UNITED STATES DISTRICT COURT
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.

Case No. 2:05-cv-0224

Hon. Gordon J. Quist

REPLY BRIEF IN SUPPORT OF DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

ORAL ARGUMENT REQUESTED

DORSEY & WHITNEY LLP
Skip Durocher (MN Bar No. 208966)
Mary J. Streitz (MN Bar No. 016186X)
Christopher R. Duggan (MN Bar No. 0302788)
Attorneys for Plaintiff
Suite 1500
50 South Sixth Street
Minneapolis, MN 55402
(612) 340-7855

CLARK HILL PLC
Steven D. Turner (P21636)
Attorneys for Plaintiff
300 Ottawa Ave NW Ste 300
Grand Rapids, MI 49503
(616) 233-4822

MILLER, CANFIELD, PADDOCK & STONE, PLC
Kevin J. Moody (P34900)
Louis B. Reinwasser (P37757)
James R. Lancaster, Jr. (P38567)
Attorneys for Defendants
One East Michigan Ave, Ste 900
Lansing, MI 48933
(517) 487-2070

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I. INTRODUCTION

The arguments raised in this motion for summary judgment require that the 33-Count, 197-paragraph Complaint by the Keweenaw Bay Indian Community (the "Community") be dismissed without the Court considering with respect to substantive tax issues. If this Court concludes that it must address any of the tax issues, Defendants rely on the brief that they have already filed in response to the Community's earlier motion for summary judgment, which explains why the Indian Trader statutes do not impose a per se rule against the Michigan sales and use taxes and why those taxes are permitted under federal law without apportionment.

II. THIS COURT SHOULD DISREGARD THE DUROCHER AFFIDAVIT

This Court should disregard the affidavit submitted by the Community's attorney, Skip Durocher, because it consists of argument, not fact. Durocher Affidavit, ¶2-4, 6-8, and exhibits; see Fed. R. Civ. P. 56(e) (an affidavit must "set forth such *facts* as would be admissible . . .") (emphasis added). The affidavit also fails to establish a basis for granting additional discovery before ruling on summary judgment under Fed. R. Civ. P. 56(f) because it does not state "what material facts [the Community] hopes to uncover, and why it has not previously discovered the information." *Cacevic v. City of Hazel Park*, 226 F.3d 483, 488 (6th Cir. 2000); Durocher Affidavit, ¶5, 9. Mr. Durocher merely avers in paragraphs 5 and 9 that the Community "has not yet had the opportunity to conduct the necessary discovery[.]" In *Celotex Corp. v. Catrett*, 477 U.S. 317, 323-324, 327; 106 S.Ct. 2548; 91 L.Ed.2d 265 (1986), the Supreme Court explained that a key purpose "of the summary judgment rule is to isolate and dispose of factually unsupported claims or defenses" and to prevent the "unwarranted consumption of public and private resources." To that end, a motion for summary judgment need not wait until after discovery closes, there must only be "adequate time for discovery." *Id.* at 322. Discovery has been open for months in this case and the Community's failure to acquire the evidence it needs

to create a genuine issue of material fact to support its claims cannot be excused at this late date.

III. DEFENDANTS ARE IMMUNE FROM SUIT

Defendants have provided an ample basis for this Court to conclude that they, as state officers, are immune from this suit under the Eleventh Amendment because this case does not fit within the narrow exception of *Ex Parte Young*, 209 U.S. 123, 28 S.Ct. 441, 52 L.Ed. 714 (1908) and because this case affects the State's special sovereignty interests. Brief Supporting Defendants' Motion for Summary Judgment, p 2-10 ("Defendants' Brief"). The Community responds that federal courts have traditionally adjudicated Native American tax cases, but does not cite precedent that would provide an exception to the State's sovereign immunity here. See, *e.g.*, *Winnebago Tribe of Nebraska v. Stovall*, 341 F.3d 1202, 1206 (10th Cir. 2003) (sovereign immunity comments in *dicta*); *Keweenaw Bay Indian Community v. Naftaly*, 370 F. Supp. 2d 620 (W.D. Mich. 2005), 452 F3d 514 (6th Cir. 2006) (never addressing sovereign immunity); see also *Asmo v. Keane, Inc.*, 471 F.3d 588, 599-600 (6th Cir. 2006) (comments unnecessary to decision not precedent). *Ex Parte Young* may allow a small class of Native American tax cases into federal court under limited circumstances, but that does not mean that every tax case can be filed in federal court. The fatal flaw in the Community's argument is that *Ex Parte Young* does not apply here because the Community is seeking relief that is *retrospective and for money damages*, making this case very different from Native American tax cases that are properly in federal court because they seek only prospective injunctive relief. See, e.g., *Sac & Fox Nation of Missouri v. Pierce*, 213 F.3d 566, 572 (10th Cir. 2000) (seeking prospective injunctive relief on tax issue).

For instance, the 1993-1994 tax assessments and the offsets that Treasury allegedly took in 1996 and 2005 relate back to taxes that could be imposed under the 1977 Tax Agreement with the State. Given that the Community has conceded that Defendants cannot be sued for breaching

the 1977 Tax Agreement because they were not parties to it, there can be only two purposes for pursuing any claims regarding those long-ago events. See Community's Memorandum Opposing Summary Judgment, p 5, n5 ("Community's Brief"). The first purpose would be to seek a declaration of a past violation of the 1977 Agreement in order to affect the rights of the State in a breach of contract action, if it were brought in the proper forum. *Ex Parte Young* does not allow a court to award retrospective relief affecting a state's rights, not even as interpreted by *Verizon Maryland, Inc. v. Public Service Com'n. of Maryland*, 535 U.S. 635; 122 S.Ct. 1753, 152 L.Ed.2d 871 (2002). See *id*. at 646 (only allowing declarations regarding past to affect private/non-state actors). The second purpose to pursue these claims concerning the past tax assessments and offsets is to obtain money damages, which is equally forbidden by the Eleventh Amendment. *MacDonald v. Village of Northport, Mich*., 164 F.3d 964, 971 (6th Cir. 1999).

The Community has no explanation for why it would ever be allowed to use this action to establish the liability of the State, which is immune from suit. As for the efforts to obtain money damages, the Community claims that an award of money damages will have no impact on the State Treasury under either one of two theories.[1] First, the Community speculates that the alleged offsets Treasury took in 1996 and 2005 have been maintained ever since in a segregated trust account for the Community's benefit and were never deposited in the State Treasury. This is false. As Palmer S. Giron, the Chief Accountant/Administrator at the Michigan Department of Treasury explains in **Exhibit D**, when Treasury takes an offset, the money is deposited "into the State Treasury and distributed according to Statute." *Id*., ¶5. Further, there "is no segregated fund associated with offsets that Treasury has taken concerning" the Community. *Id*., ¶6.

[1] Contrary to the Community's arguments, Defendants do *not* concede that the Community is owed money from the alleged 1996 and 2005 offsets. Community's Brief, p 12.

Second, the Community argues that this Court could order Treasury to pay an amount equal to the offsets to the Michigan Economic Development Corporation (MEDC), taking the place of at least part of a net win payment the Community is obligated to make to MEDC. The Community thinks this would merely "shift funds from one state fund to another . . . ." However, MEDC is not a state agency, it is a public body corporate formed under the Urban Cooperation Act of 1967, M.C.L. §124.507, and monies directed to it are not "state funds." See *Tiger Stadium Fan Club, Inc. v. Governor*, 217 Mich. App. 439, 445, 452; 553 N.W.2d 7 (1996); see also Agreement and Stipulation, **Exhibit A** to Defendants' Brief, ¶4(B)(i). Therefore, any order or judgment that would attempt to "reverse," "restore," or "refund" offsets to the Community will have an impact on the State Treasury, which the Eleventh Amendment bars.

Even the Community's request for a declaration regarding the Michigan sale and use taxes bears no meaningful resemblance to the Native American tax cases the federal courts have properly considered under the *Ex Parte Young* doctrine. Those cases involve Native American tribes that used federal law to defend their right to avoid taxation in Indian Country. The Community is not defending its rights in this action, it is seeking to expand its rights. If the Community succeeds, it will have made the Western Upper Peninsula and parts of Wisconsin a tax-free zone for the Community, its members, other Native Americans, and anyone doing business with them – including non-Native Americans. This tax-free zone will exist irrespective of whether a transaction takes place in Indian Country and irrespective of which party bears the legal incidence of the tax. There is no federal precedent that would use the *Ex Parte Young* fiction to allow such a breathtaking attempt to expand the law in the face of sovereign immunity. Therefore, sovereign immunity under the Eleventh Amendment bars all the claims in this case. Likewise, as argued in Defendants' principal brief, because *Ex Parte Young* does not apply, Fed.

R. Civ. P. 19 provides an alternative ground for dismissing this case entirely.

IV. THE COMMUNITY HAS FAILED TO STATE A CLAIM UNDER 42 USC §1983

In *Inyo County, Cal. v. Paiute-Shoshone Indians of the Bishop Community of the Bishop Colony,* 538 U.S. 701; 123 S.Ct. 1887; 155 L.Ed.2d 933 (2003), the Supreme Court held that a Native American tribe was not a "person" within the meaning of §1983. The Community contends that *Inyo* only applies to those cases involving a claim that a tribe's sovereign rights were violated. While *Inyo* did involve the tribe's sovereign rights, *id*. at 711-712, the Court did not suggest in any way that its ruling was limited to cases involving sovereign rights or that tribes can vindicate private rights under §1983. The Supreme Court rejected the broad reading of the statute the tribe advocated and apparently gave the word "person" the same meaning for both claimants and defendants under §1983 to hold that a tribe, like a state, is a sovereign and does not fit within §1983. See *id*. at 710-711 and 712 n 6.

Inyo also bars these §1983 claims because the Community is pressing its sovereign rights. The §1983 claims relate only to the alleged acts and omissions by Defendants Rising, Reynolds, and Fratzke in connection with the steps Treasury allegedly took in 2005[2] to offset the Community's 1993-1994 tax assessments. Second Amended Complaint, ¶33-44 ("Complaint"). The Community claims that these offsets violated the 1977 Tax Agreement (an agreement between two sovereigns) and has never asserted what private rights it had to the money that was allegedly taken for the 1996 and 2005 tax offsets. The alleged affront to the Community's sovereignty led Community President Susan LaFernier to inform Governor Granholm that the Community would be withholding a portion of the net win payments required under the 2001

[2] There are no allegations that Defendants Rising, Reynolds, and Fratzke were involved in or liable for the alleged 1996 offsets. See Complaint, ¶84-88

Consent Judgment even though "the Community had hoped that these [Treasury offset] issues could have been resolved on a *government to government* basis . . . ." **Exhibit E**, Letter from LaFernier to Granholm (September 8, 2005), p 2. This closely matches the Community's Complaint, which asserts that this Court has jurisdiction under 28 U.S.C. §1362 because the Community maintains "government-to-government relations with the United States,"¶4, and the Community "exercises powers of self-governance and governmental jurisdiction over its reservation," ¶6. See also Complaint, ¶84 and 190 (incorporating previous allegations in §1983 claims). The offsets affected the rights of the Community as a sovereign, which is why the chief executive of the Community wrote to the chief executive of the State regarding the issue.

The Community could have only a sovereign interest, not a private interest, in the money that Treasury allegedly offset in 2005 because the federal money that was offset was available to the Community in its governmental capacity, not in a private capacity. For instance, the Community alleges that Treasury offset federal money for Medicaid, the Women, Infant & Children (WIC) Program, family support services, and day care. Complaint, ¶42. At the same time the Complaint states that the "Community, through its various tribal *government* operations and programs, provides essential *governmental* services to its members and their families, to other Native Americans residing on or near the Reservation and trust lands, and to visitors to the Reservation and trust lands . . . ." Emphasis added. The services identified in Complaint, ¶18 match the purpose of the funding for the federal funding allegedly offset, including "medical, dental, mental health, community health and violence intervention programs and services; social services programs;" as well as education" and "day care." Some federal programs even made money available specifically for tribes to offer programs to their members. See, e.g., Dep't. of Health and Human Services, Safe and Stable Families (visited March 7, 2007)

<http://www.acf.hhs.gov/programs/cb/programs_fund/state_tribal/ss_act2.htm> (funding to tribes for programs keeping children with parents) and Tribal Child Care Grants <http://nccic.acf.hhs.gov/tribal/grantees.html#MI> (funding to the Community for child care programs). The federal government gave this money to the Community that Treasury offset so the Community could act as a sovereign and provide services to its members, not so that it could spend the money in any way it chose as an individual with a private right to money might do. Therefore, even if *Inyo* were limited to cases involving a tribe's sovereignty, the Community cannot sue to defend its sovereign interests under §1983.

In *Keweenaw Bay Indian Community v Rising*, __ F.3d __ (6th Cir. February 28, 2007) ("*Rising I Sixth Circuit Opinion*"), the Sixth Circuit mentioned in a footnote that it believed the Community could have a cause of action under §1983. This statement is classic nonbinding *dictum* because it was unnecessary to the Sixth Circuit's decision, and was also made without any analysis or authority. See *Asmo, supra*. Not even the District Court considered whether the Community is a "person" entitled to be a claimant under 42 U.S.C. § 1983. *Keweenaw Bay Indian Community v. Rising*, No. 2:03-CV-111(W.D. Mich., Sept. 12, 2005) (opinion), available at 2005 WL 2207224, at *12-16 ("*Rising I District Court Opinion*"). There is no precedent binding on this Court that holds that a tribe has the right to be a claimant under §1983.

The Court should also note that the Community has not yet provided evidence of what Defendants Rising, Reynolds, and Fratzke were supposed to have done in violation of §1983. See Community Brief, p 19; Durocher Affidavit, ¶9. That is grounds for summary judgment. Additionally, the Community does not challenge Defendants' argument that if its §1983 claims fail, it cannot obtain costs and attorney fees under § 1988. *National Private Truck Council, Inc. v. Oklahoma Tax Com'n.*, 515 U.S. 582, 592; 115 S.Ct. 2351, 132 L.Ed.2d 509 (1995).

V. RES JUDICATA/COLLATERAL ESTOPPEL BARS THE COMMUNITY'S TREATY CLAIMS

"Res judicata bars the relitigation of the same claim or cause of action while collateral estoppel bars the relitigation of the same issue." *Drummond v. Commissioner of Social Sec.*, 126 F.3d 837 (6th Cir. 1997). The Community pleaded the same *claims* concerning the effect of the 1842 Treaty on tax laws in the Ceded Area in this case that it pleaded in *Rising I*. See Defendants' Brief, p 20-21. But even if the Court views the dispute about the effect of the 1842 Treaty on the Ceded Area as presenting an "issue" instead of a "claim," it must still focus on what the Community raised and what the District Court and Sixth Circuit decided in *Rising I* to determine whether the Community is barred from re-litigating that claim or issue.

The Community attempts to confuse this Court by arguing that the 1842 Treaty claims in *Rising I* are best viewed as specific to the tobacco tax disputed there. However, the real question the Community presented in *Rising I* was whether "the parties to the 1842 Treaty understood that the laws of the United States would govern the Indians' trade and intercourse within the Ceded Area rather than, or instead of, state law." *Rising I District Court Opinion, supra* at *11. In other words, the Community asserted that the 1842 Treaty *preempted* state law and gave it "the right to conduct their trade and intercourse within the Ceded Area under the exclusive regulation and protection of federal laws." *Id*. Even assuming that Article II of the 1842 Treaty were still in effect, the District Court concluded that the Community's preemption contention was "unconvincing." *Id*. In any event, the District Court concluded that the 1842 Treaty added nothing substantive to the case because it essentially begged the question whether federal law would allow a particular state tax in the Ceded Area, the precise question before the Court absent the treaty argument. *Id*. The Sixth Circuit agreed with the District Court that the 1842 Treaty did not, itself, preempt state taxation in the Ceded Area and also looked to federal law for the

answer concerning the particular tax at issue in *Rising I*. See *Rising I Sixth Circuit Opinion*, *supra* at *10. Though the taxes in this case are different from the tobacco tax disputed in *Rising I*, the Community's position that the 1842 Treaty preempts state law is identical in both cases. The Community has already had a full and fair opportunity in court to press its arguments about whether the 1842 Treaty preempts state law in the Ceded Area and either collateral estoppel or res judicata preclude the Community from re-litigating these issues/claims.

VI. THE COMMUNITY IS NOT ENTITLED TO SETOFF

The Community claims that it is entitled to a declaration confirming its right to setoff under tribal law, *i.e.*, that it was entitled to withhold its net win payment to MEDC in response to the alleged 1996 and 2005 offsets. This argument fails for several reasons. There is no actual controversy to declare regarding the Community's right to setoff under tribal law because it did not act under tribal law when withholding its net win payments from MEDC. See 28 U.S.C. §2201(a); *National Rifle Ass'n. of America v. Magaw*, 132 F.3d 272, 279 (6th Cir. 1997) (declaratory judgment can only for an "actual controversy"). Rather, the Community actually "utiliz[ed] *the State's offset policy* that the State has used against the Community" to setoff its payment to MEDC. See **Exhibit E**, LaFernier Letter. Nor can this Court declare what tribal law would allow regarding setoff because tribal law does not address setoff. Community's Brief, p 24. As "sovereigns, tribes have the inherent right to regulate conduct occurring *within their boundaries* and exercise governmental authority *over their members*." *United States v. Peltier*, 344 F.Supp.2d 539, 547 (E.D. Mich. 2004) (emphasis added). But the Community provides no support for its contention that tribal law can be exerted against state officers who are not members of the Community and who act outside of the Community's Indian Country.

Even if there were some way to make this tribal law to apply to the Community's setoff,

the Community is not entitled to a declaration of setoff concerning its actions because it withheld more than 2.6 times the debt it claims that the State owed it. If the allegations in the Complaint are accepted as true only for the sake of argument, then Treasury took offsets in the amount of $87,839 in 1996 and an additional $103,504.90 in 2005, for a **total of $191,343.90**. Complaint, ¶33, 42. However, the Community withheld $476,300.97 from its payment to MEDC for a period that ended on March 31, 2005 and $28,388.35 from its payment to MEDC for a period that ended on September 30, 2005 for a **total of $504,689.32**. See **Exhibit E**, LaFernier Letter; **Exhibit F**, Misegan Letter to Modie (December 2, 2005). A party may take a setoff solely for the amount of a debt owed to it. See, generally, *In re Gordon Sel-Way, Inc.*, 270 F.3d 280 (6th Cir. 2001) (discussing common-law right to setoff in terms of debts owed between parties). The windfall that the Community has withheld for itself is better characterized as unjust enrichment than setoff and, therefore, should not be sanctioned by this Court in a declaration. See, generally, *First Nat. Bank of Louisville v. Hurricane Elkhorn Coal Corp. II*, 763 F.2d 188, 190 (6th Cir. 1985) (party that retains more than it is owed is actually seeking unjust enrichment).

VII. CONCLUSION AND REQUEST FOR RELIEF

Defendants respectfully request that this Court grant summary judgment to Defendants of all counts in this lawsuit and whatever other relief is just and appropriate.

Respectfully submitted,

MILLER, CANFIELD, PADDOCK AND STONE, P.L.C.

By: s/ Kevin J. Moody

Kevin J. Moody
Attorneys for Defendants
One Michigan Avenue, Suite 900
Lansing, MI 48933-1609
(517) 487-2070
moody@millercanfield.com

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