UNITED STATES DISTRICT COURT
FOR THE
WESTERN DISTRICT OF MICHIGAN

BRENDA TURUNEN,
Plaintiff,

v. File No. 2:13-CV-00106
Hon. Gordon J. Quist

KEITH CREAGH, DIRECTOR, MICHIGAN DEPARTMENT OF NATURAL RESOURCES, and JAMIE CLOVER ADAMS, DIRECTOR, MICHIGAN DEPARTMENT OF NATURAL RESOURCES.
Defendants.

PLAINTIFF'S BRIEF IN OPPOSITION TO DEFENDANTS' MOTION TO DISMISS AMENDED COMPLAINT

ORAL ARGUMENT REQUESTED

I. INTRODUCTION

On May 2, 2013 Defendants filed a motion to dismiss with prejudice the original complaint filed in the above captioned matter. On May 23, 2013 Plaintiff filed her 1st Amended Complaint and on May 30, 2013 she filed a brief in opposition to Defendants' motion to dismiss. On June 6, 2013 Defendants' filed another motion seeking dismissal of the Amended Complaint with prejudice. Except for the removal of their jurisdictional objections pursuant to Rule 12(b)(1) of the Federal Rules of Civil Procedure (Fed.R.Civ.P.), Defendants' motion to dismiss the 1st Amended Complaint pursuant to Fed.R.Civ.P. 12(b)(6) is essentially a rehash of the arguments

advanced in their motion to dismiss the original complaint. Plaintiff has already addressed those arguments in Sections II.B.1-4 (pages 5-17) of her PLAINTIFF'S BRIEF IN OPPOSITION TO DEFENDANTS' MOTION TO DISMISS.[1] For the sake of brevity Plaintiff will not regurgitate those arguments in this brief, rather Plaintiff asks this Court to refer to Sections II.B.1-4, pages 5-17, of her first brief and incorporate those arguments as if fully set forth herein.

On the following pages Plaintiff will briefly discuss and highlight for the Court the shortcomings of Defendants' latest motion. For all the reasons set forth below and in Sections II.B.1-4, pages 5-17, of her first brief, Defendants' motion should be denied and Plaintiff should be allowed her day in court to vindicate her federally created and federally protected treaty right to farm in the territory ceded by the 1842 Treaty at LaPointe between the United States of America and the Lake Superior Chippewa Indians, October 4, 1842, 7 Stat. 591 (hereafter the "1842 Treaty").

II. ARGUMENT.

Once again, Defendants seek to introduce factual matters outside of the pleadings in support of their motion to dismiss the

[1]The arguments in that section of the Plaintiff's first brief are based upon the allegations set forth in the 1st Amended Complaint.

amended complaint.[2] As discussed on pages 5-7 of Plaintiff's first brief, the Defendants are asking this Court to grant a "back-door" summary judgement against Plaintiff through the motion to dismiss. That is an invitation this Court should decline.

Defendants complain that there are not sufficient details plead to allow the 1st Amended Complaint to survive their motion to dismiss. This is not in keeping with Fed.R.Civ.P. 8(a)(2) which mandates brevity, not intensive detail, in federal pleadings:

> Under Federal Rule of Civil Procedure 8(a)(2), a pleading must contain a "short and plain statement of the claim showing that the pleader is entitled to relief." As the Court held in Twombly, ... the pleading standard Rule 8 announces does not require "detailed factual allegations," but it demands more than an unadorned, the-defendant-unlawfully-harmed-me accusation ... A pleading that offers "labels and conclusions" or "a formulaic recitation of the elements of a cause of action will not do." ... Nor does a complaint suffice if it tenders "naked assertion[s]" devoid of "further factual enhancement."

Ashcroft v. Iqbal, 556 U.S. 662, 677-678 (2009)(citations omitted). In the instant case Plaintiff, in her 1st Amended Complaint, has done precisely that. She alleges that the historical record[3]

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[2]These matters include factual findings from this and other courts in unrelated cases in which Plaintiff was not a party and where tribal rights to fish and hunt on ceded territories pursuant to the 1842 Treaty (and other treaties) were litigated. Those cases never contemplated, nor had occasion to contemplate, the farming rights asserted herein.

[3]The historical record relied upon by Plaintiff is drawn from a wide variety of highly reputable sources including numerous scholarly works, the National Archives, the Wisconsin State Historical Society, the Minnesota Historical Society and even ancient reports of the Methodist Church. ¶8 1st Amended Complaint.

surrounding the issue of treaty farming demonstrates that the original Indian signatories to the 1842 Treaty understood the phrase "the other usual privileges of occupancy" in Article 2 of the 1842 Treaty to mean that they had the right to commercially farm their lands within the Ceded Territory, including without limitation the right to engage in commercial animal husbandry activities. 1st Amended Complaint ¶¶ 13-14. This understanding is critical since it is the understanding of these original signatories that is binding on this Court when interpreting the language of Indian treaties. Minnesota v. Mille Lacs Band of Chippewa Indians, 562 U.S. 172, 196 (1999). Further, the language in such treaties is to be liberally interpreted in favor of the Indians and any ambiguities resolved in their favor. Mille Lacs, *supra*, 562 U.S. at 200. 1st Amended Complaint ¶¶ 11-12.

Plaintiff also alleges in her 1st Amended Complaint that the original Indian signatories' understanding that they could engage in commercial farming activities pursuant to Article 2 of the 1842 Treaty is bolstered by the federal policy in place during the treaty-era, which was to encourage Indian tribes nation-wide, including the Chippewa signatories to the 1842 Treaty, to engage in commercial farming activities, including specifically animal husbandry. 1st Amended Complaint ¶¶ 15-19. Indeed, Plaintiff alleges that it was not only the Indian signatories who understood that commercial farming was included as one of the usufructuary rights

reserved in Article 2 of the 1842 Treaty, the United States itself understood precisely the same thing and took concrete actions based on that understanding. 1st Amended Complaint ¶¶ 20-22, 26-27. Specific language of the 1842 Treaty, other Indian treaties and the so-called trade and intercourse acts are also relied upon by Plaintiff to support her allegation regarding the Indian signatories' understanding of Article 2 of the 1842 Treaty. 1st Amended Complaint, ¶¶ 15, 16, 18-22.

In the face of these factual allegations it is difficult to understand Defendants' position that the 1st Amended Complaint lacks sufficient details to survive the motion to dismiss. Defendants concede that all of the allegations in the 1st Amended Complaint must be accepted as true for purposes of their motion to dismiss. But then Defendants ignore the allegations referenced above and proceed to improperly introduce matters *outside* the pleadings in order to argue that the pleadings are implausible on their face. Defendants' circular logic is what is implausible, not Plaintiff's cause of action which is founded upon highly reliable historical data rather than a selective perusal of cases to which Plaintiff was not a party and which involved an entirely different subject matter.[4]

A closer look at the extra-pleading material introduced by

[4]That subject matter being the usufructuary right of farming as opposed to hunting, fishing, gathering, trapping or mineral rights.

Defendants will be helpful to the Court when weighing the plausibility of Plaintiff's asserted rights in the instant case. Pages 5-8 of Defendant's Brief In Support Of Motion To Dismiss Amended Complaint (hereafter Defendants' brief) contain an abridged version of factual findings from Lac Courte Oreilles Band of Lake Superior Chippewa Indians v. Wisconsin, 653 F. Supp. 1420 (W.D. Wis. 1987). First, it is important to note that the issue of farming as a treaty reserved usufructuary right was never placed before that court. "This is a civil action brought initially by the Lac Courte Oreilles Band of Lake Superior Chippewa Indians (LCO) to define plaintiffs' treaty-based, off-reservation usufructuary rights (generally, rights to hunt, fish, and gather) and to enjoin the defendants from interfering with the exercise of those rights. *Id.*, 653 F. Supp. at 1422.

Even though the LCO court never had the opportunity to consider the scope of the 1842 Treaty reserved usufructuary rights as they applied to farming, nonetheless, even if one uses only the excerpts selectively placed before the Court in the Defendants' brief, the fact is inescapable that at treaty time the Indian signatories were engaged in commercial agricultural activities. Defendants' excerpts demonstrate that at treaty time the Indian signatories were in fact engaged in commerce, including tapping maple trees to make sugar, undeniably an agricultural pursuit. Defendant's brief, page 5. Both inland and lakeshore signatory

bands of Chippewa Indian kept gardens. Defendants' brief, page 6. Throughout the 19th Century, the signatory bands were engaged in international commerce, commerce that imparted a commercial tint to all of their activities. Defendants' brief, page 7. Indeed, the Chippewa signatories actively traded food and made their living from hunting, gathering and agriculture. Defendants' brief, page 8.

The importance of agriculture to the Chippewa at treaty time was also explicitly acknowledged by the 7th Circuit Court of Appeals when it reversed and remanded the first LCO decision:

> Chippewa Indians in the region of Lake Superior are a peaceable, quiet and inoffensive people, rapidly improving in the arts and sciences; *and they acquire their living by hunting, fishing, manufacturing maple sugar, and agricultural pursuits*.

Lac Courte Oreilles Band of Lake Superior Chippewa Indians v. Voight, 700 F.2d 341, 348 (7th Cir. 1983)(emphasis added).

The case of U.S. v. Michigan, 471 F. Supp. 192 (W.D. Mich. 1979), also heavily relied on by Defendants (although it involved a different treaty), is similar to LCO in that the right to farm was never before the Court:

> On April 9, 1973, the United States of America in its own behalf and in behalf of the Bay Mills Indian Community, initiated this litigation in order to protect the tribe's rights to fish in certain waters of the Great Lakes vested in the tribe by virtue of aboriginal occupation and use, the Treaty of Ghent of 1814, and the Treaty with the Ottawa and Chippewa Nation of 1836. In its complaint, the United States asked that the State be enjoined from interfering with the Indians' treaty-confirmed rights to fish in the Great Lakes.

Id., 471 F. Supp. at 203. Nonetheless, as correctly pointed out by

Defendants, this Court made it clear in U.S. v. Michigan that the phrase "the other usual privileges of occupancy" was meant as an assurance to the Indian signatories that they could continue to live as they had been prior to the signing of the treaty. Defendants' brief, pages 13-14. Thus, if the Indian signatories at the time they signed the treaty understood commercial farming to be one of the rights referenced by the phrase "the other usual privileges of occupancy" then that treaty would have protected such an activity as well as just fishing. Of course, this Court in U.S. v. Michigan, like the courts in the LCO cases, simply had no occasion to consider application of that phrase to farming since it was never placed before the courts by any of the parties. That issue is now squarely before this Court and the factual support for the notion that farming was considered a usual privilege of occupancy is amply alleged in Plaintiff's 1st Amended Complaint.[5]

Despite its evisceration on pages 9-11 of Plaintiff's first brief, Defendants attempt to revitalize the case of Sokaogon Chippewa Community v. Exxon Corp., 2 F.3d 219 (7th Cir. 1993) by asserting that farming involves a more permanent occupation of land

[5]On the subject of plausibility it is worth noting that many of the historical experts who testified on both sides in the LCO and U.S. v. Michigan cases are also relied upon by Plaintiff in the instant case for her claim that farming was one of the usual privileges of occupancy protected by the 1842 Treaty. These experts include Charles E. Cleland, 1st Amended Complaint ¶¶ 8(e) & (f); James A. Clifton, 1st Amended Complaint ¶ 8(g); and James M. McKlurken, 1st Amended Complaint ¶¶ 8(g) & (l).

than hunting, fishing, trapping or gathering activities. While that may or may not be true, it is entirely beside the point. Plaintiff does not claim any right to possess, occupy or improve anyone else's land. She claims the right to engage in her treaty protected activity on land she herself lawfully owns and/or possesses in the treaty-ceded territory. That claimed right is a far cry from the squatting/trespassing activity rejected by the 7th Circuit Court of Appeals in Sokaogon, *supra*.

Finally, Defendants argue vigorously that the Chippewa signatories to the 1842 Treaty would never had understood they were reserving the right to engage in commercial farming activities, an argument that lacks merit as discussed above and in Sections II.B.1-4 of her first brief. Defendants' position in this regard completely ignores a critical doctrine related to treaty interpretation. Regardless of the understanding of the Chippewa signatories, the purpose and understanding of the United States itself when entering into the treaty is also a factor to be considered, indeed, under certain circumstances it can be controlling notwithstanding the Indian's understanding. See, Sokaogon Chippewa Community v. Exxon Corp., 805 F. Supp. 680, 693 (E.D. Wis. 1992). The fact that the United States' purpose in entering the 1842 Treaty was to encourage and if necessary to convert the Indian signatories to commercial agriculture as opposed to more nomadic lifestyles should control even if the Indians

understood otherwise. Of course, in the instant case both the Indian signatories and the United States understood the 1842 Treaty to reserve the usufructuary right of commercial farming to the Chippewa, thus compelling the conclusion that such a right exists to this day. Plaintiff should be allowed her day in court to prove precisely that.

III. CONCLUSION.

For all the reasons advanced above, and in Sections II.B.1-4 (pages 5-17) of PLAINTIFF'S BRIEF IN OPPOSITION TO DEFENDANTS' MOTION TO DISMISS, Defendants latest motion to dismiss should be denied.

Even if there were merit to Defendants' arguments, which there are not, dismissal of the action with prejudice is not the proper remedy. Plaintiff should instead be allowed an opportunity to again amend her complaint and allege in much greater detail the facts set forth in the Affidavit of Richard Allen Carlson, Jr., attached to Plaintiff's first brief as EXHIBIT 1.

Respectfully submitted,

Date: July 5, 2013

s/ Joseph P. O'Leary
Joseph P. O'Leary (P43349)
O'LEARY LAW OFFICE
419 U.S. 41 North
Baraga, MI 49908
(906) 353-1144
ATTORNEY FOR PLAINTIFF