming partners realized that “growing grapes alone was not a way to stay in agriculture. It was not a way to support a farming operation.” *Id.*, PageID.23504-06.

Black Star has two winery locations; one in Peninsula Township, opened in 2007, and another in Suttons Bay, Michigan, which opened first. *Id.*, PageID.23428, PageID.23496-97. Exhibit 28, ECF No. 611-23, PageID.25634, lists Black Star’s MLCC licenses and permits for its Peninsula Township location. ECF No. 602, PageID.23501-02. Black Star was classified as a Farm Processing Facility. *Id.*, PageID.23502-03, PageID.23516; Exhibit 27, ECF No. 611-22, PageID.25633. The Peninsula Township property consists of 72 acres, of which Black Star leases 5 from one of its members for its production facility and tasting room. *Id.* Black Star obtains grapes from another 50 acres in Peninsula Township. ECF No. 602, PageID.23505-06.

The Township tried to suggest that Black Star was violating its lease by allegedly engaging in commercial uses. *Id.*, PageID.23547-48. As this Court noted, the Township has no standing to enforce the lease. *Id.*, PageID.23551. Regardless, the landlord is a Black Star member and has an interest in its financial success. *Id.*, PageID.23583. The landlord’s real concern, in any event, was that Black Star does not sublease the property for other purposes. *Id.*, PageID.23533-34.

The Township also argued that Mr. Lutes should be bound by statements in a letter he drafted in 2011 that Black Star did not want to operate a bed and breakfast or host “large events.” *Id.*, PageID.23564-66, PageID.23584. This Court called this letter “ancient history” and inquired whether “there haven’t been any changes in the business environment since 2011?” *Id.*, PageID.23486-87. Mr. Lutes confirmed Black Star’s business plans have changed since 2011 and noted Black Star withdrew the variance request at issue in the letter. *Id.*, PageID.23585.

B. The Wineries consistently testified regarding the need more customers in their tasting rooms to preserve their farms.

The Wineries presented un rebutted evidence that farming and wine making is a time-consuming and costly endeavor which requires diverse avenues to sell their products. The Township present no evidence to support its argument that growing grapes was easy money.

1. The Wineries are farms and comply with Michigan’s Generally Accepted Agricultural Management Practices (“GAAMPs”).

The Wineries are farms. ECF No. 600, PageID.23003; ECF 601, PageID.23245; ECF No. 602, PageID.23440-40, PageID.23512, PageID.23604; ECF No. 603, PageID.23722; ECF No. 605, PageID.24063, PageID.24246-47; ECF No. 606, PageID.14350; ECF No. 607, PageID.24670; ECF No. 608, PageID.24863. While Defendants suggested the Wineries are industrial, Chris Baldyga of Two Lads disagreed: “I keep hearing the ‘I’ word being thrown around where there’s no industrial about what we do, we’re farms.” ECF No. 608, PageID.24944.

Unrebutted evidence confirms the Wineries also qualify as “farm markets” under Michigan’s GAAMPS. ECF No. 600, PageID.23013-14; ECF No. 601, PageID.23260; ECF No. 602, PageID.23609, PageID.23440-41; ECF No. 603, PageID.23746; ECF No. 605, PageID.24078; ECF No. 606, PageID.24354, PageID.23383; ECF No. 607, PageID.24677; ECF No. 608, PageID.24871. GAAMPS is a series of practices created by the Michigan Department of Agriculture and Rural Development (“MDARD”) which allow qualified farms to engage in value-added agricultural activities free from local government restrictions. ECF No. 605, PageID.24247; Exhibit 201, ECF No. 611-146, PageID.27702.

Defendants suggested prior to trial that winery activities might conflict with a farmer’s ability to spray pesticides, but they presented no evidence on this. John Kroupa, a sixth-generation farmer, testified that this suggestion is unfounded. ECF No. 606, PageID.24350-53, PageID.24388. Defendants designated testimony from Gordon Hayward related to spraying, but

he only discussed the need for residential setbacks. ECF No. 615-3, PageID.28219-22.

2. Vineyard and winery operations are enormously expensive and time consuming to monetize.

Although not every witness testified to the same level of detail, the un rebutted testimony was that it takes at least 3 years for grapevines to produce fruit, with vines not producing a full crop for 5-7 years. *See, e.g.*, ECF No. 600, PageID.23002. It costs \$20,000-\$25,000 to install one acre of grapevines; grape growing is a “[v]ery labor intensive” process; vines produce fruit only once each year; and one ton of grapes produces around 60 cases of wine. *See, e.g.*, ECF 600, PageID.23002-03; ECF 601, PageID.23245-46. It takes between 1 and 5 years before harvested grapes can be sold as wine. *See, e.g.*, ECF No. 600, PageID.23007; ECF No. 602, PageID.23515.

The equipment necessary to make wine is also incredibly expensive, costing hundreds of thousands to millions of dollars. *See, e.g.*, ECF No. 600, PageID.23006-07; ECF 601, PageID.23252; ECF No. 602, PageID.23514-15, PageID.23605-06; ECF No. 603, PageID.23723; ECF No. 606, PageID.24478; ECF No. 608, PageID.24865. Chateau Grand Traverse’s winery equipment costs approximately \$6 million. ECF No. 607, PageID.24665. And equipment needs upkeep and maintenance, costing upwards of \$60,000 a year. *See, e.g.*, ECF No. 602, PageID.23514-15, PageID.23605-06. There are also costs for bottles, corks, labels, barrels, casks and other items. *See, e.g.*, ECF No. 603, PageID.23723-24; ECF No. 606, PageID.24478. Barrels used to age wine can cost \$1,000 each. ECF No. 600, PageID.23006-07.

It can take years before the Wineries can recoup these costs. Bonobo has 4,000 to 8,000 cases of wine aging. ECF No. 600, PageID.23008. Chateau Grand Traverse has about \$5.4 million in unsold wine inventory and Brys Estate has around \$6.5 million in unsold wine in a warehouse ECF No. 607, PageID.24675; No. 604, PageID.24043. This wine is not being purposefully aged, but rather the wineries need more customers in their tasting rooms. ECF No. 604, PageID.24043.

All of the above evidence was unrebutted.

3. Just growing grapes is not a profitable business.

Although the Township’s counsel opened its case by stating that selling grapes for \$2,000 per ton was turning crops into “gold,” ECF No. 600, PageID.22957, the unrebutted evidence is that the Wineries would lose money selling grapes for \$2,000 per ton and they need value-added agriculture, *i.e.*, make wine from grapes, to be profitable. Todd Oosterhouse explained that \$2,000 per ton “doesn’t cover the cost of just the maintenance to get [them] to the point of even having to harvest [them]” and it is necessary “to do the value add” of making wine. ECF No. 600, PageID.23020-21. Other witnesses testified similarly. *See* ECF No. 602, PageID.23506 (“you cannot grow grapes alone in northern Michigan and support a farming operation. It’s just not possible.”); ECF No. 603, PageID.23721 (“we absolutely would lose money if we were just grape growers.”); *see also* ECF No. 602, PageID.23263; ECF No. 606, PageID.24268; ECF No. 606, PageID.24493; ECF No. 607, PageID.24690. Tabone started by growing grapes and realized that “we have to do value add, we have to convert to the agricultural product, move away from commodity, and move into a winery.” ECF No. 602, PageID.23610.

The Township also failed to introduce evidence that the Wineries were doing well financially. Conversely, Black Star testified that it lost money for the last two years. ECF No. 602, PageID.23546. Brys Estate conceded that during the recent years it made a net profit, but also testified in some years it loses money. ECF No. 604, PageID.24035-36. Two Lads lost money in 2022, although it managed to “break even” in 2023. ECF No. 608, PageID.24945. Tabone has never turned a profit. ECF No. 602, PageID.23618.

C. To preserve their agricultural businesses, the Wineries need to attract more customers to their tasting rooms.

It was un rebutted that the Wineries need to sell wine through their tasting rooms, and it is imperative that they be allowed to attract and host potential customers for product demonstrations and events in their tasting rooms, where they can generate the sales they need to ensure the continued viability of their agricultural businesses.

1. Tasting room sales are the most profitable sales channel for the Wineries and in-person marketing is the most effective.

The Wineries sell wine through various channels, but primarily through the tasting room and their wine club. *See, e.g.*, ECF No. 600, PageID.23008; ECF No. 606, PageID.24478-79. Each witness testified that the most profitable sales were those occurring through the tasting room, mostly when selling flights of wine, and that margins on distribution/wholesale were not good. ECF No. 600, PageID.23008-09, PageID.23009; ECF 601, PageID.23254-55; ECF No. 602, PageID.23435, PageID.23607-08, PageID.23608; ECF No. 603, PageID.23735-36, PageID.23736-37; ECF No. 605, PageID.24240-41; ECF No. 606, PageID.24479, PageID.24483, PageID.24353-54; ECF No. 607, PageID.24607; ECF No. 608, PageID.24866-67. Bowers Harbor testified that its wholesale margins were so bad that it actually lost \$2.00/case selling one of its wines. ECF No. 605, PageID.24074. Chateau Grand Traverse is the only Winery for whom distribution is a major part of its business. ECF No. 607, PageID.24675-76. Chateau Grand Traverse makes wine “on a different scale” than the other Wineries, but still makes better margins selling wine through its tasting room. *Id.*

Each witness testified that it was important to have people physically come and experience the winery. *See, e.g.*, ECF No. 602, PageID.23611-12, PageID.24361; ECF No. 600, PageID.23019 (“We need people to come in and see the place You don’t pick up a product just because you’ve generally heard about it, you actually have to want to get involved, you want to

experience it and say, I really like that flavor.”). To effectively market their wines, the Wineries need customers to come through their doors. *See, e.g.*, ECF No. 608, PageID.24875; ECF No. 603, PageID.23748 (“our best marketing is for people to actually visit the winery.”). Bowers Harbor’s marketing message, “welcome to our family farm and family home,” is not effective when directed through traditional advertising—it needs to be delivered in-person at the tasting room, and doing so helps Bowers Harbor sell more wine, which helps Bowers Harbor plant more grapes and purchase more grapes from other farmers. ECF No. 605, PageID.24082-83.

At Hawthorne, everyone who walks in the door is a potential customer, and customers who stay longer buy more wine. *Id.*, PageID.24246. “[E]very interaction with every customer [is] a marketing opportunity.” *Id.*, PageID.24250. Hawthorne wants customers to go back home with a “warm and fuzzy feeling” from having visited, so they want to visit again. *Id.*, PageID.24249-50. In-person marketing is “by far” more effective than other forms of marketing. *Id.*, PageID.24251. The Township tried to assert that Two Lads, for example, did not need people to visit its winery because it could advertise on social media; but people cannot taste Two Lads wine on social media and Two Lads can more effectively market its message in person. ECF No. 608, PageID.25002.

To ensure that customers have the best possible experience, and to convince these customers to spend more money on wine, the Wineries provide their servers with special training and take guests through guided tastings to promote their wines; this might include helping customers find the right wine for their palate. *See, e.g.*, ECF No. 600, PageID.23014-15, PageID.23112; ECF No. 605, PageID.24244; ECF No. 607, PageID.24677. Chateau Grand Traverse, for example, offers up to 40 different wines, which can be overwhelming, and so its servers are trained to help customers find something they like. ECF No. 607, PageID.24678. The interaction may also include education on the wine-making process or the history of the Winery.

See, e.g., ECF No. 602, PageID.23611; ECF No. 603, PageID.23743; ECF No. 606, PageID.24484, PageID.24355; ECF No. 608, PageID.24872. The customer-server interaction is so important that Black Star wrote an educational book for its servers and offers bi-weekly training. ECF No. 602, PageID.23441. Other wineries provide similar training. *See, e.g.*, ECF No. 606, PageID.24485; ECF No. 607, PageID.24677-80.

These guided experiences are “a great way to engage with the customers and make them feel involved in where they are and it’s not an experience coming to a wine tasting room like going to Meijer to pick up a bottle off the shelf” ECF No. 606, PageID.24355. Bowers Harbor explained “[t]his is a nation raised on Coca Cola, so a lot of people like to drink sweeter wines. And then we’ll see them 8 or 10 years later they’re on to a more sophisticated red wine or a little bit something drier.” ECF No. 605, PageID.24079. Bowers Harbor trains its servers to educate customers on the winery, its family history and its wine, including that the Stegenga family planted its very first vines on Father’s Day 30 years ago. *Id.*, PageID.24079-80. It also explains that Mr. Stegenga and his mother live on the property, and it is a “family farm” with the customers being welcomed into the Stegenga family home. *Id.*, PageID.24082.

Through this, the Wineries are marketing their wines and their wineries and their personal story. Many of the Wineries want customers to know that the wine they are drinking is “from the vineyard that they are looking at. This is a product we took time and patience to put out there, and that to enjoy those things, take a bottle home and enjoy what you just experienced here.” ECF No. 600, PageID.23019; *see also, e.g.*, ECF No. 603, PageID.23741-42; ECF No. 606, PageID.24488-89. For others, they want to tell the story that theirs is a family business. *See, e.g.*, ECF No. 606, PageID.24483 (“at the root of it, my dad lives upstairs and I’m at the front door.”), PageID.24361 (“we are a family winery, we’ve been here for generations, and we put our heart and soul into the

brand, into the wine that we make; we grow all the grapes, we grow all the fruit that we turn into wine.”). Chateau Grand Traverse summed it up nicely, it wants to “give a little bit of heritage, a little bit of tradition, family-owned, quality made products. Look outside the door. What you’re drinking is what we grew.” ECF No. 607, PageID.24680. Two Lads wants to “show everyone what northern Michigan tastes like.” ECF No. 608, PageID.24876.

All of the above evidence was unrebutted.

2. The Wineries rely on wine club memberships which derive from tasting room visits.

Although details varied, wine clubs are subscription-based, with customers getting several shipments of wine each year. *See, e.g.*, ECF No. 600, PageID.23009; ECF 601, PageID.23255; ECF No. 602, PageID.23436; ECF No. 603, PageID.23738. A wine club allows the Wineries to market through their customers when the customers share the wine with friends back home, ECF No. 600, PageID.22010, and it allows for the Wineries to generate revenue during the off season when tasting room sales are slower. ECF No. 600, PageID.23010; ECF 601, PageID.23255, PageID.23739; ECF No. 602, PageID.23436; ECF No. 603, PageID.23627-28; ECF No. 606, PageID.24358-59, PageID.24480,. According to Alex Lagina of Mari, “[w]e still have bills in the winter, and the wine club helps us pay those when we don’t have as many people through the door.” ECF 601, PageID.23255.

Wineries “create brand ambassadors” through their wine clubs. ECF No. 606, PageID.24358. They are “a huge life blood” that permits Wineries the opportunity to have a captive audience for its winery and its offerings. ECF No. 605, PageID.24074. A “wine club is incredibly important because it represents a recurring annuity, consistent repeat payments from customers.” ECF No. 605, PageID.24241-42. Even outside of their subscription purchases, wine club members tend to buy more wine than non-wine club members. ECF No. 603, PageID.23753; ECF No. 605,

PageID.24243; ECF No. 606, PageID.24481; ECF No. 608, PageID.24870. Two Lads has one of the largest wine clubs and explained that it “represents a really significant amount of wine sales for us and volume and overall revenue. It’s really important.” ECF No. 608, PageID.24868.

Because wine clubs are so important, the Wineries trained their staff to push wine club memberships and incentivize their staff to do so. ECF No. 600, PageID.23009-10; ECF No. 602, PageID.23436, PageID.23477; ECF No. 603, PageID.23740; ECF No. 605, PageID.24087; ECF No. 606, PageID.24358, PageID.22485; ECF No. 607, PageID.24679; ECF No. 608, PageID.24868. At Hawthorne, “it’s a core component of their job duties. Every interaction with a customer is a sales opportunity.” ECF No. 605, PageID.24242.

Wine club members come predominantly from customers in the tasting room, and it is unusual for a customer to sign up for wine clubs without having visited the winery. ECF No. 603, PageID.23737-38; ECF No. 606, PageID.24480; ECF No. 607, PageID.24680; ECF No. 608, PageID.24870. Mr. Maier estimates that only about 1% of Hawthorne’s wine club members have not visited its tasting room. ECF No. 605, PageID.24242. For Brys Estate, 95% of all memberships come from in-person sign ups. ECF No. 603, PageID.23741. Brys Estate also has a database of about 53,000 customer email addresses, 95% of which were collected by people who signed up for its email newsletter when visiting the winery. *Id.*, PageID.23747.

Many of the Wineries give tours (this was somewhat impacted by COVID), and the Wineries make sure that tours end in the tasting room, so customers can be sold on purchasing wine and joining the wine club. ECF No. 600, PageID.23015-17; ECF 601, PageID.23362; ECF No. 602, PageID.23612, PageID.23454 (“everything culminates in the tasting room as an opportunity to make a purchase”), ECF No. 603, PageID.23743, ECF No. 605, PageID.24080-81;

ECF No. 606, PageID.24322; ECF No. 608, PageID.24875.²

All of the above evidence was un rebutted.

3. Winery events focus on marketing and advertising to drive sales.

For their businesses to be sustainable, the Wineries need to get customers into their tasting rooms so they can sell them wine and get them to sign up for wine club. One critical way to do this is to host events at the wineries. “The intent [of events] is to get those people to buy more bottles” ECF No. 600, PageID.23022-23, *see also* PageID.23025 (an event provides the opportunity to try to sell more wine). While their primary business is making and selling wine, having events helps the Wineries sell more wine, plant or buy more grapes and keep their land in agriculture. ECF No. 600, PageID.23012, 23021-23; ECF No. 601, PageID.23224-25; ECF No. 603, PageID.23760; ECF No. 606, PageID.24377, PageID.24385.

Alex Lagina explained, “[f]or the people that are at the promotional activity, the purpose is to sell them wine. I mean we want to educate them about our products. We want them walking out the door having purchased. The promotional activity itself also is a way to get people to the winery, because people like ... fun things to do, that are out of the ordinary ... these promotional activities and events are a way to market ourselves to our potential customers where we can get them in the door where we can advertise best to them.” ECF 601, PageID.23266-67; *see also* PageID.23263; ECF No. 607, PageID.24724-25. Events also lead to more wine club memberships. ECF No. 600, PageID.23023, PageID.23075. The Wineries sell more wine and sign up more wine club members on days they have events, as compared to days they do not. ECF No. 600, PageID.23027; ECF 601, PageID.23267; ECF No. 606, PageID.24492.

² Tabone expressed concern that if it promotes tours of its winery, “it would be considered an event, you know, that’s my concern.” ECF No. 603, PageID.23699.

For example, Brys Estate hosted a PBS show called “Under the Radar” and after filming there was a “line of people waiting to buy wine from us. And that would never occur on a November morning had we not just had this group come in.” ECF No. 603, PageID.23751. Mr. Lagina testified regarding a recent 5k running event it hosted at its winery, which led to double the wine sales from the same day the prior week. ECF 601, PageID.23267. Bonobo has hosted activities like yoga, painting classes and book clubs. ECF No. 600, PageID.23024; Exhibit 38, ECF No. 611-31, PageID.25826. These activities were a way to get people to the winery who “may never set foot in a winery before and now they are there.” ECF No. 600, PageID.23024.

Mari had a few events where it sold hundreds of glasses of wine, at high tasting-room margins, and dozens of bottles of wine to go. ECF 601, PageID.23269-79; Exhibit 168, ECF No. 611-122, PageID.27282. Mari’s staff was actively involved in these events, educating guests about Mari wine, selling wine to go and pushing wine club signups. *Id.*, PageID.23279-80. Mari also has hosted “sunrise yoga” as “a way to get people to the tasting room” earlier in the day and the “opportunity for us to sell them wine.” *Id.*, PageID.23281-82. Mari also hosted a book club and trivia night so customers “have a reason to come in so [Mari] could get through the slow season.” *Id.*, PageID.23286.

Chateau Grand Traverse has realized that customers buy more wine when attending small events. ECF No. 607, PageID.24687. It has more one-on-one time with those customers which helps it provide more of an educational experience and sell more wine. *Id.*, PageID.24689. Having events is better than having customers walking in off the street. *Id.* Ms. Fenton explained that events are an effective way to market wine because guests “are being introduced to us, and that could be 100 or 150 people who have never been to Black Star Farms before. Now they are coming and they are having a memorable experience. It’s going to encourage them to want to come back.

They are going to want to taste the wine of what they just had this full experience around. Do they want to, you know, they want to purchase it, they want to join the wine club, they want to be able to share it with their friends.” ECF 602, PageID.23455, *see also* ECF No. 600, PageID.23028; ECF No. 605, PageID.24224. Patrick Brys explained, “if we can get them up the driveway, then we can market our wines and we can sell our wines.” ECF No. 603, PageID.23752. There is a correlation between having activities and increased sales, and not just increased sales on the day of the activity, but increased sales on the days following the activity. *Id.*, PageID.23760-61; ECF No. 605, PageID.24088. The ability to have events and generate more revenue ties directly to the Wineries’ need and ability to purchase more Peninsula Township grapes, which are usually under long-term contracts and require significant financial investment, and also the ability to purchase more Peninsula Township land to plant more grapevines. ECF No. 605, PageID.24089.

Simply put, events are a better marketing opportunity for the Wineries than regular tasting room sales because guests are “not just running through grabbing a tasting and leaving.” ECF No. 600, PageID.23028. Guests “are going to take that knowledge or that experience back to wherever they live and tell their friends about it” *Id.*, PageID.23028.

A winery does not become an event facility by hosting an event. ECF No. 600, PageID.23022; ECF No. 601, PageID.23219-20; ECF No. 602, PageID.23615-16; ECF No. 603, PageID.23751-52; ECF No. 605, PageID.24083, PageID.24089, PageID.24255; ECF No. 606, PageID.24491; ECF No. 608, PageID.24882. To the contrary, Winery events are hands-on experiences with the Wineries marketing and promoting their wines throughout. This includes providing guest with tasting notes, educating guests on vineyard and winery operations, providing product demonstrations and comparing wines, promoting additional wine for sale and promoting wine club. ECF No. 600, PageID.23023-24, PageID.23083-85; ECF 601, PageID.23265-67; ECF

602, PageID.23477; ECF No. 606, PageID.24491-92, PageID.2436, PageID.24387. Staff members are trained to interact with customers to help them figure out what type of wine fits best a customer's particular taste. ECF No. 603, PageID.23752-53. This includes teaching customers how to enjoy wine by walking them through the 5 S's of wine tasting, "see, swirl, smell, sip and savor." *Id.*, PageID.23804-06. At its Suttons Bay location, Black Star offers the "ultimate experience," including a guided hike, hands-on cooking demonstration, winery tour, wine tasting and a wine paired dinner with Ms. Fenton or members of her family. ECF 602, PageID.23458-59. Of course, staff is always "standing by the make sales." ECF 601, PageID.23265-67.

While important to Peninsula Township, the identity of the group and purpose of an event is unimportant to the Wineries. What matters is getting groups to the Winery to sell them wine. Chris Baldyga agreed that a group could walk in off the street and drink wine, but if that same group were able to schedule an event at Two Lads, it could provide a better experience which would lead to the group staying longer and purchasing more wine. ECF No. 608, PageID.25003-04. Hosting events would also help bring in business during the off season. *Id.*; ECF No. 600, PageID.23088; ECF No. 601, PageID.23261. For the Wineries, "[t]he most effective marketing we do is to the customer that's already in the building. That is our best chance to actually sell that person something." ECF No. 601, PageID.23261. The customer experience is the same for birthday parties, retirement parties, reunions, rehearsal dinners or wedding receptions. ECF No. 600, PageID.23025-26. "The title of what is happening there is not dictating the performance of what is happening in the winery." *Id.*, PageID.23026. Customers still get tasting notes and pairing recommendations, for example. *Id.*, PageID.23026; ECF No. 601, PageID.23220-24. "[E]verything we do, from our perspective, is the same. We are always trying to educate guests about our wine. They might put a different label on it or might have a different reason for coming

to the winery, but once they are there ... we are a winery and that's where you enjoy wine” ECF No. 601, PageID.23268. Events are “still going to ultimately be a product demonstration.” ECF No. 605, PageID.24256.

All of the above evidence was un rebutted.

4. Events are, at their core, product demonstrations.

Todd Oosterhouse testified about how Bonobo engages in “product demonstrations” during events. ECF No. 600, PageID.23075, PageID.23084. When customers visit the winery, “it’s an opportunity for Bonobo to present its products to potential customers” *Id.*, PageID.23129. Bonobo “promote[s] its products ... the entire time” *Id.*, PageID.23121. Using contracts for large group tastings as a sample, Exhibit 50, ECF No. 611-41, PageID.25853, Mr. Oosterhouse explained his staff provided tasting notes, food pairing, solicited wine sale and wine club memberships and engaged in product demonstrations. ECF No. 601, PageID.23218-20.

At Mari, “[o]ne of our staff will ... spend time with you to ask what kind of wine you usually drink, and from there make some recommendations ... you would select wines and the order to taste them in that make sure that the guest is getting the best experience and seeing each wine in the right light, and hopefully converting that into a sale.” ECF 601, PageID.23263. Brys Estate’s staff is “absolutely” trained to help potential customers figure out what kind of wine they might to try. “[E]very avenue of what we do there’s wine education and it’s all in an effort to sell wine.” ECF No. 603, PageID.23744. At Bowers Harbor, product demonstrations “is what we do.” ECF No. 605, PageID.24131.

Hawthorne prefers customers who are unsure what they are looking for, “because we’re able to just sort of walk through things with them and slowly help them determine what their preferences might be” ECF No. 605, PageID.24245. Hawthorne’s staff is trained to provide tasting notes to customers and walk through the “five S’s.” *Id.*, PageID.24246. Hawthorne

customers are given a “product demonstration” where Hawthorne tries to help customers select a wine and thereby create a long-term customer that will purchase wine that day, sign up for wine club, and come back. *Id.*, PageID.24256-57. For, Chateau Grand Traverse, the “real core of what we do” is having a well-educated server explain how to taste wine and then use tasting to help the customer choose the best wine for their own style. ECF No. 607, PageID.24683. Chateau Grand Traverse provides “training on wine” to its customers. *Id.*, PageID.24684. Black Star is “always providing product demonstrations, that is what wine tasting is. That’s what helps us sell our wine.” ECF No. 602, PageID.23477. For Two Lands, “product demonstration is at the core of what we do displaying something that we’ve made on site.” ECF No. 608, PageID.24872.

When Bonobo hosts pairing dinners, its staff “will talk to the people that are there about what they tasted, what they may have tasted, because everyone has a different experience of a taste” ECF No. 600, PageID.23021-22. Mari “will talk about the wine and why it was chosen to go with that dish. We will talk about how the wine was made ... we want the guests to have a good time, but we also want them to leave having purchased our wine or signed up for our wine club. It doesn’t really benefit us to bring people in, serve them dinner, have them leave without buying our wine, so the goal is to sell them wine.” ECF 601, PageID.23265.

Defendants’ suggestion that allowing events would turn Wineries into “bars” was nonsense. The Wineries only sell their own wine or other alcohol that they make, and guests are not legally allowed bring their own alcoholic beverages into the winery. ECF No. 600, PageID.23012; ECF No. 602, PageID.23617-18; ECF No. 605, PageID.24255; ECF No. 606, PageID.24363-64; ECF No. 607, PageID.24690.

All of the above evidence was un rebutted.

5. The Wineries' ability to keep their farms in agriculture is at risk without value-added agriculture.

Defendants assert that the Winery Ordinances are necessary to preserve agricultural land. But the unrebutted testimony at trial was that the Winery Ordinances have the opposite effect. For example, Bonobo would like to purchase 82 acres of neighboring land to plant grapevines, but Mr. Oosterhouse testified, "I just don't know with where we have been moving as a business how much, what we can do and can't do. And for me to invest money into purchasing land and to putting anything else in the ground, if I don't know what my avenues are to move that wine, move that product." ECF No. 600, PageID.23029. Similarly, Mari's ability to "invest in more agriculture" is dependent on its ability to host events because it needs the "ability to sell wine." ECF 601, PageID.23337. For now, Mari has "no more plans to plant grapes." *Id.*

Some Wineries are considering using their property for residential developments. Patrick Brys testified that if he cannot sell more wine, he will look to the next best use of the land, which is residential development. ECF No. 603, PageID.23719. Hawthorne's "Plan B" is to subdivide its property and sell it for residential development. ECF No. 606, PageID.24291. Chris Baldyga explained that he has had discussions with a residential developer, and that while "development is the thing that I rail against all the time, but that may be the only way to actually sell our farm and make as much money as I might get for it if it was a profitable business." ECF No. 608, PageID.24946. Mr. Baldyga lamented "I mean, to hear how much potential profit there is in that land, I know the land is valuable on the Peninsula, it's all valuable, but to not keep it in a farm would be – that would be a shame." *Id.*, PageID.24947.

It is not just the loss of agricultural land which would be a shame, but the loss of family businesses and legacies. John Kroupa is worried about keeping his farm in the Kroupa family because the business right now is not attractive to his children. ECF No. 606, PageID.24402, ("you

know, the business side, the winery side, is the best shot I have of preserving our farm and keeping it in agriculture.”) Edward O’Keefe is also worried his second-generation business won’t make it down to the third generation. ECF No. 607, PageID.24734.

To preserve agricultural land, the Wineries need to be more profitable, not less. With more revenue, Black Star could expand its plantings and pay its members a higher price for their fruit, which would help those members, who are grape farmers, stay in agriculture. ECF No. 602, PageID.23543-44. Ms. Dalese explained that wine sales are declining on a national and global level; she has noticed that people are coming to Chateau Chantal for the agricultural experience as much as the wine and to be profitable she has to offer farm experiences. ECF No. 606, PageID.24549-50. To continue its business and maintain the land in agriculture, she has to be able to diversify; the next best use of its land is housing developments. *Id.*, PageID.24550-51.

The Wineries want to reinvest in the land. Bonobo would purchase more property and plant more vines. ECF No. 600, PageID.23028. Bonobo wants to keep more land in agriculture, but it needs to sell more wine and have more people come through its doors, and it needs to take advantage of different means and methods to accomplish that. *Id.*, PageID.23113-14. Brys Estate owns about 40 acres suitable for planting grapes, but it has not planted more grapes because it is not selling enough wine to make doing so a worthwhile investment. ECF No. 603, PageID.23717-18. Tabone would like to expand its capacity for making wine and plant more grapes. *Id.*, PageID.23644, PageID.23661. Bowers Harbor would reinvest in its facility and in grape production in Peninsula Township, so that Mr. Stegenga can pass the family winery on to his children. ECF No. 605, PageID.24143-44. Chateau Grand Traverse would renovate its vineyards and reinvest in its business. ECF No. 607, PageID.24691. Peninsula Cellars planted 2,000 apple trees so it could produce cider, and with additional revenue, “we could continue to plant more trees

so we could expand the cider line-up through growing more apples” ECF No. 606, PageID.24365-66. If Two Lads could generate more revenue, it plans to acquire more land and plant more vines. ECF No. 608, PageID.24944-45.

All of the above evidence was un rebutted.

6. PTP’s lone witness purposefully ignored relevant information and his opinion does not rebut the factual evidence at trial.

While PTP did not call a single fact witness to rebut any of the evidence at trial, PTP did call Dr. Thomas Daniels. PTP stated that Daniels would “opine regarding the validity of harms and reasonableness of fit between the zoning provisions and the Township’s desired zoning goals.” ECF No. 581, PageID.22680. Essentially, this is the second prong of the *Central Hudson* test discussed, below. Daniels reached his conclusion, however, by burying his head in the sand.

In determining whether opinion testimony is reliable, a court may consider its factual basis. Indeed, Rule 702 provides that an expert may only testify if “the testimony is based upon sufficient facts and data.” Fed. R. Evid. 702. Likewise, Rule 703 requires that facts and data relied upon by the expert be “of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject” Fed. R. Evid. 703. “If the underlying data are so lacking in probative force and reliability that no reasonable expert could base an opinion on them, an opinion which rests entirely upon them must be excluded.” *Mohney v. U.S. Hockey, Inc.*, 300 F. Supp. 2d 556, 565 (N.D. Ohio 2004) (citations omitted). An expert cannot engage in “cherry-picking.” *LeClercq v. The Lockformer Co.*, 2005 WL 1162979, at *4 (N.D. Ill. Apr. 28, 2005). *See also E.E.O.C. v. Freeman*, 778 F.3d 463, 468-69 (4th Cir. 2015) (excluding testimony where expert ignored substantial and relevant information); *Concord Boat Corp. v. Brunswick Corp.*, 207 F.3d 1030, 1056 (8th Cir. 2000) (rejecting expert that “ignored inconvenient evidence”).

In rebuttal to Dr. Daniels, the Wineries offered two expert witnesses. Teri Quimby is a

former MLCC Commissioner. ECF No. 607, PageID.24740. Her role included creating and enforcing alcohol policy for the State of Michigan, interpreting alcohol related statutes and regulations and creating rules and regulations on behalf of the State. *Id.*, PageID.24740-41. Gary McDowell had a long career as a farmer, Michigan State Representative for a rural and agricultural district and as the Executive Director of MDARD. ECF 609, PageID.25213-16. At MDARD his duties included being a “spokesperson for agriculture across Michigan,” making policy decisions for the State related to agriculture, rural development and agricultural tourism, as well as overseeing Michigan’s Right to Farm Act and GAAMPs. *Id.*, PageID.25217-19. Ms. Quimby and Mr. McDowell read Dr. Daniels’ report and also listened to his trial testimony. Both testified that they disagreed with all of his opinions as being completely contrary to Michigan’s alcohol and agricultural policies. Their specific disagreements are discussed below.

a. Dr. Daniels ignored relevant facts and tried to alter his opinion.

Dr. Daniels was hired to provide a specific opinion and was directed to ignore any information which did not support that opinion. He conceded that he did not review the Michigan Liquor Control Code, because it was not “something [he] was asked to look at” by PTP’s attorneys. ECF No. 604, PageID.23930. Ms. Quimby took issue with the fact that Dr. Daniels did not review the Code before issuing his opinion, because “the Michigan Liquor Control Code governs activities; not just the service of alcohol, activities on the licensed premise. The lack ... of review of an essential law governing a licensee -- a licensed premise, which all of these businesses are, would be integral to all of the issues in this case, in my opinion.” ECF No. 607, PageID.24760. Ms. Quimby also took issue with the fact that Dr. Daniels did not review the Code of Federal Regulations as they relate to alcohol because those regulations are incorporated into the Liquor Control Code. ECF No. 607, PageID.24760-62.

Dr. Daniels also did not review Michigan's Right to Farm Act or Farm Market GAAMPS. *Id.*, PageID.23875. Dr. Daniels became aware of Farm Market GAAMPS only after he issued his opinion but refused to revise his opinion to account for their impact. *Id.*, PageID.23956-57. Mr. McDowell testified that the Farm Market GAAMPS help farmers preserve agriculture because they help "the farmer supplement his income any way they can. And with these farm markets are typically in the parts of the state that have the specialty crops, like the wine, the grape vineyards, the cherry farms, the apple orchards. And they are really under a lot of pressure that a lot other of the farms aren't, especially." ECF No. 609, PageID.25227. "[T]he GAAMPS protects ... these opportunities for the farmers." *Id.*, PageID.25229. The GAAMPS were actually put in place because "some townships started putting some zoning in that was very prohibitive for the farmer to make a living, him or her. So that's the reason this came about. Like I said, the GAAMPS aren't those guidelines that we follow. To make sure the farmers can do the job properly, but also remain profitable. And by doing that, by keeping those farmers profitable, that land will stay in farmland. That's the most effective way you can protect the farmland." *Id.*, PageID.25229-25230. Dr. Daniels did not know this because he deliberately chose not to review Michigan's Right to Farm Act and GAAMPS.

Dr. Daniels did not review the depositions of any Winery witnesses, Rob Manigold or Christina Deeren, or any Peninsula Township Board or Planning Commission meeting minutes. ECF No. 604, PageID.23874-75. This was odd, given the critical importance the Township placed on its meeting minutes. *See* ECF No. 608, PageID.24845 ("meeting minutes are going to be part of the record, that's going to take care of the majority of what we need to present in this case. As you know, we've always said the Township speaks through its minutes.").

Dr. Daniels tried to fix these flaws by reviewing additional materials after he was deposed and before trial. For example, Dr. Daniels reviewed additional deposition transcripts. ECF No. 604, PageID.23876-77. This Court sustained an objection on this issue and precluded Dr. Daniels from identifying any additional deposition transcripts he reviewed. *Id.* Dr. Daniels also reviewed meeting minutes after his deposition and before trial. *Id.*, PageID.23877-78. This Court again sustained the Wineries' objection. *Id.*

Dr. Daniels also tried to add a new opinion related to the success of Township's Purchase of Development Rights ("PDR") program. *Id.* This Court limited Dr. Daniels' testimony to what was in his report, which only had statistics related to the PDR program. *Id.*, PageID.23892-95.

b. Dr. Daniels' opinions are not supported.

Dr. Daniels is not an expert in wine, winery management, viticulture, marketing, consumer habits or spending, or constitutional law. ECF No. 604, PageID.23928. Because of his lack of knowledge and his admitted ignorance of the applicable laws, his opinions lacked support.

For example, he opined it was reasonable to limit wine production. *Id.*, PageID.23939. But he was not aware of the Wineries' licenses, or the scale of wine production allowed under the Liquor Control Code. *Id.*, PageID.23939-42. Ms. Quimby disagreed with Dr. Daniels' opinion because the Liquor Control Code allows small winemakers, of which ten of the eleven Wineries are, to produce up to 50,000 gallons of wine a year, and has no production cap for large wineries like Chateau Grand Traverse. ECF No. 607, PageID.24765. Dr. Daniels inferred a limit based on a federal American Viticultural Area ("AVA") designation, but he conceded at trial that an AVA is merely a labeling requirement. ECF No. 604, PageID.23942-43. Dr. Daniels opined that restricting wine production leads to higher wine prices, but he conceded the Township did not have an interest in keeping wine prices high. *Id.*, PageID.23943-46.

Dr. Daniels opined that it was reasonable to limit the sale of non-wine goods because this would prevent the Wineries from becoming convenience stores. *Id.*, PageID.23946-47. Pressed, he conceded that what he really meant was that commercial activity should be restricted. *Id.*, PageID.23948. But even this position fell apart on the stand:

Q. You would agree with me that the Wineries in Peninsula Township are allowed to sell wine, right?

A. Yes, they are.

Q. Okay. And you would agree with me that the sale of wine is a commercial transaction, correct?

A. It's an agricultural commercial transaction.

Q. I know you don't want to say the word, but it's a commercial transaction. Money is changing hands, correct?

A. It is.

Id., PageID.23948. Mr. McDowell also disagreed with Dr. Daniels' opinion because having that little bit of merchandise for sale to get people to the farms might make the difference between "mak[ing] that farm successful or not." ECF No. 609, PageID.25233-34. Daniels' opinion is also contrary to the Michigan GAAMPs, which allow farm markets to sell other farm products and generic and non-logoed merchandise. *Id.*, PageID.25234. Selling things like "logo'd clothing, coffee cups, bumper stickers" helps farmer because it gets customers out to the farm to buy their farm products and provides another revenue stream. *Id.*, PageID.25235.

Similarly, Ms. Quimby disagreed with Dr. Daniels' opinion that a winery should be limited to selling only merchandise with the winery logo because the Liquor Control Code explicitly allows wineries to advertise their businesses using things other than the logo of their winery, such as names of specific products. ECF No. 607, PageID.24763. She gave the example of Bell's Brewery not being limited to using just its brewery logo, but also being able to use the name of specific beers like "Two Hearted or Oberon." *Id.* The Liquor Control Code has specific "rules on

brand promotions and advertising and logos.” *Id.*, PageID.24764. But Dr. Daniels did not know this because he deliberately chose to not review the Liquor Control Code.

Dr. Daniels opined that it was reasonable to limit the sale of non-wine food but had no idea what constituted non-wine food. ECF No. 604, PageID.23948-50. He also opined that the Wineries should not sell bottled water, unaware that Mich. Comp. Laws § 436.1537(7) allows wineries to “sell or provide nonalcoholic beverages.” *Id.*, PageID.23950-52. Dr. Daniels opined that Wineries should not offer any food, to avoid competing with businesses that are zoned commercial. *Id.*, PageID.23952. But he was unaware that Peninsula Township only has 35 acres of commercial land and that there are only three restaurants in the Township, one of which is in the residential zone. *Id.*, PageID.23952-55. Dr. Daniels also believed that the lone convenience store in Peninsula Township needed protection but was unaware that the store is owned by the same family that owns Mari. *Id.*, PageID.23955-56.

Ms. Quimby disagreed with Dr. Daniels’ opinion that it is reasonable to limit the sale of food and drinks at the Wineries, especially, non-wine drinks, because this was bad alcohol policy and not the policy of the State of Michigan. No. 607, PageID.24770. First, “from a health, safety, welfare standpoint, it would not be in anyone’s best interests to not offer food along with alcohol. And not just any food; food that is more substantial or has more fats or carbohydrates, things like that.” *Id.*, PageID.24770-71. MLCC promotes this policy in the Liquor Control Code. *Id.*, PageID.24771. Second, Daniels’ opinion to serve only wine is not supported by a “plain reading of the state law as well as common sense; to only promote and serve alcohol to people would not be in the state’s -- the promotion of the state's interest of moderation and temperance. The ability to have water available is now in law.” *Id.*, PageID.24771-72. According to Ms. Quimby, these prohibitions on food and non-alcoholic beverages do not “promote health safety and welfare.” *Id.*,

PageID.24772. But Dr. Daniels did not know this because he deliberately chose to not review the Liquor Control Code and also because he has no expertise in alcohol policy, unlike Ms. Quimby.

Dr. Daniels also opined that the Winery Ordinances were necessary to prevent the Wineries from becoming “bars serving alcohol other than wine” and becoming “wine shops.” ECF No. 604, PageID.23957-58. But he was unaware that the Liquor Control Code prohibits wineries from serving alcohol they do not manufacture. *Id.* Ms. Quimby disagreed with Dr. Daniels’ opinion because it is “not possible” under Michigan’s three-tier system. *See* ECF No. 607, PageID.247670. (“With the three-tier system and the different licensing categories, the prohibitions of holding licenses in different categories, the wineries could not possibly become that.”) Despite this, Dr. Daniels refused to withdraw his opinion because “laws can be changed.” ECF No. 604, PageID.23959.

Dr. Daniels opined that tastings should only occur indoors and he had no idea if Michigan allowed for tasting rooms to be outdoors: “If that’s what the Liquor Control Code says, which I have not reviewed, so I honestly don’t know.” *Id.*, PageID.23962-63. Teri Quimby explained that the Code allows for outdoor service and that outdoor service is not uncommon. ECF No. 607, PageID.24762. Of course, Dr. Daniels also did not review any of the Wineries’ MLCC licenses or permits. ECF No. 604, PageID.23962.

Dr. Daniels opined that weddings add more cars to the road. *Id.*, PageID.23965-66. But he is not a traffic expert, did not perform a traffic study and has no idea how many cars the Township roads can safely handle. *Id.*, PageID.23966. It is logical that having a wedding would add some amount of cars to the roadways, but Dr. Daniels offered no opinions on whether the efficacy or safety of Township roadways would be impacted by a few more cars and neither the Township nor PTP introduced evidence on this issue. On the issue of weddings, Dr. Daniels’

ultimate opinion is that regulation of the Wineries should be left to Peninsula Township, regardless of what is allowed by the Liquor Control Code, the Right to Farm Act, Michigan GAAMPs or the United States Constitution. *Id.*, PageID.23977-78. Mr. McDowell disagreed with Dr. Daniels' opinion that marketing activities, especially weddings, should not be allowed at wineries because these activities:

Meet[] the guidelines of the GAAMPS. You take in the grapes, processing, making a product and it gives you an opportunity to directly market that product to consumers. And when consumers, they see a product they like, they're going to buy it, it helps farmers, all farmers. And a lot of it -- just like weddings is a good example, of people who come in from out of state and seeing what Michigan has to offer. So definitely it's going to help agritourism, help our farming communities, help preserve land. It just all goes back to that same cycle. We need to continue to give our farmers every tool we can to ensure they're successful.

ECF No. 609, PageID.25238-39. McDowell was specifically upset by Dr. Daniels' opinion that weddings are not allowed and thought maybe it was "another state that Dr. Daniels was talking about, but he wasn't talking about Michigan."³ *Id.*, PageID.25239. In Michigan, weddings are allowed under GAAMPs and whether a wedding can/should be held is a decision left to the individual farm and the State, not local governments. *Id.*, PageID.23239-40. Mr. McDowell testified that on-farm activities, like weddings, preserve agriculture because:

by allowing the farmer to have an additional stream of revenue, that will make his or her farm profitable. And by it being profitable, that's how we're going to preserve farmland. Your farmer will remain in farming because they want to farm and their children, most of them love to farm, and talk to so many young people growing up saying, I want to be a farmer. So long as we have a way to help them be profitable, they will get into farming, and that's how we are going to preserve the land.

Id., PageID.25240. These activities also promote the sale of agricultural products. *See id.*, PageID.25240-41. ("It's the same thing. It gives the farmer an opportunity to market his product.

³ Daniels did concede that in Michigan, "farm weddings are a form of agricultural tourism." ECF No. 605, PageID.23966.

[W]e're increasing the profitability of that farm operation. And that's -- It comes down to the end. That's how we're going to keep our land in farming.”) On cross-examination, counsel for PTP tried to get Mr. McDowell to admit that the GAAMPs do not “expressly include weddings” and he responded, “[t]hey don't [expressly] include hardly anything except the definition, and it's very obvious that weddings fall under that definition.” *Id.*, PageID.25252.

Dr. Daniels opined that striking the Winery Ordinances would lead to two primary adverse impacts.⁴ First, increased traffic would make it difficult for farmers to move their vehicles on Township roadways. As discussed, Dr. Daniels is not a traffic expert and did not review any traffic studies. ECF No. 604, PageID.23971. Instead, he based his opinion on a conversation with PTP members John and Barabara Wunsch, but he did not review Barbara Wunsch's deposition, and John Wunsch is not a farmer. *Id.*, PageID.23971-72. He also conceded he has no idea how many farm vehicles use Township roads or at what time of day they might do so. *Id.*, PageID.23972.

Second, he was worried about the impact on land values—but what he really meant was that he was worried land values might go up. *Id.*, PageID.23873-74. McDowell specifically took issue with this opinion: “[T]he one part I was really surprised at is when he talked about trying to reduce the price of farmland. I've just never heard of that before. [W]e're always trying to increase land values, that's so important for a farmer, of course, when you retire, that's your retirement. You don't have 401Ks or pension plans. And farmers have to borrow money all the time to operate, to buy equipment. And it's always the bank wants to see your net worth. And the biggest part of that, almost the whole part, is your farm.” ECF No. 609, PageID.25231-32.

⁴ Dr. Daniels was also concerned about noise, but conceded the Township's general noise ordinance was sufficient to alleviate any concerns. ECF No. 605, PageID.23976.

Dr. Daniels was asked if his real concern was “if the value of agricultural land goes up, Peninsula - - it will be more expensive for Peninsula Township to buy that land for its PDR program.” *Id.*, PageID.23974. He candidly answered, “That’s true, yes.” *Id.* While Dr. Daniels’ preferred land preservation method was through the PDR program, McDowell testified that while they are good programs, they are “absolutely not” the only method. ECF No. 609, PageID.25243.

The takeaway from this aspect of Dr. Daniels’ testimony is that he believes the government should use its power to drive land values down so the government can buy rights in that land at a lower cost. He gave this testimony even knowing that for farmers, their land values are their retirement fund. ECF No. 604, PageID.23975. Regardless, depressing land values to gobble up land for PDR was not a proffered interest of Peninsula Township and, frankly, the idea that the government should try to drive citizen land values down for its own benefit is offensive.

Mr. McDowell testified that “some of the suggestions [Dr. Daniels] made and that, I just found them totally unrealistic, just no way they would apply in today’s farming with the challenges and the struggles that our farmers are facing.” ECF No. 609, PageID.25231. Mr. McDowell summed up the issue of preserving agriculture very succinctly, “Everything goes back to that profitability. To save our farmland we have to make sure our farmers are successful.” *Id.*, PageID.25236. According to Mr. McDowell, the opinions given by Dr. Daniels are not consistent with the policies of MDARD or the State of Michigan. *Id.*, PageID.25243-44.

D. Peninsula Township enforced every section of the Winery Ordinances.

Any argument that the Township did not enforce the Winery Ordinances was blown out of the water at trial by the Township’s admissions and the Wineries’ exhibits and testimony.

1. The Township admitted that it enforced the Winery Ordinances.

Township Supervisor Rob Manigold admitted that the Township enforced the Winery Ordinance: “I want to make it clear that until the ordinance is changed, we do enforce, in fairness,

and we do that in a process where we notify the person when either we see the complaint, one or our guys, or someone calls in” and “if we’re made aware of a violation, I will go and talk to that person, and hopefully we would come into compliance.” ECF No. 611-154, PageID.27968-69, PageID.27982. Manigold and Christina Deeren repeatedly admitted that they enforced, or were prepared to enforce, specific provisions of the Winery Ordinances.

Ordinance	Testimony
<p>8.7.3(10)(u)(5)(b): Closing time enforced against all Wineries.</p>	<p>Q. All right. Let's look at 5(b): Hours of operation for guest activity uses shall be as determined by the town board, but no later than 9:30 p.m. daily. A. Mmm-hmm. Q. So winery chateaus -- well, so this is hours of operation for guest activities? A. Actually, for everybody. Q. Well, hold on: Hours of operation for guest activity uses shall be as determined by the town board, but no later than 9:30 p.m. daily. ... Q. But it doesn't say that a winery has to close all business at 9:30, right? A. I think that's inferred. Q. It doesn't say that a winery has to close all business at 9:30, right? A. I believe it's inferred. I'm going to stick with that. Q. Does it explicitly say it, yes or no? A. Explicitly, no. Q. But you believe it's implied? A. I believe it's the ordinance and it's the law. Q. But it doesn't actually say that they have to close at 9:30, right? A. Well, that's what I'm enforcing. Q. Well, that's my follow-up question. You are enforcing the wineries to close their tasting rooms at 9:30 p.m., correct? A. Yes. Q. Even though the ordinance does not say that they need to close at 9:30 p.m., correct? A. We believe that 9:30 is the closing. Q. Okay, the township is interpreting this to mean 9:30 to close all business? A. Yes. Q. Even though the ordinance doesn't say it? A. It does to us. Q. Tell me where it says that a tasting room has to close at 9:30 p.m. A. To us, that's what was implied there. Manigold, ECF No. 611-154, PageID.28001-03.</p>
<p>8.7.3(12)(i): Food item logo requirement</p>	<p>Q Is it fair to say that 12(i) states that the sale of non-food items is limited to those that promote the winery or agriculture and have the logo of the winery on it?</p>

	<p>A. Yes. Q. Okay. And is this something that you, as the zoning, director of zoning, are enforcing? A. Yes. Deeren, ECF No. 611-151, PageID.27807.</p> <p>Q. Okay. 12(i), is Peninsula Township still enforcing this ordinance? A. I believe so. Manigold, ECF No. 611-154, PageID.27939.</p>
<p>8.7.3(12)(j): Winery logo requirement.</p>	<p>Q. Are you, as the director of zoning, enforcing 12(j)? A. Yes. Deeren, ECF No. 611-151, PageID.27811.</p> <p>Q. Okay. 12(j), is Peninsula Township still enforcing this ordinance? A. To my knowledge. Manigold, ECF No. 611-154, PageID.27939.</p>
<p>8.7.3(12)(k): Sign/advertising prohibition.</p>	<p>Q. (k) is: Signs and other advertising may not promote, list or in any way identify any of the food are non-food items allowed for sale in the tasting room. Can you tell me as the director of zoning -- well, are you enforcing this provision? A. Yes. Q. And how do you enforce it? A. Well, if I saw signs that were identifying or promoting food or non-food items, I would address it. Q. Okay. Are those indoor signs or outdoor signs? A. It's not specific. It says: Signs and other advertising may not promote, list or in any way identify any of the food or non-food items allowed. So if I drove up to a winery and there was an exterior sign that was promoting food and non-food items, that would be, obviously, what I would look at. Q. How about if you walk inside of a remote winery tasting room and saw a sign that listed the, you know, non-food -- the food items and the non-food items for sale. Is that an enforcement issue? A. I would say so, yes. Deeren, ECF No. 611-151, PageID.27816-17.</p> <p>Q. You're saying that under 12(k), a remote winery tasting room could not take out an ad in the Record-Eagle that says we have these food items or this merchandise for sale? A Correct. Q. That would be a violation of 12(k)? A. Right. Q. And you would enforce that? A. Yes. Q. Okay. And then within the -- I guess the same thing. If they took out a radio ad that said we have this food for sale and we have these non-food items for sale --</p>

	<p>A. Or they're being featured on the news. Q. If there was a news story about them and that winery, they couldn't do that, either? A. Not if they were advertising it. And they could pan and show it, but if they were actually advertising that they had all of these things, then that would be a violation. Deeren, ECF No. 611-151, PageID.27819.</p> <p>Q. I'm talking about, they printed up a bunch of flyers on eight-by-ten pieces of paper and they're handing them to people as they walk in the door, "We have for sale today this special cherry jam grown from fruit in Peninsula Township, it's \$5 a jar"; is that allowed or not allowed by 12(k)? ... A. I guess it's "other advertising may not promote." Q. So it's not allowed? A. I would say no. Q. And you would enforce that? A. Yes, I would. Deeren, ECF No. 611-151, PageID.27820-21.</p>
<p>6.7.2(19)(a): Restaurant prohibition.</p>	<p>Q. All right.19(a), we had asked about -- there's a prohibition on the farm processing facilities having restaurants. The Township is still enforcing that, right? A. We haven't enforced anything on anybody, that I'm aware of, on that. Q. Well, you would enforce it if they tried to open a restaurant? A. If they opened a Burger King, yeah. Q. Well, what if they just had -- they opened for dinner, a dinner service, would you enforce that? A. I believe so. Manigold, ECF No. 611-154, PageID.27953-54.</p>
<p>6.7.2(19)(b)(1)(v): Merchandise restriction.</p>	<p>Q. So what leads you to the conclusion that that ordinance section doesn't violate the First Amendment? A. I just feel our ordinance is superior to a lot of this stuff, and in court we're going to prevail. Manigold, ECF No. 611-154, PageID.28021.</p>
<p>8.7.3(10)(u)(1)(b) and 8.7.3(10)(u)(5)(a): Required promotion of Peninsula agriculture.</p>	<p>Q. Okay. And 1(b), we talked about that, is this still being enforced, the promotional items -- or the advertisement? A. I'm going to have to say yes until I've -- if it's in the ordinance. Manigold, ECF No. 611-154, PageID.27966.</p> <p>Q. Do you think that gives Peninsula Township the right to force a Peninsula Township business to advertise in a certain way? A. I think we're giving them an option. If they don't want to take it, don't. Q. But if they do take it, you're going to force them to advertise in a certain way, right? A. If they agree to take it, yeah, we have to enforce it, if they agree to take it. Manigold, ECF No. 611-154, PageID.27997.</p>

	<p>Q. Okay. We're looking at (u)1(b). Is this a paragraph of the winery ordinances that your enforcement -- I shouldn't say -- that you are, that the -- that Peninsula Township is enforcing? A. As part of the entire ordinance, yes. Deeren, ECF No. 611-151, PageID.27763.</p> <p>Q. You, as the director of zoning, are you enforcing 5(a)? A. Yes. Deeren, ECF No. 611-151, PageID.27792.</p>
<p>8.7.3(10)(u)(1)(d): Guest Activity restriction.</p>	<p>Q. Is the Township still enforcing 1(d)? A. ... if it's in the ordinance and it's not changed by a law, then we would. Manigold, ECF No. 611-154, PageID.27966</p>
<p>8.7.3(10)(u)(2)(b): 501(c)(3) meeting restriction.</p>	<p>A. We are going to enforce that ordinance unless there's a violation, and then we'll proceed to "how do we do that." Q. So you are going to enforce it, if it comes up? A. If it comes up and there's an issue, yeah, we have to. Manigold, ECF No. 611-154, PageID.27978.</p> <p>Q. Let's take it from an enforcement perspective, okay? If a winery held a meeting of a 501(c)(3) group that was based out of Kent County, is that allowed or not allowed? A. Well, it specifically states that meetings of 501(c)(3) non-profit groups within Grand Traverse County. So I would say that if it was somebody from Kent County, it would not be allowed. Q. Okay. And that is an enforcement action that your office would then take? A. Yes. Deeren, ECF No. 611-151, PageID.27773.</p>
<p>8.7.3(10)(u)(2)(c): Meeting prohibition.</p>	<p>Q. Is the Township still enforcing this ordinance? A. Yes. Manigold, ECF No. 611-154, PageID.27959.</p> <p>Q. Is the Township still enforcing this ordinance? A. Again, the Township, we're enforcing -- anything that we find is in violation. Manigold, ECF No. 611-154, PageID.27979-80.</p> <p>Q. On 2(c), Peninsula Township is enforcing this section of the chateau ordinance? A. If we become aware of a problem, yes, it would be something that would be enforced. Deeren, ECF No. 611-151, PageID.27779.</p>
<p>8.7.3(10)(u)(2)(e): Restriction on type of wine served.</p>	<p>Q. Okay. And can you tell me what that enforcement entails? How do you enforce 2(e)? ... A. The same way I would enforce anything else. If I found there was</p>

	<p>violation, I would do an investigation and I would find out, you know, if what they did was compliant with the ordinance or not compliant with the ordinance.</p> <p>...</p> <p>Q. If wine other than Old Mission Peninsula appellation wine was being served, would that result in a violation?</p> <p>A. If wine other than old appellation wine is being served, would that result in a violation. Yes.</p> <p>Deeren, ECF No. 611-151, PageID.27783-86.</p>
<p>8.7.3(10)(u)(3): Purchase of Peninsula Township Grapes</p>	<p>Q. What's a tonnage report?</p> <p>A. It's a report that is given to us by the wineries of not only the tonnage of grapes that come off of their properties, their affiliated farms, but also grapes that are purchased from them, from not only the township but other areas.</p> <p>Q. Okay. And is that a report that's provided to the Township -- well, is that a report that's required to be provided to the Township?</p> <p>A. If they want to be considered for guest activity uses, yes.</p> <p>Deeren, ECF No. 611-151, PageID.27787.</p>
<p>8.7.3(10)(u)(5)(g): Amplified music prohibition.</p>	<p>Q. Okay. And the Township is still enforcing this, though, right?</p> <p>A. We are enforcing amplified music leaving the ground.</p> <p>Q. You're enforcing all amplified music leaving the - - you're restricting all amplified music?</p> <p>A Mmm-hmm.</p> <p>Q. Yes?</p> <p>A. Mmm-hmm.</p> <p>Q Where in the ordinance does it say there's -- no amplified music is allowed?</p> <p>A. Well, we're doing the complaints, and I'm telling you that Christina is working on letters and notification of no amplified music.</p> <p>Q. Well, that's fine, but tell me where in your ordinance does it say that amplified music of any kind is prohibited.</p> <p>A. I can't point to the exact point right now.</p> <p>Manigold, ECF No. 611-154, PageID.28007-08.</p> <p>Q. I'm asking a question, you have to answer it. Is Peninsula Township enforcing a complete prohibition on amplified music at wineries?</p> <p>A. I'm going to say yes.</p> <p>Manigold, ECF No. 611-154, PageID.28009.</p> <p>Q. Are you enforcing this provision?</p> <p>A. Yes.</p> <p>Deeren, ECF No. 611-151, PageID.27800.</p>
<p>8.7.3(10)(u)(5)(h): Outdoor displays of merchandise</p>	<p>Q. Okay. And so the Township is prohibiting advertising of merchandise, equipment or signs, regardless of where they are on the property?</p> <p>A. It's displays of them for sale outside.</p> <p>Manigold, ECF No. 611-154, PageID.28011.</p> <p>Q. Let's look at 5(h), outdoor displays it says: No outdoor displays of</p>

	<p>merchandise, equipment or signs are allowed. Are you currently enforcing this[?] A. Yes. Deeren, ECF No. 611-151, PageID.27803.</p>
<p>8.7.3(10)(u)(5)(i): Catering</p>	<p>Q. If they did cater off-site, would you enforce the ordinance? A. I'd have to go to the board, but I would say, yes, I'd have to talk to them until we got it changed. Manigold, ECF No. 611-154, PageID.28015.</p> <p>Q. Let's look at 5(i): Kitchen facilities may be used for on-site food service related to guest activity uses but not for off-site catering. Is this something that you, as the director of zoning, are enforcing? A. Yes. ...</p> <p>Q. So if a winery-chateau did off-site catering of a food and wine pairing in the city of Traverse City, that -- and you found out about it, that would result in a violation? A. Yes. Deeren, ECF No. 611-151, PageID.27805-06.</p>

Manigold also confirmed that the Township continued enforcing the Winery Ordinances even after its attorneys gave the Township a written opinion that many of the Winery Ordinances were unlawful. *See* ECF No. 611-154, PageID.28018 (“Q. ... my question is you didn’t suspend enforcement of the ordinances, right? A. No.”); Exhibit 215, ECF No. 611-149, PageID.27716.

2. The Wineries provided specific examples of enforcement.

The Wineries also provided specific examples of the Township’s enforcement. Bonobo was told it could not have a painting event because it “has no connection with agriculture [and] is merely a way to attract customers for the winery,” ECF No. 600, PageID.23045-48; Exhibit 45, ECF No. 611-37, PageID.25844, and other events were not held or cancelled. ECF No. 600, PageID.23038-40; Exhibit 43, ECF No. 611-35, PageID.25837. Mari was scared of having to cancel weddings and so it did not book them, except on one occasion where it booked a wedding before later canceling, out of fear of being issued a citation. ECF 601, PageID.23291-93, PageID.23301-02; Exhibit 161, ECF No. 611-117, PageID.27220. Brys Estate was told it could

not host a political fundraiser, or a Big Brothers/Big Sisters event, because it had not purchased enough Peninsula Township grapes to qualify for Guest Activities. ECF No. 603, PageID.23762-71; Exhibit 105, ECF No. 611-78, PageID.26585.

A farming group asked Black Star to host a tour and wine pairing dinner, but Supervisor Manigold told Black Star, “I will fine you or shut you down” if the event proceeded. ECF No. 602, PageID.23462-66. Two Lads wanted to host a barbeque and a summer solstice celebration, but Planner Michelle Reardon told Chris Baldyga they were not allowed. ECF No. 608, PageID.24483-84; Exhibit 13, ECF No. 611-13, PageID.25439. She explained that Two Lads, a Farm Processing Facility, could not host “social events for hire,” or events that had been advertised. *Id.*, PageID.24886. Rather, it could only have “regular tasting room activities,” which Two Lads found confusing. *Id.*, PageID.24882. Tabone also cannot have “social functions for hire.” ECF No. 602, PageID.23615. To Tabone, this meant that it was permissible for a bachelorette party stopped by “[o]n a pass-through basis,” but they could not make a reservation. ECF No. 603, PageID.23707-08. Black Star had no idea what a “social function for hire” was. ECF No. 602, PageID.23522-23.

Manigold told Peninsula Cellars it could not host events. ECF No. 606, PageID.24363, PageID.24377. It also could not “promote, list or in any way identify any of the food or nonfood items allowed for sale in a tasting room.” *Id.*, PageID.24378-79. Problematically, every tangible thing in the world is either food, or not food. *Id.* Peninsula Cellars was also told it could not have a “release party” to celebrate a new wine. *Id.*, PageID.24369-71; Exhibit 173, ECF No. 611-127, PageID.27593; Exhibit 175, ECF No. 611-128, PageID.27595. Peninsula Cellars had an acoustic guitarist play on its patio using a Bluetooth speaker, but the Township forced Peninsula Cellars to cancel further performances. ECF No. 606, PageID.24371-73; Exhibit 181, ECF No. 611-133,

PageID.27625; *see also* questioning by the Court at ECF No. 606, PageID.24459. In an effort to stay in business during COVID, Peninsula Cellars utilized “little igloos” on its patio, which could accommodate up to 4 customers, but Peninsula Township fined Peninsula Cellars. *Id.*, PageID.24373-74. The Township said a building permit was necessary to use the igloos. *Id.*, PageID.24458-59.

Chateau Grand Traverse wanted to hold a fundraiser for a schoolteacher, which it believed its SUP allowed if fewer than 75 people attended. ECF No. 607, PageID.24701-03. The Township insisted it obtain a special permit and when Mr. O’Keefe tried to discuss the issue, he was told to make an appointment. *Id.* The Township eventually told him that if more than 75 people attended, “we will know about it.” *Id.* As Mr. O’Keefe explained, “to have the wrath come down for something like [a fundraiser for ‘a beloved first grade teacher who had breast cancer’], who knows what would happen if I asked for someone else.” *Id.*, PageID.24703. Mr. O’Keefe also explained how he wanted to sell bottled water, but the Township vetoed that idea. *Id.*, PageID.24704-07. He found it easier to lobby the State legislature for a new law rather than dealing with the Township: “I was just perplexed that it required me to have legislation done in Lansing to solve the problem that should have been just a yes, you can sell water.” *Id.*

Bowers Harbor particularly drew the Township’s ire. It had a long-standing event known as “Dining in the Vines,” but the Township forced Bowers Harbor to stop hosting this event. ECF No. 605, PageID.24078-90, PageID.24162. Bowers Harbor began as a roadside stand but became a Winery Chateau at the Township’s insistence, a process which took years. *Id.*, PageID.24116. It should have been allowed to continue “Dining the Vines,” but the Township would not allow it. *Id.*, PageID.24116-18; Exhibit 82, ECF No. 611-66, PageID.26341. Bowers Harbord was “stuck in limbo” while it tried to comply with the Township’s demands. *Id.* The Township threatened to

“put padlocks on our doors” if it conducted further Dining in the Vines events. ECF No. 605, PageID.24101.

The Township also sent a letter accusing Bowers Harbor of having events and threatened legal action. *Id.*, PageID.24099-100, *see also* PageID.24093; Exhibit 65, ECF No. 611-52, PageID.26270 (threatening enforcement for “Yoga in the Vines” and a “Floral Education” series); ECF No. 605, PageID.24102-03; Exhibit 69, ECF No. 611-55, PageID.26278 (instructing Bowers Harbor to cancel a basketball watch party and swear under oath to never again hold similar events); ECF No. 605, PageID.24103-04; Exhibit 70, ECF No. 611-56, PageID.26279 (prohibiting a solo guitarist); ECF No. 605, PageID.24111; Exhibit 73, ECF No. 611-59, PageID.26287 (prohibiting a fundraiser). The Township enforced the Winery Chateau Ordinance against Bowers Harbor even while it was still a roadside stand. ECF No. 605, PageID.24096-97; Exhibit 65, ECF No. 611-52, PageID.26270 (using Guest Activities terminology).

On other occasions, the Township’s “enforcement officer,” David Sanger, went to Bowers Harbor and took pictures of guests. ECF No. 605, PageID.24107. On another occasion, someone secretly videotaped guests and Township officials refused to tell Bowers Harbor who gave the Township the video. *Id.*, PageID.24109-11; Exhibit 72, ECF No. 611-58, PageID.26286. The Township’s enforcement became so pervasive that Mr. Stegenga’s mother felt compelled to email Christina Deeren and Dave Sanger that she was having friends over to her house: “I want you to know that on Thursday at 2:00 p.m. I’m having 10 girlfriends over to do yoga. This is NOT AN ADVERTISED EVENT FOR THE PUBLIC.” ECF No. 605, PageID.24118-19; Exhibit 95, ECF No. 611-69, PageID.26367. The Township also secretly compiled a spreadsheet summarizing years of written communications with Bowers Harbor; but, ironically, the spreadsheet confirms Bowers Harbor had complied with state licensing requirements. ECF No. 605, PageID.24105-06;

Exhibit 71, ECF No. 611-57, PageID.26281.

Chateau Chantal was prohibited from serving a Malbec that it imports from Argentina during Guest Activities. ECF No. 606, PageID.24496. Also, no matter how many grapes it purchased and despite its ability to accommodate at least 1,000 people, it was capped at having 111 guests during Guest Activities. *Id.*, PageID.24467-71, PageID.24498. It had to obtain prior approval to host agricultural related groups (a term it did not understand) and give advance notice to host wine and food seminars. *Id.*, PageID.24516-18; Exhibit 135, ECF No. 611-92, PageID.26845.

Other Wineries did not even try to host events after seeing how the Township enforced the Winery Ordinances. ECF No. 605, PageID.24252-53. For example, Hawthorne saw the damage Bowers Harbor suffered when it was forced to cancel events and decided it could not risk its reputation. *Id.*, PageID.24254; ECF No. 606, PageID.24331-32. Likewise, Mario Tabone drew on Two Lads' experience and decided the risk of crossing the Township was not worth the potential damage to his new business. ECF No. 603, PageID.23630-34.

Enforcement was not limited to events. Manigold told Black Star it could not sell any merchandise, before letting Black Star sell "a few t-shirts" ECF No. 602, PageID.23518-19.⁵ Michelle Reardon told Tabone it could not sell any logoed merchandise. ECF No 603, PageID.23631-32. This stung, because Tabone's logo includes the Maltese cross, and the Maltese community "can't resist buying things with the Maltese cross on it;" Mario Tabone had hoped customers would wear his logo back home to advertise his winery. *Id.*, PageID.23652.

The Wineries shared these common experiences. ECF No. 602, PageID.23525-26; ECF

⁵ The Farm Processing Facilities and the Remote Winery Tasting Room were told not to sell merchandise, but later were told it was okay if they sold a little bit of merchandise—just not too much. ECF No. 602, PageID.23520; ECF No. 603, PageID.23695.

No. 603, PageID.23629; ECF No. 605, PageID.24252-53, PageID.23122-23; ECF No. 606, PageID.24374-75; ECF No. 607, PageID.24708. Chris Baldyga, the President of WOMP, testified that its members shared the Township's communications so that everyone knew "what's going on in your neighborhood." ECF No. 608, PageID.24890.

Many witnesses also testified about trying to get answers from the Township. Bonobo tried unsuccessfully to get the Township to define "guest activity, entertainment [and] accessory uses." ECF No. 600, PageID.23035-42; Exhibit 43, ECF No. 611-35, PageID.25837; *see also* ECF No. 600, PageID.23030-31; Exhibit 40, ECF No. 611-32, PageID.25830 (expressing concern with ambiguous restrictions); ECF No. 600, PageID.23034; Exhibit 41, ECF No. 611-33, PageID.25834 (not providing clarity on guest activities); ECF No. 600, PageID.23041; Exhibit 43, ECF No. 611-35, PageID.25837 (requesting prior Township interpretations). Mari experienced the same problem, so it had a "[v]ery high degree of caution." ECF 601, PageID.23303-07; Exhibit 161, ECF No. 611-117, PageID.27220. When the Township asked whether John Kroupa requested interpretation from the Zoning Board of Appeals, he answered, "No, I went directly to Rob Manigold and sought interpretation and clarification from him." ECF No. 606, PageID.24453-54.

When the Township did answer questions, the answers depended on who was speaking. Bowers Harbor received a letter defining an "event" as "something that takes place after business hours and it's registered with the Township," while an "activity" was "something that takes place during normal business hours and is part of [its] daily practice." ECF No. 605, PageID.24094. This invented definition did not last. *Id.*; Exhibit 65, ECF No. 611-52, PageID.26270. Answers changed with each Township planner (there were at least 6). ECF No. 605, PageID.24094-97. Bonobo explained "if you talk to different people in the Township office, meaning Zoning or Planning, or different people on the board, they would tell you one thing and then someone else

may tell you differently, so you just really didn't get a straight answer." ECF No. 600, PageID.23032.

Patrick Brys was trying to figure out how many guests Brys Estate might be able to host for Guest Activities, but "what I was experiencing was that every answer was different and that there was no consistency on what type of formula. Furthermore, none of these formula that he [David Sanger] mentioned here in this email [Exhibit 105, ECF No. 611-78, PageID.26585] were listed in the – in the winery chateau ordinance A new person coming to the Township might have a different interpretation of this" ECF No. 603, PageID.23772-77. Other witnesses testified similarly. ECF No 601, PageID.23363; ECF No. 606, PageID.24522.

Early in the trial, Peninsula Township objected to a question related to the effect uncertainty and vagueness had on the Wineries,⁶ but this Court overruled the objection, stating: "I'm going to allow this testimony. It's - - The witness [Alex Lagina] is an operator of a winery in the Township and has expressed on at least three or four occasions during his testimony regarding uncertainty, and I think this is relevant." ECF No. 601, PageID.23290. Mr. Lagina explained "there is not a lot of clarity in the ordinance as to what is okay and what is not" *Id.*, PageID.23286-89. Further, "I think everybody agrees that [a wine and food pairing dinner] is allowed. What I don't know is what my guests are allowed to do and what they are allowed to call the event, and I don't know if them getting up and having a meeting would invalidate this event."⁷ ECF No. 602, PageID.23390. "[I]f they called it like a corporate meeting ... we would be able to do the same thing [as a wine and food pairing dinner] but I would probably turn it down, because

⁶ Specially, the Township objected to the admission of Exhibit 170, ECF No. 611-124, PageID.27397, which is a compilation of event inquiries received by Mari. ECF 601, PageID.23289-90.

⁷ Mr. Lagina was responding to a question related to Priority Health holding an event at Mari.

I'm uncomfortable making the determination that this is an allowed event in Peninsula Township.” *Id.*, PageID.23394. *See also* ECF No. 603, PageID.23749, PageID.23744, PageID.23801 (Brys Estate not understanding Guest Activity Uses); ECF No. 604, PageID.23989 (Patrick Brys, when being asked the difference between a “special” and an event,” responding with “great question”); ECF No. 605, PageID.24225-26 (Bowers Harbor confused by undefined terminology), Hawthorne’s Chief Operating Officer, a retired corporate banker, explained that “I consider myself of average intelligence, and I have no clue what a guest activity truly consists of.” ECF No. 605, PageID.24254.

This affected Bonobo “in the sense that we weren’t able to know what we could do and couldn’t do.” ECF No. 600, PageID.23032. Bonobo needed to have definitions of “guest activity,” “entertainment,” and “accessory use” to know how to run its business and Bonobo “didn’t know what to plan for the next month, the next year.” *Id.*, PageID.23040-42; Exhibit 43, ECF No. 611-35, PageID.25837.

Confusion existed even within Peninsula Township. Christina Deeren testified that an event was “a tasting, a tour, dinner, a pairing.” ECF No. 611-151, PageID.27749-50. Later, she changed her mind to state that a wine and food pairing dinner was not an event. *Id.*, PageID.27762. She agreed that since entertainment, weddings, wedding receptions, family reunions and sales of wine by the glass were not Guest Activity Uses, those were allowed under the Winery Ordinances, despite that the Township previously prohibiting them. *Id.*, PageID.27782-83. She denied requests for events like yoga or painting in the vines and she only allowed events which were specifically identified in the Winery Ordinances. *Id.*, PageID.27751-52. For example, for her to approve an event like painting in the vines, those exact words needed to be in the Ordinances. *Id.*, PageID.27753. David Sanger, the Township’s “enforcement officer,” agreed that “[a]s a

layperson, I find the [Guest Activity Use] sentences to be hard to understand, hard to comprehend.” ECF No. 611-152, PageID.27839, PageID.27844.

All of the above evidence was un rebutted.

3. The Township enforced a made-up 9:30 p.m. closing time.

After this case was filed, Peninsula Township admitted that the Winery Ordinances do not contain a “restriction for hours of operation [for] tasting room[s].” ECF No. 159, PageID.5884-85. So did PTP: “As for hours, there is simply no restriction in the PTZO on operating hours in A-1 except for [Guest Activities].” ECF No. 488, PageID.18948. Despite this, the Township told the Wineries to close by 9:30 p.m., and but for this instruction they would have stayed open later. ECF No. 600, PageID.23063-64; ECF No. 601, PageID.23311; ECF No. 602, PageID.23523-32, PageID.23571, PageID.23586; ECF No. 603, PageID.23635, PageID.23783-84; ECF No. 605, PageID.24125-26; ECF No. 606, PageID.24273-80, PageID.24499-500, PageID.24525, PageID.24379-82, PageID.24427; ECF No. 608, PageID.24899, PageID.24971. Rob Manigold told Black Star and Peninsula Cellars to close by 6:00 p.m. ECF No. 602, PageID.23523; ECF No. 606, PageID.24379. Chateau Grand Traverse did not know when to close, because the Guest Activity Use section of the Winery Chateau Ordinance required a 9:30 p.m. stop, its SUP said its outdoor activities needed to end by 10:00 or 10:30 p.m. and its SUP was silent as to indoor activities. ECF No. 607, PageID.24697, PageID.24713-16.

The Township challenged the Wineries for not regularly staying open until 9:30 p.m., but the Wineries explained that they tended to close earlier because closing at 9:30 p.m. would force a partial evening shift. As Patrick Brys explained, a 9:30 closing time creates a split shift and “that does not make sense for somebody to drive and to come to work for only a handful of hours ... however, if we were able to stay open later, we can definitely employ two full shifts, which would make sense for our staff.” ECF No. 603, PageID.23785. Other Wineries testified similarly. *Id.*,

PageID.23635-36; ECF No. 605, PageID.24126; ECF No. 606, PageID.24275, PageID.24379-81, PageID.2452526; ECF No. 607, PageID.24427, PageID.24716-17; ECF No. 608, PageID.24902. There were other reasons the Wineries did not stay open later, such as being unable to advertise later hours, ECF No. 601, PageID.23210-11, and the Township's prohibition on serving food meaning that guests tended to leave to get dinner. ECF No. 606, PageID.24275, PageID.24379-81, PageID.24427; ECF No. 608, PageID.24902.

The Wineries testified they would be able to draw customers if they stayed open past 9:30 p.m., principally because there was demonstrated customer interest in later hours. ECF No. 600, PageID.23073-74; ECF 601, PageID.23326; ECF No. 602, PageID.23524; ECF No. 603, PageID.23639, PageID.23786-87; ECF No. 605, PageID.24212; ECF No. 606, PageID.24275, PageID.24283, PageID.24537, PageID.24384; ECF No. 608, PageID.24908-09.

All of the above evidence was un rebutted.

4. The Wineries feared, and the Township never disavowed, enforcement.

The Wineries all testified they feared Township enforcement of the Winery Ordinances and the Township presented no evidence that it ever disavowed enforcement. “Where, as here, a plaintiff asserts injury based on the threat of prosecution, the plaintiff need not ‘expose himself to liability before bringing suit to challenge the basis for the threat—for example, the constitutionality of a law threatened to be enforced.’” *Adam v. Barr*, 792 Fed. App’x 20, 21 (2nd Cir. 2019) (quoting *MedImmune, Inc. v. Genentech, Inc.*, 549 U.S. 118, 128–29 (2007)) (collecting cases). “A sufficiently imminent injury can be established by plausible allegations that a plaintiff intends to engage in conduct proscribed by a statute, and ‘there exists a credible threat of prosecution thereunder.’” *Adam*, 792 Fed. App’x at 22 (quoting *Susan B. Anthony List v. Driehaus*, 573 U.S. 149, 160 (2014)). “[C]ourts are generally ‘willing to presume that the government will enforce the law as long as the relevant statute is recent and not moribund.’” *Cayuga Nation v. Tanner*, 824

F.3d 321, 331 (quoting *Hedges v. Obama*, 724 F.3d 170, 197 (2d Cir. 2013))

In *Maguire v. City of American Canyon*, 2007 WL 1875974, *7 (N.D. Cal. June 28, 2007), the plaintiff’s “fear that the Ordinance will be enforced against him is reasonable: the City's failure to disavow enforcement of the Ordinance, and the absence of any affirmative evidence that it does not intend to enforce the Ordinance, places this case squarely in the line of cases in which Courts have found a credible threat of prosecution.” In that case, the city had the opportunity to disavow the ordinances and instead “pursued this litigation aggressively throughout.” *Id.* Likewise, the Township has defended the Winery Ordinances for years and vigorously in this litigation.

E. The Wineries presented evidence that they suffered damages due to the Township’s enforcement.

The enforcement of the Winery Ordinances, including enforcing restrictions that did not appear on the face of the Ordinances, caused the Wineries substantial damages.

1. Some Wineries incurred damages from complying with grape-source requirements.

Bonobo, Bowers Harbor, Chateau Chantal, Tabone, and Two Lads introduced evidence of their grape purchases to corroborate their damages from the Township’s enforcement of grape source requirements as set forth in Schedule 1 of Eric Larson’s supplemental report, Exhibit 194, ECF No. 611-144, PageID.27692.

Todd Oosterhouse testified that Bonobo was forced to buy more local fruit to qualify for Guest Activities. ECF No. 600, PageID.23108–10. Bonobo submitted tonnage reports to the Township, shown in Exhibit 42, ECF No. 611-34, PageID.25836, to conduct Guest Activities. ECF No. 600, PageID.23035. Bonobo also introduced Exhibit 52, ECF No. 611-43, PageID.26136, which are invoices from grape purchases. ECF No. 600, PageID.23108.

Bowers Harbors has contracts to purchase grapes from other vineyards in Peninsula Township. ECF No. 605, PageID.24142. Spencer Stegenga testified that Exhibit 78, ECF No.

611-63, PageID.26308, is a record of purchases of local fruit and non-local fruit for 2020 and part of 2021. ECF No. 605, PageID.24142. The Township attempted to elicit testimony that sometimes Bowers Harbors paid more for non-local fruit; Mr. Stegenga testified that on one occasion he did pay more because he needed to purchase a significant amount of grigio grapes to help get Bowers Harbor's brand established and the farmer was able to take advantage of that by "ripping me off." *Id.*, PageID.24215. He did agree that the price often depended on the varietal. *Id.*, PageID.24216; *see also id.*, PageID.24225.

Ms. Dalese testified that Chateau Chantal has many long-term contracts for grape purchases. ECF No. 606, PageID.24476. It has these contracts "due to the guest activity uses portion of our ordinance, which indicates we need to purchase 1.25 tons off our property to earn one guest at a guest activity use." *Id.* These contracts "can be problematic" because Chateau Chantal is "under contract to buy their excess tonnage, even though we don't need to make that much wine that year." *Id.*, PageID.24476-77. Exhibits 122, ECF No. 611-88, PageID.26811, and 127, ECF No. 611-89, PageID.26813, show Chateau Chantal's communications with Peninsula Township regarding grape purchases. ECF No. 606, PageID.24509-12.

Mario Tabone testified it is hard to get local grapes because "there's a limited number of growers on the peninsula and they make long-term commitments to various wineries" and "if you want to get your hands on a particular variety that's maybe a little more rare or a little more expensive, you need to plan years in advance." ECF No. 603, PageID.23659. The grape source requirement prevents Tabone from diversifying its wine offerings. *Id.*, PageID.23656-57.

Grape-source requirements imposed a unique hardship on Two Lads. As a Farm Processing Facility, it must use 85% Township grapes. ECF No. 608, PageID.24867-68. Two Lads cannot produce enough wine because of this requirement. *Id.*, PageID.24867-68. That

impacts Two Lads in two ways. First, “being only able to sell Old Mission Peninsula appellation wine in the tasting room, means we can’t explore any of the more diverse sites across Antrim, Leelanau, Benzie.” *Id.*, PageID.24935. Second, Two Lads cannot buy enough grapes because “there were so few contracts you could actually get because everybody that had a vineyard was under contract with somebody else, a multi-year contract.” *Id.* Two Lads has been forced to pay higher fruit prices because of the grape source requirements, “[b]ut that’s the price that since I’m restricted to buy Old Mission fruit, that’s the price I’ll have to pay if I don’t have enough fruit of my own.” *Id.*, PageID.24936–37. Two Lads introduced Exhibit 17, ECF No. 611-17, PageID.25457, which shows its grape purchases. ECF No. 608, PageID.24937, PageID.24943.

Lee Lutes, who has been in the wine business for 30 years, confirmed that Peninsula Township fruit or juice was more expensive, even factoring in shipping costs, than non-Peninsula Township fruit or juice. ECF No. 602, PageID.23541-42. Patrick Brys agreed. ECF No. 603, PageID.23820.

All of the above evidence was un rebutted.

2. Closing time restrictions caused damages to all Wineries.

As explained below, the Township’s enforcement of an unpublished 9:30 p.m. closing time violated the Wineries’ Due Process right to operate their businesses free from arbitrary government interference. If not for this restriction, the Wineries would have preferred to keep later hours, usually until 11:00 p.m. Each Winery called a witness to testify on the damages as set forth in Schedule 3 of Eric Larson’s supplemental report, Exhibit 194, ECF No. 611-144, PageID.27694.

Todd Oosterhouse testified that Schedule 3 reflects Bonobo’s current and preferred closing times. ECF No. 600, PageID.23071-72. Bonobo’s typical evening sales per hour of \$1,000 was determined from data taken from Bonobo’s point-of-sale (“POS”) system. *Id.* PageID.23072-73. Exhibit 51, ECF No. 611-42, PageID.26133, contains Bonobo’s POS data showing its sales for

2018 and 2019 between 8:00 and 9:00 p.m. *Id.*, PageID.23112-13. This data was accurate as of trial. ECF No. 600, PageID.23073; ECF No. 601, PageID.23203-05, PageID.23211-12.

Alex Lagina testified that Schedule 3 contains accurate information. ECF No. 601, PageID.23324-25. Exhibit 162, ECF No. 611-118, PageID.27256, reflects Mari's average hourly sales for the last two hours of the day, though it contains an error and should be halved, to \$1,524.50. ECF No. 601, PageID.23321-22. Mari used Fridays and Saturdays because those were its busiest times, but the information still provided a "good annual average." ECF No. 602, PageID.23411. The average likely would not change, and might go up, if data from other days of the week were included, given that a winter Friday is slower than a summer Tuesday. *Id.*, PageID.23413-15, PageID.23419-20.

Black Star's data in Schedule 3 was accurate and Black Star's typical evening sales per hour are \$1,500. ECF No. 602, PageID.23532-33. This was calculated using select Fridays and Saturdays in May and October. *Id.*, PageID.23538. Fridays and Saturdays are not always Black Star's busiest days, because during the summer, weekdays are busier than off-season weekends. *Id.*, PageID.23538-39. Mr. Lutes testified this number was a fair estimate of Black Star's typical evening sales. *Id.*, PageID.23582.

Schedule 3 accurately states Bowers Harbor's current and preferred closing times and its typical evening sales of \$1,500/hour. ECF No. 605, PageID.24126-29. Bowers Harbor used sales data for the last 2 hours it was open on Fridays and Saturday over the course of one full year, so it included its slowest and busiest months. *Id.*, PageID.24126-27, PageID.23211; Exhibit 77, ECF No. 611-130, PageID.27605. During the season, weekdays are often busier than weekends during the off-season, so Fridays and Saturdays are not always Bowers Harbor's busiest days. ECF No. 605, PageID.24224-25.

Bill Maier testified that the information in Schedule 3 was accurate and has not changed significantly for Hawthorne. ECF No 606, PageID.24280-83. The figure for typical evening sales of \$305/hour was based on sales information for random Tuesday, Wednesday and Thursday afternoons between June and September of 2020. *Id.*, PageID.24281. This number is low because Hawthorne's sales pick up later in the day. *Id.* Hawthorne's listed hours of operation were correct, although prior to 2022 Hawthorne would close in the winter. *Id.*, PageID.24318-19.

Brys Estate's closing time was accurate, although it changes a little bit depending on the season, and its typical evening sales are \$2,600/hour. The Township attempted to elicit testimony that \$2,600/hour was too high, but Patrick Brys explained that in peak season it could easily do \$4,000-\$5,000/hour (so an average of \$2,600/hour split between peak and non-peak season would be reasonable). ECF No. 604, PageID.24004-05. Mr. Brys personally reviewed the POS data using Fridays/Saturdays in July/December and \$2,600/hour was reasonably accurate. This Court overruled the Township's objection that the data was not sufficient. ECF No. 603, PageID.12792-97; *see also* ECF No. 604, PageID.23999-402 ("the ask was to find out what the last hour of the day sales were"). The data remained accurate as of trial. ECF No. 603, PageID.23796-97.

Ms. Dalese agreed that Chateau Chantal's closing time was not always 8:00 p.m., but its preferred closing time was 11:00 p.m. ECF No. 607, PageID.24611, PageID.24723. Its typical evening sales were \$1,200/hour, although this number was a little bit low by trial. ECF No. 606, PageID.24536-37; ECF No. 607, PageID.24723. This data also included 2020, when Chateau Chantal was required to operate at 50% capacity, meaning that \$1,200/hour would be low if used to calculate post-COVID sales. *Id.*

Mr. O'Keefe testified that Schedule 3 accurately reflected Chateau Grand Traverse's closing time and preferred closing time. ECF No. 607, PageID.24722-23. His winery provided

average daily sales and average daily sales per hour, Exhibit 141, ECF No. 611-98, PageID.26943, although this data was impacted by COVID restrictions. ECF No. 607, PageID.24717-21. Mr. O'Keefe believes that the typical evening sales of \$1,000/hour was a reasonable approximation of his sales. *Id.*, PageID.24723-24. The data was from Thursday through Saturday, but it was not limited to evening sales, which are typically higher. *Id.*, PageID.24828-33.

Mario Tabone testified the data in Schedule 3 was accurate through the date of trial, although Tabone sometimes closed earlier than 7:00 p.m. Tabone's typical evening sales of \$750/hour was accurate; Mr. Tabone personally calculated that number using Tabone's POS system. ECF No. 603, PageID.23636-39. He acknowledged that during the winter Tabone is not always open seven days a week. *Id.*, PageID.23700.

John Kroupa testified that Peninsula Cellars' data on Schedule 3 was accurate. It arrived at typical evening sales of \$1,200/hour by working through its POS system for the entire year. ECF No. 606, PageID.24381-83. He acknowledged there were days where Peninsula Cellars did not have any customers but explained that those days were included when he calculated the average of \$1,200/hour in typical evening sales. *Id.*, PageID.24457-58.

Two Lads' closing hours were correct, although during the off-season it closed one hour earlier than shown, and it sometimes stays open later than its posted hours. ECF No. 608, PageID.24807-08, PageID.24872, PageID.24907. Two Lads' typical evening sales per hour is \$735. *Id.*, PageID.24807-08. Exhibit 15, ECF No. 611-15, PageID.25455, contains sales data from Fridays and Saturday from early March to mid-July, so the off season, shoulder season and on season. ECF No. 608, PageID.24904-05. This data was still accurate as of trial. *Id.*, PageID.24908.

All of the above evidence was un rebutted.

3. Four Wineries were damaged by the Township's restrictions on merchandise sales.

Black Star, Tabone, Two Lads, and Peninsula Cellars were unlawfully restricted from selling merchandise. Eric Larson was provided yearly merchandise sales data from the Winery Chateaus who were allowed to sell merchandise and compared their average sales to the actual sales made by Black Star, Tabone, Two Lads, and Peninsula Cellars. Mr. Larson then summarized these damages in Schedule 5 of Exhibit 194, ECF No. 611-144, PageID.27696.

While Schedule 5 shows no merchandise sales for Black Star, Mr. Lutes volunteered that the information was no longer accurate. ECF No. 602, PageID.23534-35. Black Star now sells about \$25,000 annually in merchandise. *Id.*, PageID.23535-37.

Schedule 5 identifies Tabone as selling \$10,000 of merchandise annually, but Mr. Tabone believes that number is a little high. ECF No. 603, PageID.23654. Tabone's anticipated sales of \$85,000/year reflected on Schedule 5, which Mr. Larson calculated as described above, is a reasonable expectation if Tabone could promote merchandise for sale. *Id.*, PageID.23655.

Two Lads sells some merchandise, such as t-shirts and hats with the Two Lads logo, because "they're walking advertisements." ECF No. 608, PageID.24928-29. Two Lads sells a limited amount because Lee Lutes, from Black Star, told Chris Baldyga that Rob Manigold said it was acceptable to sell some merchandise, as long as it was kept to a "dull roar." *Id.*, PageID.24930-31. Two Lads would like to sell more merchandise, and particularly merchandise that would advertise its "R line" of wines (the "R" is for "Reserve"), but it is limited to only advertising its more general Two Lads logo. *Id.*, PageID.24933-34. It would like to sell nicer items, such as golf shirts, but does not want to invest too much into its inventory in case the Township tells Two Lads it needs to stop. *Id.*, PageID.24934. Two Lads provided merchandise sales data to Eric Larson for his use. *Id.*, PageID.24931-32.

Peninsula Cellars sells logoed merchandise because it hopes people will pick items up as a souvenir and because it helps promote the winery. ECF No. 606, PageID.24399. It is not allowed to sell non-logoed merchandise under the Remote Winery Tasting Room Ordinance. *Id.* Peninsula Cellars would like to sell non-logoed items, such as wine-stain remover, along with artwork that it displays on its walls. *Id.* PageID.24400. John Kroupa testified as to its damages from only being able to sell logoed merchandise. *Id.*, PageID.24400-01. Although Schedule 5 shows that Peninsula Cellars does not sell any merchandise, Mr. Kroupa testified that Peninsula Cellars sells \$25,000 to \$30,000 annually and it could generate total merchandise sales of \$80,000 per year if it were allowed to sell non-logoed merchandise, but more importantly, if it could advertise without worrying about the Township shutting it down. ECF No. 606, PageID.24447.

All of the above evidence was unrebutted.

4. All Wineries were damaged by the Township's enforcement of vague and unconstitutional restrictions on events and product demonstrations.

The Wineries would like to host activities or events to demonstrate their products. As explained below, the Township's restrictions violate the Due Process Clause, the First Amendment and the dormant Commerce Clause. Each Winery receives requests to host small and large events, such as business meeting, corporate retreats, anniversary parties, birthday parties and weddings. Each Winery has the space and the only thing holding them back is the Winery Ordinances. Each Winery called a witness to verify the information it provided to Eric Larson for Schedules 6 and 7 in his supplemental report, Exhibit 194, ECF No. 611-144, PageID.27697-98.

Bonobo. Exhibit 56, ECF No. 611-47, PageID.26192, is a "running tally" of requests for Bonobo to host different events, such as rehearsal dinners, weddings and holiday parties. ECF No. 600, PageID.23074, PageID.23078. Bonobo could accommodate those groups; it has an indoor capacity of 255 people and an outdoor deck that can accommodate another 100-150 people. *Id.*,

PageID.22995-97. Bonobo's entire 50 acres is licensed by MLCC for alcohol service, and it has about 70 parking spots with overflow for 500 cars. *Id.*, PageID.2297-98.

For Schedule 6, Bonobo expected to host 7 on-season small events per week, and 1 small event per week in the off season; for both, Bonobo expects to have 20 people and receive \$40 per person, per event; Bonobo arrived at \$40/person by anticipating that a couple of glasses of wine and some food would be sold; Bonobo arrived at 20 people/event by looking at its historical operations and customer inquiries. *Id.*, PageID.23086-88. Bonobo knows there is significant demand, because it had "all of these people calling you without doing any advertising or marketing on it," and if Bonobo started advertising an ability to host events, it would attract more business. *Id.*, PageID.23089-90. Bonobo can host small events within its existing capacity and a small event would not result in the facility being taken over. *Id.*, PageID.23087.

For Schedule 7, Bonobo anticipates 3 on-season events per week, and 1 off-season event per week, based on inquiries from potential customers. *Id.*, PageID.23103-05. It calculated a price of \$250/person. *Id.* Bonobo based its anticipation of 75 people/event based on historical customer inquiries. *Id.* Bonobo's prices would have probably increased since the time the report was prepared. *Id.*, PageID.23105. Since the case started, Bonobo began hosting some larger events and is currently operating at 30% capacity. *Id.*, PageID. 23106. Bonobo could keep its tasting room open while hosting large events and could even host multiple large events on the same week or weekend. *Id.*, PageID.23103, PageID.23105.

Mari. Alex Lagina explained "[t]here is demand on both sides. There's demand from us as a business. We have to figure out how to get people in in the slow season to make ends meet. We need ways to market ourselves to our customers and get people in the door all year round really to grow our business." He continued: "And then on the other side, we get constant inquiries, hey,

can I do this event here, can I do that event here, and for the most part, if I'm at all uncertain, I say I'm sorry, I don't think we are allowed to do that." ECF 601, PageID.23287. Having to ask permission for events "caused [Mari] to say no to a lot of activities right off the bat" because before asking the Township's permission, Mari already had to have the event scheduled and then might have "to turn around and say, sorry, it's a no." *Id.*, PageID.23298. Exhibit 170, ECF No. 611-124, PageID.27397, is a collection of event inquiries from potential customers. ECF No. 601, PageID.23288. It contains 160 pages of inquiries, but Mari did not host all of them: "nowhere near." ECF 602, PageID.23423.

Mari has hosted in the "low single digits" weddings despite all of the requests it receives. *Id.*, PageID.23425. One of those was for Mari's owner's daughter, but the owner had to get permission. *Id.*, PageID.23424. Exhibit 171, ECF No. 611-125, PageID.27557, is a "subset of our responses to wedding inquiries" where Mari had to respond with things like, "[u]nfortunately, per Township law we are unable to host weddings on our site at this time." ECF No. 601, PageID.23291. It "is not a guarantee" that Mari would need to close its tasting room to host a wedding, though it might choose to do so. ECF 602, PageID.23417. Mari has numerous areas where an event could take place, such as its wine caves. *Id.*, PageID.23418-19.

For Schedule 6, Mari expects to host 7 small events per week during both the high and low season. ECF 601, PageID.23328-30. The average number of customers would be 25 and each customer would spend, on average, \$37.00. *Id.* Mari calculated the number of events, price and number of customers based on historical inquiries. *Id.*, PageID.23330. While Mari has hosted some small events, it was nowhere close to all of the events Mari could have or wanted to host. ECF 602, PageID.23421-22. This was because Mr. Lagina "really wanted to do the ones that I was comfortable with, that I knew we weren't going to get in trouble for, and I wanted to make

sure that I didn't want to violate our SUP. I didn't want to do anything that the Township would be angry about." *Id.*, PageID.23422. Because of the size of its facility and the numerous tasting areas throughout its building, Mari would not need to close its tasting room in order to have small events. ECF 601, PageID.23328-30.

For Schedule 7, Mari noted for larger events, "[w]e have the space, we have the staff, we have the interest." *Id.*, PageID.23331. Mari could host 2 large events per week in the high season and 1 event in the off season; the average price per person would be \$200 with an average of 100 customers per event. *Id.*, PageID.23331-34. The information Mari provided to Mr. Larson was based on inquiries and management's experience related to wedding and larger events. *Id.* Mari could host multiple large events on the same weekend and is ready to begin hosting events immediately once the restrictions are lifted. *Id.*, PageID.23332-34.

Hawthorne. Exhibit 154, ECF No. 611-110, PageID.27113, is a list of event requests between 2019 and 2021. ECF No. 606, PageID.24271. Hawthorne stopped tracking event requests because there was no point in continuing to do so, but Hawthorne receives 3-4 requests each week, despite the fact that Hawthorne does not advertise itself as being available to host events. *Id.*, PageID.24271-73. Hawthorne's upper-level tasting room has capacity for about 50 people and its lower-level tasting room has capacity for about 30 people with room to grow. ECF No. 605, PageID.24234-35; ECF No. 606, PageID.24311. Hawthorne has a patio that can hold 30-40 people and an "expansive lawn area" with picnic tables and Adirondack chairs so that its total outdoor capacity is 150-200 people. ECF No. 605, PageID.24235. Hawthorne has 17 acres licensed by MLCC for the service of alcohol. *Id.*, PageID.24235-36. It has 20-25 paved parking spots and another 80 non-striped spots. *Id.*, PageID.24236; ECF No. 606, PageID.24336. It has dedicated parking for buses and can accommodate shuttle buses. ECF No 605, PageID.24236.

For Schedule 6, Hawthorne expects to host 3 small events for 20 people during the season for an average of \$40/person, and 1 small event during the off season with the same numbers. ECF No. 606, PageID.24283-85. This data was accurate through the date of trial. *Id.*, PageID.24285. But for Hawthorne not understanding the term “Guest Activity,” Hawthorne would have hosted small events. *Id.*, PageID.24285. Hawthorne has received inquiries and Bill Maier knows from his experience at Bowers Harbor that there is demand for small events. *Id.*, PageID.24284. Hawthorne’s normal tasting room operations would not be affected. ECF No. 606, PageID.24285.

For Schedule 7, Hawthorne expects to host 3 larger events per week during the season and 1 in the off-season, with 50 people at each event and at \$125/person. ECF No. 606, PageID.24285-87. Hawthorne based its data on the assumption it would keep its tasting room open; if for some reason Hawthorne needed to close its tasting room for a large event, it would charge an additional fee. *Id.*, PageID.24288. The Township attempted to elicit testimony that Hawthorne could not keep its tasting room open if it hosted a wedding, because the bride might have to mingle with the public, but Hawthorne explained in that circumstance it could shift all tasting operations to its lower level. *Id.*, PageID.24333.

Brys Estate. Brys Estate was especially damaged by the grape source and Guest Activities restrictions. As discussed above, Brys Estate is the largest contiguous vineyard and grows enough grapes that it does not need to purchase grapes. Because it did not purchase grapes from other Peninsula Township farmers, it was limited in how many guests could attend a Guest Activity Use. ECF No. 603, PageID.23772.⁸ Because the Ordinance would limit Brys Estate to between 7.02 and 8.98 guests, Brys Estate decided it was pointless to try to qualify for having Guest Activity

⁸ To qualify for the maximum 111 guests, Brys Estate would need to purchase 138.75 tons of fruit which would double its annual production and it does not have the capability to process that much fruit into wine. ECF No. 603, PageID.23818-20.

Uses. *Id.*, PageID.23777-78. Brys Estate could theoretically have planted more grapes on additional acreage outside of its SUP, but Brys Estate would have had to plant about 30 additional acres, “so we’re talking about millions [of] dollars in investment, potentially, just to have the ability to have an event with 111 people,” and it does not have the production capacity to make wine from that many additional grapes in any event. *Id.*, PageID.23779-80, PageID.23818-20.

Brys Estate gets “a lot of requests for private events.” *Id.*, PageID.23797. Exhibit 104, ECF No. 611-77, PageID.26529, is a collection of email inquiries. ECF No. 603, PageID.23797–98. This exhibit is not exhaustive, “not by any stretch.” *Id.*, PageID.23798. Brys Estate gets so many in-person requests that it instructed its staff to put up a notice that it is not available to host weddings or receptions, and Brys Estate does not advertise itself as being available to host events, because it understood the Township prohibits them. *Id.*, PageID.23797-99, PageID.23788-89.

If Brys Estate started advertising, it expects it would get even more requests. ECF No. 604, PageID.24040. Brys Estate could accommodate these requests, as it has an indoor tasting room/barrel-and-cask room with a capacity of 100 people, an outdoor patio and two large decks with capacity for another 152 people, and a “lawn bar” area with seating for another 15 people. ECF No. 603, PageID.23726-28. The two elevated decks are “Selfie Central” and give hundreds of people each day the chance to “experience[e] the agriculture, they’re falling in love with the scenery, they’re taking photos and tagging us.” *Id.*, PageID.23731-32. Brys Estate’s entire 80 acres is licensed to serve alcohol. *Id.*, PageID.23728. Brys Estate has about a dozen asphalt spots for guest parking with another 70-80 striped grass parking spots, and 8-10 gravel parking spots for buses with the ability to accommodate shuttle buses. *Id.*, PageID.23729. Beyond the designated spots, Brys Estate has “acres” where people can park. *Id.*

For Schedule 6, the data was accurate as of trial. It expects to have 7 on-season small

events and 4 off-season events per week, with 22 people per event, at an average of \$40/person. ECF No. 603, PageID.23806-08. The Township suggested that Brys Estate had not done a market or feasibility study, but Patrick Brys explained his feasibility study was the constant barrage of requests, to the point he needed to put up a notice “so people would stop contacting us” ECF No. 605, PageID.24009-11. Brys Estate could have hosted 1 or 2 small events at the same time without having to close its tasting room. ECF No. 603, PageID.23808-09.

For Schedule 7, Brys Estate would have 3 on-season events per week with 100 people per event, and 1.5 off-season events per week with 75 people, both at \$200/person. Brys Estate based this on the number of requests it was receiving, its layout and what other locations in Traverse City were charging. *Id.*, PageID.23810-14. Brys Estate could “easily” keep its normal tasting room space open to the public during large events. *Id.*, PageID.23815; ECF No. 604, PageID.24006-09.

Chateau Chantal. Chateau Chantal maintained Exhibit 131, ECF No. 611-91, PageID.26831, which is a spreadsheet documenting guests requesting it host an event. ECF No. 606, PageID.24505. During the time period in question, roughly 2018-2020, it received roughly 242 inquiries each year. The Winery Chateau Ordinance prevented Chateau Chantal from hosting the “vast majority” of these requests. *Id.*, PageID.24506. This harmed Chateau Chantal from a revenue and marketing standpoint. *Id.*, PageID.24504-07. There is no doubt Chateau Chantal has ample space, with two primary indoor tasting rooms with capacity for 150 people, plus an indoor dining room with capacity for another 111 people. *Id.*, PageID.22467-68. It also has a large patio on the east side with capacity for 492 people and the west lawn can hold another 200 people. *Id.*, PageID.24469-70. The MLCC licensed service area encompasses all of this space. *Id.*, PageID.22468-71. Chateau Chantal has 68 marked parking spots, plus 3 spots reserved for buses, and overflow parking for at least 200 cars and also shuttle buses. *Id.*, PageID.24471.

For Schedule 6, Chateau Chantal would host 3 on-season events per week and 1 off-season event per week, at 35 people per event and \$45/person. ECF No. 606, PageID.24539-41. This was based on the number of inquiries it receives and the cost for a small event being a couple glasses of wine with a little food. *Id.* These numbers were accurate as of trial, although the \$45/person might be a little bit low. *Id.* But for the restrictions, Chateau Chantal would have hosted these events. *Id.*, PageID.24541. Chateau Chantal could host small events without affecting the normal operations of its tasting room. *Id.*, PageID.24541.

For Schedule 7, Chateau Chantal would have 3 events per week during the season and 1 event per week during the off season. ECF No. 606, PageID.24542-43. This was based on the number of inquiries for events that it received. *Id.* It used a value of \$200/person because it expected it would need more food and more staffing for a large event, so it would charge more. *Id.* It used a value of 200 people per event based on inquiries it received for weddings that ranged from 100 to 300 people, although it used a lower off-season headcount of 75 people per event. *Id.* This information was still accurate as of trial, although if the cost to host the event would have gone up, so would the price that Chateau Chantal would have charged. *Id.*, PageID.24544. It would keep its tasting room open during larger events, and if it had to close its tasting room it would offset that by charging more. It could also set up additional temporary service areas under its MLCC license. *Id.*, PageID.24545-46. Chateau Chantal can immediately start hosting events. *Id.*, PageID.24545-46.

Peninsula Cellars. Peninsula Cellars frequently gets approached by groups wanting it to host events, particularly teachers looking to have graduation or bachelorette parties (because the tasting room is an old schoolhouse). ECF No. 606, PageID.24386. It also gets approached to host larger events, such as weddings; Peninsula Cellars declines these requests because Rob Manigold

told Peninsula Cellars it could not host events, and because of Peninsula Township's enforcement threats and actions against both Peninsula Cellars and other Wineries. *Id.*, PageID.24386-87, PageID.24391. Peninsula Cellars knows there is demand for events because its owner, John Kroupa, has spoken with wineries in Leelanau who have told him they are booked more than one year in advance for things like weddings. *Id.*, PageID.24453. If it could host these events, Peninsula Cellars could accommodate 80 people inside its tasting room, more than 20 people on its patio, and scores more on its 5-acre parcel, all of which is licensed by MLCC. *Id.*, PageID.24345-46, PageID.24390. Peninsula Cellars has 25 parking spots and a field for additional parking. *Id.*, PageID.24346.

For Schedule 6, Peninsula Cellars anticipates 2 on-season and 1 off-season event each week, at 30 people/event and \$35/person. ECF No. 606, PageID.24388-91. Peninsula Cellars has had requests for smaller events of around 30 people. *Id.*, PageID.24389. The majority of requests are oral, not written, "[t]here's no record because the answer has always been no, so there isn't really anything to write down. We don't have to follow up on a 'No, we can't do it.'" *Id.*, PageID.24445-46. Peninsula Cellars would not need to close its tasting room to accommodate a smaller event. *Id.*, PageID.24389. Its entire 5-acre site is licensed, so during good weather it could host customers outside: "We have five acres to choose from. Some people would prefer to be out in the vineyard. Some people would prefer to be on the lawn. Some would prefer to be under the old growth maple trees." *Id.*, PageID.24452. There might be times during the off-season where it would need to have an event indoors, but there are days where Peninsula Cellars does not have any customers, so it could do events on those days. *Id.*, PageID.24457-58.

For Schedule 7, Peninsula Cellars anticipates having 1 event per week during the season, with 70 people per event and \$125/person. During the off season, it anticipated doing 0.25 events

per week (1 per month), also at \$125/person, but with 30 people per event because Peninsula Cellars would want to make sure it would have the ability to move the event indoors. *Id.*, PageID.24393-96. Peninsula Cellars would keep its tasting room open during the season, but likely close it for large event during the off season. *Id.*, PageID.24396. It would likely have a surcharge during the offseason to make up for closing its tasting room so it would not lose the profit from the tasting room, *i.e.*, “the bottom line’s the same.” *Id.*, PageID.24439-42.

Black Star. Black Star receives requests for small and large events at its Peninsula Township location even without advertising its ability to host events. ECF No. 602, PageID.23475. When Black Star receives these requests, it tries to convince the customer to host the event at Black Star’s Suttons Bay location, which is “[n]ot always successful” and Black Star “lose[s] a lot of business.” *Id.*, PageID.23466-67. Black Star can fit 45 people in its tasting room, another 50 on its outdoor patio, and can set up a temporary bar anywhere in its 5-acre MLCC service area. *Id.*, PageID.23511, PageID.23571, PageID.23511, PageID.23584. Black Star has 18 asphalted parking spots, gravel spots for another 30-40 cars and the ability to park additional cars on the rest of its property, plus the ability to accommodate buses. *Id.*, PageID.23512.

For Schedule 6, Ms. Fenton testified “[t]hat is information that we provided based upon factual information that we had from our Suttons Bay location. So this is not just conjecture, this is based upon knowing that we are able to do, and it’s easily able to translate to Old Mission.” *Id.*, PageID.23468. Ms. Fenton continued, “it would be very easy for us to host fun little events like that wine and workshop series at Old Mission where we have approximately 20 to 25 guests at it, charcuterie building, whatever.” *Id.*, PageID.23470. The \$40 per person rate and number of people at each event is based on what Black Star actually does at Suttons Bay. *Id.*, PageID.23470-71. Black Star would not need to close its tasting room. *Id.*, PageID.23476.

For Schedule 7, the information was based on data from hosting large events at Suttons Bay, although it was modified based on the Peninsula Township location's size limitations. *Id.*, PageID.23471-72. The price per person and the number of people at a large event is accurate and based on information from actual events hosted at Suttons Bay. *Id.*, PageID.23471-73. Ms. Fenton did state that the flat rental charge in Schedule 7 was likely high and a more reasonable rate would be \$4,000. *Id.*, PageID.23473. A flat rate is necessary to cover planning costs and the two full time staff members Black Star employs just for events. *Id.* If the restrictions were lifted, Black Star would commence operations "much like Suttons Bay and there would be robust and exciting educational, fun atmosphere, much more than just a wine tasting experience, that it would be paired with something else, that it could be paired with food or small activity, something that is engaging people and making them want to come back and share that experience with other people." *Id.*, PageID.23480. Black Star would not need to close its tasting room. *Id.*, PageID.23476.

Bowers Harbor. Bowers Harbor receives almost daily requests to host events, such as birthday parties, anniversaries, receptions, weddings, bar mitzvahs and book clubs. ECF No. 605, PageID.24130. They are often made in-person in the tasting room. *Id.* Bowers Harbor declines these requests. *Id.*, PageID.24130. Bowers Harbor also receives email requests, a sample of which are in Exhibit 83, ECF No. 611-67, PageID.26345. ECF No. 605, PageID.24133-34. If Bowers Harbor could host the requested activities, it could engage in promotion of its wine and wine club and product demonstrations. *Id.*, PageID.24135. Bowers Harbor has room to host these activities, with multiple indoor tasting areas. ECF No. 604, PageID.24051, ECF No. 605, PageID.24158. It also has a roofed pavilion with capacity for 50 people, picnic tables with umbrellas, and a space in Mr. Stegenga's mother's basement used for tastings, known as "the Library." ECF No. 604, PageID.24051-53. In total, Bowers Harbor has 14 acres licensed by the MLCC. *Id.*, PageID.24052.

It has 153 parking spots and 10 acres of overflow parking, which the Township required Bowers Harbor have as a condition to it becoming a Winery Chateau. *Id.*, PageID.24053-54. Bowers Harbor also can accommodate buses. ECF No. 605, PageID.24170.

For Schedule 6, Bowers Harbor would host 7 events per week during the season, with 22 people/event and \$40/person; it selected 22 people because small buses typically hold 22 people, and it can easily accommodate groups that size. *Id.*, PageID.24131-33. Bowers Harbor might charge more than \$40/person now, but otherwise the numbers are accurate. *Id.* Bowers Harbor would do the same in the off-season. *Id.*, PageID.24139-40.

For Schedule 7, Bowers Harbor would host 3 events per week on and off season, which it believes it could accommodate because it sold out two Dining in the Vines events per week. *Id.*, PageID.24135-38. It used this same logic to identify \$125/person, although it could charge \$250/person now. *Id.* It expects 120 people per event based on the size of its Dining in the Vines and its parking capacity. *Id.* Bowers Harbor anticipates charging a flat fee of \$5,000/event. *Id.* Bowers Harbor would be able to keep its tasting room open. *Id.*, PageID.24138.

Tabone. Tabone would like to do events like painting or yoga in the vines but cannot because of the Township restrictions. ECF No. 602, PageID.23614. Tabone has “had requests for weddings, corporate retreats, bridal showers, baby showers, engagement parties” *Id.* Tabone receives requests “at least weekly” but must “very delicately and politely decline those requests” ECF No. 603, PageID.23645. Tabone also introduced Exhibit 189, ECF No. 611-141, PageID.27655, which is a set of email inquiries regarding weddings. ECF No. 603, PageID.23646. Tabone could host 48 people inside its tasting room and another 50 on its patio. ECF No. 602, PageID.23602–03. It can park 25-30 cars and has plenty of overflow parking. *Id.*, PageID.23603.

For Schedule 6, Tabone can host seven small events each week (on season and off season)

as “a very conservative estimate,” with 22 people per event, which was based on the usual inquiry it receives and because that is the typical number of people who arrive by bus. ECF No. 603, PageID.23641. Tabone used \$35/person because that is a couple glasses of wine and a charcuterie board. *Id.*, PageID.23640-43. Tabone could accommodate 22 people inside its tasting room without affecting its normal operations. *Id.*, PageID.23644.

For Schedule 7, Tabone would hold 3 larger events during the season, with 62 people per event and \$150/person. Tabone looked at what other venues were charging, including Jolly Pumpkin in Peninsula Township and venues in Leelanau. During the off season, Tabone would hold 1 event per week with only 40 people, but at the same rate per person. *Id.*, PageID.23649-51.

Chateau Grand Traverse. Chateau Grand Traverse gets inquiries from groups and “regular calls” regarding events. ECF No. 607, PageID.24728. It has a 3,500 square foot indoor tasting room that can accommodate 65 people in its current configuration, but this could be increased. *Id.*, PageID.24644. It can also accommodate 75 people on its patio. *Id.*, PageID.24663. It has other outdoor space that is partially roofed and heated and that can accommodate 44 people, and then yet another outdoor space for 50-60 people. *Id.*, PageID.24667. Its entire outdoor space is licensed by the MLCC. *Id.*, PageID.24663, 24667. It has roughly 80 parking spots, including dedicated spots for buses, and overflow parking. *Id.*, PageID.24668.

For Schedule 6, Chateau Grand Traverse is not pursuing damages for small events.

For Schedule 7, Chateau Grand Traverse would host 3 large events during the season at \$125/person and for 85 people. *Id.*, PageID.24727-28. This was based on Chateau Grand Traverse’s nearly 50 years of business experience and was described as a “crawl before we run” number. *Id.* During the off season, it expected to have 1 event every other week (0.5/week) with 70 people/event but at the same rate of \$125/person. *Id.*, PageID.24229-30. Mr. O’Keefe

explained that while his SUP permits him to have up to 75 people at an outdoor function, the fact that it does not address indoor functions means he does not have clarity on whether or not he can have large indoor events. *Id.*, PageID.24731.

Two Lads. Two Lads gets approached by groups on a daily basis. ECF No. 608, PageID.24909-10. Two Lads introduced Exhibit 18, ECF No. 611-18, PageID.25471, which shows “requests for events of some type or another at our facility or at our tasting room.” ECF No. 608, PageID.24910. Two Lads did not host these events because the Township planner, Michelle Reardon, told Two Lads it was not allowed to do so. *Id.*, PageID.24910-11. Instead, Two Lads had to refer guests to other businesses, as shown in Exhibit 23, ECF No. 611-20, PageID.25612. ECF No. 608, PageID.24911-12. Two Lads could have facilitated these events size-wise, as it has a primary tasting room with a 48-person capacity, a barrel room with additional capacity, and outdoor service areas. *Id.*, PageID.24852–53, PageID.24987. Two Lads has 14 marked parking spaces and “a lot of overflow area.” *Id.*, PageID.24854. It can accommodate between 75 and 100 cars. *Id.* Due to the design of its driveway, it does not accommodate large buses, but it permits smaller 20-person buses. *Id.*, PageID.24958-59, PageID.24983.

For Schedule 6, Two Lads would have 7 events each week during both the on and off season, with 22 people per event and \$50/person. *Id.*, PageID.24913-16. This was a reasonable number for some wine and a charcuterie board and the winery can easily accommodate 22 people for a small event. *Id.* This information was still accurate as of trial. *Id.*, PageID.24919. There is a “consistent ask from people throughout the year” for Two Lads to host events. *Id.*, PageID.24916. Mr. Baldyga testified that he knows the demand is there since Jolly Pumpkin, a Peninsula Township brewery just a few miles away, “do[es] five weddings a weekend consistently throughout the year.” *Id.*, PageID.24919-20.

For Schedule 7, Two Lads would have 3 on-season events per week at \$250/person and 100 people per event. *Id.*, PageID.24922-24. This was based on what other venues charge as compared to the Two Lads setting, which is “a little more elegant.” *Id.*, PageID.24922-26. Two Lads would host 1.5 large events per week during the off season. *Id.*, PageID.24924. Demand might taper off a little bit in the winter but “[s]ome people like to get married in the winter, [and] there might be corporate Christmas parties, things of that nature, family reunions that might occur, holiday parties, those sorts of things.” *Id.*, PageID.24924-25. 100 people is reasonable because its lavatories can support 225 people and it would keep its tasting room open. *Id.*, PageID.24926. It would consider closing its tasting room if it received additional revenue to make up for lost tasting room sales. *Id.*, PageID.24926-27.

The Township questioned Mr. Baldyga in detail regarding whether he had a plan for dealing with bad weather and he responded “we haven’t developed an inclement weather plan, because I’ve not even been able to advertise or develop – like I said, I don’t even have contracts for what this event might be. There are all things, though, I’d like to be able to pursue and try to develop.” ECF No. 608, PageID.24994-95. When pushed yet again for why he did not develop a business plan for something the Township prohibited, this Court succinctly nailed the heart of the issue: “I think the bottom line of the witness’s testimony is he wants the ability to do it, make a business decision as to whether he wants to or not.” *Id.*, PageID.24995.

Defendants did not offer any witnesses or evidence to rebut any of the above evidence.

IV. APPLICATION OF TRIAL EVIDENCE TO LEGAL ISSUES

A. Peninsula Township enforced restrictions on the Wineries which were not found in the text of the Winery Ordinances.

Peninsula Township and PTP have admitted that the Winery Ordinances do not contain any requirement that the Wineries' close their tasting rooms at a certain time. ECF No. 159, PageID.5884-85, ECF No. 356, PageID.12966. Peninsula Township, however, enforced a 9:30 closing time (or even earlier as to some Wineries). See Section III(D)(3), above. At trial Peninsula Township objected to the Wineries offering evidence of damages on this issue. ECF 601, PageID.23311-12. This Court overruled the Township's objection:

THE COURT: Of course the problem from the Wineries' perspective is you were enforcing a closing time. That is the problem, if I understand it from plaintiffs' perspective.

MR. RAJSIC: If that - - If that's an issue that was in the case, we are - - again, we are three and a half years into this litigation - -

THE COURT: Counsel, the issue of closing time and guest activity has been in this case since day one.

MR. RAJSIC: Understood, your honor, but it was - -

THE COURT: Well then, what is the problem?

MR. RAJSIC: It's related to a First Amendment - -

THE COURT: No.

MR. RAJSIC: - - Constitutional speech or - -

THE COURT: No, no, no. You've been heard. Overruled. Go ahead.

Id., PageID.23318-19.

This Court's ruling is supported by Sixth Circuit precedent. In *Sanderson v. Village of Greenhills*, 726 F.2d 284 (6th Cir. 1984), the court addressed whether a business has a right to be free from "erroneous enforcement of local ordinances." The plaintiff sought to open a pool room and was informed that a license was not required because the ordinance only applied to coin

operated games. *Id.* at 285. The plaintiff remodeled his building and opened the pool room. *Id.* Three hours after opening, the police chief closed the pool room for being “unlicensed.” The police chief also informed the plaintiff that while he could apply for a license, no license would be granted even though “the ordinance was inapplicable to billiard tables not operated by a coin or token.” *Id.* The plaintiff then filed a Section 1983 case alleging that it was denied “of a ‘liberty’ interest to engage in whatever legal business he elects to pursue without arbitrary interference.” *Id.* at 286. The Sixth Circuit agreed that this was a valid claim.

This Circuit still follows *Sanderson*. See *Lawrence v. Pelton*, 2021 WL 1511664, at *6 (6th Cir. April 9, 2021) (“In [*Sanderson*], we held that the plaintiff had stated a substantive due process claim where the town council denied him a license to operate a poolroom pursuant to a claimed ‘inherent municipal power’ to approve new businesses, ‘irrespective of any existing regulatory ordinance and [based] solely upon ‘unmotivated and unreasonable’ opinions of that business.’”); *Women’s Med. Prof’l Corp. v. Baird*, 438 F. 595, 612 (6th Cir. 2006) (“protected property interest in the continued operation” of a business.) Other Circuits concur. See *Chalmers v. City of Los Angeles*, 762 F.2d 753 (9th Cir. 1985) (entitled to recover lost profits caused by enforcement of vague ordinance which impaired liberty interest to engage in a lawful occupation); *United States v. Tropiano*, 418 F.2d 1069, 1076 (2d Cir. 1969) (“The right to pursue a lawful business ... has long been recognized as a property right within the protection of the Fifth and Fourteenth Amendments of the Constitution.”); *Small v. United States*, 333 F.2d 702, 704 (3d Cir. 1964) (“The right to pursue a lawful business or occupation is a right of property which the law protects against intentional and unjustifiable interference.”).

Peninsula Township also concedes it improperly enforced other non-restrictions. In their Proposed Findings of Fact and Conclusions of Law, Defendants argue that some language this

Court found unconstitutional was not actually unconstitutional because it merely set forth the Township's intent and was not operative law to be enforced. ECF No. 583, PageID.22822. The Sixth Circuit agrees: "The proposition that prologues, prefatory clauses, and purpose statements do not confer legal powers, rights, or duties is hardly controversial." *Commonwealth v. Biden*, 57 F. 4th 545, 551 (6th Cir. 2023) (internal citations omitted.) This last minute concession does not help Peninsula Township, however, because it actually enforced the provision at issue, Section 8.7.3(10)(u)(1)(b), as if it were operative law. Peninsula Township thereby walks right into a second Due Process violation: Section 6.7.2(19)(a) is the "Statement of Intent" section of the Farm Processing Facility Ordinance. It is this section that Peninsula Township has used to prohibit Farm Processing Facilities from having restaurants, weddings and other social events for hire. But because, as Defendants concede, ordinance sections setting forth intent are not operative law, Defendants thereby concedes that there was never a prohibition on these activities to begin with, and by enforcing such a restriction, Peninsula Township violated the Due Process rights of Black Star, Tabone and Two Lads, the Farm Processing Facilities.

Similarly, Peninsula Township has historically imposed a ban on weddings at Winery Chateaus. But Christina Deeren conceded that the Winery Ordinances did not require Winery Chateaus to obtain Township permission before hosting weddings and similar events:

Q. We've established that in order to engage in a guest activity use, a winery-chateau needs your approval as the ... director of zoning, correct?

A. Yes.

Q. [W]e've established that under 2(d), entertainment, weddings, wedding receptions, family reunions or sale of wine by the glass are not guest activity uses, correct?

A. Correct.

Q. [B]ecause they are not guest activity uses, winery-chateaus do not need your approval, as the director of zoning, to engage in entertainment, weddings, wedding receptions, family reunions or sale of wine by the glass, correct?

A. Yes.

Q. Does that section prevent ... weddings ... receptions, family reunions, outside of the classification of guest activities for a particular winery?

A. No.

ECF No. 611-151, PageID.27782-83. PTP also conceded this issue: “The Township does not regulate where people gather with friends and family to marry or celebrate occasions – a couple can exchange vows in a church or on the patio of Brys, friends can celebrate a birthday in Two Lads’ tasting room or at Haserot Beach.” ECF No. 488, PageID.18938.

Finally, the Remote Winery Tasting Room Ordinance contains no language prohibiting Peninsula Cellars from hosting events, playing music or operating a restaurant. Peninsula Township enforced these restrictions, however, which violated the Due Process Clause.

Peninsula Township has admitted it enforced unwritten restrictions, thereby violating the Wineries’ Due Process rights. Fed. R. Civ. P. Rule 54(c) and 15(b) allow this Court to grant Plaintiffs relief on this issue as it has been litigated by the parties and the Wineries must be awarded damages and Peninsula Township enjoined from further enforcement of unwritten restrictions.

B. Sections 6.7.2(19)(a), 6.7.2(19)(b)(1)(v), 8.7.3(10)(m), 8.7.3(10)(u)(1)(b), 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(10)(u)(2)(d), 8.7.3(10)(u)(5)(a), 8.7.3(10)(u)(5)(h), 8.7.3(12)(i), and 8.7.3(12)(k) violate the Wineries’ First Amendment rights to engage in commercial speech.

Sections 6.7.2(19)(a), 6.7.2(19)(b)(1)(v), 8.7.3(10)(m), 8.7.3(10)(u)(1)(b), 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(10)(u)(2)(d), 8.7.3(10)(u)(5)(a), 8.7.3(10)(u)(5)(h), 8.7.3(12)(i), and 8.7.3(12)(k) unconstitutionally restrict the Wineries’ rights to engage in commercial speech as protected by the First Amendment.

“The First Amendment ... protects commercial speech from unwarranted governmental regulation.” *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm’n of New York*, 447 U.S. 557, 561 (1980). Commercial speech encompasses “expression related solely to the economic interests of the speaker and its audience” and “speech proposing a commercial transaction.” *Rubin v. Coors*

Brewing Co., 514 U.S. 476, 493 (1995). It “serves to inform the public of the availability, nature, and prices of products and services, and thus performs an indispensable role in the allocation of resources in a free enterprise system.” *City of Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410, 421 (1993). “[C]ommercial speech is entitled to the protection of the First Amendment.” *New York State Rest. Ass’n v. N.Y. City Bd. of Health*, 556 F.3d 114, 131 (2d Cir. 2009).

The regulation of commercial speech is subject to the *Central Hudson* analysis. Under this analysis if (1) the speech concerns lawful activity and is not misleading, then the government must⁹ (2) identify a substantial governmental interest, (3) show that the regulation directly advances that interest, and (4) show that the regulation is not more extensive than necessary. ECF No. 559, PageID.21916 (citing *Central Hudson*, 447 U.S. at 566).

Prior to trial this Court ruled that Sections 6.7.2(19)(b)(1)(v), 8.7.3(10)(u)(1)(b), 8.7.3(10)(u)(5)(h), 8.7.3(12)(i), and 8.7.3(12)(k) implicate commercial speech as they “relate to and regulate speech on their face—generally through limits on advertising.” ECF No. 559, PageID.21918. At trial, the Wineries proved 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(10)(u)(2)(d), and 8.7.3(10)(u)(5)(a) also implicate commercial speech.

Initially, Peninsula Township objected to the Wineries presenting evidence related to damages for “large events” citing this Court’s April 5, 2024 Summary Judgment Opinion. ECF 600, PageID.23090. The Wineries argued that while the Opinion “accepts PTP’s argument for sections 6.7.2(19)(a) and 8.7.3(10)(u)(2)(d); these provisions do not implicate First Amendment protection,” the Court did not grant PTP summary judgment on the First Amendment claims. *See* ECF No. 559, PageID.21906. Instead, this Court merely denied the Wineries’ motion for

⁹ There is no dispute that the speech is not misleading.

summary judgment. In doing so, this Court referenced Sections 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)(d) and 8.7.3(10)(u)(5)(a) among other sections, stating it was “unclear whether all of these sections implicate speech” and “the Court will reject the catch all label at summary judgment.” *Id.*, PageID.21918. The Court also concluded that five sections “relate to and regulate speech on their face,” but the Court did not grant the Wineries summary judgment, as the Court determined there were triable issues as to the *Central Hudson* factors. *Id.*, PageID.21918, PageID.21921. Therefore, the question of whether Sections 6.7.2(19)(a), 8.7.3(10)(m) 8.7.3(10)(u)(1)(d),¹⁰ 8.7.3(10)(u)(2)(a), 8.7.3(10)(u)(2)(b), 8.7.3(10)(u)(2)(c), 8.7.3(10)(u)(2)(d), and 8.7.3(10)(u)(5)(a) implicate commercial speech was an issue for trial. ECF No. 600, PageID.23103.

But, even if this Court intended to grant partial summary judgment on this issue, that decision was interlocutory. See, e.g., 11 Moore's Federal Practice § 56.40[3] (Matthew Bender 3d ed.) (“A partial summary judgment order is interlocutory”) A district court retains the power to reconsider interlocutory judgments, including partial summary judgments, at any time prior to final judgment. See *Fayetteville Investors v. Commercial Builders, Inc.*, 936 F.2d 1462, 1469 (4th Cir. 1991) (“An interlocutory order is subject to reconsideration at any time prior to the entry of a final judgment.”); Fed. R. Civ. P. 54(b) (providing that interlocutory orders that resolve fewer than all claims are “subject to revision at any time before the entry of [final] judgment”). This power is committed to the discretion of the district court. *Moses H. Cone Mem. Hosp. v. Mercury Const. Corp.*, 460 U.S. 1, 12 (1983) (noting that “every order short of a final decree is subject to reopening at the discretion of the district judge.”)

¹⁰ This Court previously ruled that Section 8.7.3(10)(u)(1)(d) “unquestionably regulate[s] commercial speech,” ECF No. 162, PageID.6008, but did not list it in ECF No. 559.

While an earlier decision of a court often becomes the law of the case, this is not so when “a subsequent trial produces substantially different evidence.” *Sejman v. Warner–Lambert Co., Inc.*, 845 F.2d 66, 69 (4th Cir. 1988); accord *Westside Mothers v. Olszewski*, 454 F.3d 532 (6th Cir. 2006). “Law of the case is just that however, it does not and cannot limit the power of a court to reconsider an earlier ruling. The ultimate responsibility of the federal courts, at all levels, is to reach the correct judgment under law.” *American Canoe Ass’n v. Murphy Farms, Inc.*, 326 F.3d 505, 515 (4th Cir. 2003). This Court allowed the Wineries to make a record at trial and that record was a mountain of unrebutted evidence that when Wineries host events, those events include advertising, marketings, sales pitches and product demonstrations among other types of commercial speech. These sales pitches propose a commercial transaction and, even if they did not, the advertising and marketing at these events satisfy the *Bolger* factors discussed below.

“[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* questions are answered affirmatively, the speech is likely commercial: (1) is the speech an advertisement; (2) does the speech refer to a specific product or service; or (3) does the speaker have an economic motivation for the speech? *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). Commercial speech is not subject to “rigid classifications” *Bolger*, 463 U.S. at 81, (1983) (Stevens, J., concurring).

Commercial speech takes many forms. 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).¹¹ Product demonstrations are commercial speech. 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 parties consist of “demonstrating and offering products for sale to groups of ... 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.

Similarly, cookware demonstrations are commercial speech. *Am. Future Sys., Inc. v. Pennsylvania State Univ.*, 752 F.2d 854, 857 (3d Cir. 1984). There, product representatives compared their merchandise with other merchandise and asked whether any students wanted to make a purchase. *Id.* It did not matter that only ten to twenty percent of the students usually agreed to purchase the products. *Id.* at 857. The demonstrations were commercial speech because they were “essentially an advertisement of AFS’s wares, it specifically refers to AFS’s products, and AFS’s motivation for engaging in the speech is purely economic.” *Id.* at 862. Simply displaying a product for sale is commercial speech. *Art & Antique Dealers League of America, Inc. v. Seggos*, 394 F. Supp. 3d 447, 459 (S.D.N.Y. 2019). Ultimately, a product “pitch” is inherently commercial because it extolls a product’s “virtues and its benefits for the recipient’s practice” with the goal of “persuading the recipient to accept the offer[.]” *Carlton & Harris Chiropractic, Inc. v. PDR Network, LLC*, 80 F.4th 466, 476 (4th Cir. 2023). “[A]s with a classic sales pitch, the promoter profits if the pitch lands and the offer is accepted.” *Id.* There is no hard-

¹¹ 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).

and-fast definition, and businesses should be free to tailor pitches in a way that works for them. A pitch is anything that “draw[s] the public’s attention to something to promote its sale” *Vinny’s Landscaping, Inc. v. United Auto Credit Corp.*, 207 F. Supp. 3d 746, 749 (E.D. Mich. 2016) (citing *Sandusky Wellness Center, LLC v. Medco Health Solutions, Inc.*, 788 F3d 218 (6th Cir. 2015)).

The unrebutted evidence at trial showed 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(10)(u)(2)(d), and 8.7.3(10)(u)(5)(a) relate to or regulate commercial speech and judgment in favor of the Wineries is now appropriate. A full recitation of this evidence is contained in Section III(C)(1)-(4). This evidence confirms the Wineries propose commercial transactions which satisfy *Edenfield*, 507 U.S. at 767. This evidence also meets each of the *Bolger* factors: (1) the Wineries advertise their products at events, seeking to sell wine by the glass and bottle, and also advertising their wine clubs, (2) this advertising refers to specific products of the Wineries; and (3) the Winery has an economic motivation to advertise and promote its wines for sale and employees of the Wineries are also economically incentivized to do so. *Greater Baltimore*, 721 F.3d at 285.

Witnesses testified that the Wineries host promotional activities and events (or want to) to get customers into their tasting rooms to sample their products and (hopefully) buy wine or sign up for wine club. Witnesses testified that when people visit their winery—for any purpose—there is an opportunity to tell customers about what makes their Winery unique. When people visit a winery for promotional activities contemplated by 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), the Winery has a captive audience and can offer especially impactful marketing and messaging. Witnesses testified that there is a difference, to them, between people walking into

the tasting room off the street and hosting a group for an event. A Winery can “by far” better promote their products and sell more wine and wine club memberships during events.

At trial, the Township appeared to argue that the Wineries were able to “pitch” their products to potential customers through other means. In *Linmark Associates Inc. v. Willingboro*, 431 U.S. 85, 93 (1977), however, the Supreme Court rejected a similar argument:

Although in theory sellers remain free to employ a number of different alternatives, in practice realty is not marketed through leaflets, sound trucks, demonstrations, or the like. The options to which sellers realistically are relegated—primarily newspaper advertising and listing with real estate agents—involve more cost and less autonomy than “For Sale” signs; are less likely to reach persons not deliberately seeking sales information; and may be less effective media for communicating the message that is conveyed by a “For Sale” sign in front of the house to be sold. The alternatives, then, are far from satisfactory.

These alternative forms of communication asserted by the City are far from satisfactory since they may involve greater expense and may be a less effective means for communicating messages.

(Citations omitted.) Here, witnesses testified extensively that their best form of marketing occurred in-person at their winery and particularly during hosted events and activities. Defendants did not offer a wine industry expert who testified different. Thus, the unrebutted testimony is that events are the most effective form of marketing and advertising for Plaintiffs.

In short, Winery witnesses testified 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) regulate their ability to “have prospects enter their stores and purchase [their] products” *FF Cosmetics*, 129 F. Supp. 3d at 1321. They testified that those sections prevent them from “demonstrating and offering products for sale to groups” *Fox*, 492 U.S. at 472. And they testified that those sections bar them from hosting events requested by customers and using those events as a chance to “compare[] their merchandise with other merchandise and ultimately asked whether any [customers] wanted to purchase the products.” *Am. Future Sys.*, 752

F.2d at 857. Just as product demonstrations and marketing opportunities were commercial speech in *FF Cosmetics*, *Fox*, and *American Future Systems*, the Wineries' proposed marketing activities and demonstrations are commercial speech because they are a way to get customers in the door so the Wineries can educate and offer to sell them wine and sign them up for wine club.

While this Court did not grant summary judgment to PTP on the issue of commercial speech, and certainly never granted summary judgment to Peninsula Township on this issue, even if the Court had intended to grant summary judgment, that decision should be revisited now that the trial evidence has been submitted, pursuant to Fed. R. Civ. P. 54(b).

1. Defendants did not carry their burden to prove that preserving agriculture was a substantial governmental interest.

At summary judgment, this Court accepted that Peninsula Township's proffered governmental interest of preserving agriculture was substantial for purposes of *Central Hudson*. ECF No. 559, PageID.21919. After trial, that determination should be revisited. To demonstrate that this offered interest is a "substantial government interest," Peninsula Township had the burden to prove at trial that it is based on a problem that actually exists. *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525, 561 (2001). "[A] state may not restrict protected speech to prevent something that does not appear to occur." *Junior Sports Magazines Inc. v. Bonta*, 80 F. 4th 1109, 1117 (9th Cir. 2023) (citing *Edenfield*, 507 U.S. at 770-71). Peninsula Township "must do more than simply 'posit the existence of the disease sought to be cured.'" *Turner Broad. Sys., Inc. v. FCC*, 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 Advertising v. Zoning Bd. of Tp. Of Cherry Hill*, 672 F. Supp. 2d 675 (D.N.J. 2009). In *Burkow v. City of Los Angeles*, 119 F. Supp. 2d 1076, 1080-81 (C.D. Cal. 2000) the court considered a law which prohibited citizens from displaying

for-sale signs on vehicles:

the City has presented no studies or even anecdotal evidence, and “[n]ot even [Plaintiff]’s own conduct suggests that [Defendant]’s concerns are justified.” Instead of demonstrating how “the harms it recites are real and that its restriction will in fact alleviate them,” Defendant employs circular reasoning to suggest that the mere act of passing the ordinance is evidence that there were “serious” problems. This is inadequate.

The Eastern District of Michigan faced a similar scenario in *Carrol v. City of Detroit*, 410 F. Supp. 2d 615, 622 (E.D. Mich. 2006), where it held that the “City’s mere articulation of its interest in regulating street traffic and congestion, as well as its unspecified concerns about ‘security,’ is insufficient to carry its burden of demonstrating that ‘the harms it recites are real.’” The court continued, “the City has not shown that it truly enacted the original ordinance to further any interest in alleviating street traffic and congestion, or as a result of security concerns. Under such circumstances, courts have held ordinances that restrict commercial speech to be unconstitutional.” *Id.* (citing *National Advertising Co. v. Town of Babylon*, 900 F.2d 551, 555–56 (2d Cir.1990) (“We have been unable to find a case where a court has taken judicial notice of an unstated and unexplained legislative purpose for an ordinance that restricts speech.”))

While Peninsula Township asserted preservation of agriculture as the purpose of the Winery Ordinances, the Winery Ordinances do not contain such language. The “intent” of the Winery Chateau Ordinance is to “permit the construction and use of a winery, guest rooms, and single family residences as part of a single site subject to the provisions of this ordinance.” Section 8.7.3(10)(a). In other words, the intent is to allow for agricultural, commercial and residential uses on a single parcel. It was also the intent to ensure “additional farm land in wine fruit production in Peninsula Township.” Section 8.7.3(10)(u)(1)(a). The stated intent of the Remote Winery Tasting Room Ordinance is “to allow wine tasting in a tasting room that is not on the same property as the winery with which is associated and to establish reasonable standards for the use.” Section

8.7.3(12)(a). The intent of the Farm Processing Facility Ordinance is to “promote a thriving local agricultural production industry and preserving rural character by allowing construction and use of a Farm Processing Facility.” Section 6.7.2(19)(a). This section does not state that an intent is to preserve agriculture by prohibiting residential or commercial uses, which would be odd given Sections 6.7.2(1) and (2) allow for one and two family dwellings, Section 6.7.2(16) allows for mining and Section 6.7.2(17) allows for commercial uses (day care) in the agricultural zone by right. Other allowed uses include planned unit developments, veterinary hospitals, country clubs, airports and bed and breakfasts. See Sections 6.7.3(1), (10), (13), (17), (20) and (21).

Defendants failed to meet their burden of proving that agricultural land within Peninsula Township needed preserving. The record is devoid of any “studies, empirical data or professional literature” on this issue and the restrictions do not survive *Central Hudson*.

2. Even if any interests were substantial, the challenged sections do not preserve agriculture.

Defendants bore the burden of proving that the challenged sections “directly advance” the stated interest of preserving agriculture. “[T]he restriction must directly advance the state interest involved; the regulation may not be sustained if it provides only ineffective or remote support for the government’s purpose.” *Central Hudson*, 447 U.S. at 564. And the regulations must do so “in a direct and material way” and not 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*, 507 U.S. at 770-71). “[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 v. Fruchey*, 492 F.3d 766, 771 (6th Cir. 2007).

Defendants did not call a single fact witness or introduce any “studies, empirical data or professional literature” necessary to link their proffered interest to the challenged sections. *See Interstate Outdoor*, 672 F. Supp. 2d at 679. Instead, they conceded that the Winery Ordinances do not further a governmental interest or alleviate any harm:

Ordinance	Testimony
8.7.3(12)(j): Winery logo requirement.	Q: “[W]hat is the harm of selling a packaged food, for example, mustard, without the winery’s logo on it? What is the harm to the Township? A. “I don’t see any.” Manigold, ECF No. 611-154, PageID.27934.
8.7.3(12)(k): Sign/advertising prohibition.	Q: [C]an you think of any way that this promotes a government interest of Peninsula Township? A. No. ... Q. [T]here’s no harm you can think of to the government that...this is trying to prevent, right? A. Right. Manigold, ECF No. 611-154, PageID.27937-38.
6.7.2(19)(a): Restaurant prohibition.	Q: [H]ow is one of those four government interests...furthered by not allowing a farm processing facility to have a restaurant? A. I don’t know that it’s furthered by not having a restaurant. Q: How does this further one of your governmental interests, and you said, “I don’t see how it does.” Is that right? A. Yeah, I don’t. We just don’t want, and it’s very clear, restaurants or bars. ... Q. [W]hich of these four interests that you have identified does it further? How does not having a restaurant prevent ag land from becoming houses? A. Ag land from becoming houses, I don’t think that’s comparable. Q. Because it doesn’t, right? A. Right. Q. Is there any other harm you can think of? A. No. Manigold, ECF No. 611-154, PageID.27941-44.
6.7.2(19)(b)(1)(iv): Food restriction.	Q. I’m assuming you can’t tell me ... how this furthers the government’s interest? A. No, I don’t. ... Q How does this remedy a harm...? A. I don’t know. Manigold, ECF No. 611-154, PageID.27956.

<p>6.7.2(19)(b)(1)(v): Merchandise restriction.</p>	<p>Q: [H]ow does limiting the sale of merchandise to logoed items that relate to fresh or processed agriculture ... further one of these four governmental interests? A. I don't know. ... Q: do you know what the harm is the government was trying to prevent by having this ordinance? A. No. ECF No. 611-154, PageID.27957-58.</p>
<p>6.7.2(19)(b)(6): Facility size restriction.</p>	<p>Q. [Y]ou're limiting the size of the retail space there, right? A. Yes. Q. Why? A. It's designed to sell the person's product from the peninsula, and that, that's been determined to be their logoed items. Was that number too high or too low? We can always change Q. Is this just a number they picked out of a hat? A. I believe it. Q. Okay. There's no basis for that number? A. I couldn't point it to you. Manigold, ECF No. 611-154, PageID.27962-63.</p>
<p>8.7.3(10)(u)(1)(b): Required promotion of Peninsula agriculture.</p>	<p>Q. [H]ow does this ordinance further one of the four governmental interests...? A. ... I can't relate it to the four. Q. ... you can't tell me the harm it was trying to prevent? A. No. Manigold, ECF No. 611-154, PageID.27965.</p>
<p>8.7.3(10)(u)(1)(d): Guest Activities restriction.</p>	<p>Q. [D]o you know what it means? A. No. Q. ... I'm assuming you can't tell me how this furthers -- A. Nope, nope. Q. -- a government interest? A. No. Q. And you can't tell me what harm this is intended to prevent? A. No, I can't. Manigold, ECF No. 611-154, PageID.27965.</p>
<p>8.7.3(10)(u)(2)(b): 501(c)(3) meeting restriction.</p>	<p>Q. [How does] preventing 501(c)(3)s from out of Grand Traverse County from holding meetings ... further any of those four governmental interests? A. I don't know. ... Q. What is the harm of ... a meeting at a Peninsula Township winery chateau? ... A. I don't know that there is a harm. Manigold, ECF No. 611-154, PageID.27976-98.</p>

8.7.3(10)(u)(2)(c): Meeting prohibition.	<p>Q. [H]ow does limiting who can use meeting rooms to just ag groups ... further any of these four governmental interests?</p> <p>A. I guess my answer would be “I don’t know” all the way through.</p> <p>...</p> <p>Q. [Y]ou don’t know on interest, you don’t know on the harm to be prevented, you don’t know on what less-restrictive means?</p> <p>A. Hmmm-mmm.</p> <p>Manigold, ECF No. 611-154, PageID.27979.</p>
8.7.3(10)(u)(5)(g): Amplified music prohibition.	<p>Q. [T]he prohibition on amplified instrumental music has nothing to do with the four governmental interests ...?</p> <p>A. I can’t, I can’t say that it does.</p> <p>Manigold, ECF No. 611-154, PageID.28007.</p>

This testimony from Rob Manigold led this Court to conclude that “these challenged sections of the PTZO likely do not advance the stated interests, and . . . the Township never considered less-restrictive means.” ECF No. 559, PageID.21919-20 (citing ECF No. 136-1, PageID.4770). This Court’s earlier conclusion was spot-on.

PTP did offer the testimony of Dr. Daniels, but he did not testify that the challenged sections preserve agriculture in a “direct and material way.” *Rubin*, 514 U.S. at 487. PTP and Peninsula Township also designated testimony from PTP member John Wunsch and one of PTP’s attorneys, Grant Parsons, but they just provided their opinion as to why they favor the ordinances. Testimony by lay witnesses is limited to opinions which are rationally based on the perception of the witness and helpful to the determination of a fact in issue. Fed. R. Evid. 701(a), (b). They may not offer legal conclusions, such as interpreting a statute, or the legal implications of conduct. *United States v. Bohn*, 622 F.3d 1129, 1138 (9th Cir. 2010). Interpreting ordinances “is the distinct and exclusive province of the trial judge.” *Nationwide Transp. Fin. v. Cass Info. Sys., Inc.* 523 F.3d 1051, 1058 (9th Cir. 2008); *League to Save Lake Tahoe v. Crystal Enterp.*, 685 F.2d 1142, 1144 (9th Cir. 1982) (“construction of zoning ordinances are matters of law.”).

Defendants did not lay a foundation for Mr. Wunsch’s personal musings or establish why this Court should consider them, much less establish his testimony is admissible under FRE 701.

In reality, his concerns about noise and traffic were not credible, as he conceded that having 2,000 people visit a winery is fine, so long as they do not buy food. ECF No. 615-2, PageID.28176-77. Mr. Parsons admitted he was only providing his “personal observations and opinion” and had no authority to speak on behalf of Peninsula Township. ECF No. 615-4, PageID.28250-51. Defendants also did not establish why this Court should consider his personal observations or why they are admissible.

In contrast, the Wineries offered live testimony from twelve witnesses who explained how the Winery Ordinances hindered their agricultural operations and caused some of the Wineries to cancel investments in additional agricultural operations or to consider converting their farms to residential housing developments.

Just last year the Ninth Circuit Court of Appeals addressed a similar situation in *Junior Sports Magazines*, 80 F. 4th 1109, where the court determined that a ban on gun advertising, while related to a substantial interest in preventing unlawful possession of firearms by minors, failed *Central Hudson*: “every argument [the state made] to bolster this theory lacks evidentiary support.” *Id.* at 1117. The state was unable to provide evidence of even a single incident of a minor unlawfully purchasing a firearm. *Id.* “Rather than support this argument with any evidence, California maintains that ‘common sense’ – which, in reality, is just speculation here – provides all the justification it needs. But the First Amendment requires more than fact-free inferences to justify government infringement on speech”:

a state can invoke “common sense” only if the connection between the law restricting speech and the government goal is so direct and obvious that offering evidence would seem almost gratuitous. But as the government’s justifications for a regulation become more attenuated, bare appeals to common sense quickly veer into impermissible speculation. In such cases, the state needs to provide evidence to substantiate that its law will meaningfully further its stated objectives.

Id. The Court concluded:

In the end, California spins a web of speculation—not facts or evidence—to claim that its restriction on speech will significantly curb unlawful firearm use and gun violence among minors. The First Amendment cannot be so easily trampled through inferences and innuendo. We thus conclude that California has not justified its intrusion on protected speech. To hold otherwise “would require us to engage in the sort of ‘speculation or conjecture’ that is an unacceptable means of demonstrating that a restriction on commercial speech directly advances the State’s asserted interest.”

Id. (citing *44 Liquormart, Inc. v Rhode Island*, 517 U.S. 484 and quoting *Edenfield*, 507 U.S. at 770). The same is true here. Defendants’ position is based on speculation that restricting the activities a Winery may engage in will preserve agricultural land without any “facts or evidence” in support. The Wineries have presented this Court with “facts” and “evidence” that the Winery Ordinances have inhibited their ability to preserve their land in an agricultural use.

3. The challenged sections are not the least restrictive means to preserve agriculture.

Defendants also have not proven “a reasonable fit between the means and ends of the regulatory scheme,” *Lorillard Tobacco Co.*, 533 U.S. at 561, such that the “suppression of speech ordinarily protected by the First Amendment is no more extensive than necessary to further the State’s interest.” *Central Hudson*, 447 U.S. at 569–70. “[I]f the governmental interest could be served as well by a more limited restriction on commercial speech, the excessive restrictions cannot survive.” *Id.* at 564. In fact, Township officials testified that they did not even consider less restrictive means for many of the Winery Ordinances:

Ordinance	Testimony
8.7.3(10)(u)(1)(b): Required promotion of Peninsula agriculture.	Q. You can’t tell me what less-restrictive means you considered ...? A. No. Manigold, ECF No. 611-154, PageID.27965.
8.7.3(10)(u)(1)(d): Restriction on guest activities	Q. [Y]ou can’t tell me any less-restrictive means that the Township considered? A. No. Manigold, ECF No. 611-154, PageID.27966.

8.7.3(10)(u)(2)(c): Meeting restriction.	Q. [Y]ou don't know on what less-restrictive means? A. [No] Manigold, ECF No. 611-154, PageID.27979.
8.7.3(10)(u)(5)(g): Prohibition on amplified music.	Q. [Y]ou can't tell me any less-restrictive means the Township considered ...? A. I'm guessing it was on a complaint, but I don't know, no. Manigold, ECF No. 611-154, PageID.28007.
6.7.2(19)(b)(1)(v): Merchandise restriction.	Q. [D]o you know if the government considered less-restrictive means? A. Whatever we considered is in that document. Q. In the ordinance? A. Mmm-hmm. Q. So there's nothing else that says, "We considered these four other ordinances and we rejected those"? A. I'm unaware of that. Manigold, ECF No. 611-154, PageID.27958.

Peninsula Township presented no evidence, and Dr. Daniels testified that he was not providing any opinion, on this issue. ECF 604, PageID.23976. However, he inadvertently demonstrated that Peninsula Township had less restrictive means available. He testified that the PDR program is a "way to try to promote agricultural production and to have agricultural land available for a long time." *Id.*, PageID.23891. As of 2020, it alone preserved over 3,300 acres of land. *Id.*, PageID.23894. Peninsula Township has preserved more acres of farmland than entire counties in Michigan have. Exhibit 615-8, PageID.28805-06. Notably missing was testimony to substantiate the need to preserve even more agricultural land; as it stands, approximately one third of all land in the Township is currently under a conservation easement. *Id.*, PageID.28815.

Of course, Winery witnesses testified that they also are preserving agriculture by operating wineries. Winery Chateaus must have at least 50 acres of agricultural land, Farm Processing Facilities must have at least 40 acres, and Remote Winery Tasting Rooms must have at least 150 acres. Further, if the restrictions in the Winery Ordinances were lifted, the Wineries would be able to preserve more agricultural land, as many have plans to plant additional acres, but need to know that they will be able to sell the wine they make from those grapes.

The Wineries also presented the expert rebuttal testimony of Gary McDowell and Teri Quimby. McDowell testified that the Township’s regulations contradict the Farm Market GAAMPs. ECF No. 609, PageID.25243-44. He also testified that the State has made a policy decision that farm markets promote and preserve agriculture, and he explained that the Winery Ordinances prohibit traditional farm market activities and put agriculture at risk. *Id.*, PageID.25236. Quimby testified that the Winery Ordinances contradict Michigan’s policy decisions regarding wine makers and small wine makers as set forth in the Liquor Control Code. ECF No. 607, PageID24760-62.

Defendants state that their mission is to preserve agriculture, yet the Winery Ordinances actually hinder that effort and do not advance it through the least restrictive means.

V. APPLICATION OF TRIAL EVIDENCE TO PLAINTIFFS’ CLAIMS FOR DAMAGES AND OTHER FORMS OF RELIEF

A. The Wineries are entitled to recover lost profits caused by the constitutional violations.

Plaintiffs seek damages under 42 U.S.C. § 1983, which states that a party acting under color of state law who violates the Constitution “shall be liable to the party injured in an action at law” “[Section] 1983 serves as a vehicle to obtain damages for violations of both the Constitution and of federal statutes.” *Communities for Equity v. Michigan High Sch. Athletic Ass’n*, 459 F.3d 676, 681 (6th Cir. 2006). “[T]he plaintiff must bring out facts that establish a causal connection between the constitutional violation and the damages they seek.” *Halpern 2012, LLC v. City of Ctr. Line*, 404 F. Supp. 3d 1109, 1121 (E.D. Mich. 2019), *aff’d sub nom. Halpern 2012, LLC v. City of Ctr. Line, Michigan*, 806 F. App’x 390 (6th Cir. 2020).

As explained herein, the Wineries proved that the Winery Ordinances were the cause in fact and proximate cause of their injuries. *Powers v. Hamilton Cnty. Pub. Def. Comm’n*, 501 F.3d 592, 608 (6th Cir. 2007). “[C]ourts have framed the § 1983 proximate-cause question as a matter

of foreseeability, asking whether it was reasonably foreseeable that the complained of harm would befall the § 1983 plaintiff as a result of the defendant’s conduct.” *Id.* at 609. Lost profits are recoverable as damages in a § 1983 action. *See Tri-County Industries, Inc. v. District of Columbia*, 200 F.3d 836 (D.C. Cir. 2000) (due process); *Snodgrass–King Pediatric Dental Assocs., P.C. v. DentaQuest USA Ins. Co.*, 295 F. Supp. 3d 843, 871 (M.D. Tenn. 2018) (First Amendment claim); *Fla. Transp. Servs., Inc. v. Miami-Dade Cnty.*, 703 F.3d 1230, 1234 (11th Cir. 2012) (§ 1983 dormant Commerce Clause); *Chalmers*, 762 F. 2d. at 758 (vagueness claim).

“Damages must be established to a reasonable certainty, but the existence of some uncertainty as to the amount of damages does not foreclose recovery.” *Benson v. City of Wellston*, 201 F. App’x 350, 353 (6th Cir. 2006). A “reasonable degree of certainty” is not absolute precision, “[n]or is it especially worrisome that an element of uncertainty might have had an effect on the calculation of damages” *Id.* “Once the existence of damages has been shown, all that an award of damages requires is substantial evidence in the record to permit a factfinder to draw reasonable inferences and make a fair and reasonable assessment of the amount of damages.” *Grantham & Mann, Inc. v. Am. Safety Prod., Inc.*, 831 F.2d 596, 602 (6th Cir. 1987).

A good example of lost-profits damages is found in *Tri-County Industries*. The plaintiff sued under § 1983 for a violation of due process rights for the suspension of a building permit for a soil treatment facility. 200 F.3d at 839. The plaintiff presented evidence of more than \$11,000,000 in lost profits through eight witnesses, including “projections of tons of contaminated soil the facility would treat per hour and the number of hours it would operate per day to estimates of equipment and labor costs.” *Id.* at 839-41. The plaintiff also presented an economist who “projected the profitability” of the facility. *Id.* The court affirmed an award of \$5,000,000 because evidence of lost profits may be “uncertain or inexact” as long as it is “sufficiently well-founded to

avoid characterization as ‘mere speculation or guess.’” *Id.* at 841-42 (quoting *Samaritan Inns, Inc. v. District of Columbia*, 114 F.3d 1227, 1235 (D.C. Cir. 1997)).

Plaintiffs have proven numerous constitutional violations under 42 U.S.C. § 1983 and seek damages across five categories.¹² Witnesses from each Plaintiff testified that their damages were caused by the constitutional violations because, absent the restrictions, they would have engaged in the activities barred by the Winery Ordinances.

B. Plaintiff’s expert, Eric Larson, calculated the Wineries’ damages across five separate schedules.

Eric Larson testified unrebutted as an expert on economics and damages. ECF No. 608, PageID.25028. As this Court previously determined, “the Township *strategically chose not to disclose an expert.*” ECF No. 303, PageID.10841 (emphasis in original).

Larson’s engagement commenced with a meeting with the Wineries’ counsel. ECF No. 609, PageID.25039-40. Thereafter, Larson put together a framework for calculating damages and drafted “a table to organize all elements that would be needed to perform the analysis.” *Id.*, PageID.25040. The table was an organizational tool for data collection. *Id.*, PageID.25041. Larson asked counsel to gather information from the Wineries to populate the table. *Id.* Before issuing his opinion, Larson participated in a video call with the Wineries. *Id.* In formulating his opinion, Larson also reviewed Winery business records such as “merchandise sales reports, grape purchase reports, sales reports, some of it was data that was gathered by the Wineries and provided to me

¹² 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.21134-36, Plaintiffs did not present evidence of damages for catering (Schedule 2) or restaurant/prepacked food sales (Schedule 4) in Larson’s Supplemental Report, Exhibit 194.

that they extracted or viewed or took out of their books and records.” *Id.*, PageID.25042.¹³ After reviewing the documents and information, Larson asked follow-up questions to verify information or for clarification. *Id.*, PageID.25044. Larson also relied on “industry data or financial data from a group recalled RMA, and in addition to RMA, my accumulated skill, knowledge, training, experience, professional judgment, those factors.” *Id.*, PageID.25050.

After issuing his initial report, Larson met with a representative of each Winery. ECF No. 609, PageID.25045. The information from those meetings was not used in his initial report, but nothing he learned during those meetings caused him to question the veracity of his report: “When I eventually had those individual meetings, no. And in fact, at those meetings and, again, they were all virtual, but they were meetings with each of them independently. I went through all of the schedules that were in my report and talked about the calculations, the assumptions, the data they provided, much of which we’ve heard about over the last nine or ten days, in the courtroom at least, walked through every one of those to discuss them.” *Id.*, PageID.25046. Larson did not physically visit any of the Wineries’ facilities before issuing his opinion, although he did later, but he testified visiting the Wineries was for his own personal reasons and did not impact his opinions. *Id.*, PageID.25194. After being deposed, Larson issued a supplement expert report, Exhibit 194, ECF No. 611-144, PageID.27690, to account for government mandated closures affecting the Wineries in 2020 and to correct an Excel formula error in contained within Schedule 7. ECF No. 608, PageID.25047-49.

¹³ Peninsula Township previously objected to Larson relying on information provided by the Wineries, but an expert is “not required to independently verify all of the underlying records.” *Coyne’s & Co. v. Enesco, LLC*, 2010 WL 3269977, at *9 (D. Minn. Aug. 16, 2010) (citing *EFCO Corp. v. Symons Corp.*, 219 F.3d 734, 739 (8th Cir. 2000) (upholding admission of economist’s damages calculation based on information from plaintiff regarding revenue)). “The fact that [an expert’s] opinions are based on data collected by others is immaterial.” *Southland Sod Farms v. Stover Seed Co.*, 108 F.3d 1134, 1142 (9th Cir. 1997).

In rendering his opinions, Larson assumed that the Wineries had sufficient space to host large or small events simultaneously. *Id.*, PageID.25053. This assumption was confirmed by the trial testimony from the Wineries: “I believe every one of them testified that they would have the capacity to run these events and keep their tasting room open. And if they couldn’t, if there was some circumstance where that couldn’t happen, that they would bake in, if you will, take into consideration lost sales or profits from their tasting room into the cost of these events.” *Id.*, PageID.25052-53.

For damages that are ongoing, Larson provided annual damages figures. The original complaint was filed on October 21, 2020, so the damages period runs from October 21, 2017 through the present. As of the filing of this post-trial brief, that damages period is 2,504 days, which amounts to 6.86 years. Below, the Wineries provide damages calculations and a calculation for per diem damages until judgment is entered.

1. Schedule 1: Five Wineries suffered damages from increased grape costs from Peninsula Township’s grape source requirements.

Bonobo, Bowers Harbor, Chateau Chantal, Tabone, and Two Lads introduced evidence of damages they suffered from Peninsula Township’s enforcement of the 85% grape source requirement. These lost profits were caused by Peninsula Township’s enforcement of 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) (for Farm Processing Facilities) and 8.7.3(10)(u)(2)(e), 8.7.3(10)(u)(3), 8.7.3(10)(u)(5)(c), and 8.7.3(10)(u)(5)(d) (for Winery Chateaus). This Court has ruled each of these sections violates the Dormant Commerce Clause. ECF No. 162, PageID.60010; ECF No. 301, PageID.10698.

A witness from each of these Wineries testified that the information on Schedule 1 in Larson’s supplemental report (Exhibit 194, ECF No. 611-144, PageID.27692) was accurate or, if it was not, provided testimony to correct inaccurate information. This included average grape

prices within and outside Peninsula Township, quantities of tons purchased, and the reasons that these sections of the Ordinance forced them to purchase these grapes. *See* ECF No. 600, PageID.23035, PageID.23108-23110, Exhibit 42, ECF No. 611-34, PageID.25836, and Exhibit 52, ECF No. 611-43, PageID.26136 (Bonobo); ECF No. 603, PageID.23656-60, PageID.23708-09 (Tabone); ECF No. 605, PageID.24142, Exhibit 78, ECF No. 611-63, PageID.26308 (Bowers Harbor); ECF No. 606, PageID.24476-77, PageID.24508-16, PageID.245487-49, and Exhibits 118, ECF No. 611-85, PageID.26728, 122, ECF No. 611-88, PageID.26811, and 127, ECF No. 611-89, PageID.26813 (Chateau Chantal); and ECF No. 608, PageID.24867-68, PageID.24935, PageID.24938-42 (Two Lads).

Larson prepared Schedule 1, which is “a damages computation for a handful of the wineries for additional costs for buying grapes on Old Mission Peninsula versus an estimate of cost of grapes for off Old Mission Peninsula.” ECF No. 609, PageID.25056–57. Larson compared actual purchases from Wineries based on documents they submitted against an average cost for out-of-market grapes. Based on his discussions with the Wineries, Larson understood “that grapes on the peninsula, generally, are more expensive than grapes off the peninsula.” *Id.*, PageID.25058-59.

Larson testified that the following Wineries incurred damages from additional grape costs from Peninsula Township’s produce-source requirements. *Id.*, PageID.25059–60.

Winery	Damages for Increased Grape Costs
OV The Farm, LLC	\$24,138
Bowers Harbor Vineyards & Winery, Inc.	\$5,325
Chateau Operations, Ltd.	\$85,450
Tabone Vineyards, LLC	\$4,000
Two Lads, LLC	\$66,655

Peninsula Township did not offer its own damages calculation or present any evidence rebutting Larson's conclusions.

2. Schedule 3: All Wineries lost profits from Peninsula Township's arbitrary enforcement of a 9:30 p.m. closing time.

All Plaintiffs introduced evidence of lost profits from limited hours of operation. First, a witness from every Winery testified that each Winery understood it was required to close by 9:30 p.m. (or earlier) based on conversations with Township officials, even though nothing in the PTZO set a 9:30 p.m. closing time. *See* ECF No. 600, PageID.23063 (Bonobo); ECF No. 601, PageID.23310-23311 (Mari); ECF No. 602, PageID.23523, PageID.23525, PageID.23571 (Black Star); ECF No. 603, PageID.23635 (Tabone), PageID.23783 (Brys Estate); ECF No. 605, PageID.24125-26 (Bowers Harbor); ECF No. 606, PageID.24273-74 (Hawthorne), PageID.24379-80 (Peninsula Cellars), PageID.24499-500 (Chateau Chantal); ECF No. 607, PageID.24697, PageID.24716-15 (Chateau Grand Traverse); ECF No. 608, PageID.24899-900 (Two Lads).

The above testimony is consistent with the testimony of Supervisor Manigold that the 9:30 p.m. closing time was enforced across the board:

Q. All right. Let's look at 5(b): Hours of operation for guest activity uses shall be as determined by the town board, but no later than 9:30 p.m. daily.

A. Mmm-hmm.

Q. So winery chateaus -- well, so this is hours of operation for guest activities?

A. Actually, for everybody.

Q. Well, hold on: Hours of operation for guest activity uses shall be as determined by the town board, but no later than 9:30 p.m. daily.

...

Q. But it doesn't say that a winery has to close all business at 9:30, right?

A. I think that's inferred.

Q. It doesn't say that a winery has to close all business at 9:30, right?

A. I believe it's inferred. I'm going to stick with that.

Q. Does it explicitly say it, yes or no?

A. Explicitly, no.

Q. But you believe it's implied?

A. I believe it's the ordinance and it's the law.

Q. But it doesn't actually say that they have to close at 9:30, right?

A. Well, that's what I'm enforcing.

Q. Well, that's my follow-up question. You are enforcing the wineries to close their tasting rooms at 9:30 p.m., correct?

A. Yes.

Q. Even though the ordinance does not say that they need to close at 9:30 p.m., correct?

A. We believe that 9:30 is the closing.

Q. Okay, the township is interpreting this to mean 9:30 to close all business?

A. Yes.

Q. Even though the ordinance doesn't say it?

A. It does to us.

Q. Tell me where it says that a tasting room has to close at 9:30 p.m.

A. To us, that's what was implied there.

ECF No. 611-154, PageID.28001-03.

A witness from each Winery also testified that but for the Township-enforced 9:30 p.m. closing time, the Winery would have kept its tasting rooms open later and, preferably, until 11:00 p.m. *See* ECF No. 600, PageID.23063-64 (Bonobo); ECF No. 601, PageID.23310-11 (Mari); ECF No. 602, PageID.23529-32, PageID.23586 (Black Star); ECF No. 603, PageID.23635 (Tabone), PageID.23784 (Brys Estate); ECF No. 605, PageID.24126 (Bowers Harbor); ECF No. 606, PageID.24274, PageID.24280 (Hawthorne), PageID.24382 (Peninsula Cellars), PageID.24525 (Chateau Chantal); ECF No. 607, PageID.24715-16 (Chateau Grand Traverse); ECF No. 608, PageID.24899-901 (Two Lads).

Therefore, the Wineries have presented evidence that the Township's enforcement of a 9:30 p.m. closing time that was not on the books violated their rights to operate their businesses free from arbitrary government regulation, *see* Section III(E)(2), and that this violation caused them damages. *Sanderson*, 726 F.2d at 286-87; *Lawrence*, 2021 WL 1511664, at *6; *Women's Med. Prof' Corp.*, 438 F. at 612; *Chalmers*, 762 F.2d at 758; *Tropiano*, 418 F.2d at 1076; *Small*, 333 F.2d at 704; *Commonwealth*, 57 F. 4th at 551.

A witness from each Winery testified that the information on Schedule 3 was accurate or, if it was not, provided testimony to correct inaccurate information. This information included

typical evening sales per hour, which Winery witnesses accessed by referring to their POS systems. These witnesses also testified that they would have sufficient customer demand if they stayed open later. ECF No. 600, PageID.23071-74, PageID.23112-13, PageID.23134-35, ECF 601, PageID.23211-12 and Exhibit 51, ECF No. 611-42, PageID.26133 (Bonobo); *Id.*, PageID.23321-26, ECF 602, PageID.23411, PageID.23413-15; PageID.23419-20 and Exhibit 162, ECF No. 611-118, PageID.27256 (Mari); ECF No. 602, PageID.23524, PageID.23532-33, PageID.23538-39, PageID.23582 (Black Star); ECF No. 603, PageID.23636-39, PageID.23700 (Tabone); *Id.*, PageID.23786-87, PageID.23792-97, ECF No. 604, PageID.23999-402, PageID.24004-05 (Brys Estate); ECF No. 605, PageID.24126-29, PageID.24163, PageID.24212, PageID.24224-25 and Exhibit 77, ECF No. 611-62, PageID.26303 (Bowers Harbor); ECF No 606, PageID.24275, PageID.24280-83, PageID.24281, PageID.24318-19 (Hawthorne); *Id.*, PageID.24381-84, PageID.24457-58 (Peninsula Cellars); *Id.*, PageID.24536-37, ECF No. 607, PageID.24611, PageID.24630-38 (Chateau Chantal); *Id.*, PageID.24717-24, PageID.24828, PageID.24832-33 and Exhibit 141, ECF No. 611-98, PageID.26943 (Chateau Grand Traverse); ECF No. 608, PageID.24907, PageID.24972, PageID.24807-08, PageID.24904-05, PageID.24908-09 and Exhibit 15, ECF No. 611-15, PageID.25455 (Two Lads). The Township did not rebut this evidence.

Larson prepared Schedule 3, which he described as “lost profits from the wineries having a requirement to close earlier than what their preferred closing time would be.” ECF No. 609, PageID.25061. He used an “incremental hour and a half” from 9:30 p.m. to 11:00 p.m. to capture the additional sales period. *Id.*, PageID.25062.¹⁴ He then multiplied the additional sales period by

¹⁴ If Wineries closed before 9:30 p.m., Larson did not add additional time to his calculation; the calculation only reflects 1.5 hours of lost profits. ECF No. 609, PageID.25063-64.

the “typical evening sales per hour,” which estimates evening sales. *Id.* Larson asked for that information because he “really wanted to capture ... those last couple hours of the day.” *Id.*, PageID.25064. Larson was trying to capture sales when the Wineries were open latest. *Id.*

Ultimately, Larson testified as to the annual lost profits suffered by each Winery due to the Township’s restriction on their hours of operation. *Id.*, PageID.25066–69. He testified that the total damages for each Winery would be the damages period times the annual lost profits listed below. *Id.*, PageID.25069–70. He applied a 65% estimated gross profit percentage from RMA data, which is “something that people in [his] industry rely upon.” *Id.*, PageID.25064. Finally, he applied a 55% reduction for 2020 to account for lost sales due to COVID. *Id.*, PageID.25065.

Winery	Annual Lost Profits for Hours of Operation	Total Lost Profits for Hours of Operations to Date
OV The Farm, LLC	\$328,500	\$2,105,685
Winery at Black Star Farms, LLC	\$492,750	\$3,158,527
Bowers Harbor Vineyards & Winery, Inc.	\$492,750	\$3,158,527
Brys Winery, LLC	\$854,100	\$5,474,781
Chateau Operations, Ltd.	\$394,200	\$2,526,822
Chateau Grand Traverse, Ltd.	\$328,500	\$2,105,685
Grape Harbor, Inc.	\$394,200	\$2,526,822
Montague Development, LLC ¹⁵	\$75,144.75	\$481,677.85
Tabone Vineyards, LLC ¹⁶	\$246,375	\$1,579,263.75
Two Lads, LLC	\$241,448	\$1,547,681.68

¹⁵ Because Montague/Hawthorne was closed three months of the year, Larson testified its damages should be reduced by 25%. ECF No. 609, PageID.25067. The damages in the table reflect this.

¹⁶ Larson testified that Tabone’s damages should be recalculated to reflect that it had not been open for the entire damages period. ECF No. 609, PageID.25067–68. This table reflects this.

Villa Mari, LLC ¹⁷	\$492,750	\$3,158,527.50
-------------------------------	-----------	----------------

At trial, Peninsula Township objected to Larson’s expert report being admitted, arguing it contained errors because a handful of corrections were made. This Court overruled the objection as the objection went to weight, rather than admissibility. ECF No. 609, PageID.25203. That ruling was correct, because “experts frequently modify their opinions, and at trial counsel often establish more extensive predicates for experts’ testimony.” *Utex Industries, Inc. v. Weigand*, 2020 WL 873985, *12 (S.D. Tex. Feb. 21, 2020). “The general rule that experts may not testify on opinions not disclosed during the scheduled expert discovery period is usually relaxed to allow damages calculations to be updated through the time of trial.” *In re Genetically Modified Rice Litigation*, 2009 WL 3336086, *1 (E.D. Mo. Oct. 6, 2009). A trial court does not abuse its discretion when it allows a damages expert to “testify about his updated damage calculations.” *Atlas Flooring, LLC v. Porcelanite S.A. DE C.V.*, 425 Fed. App’x. 629, 632 (9th Cir. 2011). In *Atlas Flooring*, the Ninth Circuit noted the expert “did not issue a new report. Rather, he updated his report (using the same methodology) based on more current information reflecting ongoing damages. This was not error.” *Id.*

For some of his Schedules, Larson made minor modifications, not to his methodology, but to individual data points based on trial testimony from Winery witnesses. This was entirely appropriate, and the Wineries did not use these modifications to increase their damages claim, but rather to decrease it. Notably, Peninsula Township did not offer its own damages calculation or present any evidence rebutting Larson’s conclusions on Schedule 3.

¹⁷ Larson testified that his calculation for Mari should be cut in half based on Mr. Lagina’s testimony that Mari’s typical evening sales number listed in Exhibit 162, ECF No. 611-118, PageID.27256, was doubled. ECF No. 609, PageID.25069. This table reflects this recalculation.

3. Schedule 5: Four Wineries lost profits from lost merchandise sales.

Black Star, Peninsula Cellars, Tabone, and Two Lads proved lost profits from Peninsula Township's enforcement of Sections 6.7.2(19)(b)(1)(v) (for Farm Processing Facilities) and 8.7.3(12)(i) and 8.7.3(12)(j) (for Peninsula Cellars as the only Remote Winery Tasting Room). This Court has already ruled that these sections regulate speech on their face. ECF No. 559, PageID.21918. As explained above, Peninsula Township failed to carry its burden under *Central Hudson*. Also discussed above, Peninsula Township was enforcing these restrictions.

Witnesses from each of these Wineries testified that the information in Schedule 5 in Larson's supplemental report (Exhibit 194, ECF No. 611-144, PageID.27696) was accurate or, if it was not, provided testimony to correct inaccurate information. See ECF No. 602, PageID.23534-37 (Black Star); ECF No. 603, PageID.23654-55 (Tabone); ECF No. 606, PageID.24400-02; PageID.24447 (Peninsula Cellars); ECF No. 608, PageID.24931-32 (Two Lads).

Larson also relied on data provided by the Winery Chateaus, who were not restricted in their merchandise sales, because "I wanted to have an understanding of what a reasonable expectation would be for these people to sell that it's not some unlimited amount, and I needed some data point. And the wineries that do sell merchandise provided that data. Some of them for several years, some of them for one year, different time periods. So I used that information and essentially calculated an annual average for each of those wineries that provided their merchandise sales and then averaged them together, so it was almost an average of averages to come up with this expected merchandise sale amount of \$85,000." *Id.*, PageID.25071.

Larson testified that the total damages would be the damages period times the annual lost profits listed below less a 55% COVID reduction in 2020. ECF No. 609, PageID.25072-75.

Winery	Annual Lost Profits for Merchandise Sales	Total Lost Profits for Merchandise Sales to Date
Winery at Black Star Farms, LLC	\$30,000	\$192,300
Grape Harbor, Inc. ¹⁸	\$27,500	\$176,275
Tabone Vineyards, LLC ¹⁹	\$37,500	\$240,375
Two Lads, LLC	\$17,907	\$114,783.87

Peninsula Township did not offer its own damages calculation or present any evidence rebutting Larson's conclusions on Schedule 5.

4. Schedules 6 and 7 - All Wineries lost profits from the inability to host events.

Schedules 6 and 7 of Larson's supplemental report outline damages related to small and large events, respectively. Larson testified that the difference was his decision:

this is my delineation -- there was a difference between small events like we've heard them described and a larger event, meaning a small gathering with a limited amount of wine and a limited amount of some sort of food to go along with that. We've heard the term charcuterie probably a million times recently, that would be the example.

And then the alternative would be something of a lon[g]er duration. For lack of a better term, more formal, different food offerings. The one term that's been thrown a lot is weddings, but I can think of anniversary parties, engagement parties. You name it, any activity where people gather together.

ECF No. 609, PageID.25076.

The Wineries' damages come from multiple sections of the PTZO. For the Winery Chateaus, this Court already ruled that the entire "Guest Activity Use" scheme is vague and

¹⁸ John Kroupa testified that Peninsula Cellars sells \$25,000 to \$30,000 of merchandise annually. ECF No. 606, PageID.24400-02. Mr. Larson testified that this results in a downward adjustment of its which is reflected in this table. ECF No. 609, PageID.25073.

¹⁹ Larson testified that Tabone's damages should be recalculated to reflect that it had not been open for the entire damages period. ECF No. 609, PageID.25067-68. This table reflects this.

unenforceable. ECF No. 162, PageID.6019. Relatedly, this Court has ruled that Sections 8.7.3(10)(u)(2)(b) (501(c)(3) groups) and 8.7.3(10)(u)(2)(c) (agricultural related groups) are unlawful prior restraints on speech. ECF No. 559, PageID.21910.

Winery Chateau witnesses testified that this vagueness and prior restraint, and the Township's varying and interpretations, caused them to refrain from hosting events for fear of Township enforcement. *See, e.g.*, ECF No. 600, PageID.23032 (Bonobo uncertainty); *Id.*, PageID.23038-42 and Exhibit 43, ECF No. 611-35, PageID.25837 (Bonobo event); ECF No. 600, PageID.23045-48 and Exhibit 45, ECF No. 611-37, PageID.25842 (Bonobo event); ECF 601, PageID.23286-90 (Mari uncertainty), PageID.23291-93, PageID.23301-02, Exhibit 161, ECF No. 611-117, PageID.27220 (Mari canceling events for fear of Township enforcement); ECF No. 603, PageID.23749, PageID.23774, PageID.23801 (Brys Estate uncertainty), PageID.23762 and Exhibit 105, ECF No. 611-78, PageID.26585 (Brys forced to cancel event for Governor Whitmer), ECF No. 603, PageID.23769-71 and Exhibit 105, ECF No. 611-78, PageID.26592 (Brys forced to cancel Big Brothers/Big Sisters event); ECF No. 605, PageID.24225-26 (Bowers Harbor uncertainty), PageID.24091-94 and Exhibit 65, ECF No. 611-52, PageID.26270 (Bowers Harbor enforcement); ECF No. 605, PageID.24252-54 and ECF No. 606, PageID.24331-32 (Hawthorne refraining from events based on knowledge of what happened at Bowers Harbor); ECF No. 606, PageID.24517-18, PageID.24522-23 (Chateau Chantal uncertainty), PageID.24496 (Chateau Chantal restrictions); ECF No. 607, PageID.24701-03 (threats to Chateau Grand Traverse).

Further, to qualify for vague "Guest Activities," Winery Chateaus were forced to buy local grapes in violation of the dormant Commerce Clause. ECF No. 162, PageID.6001. Chateau Chantal and Chateau Grand Traverse had the qualifying amounts of grapes, but the Township arbitrarily capped their guests. ECF No. 606, PageID.24498 (grape source requirements limited

Chateau Chantal to 111 guests even though it has room for over 1,000 guests); ECF No. 607, PageID.24725-27, PageID.24673 (Chateau Grand Traverse purchases hundreds of tons of local grapes but the Township arbitrarily limited it to 75 people per its SUP). Brys Estate grew enough grapes to meet its needs and purchasing more grapes would have been wasteful given its limited production capacity. ECF No. 603, PageID.23802, PageID.23781-82.

As discussed above, Peninsula Township also enforced event restrictions on the Wineries which did not exist within the Winery Ordinances. For the Farm Processing Facilities (Black Star, Tabone, and Two Lads), their lost profits came from the Township's enforcement of statements of intent contained within Section 6.7.2(19)(a). The Township has conceded that statements of intent should not have been enforced as operative law. ECF No. 583, PageID.22822. Peninsula Township also restricted Peninsula Cellars, the lone Remote Winery Tasting Room, from having any events or activities despite that Section, 8.7.3(12) does not contain any such restrictions. In a similar vein, Peninsula Township prohibited the Winery Chateaus from having wedding, receptions and family reunions, but now admit that the Ordinances allow these types of events. ECF No. 611-151, PageID.27781-83, PageID.27822. All Wineries were damaged by the enforcement of restrictions not actually found within the Winery Ordinances.

Further, the restrictions on Plaintiffs' commercial speech found in 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), 8.7.3(10)(u)(5)(a) and 8.7.3(12) unconstitutionally limited the ways in which the Wineries could advertise their wine for sale and to whom they may advertise. Witnesses from each Winery testified that their purpose in hosting events is to draw more customers and have a captive audience to whom they can make a sales pitch. *See* ECF No. 600, PageID.23022-25, PageID.23083-85 and ECF No. 601, PageID.23224-25 (Bonobo); *Id.*, PageID.23263-67 (Mari);

ECF 602, PageID.23455, PageID.23458-59, PageID.23477 (Black Star); *Id.*, PageID.23611-12 (Tabone); ECF No. 603, PageID.23744, PageID.23752, PageID.23752-53, PageID.23760-61, PageID.23804-06 (Brys Estate); ECF No. 605, PageID.24088-89, PageID.24224 (Bowers Harbor); *Id.*, PageID.24245-46, PageID.24256-57, PageID.24269-70 (Hawthorne); ECF No. 606, PageID.24364, PageID.24377, PageID.24385, PageID.24387 (Peninsula Cellars); *Id.*, PageID.24490-92 (Chateau Chantal); ECF No. 607, PageID.24683-84, PageID.24724-25 (Chateau Grand Traverse); ECF No. 608, PageID.25003-04 (Two Lads).

Without those unconstitutional barriers, the Wineries would have been left with the traditional “accessory” uses to their principal use as a winery. The PTZO allows “accessory uses,” 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 A, ECF No. 615-7, PageID.28525. As discussed above, Teri Quimby and Gary McDowell testified that the uses at issue in this case are allowed by the Liquor Control Code and Farm Market GAAMPs. Further, Black Star witness Sherri Fenton testified that Black Star engages in these same accessory uses at its Suttons Bay location. But for these unconstitutional restrictions, the Wineries could fully exercise their primary use of growing grapes, making wine, and selling wine, and exercise “accessory uses” that allowed them to sell more wine. Therefore, the Wineries suffered damages resulting directly from constitutional violations.

a. Schedule 6 – All Wineries (except Chateau Grand Traverse) lost profits from the inability to host small events.

Witnesses from each Winery, except Chateau Grand Traverse which is not seeking damages for small events, testified that the information on Schedule 6 in Larson’s supplemental report (Exhibit 194, ECF No. 611-144, PageID.27697) was accurate or, if it was not, provided testimony to correct inaccurate information. *See* ECF No. 600, PageID.23086-89 (Bonobo); ECF

601, PageID.23328-30 (Mari); ECF No. 602, PageID.23468, PageID.23470-71 (Black Star); ECF No. 603, PageID.23640-43 (Tabone); *Id.*, PageID.23806-08 (Brys Estate); ECF No. 605, PageID.24131-33, PageID.24139-40 (Bowers Harbor); ECF No. 606, PageID.24283-85 (Hawthorne); *Id.*, PageID.24388-91 (Peninsula Cellars); *Id.*, PageID.24539-41 (Chateau Chantal); ECF No 608, PageID.24913-16, PageID.24919 (Two Lads).

Witnesses from each of these Wineries also testified that there was sufficient demand for small events and that they would have kept their tasting rooms open during the events. *See* ECF No. 600, PageID.23074, PageID.23078, PageID.23087, PageID.23089-90 and Exhibit 56, ECF No. 611-47, PageID.26192 (Bonobo); ECF 601, PageID.23328-30, PageID.23421-22 and Exhibit 170, ECF No. 611-124, PageID.27397 (Mari); ECF 602, PageID.23475-76 (Black Star); ECF No. 603, PageID.23641, PageID.23644 (Tabone); *Id.*, PageID.23806-09 and Exhibit 104, ECF No. 611-77, PageID.26529 (Brys Estate); ECF No. 605, PageID.24130-33 (Bowers Harbor); ECF No. 606, PageID.24284-85 (Hawthorne); *Id.*, PageID.24389, PageID.24452, PageID.24445-46, PageID.24457-58 (Peninsula Cellars); *Id.*, PageID.24539, PageID.24541 and Exhibit 131, ECF No. 611-91, PageID.26831 (Chateau Chantal);²⁰ ECF No. 608, PageID.24916-20 and Exhibits 18, ECF No. 611-18, PageID.25471, and 23, ECF No. 611-20, PageID.25612 (Two Lads).

Larson used Bonobo as an example to explain his calculations: “So for the on season, it would be seven events per week times \$40 per person times 20 people there. And I’ve broken up on season and off season right down the middle, so it’d be times 26 weeks. That’d be the total sales for that time period. And then I multiplied the gross profit percentage to get to profits. But that’s how I get to lost sales or revenues from not hosting those events.” ECF No. 609, PageID.25078.

²⁰ Exhibit 131 also contains Chateau Chantal’s independent calculations for its damages for being prohibited from holding large and small events: \$1,950,000 annually. This was admitted into evidence without rebuttal by the Township and separately supports a damage award.

Larson listened to the Winery witnesses testify, which confirmed his calculations. *Id.* PageID.25078-80.

Larson testified that the total damages, less a COVID reduction, for each Winery would be the damages period multiplied by the annual lost profits listed below. *Id.*, PageID.25081-84.

Winery	Annual Lost Profits for Small Events	Total Lost Profits for Small Events to Date
OV The Farm, LLC	\$108,160	\$693,305.60
Winery at Black Star Farms, LLC	\$54,080	\$346,652.80
Bowers Harbor Vineyards & Winery, Inc.	\$208,208	\$1,334,613.28
Brys Winery, LLC	\$163,592	\$1,048,624.72
Chateau Operations, Ltd.	\$106,470	\$682,472.70
Grape Harbor, Inc.	\$53,525	\$343,095.25
Montague Development, LLC ²¹	\$54,080	\$346,652.80
Tabone Vineyards, LLC ²²	\$182,182	\$1,167,786.62
Two Lads, LLC	\$260,260	\$1,668,266.60
Villa Mari, LLC	\$218,855	\$1,402,860.55

Peninsula Township did not offer its own damages calculations or present any evidence rebutting Larson's conclusions on Schedule 6.

²¹ Because Montague/Hawthorne was closed three months out of the year, Larson testified that its damages should be reduced by 25%. ECF No. 609, PageID.25067. The damages in the table reflect that reduction.

²² Larson testified that Tabone's damages should be recalculated to reflect that it had not been open for the entire damages period. ECF No. 609, PageID.25067–68. This table reflects this.

b. Schedule 7 – All Wineries lost profits from the inability to host large events.

Witnesses from each Winery testified that the information on Schedule 7 in Larson’s supplemental report (Exhibit 194, ECF No. 611-144, PageID.27698) was accurate or, if it was not, provided testimony to correct inaccurate information. They also testified about the significant customer demand for these events and their Winery’s ability to host them. *See* ECF No. 600, PageID.23103-06 (Bonobo); ECF 601, PageID.23331–34, PageID.23398, PageID.23423–25, PageID.23334, Exhibit 170, ECF No. 611-124, PageID.27397 (Mari); ECF No. 602, PageID.23471-73, PageID.23476, PageID.23480 (Black Star); ECF No. 603, PageID.23645-51, PageID.23704, PageID.23710 and Exhibit 189, ECF No. 611-141, PageID.27655 (Tabone); *Id.*, PageID.23810-15, ECF No. 604, PageID.24006-09 (Brys Estate); ECF No. 605, PageID.24135-38 (Bowers Harbor); ECF No. 606, PageID.24285-87, PageID.24333 (Hawthorne); *Id.*, PageID.24393, PageID.24396, PageID.24439-42 (Peninsula Cellars); *Id.*, PageID.24542-46 and Exhibit 131, ECF No. 611-91, PageID.26831 (Chateau Chantal); ECF No. 607, PageID.24727-31 (Chateau Grand Traverse); ECF No. 608, PageID.24922-27, PageID.24990, PageID.24994-95 (Two Lads).

Larson again used Bonobo to explain his calculations: “So for Bonobo and on see, the assumption was three events per week, a rate per person for that time period \$250 multiplied by the number of people at that event would be 75 and then essentially that’s multiplied by 26, because we’ve got half a year, multiplied by the profit percentage. So that’s the on-season calculation. For off-season it’s, again, one event per week now, multiplied by \$250 per person, multiplied by 75 people at that event, multiplied by the 26 weeks, multiplied by the gross profit percentage. You multiply and add all those numbers up and get to the lost profits calculation that’s in that column to the far right.” ECF No. 609, PageID.25085.

Based on the Winery testimony and evidence, Larson testified that the Wineries suffered annual damages, less a 2020 COVID reduction, from being unable to host large events. ECF No. 609, PageID.25086–89. The Wineries’ damages are set forth below.

Winery	Annual Lost Profits for Large Events	Total Lost Profits for Large Events to date
OV The Farm, LLC	\$1,267,500 (October 2020 through June 2022); \$887,250 (July 2022-present) ²³	\$7,184,598.03
Winery at Black Star Farms, LLC	\$1,344,200	\$8,616,322
Bowers Harbor Vineyards & Winery, Inc.	\$2,184,000	\$13,999,440
Brys Winery, LLC	\$1,384,250	\$8,873,042.50
Chateau Operations, Ltd.	\$2,281,500	\$14,624,415
Chateau Grand Traverse, Ltd.	\$612,625	\$3,926,926.25
Grape Harbor, Inc.	\$163,719	\$1,049,438.79
Montague Development, LLC ²⁴	\$422,500	\$2,708,225
Tabone Vineyards, LLC ²⁵	\$572,910	\$3,672,353.10
Two Lads, LLC	\$1,901,250	\$12,187,012.50
Villa Mari, LLC	\$1,014,000	\$6,499,740

²³ Bonobo’s damages in Schedule 7 should be reduced by 30% from June 2022 onward because Bonobo began hosting some large events following this Court’s original summary judgment opinion. *See* ECF No. 600, PageID.23106; ECF No. 609, PageID.25087. This reduction is included in the table.

²⁴ Because Montague/Hawthorne was closed three months out of the year, Larson testified that its damages should be reduced by 25%. ECF No. 609, PageID.25067. The damages in the table reflect that reduction.

²⁵ Larson testified that Tabone’s damages should be recalculated to reflect that it had not been open for the entire damages period. ECF No. 609, PageID.25067–68. This table reflects this.

Peninsula Township did not offer its own damages calculation or present any evidence rebutting Larson's conclusions on Schedule 7.

C. Total damages calculations.

For this Court's convenience, the Wineries have summarized their damages through the date of the submission of their trial brief, August 29, 2024, and provide a per-diem calculation to be used from that date until the date of judgment.

1. OV the Farm, LLC / Bonobo

	Through 8/29/2024	Continuing Per Diem
Schedule 1	\$24,138.00	n/a
Schedule 3	\$2,105,685.00	$\$328,500/365 = \900 per day
Schedule 5	n/a	n/a
Schedule 6	\$693,305.60	$\$108,160/365 = \296.33 per day
Schedule 7	\$7,184,598.03	$\$887,250/365 = \$2,430.82$ per day.
TOTAL	\$10,007,726.63	\$3,627.15 per day.

2. Villa Mari, LLC

	Through 8/29/2024	Continuing Per Diem
Schedule 1	n/a	n/a
Schedule 3	\$3,158,527.50	$\$492,750/365 = \$1,350$ /day
Schedule 5	n/a	n/a
Schedule 6	\$1,402,860.55	$\$218,855/365 = \599.60 /day
Schedule 7	\$6,499,740	$\$1,014,000/365 = \$2,778.08$ /day
TOTAL	\$11,061,128.05	\$4,727.68 per day

3. Chateau Operations, Ltd. / Chateau Chantal

	Through 8/29/2024	Continuing Per Diem
Schedule 1	\$85,450	n/a
Schedule 3	\$2,526,822	\$394,200/365 = \$1,080/day
Schedule 5	n/a	
Schedule 6	\$682,472.70	\$106,470 /365 = \$291.70/day
Schedule 7	\$14,624,415	\$2,281,500/365 = \$6,250.68/day
TOTAL	\$17,236,687	\$7,622.38 per day

4. Chateau Grand Traverse, Ltd.

	Through 8/29/2024	Continuing Per Diem
Schedule 1	n/a	n/a
Schedule 3	\$2,105,685	\$328,500/365 = \$900/day
Schedule 5	n/a	n/a
Schedule 6	n/a	n/a
Schedule 7	\$3,926,926.25	\$612,625 = \$1,678.42/day
TOTAL	\$6,032,611	\$2,578.42 per day

5. Brys Winery, LLC

	Through 8/29/2024	Continuing Per Diem
Schedule 1	n/a	n/a
Schedule 3	\$5,474,781	\$854,100/365 = \$2,340/day
Schedule 5	n/a	n/a
Schedule 6	\$1,048,624.72	\$163,592/365 = \$448.20/day

Schedule 7	\$8,873,042.50	$\$1,384,250/365 = \$3,792.47/\text{day}$
TOTAL	\$15,396,448	\$6,580.67 per day

6. Tabone Vineyards, LLC

	Through 8/29/2024	Continuing Per Diem
Schedule 1	\$4,000	n/a
Schedule 3	\$1,579,263.75	$\$246,375/365 = \$675/\text{day}$
Schedule 5	\$240,375	$\$37,500/365 = \$102.74/\text{day}$
Schedule 6	\$1,167,786.62	$\$182,182 = \$499.13/\text{day}$
Schedule 7	\$3,672,353.10	$\$572,910/365 = \$1,569.62/\text{day}$
TOTAL	\$6,663,778	\$2,846.49 per day

7. Two Lads, LLC

	Through 8/29/2024	Continuing Per Diem
Schedule 1	\$66,655	n/a
Schedule 3	\$1,547,681.68	$\$241,448/365 = \$661.50/\text{day}$
Schedule 5	\$114,783.87	$\$17,907/365 = \$49.06/\text{day}$
Schedule 6	\$1,668,266.60	$\$260,260/365 = \$713.04/\text{day}$
Schedule 7	\$12,187,012.50	$\$1,901,250/365 = \$5,208.90/\text{day}$
TOTAL	\$15,584,400	\$6,632.50 per day

8. Grape Harbor, Inc. / Peninsula Cellars

	Through 8/29/2024	Continuing Per Diem
Schedule 1	n/a	n/a
Schedule 3	\$2,526,822	\$394,200/365 = \$1,080/day
Schedule 5	\$176,275	\$27,500/365 = \$75.34/day
Schedule 6	\$343,095.25	\$53,525/365 = \$146.64/day
Schedule 7	\$1,049,438.79	\$163,719/365 = \$448.55/day
TOTAL	\$4,095,631	\$1,750.53 per day

9. Montague Development, LLC / Hawthorne

	Through 8/29/2024	Continuing Per Diem
Schedule 1	n/a	n/a
Schedule 3	\$481,677.85	\$75,144.75/365 = \$205.88/day
Schedule 5	n/a	n/a
Schedule 6	\$346,652.80	\$54,080/365 = \$148.16/day
Schedule 7	\$2,708,225	\$422,500/365 = \$1,157.53/day
TOTAL	\$3,536,555.65	\$1,511.57 per day

10. Bowers Harbor Vineyards & Winery, Inc.

	Through 8/29/2024	Continuing Per Diem
Schedule 1	\$5,325	n/a
Schedule 3	\$3,158,527	\$492,750/365 = \$1,350/day
Schedule 5	n/a	n/a
Schedule 6	\$1,334,613.28	\$208,208/365 = \$570.43/day

Schedule 7	\$13,999,440	\$2,184,000/365 = \$5,983.56/day
TOTAL	\$18,497,905	\$7,903.99 per day

11. Winery at Black Star Farms, LLC

	Through 8/29/2024	Continuing Per Diem
Schedule 1	n/a	n/a
Schedule 3	\$3,158,527	\$492,750/365 = \$1,350/day
Schedule 5	\$192,300	\$30,000/365 = \$82.19/day
Schedule 6	\$346,652.80	\$54,080/365 = \$148.16/day
Schedule 7	\$8,616,322	\$1,344,200/365 = \$3,682.74/day
TOTAL	\$12,313,802	\$5,263.09 per day

D. Larson correctly used gross profits to calculate damages.

Peninsula Township argued Larson should have used net, rather than gross, profits. *See, e.g.,* ECF No. 609, PageID.25148-49. Peninsula Township is incorrect. Each Winery is an established business with the facilities to host additional events or stay open later without incurring significant incremental cost. Larson explained why using net profits was not appropriate: “Net profit includes all income and all expenses. So in this particular case, there are all sorts of expenses that are in what we call SGNA or operating expenses, such as rent of land or chemicals or netting or property taxes that are essentially fixed costs that have already taken place. These activities in here, these elements of damages, are ancillary to that. So I'm really looking at understanding is the incremental profit and the incremental costs, so profit and variable costs.” *Id.*, PageID.25187.

In situations like the one in this case—with little to no additional overhead costs—gross profits are an appropriate measure of damages, and Larson’s methodology is in line with caselaw

on this issue. For example, in *Contract Design Group, Inc. v. Wayne State University*, 635 F. App'x 222, 234-36 (6th Cir. 2015), the Sixth Circuit affirmed the district court's decision to admit gross profits testimony in a § 1983 case where the expert testified that he did not calculate net profits because the overhead would not be changing. *See also DXS, Inc. v. Siemens Med. Sys., Inc.*, 100 F.3d 462, 474 (6th Cir. 1996) (rejecting use of net profits in an effort to replicate a company's overall economic performance).

Like the expert in *Contract Design*, Larson based his calculations on records and data points given to him by each Winery (and then attended trial to consider the sworn testimony), calculated annual damage figures, and applied those figures across the damages period. Similar to *DXS*, Peninsula Township repeatedly asked Larson why he did not consider the Wineries' financial statements or profit and loss statements. As Larson explained, that information simply was not relevant to his calculations. *See, e.g.*, ECF No. 609, PageID.25055-56, PageID.25151–52. The overall profit-and-loss of a winery is just not relevant when considering the additional profit to be gained from having a single event. Finally, similar to both *Contract Design* and *DXS*, Larson testified on cross-examination that gross profits were the appropriate measure of damages because there were no significant incremental costs the Wineries would incur to host these events or stay open later. ECF No. 609, PageID.25187.

The Township objected to Larson's testimony on this point, but the Township did not introduce any Winery tax returns or profit-and-loss statements, explain how those documents should affect the damages calculations, or introduce any evidence that the Wineries would experience significant incremental costs by having more events or staying open later. "The flaw in this objection is easily exposed. The method that [the Township] appears to advocate contemplates calculating net profits based on [Wineries'] overall economic performance instead

of on the basis of the transactions lost to [the Wineries]. The damages available under this theory would not place [the Wineries] in as good a position as it would have been if the alleged tort had not occurred.” *DXS*, 100 F.3d at 474.²⁶ That rationale aligns with the general purpose of damages under § 1983, to “compensate persons for injuries caused by the deprivation of constitutional rights.” *Farrar v. Hobby*, 506 U.S. 103, 112 (1992).

Ultimately, Larson’s calculations are reasonably precise, based on substantial evidence for every single Winery, and comfortably clear the “reasonable certainty” threshold. *Benson*, 201 F. App’x at 353; *Grantham & Mann, Inc.*, 831 F.2d at 602.

E. Peninsula Township and PTP “opened the door” to this Court addressing state law preemption of restaurants.

Other than default judgments, “[e]very other final judgment should grant the relief to which each party is entitled, even if the party has not demanded that relief in its pleadings.” Fed. R. Civ. P. 54(c). Rule 54(c) works together with Rule 15(b), which “which permit[s] the demand to be amended either before or during the trial so that the amount requested and ultimately awarded will be based on what was proved rather than on what has been pleaded.” 10 Wright & Miller, Fed. Prac. & Proc. Civ. § 2662 (4th ed.); *see also Holt Civic Club v. City of Tuscaloosa*, 439 U.S. 60, 66 (1978) (“although the prayer for relief may be looked to for illumination when there is doubt as to the substantive theory under which a plaintiff is proceeding, its omissions are not in and of themselves a barrier to redress of a meritorious claim ... a meritorious claim will not be rejected for want of a prayer for appropriate relief.”).

²⁶ *See also Northwoods Mfg., Inc. v. Linsmeyer*, 2016 WL 3004419, at *6 (Mich. Ct. App. May 24, 2016) (affirming damages where “the expert testified that Northwoods’ historical net profits were akin to its gross profits because the company did not have a lot of ‘below the line’ expenses”); *Davidson v. Gen. Motors Corp.*, 357 N.W.2d 59, 61 (Mich. Ct. App. 1984) (“Defendant also claims that the use of ‘variable gross profit’ figures to calculate damages was improper. In his opinion granting remittitur, the trial judge stated that this loss figure ‘was equated to a loss of net profit’. We agree that this equation can be drawn without substantially overstating net profit.”).

In this Circuit, a plaintiff is not required to formally seek amendment under Rule 15(b) when Rule 54(c) applies. *See Versatile Helicopters, Inc. v. City of Columbus, Ohio*, 548 F. Appx. 337, 343 (6th Cir. 2013) (“Whether or not the issue can be said to have been tried by ‘consent,’ we find it was an abuse of discretion to require amendment of the pleadings as a condition for entry of judgment in the full amount of the verdict under Rule 54(c).”) (citations omitted). The newly requested relief “need not have been tried by consent, but the only caveat is that the opposing party must have had notice so as not to be prejudiced.” *Id.* (citations omitted).

While this Court earlier determined that it would not rule on whether the Michigan Liquor Control Code preempts the Township’s restriction on restaurants because the Wineries had not referenced those restrictions in their First Amended Complaint, Defendants opened the door at trial. In its opening statement, Peninsula Township asserted that if it had allowed the Wineries to operate restaurants, it would have been impossible to prevent other business from operating restaurants because “that’s how zoning works.” ECF No. 600, PageID.22970. In its opening statement, PTP asserted that it was reasonable for Peninsula Township to prohibit the Wineries from operating restaurants. *Id.*, PageID.22978.

PTP also offered Daniels’ testimony that it was “reasonable to limit the sale of food” at the Wineries and “food should not be sold in an agricultural zone.” ECF No. 604, PageID.23948-52. By introducing this testimony, PTP again put at issue the legality of those restrictions, *i.e.*, Sections 6.7.2(19)(a) (intent provision - no restaurants), 6.7.2(19)(b)(1)(iv) (limited food), 8.7.3(10)(u)(2)(b) (no full meals), 8.7.3(10)(u)(2)(e) (no food service) and 8.7.3(12)(j) (packaged food for off-premises consumption only). The Defendants, thus, interjected into trial whether the Township’s restrictions were lawful, because restrictions preempted by the Liquor Control Code cannot be reasonable. *See DeRuiter v. Township of Byron*, 505 Mich. 130, 148 (2020)

(municipality cannot impose regulations that are “unreasonable and inconsistent with regulations established by state law”) (quoting *City of Detroit v. Qualls*, 434 Mich. 340, 363 (1990)). In other words, in order to rule on PTP’s argument that the food service restrictions are reasonable, this Court must first determine whether those restrictions are preempted by Michigan law.

Each of the Wineries holds a license issued by the State of Michigan allowing the winery to “own and operate a restaurant or allow another person to operate a restaurant as part of the on-premises tasting room on the manufacturing premises.” Mich. Comp. Laws § 436.1536(7)(h). Each of the Wineries holds the required MDARD license to operate a restaurant and have, or can easily add, the infrastructure necessary to serve food and operate a restaurant. ECF No. 600, PageID.23107, PageID.23131-32, Exhibit 53, ECF No. 611-44, PageID.26151 (Bonobo); ECF 601, PageID.23335, Exhibit 163, ECF No. 613, PageID.28047 (Mari); ECF No 602, PageID.23533-34, Exhibit 29, ECF No. 611-24, PageID.25636 (Black Star); ECF No. 602, PageID.23619, ECF No. 603, PageID.23692, Exhibit 186, ECF No. 611-138, PageID.27645 (Tabone); ECF No. 603, PageID.23817, PageID.12817-18, Exhibit 99, ECF No. 611-73, PageID.26494 (Brys Estate); ECF No. 605, PageID.24141, Exhibit 74, ECF No. 611-60, PageID.26288 (Bowers Harbor); ECF No. 606, PageID.24276, Exhibit 150, ECF No. 611-106, PageID.27005 (Hawthorne); ECF No. 606, PageID.24397-99, Exhibit 178, ECF No. 611-131, PageID.27609 (Peninsula Cellars); ECF No. 606, PageID.24537-38, Exhibit 116, ECF No. 611-83, PageID.26640 (Chateau Chantal); ECF No. 607, PageID.24732-33, Exhibit 139, ECF No. 611-96, PageID.26935 (Chateau Grand Traverse); ECF No. 608, PageID.24871, Exhibit 11, ECF No. 611-11, PageID.25434 (Two Lads).

Because Defendants opened the door on the reasonableness of the Township’s restrictions on restaurants and food service, this Court should find that because Sections 6.7.2(19)(a),

6.7.2(19)(b)(1)(iv), 8.7.3(10)(u)(2)(b), 8.7.3(10)(u)(2)(e) and 8.7.3(12)(j) are preempted by Mich. Comp. Laws § 436.1536(7)(h), the Township's restrictions are not reasonable.

F. This Court should enjoin Peninsula Township from further unlawful acts.

After an ordinance has been ruled unconstitutional or unlawful, its enforcement must be enjoined to prevent further violations. *See, e.g., H.D.V.-Greektown, LLC v. City of Detroit*, 568 F.3d 609, 619 (6th Cir. 2009) (finding the district court abused its discretion by declining to enjoin unconstitutional ordinance). To obtain a permanent injunction, the Wineries must show: (1) that they have “suffered an irreparable injury; (2) that remedies available at law, such as monetary damages, are inadequate to compensate for that injury; (3) that, considering the balance of hardships between the plaintiff[s] and defendant, a remedy in equity is warranted; and (4) that the public interest would not be disserved by a permanent injunction.” *eBay Inc. v. MercExchange, L.L.C.*, 547 U.S. 388, 391 (2006).

First, the Wineries have suffered, and will continue to suffer an irreparable injury because the challenged sections of the Winery Ordinances violate the Constitution. “The loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury.” *Elrod v. Burns*, 427 U.S. 347, 373 (1976). *See also Bonnell v. Lorenzo*, 241 F.3d 800, 809 (6th Cir. 2001) (“[I]f it is found that a constitutional right is being threatened or impaired, a finding of irreparable injury is mandated.”).

Second, monetary damages are inadequate to compensate for constitutional injuries. *See, e.g., Elrod*, 427 U.S. at 373; *JDC Mgmt., LLC v. Reich*, 644 F. Supp. 2d 905, 940 (W.D. Mich. 2009) (“The deprivation of a constitutional right certainly constitutes harm that cannot be adequately remedied with a later payment of money damages.” (Maloney, J.)).

Third and fourth, neither Peninsula Township, PTP nor the public has an interest in the enforcement of an unconstitutional ordinance. The government “has no legitimate interest in

enforcing an unconstitutional ordinance. For similar reasons, the injunction plainly is not adverse to the public interest. The public has no interest in enforcing an unconstitutional ordinance.” *KH Outdoor, LLC v. City of Trussville*, 458 F.3d 1261, 1272 (11th Cir. 2006).

Each factor favors the Wineries, and this Court has already stated that it “will enjoin the Township from enforcing all of the sections of the Township Ordinances that the Court has found unconstitutional or contrary to law.” ECF No. 559, PageID.21922. Accordingly, the Wineries request that the Court enter an injunction in the form submitted in Plaintiffs’ Trial Brief and Proposed Findings of Fact and Conclusions of Law, ECF No. 580, PageID.22623-26, while also enjoining enforcement of Sections 6.7.2(19)(a), 6.7.2(19)(b)(1)(iv), 8.7.3(10)(u)(2)(b), 8.7.3(10)(u)(2)(e) and 8.7.3(12)(j) (food and restaurant restrictions) as discussed above, as well as enjoining enforcement of any portion of a Winery SUP which includes the ordinance restrictions this Court has declared unconstitutional and/or preempted.

Finally, “[a]fter a zoning ordinance has been declared unconstitutional ... a judge may provide relief in the form of a declaration that the plaintiff’s proposed use is reasonable, assuming the plaintiff’s burden has been met, and an injunction preventing the defendant from interfering with that use.” *Schwartz v. Flint*, 395 N.W.2d 678, 692–693 (Mich. 1986); *see also English v. Augusta Township*, 514 N.W.2d 172, 173 (Mich. App. Ct. 1994) (enjoining township from interfering with proposed use).

The Wineries have established that their proposed uses of engaging in promotional and educational activities, hosting small and large events, and selling merchandise are allowable accessory uses that are incidental and subordinate to the primary uses of growing grapes, making wine and selling wine and that serving food is permitted by their MLCC and MDARD licenses.

The Wineries have established that they qualify as “Farm Markets” under MDARD GAAMPs and that their proposed uses are promotional and educational activities allowed under the GAAMPs.

Further, for years, the Wineries have hosted “Trail Events,” which include all the same activities: wine tastings, product demonstrations, food, outdoor service, music and tours. *See, e.g.*, ECF No. 602, PageID.23619; ECF No. 603, PageID.23754-57; ECF No. 606, PageID.24366; ECF No. 606, PageID.24493; ECF No. 607, PageID.2469; ECF No. 608, PageID.24878. “Trail Events” are official Township-sanctioned events that take place at the Wineries. *See* Sections 6.7.2(19)(b)(3), 8.7.3(u)(8)(b). If the activities conducted during Trail Events are not agricultural, why would the Township allow them to occur at the Wineries? The answer is that these sorts of activities are appropriate in the agricultural zone because they help the Wineries sell more of their farm products, *i.e.*, wine.

Other courts have determined that events at wineries are usual and customary. Recently, in *Alive Church of the Nazarene, Inc. v. Prince William County*, the Fourth Circuit explained:

special events ... further agricultural activity. Farm wineries and limited-license breweries 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 and limited-license breweries are, the more likely they will continue in operation and draw more investment in the same industry. Because farm wineries and limited-license breweries must be located on producing farms, vineyards, or orchards, investment in their continued success directly advances the promotion of farming.

59 F.4th 92, 104 (4th Cir. 2023). The district court decision noted that “meetings, conferences, banquets, dinners, wedding receptions, private parties and other events conducted for the purpose of marketing wine ... produced on the premises” and “agritourism events” are usual and customary agricultural operations. *Alive Church of Nazarene, Inc. Prince William County, Virginia*, 2021 WL 5237238, at *1-2 (E.D. Va. Nov. 10, 2021). Similarly, in *Friends of Yamhill County, Inc. v. Board of Commissioners of Yamhill County*, the court determined that “commercial activities that

are in conjunction with farm use” were a lawful and reasonable use of the facilities. 298 P.3d 586, 642 (Or. Ct. App. 2013). These events “reinforce the profitability of operations and the likelihood that agriculture use of the land will continue.” *Id.* at 652.

Accordingly, the Court should declare that the Wineries’ proposed uses of engaging in promotional and education activities, hosting small and large activities, and selling merchandise are reasonable, and that serving food as permitted by their MLCC and MDARD licenses, and enjoin Peninsula Township from interfering with those uses.

G. The Wineries are entitled to recover their costs and attorneys’ fees incurred in this matter.

Prevailing plaintiffs in a § 1983 action are entitled to attorneys’ fees under 42 U.S.C. § 1988. Section 1988 fees are an “integral part” of § 1983 remedies. *See Perdue v Kenny A. ex rel. Winn*, 559 U.S. 542, 559 (2010). Neither the fiscal impact of the fee award nor a defendant’s claimed good faith is a special circumstance justifying denial of fees. *See, e.g., Aware Woman Clinic v Cocoa Beach*, 629 F. 2d 1146, 1149-50 (5th Cir. 1980); *Williams v Hanover Hous. Auth.*, 113 F. 3d 1294 (1st Cir. 1997). As an active intervenor, PTP is also responsible for the Wineries’ costs and attorneys’ fees. *Planned Parenthood of Central New Jersey v. Attorney General of State of New Jersey*, 297 F.3d 253, 264-65 (3rd Cir. 2002).

This Court should award the Wineries their costs and attorneys’ fees incurred, jointly and several against Peninsula Township and PTP, in an amount to be established through a forthcoming fee petition.

VI. PENINSULA TOWNSHIP AND PTP DID NOT PROVE THEIR REMAINING AFFIRMATIVE DEFENSES

This Court has already dismissed the majority of PTP and Peninsula Township’s affirmative defenses. ECF No. 528. And while some affirmative defenses survived summary judgment, the Township and PTP represented that at trial they only intended to pursue laches as a

potential bar to damages, *see* ECF No. 581, PageID.22665, and “unclean hands, laches and estoppel, and others” as potential bars to injunctive relief, *id.*, PageID.22694. Peninsula Township and PTP bore the burden of proving their remaining affirmative defenses and it was not the responsibility of the Wineries to disprove them. *Franklin Am. Mortg. Co. v. Univ. Nat’l Bank of Lawrence*, 910 F.3d 270, 284 (6th Cir. 2018). Given that the Township called no witnesses and PTP called only Dr. Daniels, it should be no surprise that Defendants failed to carry their burden.

Defendants merely submitted hundreds of exhibits and, presumably, expect this Court to wade through them to see what they might hold.²⁷ It is not this Court’s job to do the heavy lifting and “issues adverted to in a perfunctory manner, unaccompanied by some effort at developed argumentation, are deemed waived. It is not sufficient for a party to mention a possible argument in the most skeletal way, leaving the court to ... put flesh on its bones.” *McPherson v. Kelsey*, 125 F.3d 989, 995–96 (6th Cir. 1997) (citations omitted). Ultimately, at trial neither the Township nor PTP proved laches, unclean hands, estoppel, or any of the other remaining affirmative defenses.

A. Peninsula Township failed to carry its burden of proof on laches.

This Court granted the Wineries summary judgment on PTP’s laches-related defenses. ECF No. 528. PageID.21262. It also held that laches was not a defense to claim for injunctive relief but could be a defense to damages. ECF No. 528, PageID.21254-55, PageID.21262. At trial, however, the Township did not introduce evidence of laches to bar damages.

Laches is an equitable doctrine concerned with the fairness of permitting a claim to be enforced; it does not apply based simply on the passage of time, but rather on changes of conditions or relationships involved with the claim. *Zelazny v. Lyng*, 853 F.2d 540, 541 (7th Cir. 1988). “A

²⁷ In a related issue, this Court ruled pre-trial that “the Township cannot point to thousands of pages of discovery and insist upon newfound government interests. The Wineries are entitled to notice and should not be ambushed at trial.” ECF No. 585, PageID.22850-51.

party asserting laches must show: (1) lack of diligence by the party against whom the defense is asserted, and (2) prejudice to the party asserting it.” *Bridgeport Music, Inc. v. Justin Combs Publ’g*, 507 F.3d 470, 493 (6th Cir. 2007). Laches is assessed on a case-by-case basis and is fact-dependent. *Mich. Chamber of Commerce v. Land*, 725 F. Supp. 2d 665, 681 (W.D. Mich. 2010).

1. The Township did not provide evidence that the Wineries were not diligent in pursuing their claims.

Peninsula Township did not call any trial witnesses. Instead, the Wineries presented un rebutted testimony that any delay in filing suit was due to ongoing discussions between the Township and the Wineries that sought to avoid litigation. Chris Baldyga of Two Lads and the President of WOMP testified that “I think I’ve had the most input with the Township over the last 16 years more so than almost any other person” ECF No. 308, PageID.24891-92. “I have been at every single one of the winery ordinance rewrite subcommittees they’ve created, which they’ve created four to my knowledge.” *Id.*, PageID.24892. “I’ve sat in numerous, numerous meets at the Township and subcommittee meetings and, you know, in the planner’s office and discussed everything about the current ordinances.” *Id.* But with a new planner every few years, “the treadmill starts again.” *Id.*, PageID.24893. Baldyga worked with Township planners to rewrite the Winery Ordinances, but those efforts died with the Township Board. *Id.*, PageID.24893-95. “It was like that was to have gone from hope to then then go we’re still on this treadmill and its still not going anywhere. Yeah, it was painful.” *Id.*, PageID.24898.

Edward O’Keefe had a similar experience. WOMP was founded in part because the Township asked the wineries to “band together, to talk as one voice collectively on winery issues.” ECF No. 607, PageID.24692. The Wineries were engaged in talks with the Township for years regarding the Winery Ordinances, but “not only did it go nowhere when it came out of the sausage machine, it was more restrictive than it was before” *Id.*, PageID.24710, *see also* Exhibit 146,

ECF No. 611-102, PageID.26973. The Township emailed Mr. O’Keefe a “survey” of issues to be addressed, and he responded to the survey, but it went nowhere: “I don’t know if you call it frustrating or just the status quo. It just – it’s just the trend of what we have been dealing with, is that you talk about it and then it goes nowhere.” *Id.*, PageID.24712. Other Winery witnesses testified similarly. ECF 601, PageID.23309-10; ECF No. 602, PageID.23527, PageID.24123-25; ECF No. 603, PageID.23634; ECF No. 606, PageID.24375-77, PageID.24520-24.

The Wineries also introduced Exhibit 215, ECF No. 611-149, PageID.27718, a 2019 legal memorandum written on behalf of Peninsula Township agreeing that the Winery Ordinances were unconstitutional and/or preempted.²⁸ The cover letter confirmed that “the Township seeks to work collaboratively with the Wineries in any future amendments to its ordinances” and that counsel for the Wineries should “contact [counsel for the Township] so that we may discuss the next steps in what both myself and the Township hope will be an amicable and cohesive process moving forward.” *Id.* The Township concluded by stating that “the Township will be taking prompt action at the next Board meeting regarding some of the items I mention in my opinion letter to ensure compliance.” *Id.* Instead of taking “prompt action,” Peninsula Township doubled down on enforcement.

2. Neither Peninsula Township nor PTP identified any prejudice or presented evidence of prejudice to support laches.

“[G]eneric claims of prejudice do not suffice for a laches defense in any case.” *In re Beaty*, 306 F.3d 914, 928 (9th Cir. 2002). Prejudice is not proven where a defendant “fails to point to any particular witnesses (or types of witnesses) whom [it] might have consulted or to any particular documents (or types of documents) that [it] might have located but for the delayed commencement

²⁸ Supervisor Manigold and Planner Mielnik asked Attorney Meihn to draft the letter and memorandum. ECF No. 611-153, PageID.27865-66.

of the action.” *Vineberg v. Bissonette*, 548 F.3d 50, 58 (1st Cir. 2008). Delay is not prejudicial “where alleged harm was ‘entirely hypothetical.’” *In re Beaty*, 306 F.3d at 928 (quoting *Meyers v. Asics Corp.*, 974 F.2d 1304, 1308 (Fed. Cir. 1992)). *See also Montgomery v. Kitsap Cnty.*, 2006 WL 1785846, at *4 (W.D. Wash. June 23, 2006) *aff’d*, 297 Fed. App’x 613 (9th Cir. 2008) (“Although defendant makes a general statement that necessary witnesses have retired or left its employ and that memories have faded, no specific evidence has been provided to show that this is the case or exactly how such would result in prejudice.”). “Proving prejudice requires more than the frenzied brandishing of a cardboard sword; it requires at least a hint of what witnesses or evidence a timeous investigation might have yielded.” *Vineberg*, 548 F.3d at 58.

Defendants’ trial brief is silent as to their claimed prejudice, ECF No. 581, PageID22683-85, and no evidence was presented at trial and the issue appears abandoned. This is likely because Peninsula Township now realizes it should have followed its counsel’s advice. Instead, the Township disregarded the advice because Supervisor Manigold “[felt] our ordinance is superior to a lot of this stuff, and in court we’re going to prevail.” ECF No. 611-154, PageID.28021. Peninsula Township decided not to follow its lawyer’s advice because “I know it sounds crazy, but that’s the way it is out there.” *Id.*, PageID.28020. In fact, after this lawsuit was filed, in November of 2020, the Township Board “disclaim[ed] the opinion of the Township attorney.” *Id.*, PageID.28018-19.

B. Peninsula Township and PTP did not present evidence of waiver, estoppel, or unclean hands.

Unclean hands is PTP’s Affirmative Defense MM: “Plaintiffs’ claims may be barred by the doctrine of unclean hands, given potential violations by one or more Plaintiff wineries of the terms of their special use permits and zoning requirements.” ECF No. 291, PageID.10332. No evidence was presented that the Wineries violated their SUPs or zoning requirements. Regardless,

any contention that a Winery should be barred from injunctive relief because it violated unconstitutional laws “completely lacks merit.” *Nobby Lobby, Inc. v. City of Dallas*, 970 F.2d 82, 93 (5th Cir. 1992). It does not matter that a party may have committed “scores of such violations” because such an argument “is so devoid of legal foundation as to be frivolous, and its attempt to exalt the [the local government’s interests] over the [United States] Constitution is fatuous.” *Id.* (quoting *Nobby Lobby, Inc. v. City of Dallas*, 767 F. Supp. 801, 820 (N.D. Tex. 1991)). To suggest otherwise is a “constitutionally offensive argument” *Nobby Lobby*, 767 F. Supp. at 820.

Waiver is Peninsula Township’s Affirmative Defense CC and PTP’s Affirmative Defense Affirmative Defense NN: “Plaintiffs have waived their ability to challenge the zoning conditions placed upon their special use permits.” ECF No. 35, PageID.1952; ECF No. 291, PageID.10332. Neither Defendant presented evidence of a single waiver. Even if they had, Defendants certainly did not elicit any testimony that any waiver was knowing or intelligent. *See U.S. v. Royster*, 204 F. Supp. 750, 753 (N.D. Ohio 1961) (“While a person may waive rights guaranteed by the Constitution the Supreme Court has said that ‘courts indulge every reasonable presumption against waiver’ of fundamental constitutional rights and do not presume acquiescence in the loss of such rights.” (quoting *Johnson v. Zerbst*, 204 U.S. 458) (1938))). Nor could the Wineries have waived their ability to raise constitutional challenges in exchange for SUPs because that would be an unconstitutional condition. *Koontz v. St. Johns River Water Mgmt. Dist.*, 570 U.S. 595, 604 (2013) (“Those cases reflect an overreaching principle, known as the unconstitutional conditions doctrine, that vindicates the Constitution’s enumerated rights by preventing the government from coercing people into giving them up.”). PTP previously argued that its members benefited from the SUPs issued to the Wineries and the Court left this issue for trial, ECF No. 528, PageID.21265, but PTP did not present any evidence at trial to support this assertion.

Finally, it is unclear what type of estoppel Defendants believe applies. This Court already granted summary judgment to the Wineries on PTP’s collateral estoppel and judicial estoppel arguments. ECF No. 528, PageID.21268-69. If they are claiming equitable estoppel, that would also fail for lack of evidence. “Equitable estoppel ‘may arise where (1) a party, by representations, admissions, or silence intentionally or negligently induces another party to believe facts, (2) the other party justifiably relies and acts on that belief, and (3) the other party is prejudiced if the first party is allowed to deny the existence of those facts.’” *Mockeridge v. Alcona Cnty. by Bd. of Commissioners*, 696 F. Supp. 3d 303, 326 (E.D. Mich. 2023) (quoting *21st Century Premier Ins. Co. v. Zufelt*, 889 N.W.2d 759, 765 (Mich. App. Ct. 2016)). “Courts are to apply equitable estoppel sparingly and only in the most extreme cases, for example, when a defendant intentionally or negligently deceives a plaintiff.” *Fuller v. GEICO Indem. Co.*, 872 N.W.2d 504, 510 (Mich. App. Ct. 2015). Here, there is no evidence that the Township was intentionally or negligently induced to believe any facts—there is simply no testimony from any Township official on that point.

Defendants made an intentional choice to not call any fact witnesses and utterly failed to meet their burden on these affirmative defenses.

C. Peninsula Township and PTP abandoned their remaining affirmative defenses by not presenting evidence supporting them at trial.

Peninsula Township did not introduce any evidence on the following affirmative defenses:

- Affirmative Defense C: “Plaintiffs have failed, neglected and/or refused to properly and adequately mitigate the damages they claim to have suffered.” ECF No. 35, PageID.1950
 - Peninsula Township did not offer any evidence of how the Wineries could have or should have mitigated their damages.
- Affirmative Defense M: “Defendant maintains that there will be substantial harm to others and that harm to the public interest weigh against Plaintiffs’ claims for injunctive relief.” ECF No.35, PageID.1951.
 - No Township witness testified regarding harm to others or the public interest.

- Affirmative Defense W: “Defendant acted at all times pertinent herein, within the bounds of the law and good faith.” *Id.*, PageID.1952.
 - No Township witness testified to this purported good faith. Instead, Supervisor Manigold testified the Township was advised by its counsel that the Winery Ordinances were unlawful and ignored the advice.
- Affirmative Defense X: “Any violation of the law by Defendant, which are denied, were inadvertent and not willful or intentional.” *Id.*
 - No Township witness testified on this issue. Instead, Supervisor Manigold testified the Township made the deliberate decision to ignore the advice of counsel.
- Affirmative Defense BB: Plaintiffs’ “claims may be barred by the doctrine of abstention.” *Id.*
 - The Township did not present evidence on this issue.

PTP did not introduce any evidence to support the following affirmative defenses:

- Affirmative Defense J: “Defendant Peninsula Township’s attorney lacked authority from the Township Board to negotiate with Plaintiffs for zoning ordinance amendments.” ECF No. 291, PageID.10329.
- Affirmative Defense K: “Defendant Peninsula Township’s attorney lacked authority under Michigan law to negotiate with Plaintiffs for zoning ordinance amendments.” *Id.*
 - PTP did not depose Greg Meihn or call him as a witness regarding Affirmative Defenses J and K and his un rebutted testimony is that he was authorized. ECF No. 611-153, PageID.27865-66; *see also* ECF No. 600, PageID.23058-59.
- Affirmative Defense Q: “Granting injunctive relief as sought by Plaintiffs would cause immediate irreparable harm to PTP and its members, including neighbors who live near existing wineries.” ECF No. 291, PageID.10329.
- Affirmative Defense R: “Granting injunction relief as sought by Plaintiffs would cause substantial harm to the public interest, as well as to cognizable interests of PTP members and Township residents and voters.” *Id.*, PageID.10329-10330.
- Affirmative Defense S: “Granting injunctive relief as sought by Plaintiffs would undermine reasonable investment-backed expectations that the zoning ordinance provisions would remain in place subject to a process to amend the zoning ordinances in the Michigan Zoning Enabling Act, including public hearings, compliance with the standards to amend an ordinance, approvals by the Planning Commission and Township Board, and the right of voter referendum.” *Id.*, PageID.10330.
 - No member of PTP testified regarding Affirmative Defenses Q, R, or S and there is no evidence in the record that harm would befall PTP, its members or the general public.

- Affirmative Defense LL: Plaintiffs’ “claims may be barred by the doctrine of abstention.” ECF No. 291, PageID.10332.
 - PTP did not present any evidence on abstention.
- Affirmative Defense BBB: “Plaintiffs’ delay in bringing these claims prejudiced PTP and its members because PTP’s members have relied for decades on reasonable investment-backed expectations that the zoning provisions would remain in place subject to a process to amend the Zoning Ordinance established in the Michigan Zoning Enabling Act, including public hearings, compliance with the standards to amend an ordinance, recommendations by the Planning Commission, approval by the Township Board, and the right of voter referendum.”
- Affirmative Defense DDD: “Plaintiffs’ own actions, including by requesting, promoting, drafting, supporting, advocating, accepting, and failing to bring timely challenges to the very zoning provisions they challenge in this case have prejudiced PTP and its members by inducing PTP and its members to rely on the zoning provisions and invest in accordance with them.”
 - None of PTP’s members testified about “prejudice” they contend they suffered. There is no evidence to even arguably support Affirmative Defenses BBB and DDD.

By failing to introduce evidence at trial, Peninsula Township and PTP abandoned these affirmative defenses. *See Chappel v. Boss Rain Forest Pet Resort, Inc.*, 2018 WL 7365237, *1 (S.D. Fl. Mar. 15, 2018) (“At trial, the Defendants did not introduce evidence pertaining to affirmative defenses (1), (8), (9) and (11), and these defenses are deemed to have been abandoned.”); *Fedders Corp. v. Taylor*, 473 F. Supp. 961, 970 (D. Minn. 1979) (waiving defense by failing to present evidence support it).

The Court should find that the Peninsula Township abandoned Affirmative Defenses M, W, X, and BB and that PTP abandoned Affirmative Defenses J, K, Q, R, S, LL, BBB and DDD.

D. Most of Peninsula Township’s defense rests on evidence it never produced in discovery.

After PTP intervened, this Court determined that Peninsula Township was stuck with the record it had made and could not benefit from PTP’s intervention to bolster its case with new evidence. ECF No. 301, PageID.10697 n.2; ECF No. 303, PageID.10838. At trial, the Wineries

objected to the Township using and seeking to introduce documents that were not disclosed to the Wineries prior to the first trial date. ECF No. 601, PageID.23152-56. This Court observed that “[the Wineries’] point is well taken, as far as the road map that [the Court] set after PTP came into the case vis-a-vis the Township.” *Id.*, PageID.23155. This Court accepted the evidence subject to a continuing objection. *Id.*, PageID.23156.

Peninsula Township then introduced 125 exhibits that it had never produced in discovery before PTP intervened: Q-RR, TT-UU, WW-AA, CCC, EEE, GGG-HHH, JJJ-KKK, MMM-AAAA, CCCC, MMMM-NNNN, RRRR, VVVV-AAAAA, DDDDD-GGGGG, MMMMM, PPPPP-QQQQQ, SSSSS-TTTTT, VVVVV, XXXXX, DDDDDD-GGGGGG, MMMMMM, OOOOOO-PPPPP, SSSSSS-TTTTTT, VVVVVV-WWWWWW, YYYYYY, DDDDDDD-FFFFFFF, HHHHHHH-KKKKKKK, MMMMMM, PPPPPP-QQQQQQ, WWWWWW, XXXXXXX, EEEEEEE-HHHHHHH, KKKKKKK-PPPPPP, VVVVVVVV, XXXXXXXXXXX, BBBBBBBBBB-HHHHHHHHH, RRRRRRRRRR-UUUUUUUUU.

Further, even if those documents—mostly meeting minutes—are considered, their contents are riddled with hearsay. Meeting minute might be evidence of what was said at a meeting, but they are not evidence that what was said at a meeting was true. *Morgan Guar. Tr. Co. v. Hellenic Lines Ltd.*, 621 F. Supp. 198, 217 (S.D.N.Y. 1985); *U.S. v. Beasley*, 513 F.2d 309, 314 (5th Cir. 1975). Peninsula Township agreed that the meeting minutes were “not offered for the truth of the matter asserted.” ECF No. 608, PageID.25007. But then for what purpose were they being offered? They might be evidence that a meeting occurred, but are not evidence that statements made in that meeting were truthful. For example, if a meeting minute reflects that a member of the public stated a Winery event would produce gridlock traffic, this is not evidence that gridlock traffic will actually occur. This Court has already stated that to determine the intent and purpose of the Winery

Ordinances, it need only look to the “four squares of the ordinances” because “[r]egardless of who advocated for it or regardless of who advocated against it, the Township board, at whatever time it was, made the policy decision to enact this ordinance” ECF 159, PageID.5964-65.

The meeting minutes are not relevant and this Court should not accept or consider the meeting minutes as evidence.

E. Conservation easements do not affect the injunctive relief this Court can award Bonobo and Black Star.

Defendants contend that conservation easements limit the injunctive relief this Court can award Bonobo and Black Star. ECF No. 583, PageID.22830, PageID.22834-35. At trial, the Township sought to question Todd Oosterhouse regarding a conservation easement. ECF 601, PageID.23161. The Wineries objected, as this Court already denied a motion for summary judgment related to the conservation easements. *Id.*; *see also* ECF 559, PageID.21900. Peninsula Township argued the ruling related only to standing, not “causation and redressability in terms of those damages, your Honor. Essentially the conservation easement limits what the property can be used for, it cannot be used for commercial purposes.” ECF No. 601, PageID.23161. This Court correctly recognized, “how is this different” and, while the questioning was allowed, the Court noted “[w]e are slicing it pretty thin here, Mr. Rajsic. I’ll allow the testimony, but I’m skeptical.” *Id.*, PageID.23162-63.

This Court was correct to be skeptical because it was the same issue. In seeking summary judgment on the conservation easements, PTP argued that Bonobo and Black Star “cannot establish actual or imminent injury caused by the challenged zoning, and a favorable decision would not redress their alleged injuries.” ECF No. 517, PageID.20034. PTP further argued that the “commercial uses [Bonobo and Black Star] seek are prohibited on the land they lease by

perpetual conservation easements.” *Id.* In denying PTP’s motion for summary judgment, this Court rejected PTP’s “narrow” reading of the easements:

PTP interprets the easements narrowly and to mean that even if the PTZO allowed bars, restaurants, and events for hire, Black Star and Bonobo would be limited to their agricultural uses and be barred from broader commercial uses. In response, the Wineries assert that there is overlap between what would be permitted if they prevailed and what is permitted under the easements.

The Court agrees with the Wineries. Black Star and Bonobo have the right to sell agricultural products under the easements, which is an inherently commercial function. The conservation easements prohibit “residential, commercial, and industrial purposes and activities which are not incident to agricultural and open space uses.” (ECF No. 457-10 at PID 16204). There is an implication that uses that are “incident to agricultural and open space uses” are allowed. The easements are not so sweeping as to preclude Black Star and Bonobo from having standing.

ECF No. 559, PageID.21901-02.

This Court’s ruling was consistent with how Peninsula Township had previously interpreted the easements. When Bonobo applied for its SUP, the Township found “that according to the subject property’s PDR easement, agricultural development of the land with structures in this area is allowed, more specifically, a winery-chateau is considered an acceptable agricultural use upon the land.” Exhibit HHHHHH, ECF No. 615-17, PageID.29689. The Township continued, “the board finds that the proposed winery-chateau is an agricultural use. This type of land use is specifically supported within the 2011 Master Plan as one of the goals in this district to encourage local growers to produce, process and market agricultural products.” *Id.*, PageID.29690.

As for Black Star, it is a Farm Processing Facility and a use by right, which did not require an SUP, but its easement is nearly identical to that of Bonobo, so its operations must also be considered agricultural uses. This is consistent with its Land Use Permit which allows for “Retail sales / Tasting.” Exhibit 27, ECF No. 611-22, PageID.25633. The conservation easements themselves allow for “Agricultural uses” which include retail and wholesale sales, roadside stands selling products, agricultural buildings, processing agricultural products and other agricultural

practices approved by the Township Board. Exhibit TTTTTTTT, ECF No. 615-23, PageID.30348.

Ultimately, restrictive covenants must be reasonably construed, *Boston–Edison Protective Association v. Paulist Fathers, Inc.*, 10 N.W.2d 847, 848 (Mich. 1943), and construed against the party seeking to enforce them, with all doubts being resolved in favor of the free use of property, *City of Livonia v. Dep’t of Social Services*, 378 N.W.2d 402, 430 (Mich. 1985). A restriction cannot be “enlarged or extended by construction or implication beyond the clear meaning of its terms, even to accomplish what it may be thought the parties would have desired had a situation which later developed been foreseen by them at the time when the restriction was written.” *Flajole v. Gallaher*, 93 N.W.2d 249, 250–51 (Mich. 1958). Here, the clear intent of the Winery Ordinances and the conservation easements is to allow agricultural and accessory uses.

That intent is consistent with Michigan’s Right to Farm Act, where a “farm” and a “farm operation” include the “commercial production, harvesting, and storage of farm products” Mich. Comp. Laws § 286.472(a), (b). Michigan’s GAAMPs recognize that farms may engage in marketing and other promotional activities. Defendants’ argument that conservation easements preclude Bonobo and Black Star from operating their agricultural businesses in accordance with Michigan’s Right to Farm Act is nonsensical. Nothing in the easements preclude Bonobo or Black Star from operating their agricultural businesses. To the contrary, each specifically allows for retail and wholesale sales.

Defendants’ position is also contradicted by Peninsula Township’s treatment of the Wineries for tax purposes. A witness for each Winery testified that although their property is zoned agricultural, the Township taxes their winery location as commercial: ECF No. 600, PageID.22993-94 (Bonobo); ECF No. 601, PageID.23232 (Mari); ECF 602, PageID.23429 (Black Star); *Id.*, PageID.23594-95 (Tabone); ECF No. 603, PageID.23722, PageID.23746 (Brys Estate);

ECF No. 604, PageID.24050 (Bowers Harbor); ECF No. 605, PageID.24233, ECF No. 606, PageID.24297 (Hawthorne); *Id.*, PageID.24343 (Peninsula Cellars); *Id.*, PageID.22467 (Chateau Chantal); ECF No. 607, PageID.14661 (Chateau Grand Traverse); ECF No. 608, PageID.24850-51 (Two Lads). Peninsula Township cannot treat the Wineries as commercial entities for tax purposes and then complain that commercial activities may occur on their property.

F. The Wineries' injuries are redressable through monetary damages and injunctive relief.

Peninsula Township and PTP raised two separate standing arguments before trial. First, they argued that Bonobo, Chateau Grand Traverse, Brys Estate, Hawthorne and Bowers Harbor “lack standing to pursue any claims for damages or equitable relief under Section 8.7.3(10)” because they “did not demonstrate that Sections 8.7.3(10)(m) and 8.7.3(10)(u) were unconstitutionally applied to them.” ECF No. 581, PageID.22686. When a witness for Bonobo testified regarding the Guest Activity Use section under in 8.7.3(10), the Township objected. ECF No. 600, PageID.23033. This Court overruled the Township’s objection. *Id.*, PageID.23033-34. Thereafter, as explained above, each of these Wineries testified extensively regarding the ways in which Section 8.7.3(10) was applied to them and they suffered damages therefrom. Because of the extensive evidence that the Township applied Section 8.7.3(10) against all of the Wineries, including the Township’s admissions of such application, this Court should reverse its earlier ruling, ECF No. 559, PageID.21903, that Bonobo, Chateau Grand Traverse, Brys Estate, Hawthorne and Bowers Harbor do not have standing to raise an as-applied challenge.

Second, Peninsula Township and PTP have asserted that the Wineries’ injuries would not be redressed by a favorable ruling from this Court. ECF No. 581, PageID.22685-87. “The question in deciding whether a plaintiff’s injury is redressable is not whether a favorable decision is likely but whether a favorable decision likely will redress a plaintiff’s injury.” *Bonnichsen v.*

United States, 367 F.3d 864, 873 (9th Cir. 2004). Therefore, “redressability analyzes the connection between the alleged injury and requested judicial relief.” *Washington Env’t Council v. Bellon*, 732 F.3d 1131, 1146 (9th Cir. 2013). In other words, redressability asks whether “the district court had the power to prevent the injury at the time the complaint was filed.” *Am. C.L. Union of Nevada v. Lomax*, 471 F.3d 1010, 1016 (9th Cir. 2006).

A plaintiff’s burden to demonstrate redressability is “relatively modest.” *Bennett v. Spear*, 520 U.S. 154, 171 (1997). A plaintiff “need not demonstrate that there is a guarantee that her injuries will be redressed by a favorable decision; rather, a plaintiff need only show a substantial likelihood that the relief sought would redress the injury.” *M.S. v. Brown*, 902 F.3d 1076, 1083 (9th Cir. 2018) (cleaned up). In evaluating whether the redressability prong is met, courts “must look at the facts ‘as they exist at the time the complaint was filed.’” *Lomax*, 471 F.3d at 1015 (quoting *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 569 n.4 (1992)).

In *Tucson v. City of Seattle*, 914 F. 4th 1318 (9th Cir. 2024), the city argued that a complaint to enjoin enforcement of an ordinance failed the redressability prong, because the complaint did not challenge an identical state law and, according to the city, any relief provided by the court would not redress the plaintiff’s injury. The Ninth Circuit disagreed, noting that the city misunderstood the redressability analysis; the complaint alleged an injury from enforcement of the city ordinance and “[i]n addressing redressability, Plaintiffs are not required to challenge all laws that plausibly criminalize their desired course of conduct in a given jurisdiction, regardless of how credible the threat to enforce those laws is. Such a requirement would necessarily conflict with the injury-in-fact doctrine, which requires ‘a credible threat’ to enforce a specific criminal provision before a plaintiff may have standing to request that a district court enjoin that provision’s future enforcement.” *Id.* at 1326; citing *Susan B. Anthony List v. Driehaus*, 573 U.S. 149, 159 (2014).

Here, Defendants have argued that Plaintiffs' injuries were caused by their location in the A-1 agricultural zoning district and that they have never challenged their zoning designation. ECF No. 581, PageID.22687. Like the City of Seattle, Defendants misunderstand the redressability analysis. At the time they filed their First Amended Complaint, Plaintiffs alleged an injury due to the enforcement of the Winery Ordinances. They were not required to plead an injury from every law, ordinance, or other restriction which might regulate them. And even if they were, the Wineries presented evidence that the definition of "accessory uses" within the PTZO, and protections from the Michigan Right to Farm Act and GAAMPs, would allow them to do what they seek absent the unconstitutional Winery Ordinances. Removing the barrier the Winery Ordinances impose will redress Plaintiffs' injuries.

G. The Chateau Chantal consent judgment does not limit its recovery.

The Township introduced Exhibit BBBB, ECF No. 615-12, PageID.29226-28, a 1998 consent judgment involving Chateau Chantal. The consent judgment essentially states that Chateau Chantal shall not serve wine by the glass and shall only serve "cheese, fruit, bread or crackers provided at no cost to the persons tasting wine." These restrictions are not relevant for two reasons.

First, Exhibit BBBB has suspect evidentiary value. The Wineries objected that the Township did not plead collateral estoppel or res judicata.²⁹ The Township asserted the consent judgment related to laches, but argued that the consent judgment "is related to whether or not there was an opportunity for this issue to be raised back in 1998." ECF No. 607, PageID.24582-83. The Wineries responded that "[t]hat is literally the definition of res judicata." *Id.* This Court accepted the exhibit but stated "the factual support of that assertion is relatively weak given the passage of

²⁹ This Court granted summary judgment to the Wineries on PTP's res judicata and collateral estoppel defenses. ECF No. 528, PageID.21268-69.

time.” ECF No. 607, PageID.24585.

Second, the MLCC rescinded a 1998 declaratory ruling regarding Chateau Chantal in 2017 “due to changes in the Michigan Liquor Control Code” which explicitly allow for the sale of wine by Michigan wineries for on-premises consumption and operation of a restaurant on a winery premises. Exhibit 226, ECF No. 611-50, PageID.27735; see also Mich. Comp. Laws § 436.1536(7)(h) (allowing small wine makers to operate a restaurant.) The 1998 consent judgment is irrelevant given changes to Michigan law.

VII. THIS COURT SHOULD REVOKE PTP’S INTERVENOR STATUS

PTP forced its way into this case by alleging its “[m]embers who own property near the Wineries fear that their property values will diminish because of the increased commercial activity,” “[PTP members] purchased their properties in partial reliance on these ordinances,” “the quiet enjoyment of their property will diminish if the Wineries win their lawsuit,” “members worry that striking down the ordinances would result in additional traffic [which] would impair driving to their properties,” “and [the Wineries will] harm one of their farming businesses by causing transportation costs to rise.” *Wineries of the Old Mission Peninsula Ass’n v. Twp. of Peninsula, Michigan*, 41 F. 4th 767, 772-73 (6th Cir. 2022).

While PTP may have alleged these interests, it did not prove these interests at trial. Not a single PTP witness testified to these purported harms—PTP pulled a classic bait and switch and misled the Sixth Circuit. Interestingly, while PTP alleged its members would be harmed because property values might decrease, PTP sole’s witness, Dr. Daniels, testified that if the Winery Ordinances were overturned then property values would likely increase. Because PTP failed to present evidence about its members’ interests or the harms that those interests would suffer, PTP no longer meets the requirements for intervention and should be dismissed.

“When a party that has been granted intervention as of right no longer meets the requirements for such intervention, a court properly dismisses that party from the case.” *Coal. to Defend Affirmative Action v. Regents of Univ. of Mich.*, 539 F. Supp.2d 960, 968 (E.D. Mich. 2008). Intervention “does not carry with it an absolute entitlement to continue as a party until termination of the suit.” *Tasby v. Wright*, 109 F.R.D. 296, 298 (N.D. Tex. 1984) (citing *Morgan v. McDonough*, 726 F.2d 11, 14 (1st Cir. 1984)). Courts have the independent authority and duty to determine whether a party’s intervenor status “continues to be viable.” See *Mishewal Wappo Tribe of Alexander Valley v. Salazar*, 2012 WL 4717814, at *1 (N.D. Cal. Sept. 28, 2012), *aff’d*, 534 F. Appx, 665 (9th Cir. 2013). This authority “stems from [the] inherent power to control the proceedings before it.” *Morgan*, 726 F.2d at 14.

There are three requirements for intervention as a matter of right: 1) the putative intervenor must have a substantial interest relating to the property or transaction that is the subject of the action; 2) the disposition of the action threatens to impair or impede the putative intervenor’s ability to protect that interest; and 3) the putative intervenor is not adequately represented by the existing parties. Fed. R. Civ. P. 24(a)(2). Now, after the proofs are closed, it is clear that PTP does not satisfy Rule 24’s requirements.

On the impairment element, the Sixth Circuit determined that an injunction may limit PTP members’ ability to bring potential nuisance lawsuits to protect their substantial interests. *WOMP*, 41 F. 4th at 774. But, of course, there is no evidence in the record of PTP members’ interests, so there is also no evidence how those interests might be impaired.

As to adequate representation, the Sixth Circuit held that PTP overcame the presumption of adequate representation because Peninsula Township might have chosen to settle the lawsuit when faced with the potential of money damages, which was not an issue faced by PTP. *Id.* at

774-775. Peninsula Township did not settle the case and, instead, entered a joint defense agreement with PTP, ECF No. 574, PageID.22435, submitted a joint trial brief with PTP, ECF No. 581, submitted joint Proposed Findings of Fact and Conclusions of Law with PTP, ECF No. 583, and took the lead role at trial for cross examination, with PTP not even bothering to ask questions of most witnesses. PTP's intervention proved to be a sham at trial and PTP's misrepresentations to the Sixth Circuit were exposed when PTP failed to introduce evidence supporting its claims.

Because PTP no longer meets the requirements under Rule 24, this Court should exercise its inherent authority and revoke PTP's status as an intervenor.

VIII. CONCLUSION

In 2019, Peninsula Township concluded that its Winery Ordinances violated the Plaintiffs' Constitutional rights but kept enforcing them anyway. In June 2021, this Court also determined that the Winery Ordinances violated the Plaintiffs' Constitutional rights, yet Peninsula Township fought on. Three years later, the Winery Ordinances still violate the Plaintiffs' Constitutional rights, so a permanent injunction must issue to prohibit their continued enforcement.

Plaintiffs must also be compensated. If Peninsula Township had stopped enforcing the Winery Ordinances when it concluded they were unconstitutional, this case never would have been filed. Instead, Peninsula Township took the position that its "ordinance is superior to a lot of this stuff, and in court we're going to prevail." ECF No. 611-154, PageID.28020-21. That vanity caused the Wineries to lose millions of dollars which Peninsula Township could have avoided.

This Court should award the Wineries the full amount of their damages to date—\$120,426,672.33—plus the per diem damages noted above and prejudgment interest until the date of a final judgment. As the prevailing party, this Court should also award the Wineries their costs and attorney fees, jointly and severally against Defendants, pursuant to a fee petition to be filed after this Court's trial ruling.

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: August 29, 2024

CERTIFICATE OF SERVICE

I hereby certify that on August 29, 2024, I filed the foregoing Plaintiffs' Post Trial Brief 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