UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MICHIGAN

KEWEENAW BAY INDIAN COMMUNITY, a federally-recognized Indian tribe, on its own behalf and as *parens patriae* for its members,

Plaintiff,

v.

ROBERT J. KLEINE, Treasurer of the State of Michigan; JAY RISING, former Treasurer of the State of Michigan; MICHAEL REYNOLDS, Administrator of the Collection Division of the Michigan Department of Treasury; WALTER A. FRATZKE, Native American Affairs Specialist of the Michigan Department of Treasury; and TERRI LYNN LAND, Secretary of State of Michigan,

Defendants.

Hon. Gordon J. Quist

Civil Action No. 2:05-CV-0224

MEMORANDUM IN SUPPORT OF PLAINTIFF'S MOTION FOR PARTIAL SUMMARY JUDGMENT AND REQUEST FOR ORAL ARGUMENT

INTRODUCTION

This action involves the State of Michigan's efforts to tax an Indian tribe and its members in violation of federal law. The State has illegally enforced the Michigan Sales Tax Act, Mich. Comp. Laws §§ 205.51-205.78 (the "Sales Tax Act") and the Michigan Use Tax Act, Mich. Comp. Laws §§ 205.91-205.111 (the "Use Tax Act," and collectively the "Acts") with respect to the purchase and use of tangible personal property and services by the Keweenaw Bay Indian Community (the "Community") and its members within its Reservation and trust lands. Accordingly, this Court should enter partial summary judgment in favor of the Community with respect to Count IX and Count XIII of the Second Amended Complaint, which claim that federal law prohibits the application of the Michigan sales tax and the Michigan use tax, respectively, to

the purchase, lease, rental, and use of tangible personal property and services by the Community and its members within its Reservation and trust lands.[1] The Community requests oral argument on this motion.

STATEMENT OF UNDISPUTED FACTS

A. The Keweenaw Bay Indian Community

The Community is a federally-recognized Indian tribal government organized and operating under a Constitution and Bylaws approved by the Secretary of the Interior on December 17, 1936, pursuant to the Indian Reorganization Act of 1934, 25 U.S.C. § 476. The Community is the successor in interest of the L'Anse and Ontonagon bands of Chippewa Indians. The Community exercises powers of self-governance and sovereign jurisdiction over the L'Anse Indian Reservation (the "Reservation"), which is located on both sides of the Keweenaw Bay of Lake Superior in Baraga County, Michigan, as well as over other lands held in trust for the Community by the United States outside the Reservation in the Upper Peninsula of Michigan (the "Trust Lands"). Affidavit of Susan J. LaFernier ("LaFernier Aff."), attached hereto as Attachment 1, ¶ 3. The Reservation and Trust Lands constitute "Indian country" within the meaning of 18 U.S.C. § 1151.[2] The Community has approximately 3,339 enrolled members,

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[1] If the Court grants the Community's motion, the Court will not need to reach the Community's claims in Counts X to XII or Counts XXII to XXV of the Second Amended Complaint.

[2] The definition of "Indian country" for federal law purposes is set forth in 18 U.S.C. § 1151, which defines the term to mean "(a) all land within the limits of any Indian reservation under the jurisdiction of the United States Government, notwithstanding the issuance of any patent, and, including rights-of-way running through the reservation, (b) all dependent Indian communities within the border of the United States whether within the original or subsequently acquired territory thereof, and whether within or without the limits of a state, and (c) all Indian allotments, the Indian titles to which have not been extinguished, including rights-of-way running through the same." Land held in trust for a tribe by the United States constitutes "Indian country" under this definition. Oklahoma Tax Comm'n v. Sac & Fox Nation, 508 U.S. 114, 124-25 (1993); Oklahoma Tax Comm'n v. Citizen Band Potawatomi Indian Tribe of Oklahoma, 498 U.S. 505, 511 (1991).

approximately 893 of whom live on the Reservation and Trust Lands. Affidavit of Jennifer S. Misegan ("Misegan Aff."), attached hereto as Attachment 2, ¶ 2.

The Community's governing body is its Tribal Council, consisting of 12 persons elected by the enrolled members, 6 each from the L'Anse and Baraga Districts on the east and west sides, respectively, of the Keweenaw Bay. The Tribal Council elects from its own members a President and other officers, who constitute the Executive Council. The current President is Susan LaFernier. The Tribal Council is vested with all of the sovereign legislative and executive powers of the Community. LaFernier Aff. ¶¶ 2, 4. The Community's Constitution mandates that the Tribal Council protect the health, security and general welfare of the Community and employ legal counsel for the protection and advancement of the rights of the Community and its members. Id. ¶ 5.

The Community and its members have purchased, leased, rented, and/or used and expect to continue to purchase, lease, rent, and/or use within the Community's Reservation and Trust Lands a wide variety of goods and services, including but not limited to motor vehicles, office furniture and equipment, household appliances and furnishings, clothing, gas, electricity, telephone and other telecommunications services, and food and beverages served at restaurants and other food and beverage establishments. LaFernier Aff. ¶¶ 6-8; Misegan Aff. ¶¶ 3-4.

B. Defendants

Defendant Robert J. Kleine is the Treasurer of the State of Michigan.[3] In this capacity, Defendant Kleine oversees the Michigan Department of Treasury (the "Department"), the State

[3] Since the filing of this action, Defendant Jay B. Rising has resigned as Treasurer of the State of Michigan, and Governor Granholm appointed Robert J. Kleine to replace him as Treasurer on April 6, 2006. <http://www.michigan.gov/gov/0,1607,7-168--140368--,00.html>. Rule 25(d)(1) of the Federal Rules of Civil Procedure provides under these circumstances that Mr. Kleine is automatically substituted as a Defendant by virtue of assuming the office of Treasurer. Defendant Rising remains in

agency that administers and enforces the Sales and Use Tax Acts. Answer ¶ 7. Defendant Michael Reynolds is the Administrator of the Collections Division of the Financial Services Bureau of the Department. Id. ¶ 8. Defendant Walter A. Fratzke functions as the Department's Native American affairs specialist. Defendant Fratzke is the Department official who oversees the administration of state laws involving Michigan taxes, including sales and use taxes, with respect to Michigan tribes and tribal members. Id. ¶ 9. Defendant Terri Lynn Land is the Secretary of State of the State of Michigan. In this capacity, Defendant Land oversees the Department of State, which manages and administers various programs and services, including motor vehicle registration, licensing, and the collection of certain taxes and fees. Id. ¶ 10.

C. The Michigan Sales Tax Act

The Sales Tax Act, Mich. Comp. Laws §§ 205.51-205.78, imposes a sales tax on retail sellers in specified transactions. More specifically, the Sales Tax Act imposes upon all persons engaged in the business of making sales at retail a tax equal to 6% of the gross proceeds from retail sales, leases, and rentals of tangible personal property in the State of Michigan. Mich. Comp. Laws § 205.52. "Tangible personal property" means "personal property . . . that is in any manner perceptible to the senses" and includes, among other things, electricity, water, gas, steam, and prewritten computer software. Mich. Comp. Laws § 205.51a(p).

The Sales Tax Act provides for a number of exemptions from sales tax. With respect to these exemptions, Mich. Comp. Laws § 205.62 provides that if the seller obtains identifying information and the basis for the exemption claim from the purchaser and maintains a record of exempt transactions, the seller will not be liable for the tax if a purchaser improperly claims an exemption, unless the seller has committed fraud or has solicited the purchaser to make an

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the case with respect to the claim in Count VI asserted against him in his individual capacity; this claim is not at issue in this motion.

improper exemption claim. The Department has issued Form 3372, entitled "Michigan Sales and Use Tax Certificate of Exemption," for use in transactions in which the purchaser claims an exemption from sales tax. A copy of the current version of Form 3372, which is posted on the Department's website at <http://www.Michigan.gov/documents/3372_2006_140031_7.pdf>, is attached hereto as Attachment 3.

D. The Michigan Use Tax Act

The Use Tax Act, Mich. Comp. Laws §§ 205.91-205.111, imposes a use tax on consumers of products and services sold at retail in specified circumstances. More specifically, the Use Tax Act imposes upon each person a tax for the privilege of using, storing or consuming tangible personal property and certain specified services in the state equal to 6% of the price of the property or services. Mich. Comp. Law § 205.93(1). The use tax does not apply to property upon which the sales tax has been paid. Mich. Comp. Laws § 205.94(1)(a). The use tax is imposed on, among other things, the use, storage, or consumption of motor vehicles in Michigan if purchased, leased, or rented out of state, the use of certain telephone and other telecommunications services, and the use of hotel lodging services. Mich. Comp. Laws §§ 205.93(2), 205.93a(1)(a) and (b), 205.93c. The Use Tax Act also presumes that tangible personal property purchased, leased, or rented outside of Michigan is subject to use tax if brought into Michigan within 90 days of the purchase date. Mich. Comp. Laws § 205.93(1)(a). Although the use tax is imposed on the consumer, every person engaged in the business of selling tangible personal property for storage, use or consumption in Michigan is required to collect the use tax from the consumer. Mich. Comp. Laws § 205.95(1).

Like the Sales Tax Act, the Use Tax Act provides for a number of exemptions from use tax. With respect to these exemptions, Mich. Comp. Laws § 205.104b provides that if the seller obtains identifying information and the basis for the exemption claim from the purchaser and

maintains a record of exempt transactions, the seller will not be liable for the tax if a purchaser improperly claims an exemption, unless the seller has committed fraud or has solicited the purchaser to make an improper exemption claim. The Department's Form 3372, "Michigan Sales and Use Tax Certificate of Exemption," attached hereto as Attachment 3, may be used in transactions in which the purchaser claims an exemption from use tax.

E. Defendants' Enforcement of the Sales and Use Tax Acts With Respect to the Community's and its Members' Purchases and Use of Tangible Personal Property and Services within the Reservation and Trust Lands

As described in more detail below, Defendants have enforced or instructed retailers to enforce the Sales and Use Tax Acts with respect to the purchase, lease, rental, use, consumption and storage of tangible personal property and services by the Community and its members within the Reservation and Trust Lands, contrary to federal law.

1. Enforcement of the Sales Tax Act

a) With Respect to Community Members

Defendants have required retailers to pay Michigan sales tax with respect to their sales, leases, and rentals of tangible personal property to Community members within the Reservation and Trust Lands in a wide variety of transactions, including but not limited to transactions involving motor vehicles, furniture, gas, and electricity. The retailers, in turn, have charged these sales taxes to the Community members as part of the purchase price in the transactions. LaFernier Aff. ¶¶ 9-14, Exs. A-E; Misegan Aff. ¶¶ 5-13, Exs. A, B, F; Affidavit of Debra Polzin ("Polzin Aff."), attached hereto as Attachment 4, ¶¶ 3-4; Affidavit of Paul Stark ("Stark Aff."), attached hereto as Attachment 5, ¶¶ 3-4, Ex. A; Affidavit of Cynthia A. Collins ("Collins Aff."), attached hereto as Attachment 6, ¶¶ 6-7.

For example, on May 9, 2005, Duane and Jennifer Misegan, enrolled members of the Community, purchased a 1993 Buick Park Avenue from ERA Chevrolet, Inc. Misegan Aff.

¶¶ 1, 3, 5. Although ERA Chevrolet is located in Norway, Michigan, outside the Reservation, Mr. and Mrs. Misegan purchased the vehicle within the Reservation. Id. ¶ 5.[4] Before the Misegans purchased the vehicle, Mrs. Misegan informed one or more representatives of ERA Chevrolet that her husband and she were entitled as members of a federally recognized Indian tribe to purchase the vehicle within the Reservation free of Michigan sales and use taxes. Id. ¶ 6. Debra Polzin, an employee of ERA Chevrolet, called the Michigan Secretary of State's office to inquire about the Secretary of State's procedures for transferring title to a motor vehicle to a member of an Indian tribe without payment of Michigan sales tax. Polzin Aff. ¶ 1. Two representatives of the Secretary of State's office informed Ms. Polzin during that call that Michigan sales tax must be paid when a vehicle is sold to a tribal member, unless the tribal member's tribe has a tax agreement with the State of Michigan and the tribe has issued the tribal member a Tribal Certificate of Exemption pursuant to the terms of the tax agreement. Id. ¶ 3, Ex. A. The Community does not have a tax agreement with the State of Michigan. Misegan Aff. ¶ 6. Accordingly, based on these instructions from the Secretary of State's Office, ERA Chevrolet paid Michigan sales tax of $197.40 in connection with the sale of the vehicle and passed along the amount of the tax to Mr. and Mrs. Misegan as part of the purchase price. Polzin Aff. ¶ 4; Misegan Aff. ¶ 7, Ex. A.

Similarly, on March 7, 2003, Mr. and Mrs. Misegan informed Ferrellgas, the Misegans' propane gas supplier, that they are members of the Community residing on the Reservation, that pursuant to federal law they are not required to pay sales or use tax with respect to propane gas delivered to the Reservation, and that they had deducted the sales tax from the amount shown as

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[4] An employee of ERA Chevrolet delivered the vehicle on behalf of ERA Chevrolet to the Misegans' home on the Reservation, where they paid for the vehicle and signed a document entitled "Application for Michigan Title & Registration, Statement of Vehicle Sale" (the "Application"). Misegan Aff. ¶ 5, Ex. A.

due on the invoice from Ferrellgas. Misegan Aff. ¶ 9, Ex. C. Kent Maki, the District Manager of Ferrellgas, replied to the Misegans on March 26, 2003, indicating that Ferrellgas had received the following instructions from one or more Department officials:

> Your Tribe is in negotiations with the State of Michigan right now to become tax exempt. However, it has not been settled as of yet. Until it is finalized the people in your Tribe will have to pay sales and use tax. Your name has been put on the list in our tax department and as soon as we receive word from the State of Michigan that this matter has been settled in court you will become tax exempt.

Misegan Aff. ¶ 10, Ex. D. In 2005, Mr. and Mrs. Misegan again informed Ferrellgas that they are not required to pay sales tax with respect to their purchase of propane gas within the Reservation and again deducted the sales tax from the amount shown as due on the invoice from Ferrellgas. They received a reply from Ferrellgas dated April 26, 2005, stating:

> As of this date we have not received a tax exempt ID number or documentation stating the matter between your tribe and the State of Michigan has been settled. It is a State law that we, as a business, have to charge sales tax to all residential and commercial accounts unless we have a tax exempt number on file. Until we have the necessary documentation, we will have to continue to charge sales tax.

Id. ¶ 11, Ex. E.

Mrs. Misegan also recently contacted Baraga Telephone Company to inquire why she has been charged Michigan sales and use taxes on her purchase of telephone services within the Reservation and spoke with a representative of Baraga Telephone Company named Cindy Collins. Ms. Collins informed Mrs. Misegan that Defendant Walter Fratzke had instructed her that tribal members or anyone representing any tribal entity must seek a tax exemption by sending a letter to him, and that the Department would not automatically exempt tribal members and tribal entities just because they may have filled out a state tax exemption form stating that

they are a tribal member or tribal entity. Misegan Aff. ¶ 13; Stark Aff. ¶¶ 3-4, Ex. A; Collins Aff. ¶¶ 5-7, Ex. D.

b) With Respect to the Community

Defendants also have advised retailers in the State of Michigan not to sell tangible personal property to the Community within the Reservation and Trust Lands free of Michigan sales tax until the Department preapproves the transaction for tax-free treatment after reviewing detailed information regarding the transaction, including the function of the tribal government department or section purchasing the goods and the use to be made of the goods. LaFernier Aff. ¶ 15. For instance, in a letter dated May 10, 2004, Defendant Fratzke informed the Upper Peninsula Power Company:

> With regards to transactions involving Indian Tribes not operating under a State/Tribal tax agreement, the Department will review individual claims of exemption based on the specific circumstances surrounding that claim. Information needed to evaluate the claim would include the name of the Tribe and the individual purchaser (including title), the section of the tribal government using the property or receiving the service, what that use will be and the function of the Department or Section, and the physical address of the Department or Section actually using the product.
>
> Upon receipt of the information, the State will evaluate the situation and determine if it is in agreement with the requester as to whether or not the State tax is federally preempted. If so, the Department will send a letter to the seller acknowledging the specific exemption.

Id., Ex. F.

Likewise, Defendant Fratzke has advised Baraga Telephone Company not to provide telecommunications services to tribal entities free of sales or use tax until the Department preapproves the transaction for tax-free treatment. In a letter to Tribal Attorney John Baker dated June 1, 2006, the President and General Manager of Baraga Telephone stated:

> It is [the company's] understanding from our recent conversations with Mr. Walt Fratzke . . . that tribal members or a tribal entity who feel they are due some sort of sales and use tax exemption should write him a letter and he will address their case. . . . Mr. Fratzke has informed us that we should charge tribal members and tribal enterprises state sales and use tax unless we get a notification of exemption from his office.

Stark Aff. ¶ 4, Ex. A; see also Collins Aff. ¶¶ 3-5, Exs. A-D; LaFernier Aff. ¶ 17. As a result of Defendant Fratzke's instructions, on or about August 1, 2006, Baraga Telephone Company began charging the Community Michigan sales and use taxes on purchases of new telephone and internet services. LaFernier Aff. ¶ 18, Ex. G; Stark Aff. Ex. A.

Similarly, Defendants have instructed the Community that it must obtain the Department's pre-approval before it may purchase, lease, rent, or use any motor vehicle within the Reservation and Trust Lands free from Michigan sales and use taxes. LaFernier Aff. ¶ 16; Affidavit of John R. Baker ("Baker Aff."), attached hereto as Attachment 7, ¶ 3. On March 28, 2006, for instance, pursuant to a pre-approval process imposed by Defendant Fratzke or other officials of the State of Michigan, the Community requested that Defendant Fratzke acknowledge that the Community's purchase of a 2006 GMC Savanna Van that it intended to purchase and principally garage on the Reservation and Trust Lands would be immune from Michigan sales and use taxes as a matter of federal law. Baker Aff. ¶ 3, Ex. B. Defendant Fratzke refused to acknowledge the federal immunity, or approve the issuance by the Secretary of State's office of a title certification and registration for the vehicle, unless and until the Community answered the following questions to Mr. Fratzke's satisfaction:

> [Whether] there [are] any aspects of the purchase that were conducted outside of the Tribe's Indian Country (e.g., solicitation, execution of purchase agreement/contract, payment, etc.)?
>
> What is the unit of tribal government making the purchase and what is the intended use (e.g., a police vehicle, school vehicle, etc.)?

> Is it anticipated that the vehicle will be used outside of the Tribe's Indian Country?

Baker Aff. ¶ 4, Ex. C. As demonstrated in the Argument section below, the information required by Defendant Fratzke has no bearing whatsoever on the Community's and its vendors' federal immunities from Michigan sales and use taxes.

2. Enforcement of the Use Tax Act

a) With Respect to Community Members

Retailers frequently and routinely have collected Michigan use tax from Community members in transactions involving property or services used within the Reservation and Trust Lands (such as telephone services) or property which will be principally housed or garaged within the Reservation and Trust Lands (such as motor vehicles). LaFernier Aff. ¶¶ 9, 13, 14; see also Misegan Aff. ¶¶ 5, 13.

Not only have retailers collected Michigan use tax in these transactions, but they have been instructed to do so by Defendants and/or their predecessors or agents. For instance, as noted above, Defendant Fratzke has instructed Baraga Telephone Company to collect use tax from Community members for their use of telephone services within the Reservation. Misegan Aff. ¶ 13.

Defendants and/or their predecessors or agents also have collected use tax from a Community member in a situation involving a motor vehicle. In that situation, Todd Chosa, an enrolled member of the Community living within the Community's Reservation, purchased a 1997 Oldsmobile in the State of Wisconsin in 2000 and principally garaged the vehicle on the Reservation. Mr. Chosa was required by the Michigan Secretary of State's office to pay Michigan use tax of $979.26 as a condition to obtaining a Michigan title for the vehicle. Mr. Chosa sought a refund of the use tax, which was denied by the Department, but he prevailed in

his appeal before the Michigan Tax Tribunal on the basis that the use tax could not validly be imposed as a matter of federal law. Answer ¶ 48(b); Baker Aff. ¶ 2, Ex. A (Tax Tribunal decision dated April 20, 2005). The Department has appealed the Tax Tribunal's decision to the Michigan Court of Appeals. Answer ¶ 48(b).[5]

b) With Respect to Community

As discussed above, Defendants have instructed the Community and its retailers that the Community must obtain the Department's pre-approval before the Community may purchase telecommunications services or motor vehicles free of Michigan use tax. In addition, Defendant Fratzke has required the Community to provide detailed information to the Department regarding these transactions that has no bearing whatsoever on the Community's federal immunity from Michigan use tax. On or about August 1, 2006, as a result of Defendant Fratzke's instructions, Baraga Telephone Company began charging the Community Michigan use tax on purchases of new telephone and internet services. See supra pp. 9-11.

Based upon these undisputed facts, the Community is entitled to partial summary judgment on Count IX and Count XIII of its Second Amended Complaint.

ARGUMENT

Summary judgment is appropriate where the court is satisfied that there is "no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Capitol Beverage Co., Inc. v. Teamsters Local Union No. 580, 211 F. Supp. 2d 861, 862 (W.D. Mich. 2002) (quoting Fed. R. Civ. P. 56(c)). The moving party bears the initial burden of demonstrating the absence of any genuine issue of material fact and its entitlement to judgment

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5 The Michigan Attorney General's office recently contacted counsel for the Community to inquire whether the Community would stipulate to a voluntary dismissal of the Department's appeal, presumably because the position taken by the Department in the Chosa case is at odds with the position that the Department intends to take in this case. The Community has agreed to stipulate to a voluntary dismissal of the Department's appeal.

as a matter of law. See Celotex v. Catrett, 477 U.S. 317, 323 (1986). To defeat the motion, an opponent may not rest upon the mere allegations or denials of his pleadings, but must set forth, through competent and material evidence, specific facts showing that there is a genuine issue of material fact for trial. Fed. R. Civ. P. 56(e); Mounts v. Grand Trunk Western R.R., 198 F.3d 578, 580 (6th Cir. 2000). The nonmovant must do more than present a scintilla of evidence or cast metaphysical doubt as to the material facts; there must be evidence on which the jury could find for the nonmovant. Matsushita Electric Ind. Co., Ltd. v. Zenith Radio Corp., 475 U.S. 574, 586 (1986); Nernberg v. Pearce, 35 F.3d 247, 249 (6th Cir. 1994); Street v. J.C. Bradford & Co., 886 F.2d 1472, 1479-80 (6th Cir. 1989).

There is no genuine issue as to any material fact and the Community is entitled to partial summary judgment on Count IX and Count XIII of its Second Amended Complaint.

I. FEDERAL LAW PROHIBITS DEFENDANTS FROM IMPOSING THE MICHIGAN SALES TAX UPON RETAILERS FOR THE SALE, LEASE OR RENTAL OF TANGIBLE PERSONAL PROPERTY TO THE COMMUNITY OR ITS MEMBERS WITHIN THE COMMUNITY'S RESERVATION AND TRUST LANDS.

The Supreme Court has repeatedly held that the Indian Trader Statutes, 25 U.S.C. §§ 261-264, categorically bar a state from imposing a tax, the legal incidence of which falls on an Indian trader, for sales to Indians within their Indian country. Central Machinery Co. v. Arizona Tax Comm'n , 448 U.S. 160, 165 (1980); Warren Trading Post Co. v. Arizona Tax Comm'n, 380 U.S. 685, 690 (1965); accord Department of Taxation & Fin. of New York v. Milhelm Attea & Bros., Inc., 512 U.S. 61, 73 (1994). The Supreme Court also has held that a vendor making sales to Indians within their Indian country constitutes an Indian trader and qualifies for this federal immunity regardless of whether the vendor has obtained an Indian trader's license from the Bureau of Indian Affairs. Central Machinery, 448 U.S. at 165. Because the legal incidence of the Michigan sales tax falls upon the retail vendor, as shown below, Defendants are

categorically barred under federal law from imposing the Michigan sales tax upon retailers for their sales of tangible personal property to the Community or its members within the Reservation or Trust Lands.

A. The Indian Trader Statutes

The Indian Trader Statutes provide, in pertinent part, that the Commissioner of Indian Affairs "shall have the sole power and authority to appoint traders to the Indian tribes and to make such rules and regulations as he may deem just and proper specifying the kind and quantity of goods and the prices at which such goods shall be sold to the Indians." 25 U.S.C. § 261. Pursuant to this and other sections of the Indian Trader Statutes, the Commissioner has issued detailed regulations that govern all aspects of trading with reservation Indians. 25 CFR §§ 140.1-140.26. None of these regulations allows for the imposition of a state sales tax with respect to sales of goods to Indian tribes or their members within the tribe's reservation or trust lands.

B. Federal Preemption of State Taxes on Indian Traders

The Supreme Court repeatedly has held that within the sphere of trading with reservation Indians, the Indian Trader Statutes bar a state from imposing any significant burdens, and certainly from imposing any direct tax, upon an Indian trader. In Warren Trading, the Supreme Court unanimously held that the Indian Trader Statutes barred the imposition of an Arizona gross receipts tax upon a licensed Indian trader operating within the Navajo Indian Reservation. Arizona sought to impose the tax upon the Indian Trader's gross income from sales on the reservation to reservation Indians. 380 U.S. at 686 n.1. The Court held that the tax could not be imposed on the Indian trader, concluding that the all-inclusive nature of the Indian Trader Statutes and the related regulations showed that "Congress has taken the business of Indian

trading on reservations so fully in hand that no room remains for state laws imposing additional burdens upon traders." Id. at 690. The Court added that the "financial burdens" imposed by such tax on an Indian trader or its Indian customers "could thereby disturb and disarrange the statutory plan Congress set up in order to protect Indians against prices deemed unfair or unreasonable by the Indian Commissioner." Id. at 691.

Fifteen years later, in Central Machinery, the Supreme Court strongly reaffirmed the federal preemption of state taxes imposed on Indian traders. Arizona sought to impose the same gross receipts tax at issue in Warren Trading upon a one-time sale of tractors by an Arizona corporation to the Gila River Indian Tribe on its reservation. 448 U.S. at 164 n.3. Unlike the Indian Trader in Warren Trading, the seller did not maintain a place of business on the reservation and had not obtained an Indian trader license. The Court nevertheless held that the tax could not be imposed on the Indian trader, concluding that the Indian Trader Statutes "apply no less to a nonresident person who sells goods to Indians on a reservation than they do to a resident trader." Id. at 165. Dismissing the fact that the vendor lacked an Indian Trader license, the Court held that "[i]t is the existence of the Indian trader statutes . . . and not their administration, that pre-empts the field of transactions with Indians occurring on reservations." Id.

More recently, in Milhelm Attea, the Supreme Court permitted a state to impose minor administrative burdens on Indian Traders, while reaffirming its prior holdings prohibiting the direct taxation of Indian traders. The case involved the New York cigarette tax statute, which required wholesalers who sold unstamped cigarettes to Indian tribes or reservation retailers to comply with certain record keeping, reporting and substantiation requirements. Several cigarette wholesalers who sold to Indian retailers challenged these administrative requirements as a

violation of the Indian Trader Statutes. The Court upheld these administrative duties imposed on the wholesalers/Indian Traders by sharply distinguishing them from a direct tax. The Court emphasized that the administrative burdens placed on the Indian traders stood "on a markedly differing footing from *a tax imposed directly on Indian traders*, on enrolled tribal members or tribal organizations, or on 'value generated on the reservation by activities involving the Tribes.'" 512 U.S. at 73 (emphasis added) (citing Washington v. Confederated Tribes of the Colville Indian Reservation, 447 U.S. 134, 156-57 (1980)).

C. The Michigan Sales Tax Falls Directly on Retailers

These Supreme Court decisions make clear that federal law absolutely bars Defendants from imposing the Michigan sales tax upon retailers with respect to their sales of tangible personal property to the Community or its members within the Reservation or Trust Lands. It is well-established that the Michigan sales tax is imposed on the retailer for the privilege of engaging in the retail sale of tangible personal property and that the legal incidence of this tax falls directly on the retailer. See, e.g., Op. Mich. Att'y Gen. 7062 (Oct. 4, 2000); Sims v. Firestone Tire & Rubber Co., 397 Mich. 469, 245 N.W.2d 13 (1976); Federal Reserve Bank of Chicago v. Department of Revenue, 339 Mich. 587, 64 N.W.2d 639 (1954); National Bank of Detroit v. Department of Revenue, 334 Mich. 132, 54 N.W.2d 278 (1952). Liability for the tax is triggered in any given instance when the vendor makes a "sale at retail" that is not otherwise exempt under the statute. Mich. Comp. Laws §§ 205.51(1)(b), 205.52(1). Pursuant to the principles of Central Machinery, retailers making sales of tangible personal property to the Community or its members within the Reservation or Trust Lands constitute Indian Traders for purposes of federal preemption analysis. Accordingly, the enforcement of the sales tax against a retailer for sales of tangible personal property to the Community or its members within the

Reservation or Trust Lands would impose a direct tax upon an Indian Trader for sales to Indians within Indian country. Federal law, therefore, categorically bars Defendants from imposing the sales tax upon retailers for their sales of tangible personal property to the Community or its members within the Reservation or Trust Lands.

In violation of these rules regarding federal immunities from state taxation, Defendants have repeatedly instructed retailers to pay Michigan sales tax with respect to sales of tangible personal property to the Community and its members within the Reservation and Trust Lands, and have obstructed the Community's enjoyment of its federal immunity from the Michigan sales tax until the Community complied with arbitrary and obstructive conditions. See supra pp. 6-11. Accordingly, this Court should enjoin Defendants from enforcing the Sales Tax Act against the Community, its members, or any vendor to the Community or its members with respect to the purchase, lease, or rental by the Community and its members within the Reservation and Trust Lands of any tangible personal property as defined in the Sales Tax Act, including but not limited to motor vehicles, office furniture and equipment, household appliances and furnishings, clothing, gas, electricity, telephone and other telecommunications services, and food and beverages served at restaurants and other food and beverage establishments.

II. FEDERAL LAW PROHIBITS DEFENDANTS FROM IMPOSING THE MICHIGAN USE TAX UPON THE COMMUNITY OR ITS MEMBERS FOR (1) THE USE OF TANGIBLE PERSONAL PROPERTY OR SERVICES WITHIN THE RESERVATION OR TRUST LANDS, OR (2) THE USE OF TANGIBLE PERSONAL PROPERTY BOTH WITHIN AND WITHOUT THE RESERVATION OR TRUST LANDS THAT IS PRINCIPALLY HOUSED, STORED OR GARAGED WITHIN THE RESERVATION OR TRUST LANDS.

The Supreme Court has repeatedly held that a state is categorically barred from imposing a tax upon Indians for activities or transactions that take place within Indian country. In Oklahoma Tax Commission v. Chickasaw Nation, 515 U.S. 450, 458 (1995), the Supreme Court held that, absent express congressional permission to the contrary, federal common law

categorically bars a state from imposing a tax the legal incidence of which falls "directly on an Indian tribe or its members inside Indian country, rather than on non-Indians." This holding reaffirmed a principle that the court had consistently enforced for decades. See, e.g., Montana v. Blackfeet Tribe of Indians, 471 U.S. 759 (1985) (state may not impose severance and royalty taxes on tribe's royalty interests in leased tribal property located within reservation); Bryan v. Itasca County, 426 U.S. 373 (1976) (state may not tax personal property owned by tribal member within reservation); Moe v. Confederated Salish & Kootenai Tribes of the Flathead Reservation, 425 U.S. 463 (1976) (state may not impose cigarette tax on Indians purchasing cigarettes within reservation); McClanahan v. Arizona Tax Commission, 411 U.S. 164 (1973) (state may not tax tribal members' reservation income); Carpenter v. Shaw, 280 U.S. 363 (1930) (state may not tax Indians' royalty interests in leased allotted lands); The Kansas Indians, 72 U.S. 737 (1866) (state may not tax Indians' real property within reservation). Quite simply, Defendants cannot impose a direct tax upon the Community or its members for their activities within the Reservation and Trust Lands.

The Supreme Court has also repeatedly held that states are categorically barred from imposing a tax upon Indians with respect to tangible personal property that is principally housed, stored or garaged within Indian country, even if such property is moved outside Indian country, unless such tax is tailored to the amount of actual off-reservation use. The Court has addressed this issue in the context of state taxes imposed on motor vehicles. In Moe, the Court barred the imposition of Montana's personal property tax on motor vehicles owned by tribal members who lived on the tribe's reservation and drove their vehicles both on and off the reservation. The tax was assessed annually based on the value of the vehicle, and payment of the tax was made a condition precedent for registration of the vehicle. 425 U.S. at 468-69. The Supreme Court held

that the tax could not validly be imposed with respect to the tribal members' vehicles. Id. at 480-81.

The Court strongly reaffirmed the Moe holding in Colville. The case involved Washington's motor vehicle excise tax, an annual tax based on the value of the vehicle, which was imposed for the privilege of using the vehicle in the state. 447 U.S. at 142-43, 162. The state imposed the tax on motor vehicles owned by tribal members who lived on the tribe's reservation and drove their vehicles both on and off the reservation. Washington attempted to distinguish its tax from Montana's personal property tax by describing it as an excise tax imposed for the "use" of the vehicles in question within the state. Id. at 163. The Supreme Court concluded that this purported distinction was meritless and held that the inherent taxation of the on-reservation use of such vehicles rendered the entire tax invalid as applied to the tribal members:

> We do not think that Moe and McClanahan can be this easily circumvented. While Washington may well be free to *levy a tax on the use outside the reservation* of Indian-owned vehicles, it may not under that rubric accomplish what Moe held was prohibited. Had Washington tailored its tax to the amount of *actual off-reservation use*, or otherwise varied something more than nomenclature, this might be a different case.

Id. at 163-64 (emphasis added).

Finally, in Oklahoma Tax Commission v. Sac & Fox Nation, 508 U.S. 114 (1993), the Court removed any doubt that, absent tailoring of a use tax to the actual amount of off-reservation use, states are absolutely precluded from imposing use taxes upon Indian property that is principally housed or stored within Indian country. The case involved Oklahoma's excise tax and registration fee on motor vehicles owned by tribal members who lived within the tribe's Indian country and drove their vehicles inside and outside Indian country. Oklahoma's excise tax was imposed, *inter alia*, "upon the use" of any vehicle; its registration fee, likewise, had the

features of a use tax. The excise tax was imposed on a one-time basis as a percentage of the value of the vehicle; the registration fee was imposed annually as a percentage of the value of the vehicle. Id. at 119-20. The Supreme Court unanimously held that Oklahoma's one-time tax and annual registration fees "are no different than those in Moe and Colville," emphasizing that both taxes were "imposed for use both on and off Indian country." Id. at 127. As the Court explained:

> Tribal members who live in Indian country consisting solely of scattered allotments likely use their cars more frequently on state land and less frequently within Indian country than tribal members who live on an established reservation. Nevertheless, members of the Sac and Fox Nation undeniably use their vehicles within Indian country. As we said in Colville, had the State "tailored its tax to the amount of actual off-[Indian country] use, or otherwise varied something more than mere nomenclature, this might be a different case. But it has not done so, and we decline to treat the case as if it had." 447 U.S., at 163-64 . . . .

Id. at 128 (bracketing in original).

The Michigan use tax is imposed upon a person for the privilege of using, storing, or consuming within Michigan tangible personal property upon which the Michigan sales tax has not been paid and which is not otherwise exempt. Mich. Comp. Laws § 205.93(1). The legal incidence of the use tax falls upon the user of the tangible personal property or services and the trigger of the tax is the use, storage, or consumption of such property or services. Id. The Use Tax Act lacks any apportionment formula that would tailor it to the amount of actual use of tangible personal property outside the Reservation.

Accordingly, under the longstanding federal law reaffirmed in Chickasaw Nation, Defendants are absolutely precluded from imposing the Michigan use tax upon the Community or its members with respect to their use, storage, or consumption of tangible personal property or services within the Reservation and Trust Lands. Similarly, pursuant to Moe, Colville, and Sac

& Fox Nation, Defendants are absolutely precluded from imposing the Michigan use tax upon tangible personal property that is principally housed, stored or garaged within the Reservation or Trust Lands, regardless of whether it is also used outside of the Reservation or Trust Lands.

As described above, Defendants have instructed retailers to collect Michigan use tax from the Community and its members with respect to their use of telecommunications services within the Reservation and Trust Lands. In addition, Defendants have collected use tax with respect to a Community member's use of a motor vehicle that is principally garaged on the Reservation, and have obstructed the Community's enjoyment of its federal immunity from use tax with respect to motor vehicles that the Community intended to purchase and principally garage on the Reservation and Trust Lands until the Community complied with arbitrary and obstructive conditions. See supra pp. 11-12. Accordingly, this Court should enjoin Defendants from enforcing the Use Tax Act against the Community, its members, or any vendor to the Community or its members with respect to the use, storage, or consumption by the Community and its members of any tangible personal property or services as defined in the Use Tax Act within the Reservation and Trust Lands. The Court should also enjoin Defendants from enforcing the Use Tax Act against the Community, its members, or any vendor to the Community or its members with respect to the use of any tangible personal property that its principally housed, stored, or garaged on the Reservation or Trust Lands, including but not limited to motor vehicles, snowmobiles, motorcycles, recreational watercraft, off-road vehicles, bicycles, clothing, food and beverages, and mobile phones.

CONCLUSION

For the foregoing reasons, the Community respectfully requests that this Court enter partial summary judgment for the Community providing for the following relief:

1. A declaration that the Michigan sales and use taxes are invalid as applied to (a) the purchase, lease, rental, use, storage, or consumption of tangible personal property or services by the Community and its members within the Reservation and Trust Lands, and (b) the use, storage, or consumption of tangible personal property by the Community or its members that is used or consumed both within and outside the Reservation or Trust Lands but is principally housed, stored, or garaged within the Reservation or Trust Lands;

2. A declaration that with respect to any sale, lease, rental, use, storage, or consumption of tangible personal property or services within the Community's Reservation and Trust Lands, the seller is entitled to rely on a single use or a blanket certificate of federal tax immunity provided by the purchaser containing information and a certification similar to that required in the Michigan Department of Treasury Form 3372 entitled "Michigan Sales and Use Tax Certificate of Exemption" stating that the purchaser is the Community (including any of its enterprises) or any of its members, and shall not be liable for any Michigan sales or use tax if a purchaser improperly claims an exemption, unless the seller has committed fraud or has solicited the purchaser to make an improper claim of federal tax immunity;

3. An order enjoining Defendants from enforcing the Michigan Sales and Use Tax Acts against the Community, its members, or any seller to the Community or its members with respect to (a) the purchase, lease, rental, use, storage, or consumption of tangible personal property or services by the Community and its members within the Reservation and Trust Lands, and (b) the use, storage, or consumption of tangible personal property by the Community or its members that is used or consumed both within and without the Reservation or Trust Lands but is principally housed, stored, or garaged within the Reservation or Trust Lands;

4. An order enjoining Defendants from (a) providing information or instructions to sellers to the Community or its members that is inconsistent with the declarations sought in numbers 1 and 2 above, (b) imposing a system requiring pre-approval from Defendant Fratzke, the Department, or any other Michigan agency or official for any purchase, lease, rental, use, storage, or consumption of tangible personal property or services that falls within the facts described in the declaration sought in number 1 above or that is accompanied by a certificate of federal tax immunity provided by the purchaser to the seller that meets the requirements set forth in the declaration sought in number 2 above, or (c) imposing a recordkeeping system on sellers with respect to any facts beyond those described in the declaration sought in number 1 above; and

5. An order awarding the Community such other relief as the Court deems just and appropriate.

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Respectfully submitted,

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