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

PLAINTIFF'S MEMORANDUM IN OPPOSITION TO DEFENDANTS' SECOND MOTION FOR SUMMARY JUDGMENT

INTRODUCTION

Defendants raise four issues in their second motion for summary judgment. With respect to each of these issues, the Court should rule in favor of the Community.

First, Defendants' argument that the Tax Injunction Act bars the Community's claims relating to the 1993-94 sale and use tax assessments (the "1993-94 Sales and Use Taxes") borders on the frivolous. The federal courts have repeatedly held that 28 U.S.C. § 1362 permits tribal lawsuits enjoining state taxes without regard to the limitations of the Tax Injunction Act. Defendants certainly cannot claim they are unaware of this black letter law, as Judge McKeague recently applied it against them in a property tax case involving the Community in 2004.

Second, Defendants' argument that the Community's claims are precluded by state law statutory collateral estoppel is equally meritless. Again, black letter law defeats their argument. The Community's claims are based on federal, not state law. This Court has jurisdiction to hear these claims. The Community's alleged failure to comply with state statutory requirements has no legal effect on their federal law claims.

Defendants' third argument regarding waiver fares no better. Defendants ask this Court to ignore the fundamental question of whether they had the right to impose the 1993-94 Sales and Use Taxes (they did not, as discussed in the Community's second motion for summary judgment filed in conjunction with this brief), and find that the Community waived its substantive federal rights through the, at best, ambiguous words of two tribal employees. Because only the Community's Tribal Council has the authority to waive its substantive rights -- and it clearly failed to so here – the Court should reject Defendants' waiver argument.

Finally, Defendants ask this Court to grant summary judgment to Defendants Rising, Reynolds and Fratzke on the Community's Section 1983 damages claim. The Community's claim is that these Defendants offset alleged (and illegal) tax obligations of the Community against federal funds earmarked for specific federal programs providing benefits for health care, nutrition education and dietary supplements, the provision of daycare services and child safety, preventing child maltreatment and providing reunification and adoption services. There is no dispute that these offsets occurred, and there is no dispute that they violate federal law. Defendants, however, argue that they should not be personally liable because the offsets were performed by a computer. Because Defendants had oversight responsibility for this offset program, and because they had the power to reverse the offsets but chose not to do so, they can and should be held responsible under Section 1983.

STATEMENT OF FACTS

Many of the relevant facts are set forth in the Community's memorandum in support of its Second Motion for Summary Judgment, and this memorandum incorporates those facts herein by reference.

Although Defendants have presented 17 pages of "facts" and a multitude of exhibits in support of their motion, many of their facts are extraneous to their motion.[1] Much of these "facts" consist of mischaracterizations of the Community's motives and intentions in protecting its federal tax immunities from assault by the State, which Defendants apparently hope will prejudice the Court against the Community.[2] In any event, an examination of facts is only needed for two of the four arguments in Defendants' motion – (1) that the Community has waived its right to contest the 1993-94 sales and use tax determinations, and (2) that Defendants Rising, Reynolds, and Fratzke cannot be liable in their individual capacities for damages pursuant to Section 1983. The Community will address the facts that are pertinent to each of these arguments in the sections below addressing each argument. Defendants' remaining two arguments are jurisdictional in nature and, as demonstrated in Sections I and II below, they fail as a matter of law.

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1 For example, Defendants' Exhibit O consists of 48 pages of material relating to the Community's federal tax immunities as a retail purchaser, not a retail seller, which are not relevant to Defendants' motion.

2 See, e.g., Brief in Support of Defendants' Second Motion for Summary Judgment ("Def. Br.") 14 ("For almost a decade, the Community has used the 1993 and 1994 sales and use taxes for leverage in tax agreement negotiations with the State, but has never been able to obtain all the tax advantages it desired."); id. ("the Community has never been willing to make the concessions that Michigan's other tribes made…"); id. 15 ("[t]he Community's new strategy is to use litigation to force the tax concessions that it wants"); id. 16 ("the Community began aggressively pushing its 'tax-free' status"); id. 17 ("[the Community] only seeks to embroil this Court in its gamesmanship."). Needless to say, the Community took these steps to protect its sovereign rights, and not for the reasons suggested by Defendants in these statements.

SUMMARY JUDGMENT STANDARD UNDER FED. R. CIV. P. 56

Summary judgment is appropriate where "the pleadings, the discovery and disclosure materials on file, and any affidavits show that there is no genuine issue as to any material fact and that the movant is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). In deciding a motion for summary judgment, the court views the factual evidence and draws all reasonable inferences in favor of the non-moving party. See National Enters., Inc. v. Smith, 114 F.3d 561, 563 (6th Cir. 1997). To prevail, the non-movant must show sufficient evidence to create a genuine issue of material fact. See Klepper v. First Am. Bank, 916 F.2d 337, 342 (6th Cir. 1990) (citing Celotex Corp. v. Catrett, 477 U.S. 317, 322 (1986)). A mere scintilla of evidence is insufficient; "there must be evidence on which the jury could reasonably find for the [non-movant]." Id. (quoting Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 252 (1986)).

On cross-motions for summary judgment, "[t]he fact that both parties make motions for summary judgment . . . does not require the Court to rule that no fact issue exists." B.F. Goodrich Co. v. U.S. Filter Corp., 245 F.3d 587, 592 (6th Cir. 2001) (quoting Begnaud v. White, 170 F.2d 323, 327 (6th Cir. 1948)). When parties file cross-motions for summary judgment, "the making of such inherently contradictory claims does not constitute an agreement that if one is rejected the other is necessarily justified or that the losing party waives judicial consideration and determination whether genuine issues of material fact exist." Id. at 593 (citing 10A Charles Alan Wright, Arthur R. Miller & Mary Kay Kane, Federal Practice and Procedure § 2720 (3d ed.1998)). A trial court may conclude, when reviewing the undisputed material facts agreed upon by the parties and drawing all inferences, in turn, for the non-moving party, that a genuine issue exists as to those material facts, in which case the court is not permitted to resolve the matter, but rather, must allow the case to proceed to trial." Id.

ARGUMENT

I. THE TAX INJUNCTION ACT DOES NOT BAR THE COMMUNITY'S CLAIMS REGARDING THE 1993-94 SALES AND USE TAX DETERMINATIONS, THE 1996 OFFSETS, OR THE 2005 OFFSETS.

Defendant's assertion that the Tax Injunction Act, 28 U.S.C. § 1341, bars the Community's claims with respect to the 1993-94 Sales and Use Taxes and the 1996 and 2005 Offsets lacks any merit. The Supreme Court held 31 years ago in Moe v. Confederated Salish & Kootenai Tribes of the Flathead Reservation, 425 U.S. 463, 474-75 (1976), that 28 U.S.C. § 1362's explicit grant of jurisdiction over "all civil actions, brought by any Indian tribe . . . wherein the matter in controversy arises under the Constitution, laws, or treaties of the United States" provides an exception to the Tax Injunction Act for tribal actions for injunctive relief. The Moe Court held that because Congress enacted Section 1362 *after* the enactment of the Tax Injunction Act, it intended to permit tribal lawsuits in federal courts to the same extent that the United States could have brought such a suit on behalf of a tribe, and thus that Section 1362 permits tribal lawsuits enjoining state taxes without regard to the limitations of the Tax Injunction Act. Id.

The Moe holding has been applied in numerous cases to tribal claims for declaratory and injunctive relief, and tribal challenges to state taxation in federal court are routine. See, e.g., Cass County, Minnesota v. Leech Lake Band of Chippewa Indians, 524 U.S. 103, 109 (1998); County of Yakima v. Confederated Tribes & Bands of the Yakima Indian Nation, 502 U.S. 251, 256 (1992). Indeed, this Court recently rejected an argument by Michigan state officials that the Tax Injunction Act barred the Community's claims for declaratory and injunctive relief against illegal state property taxes. Keweenaw Bay Indian Community v. Naftaly, No. 2:03-cv-170

(Sept. 27, 1994) (McKeague, J.), slip. op. at 8-10. The Court's holding in Naftaly is equally applicable here.[3]

Defendants contend that the Tax Injunction Act bars the Community's assessment and offset claims because the declaratory relief sought is barred, even if brought by the United States, by the state's sovereign immunity. The Community thoroughly refuted this sovereign immunity argument in its response to the Defendants' first motion for summary judgment, Comm. Resp. Br. 8-14, showing among other things that the Supreme Court has specifically upheld against Eleventh Amendment concerns declaratory relief with respect to prior state actions, Verizon Maryland, Inc. v. Public Service Comm'n of Maryland, 535 U.S. 635, 646 (2002), and that reversal of the offset is permissible because such action would not effect the state treasury. Defendants' facile attempt to reargue its Eleventh Amendment claims, without countering in any manner the authorities previously cited by the Community, necessarily fails.

II. "STATUTORY COLLATERAL ESTOPPEL" DOES NOT BAR THE COMMUNITY'S CLAIMS CHALLENGING THE 1993-94 SALES AND USE TAXES, BECAUSE THE CLAIMS ARE FEDERAL LAW CLAIMS WITH RESPECT TO WHICH THIS COURT HAS JURISDICTION.

Michigan Compiled Laws Section 205.22 prescribes the requirements for review in Michigan's state courts of an unfavorable Department of Treasury decision, as well as the finality of these decisions when a state court appeal is not taken. Because Section 1362 permits Indian tribes to bring a federal challenge against a state tax directly in federal court, however, no federal court has required tribes to initiate such actions under the procedures and remedies

[3] Defendants seek summary judgment with respect to Counts V, VI, VIII, XXIX, and XXX of the Complaint, which do not challenge the legality of the 1993-94 sales and use tax determinations. These Counts could not possibly implicate the Tax Injunction Act, even if the plaintiff here was not an Indian tribe.

provided by the state taxing statute.[4] None of the federal cases cited by Defendants that required litigants to challenge a state tax in accordance with state law procedures involved an Indian tribe, and one of these cases specifically based its holding on the ground that the defendant was an Indian corporation and *not* an Indian "tribe," as required by Section 1362. Chippewa Trading Co. v. Cox, 365 F.3d 538, 545 (6th Cir. 2004), cert. denied, 543 U.S. 988 (2004).[5]

III. THE COMMUNITY NEVER WAIVED ITS RIGHTS TO CONTEST THE LEGALITY OF THE 1993-94 SALES AND USE TAXES.

Defendants, recognizing that they had no legal basis for imposing the 1993-94 Sales and Use Taxes,[6] resort to arguing that the Community waived its right to contest these taxes. Defendants rely on two statements by tribal employees to support their argument: a claim in the audit reports that a supposed tribal representative, Gerald Hays, verbally agreed with the audit determinations; and a statement in a letter by former Tribal Attorney Joseph O'Leary. As discussed below, Defendants' arguments fail on the facts and the law.

A. Only the Community's Tribal Council has the Authority to Waive the Community's Substantive Rights.

The governing body of the Community is the Tribal Council, consisting of 12 persons elected by the enrolled members of the Community. Affidavit of Susan LaFernier ("LaFernier Aff." at ¶ 5.) The Tribal Council elects from its own members a President and other officers,

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4 Thus, Defendants' contention that the Community's failed to appear at the Michigan Department's informal conference in 2002 (see Def. Br. 7; but see DePetro Aff. at ¶ 3) has no impact on the Community's federal claims in this Court.

5 The Chippewa Trading decision also contradicts Defendants' argument that the "comity doctrine" should bar the Community's 1993-94 assessment and 1996 and 2005 offset claim. 365 F.3d at 545 (noting that "it is reasonable to assume that § 1362 exempts suits from the Fair Assessment comity doctrine *to the same extent* that it exempts them from the Tax Injunction Act").

6 See Mem. in Support of Plaintiffs' Second Motion for Partial Summary Judgment at Sections I. A. – I. D. As discussed therein, the 1993-94 Sales and Use Taxes are not authorized by the 1977 Tax Agreement and violate federal law.

who constitute the Executive Council. Id. The Tribal Council is vested with all of the sovereign legislative and executive powers of the Community, including the power to:

- negotiate with federal, state and local governments on behalf of the Community (Art. VI, Sec. 1(c));
- manage all economic affairs and enterprises of the Community (Art. VI, Sec. 1(f));
- create and maintain a Community fund by accepting grants from the United States (Art. VI, Sec. 1(s);
- and to adopt resolutions to effectuate its powers (Art. VI, Sec. 1(u)). Id.

Like the governing bodies in other governments, the Tribal Council votes on legislative and executive matters relating to the Community. Id. After voting on a particular matter, the Tribal Council then passes or defeats, by majority vote, a resolution or motion relating to the matter at issue, which formally expresses the decision of the Tribal Council, which is then lawfully binding on the Community, its members and employees. See Tribal Constitution, Art. VI, Sec. 1(u). Id.

Defendants rely heavily on reports of audits performed by Jim Brulla in 1996.[7] Each of the audit reports contains the following language: "Although they did not return a signed Audit Determination Letter, Gerald Hays, the tribal representative, expressed agreement with the determination. However, they (Tribal Chairman Fred Dakota) has decided to withhold payment 'until there is meaningful discussions between the tribe and the Department with respect to a new agreement'." Def. Br., Exs. D at 6; E at 5; F at 5; and G at 5. Contrary to Mr. Brulla's

[7] Former Tribal Chairman Dakota and former Tribal Attorneys Joseph O'Leary and James Bittorf do not recall being aware of these audits taking place, and do not recall ever meeting Mr. Brulla. Affidavit of Joseph O'Leary (hereinafter "O'Leary Aff.") at ¶ 9; Affidavit of James Bittorf (hereinafter "Bittorf Aff.") at ¶ 4. Moreover, as described in detail in the Affidavit of Tribal Attorney Joseph O'Leary, during the time the Department was apparently conducting these audits, there was highly publicized political turmoil occurring on the Community's Reservation, including an armed takeover of the Tribal Government Center by tribal dissidents. O'Leary Aff. at ¶¶ 13-14.

conclusory assertion in those reports, Mr. Hays was not the "tribal representative" for purposes of the 1977 Tax Agreement, and he had no authority to bind the Community to any agreement to pay state taxes or to waive any substantive rights of the Community. Affidavit of Fred Dakota (hereinafter "Dakota Aff.") at ¶ 14; Affidavit of Susan LaFernier (hereinafter "LaFernier Aff.") at ¶ 9; O'Leary Aff. at ¶ 12.[8] Only the Tribal Council has such authority, and the Tribal Council never passed any resolution or motion agreeing to pay any such taxes or to waive any such rights. Id.

Defendants also suggest in their brief that Tribal Attorney Joseph O'Leary acknowledged the Community's obligation to pay Michigan sales and use taxes asserted to be owing in the audit reports for 1993 and 1994, citing a letter to Defendant Fratzke dated May 12, 1997, attached to Defendants' Brief as Exhibit M. In that letter, Mr. O'Leary merely stated that "*[a]ny* amounts owing under the existing agreement will be calculated through [May 29, 1997,] and thereafter the Community will cease its efforts to cooperate with you in collecting legitimate state taxes which arise on this Reservation." See Def. Br., Ex. M. Mr. O'Leary's understanding of the 1977 Tax Agreement was that the only amounts the Community might owe pursuant to the agreement would be cigarette taxes. O'Leary Aff. at ¶ 15. He had no intention of waiving any rights of the Community by sending his letter, and indeed, he had no authority from the Tribal Council to bind the Community to pay any state taxes or waive any substantive rights of the Community. Id. As noted above, only the Tribal Council has such authority. LaFernier Aff. at ¶¶ 5, 9; Dakota Aff. at ¶ 14; O'Leary Aff. at ¶ 15.

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[8] As the Community's Chief Financial Officer, Mr. Hays would have had the authority to agree with a mathematical determination made by the State, and the Community does not contest the Department's arithmetic. LaFernier Aff. at ¶ 9.

B. None of the Actions Cited by Defendants Constitutes a Waiver of the Community's Rights.

Under tribal law, none of the actions cited by Defendants was sufficient to waive the Community's rights with respect to the 1993-94 Sales and Use Taxes and the 1996 and 2005 offsets. Pursuant to the Community's Constitution, only a resolution or motion passed by the Tribal Council, the holder of the Tribe's executive powers, could have authorized the Community to consent to liability for the 1993-94 Sales and Use Taxes, waive the Community's federal immunities from such liability, or waive the Community's right to contest such taxes. Defendants' contention that Gerald Hays "agreed with" the "determination" is irrelevant. Def. Br. 29. Mr. Hays had no authority from the Tribal Council to bind the Community by agreeing with or waiving its rights with respect to the determinations. LaFernier Aff at ¶ 9; see also supra n.7. For the same reason, Mr. O'Leary's letter to Walt Fratzke could not serve as a waiver under tribal law even if his statement therein could be read as such.

Federal law confirms that a purported waiver of a substantive tribal immunity, such as a tribe's sovereign immunity, must comply with the internal laws and procedures of the tribe or tribal business in question in order to be effective. See, e.g, World Touch Gaming v. Massena Management, LLC, 117 F. Supp. 2d 271, 275 (N.D.N.Y. 2000) ("[A]ccording to the unequivocal language of the Tribe's Constitution and Civil Judicial Code, only the Tribal Council can waive the Tribe's sovereign immunity, and such waiver must be express."); Lobo Gaming, Inc. v. Pit River Tribe of Cal., No. CO37661, 2002 WL 922136 at *6 (Cal. Ct. App. May 7, 2002) (no waiver of sovereign immunity where purported waiver contravened tribe's constitution), cert. denied, 537 U.S. 1190 (2003); Hydrothermal Energy Corp. v. Fort Bidwell Indian Community Council, 216 Cal. Rptr. 59, 63 (Cal. Ct. App. 1985) (no valid waiver where tribal official signing document alleged to constitute a waiver of Indian tribe's sovereign immunity did not have actual

authority to waive immunity on tribe's behalf); Danka Funding Co. v. Sky City Casino, 747 A.2d 837, 843 (N. J. Super. Ct. Law Div. 1999) (no waiver of sovereign immunity where comptroller of Indian casino signed agreements on behalf of tribe but where internal tribal laws, which stated what procedures had to be followed in order to waive immunity, were not followed). As noted above, because none of the individual actions alleged to have waived the Community's tax immunity was authorized by a resolution or motion of the Tribal Council, none of the actions were sufficient under federal law to waive such immunity.

Finally, federal law requires that any purported waiver of tribal sovereign immunity, and by implication of any federal tribal immunity, must be explicit and unequivocal. The Supreme Court has noted that it is "settled" that a waiver of sovereign immunity "cannot be implied but must be unequivocally expressed." Santa Clara Pueblo v. Martinez, 436 U.S. 49, 58 (1978) (quoting United States v. Testan, 424 U.S. 392, 399 (1976)); American Indian Agricultural Credit Consortium, Inc. v. Standing Rock Sioux Tribe, 780 F.2d 1374, 1378 (8th Cir. 1985) (sovereign immunity must be expressly waived and cannot be waived by implication in contract actions).

Neither of Defendants' purported instances of waiver came even close to an express waiver of the Community's federal immunity from the Michigan sales and use taxes at issue in the 1993-94 assessments. Mr. Hays' alleged oral statement is ambiguous at best. The fairer reading of the statement, as described by Mr. Brulla, is that Hays, as the Community's chief financial officer, was indicating his agreement with the Department's arithmetic. The Community certainly did not "confirm its waiver" when Mr. O'Leary stated in 1997 that it would calculate "[a]ny amounts owing" under the Tax Agreement. Def. Br., Ex. M at 2. As noted supra at n.5, the 1977 Tax Agreement covered sales and use tax exemptions enjoyed by

Community members and did not authorize *any* payments or collections of sales and use taxes by the Community as retailer. Similarly, the failure of Defendants to "recollect" whether the Community challenged the validity of the 2002 offsets does not show that the Community intentionally relinquished its right to challenge the tax assessments. On the contrary, the Community resisted and contested these assessments on various occasions. See Bittorf Aff. at ¶ 6; Affidavit of Chad DePetro (hereinafter "DePetro Aff.") at ¶¶ 3-4.

IV. DEFENDANTS RISING, REYNOLDS, AND FRATZKE ARE NOT ENTITLED TO SUMMARY JUDGMENT ON THE COMMUNITY'S CLAIM FOR DAMAGES BASED ON 42 U.S.C. § 1983.

Defendants' remaining argument relates only to the claim based on Section 1983, and focuses solely on the claims against Defendants Rising, Reynolds, and Fratzke in their individual capacities and whether these Defendants are entitled to qualified immunity from liability for damages.[9] As discussed below, Defendants' contentions that inanimate computers are responsible for the 2005 Offsets and that the Community's filing of this lawsuit cut off the Defendants' ability to reverse the offsets, are not only breathtakingly absurd, but also raise genuine issues of material fact that preclude summary judgment in favor of Defendants. Even if the Court does not find that fact issues exist – though it should –Defendants' motion should be denied or stayed pursuant to Fed. R. Civ. P. 56(f).

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[9] Defendants are not entitled to qualified immunity with respect to any of the declaratory or injunctive relief sought by the Community on the basis of Section 1983, because qualified immunity is only a defense to liability for damages. E.g., Mitchell v. Forsyth, 472 U.S. 511, 519 n.5 (1985); Kennedy v. City of Cleveland, 797 F.2d 297, 305-06 (6th Cir. 1986), cert. denied, 479 U.S. 1103 (1987) (both cases noting that defendant would remain in litigation with respect to claims for injunctive relief based on Section 1983 where summary judgment was granted on qualified immunity grounds with respect to claims for damages).

A. The Community's Section 1983 Claim is Based on Defendants' Violations of Clearly Established Constitutional and Statutory Rights.

The Community's Section 1983 claim for damages against Defendants Rising, Reynolds, and Fratzke in their individual capacities is based upon their violations of clearly established constitutional and statutory rights. The Community has established this by demonstrating that the 2005 Offsets were illegal because those offsets were based upon invalid taxes (see Mem. in Support of Plaintiff's Second Motion for Summary Judgment at Section I,) and because those offsets were against federal funds owed to the Community (see Mem. in Support of Plaintiff's Second Motion for Summary Judgment at Section II,). In particular, Defendants' 2005 Offsets against the Community's federal funds deprived the Community and its members and other Native Americans of federal Medicaid, WIC, Child Care and Promoting Safe and Stable Families funds. See LaFernier Aff. at ¶ 11. By virtue of their actions relating to the 2005 Offsets, Defendants violated at least the following clearly established federal rights in their actions relating to the 2005 Offsets of federal funds:

- The Community's rights under the Fourth Amendment, made applicable to the States through the Fourteenth Amendment, and those of its members and other Native Americans in the Community's service area, to be free from unreasonable searches and seizures. Although this protection most often applies to the actions of police officers in the criminal context, the protection also applies in the civil context. See Soldal v. Cook County, Illinois, 506 U.S. 56, 71 (1992) ("[T]his was no 'garden-variety' landlord-tenant or commercial dispute. The facts alleged suffice to constitute a 'seizure' within the meaning of the Fourth Amendment, for they plainly implicate the interests protected by that provision."). A seizure of property under the Fourth Amendment occurs where "there is some meaningful interference with an individual's possessory interests in that property." Id. at 61 (quoting Untied States v. Jacobson, 466 U.S.

109, 113 (1984)). To constitute a violation of the Fourth Amendment, a seizure of property must be "objectively unreasonable." HRSS v. Wayne County Treasurer, 279 F. Supp. 2d 846, 852 (E.D. Mich. 2003) (citing Thomas v. Cohen, 304 F.3d 563, 574 (6th Cir. 2002)). In HRSS, the court found that when county officials failed to pay interest earned on surplus accounts to mortgagors following foreclosure, they "took . . . private funds for public use" and the seizure was "objectively unreasonable." Id. The court went on to find a genuine issue of material fact that precluded summary judgment for plaintiffs with regard to the existence and amount of the plaintiff's property interest in the mortgage surplus interest. Id. at 855.[10]

- The Community's rights under the Fifth Amendment, made applicable to the States through the Fourteenth Amendment, and those of its members and other Native Americans in its service area, to be free from a taking of "private property . . . for public use, without just compensation." The court in HRSS cited Soldal for the proposition that a Fourth Amendment unreasonable seizure claim could be "coupled with a Fifth Amendment takings claim." The HRSS court found that the county's retention of interest on the surplus accounts was a taking requiring just compensation under the Fifth Amendment to the extent that the interest exceeded the state's administrative fees in maintaining the accounts. Id. at 855; see also Phillips, 524 U.S.

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[10] Keweenaw Bay Indian Community v. Rising, 477 F.3d 881 (6th Cir. 2007), cited by Defendants to suggest that the Community's Fourth Amendment interests are not implicated by seizures of property in the possession of third parties, actually *supports* the principle that a seizure of funds before they are remitted to their owners may violate the Fourth Amendment. In Rising, summary judgment was granted to the state officials only because the court concluded that the search warrants at issue were not constitutionally deficient, not because the Community had no Fourth Amendment interests implicated by the seizures. G.M. Leasing Corp. v. United States, 429 U.S. 338, 351-52 (1977), likewise is inapposite, because the issue in that case was whether a search warrant was necessary to execute a levy to collect a valid tax liability on taxpayer's property located in a public place, factual circumstances that are very different from the illegal seizures of federal program funds that occurred here.

at 172 (holding "interest income generated by funds held in [Interest On Lawyer Trust Accounts Program] accounts is the 'private property' of the owner of the principal").[11]

- The Community's right, and those of its members, to procedural due process secured by the Fourteenth Amendment. Government benefits, such as welfare benefits, are considered property entitlements for procedural due process claims. Goldberg v. Kelly, 397 U.S. 254, 262 (1970) Defendants violated the Community's procedural due process rights because they failed to provide the Community with pre-deprivation notice of the 2005 Offsets and an opportunity to be heard, as the Supreme Court required in a welfare benefits context in Goldberg. Defendants have alleged that the post-deprivation process that was provided was adequate, but the question of what process is due must be resolved under the application of the balancing test

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[11] Coleman v. Commissioner of Internal Revenue, 791 F.2d 68, stands only for the proposition that a tax levied by the Internal Revenue Code does not offend the Fifth Amendment. 791 F.2d 68, 70 (7th Cir. 1986). Defendants' reliance on this case ignores the key fact that the Community challenges the *offset* of its funds as a violation of the Fifth Amendment's prohibition against takings without just compensation, not whether *taxes* constitute takings under the Fifth Amendment. Commonwealth Edison, 271 F. 3d 1327 (Fed. Cir. 2001), which involved a challenge to an environmental regulatory fee based on the Takings Clause, is inapposite for the same reason. In fact, the court in Commonwealth Edison Co. recognized that "[i]t is also clear that a fund of money can be property protected under the Takings Clause." Id. at 1338 (citing Phillips v. Washington Legal Found., 524 U.S. 156, 160 (1998) (holding that interest income generated by funds held in IOLTA accounts is private property of the owner of the principal for purposes of the Takings Clause) and Webb's Fabulous Pharmacies, Inc. v. Beckwith, 449 U.S. 155, 164-65 (1980) (holding that the Takings Clause can apply to monetary interest generated from the operation of a specific, separately identifiable fund of money)).

Defendants also overreach when they insist that the Community cannot sustain its Section 1983 claim without first attempting to obtain compensation through state procedures. Def. Br. 25. As clearly stated in Macene v. MJW, Inc., "[a]s a general matter, exhaustion of state remedies is not a prerequisite to the bringing of a § 1983 action in federal court." 951 F.2d 700, 703 (6th Cir. 1991 (citing Patsy v. Board of Regents, 457 U.S. 496 (1982)). In Macene, the Sixth Circuit found that the exhaustion requirement that applied to the claim brought in that case was a "product of the ripeness doctrine" and that "if a state provides an adequate procedure for seeking just compensation, the property owner cannot claim a violation" until the property owner had been denied just compensation. Id. (internal citations and quotations omitted). Unlike in Macene, where the plaintiff sought a *state* license and failed to pursue compensation through *state* inverse condemnation proceedings, the Community's claims in this case are distinctly *federal* with respect to the offset of the Community's *federal* funds.

prescribed in Mathews v. Eldridge, 424 U.S. 319, 335 (1976). Because the Community has not had the opportunity to conduct the necessary discovery with respect to the events surrounding the 2005 Offsets due to Defendants' failure to produce key documents prior to the depositions of Defendants Fratzke and Reynolds, see supra at IV. C., it is premature to apply any such balancing test for the purposes of summary judgment.

- The Community's rights under the Social Security Act, 42 U.S.C. Ch. 7 (Disp Table); the Medicaid Act, codified at 42 U.S.C. § 1396 et seq.; the Child Care program, codified at 42 U.S.C. § 618 et seq.; the Promoting Safe and Stable Families Program, codified at 42 U.S.C. § 629 et seq.; the Special Supplemental Nutrition Program for Women, Infants and Children ("WIC"), 42 U.S.C. § 1786; and under the Debt Collection Improvement Act ("DCIA"), Pub. L. No. 104-134, 110 Stat. 1321, 1321-358 (Apr. 26, 1996), codified at 31 U.S.C. § 3716, to receive federal Medicaid, WIC, Child Care, and Promoting Safe and Stable Families program funds free of administrative offset. See Plaintiff's Memorandum in Support of the Partial Motion for Summary Judgment at Section II., which establishes that the 2005 Offsets violated the DCIA. In Gamble v. Ohio Dep't of Jobs and Family, the District Court in the Southern District of Ohio held that plaintiff's Section 1983 claims based on the County's violations of federal law survived a motion for summary judgment. No. 1:03-CV-452, 2006 WL 38996, at *13, *17 (S.D. Ohio 2006). The plaintiffs argued that the defendants violated certain "Family First" provisions of the Social Security Act (Title IV-D) and thereby deprived plaintiffs of child support arrearage payments to which they were entitled. Id. at *1. In denying defendant's motion for summary judgment, the court held that the plaintiffs had "alleged a violation of a federal statutory right enforceable under 42 U.S.C. § 1983." Id. at *17.

B. Genuine Issues of Material Fact Preclude Summary Judgment in Favor of Defendants with Respect to the Community's Section 1983 Claim.

Defendants' factual support underlying their motion with respect to the Section 1983 damages claim essentially come down to two propositions: (1) that computers were responsible for the 2005 Offsets, not key agency officials Defendants Rising, Reynolds, and Fratzke; and (2) that the Community cut off these Defendants' ability to reverse the offsets by bringing this lawsuit. The facts developed up to the time that the Court stayed discovery, relating both to the 2002 Offsets that were promptly reversed after the Community objected and to the 2005 Offsets, demonstrate the absurdity of Defendants' factual contentions. When all of these facts are considered, it is clear that, in the very least, genuine issues of fact preclude summary judgment in favor of Defendants.

1. The 2002 Offsets

Defendant Michael Reynolds, Administrator of the Collection Division of the Michigan Department of Treasury, oversaw the State Treasurer's Accounts Receivable ("STAR") computer system in place in 2002. Affidavit of Skip Durocher (hereinafter "Durocher Aff."), Ex. C (Reynolds Deposition) at 29:11-30:3, 37:6-8. Defendant Reynolds testified that the Department's STAR system identified payments owed by taxpayers to the State of Michigan, and that the Department's MAIN system's software tracked when payments are owed by the State of Michigan to taxpayers. Id. at 31:9-33:24. According to Defendant Reynolds, his department's STAR and MAIN accounts reconciled taxpayer accounts by either issuing a "warrant" or an "electronic payment" to a taxpayer's account when the State of Michigan owed money to that taxpayer. When a taxpayer allegedly owed the State of Michigan a payment, the Department's STAR and MAIN systems conduct an offset . Id.

Between September 20 and November 25, 2002, through operation of the Department's STAR system the Department offset federal and state funds owed to the Community and applied those balances to the disputed 1993-94 Tax Assessments (the "2002 Offsets"). Durocher Aff. at ¶ 23, Ex. J at 855-860. The 2002 Offsets prevented the Community from receiving state and federal funds to which it was entitled, including funds from the Federal Medicaid Program, Federal Community Health Program, Federal Child Day Care Program and State Department of Transportation Funds. LaFernier Aff. at ¶ 10.

The Community objected to the 2002 Offsets. DePetro Aff. at ¶ 4. In response to the Community's objections, on November 26, 2002, Defendant Reynolds, acting on instructions from Defendant Fratzke, caused a manual override of the automatic offsets of the Community's funds that had been performed by the STAR system, and placed the Community's account on "bypass" status, which was supposed to prevent the Community from being subject to future offsets through the STAR system. Durocher Aff., Ex. C at 83:16-84:3 (account placed on bypass status by Defendant Reynolds; Defendant Reynolds has the capacity/authority to place taxpayer accounts on bypass status), 86:17-21 (Defendant Fratzke instructed Defendant Reynolds to put the Community's account on bypass status). Defendant Reynolds also promptly directed that the 2002 Offsets be reversed, resulting in the return of offset funds to the Community. Durocher Aff. at ¶ 23, Ex. J at 859; Durocher Aff., Ex. C at 89:1-92:-24; DePetro Aff. at ¶ 4; LaFernier Aff. at ¶ 10.

2. The 2005 Offsets

In May and June 2005, the Defendants again offset state and federal funds to which the Community was entitled and applied those state and federal funds to the disputed 1993-94 Sales and Use Taxes (the "2005 Offsets"). The 2005 Offsets involved funds from the Federal

Medicaid Program, the Federal Women, Infants & Children Program ("WIC"), the Federal Safe and Stable Families Program, the Federal Child Day Care Program, as well as State Motor Fuel Tax Refunds and funds from an unspecified source. LaFernier Aff. at ¶ 10-11; Durocher Aff. at ¶ 30.

Defendant Reynolds oversaw the MARCS computer systems in 2005 at the time of the offsets.[12] Defendant Reynolds has not explained how the Community's account, which Defendant Reynolds claimed to have placed on manual bypass status in 2002, was once again subject to "automatic" offsets in 2005. Durocher Aff., Ex. C at 96:3-17. Defendant Reynolds' only explanation was that the system he oversees "doesn't catch everything" and "occasionally though we put an account on bypass occasionally an offset still occurs." Id.[13]

The 2005 Offsets occurred on five separate occasions over a month-long period: May 10, May 17, May 25, May 31, June 1, June 7, and June 8, 2005. Durocher Aff. at ¶ 24, Ex. K; id. at ¶ 25, Ex. L. On May 25, 2002, the Community's Tribal Attorney John Baker notified Defendant Fratzke that the Community objected to the 2005 Offsets, specifically identified the federal Medicaid payments as improperly offset, and requested that the offsets be reversed. Durocher Aff. at ¶ 24, Ex. K. On June 15, 2005, Tribal Attorney Baker again notified Defendant Fratzke of the Community's objection to the 2005 Offsets, again identified the federal sources of the

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12 According to Defendant Reynolds, the MARCS system replaced the STAR system at some point after November 27, 2002. The Department uses the MARCS system for the same collection functions as the previous STAR system. Durocher Aff., Ex. C at 93:1-21.

13 The Defendants had not produced the MARCS system documents reflecting the Department's actions with respect to the Community's account after November 27, 2002 at the time of the depositions of Defendants Fratzke and Reynolds on May 2 and 3, 2007. See Durocher Aff., Ex. C at 93:1-95:10; 168:24-171:4. In addition, the Defendants did not produce the MARCS documents until June 14, 2007. Durocher Aff. at ¶ 11. Accordingly, as discussed more fully in Section C below, the Community has not had the opportunity to depose Defendants Fratzke and Reynolds with respect to these key documents, and Defendant Reynolds could not explain any of the Department's actions after November 27, 2002.

offset funds, and asked Defendant Fratzke to reverse the 2005 Offsets as had been done with the 2002 Offsets, which the Community understood to be the "final resolution of the offset issue." Id. at ¶ 25, Ex. L.

On June 28, 2005, Defendant Fratzke sent a letter to Tribal Attorney Baker claiming the Department was entitled to offset funds as a matter of state common law, and requesting clarification of the Community's legal basis for requesting that the 2005 Offsets to be reversed. Durocher Aff. at ¶ 26, Ex. M. On August 10, 2005, Deputy Tribal Attorney Christoph Geiger sent a letter to Defendant Fratzke, identifying again the federal sources of funds for the 2005 Offsets, challenging the 1993-94 sales and use tax determinations and the assessment of interest and penalties on the disputed balance, and challenging the legal basis for the 2005 Offsets on the basis of federal law regarding balancing of interests and tribal sovereignty. Durocher Aff. at ¶ 27, Ex. N. The Community also challenged the 2005 Offsets because the 1993-94 tax determinations were not liquidated sums and further challenged the 2005 Offsets because the federal program funds could not legally be subject to offset. Id.

In spite of having responsibility for overseeing the Department's accounts, having reversed and refunded the 2002 Offsets, and having notice of the federal sources of funds for the 2005 Offsets, Defendants Fratzke and Reynolds stubbornly refused to reverse the 2005 Offsets. Durocher Aff., Ex. B at 156:16-23 (Defendant Fratzke did not take any action to reverse 2005 Offsets), 177:25-178:6 (Defendant Fratzke had notice that 2005 Offsets involved federal funds), 192:17-19 (same); Ex. C at 137:16-138:5 (Defendant Reynolds unable to recall due to unavailability of history text in missing MARCS documents at deposition, but acknowledging that the 2005 Offsets have not been reversed). After receiving the initial May 25, 2005 letter, Defendant Fratzke not only refused to reverse those offsets that had already occurred, but also

failed to take any action to prevent subsequent offsets. Durocher Aff., Ex. B at 188:17-19. After receiving the second notice from the Community on June 15, 2005, disputing and requesting reversal of the 2005 Offsets, Defendant Fratzke again refused to reverse the illegal offsets, and failed to take any steps to prevent subsequent offsets. Id. at 188:25-189:5. Defendant Fratzke claimed that he consulted with the Michigan Attorney General's office regarding the validity of the 2005 Offsets and the use of federal funds, but testified that inquiry into the Department's legal obligations apparently ceased when the Community filed suit. Durocher Aff., Ex. B at 179:1-181:19. Defendant Fratzke also failed to conduct any independent research into the validity of using federal program funds for the 2005 Offsets. Durocher Aff., Ex. B at 195:23-196:2.

Significantly, around the same time the Community was objecting to the offset of its federal funds in 2005,[14] Defendant Reynolds also became aware of an inter-departmental controversy regarding the Department's use of federal program funds as offsets. Durocher Aff., Ex. C at 49:14-24, 126:10-128:11. More specifically, the Department offset federal child daycare payments owed to Michigan taxpayers and the State's Community Health Department disputed the Department of Treasury's right to do so. Id. at 45:15-46:14. Defendant Reynolds characterized the dispute as "tied up in the two different statutes. The one that says we should offset and their program that says they're [sic] recipient should receive the funds." Id. at 48:11-

[14] The Defendants served a privilege log on March 26, 2007, and a supplemented privilege log on June 14, 2007. Durocher Aff. at ¶ 28, Ex. O. The privilege log identifies multiple documents that may indicate that Defendants were aware of issues regarding offsetting federal funds years before this dispute. However, as discussed below, the Community has not yet had the opportunity to file a motion to compel regarding these documents due to the discovery stay. Id.

14. Defendant Reynolds claims this issue has never been resolved. Durocher Aff., Ex. C at 48:15-49:24.[15]

Thus, as discussed above, the facts developed to date demonstrate the following:

- The Community disputed the 1993-94 sales and use tax determinations that formed the basis for the 2005 Offsets;
- The Community had previously objected to the 2002 Offsets, which had also offset the Community's federal funds, and the Department reversed and refunded those offsets;
- The 2005 Offsets offset federal funds owing to the Community for specific federal programs;
- The Community objected to the 2005 Offsets, pointing out that they involved federal funds that could not be offset.
- Another Michigan state agency raised a similar objection with the Department of Treasury regarding the offset of federal funds around this same time;
- Defendants Rising, Reynolds, and Fratzke oversaw the Department's offset program; and
- Defendants Rising, Reynolds, and Fratzke had the ability to reverse and refund the 2005 Offsets, but chose not to.

Based upon these facts, the Community has demonstrated, in the very least, a genuine issue of fact as to whether Defendants' actions and failures to act with respect to the 2005 Offsets violated the Community's clearly stablished constitutional and statutory rights under the Fourth Amendment, the Fifth Amendment Takings Clause, the Fourteenth Amendment Due Process Clause, and the various federal program statutes and the DCIA.

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[15] As discussed below, the Community intends to conduct additional discovery on this issue, but because of the parties' agreement to stay discovery and the Court's resulting order regarding that agreement, the Community has not yet had the opportunity to conduct this discovery. Durocher Aff. at ¶¶ 12-14.

C. In the Alternative, the Court Should Deny or Continue Defendants' Motion Pursuant to Fed. R. Civ. P. 56(f) to Permit the Community to Conduct Further Discovery.

As discussed above, there are genuine issues of fact relating to the Community's Section 1983 claim for damages. If the Court has any remaining questions regarding the reasonableness of Defendants' conduct in evaluating their qualified immunity defense to liability for damages under Section 1983, it should still deny or continue the Defendants' motion on this claim pursuant to Rule 56(f) of the Federal Rules of Civil Procedure. As set forth in detail below, the Community has not had the opportunity to conduct key discovery on essential factual matters underlying the Community's Section 1983 claims.

The Community initially filed this lawsuit on September 15, 2005; it filed a First Amended Complaint on October 28, 2005, and a Second Amended Complaint on May 26, 2006. On September 29, 2006, the Community filed a Motion for Partial Summary Judgment with respect to Counts IX and XIII of the Second Amended Complaint involving the applicability of Michigan's sales and use taxes to the Community's and its members' purchases of tangible personal property and services within the Community's Reservation and trust lands. In doing so, the Community advised the Court that if it granted the Community's motion, the Court would not need to reach the Community's claims in Counts X to XII or Counts XXII to XXV. Defendants filed their response to this motion on November 22, 2006, and the Community filed its reply on December 15, 2006.

On January 8, 2007, Defendants filed their first Motion for Summary Judgment, in which they sought judgment in their favor with respect to *all counts* of the Second Amended Complaint. The Community filed its response to this motion on February 20, 2007, and Defendants filed their reply on March 12, 2007. With the Court's permission, the Community filed a sur-reply on April 19, 2007.

While these motions were pending, the Community commenced discovery with respect to the claims relating to the illegality of the 2002 and 2005 Offsets. The Community deposed Defendant Fratzke on May 2, 2007, and Defendant Reynolds on May 3, 2007. Several months prior to the deposition, on June 19, 2006, the Community had served document requests, and Defendants had responded to these requests on September 22, 2006, and produced documents on November 28, 2006. Durocher Aff. at ¶ 7. At the commencement of Defendant Fratzke's deposition, however, Defendants' counsel produced over 200 pages of additional responsive documents. Id. During the depositions, counsel for the Community made it clear that it may need to re-depose the witnesses because counsel did not have an adequate opportunity to review these newly-produced documents. Id.; Ex. B at 125. During Defendant Reynolds' deposition, it also became clear that Defendants had failed to produce additional responsive documents, including, among other things, MARCS system documents relating to the 2005 Offsets and a list of program funds exempt from offset by the Michigan Department of Treasury. Durocher Aff. at ¶¶ 8, 11. Counsel for the Community repeatedly stated during the deposition that additional discovery in the form of both document production and depositions would therefore be necessary. Durocher Aff., Ex. C at 66-67, 78, 170.

On May 16, 2007, shortly after the depositions, the Community sent a letter to counsel for Defendants requesting the documents identified in the course of the Fratzke and Reynolds depositions, and out of abundance of caution to ensure production of these documents, the Community also served a Second Request for Production of Documents and Second Set of Interrogatories. Durocher Aff. at ¶ 9.

On June 5, 2007, at the joint request of both parties, Magistrate Judge Greeley issued an Amended Case Management Order. The Amended Case Management Order set a deadline for

the Completion of Discovery on September 7, 2007, and a deadline to file dispositive motions by September 21, 2007. Durocher Aff. at ¶ 10.

On June 14, 2007, Defendants produced 113 pages of additional documents, including the MARCS documents that were not previously produced relating to the 2002 and 2005 Offsets. Durocher Aff. at ¶ 11. On June 18, 2007, Defendants produced an additional 155 pages of documents. Id. These documents obviously were not available to the Community at the time of the May 2 and May 3, 2007 Fratzke and Reynolds depositions even though they clearly fell within the scope of the Community's first set of document requests.[16] Id. As discussed below, the Community has not had an opportunity to depose the Defendants or any other witnesses with respect to any of these documents. Id.

In late June and July, 2007, counsel for both sides engaged in many discussions about additional discovery that was anticipated. Durocher Aff. at ¶ 12. Because of concerns relating to the cost of the additional discovery, and in light of the pending dispositive motions, counsel jointly agreed to seek an order continuing the scheduling order and staying discovery until after the Court ruled on the motions pending at the time. Id. At no time did counsel for Defendants advise the Community that Defendants planned to file a second motion for summary judgment, during the period of the requested stay, on the very subjects for which the parties were agreeing to stay discovery. Id. Had this been disclosed, the Community would not have agreed to a stay and would have proceeded with outstanding discovery.

On July 20, 2007, the parties filed a Joint Motion to Continue Scheduling Order Deadlines Pending Ruling on Summary Judgment. Durocher Aff. at ¶ 13. In that joint motion,

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16 One example of a key document not produced until after the affidavits of Defendants Fratzke and Reynolds is the "STAR/GAL SAI CODE BYPASS" list of categories of funds that appear to be on "bypass" status, and thereby exempt from offset. Among other categories of funds, the list includes "PAYMENTS TO INDIAN TRIBES," "FIA NON-MMIS MEDICAID PAYMENTS," and "CHILD CARE." Durocher Aff. at ¶ 11; Ex. E.

the parties stated: "[b]ecause the Court has not yet ruled on the parties' pending motions for summary judgment, and because resolution of those motions could impact what additional discovery the parties will need to conduct and could also impact the filing of additional motions for summary judgment, the parties now ask the Court to continue the current deadlines in the June 5, 2007 Case Management Order until after the resolution of the pending summary judgment motions." See Docket No. 92 at 2. The parties specifically addressed the need for additional discovery depending on the Court's ruling on the summary judgment motions, and noted that it was possible that further discovery might not be necessary depending on the Court's ruling. See id. at 3. The parties went on to describe the expected additional discovery both parties intended to seek. Id. at 3-4. The parties jointly represented to the Court that "[t]he parties respectfully submit that continuing the current scheduling deadlines until after the Court has ruled on the pending summary judgment motions may obviate the need for certain additional discovery and *for certain additional summary judgment motions*." Id. at 4 (emphasis added).

On July 24, 2007, after the joint motion was filed but before the Court ruled on the parties' joint motion, counsel for the Community sent a letter to counsel for Defendants for the primary purpose of serving the Community's 30(b)(b) subpoena and subpoena *duces tecum*. Durocher Aff. at ¶ 14. The information and documents sought by the subpoena included the source of funds for the 2002 and 2005 offsets, the inter-departmental dispute regarding the propriety of offsetting federal funds identified in the deposition of Defendant Reynolds on May 3, 2007, the terms of agreements between the State of Michigan and the federal government, as well as any plans and/or procedures adopted by the State of Michigan with respect to the federal programs at issue. Id. Counsel for the Community served this subpoena because counsel for Defendants had advised that the information sought by the Community was not within the

custody or control of any of the Defendants (notwithstanding the fact that these same Defendants allowed the offset of these federal funds that belonged to the Community). Id. The letter and the subpoenas indicated that the Community intended to commence the depositions on August 20, 2007. Id.

On July 25, 2007, counsel for the Community sent an email to Defendants' counsel, confirming the depositions of Messrs. Rising, Fratzke and Reynolds for the week of August 20, 2007, as well as the Rule 30(b)(6) depositions that were identified in the subpoena. Durocher Aff. at ¶ 15. On July 26, 2007, counsel for Defendants responded to the Community's July 24, 2007 letter, again acknowledging the need for future discovery, and specifically noting the availability of Defendant Rising, who had not yet been deposed. Durocher Aff. at ¶ 16. On July 27, 2007, the Court granted the parties' joint motion to continue the scheduling order. Docket No. 95. On August 7, 2007, Defendants' counsel sent counsel for the Community an e-mail to confirm that "all scheduled deps are off, given the court's order." Durocher Aff. at ¶ 18; Ex. I.

On September 17, 2007, the Court set a hearing date for oral argument on the Community's Partial Motion for Summary Judgment (Docket No. 44) and the Defendants' Motion for Summary Judgment (Docket No. 63) for December 5, 2007. Durocher Aff. at ¶ 19. In reliance on counsel for Defendants' representations regarding a stay of additional discovery until after the Court ruled on the pending summary judgment motions, the Community abided by the discovery stay and did not pursue depositions of the parties or any of the discovery sought with respect to the subpoenas that had been served on counsel for the Defendants. Durocher Aff. at ¶ 20.

On October 31, 2007, Defendants filed their Second Motion for Summary Judgment. Durocher Aff. at ¶ 21. As discussed above and in the Durocher Affidavit, the Community has

not yet had the opportunity to conduct additional discovery relating to the Defendants' actions and failures to act relating to the 2005 Offsets. Id. at ¶ 22. Among other discovery, the Community intends to take the deposition of Defendant Rising, and to re-take the depositions of Defendants Reynolds and Fratzke to obtain information regarding, at a minimum, the documents the Community did not produce until June 12, 2007, well after Defendants Fratzke and Reynolds depositions on May 2 and 3, 2007, respectively. Id. As noted above, these documents included information from the MARCS system, the very computer system that Defendants claim is responsible for the 2005 offsets at issue in this lawsuit. Id. The Community also intends to depose other state employees familiar with the federal program funding and agreements that are at issue in this lawsuit, as well as employees from the Michigan Community Health Department who also objected to the Department of Treasury offsetting federal funds against alleged tax obligations. Durocher Aff., Ex. C at 46-50, 126-28.

Defendants' Second Motion for Summary Judgment is extraordinarily premature in light of the extensive discovery that remains with respect to the 2005 Offsets, the MARCS documents, and the documents produced at and after the depositions of Defendants Fratzke and Reynolds,[17] all of which pertain to the Community's Section 1983 claims. The Court should deny Defendants' Second Motion for Summary Judgment because genuine issues of material fact exist. Even if the Court does not deny the motion on that basis, the Court should deny or continue the motion to permit the Community to conduct additional discovery pursuant to Fed. R. Civ. P. 56(f).[18]

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[17] In their Second Motion for Summary Judgment, Defendants rely on several documents that were produced on the day of Defendant Fratzke's deposition, and several others that were not produced until well after the depositions. Durocher Aff. at ¶ 11.

[18] It is well-established that the plaintiff must receive "a full opportunity to conduct discovery" to be able to successfully defeat a motion for summary judgment. Ball v. Union Carbide Corp., 385 F.3d 713, 719-20 (6th Cir. 2004) (citing Anderson v. Liberty Lobby, Inc., 477 U.S. at 257; see also

CONCLUSION

For the foregoing reasons, the Community respectfully requests that this Court deny Defendants' second motion for summary judgment.

Dated: December 14, 2007

Respectfully submitted,

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Celotex Corp. v. Catrett, 477 U.S. 317, 322(1986) ("the plain language of Rule 56(c) mandates the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial"); White's Landing Fisheries, Inc. v. Buchholzer, 29 F.3d 229, 231-32 (6th Cir.1994) ("[in light of Anderson and Celotex,] a grant of summary judgment is improper if the non-movant is given an insufficient opportunity for discovery")). "Beyond the procedural requirement of filing an affidavit, Rule 56(f) has been interpreted as requiring that a party making such a filing indicate to the district court its need for discovery, what material facts it hopes to uncover, and why it has not previously discovered the information." Id. (citing Cacevic v. City of Hazel Park, 226 F.3d 483, 488 (6th Cir.2000)). The Community has met its burden under Fed. R. Civ. P. 56(f).