UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MICHIGAN
NORTHERN DIVISION

Shepler's Inc. d/b/a Shepler's Mackinac Island Ferry Service, and Mackinac Island Ferry Company d/b/a Arnold Transit Company, Plaintiffs/Counter-Defendants, -against- City of Mackinac Island, Defendant/Counterclaim- Plaintiff.	Case No.: 25-cv-00036 Hon. Robert J. Jonker Mag. Maarten Vermaat

COUNTERCLAIM-DEFENDANTS'
BRIEF IN SUPPORT OF THEIR
MOTION TO DISMISS COUNTERCLAIM

Shepler's Inc. d/b/a Shepler's Mackinac Island Ferry Service ("Shepler's") and Mackinac Island Ferry Company d/b/a Arnold Transit Company ("MIFC," and together with Shepler's, the "Ferry Companies") submit this Memorandum of Law in support of their Motion to Dismiss the City of Mackinac Island's (the "City") Counterclaim, dated April 3, 2025 ("Counterclaim" or "Countercl."). *See* ECF No. 7.[1]

PRELIMINARY STATEMENT

In their initial Complaint in this matter, ECF No. 1, the Ferry Companies seek a declaratory judgment that the City is attempting to ignore the express terms of, and meaningful silences in, the Ferry Companies' Franchise Agreement with the City to provide ferry service to and from Mackinac Island by purporting to regulate not only the fares the Ferry Companies charge for ferry transportation, but also the prices the Ferry Companies charge for ancillary services that are not addressed by the Franchise Agreement whatsoever. By filing its Counterclaim, the City now seeks to use the antitrust laws as a cudgel to obtain a ruling by this Court, *inter alia*, that the Ferry Companies have a "monopoly" over ferry services that somehow gives the City the right to regulate the Ferry Companies' commercial conduct beyond the four corners of the Franchise Agreement, while also holding a sword of unstated and unknowable "damages" over the Ferry Companies' heads.

But if the City intends to actually state actionable claims under the federal antitrust laws (rather than simply assert its own list of issues on which it seeks declaratory relief, as the Ferry Companies have done in their Complaint), this Counterclaim does not accomplish that goal. The Counterclaim is rife with shortcomings. Unlike most serious antitrust pleadings that support their theories with hundreds of paragraphs of allegations spread over dozens of pages, the

[1] The Counterclaim begins at Page 36 of ECF No. 7. All paragraph references herein are to the paragraphs stated in the Counterclaim.

Counterclaim attempts to assert its causes of action in only a few dozen largely conclusory descriptive paragraphs. This brevity – as well as the intentional vagueness of much of the City's rhetoric – deprives the Counterclaim of the type of detail needed to sustain its causes of action, even at the pleading stage. The injury the City has allegedly suffered, which affects its standing to bring its claims at all, is insufficiently pleaded at best, and wholly speculative at worst. It is unclear whether the City only seeks declaratory relief, or whether it also seeks treble damages for imagined prior conduct – none of which is described with any clarity at all. The market(s) the Ferry Companies have allegedly monopolized are inadequately – and sometimes contradictorily – described, often ignoring common sense. Moreover, the City attempts to pin the Ferry Companies with an allegation of exercising monopoly power in violation of the antitrust laws without alleging any actual, actionable conduct on the part of the Ferry Companies to *exclude* competition against them in the market, as the antitrust laws require to support this type of antitrust claim. Finally, because the City's substantive claims fail, the City lacks a basis to assert its claim for declaratory relief as well.

For all these reasons, every cause of action the City asserts in the Counterclaim must be dismissed.

STATEMENT OF RELEVANT FACTS

For purposes of this Motion only, Shepler's and MIFC must assume the allegations in the Counterclaim to be correct and frame the discussion below on that basis. *Lambert v. Hartman*, 517 F.3d 433, 439 (6th Cir. 2008).

Shepler's and MIFC operate ferry service to and from Mackinac Island and St. Ignace, Michigan, and to and from Mackinac Island and Mackinaw City, Michigan. In 2022, the Hoffmann Family of Companies (for relevant purposes here, identified in the Counterclaim as

"Hoffmann Marine"[2]) purchased Shepler's. *Id.* ¶ 20. In 2024, Hoffmann Marine then purchased MIFC as well. *Id.* ¶ 21. Hoffmann Marine is thus the common owner of both Ferry Companies. *Id.* Although the ferry lines are still organized as independent companies, the Counterclaim repeatedly alleges that the two Ferry Companies operate a singular entity. "Hoffmann Marine owns all or a majority of the stock of both companies, and exercises complete control over both companies, including their boats, docks, parking lots, names, brands and pricing." *Id.* ¶ 24. For example, both Shepler's and MIFC report to Jenny Gezella, the President of Hoffmann Marine. *Id.* ¶ 26. Shepler's CEO Chris Shepler "acts or has acted as the chief operating officer of both Ferry Companies." *Id.* ¶ 30. Gezella and Shepler have "appeared together at [a] City Council meeting on behalf of Hoffmann Marine and both ferry companies" to discuss the Ferry Companies' intended, identical new rates. *Id.* ¶ 32. In sum, "Shepler's and MIFC, being under the common ownership and complete control of Hoffmann Marine, are not competitors as a matter of fact and law." *Id.* ¶ 38. *As alleged in the Counterclaim,* the Ferry Companies operate as a singular, unified entity. The City pleads no facts that would support any contrary allegation.

Other than that simple set of allegations, though, the facts portrayed in the Counterclaim are notable for their self-contradiction and the important points they do *not* make. The Ferry Companies own or control the docks in the City, St. Ignace, and Mackinaw City that are used for ferry service. *Id.* ¶ 48. Although the Counterclaim alleges that the Ferry Companies "own or have exclusive access to the docks," significantly, the Counterclaim never alleges that the Ferry Companies have ever restricted their use by any competitor or potential competitor that sought access to the docks for its own use. Nor does the Counterclaim ever allege that other docks

[2] For clarity, "Hoffmann Marine" is not an organized entity, but merely a trade name used by the Hoffmann Family of Companies to encompass its separately-owned and organized maritime businesses.

could not be built to serve another ferry operator. Likewise, the Counterclaim never alleges that the docks presently lack capacity to support a potential competitor's ferry traffic. The Ferry Companies also own parking lots in Mackinaw City and St. Ignace, at which passengers (or, significantly, the public at large) can park vehicles before or after having taken a ferry, or otherwise. *Id.* ¶ 44. Although the Counterclaim asserts that "[t]here are no competing public or privately-owned parking lots in or near Mackinaw City or St. Ignace that ferry passengers could use[,]"[3] (*id.* ¶ 46), the Counterclaim admits that it is "conceivable" that a competitor could develop additional parking lots to serve ferry passenger, although it alleges that developing such lots would be "expensive, time-consuming, and uncertain." *Id.* ¶ 47. As to both dock access and control of parking, the Counterclaim notably never alleges that there were competitors or potential competitors ready to step in and provide either ferry service and/or parking but for the alleged anticompetitive conduct of the Ferry Companies.

Of course, the ferries operated by Shepler's and MIFC are not the only means to travel to and from Mackinac Island. The Counterclaim admits that travel to and from Mackinac Island is also available by private plane, chartered aircraft, and private boat, although it fails to further describe the significance of these competing modes of transportation, including the number of travelers who utilize these options, and the relative cost compared to ferry transportation. *Id.* ¶ 43.

Both Shepler's and MIFC operate their ferry services pursuant to agreements with the City that expire in 2027. *Id.* ¶¶ 35-36 (Because these agreements are in significant part

[3] Although not relevant for purposes of this Motion, that alleged fact is objectively wildly incorrect. As but one example, at least one other property owner operates a competing lot right next to MIFC's docks in Mackinaw City. *See ferryboatparking.com*.

identical, they are referred to herein collectively as the "Franchise Agreement").[4] Regardless of the City's characterization in the Counterclaim of the Ferry Companies' rights and duties expressed in the Franchise Agreement, their terms speak for themselves.[5] Regardless of the City's concocted antitrust-based theories now, the gravamen of this Action – both the Ferry Companies' initial Complaint and the City's Counterclaim – essentially revolves around the meaning of the Franchise Agreement. Section 4 requires that the relevant Ferry Company "provide ferry boat service to and from the City during the regular ferry boat season which is the period of time between April 21 of any calendar year and October 31 of the same calendar year during the term," with the possibility of being awarded a franchise for the winter ferry boat season as well. *See* Franchise Agreement § 4. Per Section 3, a Ferry Company must "file [their] schedule[s] of services and rates for the next season with the City Clerk" no later than November 15 of each year. *Id.* § 3. But setting a schedule of services and fares is a *unilateral right* belonging to the Ferry Companies – nothing in the Franchise Agreement gives the City the right to approve or reject the filed rates. The only exception to the unilateral ability of the Ferry Companies to determine their rates lies in Section 9, which allows the City "the right to assert its jurisdiction over schedules and fares to the extent permitted by present law" if "no competition is found to exist in ferry boat service[.]" *Id*. § 9. Section 3. However, the Franchise Agreement does not highlight any test or procedure for determining when "no competition" exists.

[4] The Counterclaim attaches each agreement separately at Exs. 2 and 4.
[5] Because the two Ferry Companies' agreements with the City are annexed to the Counterclaim, the Court may consider the meaning of their plain language in connection with this Motion. *Gavitt v. Born*, 835 F.3d 623, 640 (6th Cir. 2016) (citation and quotations omitted); *see also* Fed. R. Civ. P. 10(c).

To presage issues that arose later, it should be noted that the Franchise Agreement, by its clear terms, does not require the Ferry Companies to notify the City of any other prices or charges associated with services ancillary to ferry service whatsoever. For example, the Franchise Agreement does not address any fees the Ferry Companies might charge for luggage, priority boarding, or for parking at the lots they own in Mackinaw City and St. Ignace.

After not having raised ferry rates in the several years since Hoffmann Marine acquired Shepler's, in late 2024 the Ferry Companies notified the City that they intended to raise ferry rates by $2.[6] Countercl. ¶ 32. The City declined to "approve" the new rates (*id.* ¶ 41), even though it had no ability to control them.

Indeed, the City must have realized that the existing Franchise Agreement gave it no ability to control the Ferry Companies' rates, or other charges the Ferry Companies might adopt for ancillary services. On April 30, 2025 – after the Ferry Companies filed their initial Complaint in this matter on March 3, 2025, and after the City filed its Counterclaim on April 3, the City adopted a new ordinance (the "2025 Ordinance") that purported to give the City exactly the powers it lacked under the Franchise Agreement.[7] (A copy of the 2025 Ordinance is attached hereto as Ex. A)[8] In pertinent part, the 2025 Ordinance requires that a ferry boat operator that is granted a franchise to operate ferry service "shall submit in writing to the Council its proposed

[6] Although the Counterclaim describes this as the Ferry Companies "asking" the City to approve a $2 rate increase, the Ferry Companies never stated that the City had the right to *approve* the Ferry Companies' rates. They simply notified the City of their new rates and met with the City Council to educate its members about the new pricing.

[7] To be clear, Shepler's and MIFC believe the City lacked the power to enact the 2025 Ordinance and intend to challenge it on that basis in the future if necessary. The Ferry Companies also believe the 2025 Ordinance cannot alter the terms of the existing Franchise Agreement.

[8] The Ferry Companies cite to the 2025 Ordinance not as new factual material outside the ambit of a motion to dismiss, but rather as purported law that can be freely referenced in that context. If necessary, however, the Ferry Companies request that the Court take judicial notice of the adoption and contents of the 2025 Ordinance.

service rates and Schedule of Services for the following year," no later than September 1st of each year. A Ferry Boat Company "has the obligation to demonstrate that the Service Rates are just and reasonable for the services provided." Ex. A, § 22(b). Following the production of certain voluminous information also outlined in the 2025 Ordinance, "[t]he Council shall determine the Service Rates and Schedule of Services no later than November 30th of the year prior to the year the rates are scheduled to go into effect." *Id.* § 22(f). Significantly, the 2025 Ordinance defines "Service Rates" to include activities it cannot regulate under the Franchise Agreement, such as "any rate, fare, fee and/or charge the Ferry Boat Company charges for any service related to the Ferry Boat Service, including but not limited to transportation of passenger [sic], transportation of property, luggage, and parking fees." *Id.* § 2. The 2025 Ordinance is to take effect no later than May 28, 2025.

Although the Ferry Companies notified the City of their new intended rates for the 2025 season (Countercl. ¶ 32), the Counterclaim does not allege that the Ferry Companies ever actually implemented those revised rates (although, as discussed below, it would not support the City's theories if they had).

The Counterclaim alleges five causes of action. Count I of the Counterclaim accuses Shepler's and MIFC of collectively having and exercising monopoly power over either ferry service to Mackinac Island or, in the alternative, having a monopoly over parking necessary to use the ferries, in violation of Sections 1 and 2 of the Sherman Act, 15 U.S.C. §§ 1 and 2. Count II states an alternative theory (which cannot stand alongside Count I) that if Shepler's and MIFC are in fact *independent* entities, their coordination on rates and terms of service violates Section 1 of the Sherman Act. Count III appears to state the same antitrust theories under the Michigan

Antitrust Reform Act, MCL 44.772 and MCL 445.773.[9] Count IV alleges the Ferry Companies have breached the Franchise Agreement because "competition between the ferry companies has ceased as a matter of fact and law," and Shepler's and MIFC are obligated under the Franchise Agreement to cooperate with the City in its regulation of rates for ferry transportation, parking, and other fees and charges, which Shepler's and MIFC allegedly have not done. Finally, Count V seeks declaratory relief from the Court as to a host of issues that run in tandem with the City's substantive theories.

It is equally unclear whether the City is truly seeking any damages for its causes of action, or only the declaratory relief described in Count V. As to the City's antitrust causes of action, although the City asserts it is entitled to treble damages and its attorneys' fees, the City has not sued under, or even mentioned, Section 4 of the Clayton Act, 15 U.S.C. § 15, the statutory enactment that provides for such relief for a violation of the federal antitrust laws. More broadly, however, the Counterclaim asserts only one vague, summary paragraph regarding the damages the City has allegedly suffered to date as a result of the Ferry Companies' actions: that it has been "injured in its business or property . . . [because] the City is a customer of the ferries, and the ferry companies' supra-competitive rates and charges for ferry service, including but not limited to parking, increase the City's costs and suppress the City's revenues by discouraging travel to Mackinac Island." Countercl. ¶ 59. The significance of this pithy,

[9] The analysis of the City's antitrust claims under the Michigan Antitrust Reform Act and the Sherman Act should be identical. "'[B]ecause the Michigan Anti-Trust statute and the Sherman Anti-Trust Act mirror each other, [the court] appl[ies] the same analysis to both the federal and the state antitrust claims.'" *Hobart-Mayfield, Inc. v. Nat'l Operating Comm. on Standards for Athletic Equip.*, 48 F.4th 656, 663 (6th Cir. 2022) (quoting *Am. Council of Certified Podiatric Physicians & Surgeons v. Am. Bd. of Podiatric Surgery, Inc.*, 323 F.3d 366, 368 (6th Cir. 2003)). Accordingly, "Michigan Antitrust Reform Act claims prevail or fail in tandem with [a claimant's] Sherman Act claims." *Id.*

unsupported assertion is discussed further below and is damning for several aspects of the City's theories.

ARGUMENT

"A motion to dismiss for failure to state a claim is a test of the plaintiff's cause of action as stated in the complaint, not a challenge to the plaintiff's factual allegations." *Lambert v. Hartman*, 517 F.3d 433, 439 (6th Cir. 2008) (quotations and citation omitted). As such, all allegations in the Counterclaim must be accepted as true. *Id.* To satisfy the City's pleading requirement, those allegation "must do more than create speculation or suspicion of a legally cognizable cause of action; they must show *entitlement* to relief." *Id*. (emphasis in the original). Accordingly, a complaint "must contain either direct or inferential allegations respecting all the material elements to sustain recovery under a viable legal theory." *German Free State of Bavaria v. Toyobo Co., Ltd.,* 480 F. Supp. 2d 958, 963 (W.D. Mich. 2007) (citations omitted).

In this specific context, courts have long recognized that antitrust claims must clear a high hurdle to advance past the pleadings stage – more so than cases asserting different legal theories. "In the antitrust context, the Supreme Court is clear that 'a district court must retain the power to insist on some specificity in pleading before allowing a potentially massive factual controversy to proceed.'" *ComSpec Int'l, Inc. v. Uniface B.V.*, 2021 WL 4169726, at *5 (E.D. Mich. Sept. 14, 2021) (dismissing Sherman Act section 2 monopolization claim for inadequate pleading) (quoting *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 558 (2007)). As the Sixth Circuit has explained, "[w]hile the pleading standard under the federal rules is very liberal ... 'the price of entry [into the federal courts on a private antitrust claim], even to discovery, is for the plaintiff to allege a factual predicate concrete enough to warrant further proceedings, which may be costly and burdensome.'" *Foundation for Interior Design Educ. Research v. Savannah Coll.*

of Art & Design, 244 F.3d 521, 530 (6th Cir. 2001) (quoting *DM Research, Inc. v. College of Am. Pathologists,* 170 F.3d 53, 55 (1st Cir. 1999)).

Thus, in an antitrust action, a complaint "must comprehend a so-called prima facie case, and enough data must be pleaded so that each element of the alleged antitrust violation can be properly identified.'" *Clark Memorials of Alabama Inc. v. SCI Alabama Funeral Servs. LLC*, 991 F. Supp. 2d 1151, 1156 (N.D. Ala. 2014) (quoting *Quality Foods de Centro Am., S.A. v. Latin Am. Agribusiness Dev. Corp., S.A.*, 711 F.2d 989, 995 (11th Cir. 1983)).

I. COUNTS I, II, III, AND IV SHOULD BE DISMISSED FOR LACK OF STANDING.

In order to assert Counts I, II, III, and IV, the City must properly allege Article III standing. To support Counts I, II, and III, the City must also adequately allege that it has "antitrust standing," a special doctrine appliable to antitrust claims. *NicSand, Inc. v. 3M Co.*, 507 F.3d 442, 449 (6th Cir. 2007). But here, the Counterclaim does not meet those burdens.[10]

A. The City Fails to Adequately Plead Article III Standing.

In the absence of constitutional standing on the part of the City, this Court has no subject matter jurisdiction. *Kokkonen v. Guardian Life Ins. Co. of America*, 511 U.S. 375, 377-78 (1994). Whether a claimant has Article III standing is a threshold jurisdictional issue governed by Federal Rule of Civil Procedure 12(b)(1). Fed. R. Civ. P. 12(b)(1); *Allstate Ins. Co. v. Glob. Med. Billing, Inc.*, 520 F. App'x 409, 410-11 (6th Cir. 2013) (citations omitted). Article III standing requires a plaintiff to "have (1) suffered an injury in fact, (2) that is fairly traceable to the challenged conduct of the defendant, and (3) that is likely to be redressed by a favorable judicial decision." *Spokeo, Inc. v. Robins*, 578 U.S. 330, 338, 136 S. Ct. 1540 (2016).

[10] Interestingly, the City never even pleads that it has standing to assert any of its causes of action whatsoever. The word "standing" simply never appears in the Counterclaim.

To satisfy the injury in fact element, a plaintiff must allege an injury that is both "concrete and particularized" and "actual or imminent." *Id.* (citations and quotations omitted). "For an injury to be particularized, it must affect the plaintiff in a personal or individual way." *Id.* (citations and quotations omitted). Concrete means "real and not abstract;" the alleged injury "must actually exist." *Id.* at 340. The injury in fact requirement is the foremost of these three elements; claimants must have standing for each claim that they press and for each form of relief that they seek. *Jordan v. Beasley*, No. 24-5122, 2024 U.S. App. LEXIS 28498, at *3 (6th Cir. Nov. 7, 2024); *Waskul v. Washtenaw Cty. Cmty. Mental Health*, 900 F.3d 250, 253 (6th Cir. 2018).

Because the City invokes federal jurisdiction through its Counterclaims, it "bears the burden of establishing these elements." *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560, 112 S. Ct. 2130 (1992).

To start, the City does not have standing to sue to remedy the rights of its citizens, or to otherwise have the federal antitrust laws enforced in its jurisdiction – the so-called *parens patriae* power. State Attorneys General expressly have standing to bring claims on behalf of their state's citizens, 15 U.S.C. § 15c, but nothing in the federal statutory scheme gives any other sub-state level actor the ability to do so. *Oakland Cnty. by Kuhn v City of Detroit*, 628 F. Supp. 610, 613 (E.D. Mich. 1986) ("Congress has established that only a state, acting through its attorney general, may sue as *parens patriae* of its citizens."). Rather, the City must sufficiently plead its *own* harm that allegedly results from the Ferry Companies' actions.

Although the requirements of Article III standing are often relatively easy to satisfy, here, however, the paucity and vagueness of the City's sole allegation as to its own damages – one lone paragraph – deprives this Court of standing over Counts I, II, III, and IV. Because the

Counterclaim fails to adequately allege the City's direct harm resulting from the Ferry Companies' actions, no sufficient "injury in fact" has been pleaded that would be redressable through a decision in its favor on these theories. *Merck v. Walmart, Inc.*, 114 F.4th 762, 772-73 (6th Cir. 2024). In the only paragraph of the Counterclaim describing the extent to which it has been affected by the Ferry Companies' alleged actions, the City asserts that it "is" injured by the Ferry Companies because it is a "customer" of the Ferry Companies, and "the [F]erry [C]ompanies' supra-competitive rates and charges for ferry service, including but not limited to parking, increase the City's costs[.]" Countercl. ¶ 59. But the Counterclaim does not describe what these additional costs have been, or even whether the City itself has had to pay any part of them or if it simply expects to in the future. The City's assertion of having to pay increased "costs" is thus entirely summary and unspecific. Furthermore, the City cannot base an allegation of injury on the increased rates the Ferry Companies have sought to implement, as the Counterclaim admits they have yet been implemented (*id.* ¶ 56), and, even if fees were increased later, it is complete guesswork at this point as to what new rates or costs would be, the extent to which they would apply to the City, and what the City would have to pay as a result. Finally, to the extent the City's alleged damages are based on the hypothetical and speculative "suppress[ion] of the City's revenues by discouraging travel to Mackinac Island," (*id.* ¶ 59), the Counterclaim fails to describe whatsoever how such an alleged diminution of revenue actually has injured the City (e.g., lost tax revenue or license fees), or would injure, the City itself if the Ferry Companies implemented them.

As a result, the City has not adequately alleged Article III standing, and the Court should dismiss Counts I, II, III, and IV.[11]

B. The City Fails to Plead an Antitrust Injury.

Although lack of Article III standing calls for dismissal under Rule 12(b)(1), lack of statutory standing – here, "antirust standing" – warrants dismissal under Rule 12(b)(6). *NicSand, Inc.*, 507 F.3d at 459. Establishing antitrust standing is "more onerous" than Article III standing. *Static Control Components, Inc. v. Lexmark Int'l, Inc.*, 697 F.3d 387, 402 (6th Cir. 2012). An antitrust claimant "must do more than make allegations of consequential harm resulting from a violation of the antitrust laws." *NicSand, Inc.*, 507 F.3d at 449 (quotation omitted). The foremost requirement of antitrust standing is that a claimant need allege a cognizable "antitrust injury." Even so, antitrust injury is a "necessary, but not always sufficient, condition of antitrust standing." *Id.* at 450 (quotations and citations omitted).

To sufficiently plead an antitrust injury, a claimant must plausibly allege an "injury of the type that the antitrust laws were intended to prevent and that flows from that which makes defendants' acts unlawful." *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 489 (1977). Specifically, a plaintiff "must allege, not only an injury to himself, but an injury to the market as well." *Bassett v. Nat'l Collegiate Athletic Ass'n*, 528 F.3d 426, 434 (6th Cir. 2008) (quoting *Banks v. Nat'l Collegiate Athletic Ass'n*, 977 F.2d 1081, 1088 (7th Cir. 1992)). As this Court has explained, "the Sherman Act is focused on conduct '**which unfairly tends to destroy competition itself.**'" *Rivers Bend RV Resort & Campground, LLC v. Spectrum Mid-Am., LLC*,

[11] To the extent the City bases its allegation of harm on a diminution of revenue because of the Ferry Companies' alleged acts, that allegation would also fail to satisfy the prong of the test that requires the City's injury be "fairly traceable to the challenged conduct of the defendant." A diminution in City revenue could result from many internal and external factors; it would be rank speculation to attempt to tie any development like that to a small increase in ferry rates or other charges.

2024 WL 4008707, at *5 (W.D. Mich. Aug. 15, 2024), *report and recommendation adopted*, No. 2:23-CV-107, 2024 WL 4007184 (W.D. Mich. Aug. 30, 2024) (quoting *Spectrum Sports, Inc.*, *v. McQuillan,* 506 U.S. 447, 458 (1993)) (emphasis added).

In practice, in order to recover damages under the Sherman Act, the claimant must establish an antitrust injury such that (1) the alleged violation tends to reduce competition in some market, and (2) the claimant's injury would result from a decrease in that competition, rather than from some other consequence of the defendant's actions. *Conwood Co., LP v. United States Tobacco Co.,* 290 F.3d 768, 788 (6th Cir. 2002). The Sixth Circuit "has been reasonably aggressive in using the antitrust injury doctrine to bar recovery[.]" *Ky. Speedway, LLC v. Nat'l Ass'n of Stock Car Auto Racing, Inc.,* 588 F.3d 908, 920 (6th Cir. 2010) (quotations and citations omitted). Under this framework, naked assertions of antitrust injury, speculative injuries and conclusory allegations fail as a matter of law.[12] *NicSand, Inc. v. 3M Co.*, 507 F.3d 442, 451 (6th Cir. 2007) (quotations and citations omitted); *Hurley v. Nat'l Basketball Players Ass'n*, 2021 WL 6065783, at *7 (N.D. Ohio Dec. 22, 2021), *aff'd*, No. 22-3038, 2022 WL 17998878 (6th Cir. Dec. 30, 2022).

In construing a pleading for antitrust standing, courts analyze the following factors:

> (1) the causal connection between the antitrust violation and harm to the plaintiff and whether that harm was intended to be caused; (2) the nature of the plaintiff's alleged injury including the status of the plaintiff as consumer or competitor in the relevant market; (3) the directness or indirectness of the injury, and the related inquiry of whether the damages are speculative; (4) the potential for duplicative recovery or complex apportionment of damages; and (5) the existence of more direct victims of the alleged antitrust violation.

[12] Indeed, the Counterclaim does not even *summarily* allege "antitrust standing" or an "antitrust injury" as antitrust complaints typically do.

Indeck Energy Servs., Inc. v. Consumers Energy Co., 250 F.3d 972, 976 (6th Cir. 2000) (quoting *Southaven Land Co., Inc. v. Malone & Hyde, Inc.,* 715 F.2d 1079, 1085 (6th Cir.1983).

The foregoing factors weigh heavily against a finding of antitrust standing on the part of the City for its antitrust causes of action. As discussed above, as to its own damages, the City offers only the most exceedingly sparse allegation harm to it to date resulting from Shepler's and MIFC's actions. *See* Countercl. ¶¶ 8-9, 17, 42, 59. Allegations of potential future injury if the Ferry Companies implement increased fares offer only rank speculation. Moreover, the City is not a competitor or would-be competitor of the Ferry Companies, which might imbue it with an increased interest in seeing the antitrust laws vigorously enforced. As with constitutional standing, the City also has no antitrust standing to sue on behalf of its residents and visitors for what amounts to prospective relief that would effectively enjoin commerce in three different municipalities.

But most significantly, the City has not pleaded any harm to competition that has resulted from the Ferry Companies' alleged actions. Again, what the Counterclaim does *not* allege is significant. As discussed below at Point II.C., *infra*, it does not violate Section 1 of the Sherman Act for the Ferry Companies to simply possess a dominant market share, or to raise fares or implement charges for ancillary services. What an entity with dominant market power cannot do is to use that market power to exclude competition or potential competition against it. But the Counterclaim does not plead that Hoffmann Marine somehow acted anticompetitively in acquiring both Shepler's and MIFC. It does not plead that the Ferry Companies have used any anticompetitive tactics to exclude competitors from the market, such as by locking up customers or essential suppliers with preferential terms or exclusive dealing arrangements. Indeed, a particularly damning shortcoming of the Counterclaim is its failure to allege the existence of a

competitor "willing and able to enter the relevant market, but for the exclusionary conduct" of the Ferry Companies, an allegation essential to the assertion of antitrust standing. *Sunbeam Television Corp. v. Nielsen Media Research, Inc.*, 711 F.3d 1264, 1273 (11th Cir. 2013). Again, the Counterclaim's silence on this point is deafening.

Therefore, the City's antitrust causes of action fail because it has not sufficiently alleged that it was injured by Counterclaim Defendants' conduct, or that the Ferry Companies' conduct in any way actually limited competition, the true focus of the antitrust laws.

Where, as here, "a complaint by its terms fails to establish" antitrust standing, a Court must dismiss it as a matter of law. *NicSand*, 507 F.3d at 450. For all these reasons, Counts I, II, III should be dismissed.

II. COUNTS I, II, AND III FAIL TO ADEQUATELY ALLEGE SIGNIFICANT ELEMENTS OF THE ANTITRUST CLAIMS THEY RAISE AND SHOULD BE DISMISSED.

Beyond the City's failure to establish subject matter jurisdiction and antitrust standing, Counts I, II, and III should be dismissed because the City has not pleaded adequate facts that would support the antitrust theories expressed therein, and has insufficiently pleaded other important facts necessary to assert antitrust claims.

A. Elements of Sherman Act 1 and Sherman 2 Claims.

Before examining the shortcomings in the City's pleading of its antitrust claims, it is important to understand the allegations required to state claims under Sections 1 and 2 of the Sherman Act. Count I (and Count III, to the extent it mirrors Count III) complains of "monopolization" by the Ferry Companies in violation of Sections 1 and 2 of the Sherman Act. 15 U.S.C. §§ 1, 2. A claim under § 1 of the Sherman Act ("Sherman Section 1") requires some sort of coordinated activity between *two independent parties*. *Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752, 771 (1984). To sustain a Section 1 claim, a claimant

must sufficiently allege: (1) the existence of a contract, combination, or conspiracy, *i.e.* some agreement, (2) that unreasonably restrains interstate trade or commerce, (3) in a relevant antitrust market. *See Hobart-Mayfield, Inc. v. Nat'l Operating Comm. on Standards for Athletic Equip.*, 48 F.4th 656, 663 (6th Cir. 2022).

By contrast, a claim for monopolization under § 2 of the Sherman Act ("Sherman Section 2"), which is used to challenge conduct by a single entity, requires proof of: (i) dominant market power, (ii) in a relevant antitrust market, and (iii) that the defendant willfully acquired, maintained, or abused through anti-competitive or exclusionary means. *Static Control Components, Inc*, 697 F.3d at 402; *Gene Cope & Assocs., Inc. v. Aura Promotions, Ltd.*, 692 F. Supp. 724, 727 (E.D. Mich. 1988) (same). Because Sherman Section 2 prohibits only anticompetitive single-firm conduct "among the several States," an effect on interstate commerce must also be demonstrated. *See* 15 U.S.C. § 2 (it is illegal to "monopolize, or attempt to monopolize, ... any part of the trade or commerce among the several States.")

Count II (and Count III, to the extent it mirrors Count II) complains only of a violation of Sherman Section 1.

B. Counts I and II Should be Dismissed Because the City Fails to Plead that the Ferry Companies' Conduct Affects Interstate Commerce.

As noted above, in order to adequately plead a claim under either Sherman Section 1 or 2, a claimant must allege, among other factors, that the defendant's conduct affects interstate commerce. The Counterclaim, however, sorely lacks any such allegation. Strikingly, it does not even *summarily* allege that jurisdictional trigger, as antitrust complaints often do. The Counterclaim does not mention "interstate commerce" at all. But it also fails to plead any specific facts that could even lead to that conclusion, such as that tourists visit Mackinac Island from around the United States.

Other courts have addressed allegations of antitrust violations involving solely local activities – such as the intra-state ferry service and parking here – and have not hesitated to dismiss a complaint for failure to adequately allege an effect on interstate commerce. *Powell v. Shelton*, 386 F. Supp. 3d 842, 849 (W.D. Ky. 2019) (dismissing Section 1 claim arising from alleged bid-rigging in local real estate auction in local real estate auction; complaint contained "no allegations relating to the interstate features" of defendant's business, and was "devoid of allegations relating the subject transaction to interstate commerce"); 54 Am. Jur. 2d Monopolies and Restraints of Trade § 316 (2025) ("[a]n antitrust complaint must set forth facts in support of the plaintiff's claim, because a Federal District Court cannot assume jurisdiction of a claim on the basis of entirely conclusory allegations").

For this reason, Count I and Count II, and those parts of Count V that mirror Count I and Count II, should be dismissed.[13]

C. Counts I and III Should be Dismissed Because the City Has Not Sufficiently Pleaded that the Ferry Companies Have Excluded Competition.

The Counterclaim attempts to hang its hat on the simple fact that the Ferry Companies are under common ownership and the only providers of ferry services to and from Mackinac Island, and/or that they control all or substantially all of the parking "necessary" for ferry passengers' use. But **the simple fact of possessing dominant market power in a relevant market, even if the antitrust defendant increases prices, does not violate Section 2**. *Pacific Bell Telephone Co. v. Linkline Communications, Inc.,* 555 U.S. 438, 447-48 (2009). A plaintiff has no Section 2 claim where a defendant did not *obtain* dominant market power unlawfully or deploy its monopoly power to frustrate current or potential competition against it in order to

[13] The Ferry Companies do not seek dismissal of Count III (the Michigan Antitrust Act cause of action) on this basis, because the City has likely met its burden of pleading that commerce *within Michigan* has been satisfied).

preserve its market dominance. *See Static Control Components, Inc.*, 697 F.3d at 402 (affirming dismissal of § 2 monopolization claims); *Gene Cope & Assocs.*, 692 F. Supp. at 727, 729 ("possession of monopoly power in itself is not illegal;" "[i]f unreasonable practices are not utilized, [a] monopoly is not violative of § 2"). At its core, "[s]imply possessing monopoly power *and* charging monopoly prices does not violate" Section 2.[14] *Pacific Bell Telephone Co.*, 555 U.S. at 447-48.

Here, the Counterclaim does not anywhere even *attempt* to allege a sufficient Section 2 claim. The simple fact that Shepler's and MIFC might have dominant market power in the market for transportation to and from Mackinac Island, even if it were to use that dominance to increase prices or charge fees that some might find unreasonably excessive, does not support a Section 2 claim. It is simply not illegal; an entity with dominant market power is free to price to whatever level the market will bear. What would be required to adequately plead a Sherman 2 claim – and what the Counterclaim here does *not* plead – would be concrete, nonspeculative allegations that the Ferry Companies somehow used their market power to exclude or limit competition against them, for example, by offering important customers such attractive terms that they would be unlikely to switch to a potential competitor, by entering into exclusive agreements with suppliers of an essential input that restrict those suppliers from dealing with potential rivals, by refusing to discuss with a potential rival access to ferry docks that the Ferry Companies allegedly own or control, or by purchasing all land in and around the docks so that no

[14] The only federal or state antitrust statutes that provide a potential remedy for the simple fact of acquiring substantial market power in an appropriate antitrust market are Section 7 of the Clayton Act, 15 U.S.C. § 18, which prohibits acquisitions that "may substantially lessen competition," and Section 5 of the FTC Act, 15 U.S.C. § 45, which is enforceable only by the Federal Trade Commission. Notably, however, the City has not sued under Section 7 of the Clayton Act and instead relies on theories for which no cause of action exists under these circumstances.

competitor could develop parking lots. Further, as discussed at Point § I. B., *supra*, in the context of antitrust standing, the City has also not identified any willing and able competitor that the Ferry Companies' alleged conduct prevented from entering the market. At best, the Counterclaim only alleges that the Ferry Companies increased or will increase prices, which simply is not the type of conduct that Section 2 contemplates. Nor does the Counterclaim ever state that Hoffmann Marine used illegal or anticompetitive tactics to acquire Shepler's and MIFC in the first instance. There are simply no allegations anywhere in the Counterclaim that supports the type of "exclusionary conduct" necessary for a Sherman 2 claim.

For these reasons, Counts I and III should be dismissed.

D. Count II Should Be Dismissed Because the Counterclaim Alleges the Ferry Companies are Under Common Ownership and Control.

Count II poses an alternative to the monopolization theory advanced in Count I. Count II (and thus Count III to the extent it mirrors Count II) alleges that if Shepler's and MIFC are *independent* entities, the coordination between them violates Section 1 of the Sherman Act.

The Court need look no farther than the City's allegations in the Counterclaim and the *Copperweld* doctrine to make quick work of this argument. As discussed above, the Counterclaim repeatedly alleges that Shepler's and MIFC are both commonly owned and controlled by the same corporate parent, Hoffmann Marine. *See* Countercl. ¶¶ 21-33. Nowhere does it allege that the Ferry Companies are, in fact, independent competitors of each other – just an allegation that the Ferry Companies have held themselves out as such. *Id.* ¶ 40. Just as a parent corporation and a subsidiary cannot be found to have formed a "contract, combination, or conspiracy" in violation of Section 1, so, too, commonly owned and controlled sibling companies cannot, as a matter of law, be found to have violated Section 1 of the Sherman Act. *Copperweld,* 467 U.S. at 771 (a conspiracy sufficient to meet the first element of a Section 1

claim cannot exist solely between a parent and its wholly owned subsidiary because they have "a complete unity of interest"). The *Copperweld* doctrine has subsequently been extended to coordination between subsidiary companies in the same corporate family tree. *Directory Sales Mgmt. Corp. v. Ohio Bell Tel. Co.*, 833 F.2d 606, 611 (6th Cir. 1987) (*Copperweld* barred a plaintiff from alleging a "contract, combination or conspiracy" among subsidiaries with the same parent company).

If the City's allegations are correct that Hoffmann Marine, Shepler's and MIFC are a "single economic unit serving a common interest" – and the City has not alleged any facts sufficient to support a contrary conclusion – they are incapable of forming the requisite contract, combination, or conspiracy as a matter of law to violate Section 1. *Guzowski v. Hartman*, 969 F.2d 211, 218 (6th Cir. 1992) (affirming order dismissing Section 1 claim under the *Copperweld* doctrine).

For this reason, Count II, and any part of Count III that is based on this same theory, should be dismissed.

E. Counts I, II, and III Should be Dismissed Because the City Has Inadequately and Contradictorily Pleaded a Relevant Service Market.

The City's antitrust claims also fail because the Counterclaim fails to adequately allege the "market" the Ferry Companies are accused of monopolizing, or, for Count II (which alleges a violation only of Section 1 of the Sherman Act), the market in which the Ferry Companies are accused of coordinating conduct.[15]

Definition of the relevant antitrust market is the gating element for all Sherman Act claims. *Worldwide Basketball & Sport Tours, Inc. v. NCAA*, 388 F.3d 955, 962 (6th Cir. 2004) ("Failure to identify a relevant market is a proper ground for dismissing

[15] *See* Point § II.D., *supra*, for more discussion concerning Count II.

a Sherman Act claim."). The relevant market is tethered to the purported monopoly or coordinated conduct; without a defined market, "there is no way to measure [the defendant's] ability to lessen or destroy competition." *Spectrum Sports Inc. v. McQuillan,* 506 U.S. 447, 455 (1993). Plaintiffs must "identity the relevant product and geographic markets so the district court can assess what the area of competition is, and whether the alleged unlawful acts have anticompetitive effects in that market." *Total Benefits Plan. Agency, Inc. v. Anthem Blue Cross & Blue Shield*, 552 F.3d 430, 437 (6th Cir. 2008) (affirming dismissal of Sherman Act claim for failure to allege the relevant market) (internal quotations and citations omitted). In general, the relevant market includes services that are "reasonably interchangeable with, as well as identical to, defendant's" services. *American Council of Certified Podiatric Physicians & Surgeons v. American Bd. of Podiatric Surgery, Inc.,* 185 F.3d 606, 622 (6th Cir.1999); *see also White and White, Inc. v. Am. Hosp. Supply Corp*., 723 F.2d 495, 500 (6th Cir. 1983) (the "reasonable interchangeability" standard looks to "whether the substitute products or services can perform the same function, and/or [] consumer response (cross-elasticity); that is, consumer sensitivity to price levels at which they elect substitutes for the defendant's product or service").

The contours and competitive dynamics of the relevant market must be alleged with "some specificity," not merely painted with conclusory statements. *ComSpec Int'l, Inc.*, 2021 WL 4169726, at *5. Courts routinely dismiss Sherman Act claims "on the basis of an insufficiently pled or totally unsupportable proposed market." *Monument Builders of N. Am. v. Mich. Cemetery Ass'n* ("*Mich. Div. II*"), 524 F.3d 726, 733 (6th Cir. 2008); *see also Smartrend Mfg. Grp. (Smg), Inc. v. Opti-Luxx, Inc.*, No. 1:21-CV-1009, 2023 WL 6304912, at *30 (W.D. Mich. Sept. 28, 2023) (Jarbou, C.J.) (dismissing a complaint consisting of "threadbare recitals"

which provided "no clues as to the geographic scope of the alleged market, the types of products on which the parties compete, or whether the parties are the only competitors in the market[.]")

Here, the City appears to allege that Counterclaim Defendants simultaneously hold monopoly power over two ill-defined and otherwise improper antitrust markets. Countercl. ¶ 69.

First, if the relevant service market constitutes "ferry service to and from Mackinac Island," as the City sometimes pleads, the Counterclaim contradicts itself by simultaneously admitting that travel to and from Mackinac Island is possible by aircraft and private boat, while still asserting that the Ferry Companies are the only service providers in the market. Countercl. ¶ 43. To the extent the City intends to exclude those means of transportation as available substitutes for ferry service, it fails to describe important details that would inform their status as substitutes, such as (but not limited to) the number of passengers who travel or could travel to and from Mackinac Island by these means, and the cost of these forms of transit compared to the cost of traveling by ferry. Without those details, the Ferry Companies, and the Court, cannot assess the extent to which competition from these other modes exists. The City's attempt to exclude these alternatives might be correct, or it might be incorrect – it simply cannot be determined without more detail than the Counterclaim now offers. Such detail must be pleaded now, not developed later in discovery. *United Wholesale Mortg., LLC v. Am.'s Moneyline, Inc.*, No. 22-10228, 2025 WL 502743, at *6 (E.D. Mich. Feb. 14, 2025) ("a rule that courts should not grant dismissal for failure to define the relevant market, or should defer the issue until after discovery, would contravene a plaintiff's basic obligation to plead facts plausibly supporting each element of the claims alleged").

Second, to the extent the City argues that the relevant service market is parking in Mackinaw City or St. Ignace over which the Ferry Companies allegedly exercise complete

control, and which is somehow "necessary" to transit on the Ferry Companies' ferries, that assertion is threadbare and belies common sense. Countercl. ¶ 65. The City contends that "parking in the lots owned by Shepler's and MIFC is necessary to access the ferries," but also admits that there is street parking in both Mackinaw City and St. Ignace, and that "it is conceivable that a competitor could develop additional remote parking lots and bus customers to the ferries," as the Ferry Companies themselves do. *Id.* ¶¶ 46, 47, 55. But again, the Counterclaim does nothing to define the significance of these potential alternatives to parking in the Ferry Companies' parking lots, the number of spaces that could be available, and the prices customers would have to pay. Also fundamentally, the Complaint never even mentions the extent to which intended ferry passengers could avail themselves of other means of transportation in Mackinaw City and St. Ignace, such as the obvious possibilities of walking to and from the docks, taking a taxi or rideshare car, getting dropped off or picked up at the docks by a family member, bicycle, or even other means. These are just some of the alternatives – and thus potential substitutes – to utilizing the Ferry Companies' parking lots. But without more developed allegations concerning these matters, the Ferry Companies are left with no meaningful description of possible competition.[16] Counts I, II, and III should be dismissed on this basis.

F. Count IV Should be Dismissed Because the Ferry Companies are Acting in Accord with the Franchise Agreement, and the City Has Not Sufficiently Pleaded the Elements of Breach of Contract.

Count IV complains that Shepler's and MIFC have breached Article 9 of the Franchise Agreement by refusing to cooperate with the City in its regulation of rates for ferry transportation to and from Mackinac Island, "including rates for parking in the lots owned by the ferry companies that are necessary to access the ferries, and all other fees and charges imposed

[16] The fact that alleged monopolization of parking lots occurs wholly outside of the City's geographic ability to regulate is also significant.

by [the Ferry Companies] in connection with transportation by ferry," because the City has the right to regulate as "competition has ceased between the ferry companies[.]" Countercl. ¶ 76. A reading of the unambiguous terms of the Franchise Agreement, however, plainly demonstrates that the City is attempting to insert *new* language into the Franchise Agreement that simply does not exist. Shepler's and MIFC have not breached the Franchise Agreement whatsoever.

The language of the Franchise Agreement is unambiguous and must be enforced according to its plain terms. *Rory v. Cont'l Ins. Co.,* 473 Mich. 457, 703 N.W.2d 23, 28 (Mich. 2005). Per Article 3, the Ferry Companies are required only to "file [their] schedule[s] of services and rates for the next season with the City Clerk" no later than November 15 of each year. Franchise Agmt, Art. 3. Nothing in the Franchise Agreement gives the City the right to approve or reject the files rates. The only exception to the Ferry Companies' ability to determine their rates is Section 9, which allows the City "the right to assert its jurisdiction over schedules and fares to the extent permitted by present law" if "no competition is found to exist in ferry boat service[.]" *Id.* § 9.

But the Franchise Agreement does not speak to the circumstances under which "no competition is found to exist," or by what means that is to be determined. *See id.* The City apparently claims the unilateral right to assert such lack of competition, but that power is nowhere to be found in the Franchise Agreement. To the contrary, if one looks to antitrust law to determine circumstances in which "no competition" exists, factors such as the availability of substitute products or services (here, for example, airplane and private boat), and the possibility of new entrants entering the market relatively easily, must be considered, as discussed at Point § I. B., *supra*.

Additionally, the Franchise Agreement contains absolutely no language that gives the City the right to regulate fees charged for parking or for ancillary services, such as priority boarding or luggage fees. Section 3 of the Franchise Agreement only requires the Ferry Companies to file their "schedule of services" for ferry service and rates; Section 9 of the Franchise Agreement allows the City to regulate only "schedules and fares" if "no competition" is found to exist. *Id.* §§ 3, 9. The Ferry Companies cannot be held to have breached the Franchise Agreement by setting prices for these ancillary services when the Franchise Agreement does not mention any rights or duties related thereto whatsoever.[17]

The fact that the City apparently thought it necessary to enact the new 2025 Ordinance to regulate the Ferry Companies' conduct about which it complains appears to confirm that the Ferry Companies' reading of the Franchise Agreement is correct, and left the City with no alternatives when it became unhappy with the Ferry Companies' intended rate increases.

Because of the unambiguous language of the Franchise Agreement, Count IV fails to state a claim, and should be dismissed.

Even if one disagrees that the Franchise Agreement is that clear, Count IV is inadequately pleaded. To sufficiently plead a breach of contract claim, the claimant must show (i) the existence of a contract, (ii) that the defendant breached the terms of the contract, and (iii) damages. *Hendricks v. DSW Shoe Warehouse, Inc.*, 444 F. Supp. 2d 775, 780 (W.D. Mich. 2006). "The party asserting a breach of contract has the burden of proving its damages with

[17] Indeed, although the City claims that "parking in the lots owned by the ferry companies [is] necessary to access the ferries," common sense demonstrates this is simply not true – passengers can travel to the docks by walking, by bicycle, by being dropped off by private car, and a variety of other methods. The Counterclaim does not allege anywhere that passengers on the ferries are *required* to purchase parking in Shepler's and MIFC's lots. Moreover, if regulation of parking were so essential to ferry service, one would expect the City to have attempted to address it in the Franchise Agreement, which it did not do.

reasonable certainty and may recover only those damages that are the direct, natural, and proximate result of the breach.*" Alan Custom Homes, Inc. v. Krol,* 667 N.W.2d 379, 383 (Mich. Ct. App. 2003). Dismissal of a contract claim is warranted where damages are "'dependent upon the chances of business *or other contingencies.*'' *Hendricks*, 444 F. Supp. 2d at 780 (quoting *McEwen v. McKinnon,* 11 N.W. 828, 829 (Mich. 1882)). To that end, contract damages are limited to those which "arise naturally from the breach." *Kewin v. Massachusetts Mutual Life Ins. Co.,* 409 Mich. 401, 295 N.W.2d 50, 53 (Mich. 1980).

As discussed above at Point §§ I.A.B., *supra*, the City has not sufficiently pleaded any already-accrued, actual harm or injury to itself for any prior breach of the Franchise Agreement, and has offered only a conclusory allegation that the Ferry Companies' actions "increase the City's costs" without explaining how or why, and whether those increased costs have already been suffered, or will only be suffered in the future. The City also only advances speculation that, due to the Ferry Companies' alleged breach of the Franchise Agreement (to date, or going forward), the City will suffer some sort of undefined, derivative losses tied to a decrease in tourism. Allegations as paltry and unspecific as these do not fulfill the City's pleading obligations.

For all these reasons, Count IV should be dismissed.

III. BECAUSE THE CITY'S SUBSTANTIVE CLAIMS FAIL, COUNT V SHOULD BE DISMISSED AS WELL.

In Count V, and in the following concluding paragraph that details the points on which the City asks the Court to enter a declaratory judgment, the City simply asks that the Court affirm its rights, and deny the Ferry Companies' rights, all of which are related to the substance of each of the City's causes of action described in Counts I through IV. Because the Court should dismiss all of Counts I through IV, the redundant Count V should also be dismissed, or at

least dismissed because nothing remains to support the Court's jurisdiction over Count V by itself.

Under 28 U.S.C. § 2201, the Court may declare the rights and other legal relations of interested parties if a live case or controversy to adjudicate exists. Where the underlying substantive claims fail, dismissal of a request for declaratory relief is appropriate. *See Int'l Ass'n of Machinists & Aerospace Workers v. Tenn. Valley Auth.*, 108 F.3d 658, 668 (6th Cir. 1997) ("A request for declaratory relief is barred to the same extent that the claim[s] for substantive relief on which it is based would be barred"); *Ebu v. U.S. Citizenship & Immigr. Servs.*, 134 F.4th 895, 903 (6th Cir. 2025) ([w]ithout any claims left providing [a claimant with] possible relief," its "declaratory judgment claim must also be dismissed").

Accordingly, because Counts I through IV should be dismissed, so, too, should the Court dismiss Count V as well.

CONCLUSION

To summarize, each and every one of the causes of action that the City asserts in the Counterclaim for the following reasons:

Count I: Lack of Article III standing; lack of antitrust standing; failure to plead an effect on intestate commerce; failure to allege anticompetitive conduct; failure to adequately plead a service market.

Count II: Lack of Article III standing; lack of antitrust standing; failure to plead an effect on interstate commerce; alleged common ownership precludes a finding of collusive conduct; failure to adequately plead a service market.

Count III: Lack of Article III standing; lack of antitrust standing; alleged common ownership precludes a finding of collusive conduct; failure to adequately plead a service market.

Count IV: Lack of Article III standing; no breach of contract; failure to adequately elements of a breach of contract.

Count V: Redundant of each of Counts I, II, III, and IV.

For the foregoing reasons, Counterclaim Defendants respectfully request that the Court

dismiss the Counterclaims in their entirety, with prejudice, along with such other and further relief the Court deems just and proper.

Dated: May 19, 2025

Respectfully submitted,

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WORD COUNT CERTIFICATION

I hereby certify that the word count for this memorandum of law complies with the word limits of W.D. Mich. LCivR. 7.2(b)(i). According to the word-processing system used to prepare this brief in support, the total word count for all printed text exclusive of the caption, tables and signature block is 9,331 words.

Dated: May 19, 2025

By: */s/ Mark J. Magyar*

Mark J. Magyar

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing **BRIEF IN SUPPORT** was served on May 19, 2025, on all counsel of record via the ECF filing system.

/s/ Mark J. Magyar
Mark J. Magyar

EXHIBIT A

FERRY BOATS ORDINANCE
CITY OF MACKINAC ISLAND, MICHIGAN
Ord. No. 628 **Eff.** 5·28·2025

An ordinance amending the City of Mackinac Island Ordinance with respect to Ferry Boats.

THE CITY OF MACKINAC ISLAND ORDAINS:

DIVISION 1. GENERALLY

Section 1. Repealer.

The previous Ferry Boats Ordinance, No. 445, is hereby repealed and replaced by this ordinance.

Section 2. Definitions.

The following words, terms and phrases, when used in this ordinance, shall have the meanings ascribed to them in this section, except where the context clearly indicates a different meaning:

Annual Regulatory Fee means the fee assessed to Franchisee(s) for the cost of regulation of Ferry Boat Service rates, schedules, parking fees, and other services

City means the City of Mackinac Island.

Council means the City Council of the City of Mackinac Island, Michigan

Ferry Boat means any boat used to transport persons and/or property to and from the City as part of a Ferry Boat Service.

Ferry Boat Company means any person which owns, controls, operates or manages a Ferry Boat providing a Ferry Boat Service.

Ferry Boat Service means the transporting of persons and/or property for pay to or from the City by Ferry Boat.

Franchisee means any person who is granted a franchise under this article to provide Ferry Boat Service.

Invested capital means direct equity investment of a Ferry Boat Company in the Ferry Boat Services, including all services related to said Ferry Boat Services.

Person means a natural person, corporation, trust, partnership, incorporated or unincorporated association, or other legal entity.

Regular Ferry Boat Season means the period of time between April 21 of any calendar year and October 31 of the same calendar year.

Return on Equity means a return on equity for a Ferry Boat Company that is based on comparable authorized return on equity of other regulated service utility providers in Michigan.

Schedule of Services means the times and places of departure of Ferry Boats.

Service Class means any type or classification (or sub-classification) of service for which the Ferry Boat Company charges a separate Service Rate.

Service Rate means any rate, fare, fee and/or charge the Ferry Boat Company charges for any service related to the Ferry Boat Service, including but not limited to transportation of passenger, transportation of property, luggage, and parking fees.

To and from the City of Mackinac Island means to or from the City of Mackinac Island where the Ferry Boats depart, or are destined to points and places within the State of Michigan, respectively.

Winter Ferry Boat Season means the period of time between November 1 of any calendar year and April 20 of the following calendar year.

Section 3. Declaration of purpose.

The purpose of this ordinance is to:

(1) Provide fair regulation of ferry service to and from the City in the interest of the public;

(2) Promote and encourage adequate, economical and efficient ferry service to and from the City;

(3) Promote and encourage harmony between Ferry Boat Companies and their customers and passengers;

(4) Provide for the furnishing of Ferry Boat Service without unjust discrimination, undue preferences or advantages; and

(5) Provide for the payment of franchise fees to the City.

Section 4. Violations; penalties.

(a) Any person or Ferry Boat Company who violates any provision of this article shall be guilty of a civil infraction and liable for a fine not to exceed $500.00. Each day that the violation continues is a separate offense.

(b) In addition to pursuing a violation as a civil infraction, or as an alternative to pursuing a violation as a civil infraction, the Council may pursue revocation of the franchise of the violating person or Ferry Boat Company as provided in section 66-496.

(c) In addition to pursuing a violation as a civil infraction, or as an alternative to pursuing a violation as a civil infraction, the Council may file a civil suit seeking injunctive relief pursuant to section 66-464.

Section 5. Injunctive relief.

A violation of any provision of this article by any person or Ferry Boat Company is deemed to be a nuisance per se, causing irreparable harm, and shall constitute grounds for injunctive relief. In the event injunctive relief is sought and granted by the Council, the Franchisee against which the injunctive relief was granted shall reimburse the Council for all costs and reasonable attorney's fees.

Section 6. Majority concurrence required.

Any approval, denial or waiver by the Council pursuant to this article shall require the concurrence of a majority of all the elected aldermen.

Section 7. Schedule of services; additional services.

(a) A Ferry Boat Company granted a franchise must provide Ferry Boat Service during the entire Regular Ferry Boat Season and the Ferry Boat Company selected from time to time to provide Ferry Boat Service during the Winter Ferry Boat Season must in addition provide Ferry Boat Service during the entire Winter Ferry Boat Season, ice conditions and weather permitting.

(b) A Ferry Boat Company not selected to provide winter Ferry Boat Service shall not provide Ferry Boat Service during the Winter Ferry Boat Season without specific authorization from the Council.

(c) A Ferry Boat Company granted a franchise must operate in accordance with its Schedule of Services as is on file with the Council. Provided, however:

(1) A Ferry Boat Company is not obligated to provide service on any day when, in the good faith judgment of the Ferry Boat Company, it would be unsafe to provide service because of the weather.

(2) A Ferry Boat Company may change its filed Schedule of Services; however no changes shall occur until after the new Schedule is approved by the Council.

(d) Any request for increases to fares or rates, or decreases in the Schedule of Services shall require a minimum of thirty (30) days' notice of such changes prior to any such Council discussion or decision.

Section 8. Safety regulations; reporting requirement.

(a) The Ferry Boats operated in connection with a Ferry Boat Service shall meet all of the safety regulations of the United States Coast Guard. Any person operating a Ferry Boat in connection with a Ferry Boat Service must provide written evidence of satisfaction of all of the United States Coast Guard regulations prior to the commencement of any Ferry Boat Service.

(b) Any person operating a Ferry Boat in connection with a Ferry Boat Service must give notice to the Council, in writing, of any marine casualty (as defined in 46 CFR 4.03-1) or violation of the United States Coast Guard regulations of which such person has been informed by the United States Coast Guard, either in writing or by verbal communication.

(c) All docks used by the Franchisee shall be inspected for safety of all services in use every five (5) years or upon reasonable request from the Council, whichever event occurs first. Safety inspections shall be conducted by an independent engineer of the Council's choosing, and shall be paid for by the Franchisee.

Section 9. Rates: filing requirements.

(a) No Ferry Boat Company shall make any unjust or unreasonable discrimination in rates, charges, classifications, promotions, practices, regulations, facilities or services for or in connection with Ferry Boat Services, nor subject any person to any prejudice or disadvantage in any respect whatsoever; however, this shall not be deemed to prohibit the establishment of a graded scale of charges and classification of rates to which any customer or passenger coming within such classification shall be entitled.

DIVISION 2. FRANCHISE

Section 10. Franchise; required.

(a) The Council may grant a franchise to operate a Ferry Boat Service.

(b) No person shall operate a Ferry Boat Service nor shall any person provide a Ferry Boat Service in the City without such person having first obtained a franchise therefore from the Council.

(c) No person shall use, occupy or traverse any public place or public way in the City or any extensions thereof or additions thereto for the purpose of establishing or maintaining a Ferry Boat Service or any facility used in conjunction therewith, including, but not limited to, any building, pier, piling, bulkhead, reef, breakwater or other structure in, upon or over the waters in the City limits, without such person having first obtained a franchise therefore from the City.

Section 11. Application; contents; fees; acknowledgement.

(a) An application for a franchise to operate a Ferry Boat Service shall be made in writing to the Council and shall include such information as requested by the Council, including but not limited to:

(1) The applicant's name, and if other than a single individual, a certified copy of the partnership agreement, articles of association, or articles of incorporation, as the case may be.

(2) The applicant's principal place of business.

(3) A description, including passenger capacity, of each Ferry Boat which will be used to provide a Ferry Boat Service.

(b) The application shall be accompanied by an application fee established by ordinance.

(c) The application must be signed by an individual with authority to legally bind the Ferry Boat Company, and provide that the company, its officers, employees and agents, will operate according to the terms of this article.

Section 12. Issuance; display; transfer.

(a) Upon the granting of such franchise, the city clerk shall issue a certificate evidencing the existence of such franchise, which must be publicly displayed on all Ferry Boats providing a Ferry Boat Service.

(b) No franchise granted under this section may be sold, transferred or assigned unless such transaction is first approved by the Council after receipt of a written application therefore, containing the same information as to transferee as would be required of an original applicant.

Section 13. Nonexclusive; term; form.

Any franchise issued pursuant to this ordinance shall be a nonexclusive franchise for a term of years, not to exceed 20 years, as the Council may approve and shall be issued in the form to be determined by the Council. A grant of a franchise for a term of years shall create no right to a franchise after the expiration of the term of years.

Section 14. Fees; reporting; record.

(a) During the term of any franchise granted pursuant to this division for the operation of Ferry Boat Service, the person granted such franchise shall pay to the Council in consideration of the granting of such franchise a franchise fee determined as follows:

(1) During all calendar years beginning on or after January 1, 2013, a Franchisee shall pay a monthly fee equal to the base sum of $50,000.00 divided by the number of ferry boat franchises in effect for the month the franchise fee is owed; provided, however, on July 1 of each calendar year after 2012, the $50,000.00 base sum shall be adjusted by an increase equal to any percentage increase in the cost-of-living for the preceding one-year period as reflected in the Consumer Price Index, All Urban Consumers (CPI-U), U.S. City Average published by the Bureau of Labor Statistics of the U.S. Department of Labor. If that Consumer Price Index is subsequently discontinued, the Council shall select comparable statistics on the cost of living as they are computed and published by the federal government.

(b) The monthly franchise fee shall be due and payable on the last day of each month, provided, however, at the election of the Franchisee, the total franchise fee owed by that Franchisee for a calendar year, may be paid, without penalty, in six equal installments on the 15th day of June, July, August, September, October and November of that year. Such franchise fee shall be paid at the treasurer's office of the city during regular business hours. If the city treasurer's office is closed on the due date, then payment

may be made during regular business hours on the next following day on which the office is open for business.

(c) No acceptance of any payment shall be construed as a release or as an accord and satisfaction of any claim the city may have for further or additional sums payable as a franchise fee under this section or for the performance of any other obligation under this division.

Section 15. Revocation.

A franchise granted pursuant to this ordinance may be revoked by the Council in the event a Franchisee defaults in its performance of the terms and provisions of this article. Such revocation shall not be effective until the Franchisee has been advised of the violation and, except for a violation of subsections 66-466(a) or 66-466(b) of this article, given a period of ten calendar days to cure the default, and if the default is not cured within that ten-day period, provided with a hearing before the Council. The ten-day period to cure does not apply to violations of subsection 66-466(a) or subsection 66-466(b) of this article. The Council decision shall be based on a preponderance of the evidence.

Section 16. Rights of city; public utility.

Any franchise granted under this division is made subject to all applicable provisions of the charter of the city and ordinances thereof, and specifically subject to the rights and powers of the city and limitations upon the Ferry Boat Company holding such franchise as are set forth in the charter, including, but not limited to, chapter IX, section 1, chapter XV and chapter XVI thereof which are herein incorporated by reference, and such Ferry Boat Company shall abide by and be bound by such rights, powers and limitations, and any franchise granted under this division constitutes and shall be considered as a public utility franchise and a Ferry Boat Company shall be deemed to be a public utility.

Section 17. Recourse of Franchisee.

Any person granted a franchise pursuant to this division shall have no recourse whatsoever against the city, its officers, boards, commissions, agents or employees for any loss, cost, expense or damage arising out of any provision or requirement of this ordinance or the enforcement thereof.

Section 18. Value.

No franchise granted pursuant to this division shall be given any value by any court or other authority public or private, in any proceeding of any nature or character whatsoever, wherein or whereby the city shall be a party or affected therein or thereby.

DIVISION 3. REGULATION

Section 20. Regulation required.

(a) The Council shall have and exercise complete power to regulate all rates, fares, fees, charges, services, rules, conditions of service, Schedules of Service and all other matters pertaining to Ferry Boat Service provided by a Ferry Boat Company or Companies.

(b) The Council may establish a Ferry Boat Service Regulatory Committee (FRC) to review a Ferry Boat Company's proposed Service Rates, Schedule of Services, and all terms and conditions of service; and to provide the Council with a recommendation regarding those Service Rates, Schedule of Services, and terms and conditions. The FRC shall have the same authority as the Council to require a Ferry Boat Company to supply all documentation necessary to determine if the proposed Service Rates and Schedule of Services are fair and reasonable. The FRC shall be composed of three members appointed by the mayor and approved by the Council. A minimum of one member shall be a member of the Council.

Section 21. Cost of regulation.

(a) The Council shall determine the annual cost of regulation of Ferry Boat Companies and assess each Company an Annual Regulation Fee for the cost of regulation. Upon passage of this ordinance, the Council shall invoice the 2025 Annual Regulatory Fee of $150,000.00 to each Ferry Boat Company to cover the estimated 2025 cost of regulation of Ferry Boat Companies. A Ferry Boat Company shall be required to pay such invoice in quarterly payments, with the first payment due 30 days after the date of the invoice and all subsequent payments due the first business day of June, July, and August of each year. The annual cost of regulation shall include all fees paid for consultants, legal services, court costs, litigation costs, and other costs directly associated with regulation of Ferry Boat Companies.

(b) After 2025, the Council shall establish the Annual Regulatory Fee by the first Friday in February. The Annual Regulatory Fee shall be based on forecasted cost of regulation that year, the amount of regulatory costs incurred by the Council in the previous year, and the previous year's Annual Regulatory Fee. The Annual Regulatory Fee shall be calculated by subtracting any collected unused regulatory fees from the previous year from the projected annual regulatory costs. If the previous year's actual regulatory cost exceeded the previous year's Regulatory Fee collected, the cost in excess of the Regulatory Fee shall be added to the current years projected regulatory costs.

$$\textit{Annual Regultory Fee} = \textit{Projected Current Year Regulatory Cost} - (\textit{Previous Year Regulatory Fee} - \textit{Actual Regulatory Cost})$$

Section 22. Regulatory Procedure.

(a) In order to prepare for the review of a Ferry Boat Company's 2026 Service Rates, upon passage of this Ordinance, all Ferry Boat Companies shall provide any and all documentation needed for the Council to review Ferry Boat Company operations, cost to provide Ferry Boat Services, annual revenues, quantity of Service Classes provided, and any other documentation or information requested by the Council. Said documentation shall be prepared by and certified by a certified public accountant.

(b) A Ferry Boat Company shall submit in writing to the Council its proposed Service Rates and Schedule of Services for the following year, no later than September 1st of each year. A Ferry Boat Company has the obligation to demonstrate that the proposed Services Rates are just and reasonable for the services provided. A Ferry Boat Company shall include all documentation required to justify the proposed Service Rates and Schedule of Services, including but not limited to, the prior year's revenues

by Service Class, quantity of services provided by Service Class, number of vehicles assessed parking fees and associated revenue, cost to perform service, maintenance costs, capital investment, audited financials, fuel costs, overhead and administrative costs, proposed Return on Equity, debt cost, depreciation, taxes, and any other costs included in the Service Rates. In the event any subsidiary, or commonly owned company, provides services related to Ferry Boat Service, including but not limited to parking, employment, or shuttles, that company's documentation and information shall be provided to the Council in accordance to this Section 22. The Franchisee shall provide any additional requested documentation or other information to the Council or its designee within 10 business days of issuance of request.

(c) A Ferry Boat Company shall provide the Council requested documentation within ten (10) business days of issuance of the Council's written request.

(d) The Council has the right to require an independent audit of a Ferry Boat Company's financials if it is determined, in the Council's sole judgment, that the audited financials provided by a Ferry Boat Company are not adequate in the judgment of the Council.

(e) A Ferry Boat Company shall be entitled to a fair Return on Equity in the Ferry Boat Service. Return on Equity shall not include portions of capital financed through debt.

(f) The Council shall determine the Service Rates and Schedule of Services no later than November 30th of the year prior to the year the rates are scheduled to go into effect.

(g) A Ferry Boat Company has the right to request reconsideration by the Council of the Council's determination of the Service Rates and Schedule of Services. With any request for reconsideration, a Ferry Boat Company shall include documentation that the current approved Service Rates do not cover operating and maintenance costs, and do not provide a fair rate of return on capital investment. The Ferry Boat Company shall also propose different Service Rates.

(h) The Council shall provide final determination of the Service Rates and Schedule of Services no later than December 30th.

Section 23. Severability.

Should any section, clause, or provision of this ordinance be declared to be invalid by a court of record, the same shall not affect the validity of the ordinance as a whole or any part thereof, other than the part so declared invalid.

Section 24. Effective Date.

This ordinance shall become effective twenty (20) days after passage.

Margaret Doud

Margaret Doud, Mayor

Danielle Leach

Danielle Leach, Clerk

Adopted: 4·30·2025

Effective: 5·28·2025