UNITED STATES DISTRICT COURT EASTERN DISTRICT OF MICHIGAN NORTHERN DIVISION

Saginaw Chippewa Indian Tribe of Michigan, et al.,

Plaintiffs.

Case No. 05-10296-BC Honorable Thomas L. Ludington

v.

Jennifer Granholm, et al.,

Defendants.

Motion to Strike Rosebud Statutory-Diminishment Defense and Supporting Witnesses

The Saginaw Chippewa Indian Tribe of Michigan moves the Court to strike the Defendants' diminishment and disestablishment defenses to the extent that Defendants rely on a Rosebud¹ statutory-diminishment theory, and to strike all witnesses Defendants have named to testify about facts relating to those defenses.

If a statute and its legislative history evince congressional intent to diminish a reservation, Rosebud statutory-interpretation cases consider evidence of modern "jurisdictional facts" to bolster that intent. But in this case, Defendants do not allege that any statute diminished the Tribe's reservation. Instead, the parties dispute the effect of the Treaties of 1855 and 1864 between the U.S. and the Tribe. The Plaintiffs' position is that the Treaties created a six-township reservation consisting of all lands within the six townships. The Defendants assert that the Treaties simply gave the Tribe (or its predecessor-in-interest) various parcels of land within the six townships, and that as those parcels passed out of Indian ownership, they passed

¹ Rosebud Sioux Tribe v. Kneip, 430 U.S. at 586, 603 (1977).

out of the Reservation. In other words, the Defendants argue that the Treaties themselves contemplated the diminishment of the Tribe's reservation. So in this case, the parties dispute the meaning—or interpretation—of the Treaties. But treaty-interpretation cases involve different analyses than statutory-diminishment cases.² So the Tribe requests that the Court issue an order:

- striking Defendants' diminishment and disestablishment defenses to the extent that
 Defendants rely on a statutory-diminishment theory;
- 2) striking as irrelevant Defendant's proposed "jurisdictional-fact" witnesses and any other evidence of statutory diminishment; and
- 3) defining Phase I as a treaty-interpretation phase directed to discerning the Indians' contemporaneous understanding of the 1855 and 1864 treaties, to which only the testimony of the parties' historical and treaty-interpretation experts is relevant.

The Tribe has contacted all parties to seek concurrence with this motion and to resolve this dispute without court action. The United States concurs in this motion, but the Defendants do not concur, and court action is necessary to resolve the dispute. A supporting memorandum and exhibits are filed with this motion.

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² Compare Minnesota v. Mille Lacs Band of Chippewa, 526 U.S. 172, 196 (1999) ("[W]e interpret treaties to give effect to the terms as the Indians themselves would have understood them," by focusing not only on the Treaty language, but also on "the larger context that frames the Treaty, including the history of the treaty, the negotiations, and the practical construction adopted by the parties.") (internal citations omitted) with Rosebud Sioux Tribe, 430 U.S. at 603 (noting that in considering whether a reservation has been diminished by statute, "[t]he underlying premise is that congressional intent will control," and that if congressional intent to diminish is present, the court looks to "subsequent jurisdictional history" to confirm that intent) (internal citations omitted).

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Plaintiff,

v.

Case No. 05-10296-BC Honorable Thomas L. Ludington

Filed 01/30/2009

Jennifer Granholm, et al.,

Defendants,

Memorandum in Support of Motion to Strike Rosebud Statutory-Diminishment Defense and Supporting Witnesses

CONCISE STATEMENT OF ISSUES PRESENTED

- 1. The Supreme Court has adopted different methodologies for interpreting treaties and for determining whether a pre-existing reservation has been "diminished" by congressional action. Defendants admit that no congressional act diminished the reservation of the Saginaw Chippewa Tribe, and that the Sixth Circuit has ruled that a treaty may not be treated like a congressional act. Can the Rosebud statutorydiminishment defense apply to this case?
- 2. Under well-established controlling authority, the *Rosebud* statutory-diminishment defense cannot apply to this case, and the only Phase-I question for the Court is to determine the contemporaneous Indian understanding of the Treaties of 1855 and 1864. May Defendants introduce modern "jurisdictional-fact" evidence that is not relevant to the contemporaneous Indian understanding of the treaties in Phase I?

CONTROLLING OR MOST APPROPRIATE AUTHORITY

Constitutional Authority for Treaty-Making Power

U.S. Const. art. II § 2 cl. 2.

Treaties as Distinguished from Statutes or Acts of Congress

Keweenaw Bay Indian Community v. Naftaly, 452 F.3d 514 (2005).

Framework for Treaty Interpretation

Minnesota v. Mille Lacs Band of Chippewa, 526 U.S. 172 (1999).

Standard for Striking a Defense

Glover v. Elliott, No. 1:07-cv-648, 2007 WL 2904050 (W.D. Mich. Oct. 2, 2007).

Standard for Limiting Discovery and Excluding Evidence

Fed. R. Civ. P. 26(c).

Seales v. Macomb County, 226 F.R.D. 575 (E.D. Mich. 2005).

INTRODUCTION AND FACTUAL BACKGROUND

In October, the Court narrowed this case by ruling that the Defendants "may not rely on, or advance any evidentiary support for, the time-based equitable defenses of laches, estoppel, acquiescence, or impossibility." It went on to order the parties to "file amended witness lists consistent with this opinion and order[.]" But rather than prune their respective witness lists, the Defendants' amended witness lists now collectively name *more* witnesses than they did before the Court's order striking the defenses. While the County and State narrowed their respective Phase I lists, the City recast *all but three* of every defendant's previously named *Sherrill* future-effects witnesses as "jurisdictional-fact" witnesses supporting a *Rosebud* statutory-diminishment defense. 5

Interestingly, it is not at all clear from Defendants' *pleadings* that they have formally asserted a *Rosebud* statutory-diminishment defense. Instead, the Defendants pleaded only that the Tribe's reservation "has been diminished or disestablished by the selection of lands by individual Saginaw Chippewa Indian Tribe members as citizens of the State of Michigan[,]" without any reference to a diminishing statute. Through the historical-discovery period, and as this case has developed, the Tribe has come to understand this individual-diminishment language to mean that Defendants argue that the Tribe's reservation "was diminished by operation of the

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¹ Oct. 22, 2008 Opinion and Order (the "Opinion"), Doc. 121, at 41.

² *Id*.

³ City of Sherrill v. Oneida Indian Nation of New York, 544 U.S. 197 (2005).

⁴ Rosebud Sioux Tribe v. Kneip, 430 U.S. 584 (1977).

⁵ See Oct. 31, 2008 City of Mt. Pleasant's Second Amended Witness List, Doc. 130 at 2-5.

⁶ Oct. 24, 2008 State Defendants' Amended Answer to Amended Complaint for Declaratory and Injunctive Relief, Doc. 123 at 8 ¶ 5. *See also* Oct. 31, 2008 Isabella County's Amended Answer to Amended Complaint and Affirmative Defenses, Doc. 128 at 8 ¶ 5 (same); Nov. 5, 2008 City of Mt. Pleasant's Amended Affirmative Defenses, Doc. 136 at 3 ¶ 6 (same).

1855 and 1864 Treaties themselves[,]" but that *Rosebud* should nevertheless govern the court's consideration of this question.⁷

The problem is that *Rosebud* is a statutory-interpretation case, and *every party to this* case agrees that if the Saginaw Tribe's reservation was in fact created by the Treaty of 1855 and confirmed by the Treaty of 1864, no statute diminishes the Saginaw Tribe's reservation. So the court is presented with the question of whether the *Rosebud* statutory-diminishment analysis can be applied to interpret a *treaty*, and the parties agree that this is a threshold "legal question." The parties may well (and in fact do) disagree as to whether the Treaties of 1855 and 1864 self-diminish, but that is a factual question that is not yet before the Court. Rather, the question now is the purely legal one of methodology.

Defendants seek to superimpose the *Rosebud* statutory-interpretation model on this treaty case, even though there is no statute to interpret. Because Indian treaties must be evaluated to discern the historical *Indian* understanding of the treaty, evidence of statutory interpretation (including of modern "jurisdictional facts") and congressional intent has no place in this treaty-interpretation case. The Defendants' untenable extension of *Rosebud* to avoid the court's

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 $^{^{7}}$ Jan. 7, 2009, Joint Stipulation, Doc. 149, $\P\P$ 1-3.

⁸ Rosebud Sioux, 430 U.S. at 586 (interpreting the language and legislative history of acts of 1904, 1907, and 1910, and stating that "[t]he underlying premise is that congressional intent will control."); *id.* at 588 n. 4 ("The focus of our inquiry is congressional intent. . . . the nature of our inquiry [] is to inquire whether a congressional determination to terminate is expressed on the face of the Act or is clear from the surrounding circumstances and legislative history.").

⁹ Jan. 7, 2009, Joint Stipulation, Doc. 149 at ¶ 1.

¹⁰ *Id.* at $\P 4$.

There will come a time in this case, regardless of the outcome of this motion, when the parties will present their respective expert reports regarding the history and import of the Treaties of 1855 and 1864. But that time is not now. The instant question before the Court will only determine the lens through which the Court must eventually view that evidence. Submission of any of the disputed factual evidence is unnecessary and inappropriate to the determination of the stipulated legal-methodology issue raised by this motion.

October 22, 2008 ruling should not be allowed. To the extent that the Defendants rely on a Rosebud statutory-diminishment defense, that defense should be stricken. Further, Defendants' evidence in support of the Rosebud statutory-diminishment defense, including any witnesses or other evidence addressing modern demographic or "jurisdictional facts" in Phase I should be stricken. 12 Finally, to ensure that the parties continue on an orderly course to trial, the Court should affirmatively limit all Phase I witnesses and evidence to treaty-interpretation issues.

ARGUMENT

- I. The Rosebud statutory-diminishment defense cannot apply to this legal proceeding.
 - Legal standard to strike an affirmative defense A.

The Court may strike affirmative defenses from a pleading on its own motion, or upon the motion of a party. 13 One "purpose of a motion to strike under Rule 12(f) is to test the legal validity of a defense." ¹⁴ To prevail, "a plaintiff must show that there is no issue of fact that

¹² Granting this motion would eliminate the following witnesses from Phase I: Kenneth Daraga, Anthony Olkowski, and Don Seal to the extent that the State seeks to rely on them for anything other than testimony relevant to the Tribe's contemporaneous understanding of the Treaties of 1855 and 1864, see Feb. 29, 2008, [State] Defendants' Supplemental Witness List, Doc. 125 ("State's Witness List") at 2 ¶¶ 3, 4, and 8, and all witness named by the City under Roman numeral I of their witness list except Drs. LeRoy Barnett, Anthony Gulig, and Theodore Karamanski. See Oct. 31, 2008 City of Mt. Pleasant's Second Amended Witness List, Doc. 130 ("City's Witness List") at 2-5, ¶¶ 1-13, 17-21.

¹³ Fed. R. Civ. P. 12(f).

¹⁴ Glover v. Elliott, No. 1:07-cv-648, 2007 WL 2904050 at *2 (W.D. Mich. Oct. 2, 2007). Exhibit A.

might allow the defense to succeed, nor any substantial question of law." To this end, an affirmative defense is insufficient if it is not recognized as a defense to the cause of action. 16

This motion concerns no issue of fact that. Rather, the parties concur that it raises only a "legal question," and agree to the single fact needed to determine this motion: Defendants do not allege that any act of Congress diminished the Tribe's reservation. Instead, the parties agree that this case will be resolved by interpreting the Treaties of 1855 and 1864. The question that remains is a matter of legal methodology: may a statutory-diminishment line of cases apply when the parties agree that no statute diminished the Tribe's reservation? Or, instead, must the Court rely on well-established principles of treaty interpretation to resolve the meanings of the Treaties of 1855 and 1864?

B. A treaty may be abrogated either by a renegotiated treaty or a subsequent act of Congress.

Treaties are not static. They may be amended, qualified, modified, or abrogated—*either* by a later treaty *or* a subsequent congressional act.¹⁹ In the case of the former, the original parties to the treaty renegotiate its terms to create a new treaty, and a court may be called upon to decide whether the new treaty abrogates the first in whole or in part. To do this, the court must

¹⁵ *Id.* (citing *EEOC v. Bay Ridge Toyota, Inc.*, 327 F. Supp. 2d 167, 170 (E.D.N.Y. 2004).

¹⁶ 61A Am. Jur. 2d Pleadings § 515. *See also Glover*, 2007 WL 2904050, Exhibit A at *5 (striking the affirmative defense of unclean hands because, "[a]s plaintiff seeks no equitable relief, the unclean hands doctrine is inapplicable to this case and insufficient on its face.").

¹⁷ Jan. 7, 2009, Joint Stipulation, Doc. 149.

¹⁸ *Id*.

¹⁹ See, e.g., Rosebud Sioux, 430 U.S. at 589-94 (discussing failed attempts to negotiate a new treaty shrinking the Rosebud Reservation, and the power of Congress to unilaterally abrogate a treaty and diminish a reservation). See also generally, The Diamond Rings, 183 U.S. 176, 185 (1901) (Brown, concurring) (stating that a modification to a treaty is efficacious only if it is "an amendment to the treaty" or "a legislative act qualifying or modifying the treaty.").

use traditional principles of treaty interpretation, ²⁰ and examine the new treaty to determine the Indian understanding of the treaty. ²¹ To interpret Indian treaties, courts do look "beyond the written words to the larger context that frames the Treaty, including 'the history of the treaty, the negotiations, and the practical construction adopted by the parties." But they do so only to reach the ultimate question of *Indian* intent. As the Supreme Court noted in the *Mille Lacs* case,

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an examination of the historical record provides insight into how the parties to the Treaty understood the terms of the agreement. This insight is especially helpful to the extent it sheds light on how the Chippewa signatories to the Treaty understood the agreement because we interpret Indian treaties to give effect to the terms as the Indians themselves would have understood them.²

After looking to the language and historical context of the treaty, any remaining ambiguities "must be . . . resolved in favor of the Indians." ²⁴

As a separate matter, the Supreme Court has held that a treaty may also be abrogated by a subsequent act of Congress.²⁵ "Congress may abrogate treaty rights, but it must clearly express its intent to do so."²⁶ To decide whether a later act abrogates a treaty, rather than focusing on

²⁰ See, e.g., Minnesota v. Mille Lacs Band of Chippewa Indians, 526 U.S. 172, 195 et seq. (1999) (using treaty-interpretation principles to evaluate the effect of the 1855 Treaty with the Chippewa on the 1837 Treaty).

²¹ See infra, notes 51-53(describing the rules of treaty interpretation generally, and Indian-treaty interpretation in particular).

²² Mille Lacs Band of Chippewa, 526 U.S. at 196 (citing Choctaw Nation v. United States, 318 U.S. 423, 432 (1943) and El Al Israel Airlines, Ltd. v. Tsui Yuan Tseng, 525 U.S. 155 (1999)). ²³ *Id*.

²⁴ *Id.* at 206 (citing *Winters v. United States*, 207 U.S. 564, 576-77 (1908)).

²⁵ Lone Wolf v. Hitchcock, 187 U.S. 553, 564-68 (1903) (allowing statutory abrogation of Indian treaties); Edye v. Robertson, 112 U.S. 580, 598-99 (1884) (allowing statutory abrogation of treaties generally).

²⁶ Mille Lacs Band of Chippewa, 526 U.S. at 202 (citing United States v. Dion, 476 U.S. 734, 738-40 (1986); Washington v. Washington State Commercial Passenger Fishing Vessel Assoc., 443 U.S. 658, 690 (1979); Menominee Tribe v. United States, 391 U.S. 404, 413 (1968)).

Indian intent, the court focuses whether there is sufficient evidence that *Congress* intended that the subsequent statute would abrogate the treaty.

C. Rosebud and its progeny control statutory-diminishment cases, not treaty-interpretation cases.

Virtually all reservation-diminishment cases follow this second statutory-diminishment path, and the court is asked to evaluate congressional intent to decide whether a subsequent act of Congress diminished an already-established reservation.²⁷ These statutory-diminishment cases, including *Rosebud*, follow a three-step analysis.²⁸

The first two steps of statutory-diminishment analysis are analogous to treaty interpretation. Just as a court will look to treaty language and the immediate historical context of a treaty to determine the Indian understanding of a treaty, it will look to a statute's language and the historical circumstances surrounding the passage of the act to determine whether Congress intended to abrogate the treaty.²⁹ But here, the treaty and statutory analyses diverge. Under the

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See, e.g., Hagen v. Utah, 510 U.S. 399 (1994) (determining the effects of the congressional acts of 1902, 1903, 1904, and 1905 on the Uintah Valley Reservation); Solem v. Bartlett, 465 U.S. 463, 468-69 (1984) (examining a surplus land act opening up part of the Cheyenne River Sioux Tribe's reservation); Rosebud Sioux, 430 U.S. at 586 ("The contention of the Rosebud Sioux Tribe is that these Acts, while opening up the unallotted land outside of Todd County to non-Indian settlement, did not thereby change the Reservation boundaries . . . "); Seymour v. Superintendent of Washington State Penitentiary, 368 U.S. 351 (1962) (examining act opening up portion of Colville Indian Reservation for settlement); Wisconsin v. Stockbridge-Munsee Community, No. 04-3834 (E.D. Wis. Jan. 20, 2009), Exhibit B (examining an 1871 act allotting and opening a portion of the Community's reservation).

²⁸ See generally Plaintiff Saginaw Chippewa Indian Tribe of Michigan's Challenges to Defendants' October 2008 Witness Lists ("Tribe's Witness Challenges"), Doc. 142, at § I(C), pp. 7-11 (providing detail regarding the three-step analysis).

E.g. Rosebud Sioux, 430 U.S. at 590-603 (examining the language of the surplus-land act, the agreement between the U.S. and the tribe underlying the act, how the agreement was presented to Congress, and how the act was eventually passed, including the Executive Proclamation issued shortly after the act's passage). One of the more recent statutory-diminishment cases, *Hagen v.* (continued on following page)

treaty analysis, after looking to the treaty language and surrounding circumstances to determine the Indian understanding of the treaty, any remaining ambiguities must be resolved in favor of the tribe, and the examination ends. ³⁰

In contrast, statutory-diminishment cases add a third step with no treaty-interpretation parallel. If *both* the congressional act *and* the legislative history indicate congressional intent to diminish, *then* a court in a statutory-diminishment case will move to the third factor and examine "jurisdictional facts" occurring *after* the passage of the act (such as who moved on to the reservation after its opening, and who has exercised jurisdiction over the area) to confirm congressional intent to diminish a reservation.³¹

It is this type of evidence that Defendants improperly seek to introduce in this case. But even in statutory-diminishment cases, the Supreme Court has noted that subsequent "jurisdictional facts" are weak evidence of congressional intent, at best.³² One can hardly imagine how, for instance, the testimony of someone from the City's planning department

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Utah, noted that when examining the second factor, the Court has "been particularly careful to distinguish between evidence of the contemporaneous understanding of the particular Act and matters occurring subsequent to the Act's passage." 510 U.S. at 411 (considering whether the Uintah reservation in Utah was diminished by a 1902 surplus-land act).

³⁰ Mille Lacs Band of Chippewa, 526 U.S. at 206 (citing Winters v. United States, 207 U.S. at 576-77).

³¹ See, e.g., Rosebud Sioux, 430 U.S. at 603-605; Hagen, 510 U.S. at 420-21.

³² Solem, 465 U.S. at 472 n.13 ("Resort to subsequent demographic history is, of course, an unorthodox and potentially unreliable method of statutory interpretation."). And postenactment history is always viewed skeptically for determining what Congress intended earlier. See, e.g., EPA v. Massachusetts, 549 U.S. 497, 530, n.27 ("Post-enactment legislative history is not only oxymoronic but inherently entitled to little weight.") (internal quotation omitted); State of Wisconsin v. Stockbridge-Munsee Community, Exhibit B, at *5 (noting that a statement, "made 20 years after the fact, sheds little light on what Congress intended to do when passing [a surplus-land] act in 1871").

regarding services the City currently provides in the six townships could possibly be relevant to the United States' intent in entering into treaties in 1855 and 1864—let alone to the Saginaw Chippewa Indian Tribe's understanding of the Treaties.³³ The court should only allow Defendants to introduce this evidence if they can show that it is relevant to a recognizable defense that hasn't already been stricken by the Court.

D. Statutory-diminishment analysis may not be applied to treaties.

1. Keweenaw Bay is controlling: a treaty is not a statute.

Defendants seek to blur the Supreme Court's clearly established case lines by arguing that the Treaties of 1855 and 1864 "can serve the same legal function as a post-treaty Act of Congress that diminishes a reservation."³⁴ But in the 2005 Keweenaw Bay tax case, the Sixth Circuit Court of Appeals could not have been more clear: "A treaty is not a federal statute or an act of Congress."³⁵ In that case, the Keweenaw Bay Indian Community argued that certain parcels of land within its reservation were not subject to ad valorem taxation because the treaty creating that reservation precluded taxation.³⁶ It argued in the alternative that even if the treaty did not preclude taxation, the parcels could not be taxed because "Indians and property on an Indian reservation are not subject to state taxation except by virtue of express authority conferred upon the State by act of Congress."³⁷ In response, the State of Michigan argued that "the 1854

³³ See October 31, 2008 City of Mt. Pleasant's Second Amended Witness List, Doc. 130 at 3.

³⁴ Jan. 7, 2008 Joint Stipulation, Doc. 149 at 2. ³⁵ Keweenaw Bay Indian Community v. Naftaly, 452 F.3d 514, 530 (2005), cert denied 549 U.S. 1053 (2006).

³⁶ *Id.* at 524.

³⁷ *Id.* at 530 (citing *McClanahan v. State Tax Comm'n of Ariz.*, 411 U.S. 164, 171 (1973)) (emphasis in original).

Treaty is sufficient to demonstrate the clear congressional intent necessary to allow the state taxation of reservation lands."³⁸ The Sixth Circuit rejected this contention out of hand:

It is no coincidence that the Supreme Court used phrases such as "federal statutes" and "act of Congress" in describing what would be necessary for the Court to deem state taxation of reservation lands permissible. A treaty simply does not embody this clear congressional intent, as a treaty's ratification only involves the Senate, and thus does not have the same bicameral hurdles as an act of Congress. Defendants argue that because a treaty, under United States law, is self-executing and is the law of the land, it is the equivalent of an act of the legislature. We agree that the effect of a treaty has legal import, as does the effect of an act of legislation; however the mere fact that a treaty has legal force does not mean it is an act of Congress.³⁹

The Sixth Circuit refused the State's invitation (extended by Mr. Adams himself) to evaluate a treaty right as one would a statute by searching for *congressional* intent, but instead reaffirmed that treaties—particularly Indian treaties—must be interpreted "to give effect to the terms as the Indians themselves would have understood them."40

2. The Founders intended treaties to operate and be analyzed differently than statutes.

Even a fleeting examination of the Constitution confirms that the Sixth Circuit was correct to reject the State's argument. It is Article I that vests the power to make laws in the bicameral Congress, 41 but Article II that lodges the power to make treaties with the President, "by and with the Advice and Consent of the Senate." This division of responsibility was not a

³⁸ Id. at 530. Compare Nov. 14, 2008 State Defendants' Motion in Limine to Exclude Saginaw Chippewa Indian Tribe of Michigan's Unnamed Witnesses, Doc. 141 at 6 ("Congress, acting through the Saginaw Chippewa Indian Treaties of 1855 and 1864, intended to diminish any alleged reservation at Isabella.").

³⁹ Keweenaw Bay Indian Community, 452 F.3d at 530-31.

⁴⁰ Id. at 524 (citing Mille Lacs Band of Chippewa Indians, 526 U.S. at 196).

⁴¹ U.S. Const. art. I, § 8.

⁴² U.S. Const. art. II § 2 cl. 2.

slip or oversight, but an intentional check and balance on treaty-making power. 43 Explaining the "Treaty-Making Power of the Executive," Alexander Hamilton wrote in the Federalist Papers that it "would be utterly unsafe and improper to intrust [treaty-making] power to an elective magistrate of four years' duration[,]" but "[t]o have intrusted the power of making treaties to the Senate alone, would have been to relinquish the benefits of the constitutional agency of the President in the conduct of foreign negotiations."⁴⁴ Thus, the delegates to the Constitutional Convention mandated that the President and Senate share the treaty-making power. 45 But that shared treaty-making power has nothing to do with *Congress*, and is wholly different than the bicameralism and presentment requirements for *statutes*.

A Pennsylvania delegate to the Constitutional Convention sought to make the treatymaking process more akin to legislation by moving to amend the treaty clause to state that "[t]he President by and with the advice and consent of the Senate and House of Representatives shall have the power to make treaties[.]"46 The delegate argued (just as the State did to the Sixth Circuit in Keweenaw Bay) that "[a]s treaties . . . are to have the operation of laws, they ought to

⁴³ See The Federalist No. 48 (James Madison) ("Unless these departments be so far connected and blended as to give to each a constitutional control over the others, the degree of separation which the maxim requires, as essential to a free government, can never in practice be duly maintained.").

⁴⁴ THE FEDERALIST No. 75 (Alexander Hamilton).

⁴⁵ This is consistent with the Founders' characterization of the treaty-making power. They understood the power to be "more of the legislative than of the executive character, though it does not seem strictly to fall within the definition of either of them. The essence of the legislative authority is to enact laws, or, in other words, to prescribe rules for the regulation of the society; while the execution of the laws, and the employment of the common strength, either for this purpose, or for the common defense, seem to comprise all the functions of the executive magistrate. The power of making treaties is, plainly, neither the one nor the other. It relates neither to the execution of the subsisting laws, nor to the enaction of new ones. . . . " Id. ⁴⁶ See Notes of Debate in the Federal Convention of 1787, at 597 (Adrienne Koch, ed., Norton 1969) (1840), Exhibit C.

have the sanction of laws also."47 After debate, every state present at the Convention, save Pennsylvania, voted against the amendment. Not only has the Sixth Circuit rejected the argument that a treaty is tantamount to a law—in the summer of 1787, so too did the Founders.

The crafters of the Constitution clearly understood and intended that treaties would be created and treated differently than laws. Treaties "are CONTRACTS with foreign nations, which have the force of law, but derive it from the obligations of good faith. They are not rules prescribed by the sovereign to the subject, but agreements between sovereign and sovereign."48 The Supreme Court has often repeated that because treaties are bilateral agreements akin to contracts, ⁴⁹ it is not congressional, but *party* intent that controls their interpretation. ⁵⁰ And in the unique context of Indian law, because the United States maintains a trust relationship with tribes, the Supreme Court has said that the sole question is how the Indian signatories would have

⁴⁷ *Id*.

⁴⁸ THE FEDERALIST No. 75 (Alexander Hamilton) (emphasis in original).

⁴⁹ Washington State Commercial Passenger Fishing Vessel Assoc., 443 U.S. at 675 ("A treaty, including one between the United States and an Indian tribe, is essentially a contract between two sovereign nations."). See also Valentine v. U.S. ex rel. Neidecker, 299 U.S. 5, 15 (1936); Rainey v. U.S., 232 U.S. 310, 316-317 (1914); Rocca v. Thompson, 223 U.S. 317, 331-332 (1912); Fong Yue Ting v. U.S., 149 U.S. 698, 720-721 (1893); Whitney v. Robertson, 124 U.S. 190, 194, (1888).

⁵⁰ Sumitomo Shoji America, Inc. v. Avagliano, 457 U.S. 176, 185 (1982) ("Our role is limited to giving effect to the intent of the Treaty parties. When the parties to a treaty both agree as to the meaning of a treaty provision, and that interpretation follows from the clear treaty language, we must, absent extraordinarily strong contrary evidence, defer to that interpretation."); Nielsen v. Johnson, 279 U.S. 47, 51-52 (1929) ("Treaties are to be liberally construed, so as to effect the apparent intention of the parties.") (citing Jordan v. Tashiro, 278 U. S. 123 (1928); Tucker v. Alexandroff, 183 U. S. 424 (1902); In re Ross, 140 U.S. 453, 475 (1891); Geofrov v. Riggs, 133 U. S. 258, 271 (1890)).

understood the treaty,⁵¹ and all ambiguities regarding party intent are resolved in favor of the Indian understanding of the treaties.⁵²

[I]t is the intention of the parties, and not solely that of the superior side, that must control any attempt to interpret the treaties. When Indians are involved, the Court has long given special meaning to this rule. It has held that the United States, as the party with the presumptively superior knowledge of the language in which the treaty is recorded, has a responsibility to avoid taking advantage of the other side. "The treaty must therefore be construed, not according to the technical meaning of its words to learned lawyers, but in the sense in which they would naturally be understood by the Indians."53

Under controlling and longstanding principles of Constitutional law, treaties are created in a different manner from statutes, are of a fundamentally different character from statutes, and are interpreted differently from statutes.

Ε. Defendants seek an untenable expansion of Rosebud.

By its own terms, then, Rosebud has no application in this case. The Rosebud line of diminishment cases looks at "jurisdictional facts" to determine congressional intent in passing

⁵¹ Mille Lacs Band of Chippewa, 526 U.S. at 198 ("[W]e interpret Indian treaties to give effect to the terms as the Indians themselves would have understood them."); Washington State Commercial Passenger Fishing Vessel Assoc., 443 U.S. at 676 (citing Jones v. Meehan, 175 U.S. 1, 11 (1899)); Choctaw Nation v. Oklahoma, 397 U.S. 620, 631 (1970) ("[T]his Court has often held that treaties with the Indians must be interpreted as they would have understood them[.]"); Worchester v. Georgia, 42 U.S. (6 Pet.) 515, 582 (1832) ("How the words of the Treaty were understood by [the Indians], rather than their critical meaning, should form the rule of construction.").

⁵² Mille Lacs Band of Chippewa, 526 U.S. at 200 ("We have held that Indian treaties are to be interpreted liberally in favor of the Indians, and that any ambiguities are to be resolved in their favor[.]") (citing County of Yakima v. Confederated Tribes and Bands of Yakima Nation, 502 U.S. 251, 269 (1992); Washington State Commercial Passenger Fishing Vessel Assoc., 443 U.S. at 675-676; Choctaw Nation, 318 U.S. at 432; Winters v. United States, 207 U.S. 564, 576-77 (1908)).

Washington State Commercial Passenger Fishing Vessel Assoc., 443 U.S. at 675-676 (quoting Jones, 175 U.S. at 11).

certain surplus-land *statutes*. Without a predicate statute, there is no need to determine congressional intent, and "jurisdictional facts" have no relevance.

The State argues as its diminishment defense that "Congress, acting through the Saginaw Chippewa Indian Treaties of 1855 and 1864, intended to diminish any alleged reservation at Isabella."54 Of course, this is logically impossible. Congress does not act through treaties—it acts through statutes. The State admits that its "argument requires that the Court consider a treaty as the equivalent to an Act of Congress[,]" despite "a controlling opinion" to the contrary. 55 But Defendants do more than this. They ask the Court to ignore centuries of the Supreme Court's careful separation of treaty interpretation from statutory interpretation something the Sixth Circuit would not do. And in so asking, Defendants seek an untenable expansion of Rosebud that stretches the case past its breaking point. Just as "[i]t is no coincidence that the Supreme Court used phrases such as 'federal statutes' and 'act of Congress' in describing what would be necessary for the Court to deem state taxation of reservation lands permissible,"⁵⁶ it is no coincidence that the Supreme Court used the same words to describe when a court may consider "jurisdictional facts" as evidence of reservation diminishment.⁵⁷

Nov. 14, 2008 State Defendants' Motion in Limine to Exclude Saginaw Chippewa Indian Tribe of Michigan's Unnamed Witnesses, Doc. 141 at 6.

⁵⁵ *Id. See also Keweenaw Bay Indian Community*, 452 F.3d at 530 ("A treaty is not a federal statute or an act of Congress."). In light of Keweenaw Bay, one might ask how the State's arguments "are warranted by existing law or by a nonfrivolous argument for extending, modifying, or reversing existing law or for establishing new law." Fed. R. Civ. P. 11(b)(2). ⁵⁶ *Id.* at 530-31.

⁵⁷ Compare Hagen, 510 U.S. at 420 ("[O]ur conclusion that the statutory language and history indicate a *congressional intent* to diminish is not controverted by the subsequent demographics of the Uintah Valley area.") (emphasis added); Rosebud Sioux Tribe, 430 U.S. at 603-04 (reviewing jurisdictional facts and finding that "[w]e are simply unable to conclude that the intent of the 1904 Act was other than to disestablish.") (emphasis added) with Keweenaw Bay (continued on next page)

The Supreme Court's *Rosebud* case line has looked to "jurisdictional facts" *only* to assist the Court's interpretation of a statue (and then only if a court has found that the statute itself *and* its legislative history evince intent to diminish). Every party to this case agrees that "Defendants *do not allege* that any Act of Congress post-dating the Treaties of 1855 and 1864 diminishes or disestablishes the Isabella Reservation[.]" Accepting Defendants' invitation to apply *Rosebud* to a treaty would inappropriately conflate the Supreme Court's treaty-interpretation analysis with its statutory-diminishment analysis—a step the Supreme Court has never taken, and the Sixth Circuit has refused to. Because controlling authority and even a cursory analysis of the Constitution forbid Defendants' expansion of *Rosebud*, there is no question of law in this case—let alone a substantial one. Defendants' *Rosebud* statutory-diminishment argument cannot apply to a treaty-based claim, and must be stricken under Rule 12(f).⁵⁹

II. Because the *Rosebud*-diminishment defense cannot apply to this case, *Rosebud* evidence should not be allowed.

A. Legal standard for limiting discovery and excluding evidence

Under the Federal Rules of Civil Procedure, "[p]arties may obtain discovery regarding any matter, not privileged, that is relevant to the claim or defense of any party[.]" A matter is relevant if it has "any tendency to make the existence of any fact that is of consequence to the

(continued from previous page)

Indian Community v. State of Michigan, 784 F. Supp. 418 (W.D. Mich. 1991) (evaluating a treaty-based-reservation-boundary case, where no statutory diminishment was alleged, by determining the Indian understanding of the treaty, and without reference to any "jurisdictional fact" evidence).

⁵⁸ Jan. 7, 2009 Joint Stipulation, Doc. 149.

⁵⁹ Cf. Glover, 2007 WL 2904050, Exhibit A at *5 (striking the affirmative defense of unclean hands because, "[a]s plaintiff seeks no equitable relief, the unclean hands doctrine is inapplicable to this case and insufficient on its face.").

⁶⁰ Fed. R. Civ. P. 26(b)(1).

determination of the action more probable or less probable than it would be without the evidence."61 Thus, "the relevance of the materials sought depends on the nature of the actions before [the] Court[.]"62 Matters that do not tend to prove or disprove any element of a claim or defense at issue are not relevant.⁶³

A trial court is well within its discretion to protect against discovery of irrelevant matters, ⁶⁴ and it is proper to strike a witness (or a class of witnesses) where that witness's proposed testimony has no relevance to the proof of any claim or defense at issue in a case.⁶⁵ It is also appropriate to bar discovery of irrelevant matters⁶⁶ and to bar references to those matters at trial.⁶⁷ As this court has noted, "[i]t is well established that the scope of discovery is within the sound discretion of the trial court."68 For example, in Eschenberg v. Navistar International. the plaintiff moved in limine to exclude certain deposition testimony from introduction at trial on relevance grounds. The Court determined that, although the deposition testimony was related to the subject of the case, the testimony did not bear on the claims or defenses asserted, and so was

⁶¹ Fed. R. Evid. 401.

⁶² Compuware Corp. v. Moody's Investors Serv., Inc., 222 F.R.D. 124, 127 (E.D. Mich. 2004).

⁶³ See, e.g. Goodyear Tire & Rubber Co. v. Chiles Power Supply, Inc., 332 F.3d 976, 982 (6th Cir. 2003) (discussing why settlement negotiations between manufacturers of a heating system and manufacturers of a rubber hose manufacturer were not relevant to third party homeowners' complaints against the heating system manufacturer, and prohibiting discovery).

E.g. Szarka v. Ohio Transmission Corp., 132 Fed. Appx. 581, 581, 2005 WL 1313525, at *1 (6th Cir. 2005) (upholding district court's decision to limit discovery and require the requesting party to "show[] that broader discovery requests bore some relevance to disputed issues."); Goodyear Tire, 332 F.3d at 982 (upholding prohibition of discovery where, inter alia, the requesting party "has not presented any evidence that the alleged statements are *relevant* to his Colorado case.") (emphasis in original).

E.g. Fairland, Inc. v. United States Fidelity & Guarantee Co., No. 05-CV-71491, 2007 WL 603377, Exhibit D at *2 (E.D. Mich. Feb. 22, 2007) (striking witness where that witness would only testify regarding the foundation for materials previously ruled inadmissible).

⁶⁶ Fed. R. Civ. P. 26(c); Seales v. Macomb County, 226 F.R.D. 572, 575 (E.D. Mich. 2005) ("Under Rule 26(c), the Court may enter a protective order to limit or preclude discovery, with reference to the Rule 26(b) factors.").

⁶⁷ E.g. Eschenberg v. Navistar Int'l, 142 F.R.D. 296 (E.D. Mich. 1992). Seales, 226 F.R.D. at 575.

"not relevant and therefore not admissible." The court barred the introduction of the evidence at trial, but further held that because it should have been clear at the deposition that "the information sought was irrelevant and not discoverable, . . . the deposition of plaintiff's counsel should never have been permitted."69

В. Because Rosebud cannot apply to a treaty-interpretation case, Rosebud evidence is not relevant and should not be allowed.

It is not the allegation of diminishment, but the allegation of a diminishing congressional act that triggers Rosebud and the relevance of "jurisdictional facts." It is theoretically possible that a treaty-created reservation *could* diminish over time by the treaty's own terms (if, for example, the treaty included bargained-for expiration language). But a court would evaluate such a claim under the established principles of Indian treaty interpretation—Indian understanding would control, ambiguities would be resolved in favor of the Tribe, and no evidence of modern "jurisdictional facts" would be relevant. Because Defendants do not allege that a statute diminished the Saginaw Tribe's reservation, discovery and consideration of any modern-demographic or "jurisdictional-fact" evidence or testimony is unnecessary. Put simply, without a statute to interpret, Rosebud does not apply, and Rosebud witnesses are inappropriate.

The Tribe has already noted the significant case-management concerns that would arise if the Defendants were permitted to rely on modern "jurisdictional facts." If the Defendants are allowed to expand the *Rosebud* statutory-diminishment analysis to reach this case, they will parade almost two dozen witnesses before this court to discuss modern "jurisdictional facts"

⁷⁰ Tribe's Witness Challenges, Doc. 142, at § I(D), pp. 12-15.

like "the services provided by the City within the City limits" today. 71 And the Tribe can and will counter these. Even the modern "jurisdictional-fact" picture is a hotly disputed one, and the Tribe's rebuttal witnesses can paint the fuller picture, for example, of what current coordination of children's protective services between the State and Tribe really looks like.⁷² But the point is that the Tribe shouldn't have to.

Setting aside the deposition time and trial time that such testimony would require not only of the parties and the Court, but also of the myriad State, County, City, and Tribal government employees who would be these witnesses, and the resources that such efforts would gobble up, more fundamentally, by its own terms the "jurisdictional-fact" evidence of congressional intent regarding a statute is simply not relevant to a case with the object of determining Indian understanding of a treaty. The Supreme Court's methodology has been clear on this. It is inconceivable that a laundry list of Mt. Pleasant city services provided in 2009 could in any way inform the Court's understanding of what the Indian signatories to the Treaties of 1855 and 1864— treaties entered into before there even was a city of Mt. Pleasant⁷³— would have understood those treaties to mean.

And because this evidence cannot ever be relevant to this treaty-interpretation case, it should not be the subject of discovery. There are no reasonable grounds to require the Plaintiffs to discover and prepare rebuttals to Defense evidence when that Defense evidence, as a matter of law, cannot be relevant to this proceeding. Because the Supreme Court has

Oct. 31, 2008 City of Mt. Pleasant's Second Amended Witness List, Doc. 130 at 3 ¶ 4-7.

See id. at $5 ext{ } ext{ }$

⁷³ The City of Mt. Pleasant was not incorporated as a city until 1889. See http://www.mtpleasant.org/Info/history.htm (last visited Jan. 29, 2009).

clearly delineated the methodology for treaty-interpretation cases—and it does not include modern "jurisdictional-fact" evidence—Defendants' proposed modern and "jurisdictional-fact" witnesses should be stricken and Defendants should be precluded from introducing any such evidence at trial.⁷⁴

CONCLUSION

The Defendants seek to end-run the Court's decision excluding the Sherrill defense by recasting their Sherrill witnesses as Rosebud witnesses. But an unbroken line of diminishment caselaw shows that *Rosebud* "jurisdictional-fact" evidence of congressional intent is by its terms *irrelevant* without a statute to interpret. And mandatory Sixth Circuit authority is clear: a treaty is not the same as a statute. This motion is not outcome-determinative, and regardless of how it is decided, each party's case will live to fight another day. What this motion will decide is what the *rules* are for that fight. By throwing up dozens of Phase I *Rosebud* witnesses, the Defendants seek to shift this case away from its treaty roots to a statutory-interpretation analysis that can open the floodgates of modern jurisdictional facts. No less an authority than the Constitution of the United States precludes this. By rejecting the Rosebud methodology, the Court would refocus the case, and bring it back into line with what it always has been—a case interpreting the Treaties of 1855 and 1864. No blind eye to controlling authority or slight-of-diminishment hand can make it anything else. Rosebud statutory-diminishment "jurisdictional facts" are irrelevant to this treaty-interpretation case and should not be allowed.

⁷⁴ Fed. R. Civ. P. 26(c); *Seales v. Macomb County*, 226 F.R.D. 572, 575 (E.D. Mich. 2005).

SAGINAW CHIPPEWA INDIAN TRIBE OF MICHIGAN

s/ William A. Szotkowski

William A. Szotkowski (MN #161937) Vanya S. Hogen (MN # 23879X) Jessica S. Intermill (MN #0346287) Jacobson, Buffalo, Magnuson, Anderson & Hogen, P.C.

1360 Energy Park Drive, Suite 210

St. Paul, Minnesota 55108

Tele: (651) 644-4710 Fax: (651) 644-5904

E-mail: bszot@jacobsonbuffalo.com

vhogen@jacobsonbuffalo.com jintermill@jacobsonbuffalo.com

Sean J. Reed (MI #P62026) General Counsel, SCIT 7070 East Broadway Mt. Pleasant, Michigan Tele: (989) 775-4032 Fax: (989) 773-4614

E-mail: Sean.Reed@verizon.net

Certificate of Service

I hereby certify that on January 30, 2008, I electronically filed the foregoing paper with the Clerk of the Court using the ECF system, which will send notification of such filing to the following:

Attorney for State of Michigan Defendants:	Attorney for U.S.:
Todd B. Adams (P36819) Loretta S. Crum (P68297) Michigan Attorney General Environment, Natural Resources, and Agriculture Div. 525 West Ottawa St., Fl. 6 Lansing, MI 48909 Tele: (517) 373-7540 E-mail: adamstb@michigan.gov	Patricia Miller U.S. Department of Justice Environment and Natural Resources Div.— Indian Resources Section 601 D Street NW, 3 rd Fl., Rm. 3507 Washington, D.C. 20004 Tele: (202) 305-1117 E-mail: Patti.Miller@usdoj.gov
Attorneys for City of Mt. Pleasant:	Attorney for County of Isabella:
John J. Lynch (P16886) Mary Ann J. O'Neill (P49063) Matthew A. Romashko (P59447) Lynch, Gallagher, Lynch, Martineau & Hackett, P.L.L.C. 555 North Main Mt. Pleasant, MI 48804-0446 Tele: (989) 773-9961 E-mail: jack@lglm.com; maryann@lglm.com; matthew@lglm.com	Larry J. Burdick (P31930) Prosecuting Attorney for Isabella County 200 N. Main St. Mt. Pleasant, MU 48858 Tele: (989) 772-0911 x 311 E-mail: lburdick@isabellacounty.org

and I hereby certify that there are no non-ECF participants listed in the case that require service by U.S. mail.

s/ Jessica Intermill

Jacobson, Buffalo, Magnuson, Anderson & Hogen, P.C. 1360 Energy Park Drive, Suite 210

St. Paul, Minnesota 55108 Tel: (651) 644-4710

Fax: (651) 644-5904

E-mail: svannorman@jacobsonbuffalo.com

UNITED STATES DISTRICT COURT EASTERN DISTRICT OF MICHIGAN NORTHERN DIVISION

Saginaw Chippewa Indian Tribe of Michigan, et al.,

Plaintiffs,

Case No. 05-10296-BC Honorable Thomas L. Ludington

Jennifer Granholm, et al.,

v.

Defendants.

SAGINAW CHIPPEWA TRIBE OF MICHIGAN'S INDEX OF EXHIBITS TO MOTION TO STRIKE ROSEBUD STATUTORY-DIMINISHMENT DEFENSE AND SUPPORTING WITNESSES

EXHIBIT	DESCRIPTION
A	Glover v. Elliott, No. 07-cv-648, 2007 WL 2904050 (W.D. Mich. Oct. 2, 2007).
В	State of Wisconsin v. Stockbridge-Munsee Community, F.3d, 2009 WL 113487 (7th Cir. 2009).
С	Notes of Debates in the Federal Convention of 1787, (Adrienne Koch, ed., Norton 1969) (1840).
D	Fairland, Inc. v. United States Fidelity & Guarantee Co., No. 05-CV-71491, 2007 WL 603377 (E.D. Mich. Feb. 22, 2007).

Exhibit A



Not Reported in F.Supp.2d Not Reported in F.Supp.2d, 2007 WL 2904050 (W.D.Mich.) (Cite as: 2007 WL 2904050 (W.D.Mich.))

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Only the Westlaw citation is currently available. United States District Court, W.D. Michigan, Southern Division.

Frank GLOVER, Plaintiff,

MARY JANE M. ELLIOTT, P.C., Defendant. No. 1:07-cv-648.

Oct. 2, 2007.

Curtis Charles Warner, Warner Law Firm LLC, Chicago, IL, for Plaintiff.

Daniel J. Manion, Mary Jane M. Elliott PC, Novi, MI. for Defendant.

MEMORANDUM OPINION

JOSEPH G. SCOVILLE, United States Magistrate Judge.

*1 This is a civil action alleging unlawful credit and collection practices. Plaintiff's two-count complaint asserts claims under the federal Fair Debt Collection Practices Act, 15 U.S.C. § 1692, et seq. and pendent claims under Michigan statutory law governing debt collection practices, MICH. COMP. LAWS §§ 445.252 (Collection Practices Act) and 339.915 (Occupational Code). Plaintiff's complaint arises from a form collection letter sent by defendant, an attorney, dated March 15, 2007. (docket # 1, Ex. 1). Among other alleged violations of federal and state statute, plaintiff alleges that defendant's collection letter falsely implies that legal action has begun and contains deceptive and misleading statements concerning the amount of the alleged debt. Defendant has filed an answer to the complaint containing eighteen separate affirmative defenses.

Presently pending before the court is plaintiff's motion under Rules 11 and 12(f) of the Federal Rules of Civil Procedure to strike defendant's affirmative defenses. (docket # 4) Chief Judge Robert Holmes Bell has referred the motion to me for decision pursuant to 28 U.S.C. § 636(b)(1)(A) and Fed.R.Civ.P. 72(a). Because the motion to strike raises only legal issues, the court determined that oral argument would not be helpful. See W.D. MICH. LCIVR 7.3(d). For the reasons set forth below, the motion to strike will be granted in part and denied in part.

Discussion

In his brief in support of the motion to strike, plaintiff appears to rely on two separate grounds for his motion. First, plaintiff asserts that defendant's answer was filed in violation of Rule 11 of the Federal Rules of Civil Procedure, because defendant allegedly asserted defenses without the requisite investigation. The court dismisses out of hand plaintiff's reliance on Rule 11 as authority for striking any affirmative defense. The text of Rule 11 expressly requires a party moving for sanctions to serve the proposed motion at least 21 days before filing, to give the opposing party an opportunity to withdraw the challenged claim or defense before the filing of the motion. FED. R. CIV. P. 11(c)(1)(A). Plaintiff has admittedly not complied with this "safe harbor" provision of Rule 11. By the plain language of Rule 11, as well as governing Sixth Circuit authority, the grant of any relief under Rule 11 would be error. See Brickwood Contractors, Inc. v. Datanet Eng'g, Inc., 369 F.3d 385, 389 (6th Cir.2004); Ridder v. City of Springfield, 109 F.3d 288, 296-97 (6th Cir.1997). Furthermore, the rule requires that sanctions be limited to that which is sufficient to deter repetition of such conduct or comparable conduct by others similarly situated. At this early stage of the case, plaintiff has not even attempted to demonstrate that the striking of pleadings fits within the contemplation of the rule. Consequently, plaintiff's reliance on Rule 11 as a basis for striking defenses in this case is meritless.

*2 Rule 12(f) grants the district court express textual authority to strike portions of pleadings. The rule is aimed at two very different problems. First, the rule empowers the court to strike "any redundant, immaterial, impertinent, or scandalous matter" from a pleading. This provision applies to any pleading and is applied sparingly, lest the court become embroiled in time-consuming and wasteful arguments about the words chosen by lawyers in presenting claims and defenses. See, e.g., Anderson v. United States, 39 F. App'x 132, 135 (6th Cir.2002).

The other purpose of a motion to strike under Rule 12(f) is to test the legal validity of a defense. The

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motion to strike should be granted only if the insufficiency of the defense is clearly apparent. See Cipollone v. Liggett Group, Inc., 789 F.2d 181, 188 (3d Cir.1986). Therefore, to prevail on a motion to strike an insufficient defense, a plaintiff must show that there is no issue of fact that might allow the defense to succeed, nor any substantial question of law. See EEOC v. Bay Ridge Toyota, Inc., 327 F.Supp.2d 167, 170 (E.D.N.Y.2004)."A defense should be struck when it is clearly irrelevant and frivolous and its removal from the case would avoid wasting unnecessary time and money litigating the invalid defense." S.E.C. v. Elec. Warehouse, Inc., 689 F.Supp. 53, 73 (D.Conn.1988), aff'd, 891 F.2d 457 (2d Cir.1989). Furthermore, broad affirmative defenses such as waiver, estoppel, or unclean hands may be stricken where these defenses are alleged in conclusory fashion without any factual basis, thereby depriving plaintiff a fair notice of the grounds upon which the defense rests. See Qarbon.com, Inc. v. *eHelp Corp.*, 315 F.Supp.2d 1046, 1049-50 (N.D.Cal.2004).

Defendant's answer in the present case appears especially vulnerable to a motion to strike. In a simple lawsuit involving a single collection letter, defendant has alleged eighteen separate affirmative defenses. This method of pleading everything, "including the kitchen sink," displays a lack of care, deliberation, and professionalism on the part of counsel engaging in such conduct. Indeed, one of the alleged affirmative defenses (defense 10) purports to incorporate by reference all of the defenses set forth in Rules 8(c) and 12(b) of the Federal Rules of Civil Procedure. No attorney could possibly believe that every defense recognized by the federal rules is even remotely applicable in a case of this simplicity. Such a lack of thought and self-discipline, whether displayed by plaintiff's or defendant's counsel, fairly invites reaction by the court, which is interested in the fair and efficient resolution of cases on the merits.

Defense counsel's extravagance has put plaintiff's counsel, and now the court, to the burden of scrutinizing each of the affirmative defenses to determine whether they are subject to a motion to strike under Rule 12(f) under the standards set forth above. The court therefore examines each affirmative defense in

*3 First Defense. Defendant asserts that the complaint

fails to state a claim upon which relief can be granted. Rule 12 allows this defense to be raised in an answer, FED. R. CIV. P. 12(b), and further provides that this defense is essentially never waived, as it may be asserted as late as trial, FED. R. CIV. P. 12(h). As the question whether a complaint states a claim upon which relief can be granted is always a potential issue in any case, the first defense cannot be stricken as insufficient.

Second Defense. Defendant asserts that plaintiff's claims may be barred in whole or in part by the statute of limitations. In response, plaintiff aptly points out that the statute of limitations under the federal Fair Debt Collection Practices Act expires one year after the date on which the violation occurs. 15 U.S.C. § 1692k(d). Plaintiff's claim arises from a letter dated March 15, 2007, and the complaint was filed only four months later, in July 2007. In response to this argument, defendant has advanced no legal or factual basis upon which the court could conclude that the complaint was untimely under the one-year statute. With regard to the pendent state-law claims, plaintiff has not even pointed to a state limitations period that could conceivably bar a claim filed only four months after accrual. Obviously, defendant has engaged in "boilerplate" pleading, asserting defenses with no conceivable basis in law or fact. Defendant argues only that this defense, along with others, raises "questions of fact," without ever informing the court what those questions might be. When faced with a motion to strike a limitations defense, the defendant has the burden of at least identifying the appropriate limitations period and raising some plausible reason why it has expired. Defendant has not even tried to do so. The second defense will be stricken as insufficient.

Third Defense. Defendant asserts that plaintiff has failed to mitigate his damages. Mitigation of damages is an affirmative defense, but the facts supporting the defense are generally within the control of plaintiff. A defendant should therefore be given a reasonable opportunity to conduct discovery before being put to the task of supporting this defense with proof. Furthermore, the two state statutes pleaded by plaintiff each allow an award of actual damages. SeeMICH. COMP. LAWS §§ 339.916, 445.257. Although failure to mitigate is not a defense to an award of statutory damages, it may be a defense to a claim for actual damages. The third defense will therefore not be

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stricken, but its validity is reserved for summary judgment motion or trial.

Fourth Defense. Defendant alleges "on information and belief," that plaintiff's claims may be barred by res judicata. The answer does not identify any previous judgment that would have preclusive effect in this case. Consequently, plaintiff has not been given fair notice of the basis for this defense. A defendant alleging the preclusive effect of a prior judgment should, at the time of pleading, at least be in a position to identify the judgment. This defense will therefore be stricken, with leave to reassert the defense within five business days to identify the factual basis for the defense. See Qarbon.com, 315 F.Supp.2d at 1050.

*4 Fifth Defense. The fifth defense asserts that plaintiff is estopped to assert all claims against defendant and may have waived "all or some" of those claims. Again, no factual basis is alleged for this affirmative defense and, given the nature of plaintiff's claims, it is hard to imagine such a basis. This defense will again be stricken, with leave to amend if defendant can supply an appropriate factual basis.

Sixth Defense. In the sixth affirmative defense, defendant asserts that plaintiff lacks standing. Because of the case or controversy requirements of Article III of the Constitution, as well as the requirements of specific statutes, standing is a potential issue in any case. The burden of establishing standing is always on the plaintiff. See Loren v. Blue Cross & Blue Shield of Mich., No. 06-2090, --- F.3d ----, 2007 WL 2726704, at * 7 (6th Cir. Sept.20, 2007). Therefore, the sixth defense is not insufficient on its face.

Seventh Defense. Defendant asserts that plaintiff's claims against defendant are brought "in bad faith" and solely for the purpose of harassing the defendant. This is not an affirmative defense, but a finding that a plaintiff has brought a bad-faith claim can subject plaintiff to an award of attorney's fees. 15 U.S.C. § 1692k(a)(3). Defendant's seventh defense may be seen as a notification to plaintiff of defendant's intent to do so, and therefore is properly alleged in the answer, even if not technically a defense.

Eighth Defense. The eighth affirmative defense asserts bona fide error. The Fair Debt Collection Practices Act establishes a special defense, called the

"bona fide error defense," providing an exception to liability if the defendant can prove that (1) it acted unintentionally and (2) it had in place "procedures reasonably adapted to avoid" the error alleged. 15 U.S.C. § 1692k(c); see Moya v. Hocking, 10 F.Supp.2d 847, 849 (W.D.Mich.1998). The eighth affirmative defense therefore alleges a valid defense, established by the statute itself. Plaintiff's argument that the bona fide error defense must be limited to clerical errors alone is not meritorious. Contrary to plaintiff's argument, the Sixth Circuit has never held that the bona fide error defense applies only to clerical errors. The citation provided by plaintiff for this proposition, Smith v. Transworld Systems, Inc., 953 F.2d 1025, 1034 (6th Cir.1992), is to a dissenting opinion by Circuit Judge Krupansky. Although Judge Krupansky would have so limited the defense, his position was not accepted by the majority. The majority merely noted that the conduct of the defendant in that case "was at most a clerical error," but the court did not purport to limit the effect of the defense to clerical errors alone. 953 F.2d at 1031. Consequently, the bona fide error defense is properly alleged in this case and a determination of its viability must await summary judgment or trial.

*5 Ninth Defense. In its ninth defense, defendant asserts that any loss or damage suffered by plaintiff was due to the affirmative act or omission of plaintiff or other people. This is not a defense. Defendant is only responsible for its own acts or omissions. It is not necessary for it to assert plaintiff's own fault, an allegation that may be appropriate in a state tort case but has no bearing on the present case. The ninth defense will therefore be stricken.

Tenth Defense. As noted above, the tenth defense attempts to incorporate by reference all affirmative defenses recognized in Rules 8(c) and 12(b) of the Federal Rules of Civil Procedure. This is utter nonsense. It is inconceivable that every defense known to the law could be applicable to a case of this simplicity. The tenth defense does not given plaintiff fair notice of anything and will be stricken.

Eleventh Defense. Defendant asserts that plaintiff has suffered no damages as a result of any act or omission of defendant. This is not an affirmative defense. Plaintiff has the burden of demonstrating that he is entitled to whatever damages the statutes allow. The eleventh defense is a waste of ink and will be

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stricken.

Twelfth Defense. Defendant raises the equitable defense of unclean hands. The unclean hands defense will, in certain circumstances, provide a defense to claims for injunction or other equitable relief. See, e.g., Performance Unlimited, Inc. v. Questar Pub., Inc., 52 F.3d 1373, 1383 (6th Cir.1995). As plaintiff seeks no equitable relief, the unclean hands doctrine is inapplicable to this case and insufficient on its face

Thirteenth Defense. The thirteenth defense alleges verbatim: "Plaintiff's and/or their agents have engaged in the unauthorized practice of law." Leaving grammatical errors aside, the court notes the utter futility of this so-called defense. Although called upon to do so by the motion to strike, defendant has not attempted to justify its accusation that plaintiff has engaged in the unauthorized practice of law. If the accusation is aimed at plaintiff's counsel, it appears completely frivolous, as counsel has been admitted to the bar of this court. This nonsensical defense will be stricken.

Fourteenth Defense. In five words, defendant asserts the right of setoff, but does not identify any debt or claim owing to defendant that would give rise to such a right. Again, this is boilerplate pleading that the court will not tolerate. The defense will be stricken.

Fifteenth Defense. Defendant asserts that plaintiff's claims are barred "due to impossibility." The doctrine of impossibility may have some relevance to a contract claim or an action under Article II of the UCC. It is hard to conceive of a more ridiculous defense to an action under the Fair Debt Collection Practices Δct

Sixteenth Defense. Defendant asserts that venue is improper. In a federal question case, venue is proper in the district, among others, in which a substantial part of the events or omissions giving rise to the claim occurred. 28 U.S.C. § 1391(b). Plaintiff alleges that defendant sent the offending letter to his residence in Kent County, which is located within the Western District of Michigan. Plaintiff has presented the court with no facts that would indicate venue is improper. The sixteenth defense will therefore be stricken.

*6 Seventeenth and Eighteenth Defenses. The seventeenth and eighteenth defenses broadly assert defendant's "right" to amend their affirmative defenses and to assert other defenses at any time, including at trial. These exercises in throat-clearing add nothing to the answer. Defendant's ability to amend her answer is presently governed by Rule 15; after entry of a case management order, Rules 15 and 16(b) will be applied. Nothing that defendant says or does not say in her answer can create or diminish her "rights" in this regard. These affirmative defenses will therefore be stricken.

Every attorney admitted to practice in this state takes an oath promising, among other things, not to counsel or maintain "any defense except such as I believe to be honestly debatable under the law of the land."Rule 15, § 3(1) of the Supreme Court Rules Concerning the State Bar of Michigan. The assertion of every conceivable affirmative defense falls far outside this solemn obligation. If the answer in the present case represents defense counsel's usual approach to civil litigation, he should reform his practices immediately. Certainly, if counsel should ever file another set of omnibus affirmative defenses in this court, he will be subject to the imposition of sanctions under Rule 11, on the court's own motion.

For the foregoing reasons, defenses 2, 9, 10, 11, 12, 13, 14, 15, 16, 17 and 18 will be stricken, defenses 4 and 5 will be stricken with leave to amend, and the remainder of plaintiff's motion will be denied.

W.D.Mich.,2007. Glover v. Mary Jane M. Elliott, P.C. Not Reported in F.Supp.2d, 2007 WL 2904050 (W.D.Mich.)

END OF DOCUMENT

Exhibit B



--- F.3d ---- F.3d ----, 2009 WL 113487 (C.A.7 (Wis.)) (Cite as: 2009 WL 113487 (C.A.7 (Wis.)))

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Only the Westlaw citation is currently available. United States Court of Appeals, Seventh Circuit. State of WISCONSIN, Plaintiff-Appellee,

v

The STOCKBRIDGE-MUNSEE COMMUNITY and Robert Chicks, Defendants-Appellants.

No. 04-3834.

Argued Sept. 3, 2008. Decided Jan. 20, 2009.

Background: State of Wisconsin filed action alleging that Indian tribe was operating Class III electronic games of chance on land located outside the boundaries of the tribe's reservation in violation of Indian Gaming Regulatory Act (IGRA). The United States District Court for the Eastern District of Wisconsin, Patricia J. Gorence, United States Magistrate Judge, <u>366 F.Supp.2d 698</u>, denied defendants' motion for summary judgment and granted state's motion for summary judgment. Defendants appealed.

Holdings: The Court of Appeals, <u>Evans</u>, Circuit Judge, held that:

(1) 1981 Act intended to remove opened lands from the reservation, and

(2) 1906 Act effectively abolished the reservation.

Affirmed.

Ripple, Circuit Judge, filed a concurring opinion.

West Headnotes

[1] Indians 209 158

209 Indians

209IV Real Property

209k156 Reservations or Grants to Indian Nations or Tribes

209k158 k. Lands Included and Boundaries; Appropriation and Diminishment. Most Cited Cases

Once an Indian reservation is established, it remains intact until Congress explicitly diminishes its boundaries or disestablishes it entirely.

[2] Indians 209 \$\infty\$=158

209 Indians

209IV Real Property

209k156 Reservations or Grants to Indian Nations or Tribes

209k158 k. Lands Included and Boundaries; Appropriation and Diminishment. Most Cited Cases

Because courts must construe Indian treaties sympathetically to Indian interests, an intent to alter a reservation's boundaries will not be lightly inferred.

[3] Indians 209 • 158

209 Indians

209IV Real Property

 $\underline{209k156}$ Reservations or Grants to Indian Nations or Tribes

209k158 k. Lands Included and Boundaries; Appropriation and Diminishment. Most Cited Cases

The most probative evidence of intent is the operative language of the act that purportedly shrinks an Indian reservation.

[4] Indians 209 \$\infty\$158

209 Indians

209IV Real Property

<u>209k156</u> Reservations or Grants to Indian Nations or Tribes

 $\frac{209k158}{\text{c}}$ k. Lands Included and Boundaries; Appropriation and Diminishment. Most Cited Cases

Absent clear language indicating Congressional intent to shrink an Indian reservation, courts look to events surrounding the passage of an Act that unequivocally reveal a widely held, contemporaneous understanding that the affected reservation would shrink as a result of the proposed legislation, and, to a lesser extent, events that occur after the passage of the act.

[5] Indians 209 158

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209 Indians

209IV Real Property

209k156 Reservations or Grants to Indian Nations or Tribes

Congress, in passing 1871 Act, calling for public auction, run by the government, of three quarters of Indian Tribe's reservation, intended to remove opened lands from the reservation, effectively creating a new reservation for the Tribe from which Tribal members could select their allotments, despite the lack of specific statements within the Act; Tribe ended up choosing an unsold portion of prior reservation, which, by the terms of the act, became its new, smaller, permanent reservation, legislation was meant to address Tribe's history of internal conflict by shrinking the Tribe itself, and reservation was consistently treated as if it had been diminished by the Act. Act Fed. 8, 1871, § 7, 16 Stat. 404.

[6] Indians 209 \$\infty\$159

209 Indians

209IV Real Property

<u>209k156</u> Reservations or Grants to Indian Nations or Tribes

 $\underline{209k159}$ k. Disestablishment and Termination. Most Cited Cases

Congress, in passing 1906 Act, explaining how members of Indian Tribe would be given allotments of land, effectively abolished the reservation, even though Act included no hallmark language suggesting such an intent; all parties, including the Tribe, the United States Department of Interior, and Congress, expected that the completion of the allotment process would end the prior treaty establishing a new reservation, Act provided for allotments in fee simple and paved the way for non-Indians to own every parcel within the original reservation, and in the aftermath of the Act, the reservation was treated as though it had been abolished, the land becoming subject to state taxes, and the Department of Interior having refused to intervene in alcohol-related problems within the original reservation. Act June 21, 1906, § 1 et seq., 34 Stat. 325.

[7] Indians 209 123

209 Indians

209II Treaties in General

<u>209k123</u> k. Alteration or Abrogation in General. Most Cited Cases

Congress can act unilaterally, even when abrogating its treaty obligations with an Indian Tribe.

Appeal from the United States District Court for the Eastern District of Wisconsin. No. 98 C 871-Patricia J. Gorence, Magistrate Judge.

<u>John S. Greene</u>, <u>Maura F.J. Whelan</u>, Office of the Attorney General, Madison, WI, for Plaintiff-Appellee.

Riyaz A. Kanji, Kanji & Katzen, Ann Arbor, MI, Cory J. Albright, Kanji & Katzen, Seattle, WA, for Defendants-Appellants.

Before <u>POSNER</u>, <u>RIPPLE</u>, and <u>EVANS</u>, Circuit Judges.

EVANS, Circuit Judge.

*1 The Stockbridge-Munsee Indians (the Tribe) are comprised of descendants of the Mohican Tribe who migrated westward and eventually arrived in Wisconsin in the 1820s. In 1856, the United States entered into a treaty and created a reservation for the Tribe consisting of two townships (Bartelme and Red Springs) in Shawano County, Wisconsin, some 40 miles northwest of Green Bay. The issue in this case is straightforward-are the boundaries of that reservation still intact? The answer is important because the Tribe can only operate slot machines (under a contract with the State of Wisconsin entered into pursuant to the Indian Gaming Regulatory Act, 25 U.S.C. § 2701 et seq.) at the Pine Hills Golf and Supper Club, ENI an entity it purchased in the 1990s, if the course is within the exterior boundaries of the tribal reservation. FN2 Everyone agrees that Pine Hills, which is in Section 2 of the township of Red Springs, falls within the original boundaries of the reservation, but Wisconsin filed this suit because it believes that Pine Hills lies outside the reservation as it stands today. The magistrate judge (Patricia J. Gorence) agreed, granting summary judgment for the State after holding that the reservation, as it existed over 150 years ago, was extinguished by two legislative acts, which first allowed non-Indians to purchase a large section of the 1856 reservation, and then allotted parcels of the reservation to tribal members. The reservation came back a bit, starting in 1937, but never reclaimed its full original size. The Tribe appeals.

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The Tribe's history, like that of many other Indian tribes, was shaped by the constant pressure to move westward to make way for white settlers. Originally from western Massachusetts, the Tribe moved to the Hudson River Valley in New York after the Revolutionary War and eventually to a reservation east of Lake Winnebago in Calumet County, Wisconsin. But it was not long before the Tribe faced pressure to move out of its Lake Winnebago site. This pressure produced two factions within the Tribe. One faction, the Old Citizen Party, wanted to break free from its guardianship relationship with the United States. It sought full United States citizenship and the allotment of parcels of land to individual tribal members. Another group, the Indian Party, wanted to maintain a tribal structure and move to a new reservation west of the Mississippi. Between 1843 and 1848, a treaty and two legislative acts were passed and then repealed, seesawing between these positions. See Act of Mar. 3, 1843, ch. 101, 5 Stat. 645; Act of Aug. 6, 1846, ch. 85, 9 Stat. 55; Treaty with the Stockbridge Tribe of Indians, Nov. 24, 1848, 9 Stat. 955.

Unsurprisingly, this haphazard approach didn't help matters much. In 1856, a new compromise was brokered, and the Tribe entered into a treaty with the United States, agreeing to "cede and relinquish" its Lake Winnebago reservation (and other lands reserved for their use) in exchange for a new reservation in Wisconsin. Treaty with the Stockbridge and Munsees, Feb. 5, 1856, 11 Stat. 679. "As soon as practicable," the new reservation was to be surveyed and allotted to the individual tribal members, and the Tribe's membership was defined by reference to an earlier treaty, which predated the series of seesawing legislative acts. Id. Although tribal members would have the right to occupy their allotments, they could not sell the land without first waiting 10 years and getting permission from both the Tribe and the United States government. But the controversy did not end here. The new reservation turned out to be heavily forested and difficult to farm-not quite the arable land that had been promised in the treaty. And to make matters worse, the Department of the Interior prevented the Tribe from cutting and selling the timber on the reservation. As the Tribe struggled to survive at its new spot, conflicts between the two factions renewed and stymied the allotment process.

*2 Fifteen years later, Congress intervened again. In 1871, an act was passed, calling for the public auc-

tion, run by the government, of three quarters of the reservation. Act of Feb. 6, 1871, ch. 38, 16Stat. 404. Whatever land was not sold after two years was to be purchased by the government at belowmarket prices, and the proceeds from all the sales were to be divided amongst the tribal members. Those willing to sever their ties with the Tribe could take their share on a per capita basis, but the funds belonging to those who wished to remain in the Tribe were held in their trust by the United States. The last quarter of the reservation was "reserved" from sale, and the Tribe was given a choice to make their permanent home there or on an equivalent tract of land to be procured later. Id. at 405. The Tribe elected to stay put, and the remaining tribal members were eligible to receive allotments from this land, with restrictions on alienability. Most of the land up for sale went into the hands of timber companies that harvested the lumber.

But there was a catch. Those who had separated from the Tribe or had received allotments under previous acts-including the repealed acts regarding the old Lake Winnebago reservation-were expelled from the Tribe and received nothing. This provision ended up disenfranchising members of the Old Citizen Party, who vociferously contested the 1871 Act's legitimacy. After receiving reports that the ouster of the Old Citizen Party was obtained by fraud, Congress stepped in again, and in 1893 it restored the tribal membership of those who were expelled. Act of Mar. 3, 1893, ch. 219, 27 Stat. 744. That act, however, did not restore the tribal membership of those who chose, under the 1871 Act, to receive their share of the proceeds of the sale up front and separate from the Tribe. This group became known as the New Citizen Party, and it separated from the Tribe without complaint.

This solution created its own set of problems-the tribal rolls swelled with the reenfranchisement of the Old Citizen Party, and although some tribal members cashed out of the Tribe, most did not. Soon, it was clear that there wasn't enough land to go around, and the allotment process again came to a standstill. The Tribe, unable to reap much benefit from the inhospitable land, pushed the Department of the Interior and Congress to step in again. The Tribe proposed a plan, approved by the Department, in which tribal members agreed to accept either allotments from the unsold portion of the reservation, allotments from additional land purchased by the United States, or cash in

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lieu of land, "as a full and complete settlement of all obligations ... due to said tribe ... from whatever source the same may have accrued, whether under the [1856 treaty], any act of Congress, or otherwise...." These allotments, unlike the ones in previous acts, were alienable. This plan was proposed in 1900, but its passage stalled largely because Congress did not want the United States to foot the bill. Finally, in 1906, the proposal was tucked inside a larger appropriations act, but in its final form the Tribe, not the United States, was obligated to fund it. Act of June 21, 1906, ch. 3504, 34Stat. 325, 382-83. Four years later, all the unsold land within the boundaries of the 1856 reservation was allotted to tribal members.

*3 Following the allotments, the Tribe's reservation was, for the most part, treated as if it had faded out of existence. In the 1930s, the Department of the Interior worked with the Tribe to reacquire parts of the land described in the 1856 treaty, rededicating the property as the Tribe's reservation. 2 Fed.Reg. 629 (Apr. 1, 1937); 13 Fed.Reg. 7718 (Dec. 13, 1948); Act of Oct. 9, 1972, Pub.L. No. 92-480, 86 Stat. 795.Later, Wisconsin and the Tribe entered into an agreement pursuant to the Indian Gaming Regulatory Act, 25 U.S.C. § 2710(d)(1)(C), which allowed the Tribe to operate gaming activities within the boundaries of its reservation. The Tribe purchased Pine Hills in 1993 and soon after set up slot machines there. Pine Hills falls within the boundaries of the 1856 reservation, but it was not part of the land reserved from the 1871 sale to the timber companies, nor has it been restored to reservation status by later legislation.

Wisconsin sued to enjoin the gambling and sought a declaration of the current boundaries of the reservation. The Tribe filed a counterclaim, asking the court to recognize the 1856 boundaries of the reservation and enjoin the State from imposing a tax on the income of tribal members who lived and earned their money within those boundaries. After the district court granted the State's motion for a preliminary injunction (which pulled the plug on the slot machines-golfers, of course, could still play away), both parties agreed that the Tribe would collect the contested taxes and hold them in escrow pending final resolution of this case. Both parties then filed motions for summary judgment. The State argued that the 1856 reservation was diminished by the 1871 Act's sale of reservation land to timber companies, and then extinguished by the 1906 Act, which allot-

ted what remained of the reservation to individual tribal members. The Tribe, on the other hand, maintained that the reservation remained completely intact because Congress never clearly demonstrated its intent to shrink or extinguish it in either 1871 or 1906, a position reiterated by the United States in an amicus curiae brief filed in the district court. Judge Gorence granted the State's motion, concluding that, while neither the 1871 Act nor the 1906 Act contained explicit language diminishing or disestablishing the reservation, the contemporaneous congressional records and subsequent treatment of the reservation demonstrated its intent to do so. The Tribe appeals, but the United States has not sought permission to appear here as an amicus curiae on the Tribe's behalf. FN4

[1][2][3][4] We start with the unremarkable observation that once a reservation is established, it remains intact until Congress explicitly diminishes its boundaries or disestablishes it entirely. Solem v. Bartlett, 465 U.S. 463, 470, 104 S.Ct. 1161, 79 L.Ed.2d 443 (1984); United States v. Celestine, 215 U.S. 278, 285, 30 S.Ct. 93, 54 L.Ed. 195 (1909). Because courts must construe Indian treaties sympathetically to Indian interests, an intent to alter a reservation's boundaries "will not be lightly inferred." Solem, 465 U.S. at 470. The most probative evidence of intent is the operative language of the act that purportedly shrinks a reservation. Id. But Congress was not always clear about its intentions for the boundaries of a reservation, primarily because at the turn of the last century, when many allotment acts were passed, it was operating under a different set of assumptions than it does now. Today, a reservation can encompass land that is not owned by Indians, 18 U.S.C. § 1151(a), but back then, the "notion that reservation status of Indian lands might not be coextensive with tribal ownership was unfamiliar...." Solem, 465 U.S. at 468. What's more, Congress believed that all reservations would soon fade away-the idea behind the allotment acts was that ownership of property would prepare Indians for citizenship in the United States, which, down the road, would make reservations obsolete. Id. Given these background assumptions, Congress would have felt little need to explicitly address a reservation's boundaries. We cannot, of course, extrapolate a clear intent to diminish a reservation from these generic assumptions. Id. at 468-69.But given this backdrop, we also cannot expect Congress to have employed a set of magic words to signal its intention to shrink a reservation. Absent

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such clear language, courts look to events surrounding the passage of the act that "unequivocally reveal a widely held, contemporaneous understanding that the affected reservation would shrink as a result of the proposed legislation," id. at 471, and, "to a lesser extent," events that occur after the passage of the act, South Dakota v. Yankton Sioux Tribe, 522 U.S. 329, 344, 118 S.Ct. 789, 139 L.Ed.2d 773 (1998).

*4 With this framework in mind, we turn to the 1871 Act which, like many similar acts passed during this period, allotted a limited property interest to tribal members and opened the remaining land for sale to non-Indians. We must decide whether this act simply gave non-Indians a chance to buy land within an existing reservation or if the act was meant to diminish the reservation.

[5] The 1871 Act includes no hallmark diminishment language, such as statements that the opened land is "restored to the public domain," Hagen v. Utah, 510 U.S. 399, 412-14, 114 S.Ct. 958, 127 L.Ed.2d 252 (1994), or that a tribe agrees to "cede, sell, relinquish, and convey" reservation land, DeCoteau v. District County Court, 420 U.S. 425, 436, 445, 95 S.Ct. 1082, 43 L.Ed.2d 300 (1975). But the act does include other language which shows that Congress wanted to slice the opened lands off from the reservation. The act effectively created a new reservation for the Tribe from which tribal members could select their allotments. That reservation could consist of either the land "reserved" from the sale to the timber companies, "or such other reservation as may be procured for them."16 Stat. 406. And the act goes on to require the expeditious allotment of land "after a suitable and permanent reservation shall be obtained and accepted by said tribe, either at their present home or elsewhere...."Id. The clear implication is that the boundaries of the new reservation were not defined by the 1856 treaty, but rather by the Tribe and its acceptance of a new home. The Tribe ended up choosing the unsold portion of the 1856 reservation, which, by the terms of the 1871 Act, became its new, smaller, "permanent reservation."

These references to a new reservation may not, by themselves, be enough to demonstrate Congress's intent to diminish the reservation, *Solem*, 465 U.S. at 475 (reference to the "reservations thus diminished" and "the public domain" are insufficient to infer intent to diminish a reservation); *Mattz v. Arnett*, 412

U.S. 481, 498, 93 S.Ct. 2245, 37 L.Ed.2d 92 (1973) (reference to a reservation in past tense insufficient to infer intent to diminish it), but we need not rest on them alone. The circumstances surrounding the passage of this legislation show that it was more than a run-of-the-mill allotment act. The Tribe had a history of internal conflict which this legislation was meant to address by shrinking the Tribe itself. While Congress later repudiated the disenfranchisement of the Old Citizen Party, it never backed away from the provision that allowed tribal members to receive their share of the proceeds from the sale of the land up front in exchange for severance from the Tribe. Given this context, we cannot dismiss the references to a new permanent reservation as casual. To the contrary, it makes perfect sense-smaller tribe, smaller reservation. The Wisconsin Supreme Court, confronting the same issue we face here, similarly reasoned that if the "Act of 1871 did not diminish reservation status ... it stands to reason that members of the Indian party would have asked for and been entitled to greater consideration in terms of property rights." Wisconsin v. Davids, 194 Wis.2d 386, 534 N.W.2d 70, 80 (Wis.1995). Finding that reading untenable, the court held that the 1871 Act diminished the Tribe's reservation. Id. at 72. We agree.

Filed 01/30/2009

*5 What's more, the reservation was consistently treated as if it had been diminished by the 1871 Act. The Commissioner of Indian Affairs, in multiple reports following the act, excluded the land sold to the timber interests from its descriptions of the reservation. Maps from the General Land Office did likewise. The Tribe itself-when advocating before the Senate for the passage of the 1893 Act which reenfranchised the Old Citizen Party-admitted that their reservation had been diminished. The Tribe attempts to introduce ambiguity into this otherwise consistent picture by pointing to the preamble of the 1893 Act, which states that the Tribe received a reservation under the 1856 treaty, "upon which they have ever since resided."27 Stat. 744. The Tribe, despite taking a contrary position when advocating for the legislation, now reads this statement to be a reaffirmation of the 1856 reservation and its boundaries. But this reference, in an act about the Tribe's membership, not its land, cannot be understood as a resurrection of the original reservation boundaries. The reference merely points out that the Tribe continued to live on land reserved for them by the 1856 treaty, a fact that was both true and consistent with diminishment. They resided within the 1856 reservation, just on a smaller

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part than they originally did. In any event, this statement, made 20 years after the fact, sheds little light on what Congress intended to do when passing the act in 1871. Yankton, 522 U.S. at 344, 356; Mattz, 412 U.S. at 505.

[6] The 1906 Act, like the 1871 Act, included none of the hallmark language suggesting that Congress intended to disestablish the reservation. The relevant provision was just a few paragraphs tucked inside a larger appropriations act, and it explains only how the tribal members will be given allotments of land. The act addressed the "small shoe, big foot" problem-the remaining reservation was too small to provide parcels to all tribal members. The Supreme Court has repeatedly held that allotting land to Indians is consistent with continued reservation status, see, e.g., Solem, 465 U.S. 473-74; Mattz, 412 U.S. at 497; Seymour v. Superintendent, 368 U.S. 351, 357-58, 82 S.Ct. 424, 7 L.Ed.2d 346 (1962), therefore, this language alone is insufficient to abolish the reservation.

[7] However, the circumstances surrounding the act show that Congress wanted to extinguish what remained of the reservation when it passed the act. By the 1900s, the Tribe was anxious to complete the stalled allotment process, and it worked with the Department of the Interior to propose a plan to get the land divvied up. The plan they came up with required the purchase of additional land to complete the allotments and gave tribal members an option to receive cash in lieu of land-all at the expense of the United States. This proposed plan (and the proposed bill that tracked it) was unequivocal-the completion of the allotment process was to be "a full and complete settlement of all obligations" the United States had under the 1856 treaty, including the reservation it created. The Department of the Interior urged Congress to pass the bill to facilitate "a final adjustment" of the Tribe's affairs, and a report from the House Committee on Indian Affairs noted that the bill was "drawn so as to carry out the plan of settlement" formulated by the Tribe. It's clear from this congressional record that all the parties at the table-the Tribe, the Department of Interior, and Congress-expected that the completion of the allotment process would end the 1856 treaty and the reservation it created. Of course, the Tribe did not get the bargain it sought-the Tribe, not the United States, was required to fund the proposed compromise. But Congress can act unilaterally,

even when abrogating its treaty obligations with an Indian Tribe, Lone Wolf v. Hitchcock, 187 U.S. 553, 566, 567-68, 23 S.Ct. 216, 47 L.Ed. 299 (1903), and although this change shifted, perhaps unfairly, the burden of payment, it is not our place to rewrite history.

*6 The intent to extinguish what remained of the reservation is born out by the act's provision for allotments in fee simple. This provision sets the 1906 Act apart from most allotment acts, like the 1871 Act, which restricted the Indian owners from selling their land or required that it be held in trust by the United States. 3 Cohen's Handbook of Federal Indian Law § 3.04.3; see, e.g., Dawes Act, ch. 119, 24Stat. 388, 389 (1887). Why include this peculiar provision? Because the reservation could only be abolished if the tribal members held their allotments in fee simple. See Mattz, 412 U.S. at 496 ("When all the lands had been allotted and the trust expired, the reservation could be abolished."). By 1910, all the land in the 1856 reservation was sold to non-Indians or allotted in fee simple, which meant that Congress paved the way for non-Indians to own every parcel within the original reservation and ensured that the reservation could be immediately extinguished.

In the aftermath of the act, the reservation was treated, for the most part, as though it had been abolished. See, e.g., United States v. Anderson, 225 F. 825 (E.D.Wis.1915) (noting in title dispute case that the reservation had been dissolved); United States v. Gardner, 189 F. 690, 693, 696 (E.D.Wis.1911) (suggesting that the reservation expired once the land was allotted). The land became subject to state taxes, and the Department of the Interior refused to intervene in alcohol-related problems within the original reservation. And once official policy towards Indians shifted away from allotments and assimilation, the Department of the Interior worked with the Tribe to reacquire large parts of its 1856 reservation, declaring the newly reacquired land to be the Tribe's reservation. There were exceptions to this understanding, but aberrational statements are not enough to overcome the clear record showing Congress's intent to extinguish the reservation and the otherwise consistent treatment of the reservation as disestablished.

We, like Judge Gorence, do not lightly reach the conclusion that the Tribe's reservation was diminished by the 1871 Act and subsequently extinguished by the

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1906 Act. The present, reestablished reservation is but a part of the original two-township reservation created in 1856. And the Pine Hills entity is not within the boundary of the reservation as it exists today. On this point Congress's intent is clear. Accordingly, we AFFIRM the judgment of the district court.

RIPPLE, Circuit Judge, concurring.

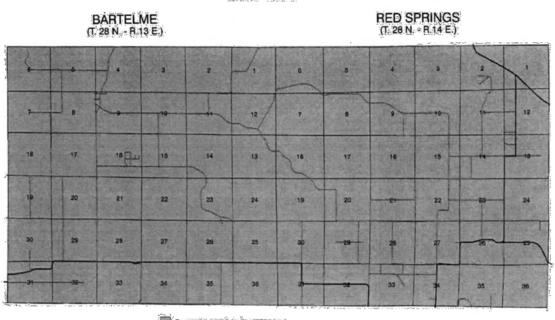
I join the judgment and the opinion of the court. I write separately simply to underline that today's decision does not constitute a departure from the general rule that once Congress has established a reservation, its boundaries remained fixed unless Congress explicitly diminishes those boundaries or disestablishes the reservation. As the court's opinion makes explicit,

this general proposition is firmly embedded in our jurisprudence. *See Solem v. Bartlett*, 465 U.S. 463, 470, 104 S.Ct. 1161, 79 L.Ed.2d 443 (1984). Moreover, explicit legislative language remains "[t]he most probative evidence of congressional intent." *Id.*

*7 Today's opinion not only states these propositions unequivocally, but also demonstrates cogently that the unique historical context makes it unreasonable for us to demand a clearer statement in the statutory language. On this basis, I am pleased to join the judgment and the opinion of the court.

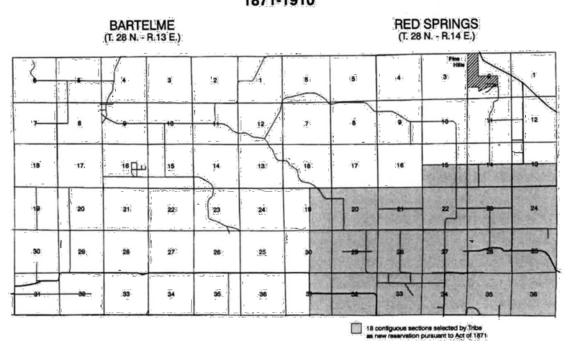
STOCKBRIDGE - MUNSEE RESERVATION

1856-1871



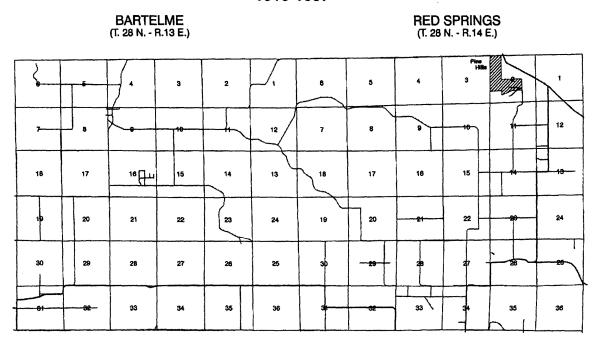
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STOCKBRIDGE - MUNSEE RESERVATION 1871-1910



STOCKBRIDGE - MUNSEE RESERVATION (NONE)

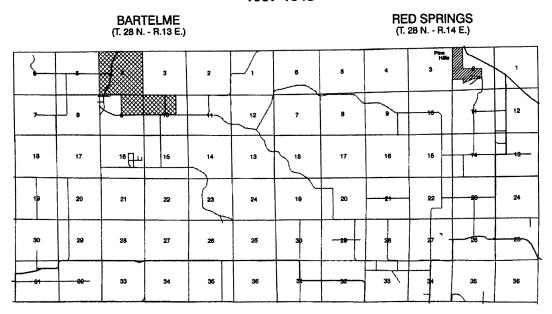
1910-1937



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STOCKBRIDGE - MUNSEE RESERVATION

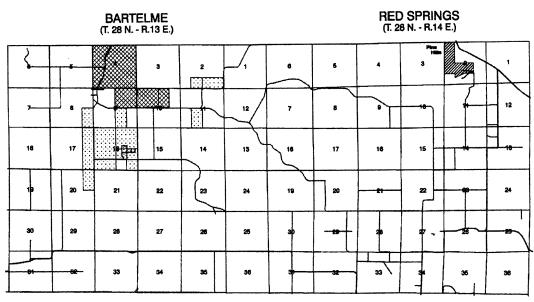
1937-1948



New reservation created by proclamation dated March 19, 1937

STOCKBRIDGE - MUNSEE RESERVATION

1948-1972



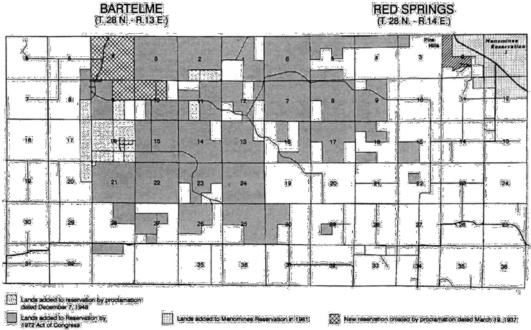
Lands added to reservation by proclamation dated December 7, 1948

New reservation created by proclamation dated March 19, 1937

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STOCKBRIDGE - MUNSEE RESERVATION

1972-Present



FN1. The Tribe's Pine Hills golf course, which carries a Wisconsin State Golf Association (WSGA) rating of 70.2 and a slope of 126, is located on Pine Hills Drive in or near the Village of Gresham. *See* www.mohican.com. It opened for play in 1999. It should not be confused with another Wisconsin course that operates under the same name. That Pine Hills, with a WSGA rating of 72.3 and a slope of 132, is a premier course in Sheboygan that recently hosted qualifying rounds for both the United States Open and the United States Senior Open championships.

<u>FN2.</u> The Tribe validly operates the North Star Casino and Bingo on its present reservation.

<u>FN3.</u> We have included, as an appendix to our opinion, six maps from the record that we think accurately track the changes to the reservation over the years. On five of six maps (all except the first one), the present location of Pine Hills is noted. In consider-

ing these maps, which we found helpful, it is worth remembering that a township consists of 36 sections, each covering one square mile.

FN4. The record does not tell us why the United States elected to sit this one out, but counsel for the Tribe told us at oral argument that he believed it did not file here because time was too short to do so. Another possibility, perhaps, is that the United States saw wisdom in Judge Gorence's analysis of the case.

C.A.7 (Wis.),2009. Wisconsin v. Stockbridge-Munsee Community --- F.3d ----, 2009 WL 113487 (C.A.7 (Wis.))

END OF DOCUMENT

Exhibit C

NOTES

OF DEBATES

IN THE

FEDERAL

CONVENTION

OF 1787

REPORTED BY

James Madison

With an introduction by Adrienne Koch



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The section 2. (see Sep! 4) requiring that the President shows years, & be thirty five years of age, was agreed to nem: con: be a natural-born Citizen, &c & have been resident for four

"The vice President shall be ex-off 54 Section 3. (see Sep: 4). President of the Senate"

M: Gerry opposed this regulation. We might as well put President himself at the head of the Legislature. The close macy that must subsist between the President & vice-president makes it absolutely improper. He was aget having any President M: Gov: Morris. The vice president then will be the first president, the President of the Senate would be temporary such apparent that ever loved his father. If there should be no sor, which would amount to the same thing.

employment, and some member by being made President must deprived of his vote, unless when an equal division of votes me were not to be President of the Senate, he would be with M. Sherman saw no danger in the case. If the vice-Preside happen in the Senate, which would be but seldom.

M: RANDOL, PH concurred in the opposition to the clause.

was not wanted. He was introduced only for the sake of a valua mode of election which required two to be chosen at the same t M: WILLIAMSON, observed that such an officer as vice-Presid

ments, 66 ought to be kept as separate as possible. He took or sion to express his dislike of any reference whatever of the power that a privy Council of six members to the president should established; to be chosen for six years by the Senate, two out the Eastern two out of the middle, and two out of the South Col: Mason, thought the office of vice-President an encrose ment on the rights of the Senate; and that it mixed too much Legislative & Executive, which as well as the Judiciary depe other hand he was averse to vest so dangerous a power in President alone. As a method for avoiding both, he sugges quarters of the Union, & to go out in rotation two every sea make appointments to either branch of the Legislature.

"This paragraph is changed in the transcript to read as follows: "The third section, "The resident shall be ex-officio President of the Senate' being then considered." W The letter "s" is striken from the word "departments" in the transcript.

are of a legislative nature. This would prevent the constant e departments separate & distinct. It would also save the pence of constant sessions of the Senate. He had he said always ar; the concurrence of the Senate to be required only in the pointment of Ambassadors, and in making treaties, which are thing of the Senate which he thought dangerous, as well as keep nsidered the Senate as too unwieldy & expensive for appointing reduced his idea to writing, but it could be easily done if it icers, especially the smallest, such as tide waiters &c. He had puld be found acceptable.

On the question shall the vice President be ex officio President of Senate?

Del ay. Mas N. H. ay. Mas. ay. Ctay. N. J. no. Ptay. V* ay. N. C. abs! S. C. ay. Geo. ay. 50

The Section 4.—to wit, "The President by & with the advice d consent of the Senate shall have power to make Treaties The other parts of the same Section (3) in were then agreed to.

and House of Representatives." As treaties he said are to have e operation of laws, they ought to have the sanction of laws also. he circumstance of secrecy in the business of treaties formed the by objection; but this he thought, so far as it was inconsistent M: Wilson moved to add, after the word "Senate" the words, ith obtaining the Legislative sanction, was outweighed by the cessity of the latter. M: Sherman thought the only question that could be made was ought it could; and that the necessity of secresy in the case of bether the power could be safely trusted to the Senate. He aties forbade a reference of them to the whole Legislature.

M: Fitzimmons 2444 the motion of M: Wilson, & on the question N. H. no. Mas. no. C! no. N. J. no. P! ay. Del. no. M4 no. Geo. 110.59 S. C. no. 10. N. C. no.

In the transcript the vote reads: "New Hampshire, Massachusetts, Connecticut, Pennsylvanis, Maryland, no-7; North Carolina, Georgia, aye-8; New Jersey, Maryland, no-7; North Carolina,

The figure ", 3" is omitted in the transcript.

The phrase "was then taken up" is here added in the transcript.

In the transcript the vote reads: "Pennsylvania, aye—1; New Hampshire, Massachusetts, Connecting The Transcript the vote reads: "Pennsylvania, aye—1; New Jursey, Delaware, Maryland, Virginia, North Carolina, South Carolina, Georgia, no—ra."

Exhibit D



Not Reported in F.Supp.2d Not Reported in F.Supp.2d, 2007 WL 603377 (E.D.Mich.) (Cite as: 2007 WL 603377 (E.D.Mich.))

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COnly the Westlaw citation is currently available. United States District Court, E.D. Michigan, Southern Division.

FAIRLAND, INC., d/b/a New Home Pride, Plaintiff,

UNITED STATES FIDELITY & GUARANTY CO., Defendant.

No. 05-CV-71491.

Feb. 22, 2007.

Joseph L. Milanowski, Mark L. Dailey, Melamed, Dailey, Huntington Woods, MI, for Plaintiff. Erin E. Pellegrino, James R. Swinehart, Clausen Miller, Chicago, IL, John D. Honeyman, Patrick, Johnson, Southfield, MI, for Defendant.

OPINION AND ORDER (1) GRANTING DE-FENDANT'S MOTION TO BAR REFERENCES TO "PHANTOM ARSONISTS"; (2) DENYING DEFENDANT'S MOTION TO BAR REFER-ENCES TO ROOF HATCH; (3) GRANTING IN PART AND DENYING IN PART DEFENDANT'S MOTION TO BAR PLAINTIFF'S "EXPERT" EUGENE RIZZO; (4) DENYING DEFENDANT'S MOTION TO SEQUESTER WITNESSES; (5) DENYING DEFENDANT'S MOTION TO BAR PLAINTIFF'S EXPERT DANIEL CHURCH-WARD: (6) GRANTING DEFENDANT'S MO-TION TO STRIKE PLAINTIFF'S WITNESS SAMI LOUISSA; (7) GRANTING DEFENDANT'S MOTION TO BAR PLAINTIFF'S EXPERT GE-RALD KOLB

PAUL D. BORMAN, United States District Judge. *1 Before the Court are Defendant's following Motions in Limine:

- (1) To Bar references to "Phantom Arsonists" (Docket No. 25);
- (2) To Bar references to damage to roof hatch (Docket No. 26);
- (3) To Bar Plaintiff's "Expert" Eugene Rizzo (Docket No. 27);

- (4) To Bar all witnesses from the courtroom while not testifying (Docket No. 28);
- (5) To Bar Plaintiff's Expert Daniel Churchward (Docket No. 29);
- (6) To Strike Plaintiff's Witness Sami Louissa (Docket No. 44);
- (7) To Bar Plaintiff's Rebuttal Expert Gerald Kolb (Docket No. 46).

The Court held motion hearings on December 13, 2006, and on February 21, 2007.

I. BACKGROUND

This case involves Defendant's refusal to pay benefits under an insurance policy for the destruction by fire of Plaintiff's business, due to Defendant's assertion of arson.

Defendant United States Fidelity and Guaranty Company ("Defendant") issued a policy to Plaintiff Fairland, Inc. (d/b/a a New Home Pride) ("Plaintiff") for the building and personal property located at 4031 Oakman Boulevard in Detroit, Michigan. The applicable policy was in effect from August 29, 2003 to August 29, 2004. Plaintiff leased the building from Allie and Jameel Hilder.

In April 2003, Plaintiff began operating a "dollar" grocery store in the leased premises. A fire occurred on the premises on November 20, 2003, likely originating in the back storeroom. Gasoline was also found to be present at the floor level of the back storeroom or near the area of origin of the fire. Aimer Kato had closed the New Home Pride store on the night of the fire and activated the security alarm at 8:14 p.m. The alarm system was triggered at 8:23 p.m., and the fire department arrived at 8:29 p.m.

Subsequent to the fire, Plaintiff made an insurance claim against Defendant, which Defendant denied. On March 18, 2005, Plaintiff filed a breach of contract action against Defendant in Wayne County Circuit Court. Defendant removed the case on the basis

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of diversity on April 15, 2005. In response to Plaintiff's breach of contract claim, Defendant asserts the affirmative defense of arson.

To prevail on the affirmative defense of arson under Michigan law, a defendant must establish by a preponderance of the evidence that the plaintiff either set fire to the building or caused such to be done. Crossley v. Allstate Ins. Co., 139 Mich.App. 464, 469, 362 N.W.2d 760 (1985). [A]rson may be established by circumstantial evidence where there is evidence of motive (such as insurance together with business difficulties) and opportunity (such as access to the building), along with independent evidence of the incendiary origins of the fire. "Id.

II. ANALYSIS

A. Motion to Bar any Reference to "Phantom Arsonists" and to Strike Plaintiff's Witness Sami Louissa

Defendant motions the Court to exclude any reference to "phantom arsonists," particularly in regards to (1) multiple unknown persons allegedly caught shoplifting at the store, prior to Plaintiff's ownership, three years before the fire; and (2) alleged unknown persons, such as "phantom arsonists," running around inside the store and triggering internal security alarms

*2 Specifically, Defendant objects to the introduction of several Polaroid photographs depicting individuals caught shoplifting, years before the fire, by a previous store owner. Defendant argues that the photographs have not been made part of the record. Defendant further contends that there is no evidence to suggest that any of these previous shoplifters had any motive or opportunity to burn Plaintiff's store. As to the second matter, people "running around" in the store, Defendant points out that Plaintiff's expert Daniel Churchward could not testify with competence that the multiple alarm triggering was caused by people "running around" inside of the store, rather than the fire itself. Therefore, Defendant asks that the Court exclude the photographs and testimony that "phantom arsonists" were involved in the arson of Plaintiff's store.

Defendant also requests that the Court strike Plaintiff's witness Sami Louissa, the previous owner of the store, who would identify the photographs that he took.

Plaintiff responds that the shoplifter photographs should be admitted and offers the testimony of Louissa to authenticate them. Plaintiff argues that the individuals in the photographs, humiliated by being handcuffed displaying the items they had stolen, possibly would have had a motive to burn Plaintiff's store. Second, as to possible people "running around" triggering alarms, Plaintiff contends that it should be able to introduce evidence to support the theory that the interior store security alarms could have been triggered by multiple burglars inside of the store, instead of Defendant's theory that the fire itself set off the alarms. In support of this theory, Plaintiff relies upon the testimony of Mark Dooda, a representative from the security monitoring system, and Daniel Churchward, Plaintiff's fire investigation expert.

The Court ruled at the December 13, 2006 motion hearing that it would not allow into evidence the photographs of shoplifters caught by the previous owner three years prior to the fire. That ruling stands. Therefore, the Court strikes Plaintiff's witness Louissa, since his testimony would only be relevant on this point.

The Court also precludes Plaintiff's experts from testifying to a speculative theory that the alarm system may have been triggered by multiple individuals "running around" in Plaintiff's store that was experiencing a fire. Both sides concede there was a fire and that the alarms went off. There is no evidence of multiple individuals running around the store. Instead, this is just mere speculation and conjecture, and is not relevant. *See Lanza v. Poretti*, 537 F.Supp. 777, 785 (E.D.Pa.1982).

Therefore, the Court GRANTS Defendant's Motion to Bar References to "Phantom Arsonists."

B. Motion to Bar Any Reference to Damage to Roof Hatch

Defendant motions the Court to exclude any references to the prior damage to the roof hatch on the top of Plaintiff's building insofar that it would allow for the possibility that some unidentified individual may have entered the store through the roof hatch, and then set the fire. Defendant points to deposition testimony from the store's previous owner that the

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store's roof hatch was damaged well before the November 20, 2003 fire. Furthermore, Defendant points to Plaintiff's fire investigation expert's deposition testimony to show that he admitted that he did not know when the roof hatch was damaged. Defendant argues that any reference to the damaged roof hatch would be irrelevant under FRE 401.

*3 Plaintiff responds that testimony concerning the damaged roof hatch is relevant to the issue of opportunity and causation. Plaintiff's expert Daniel Churchward inspected the roof hatch two months after the fire. Churchward testified that there was evidence that there had been a burglary at the time of the fire. (Pl. Resp. Ex. A, Churchward Dep. 48-49).

The Court finds that Defendant's arguments on this point are relevant to the impeachment of Plaintiff's expert opinion, and not to the preclusion of the admission of the roof hatch testimony. Therefore, the Court, having considered the factors in Daubert and Kumho, DENIES Defendant's Motion to Bar Any Reference to Damage to Roof Hatch.

C. Motion to Bar Plaintiff's Accounting Expert **Eugene Rizzo**

For the reasons stated on the record at the December 13, 2006 motion hearing, the Court GRANTS IN PART and DENIES IN PART Defendant's Motion to Bar Plaintiff's Accounting Expert Eugene Rizzo. Rizzo can testify as Plaintiff's accountant, but not as an expert.

D. Motion to Exclude Witnesses from the Courtroom while not Testifying

The Court DENIES Defendant's Motion to Sequester Witnesses. The parties will be each allowed to have one representative, and their experts can remain in the courtroom during testimony of the adversary's expert. See Malek v. Federal Ins. Co., 994 F.2d 49, 53-54 (2d Cir.1993).

E. Motion to Bar Plaintiff's Expert Daniel Churchward

Defendant argues that the testimony of Plaintiff's fire causation expert Daniel Churchward should be excluded because neither of his two theories of the ori-

gin of the fire-either an electrical failure or arson-are only "possibilities" and not "probabilities." Defendant then contends that since Churchward expresses only "theories" and "possibilities," the Court should exclude his testimony.

The Court finds that Churchward can testify as an expert, per Daubert and Kumho, and that Defendant will have a full opportunity to cross-examine his testimony. Therefore the Court DENIES Defendant's Motion to Exclude Plaintiff's Expert Daniel Churchward.

F. Motion to Bar Plaintiff's Expert Gerald Kolb

For the reasons stated on the record at the February 21, 2007 motion hearing, the Court GRANTS Defendant's Motion to Bar Gerald Kolb.

III. CONCLUSION

For the foregoing reasons, the Court:

- (1) GRANTS Defendant's Motion to Bar references to "Phantom Arsonists" (Docket No. 25);
- (2) **DENIES** Defendant's Motion to Bar any reference to damage to roof hatch (Docket No. 26);
- (3) GRANTS IN PART and DENIES IN PART Defendant's Motion to Bar Plaintiff's "Expert" Eugene Rizzo (Docket No. 27);
- (4) **DENIES** Defendant's Motion to Bar all expert witnesses from the courtroom while not testifying (Docket No. 28);
- (5) **DENIES** Defendant's Motion to Bar Plaintiff's Expert Daniel Churchward (Docket No. 29);
- (6) **GRANTS** Defendant's Motion to Strike Plaintiff's Witness Sami Louissa (Docket No. 44);
- *4 (7) GRANTS Defendant's Motion to Bar Plaintiff's Rebuttal Expert Gerald Kolb (Docket No. 46).

SO ORDERED.

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END OF DOCUMENT