UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MICHIGAN

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

Plaintiff,

v.

File No. _____

NICK A. KHOURI, Treasurer of the State of Michigan; WALTER FRATZKE, Native American Affairs Specialist of the Michigan Department of Treasury; RUTH JOHNSON, Secretary of State of Michigan; and CHRISTOPHER CROWLEY, Sergeant of the Michigan State Police,

Hon. _____

Defendants.

COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF

Plaintiff Keweenaw Bay Indian Community (the "Community"), by and through its counsel, states and alleges as follows:

INTRODUCTION

1. The Community brings this action for declaratory and injunctive relief in response to Defendants' violations of federal law and unlawful interference with the Community's federally-sanctioned activities.

2. Defendants have enforced, and continue to enforce, the Michigan Sales Tax Act, Mich. Comp. Laws §§ 205.51-205.78 (the "Sales Tax Act") and the Michigan Use Tax Act, Mich. Comp. Laws §§ 205.91-205.111 (the "Use Tax Act") in a manner that violates federal and state law and impermissibly restricts the Community's and Community members' rights to

purchase, lease, rent, use, store, and consume tangible personal property and services free from unlawful Michigan sales and use taxes and free from other unlawful and impermissible burdens.

3. Defendants have also enforced, and continue to enforce, the Michigan Tobacco Products Tax Act, Mich. Comp. Laws §§ 205.421-205.436 (the "Tobacco Products Tax Act"), in a manner that violates federal and state law and impermissibly restricts the Community's rights to purchase, sell, and transport tobacco products free from unlawful Michigan tobacco products taxes and free from other unlawful and impermissible seizures and other burdens.

JURISDICTION

4. The District Court has jurisdiction over this action pursuant to 28 U.S.C. §§ 1331 and 1362, because the Community is an American Indian tribe maintaining government-to-government relations with the United States and having a governing body duly recognized by the Secretary of the Interior, and the Community asserts claims arising under the Constitution and laws of the United States, including, but not limited to, the Supremacy Clause of Article VI, Section 2 of the Constitution, the Commerce Clause of Article I, Section 8, Clause 3 of the Constitution, the Indian Trader Statutes, 26 U.S.C. §§ 261-264, and 42 U.S.C. § 1983. The District Court has supplemental jurisdiction over the Community's state law claims pursuant to 28 U.S.C. § 1367(a), in that the Community asserts claims so related to their federal claims that they form part of the same case or controversy under Article III of the United States Constitution.

VENUE

5. Venue is proper in this District pursuant to 28 U.S.C. § 1391(b) because one or more of the Defendants reside in this District, a substantial part of the events or omissions giving rise to the claims occurred in this District, and a substantial part of the property that is the subject of the action is situated in this District.

PLAINTIFF

6. Plaintiff Keweenaw Bay Indian Community is a federally-recognized Indian tribe organized under the Indian Reorganization Act of 1934, 25 U.S.C. § 476, and the successor in interest of the L'Anse and Ontonagon bands of Chippewa Indians. The Community exercises powers of self-governance and governmental jurisdiction over the L'Anse Indian Reservation located in Baraga County, Michigan, and other lands in the Upper Peninsula of Michigan which are held by the United States in trust for the Community.

DEFENDANTS

7. Defendant Nick A. Khouri is the Treasurer of the State of Michigan. In this capacity, Defendant Khouri oversees the Michigan Department of Treasury (the "Department"), the State agency that administers and enforces the Sales, Use, and Tobacco Products Tax Acts. Defendant Khouri is sued in his official and individual capacities.

8. Defendant Walter A. Fratzke is the Native American Affairs Specialist of the Department. Defendant Fratzke is the Department official charged with administering, enforcing and applying federal and state laws to Michigan tribes and tribal members as they involve Michigan taxes, including sales, use, and tobacco products taxes. Defendant Fratzke is sued in his official and individual capacities.

9. Defendant Ruth Johnson is Secretary of State of the State of Michigan. In this capacity, Defendant Johnson oversees the Department of State, which manages and administers programs and services including enforcement of certain requirements imposed under the Sales and Use Tax Acts with respect to motor vehicle transactions. Defendant Johnson is sued in her official capacity.

10. Defendant Sgt. Christopher Crowley is an officer of the Michigan State Police. Defendant Crowley is responsible for enforcing Michigan state law, including the Tobacco

Products Tax Act. Upon information and belief, Defendant Crowley coordinated, authorized, and executed the seizures of tobacco products and other Community property at issue in this action. Defendant Crowley is sued in his official and individual capacities.

ALLEGATIONS COMMON TO ALL CLAIMS FOR RELIEF

The Community, its History, and its Members

11. The L'Anse band of Chippewa Indians occupied the area near the base of Keweenaw Bay in Michigan's Upper Peninsula since long before the coming of European explorers and possessed aboriginal title to the same.

12. Pursuant to the Treaty with the Chippewa at La Pointe, Oct. 4, 1842, 7 Stat. 591 (the "1842 Treaty"), the Chippewa Indians of the Mississippi and Lake Superior, including the L'Anse band, ceded to the United States the western half of Michigan's Upper Peninsula, including the Keweenaw Bay area, as well as portions of northern Wisconsin (hereafter, the "Ceded Area"). Article II of the 1842 Treaty provided that the "[t]he Indians stipulate for the right of hunting on the ceded territory, with the other usual privileges of occupancy, until required to remove by the President of the United States, and that *the laws of the United States shall be continued in force, in respect to their trade and intercourse with the whites, until otherwise ordered by Congress*" (emphasis added). At the time the 1842 Treaty was executed, the laws of the United States governing Indian trade and intercourse applied to transactions within Indian country. Accordingly, pursuant to Article II of the 1842 Treaty, the federal Indian trade and intercourse laws would continue to apply to the signatory bands within the Ceded Area as though such territory remained Indian country. Congress has never abrogated the 1842 Treaty provision for enforcement of the federal Indian trade and intercourse laws. Accordingly, federal law governing Indian trade and intercourse remains applicable to the Community's trade and intercourse within the Ceded Area, and, with respect to taxation in relation to the Indians' trade

and intercourse, the law that applies in the Ceded Area must be the same as the law that would apply as if the Ceded Area was Indian country.

13. Pursuant to the Treaty with the Chippewa at La Pointe, Sept. 30, 1854, 10 Stat. 1109 (the "1854 Treaty"), the United States set apart nearly 60,000 acres of lands near the base of Keweenaw Bay as an Indian reservation for the L'Anse and Lac Vieux Desert Bands of Chippewa Indians. These lands comprise the L'Anse Indian Reservation (the "Reservation"). Nothing in the 1854 Treaty affected Article II of the 1842 Treaty, and even after execution of the 1854 Treaty, the federal laws in respect to the Indians' trade and intercourse continued to apply within the Ceded Area as though such territory remained Indian country.

14. The Community also is the beneficial owner of additional lands outside the Reservation in the Upper Peninsula which are held by the United States in trust for the Community.

15. The Community's Reservation is located within the Ceded Area.

16. The Community exercises sovereign authority and governmental jurisdiction over its Reservation and trust lands, which constitute "Indian country" as defined by federal law and for purposes of determining the scope and validity of state tax and regulatory jurisdiction over the Community, its members, and their activities.

17. The Community has approximately 3,625 enrolled members, approximately 1,044 of whom reside on the Community's Reservation and trust lands and numerous others of whom reside elsewhere within the Ceded Area.

18. The Community's governing body is its Tribal Council, consisting of 12 persons elected by the enrolled members, 6 each from the L'Anse and Baraga Districts on the east and west sides, respectively, of the Keweenaw Bay. The Tribal Council elects from its own numbers

a Tribal President and other officers, who constitute the Executive Council. The Tribal Council is vested with all of the sovereign legislative and executive powers of the Community.

19. The Community, through its various tribal government operations and programs, provides essential governmental services to its members and their families, to other Native Americans residing on or near the Reservation and trust lands, and, in some instances, to visitors to the Reservation and trust lands, including such services as police protection and services; natural resources management; environmental protection; housing; medical, dental, mental health, community health and violence intervention programs and services; social services programs; justice administration; education; day care; road maintenance and public works.

20. The Community conducts numerous economic development activities to generate revenues for various tribal government operations, programs and services, and to provide employment for Community members. These economic development activities include, among others: (1) the Pines Convenience Center and Ojibwa BP located in Baraga, Michigan, the Rez Stop located in L'Anse Michigan, and the Ojibwa Express located in Marquette Township; (2) Ojibwa Building Supply located in Baraga, Michigan; (3) WCUP-FM Eagle Country and WGLI-FM Eagle Rock, radio stations in Baraga, Michigan; (4) the Transfer Station in Baraga, Michigan; (5) Ojibwa Car Wash in Baraga, Michigan; (6) Ojibwa Laundromat in Baraga, Michigan; (7) Ojibwa Casino Resort, a gaming enterprise that conducts gaming and related motel, restaurant and bar, bowling and gift shop activities in Baraga, Michigan; and, (8) Ojibwa Casino - Marquette, a gaming enterprise that conducts gaming and related restaurant and bar activities in Marquette, Michigan. Each of these enterprises is located within the Community's Reservation boundaries, on trust lands, and/or within the Ceded Area.

21. The Community, and the Community's wholly-owned entities, employ approximately 380 Community members.

22. The Community and its members have purchased, leased, or rented and expect to continue to purchase, lease, or rent from retail sellers a wide variety of tangible personal property and services, including but not limited to motor vehicles, office furniture, equipment, and supplies, electronics and electrical parts, auto parts and supplies, housekeeping items, linens and uniforms, appliances, household goods and furnishings, clothing, prepared food and beverages, nonprescription medications, toiletries, telephone and other telecommunications services, and gas, electricity, and similar goods and services.

Federal Law on State Taxation of Indian Tribes and Tribal Members

23. Under established federal law, absent explicit congressional permission to the contrary, the imposition of a state tax the legal incidence of which falls upon an Indian tribe or tribal member with respect to activities within Indian country is categorically barred as a matter of federal law and violates the Supremacy Clause in Article VI of the United States Constitution. With respect to property principally housed, garaged, and stored by an Indian tribe or tribal member within Indian country but used both within and outside Indian country, a state is without power to impose a tax upon the property or the use thereof unless the taxing statute provides a mechanism for apportioning the tax to exclude the activity within Indian country from the reach of the tax. The Indian Trader Statutes, 25 U.S.C. §§ 261-264, too, categorically bar a state from imposing a tax, the legal incidence of which falls on an Indian trader, for sales, leases, or rentals of property to Indian tribes or tribal members within their Indian country. The Community will refer herein to these categorical principles as the "*Per Se* Rules" against state taxation of Indian tribes, tribal members, and Indian traders.

24. In situations in which the *Per Se* Rules do not apply, federal law requires, among other things, an analysis balancing the federal, tribal, and state interests to determine whether a state may validly impose a tax on transactions and activities of non-Indians in Indian country that affect an Indian tribe or tribal member. If the balance lies against the state's interest in imposing the tax and federal law is not to the contrary, the state shall *not* impose its tax. This balancing of interests analysis is required under *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136 (1980), and its progeny, and will be referred to hereafter as the "*Bracker* Balancing Test." Under a related doctrine of federal law, enunciated in *Williams v. Lee*, 358 U.S. 217 (1959), and its progeny, a state also may not validly impose a tax on transactions and activities of non-Indians in Indian country that affect an Indian tribe or tribal members if the tax unlawfully infringes on the rights of tribal self-government.

Michigan's Unlawful Enforcement of its Sales and Use Tax

The Michigan Sales Tax Act

25. Michigan's Sales Tax Act imposes a 6% tax on persons engaged in the business of making retail sales, leases, and rentals of tangible personal property in Michigan. "Tangible personal property" includes, among other things, motor vehicles, office furniture, equipment, and supplies, electronics and electrical parts, auto parts and supplies, housekeeping items, linens and uniforms, appliances, household goods and furnishings, clothing, prepared food and beverages, nonprescription medications, toiletries, electricity, gas, and similar goods and services.

26. Each seller is responsible for payment of the sales tax, but sellers generally pass the cost of the sales tax on to the purchaser as part of the selling price.

27. The Sales Tax Act allows for statutory exemptions from the tax, and requires purchasers who qualify for such exemptions to provide proof of exemption to the seller. The Act provides for numerous statutory exemptions, including but not limited to: sales for resale; sales to certain types of non-profit organizations; sales by non-profit schools to "bona fide enrolled students;" sales to persons for demonstration purposes; sales to federal and state governments and their agencies, instrumentalities, and political subdivisions; and, sales for use in industrial processing. Such purchasers who are entitled to statutory exemptions, however, are not required to secure pre-approval from a Department official prior to each purchase in order to make purchases exempt from tax.

The Michigan Use Tax Act

28. Michigan's Use Tax Act imposes a 6% tax on the use, storage, or consumption of certain specified tangible personal property and certain services purchased at retail in Michigan.

29. Each person using, storing, or consuming tangible personal property or services in Michigan is liable for the use tax, although the seller may be required to collect the use tax from the person liable for it and pay it over to the Department.

30. The Use Tax Act presumes that tangible personal property purchased, leased, or rented outside of Michigan is subject to use tax if brought into Michigan within 90 days of the purchase date and is considered as acquired for use, storage, or consumption in Michigan.

31. Michigan's use tax is imposed on, among other things: the use, storage, or consumption of motor vehicles in Michigan if purchased, leased, or rented out of state or if purchased, leased, or rented in Michigan in an isolated sale; the use of certain telephone and other telecommunications services; and the use of hotel lodging services.

32. The Use Tax Act allows for statutory exemptions from the tax, and requires purchasers who qualify for such exemptions to provide proof of exemption to the seller. The Act

provides for numerous statutory exemptions, including, but not limited to, exemptions from use tax that are similar to the exemptions from sales tax enumerated in paragraph 27. Such purchasers who are entitled to statutory exemptions, however, are not required to secure pre-approval from a Department official prior to each purchase in order to make purchases exempt from tax.

The Community's 1977 Tax Agreement with the State of Michigan, the State of Michigan's Termination of the 1977 Tax Agreement, and the Community's Prior Litigation relating to the Michigan Sales and Use Tax

33. In 1977, the Community and the State of Michigan executed a Tax Agreement (the "1977 Tax Agreement"). In that agreement, the parties expressly acknowledged the nontaxable status of the Community and its members with respect to various Michigan taxes, including state sales and use taxes.

34. With respect to the state sales tax, the 1977 Tax Agreement provided for a refund to the Community of sales tax paid by Community members for the period from July 1, 1976, to June 30, 1977, and future periods, computed under a formula set forth in the agreement, and further provided that Community members could purchase various items free of sales tax, including cars, trucks, boats, airplanes, homes, and materials to build new homes.

35. With respect to the state use tax, the 1977 Tax Agreement provided that Community members could purchase various items free of state use tax, including telephone service, vehicles, watercraft, and snowmobiles.

36. On April 29, 1997, the Department notified the Community that, effective as of May 29, 1997, it was terminating any tax agreements in effect between the Community and the State.

37. The Community and the State of Michigan have attempted on various occasions to negotiate a new tax agreement, but they have been unable to reach a new agreement. Ten

Michigan tribes have entered into tax agreements with the State of Michigan, on various dates between 2002 and 2010, each containing substantially similar terms and conditions. Like the Community, the Lac Vieux Desert Band of Lake Superior Chippewa Indians has no tax agreement with the State of Michigan.

38. In 2005, the Community filed a lawsuit against the Treasurer of the State of Michigan, the Administrator of the Collection Division of the Michigan Department of Treasury, the Native American Affairs Specialist of the Michigan Department of Treasury, and the Secretary of State of Michigan. In the lawsuit, the Community sought, among other things, declaratory and injunctive relief from the imposition and collection of Michigan sales and use taxes on purchases, leases, rentals, use, storage, or consumption by the Community or its members of tangible personal property or services within the Community's Reservation and trust lands. The District Court, acting *sua sponte*, dismissed the Community's claims as unripe because, in the view of the District Court, "[t]he Court will not make abstract pronouncements of law about different types of activities until the Court is presented with a specific purchase or use for which the State has denied a tax exemption." *Keweenaw Bay Indian Cmty. v. Kleine*, 546 F. Supp. 2d 509, 526 (W.D. Mich. 2008). The Sixth Circuit affirmed this aspect of the District Court's decision, but further stated that "[i]f the Community files, and the State denies, a request for an exemption or refund based on a transaction occurring within Indian country and involving a member of the Community, the courthouse doors will be open to an appropriate challenge." *Keweenaw Bay Indian Cmty. v. Rising*, 569 F.3d 589, 592-593 (6th Cir. 2009). The Sixth Circuit also noted in its decision that "Michigan's briefs and statements at oral argument may misstate the law in certain respects, such as the preemptive effect of the Indian trader statutes, 25 U.S.C. §§ 261-264, or the necessity of apportioning the use tax under certain circumstances." *Id.* at 592.

39. After the Sixth Circuit decision, the Department established a formal process pursuant to which tribes in Michigan without a tax agreement and members of such tribes may file with the Department claims for exemption from or refund of sales and use taxes with respect to purchases, leases, rentals, use, storage, or consumption of tangible personal property or services within Indian country. The Community raised a number of objections and concerns regarding the Department's process, but the Department did not make any changes to the process in response to the Community's objections and concerns. Under the Department's process, tribes and tribal members must pay sales and use tax at the time of the transaction or a claim must be filed with the Department requesting an advance determination that the particular transaction is not subject to sales and use tax. If an advance determination is not obtained, the purchaser must pay the tax at the time of sale and then submit a claim for refund of the sales or use tax paid.

40. The claim forms require the tribe or tribal member submitting the form to provide information to the Department about the purchaser, item purchased, location of various components of the transaction, seller information, and intended use of the item. For claims for refund, the forms also require the tribe or tribal member to include documentation showing the sales or use tax was actually paid. The completed refund claim forms must be mailed to the Department for consideration.

41. The process includes guidelines for processing and deciding claims that the Department contends are based on current federal law. Neither the claim forms nor the guidelines provide any timeline within which the Department must make a determination on the claim.

Test Claims Brought by the Community and 4 of its Members

42. Since January 1, 2013, the Community submitted approximately 991 claims for exemption or refund to the Department. The claims related to purchases of a wide variety of tangible personal property and services, including motor vehicles, office furniture, equipment, and supplies, electronics and electrical parts, linens and uniforms, housekeeping items, appliances, clothing, prepared food and beverages, telephone and other telecommunications services, and gas, electricity, and similar goods and services. The Community's claims were made under protest, because the Community objects to the necessity of participating in the Department's claims process in order to exercise its immunities from state taxation provided for under federal law. Of the approximately 991 claims submitted, the Department denied approximately 900 claims, granted approximately 58 claims, and to date has failed to rule on the approximately 33 remaining claims.

43. Since July 1, 2012, with the assistance of the Community, four Community members submitted approximately 254 claims for exemption or refund to the Department. The claims related to purchases of a wide variety of tangible personal property and services, including motor vehicles, auto parts and supplies, household goods and furnishings, clothing, prepared food and beverages, nonprescription medications, toiletries, telephone and other telecommunications services, and gas, electricity, and similar goods and services. The Community members' claims were made under protest, because the Community members object to the necessity of participating in the Department's claims process in order to exercise their immunities from state taxation provided for under federal law. Of the approximately 254 claims submitted, the Department denied approximately 161 claims and granted approximately 68 claims. The Community has no records in its possession that indicate the Department's actions, if any, with respect to the approximately 25 remaining claims.

44. The claims submitted by the Community and its members represent only a tiny fraction of the transactions in which the Community and its members purchase, lease, rent, use, store, or consume tangible personal property and services within the Reservation and trust lands in which sales or use tax is charged. The Community, and especially its members, do not have the time or resources to file exemption or refund claims for all of the hundreds and thousands of transactions that occur each day and week for which the imposition of Michigan sales and use taxes is unlawful.

45. In the test claims brought by the Community and its members, the following patterns identified in paragraphs 46 through 56 have emerged in the Department's rulings on the merits of the claims to which it has responded.

46. In addressing sales tax claims, the Department has always purported to apply the *Bracker* Balancing Test instead of applying the rule that state taxes imposed with respect to sales by Indian traders in Indian country are *per se* invalid as a matter of federal law.

47. In addressing the Community's sales tax claims for items purchased, leased, or rented within the Reservation and trust lands for use in its gaming or other tribal enterprises, the Department has purported to balance all tribal, federal, and state interests but has concluded in each case that "the State's interests are sufficient to justify its tax."

48. Similarly, in addressing the Community's sales tax claims for payments made through the Community Assistance Program on behalf of individual Community members for their purchases of electricity and gas within the Community's Reservation and trust lands, the Department has purported to balance all tribal, federal, and state interests but has concluded in each case that "the State's interests are sufficient to justify its tax."

49. Similarly, in addressing the Community members' sales tax claims for purchases, leases, and rentals within the Reservation and trust lands, the Department has purported to balance all tribal, federal, and state interests but has concluded in each case that "the State's interests are sufficient to justify its tax."

50. The Department has granted the Community's sales tax claims only with respect to purchases for use in what the Department views to be an "essential government function," an improper limitation on tribal immunities from state taxation even in situations in which the *Per Se* Rules do not apply and balancing of interests is appropriate.

51. In addressing use tax claims, while the Department has granted the Community's and the Community members' claims involving telecommunications services, the Department has denied the claims by individual Community members involving motor vehicles on the basis that the motor vehicle will be used in part outside the Community's Reservation. The Department's position is in contravention of the U.S. Supreme Court's decisions in *Oklahoma Tax Comm'n v. Sac & Fox Nation*, 508 U.S. 114 (1993), *Washington v. Confederated Tribes of the Colville Reservation*, 447 U.S. 134 (1980), and, *Moe v. Confederated Salish & Kootenai Tribes of the Flathead Reservation*, 425 U.S. 463 (1976), and in contravention of the Michigan Tax Tribunal's decision in *Chosa v. Michigan Department of Treasury*, Michigan Tax Tribunal Docket No. 283437 (Apr. 20, 2005). The Department similarly has denied the use tax claims by individual Community members involving internet purchases of personal items if the individual indicates that the items will be used in part outside the Reservation, in contravention of these same authorities. The Act does not provide for apportionment of the tax to apply only to use outside the Reservation and Ceded Area, and to the extent that such apportionment would be appropriate, the Department has not even attempted it.

52. The Department has denied the Community's claims involving items leased from an out-of-state lessor on the basis that the lessor is considered the user of the items for state law purposes, but the lessor is not using the item and is not located within Michigan. In addition, the denial of these claims is in contravention of the *Per Se* Rule that state taxes imposed with respect to sales, leases, and rentals by Indian traders in Indian country are *per se* invalid as a matter of federal law.

53. The Department has not ruled promptly on the test claims brought by the Community and its members. Defendant Fratzke stated in an affidavit filed in the prior lawsuit that "once Treasury is provided with adequate information, it can usually provide a determination regarding the taxable status of a sale within a day or two." However, the Department never responded to a test claim "within a day or two." The Department usually took several weeks, and some of the test claims were pending for over eight months before the Department took any action on them. Moreover, the Department has failed to rule or otherwise respond to some of the test claims altogether.

54. In the prior lawsuit, Department officials contended that federal law "mandates a case-by-case analysis" to determine whether state taxes apply. Since it established its formal claims process after the litigation, however, the Department has not undertaken a "case-by-case analysis" of the test claims that have been brought by the Community and its members. For denied claims, the Department issues one of several form denial letters with identical explanations of the reason or reasons it denied the claim. For granted claims, the Department issues checks without any explanation of the reason or reasons it granted the claim.

55. The Department does not appear to adequately track claims submitted to it by the Community and its members. For example, on occasion, the Department fails to respond to

certain claims that were submitted to it on the very same day as other claims to which the Department did respond.

56. In addition, the Department does not clearly identify the claim to which it is responding in its denial letters and refund checks. To identify the claim, the Department's denial letters and refund checks only list the date of the claim, the purchaser, and the amount of the refund requested or issued. However, there are frequently errors in the information listed, which makes matching the denial letters or refund checks to the claims submitted a difficult and time-consuming task.

Irreparable Harm to the Community and its Members

57. The actions described in paragraphs 42 to 56 above have caused and will continue to cause irreparable harm to the Community and its members. Among other reasons, the actions violate the federal rights of the Community and its members, constitute a violation of the Community's sovereignty recognized by longstanding federal law, impose unlawful and burdensome administrative obligations on the Community and its members that effectively deprive them of the enjoyment of the tax immunities to which they are entitled, threaten the Community's government operations and continued vitality, and diminish Community funds and resources available to provide health care, day care, other social services, police, natural resources management, education, and other essential governmental services for Community members, residents, and visitors, as well as to provide employment for Community members. The continued collection of unlawful sales and use taxes, imposition of unlawful administrative obligations, and unlawful denial of claims will further diminish Community funds and resources available to provide these services and employment and will delay or possibly eliminate these

services and employment. None of these serious and potentially devastating harms to the Community and its members can be measured in dollars.

Michigan's Unlawful Enforcement of its Tobacco Tax

The Tobacco Products Tax Act

58. Michigan's Tobacco Products Tax Act imposes a tax on the sale of tobacco products, including cigarettes, sold in Michigan. Mich. Comp. Laws § 205.427(1). The Act requires licensed wholesalers and unclassified acquirers other than a manufacturer to remit the tobacco tax and a tax return to the Department by the twentieth day of each calendar month for products sold during the preceding month. Mich. Comp. Laws § 205.427(2) and (3). A "wholesaler" is a person who purchases tobacco products from a manufacturer, sells 75% or more of those products to others for resale, and maintains an established business where substantially all of the business is the sale of tobacco products at wholesale and a substantial stock of tobacco products is available to retailers for resale. Mich. Comp. Laws § 204.422(x). An "unclassified acquirer" is a person who is not a transportation company or a purchaser at retail from a licensed retailer, and "who imports or acquires a tobacco product from a source other than a wholesaler or secondary wholesaler licensed under this act for use, sale, or distribution." Mich. Comp. Laws § 205.422(u).

59. The Act provides that "a person shall not purchase, possess, acquire for resale, or sell a tobacco product as a manufacturer, wholesaler, secondary wholesaler, vending machine operator, unclassified acquirer, transportation company, or transporter in this state unless licensed to do so." Mich. Comp. Laws § 205.423. A "transporter" means a person importing or transporting into the State, or transporting in the State, a tobacco product obtained from a source located outside the State, or from any person not duly licensed under the Act, but does not

include an interstate commerce carrier licensed by the interstate commerce commission to carry commodities in interstate commerce. Mich. Comp. Laws § 205.422(t).

60. Federal law specifically permits common carriers to transport cigarettes even if the cigarettes bear "no evidence of the payment of applicable State or local cigarette taxes in the State or locality where such cigarettes are found, if the State or local government requires a stamp, impression, or other indication to be placed on packages or other containers of cigarettes to evidence payment of cigarette taxes." 18 U.S.C. § 2341(2)(B).

61. In addition to licensing requirements, the Act requires a wholesaler and unclassified acquirer (other than a manufacturer) to affix a stamp provided by the Department to the bottom of each individual package of cigarettes to be sold within the State before delivery, sale, or transfer of the cigarette package to any person in the State. Mich. Comp. Laws § 205.426a(2). A retailer or a person licensed under the Act, other than a wholesaler or unclassified acquirer or a person acting as a transporter for a wholesaler or unclassified acquirer, must not acquire any package of cigarettes for resale unless the package has affixed to it a stamp as provided in the Act. Mich. Comp. Laws § 205.426a(3).

62. The Act provides that "[a] tobacco product held, owned, possessed, transported, or in control of a person in violation of this Act, and a vending machine, vehicle, and other tangible personal property containing a tobacco product in violation of this Act and any related books and records are contraband and may be seized and confiscated by the department [of Treasury] . . . ." Mich. Comp. Laws § 205.429.

63. The Act does not address whether or how the Act applies to federally-recognized Indian tribes and their members or to Indian nation-to-Indian nation trading.

The Community's Tobacco Purchases and Sales

64. The Community sells tobacco products at several locations, including but not limited to: (1) the Ojibwa Casino Resort in Baraga, Michigan; (2) the Pines Convenience Center, a gas station and convenience store in Baraga, Michigan; (3) the Rez Stop, a gas station and convenience store in L'Anse, Michigan; and, (4) the Ojibwa Casino-Marquette in Marquette, Michigan. Each of these facilities is wholly owned and operated by the Community and is located either within the boundaries of the Community's Reservation or on lands held in trust for the Community by the United States. As noted above, the Community's Reservation and trust lands constitute "Indian country" as defined by federal law and for purposes of determining the scope and validity of state tax and regulatory jurisdiction over the Community and its activities, and the Reservation is in the Ceded Area.

The Department's December 11, 2015 Seizure of the Community's Tobacco and Other Property

65. On or around December 4, 2015, the Community contracted to purchase 3,360 cartons of Seneca brand cigarettes, for a purchase price of $65,620.80 from HCI Distribution ("HCI"). On information and belief, HCI is an economic development arm of the Winnebago Tribe of Nebraska, a federally recognized Indian tribe. On information and belief, HCI's operations and facilities are located in "Indian country" as defined by federal law and for purposes of determining the scope and validity of state tax and regulatory jurisdiction over the Community and its activities.

66. The Community contracted to purchase the cigarettes from HCI for resale at the Community's two gaming facilities, the Rez Stop, and the Pines Convenience Center. The contract was entered into by the Community on its Reservation.

67. The Community sent a 2015 Ford F-250 pickup truck and 2014 CargoMate utility trailer, driven by John Davis, an enrolled member of the Community, to transport the cigarettes from HCI's facilities to the Community's Reservation. The truck and trailer belonged to the Community. The Community contracted to purchase the cigarettes "FOB origin," meaning that ownership transferred to the Community from HCI at the time the cigarettes were loaded into its trailer, which occurred, on information and belief, on the Winnebago Tribe reservation.

68. On or about December 10, 2015, Davis left HCI's facilities in the Community's F-250 truck, towing the trailer containing the cigarettes.

69. On December 11, 2015, Davis was driving the truck on eastbound U.S. Highway 41, near County Road CKC, Ely Township, Marquette County, Michigan when Davis was stopped by Michigan State Trooper Lajimodiere, purportedly for speeding. However, no speeding citation was ever issued. The location of the stop is in the Ceded Area.

70. In the course of the stop, Trooper Lajimodiere opened the trailer and purported to see cases of Seneca brand cigarettes. Trooper Lajimodiere contacted the Michigan State Police Tobacco Tax Enforcement Team.

71. Upon information and belief, members of the Tobacco Tax Enforcement Team responded to Trooper Lajimodiere's call. The Tobacco Tax Enforcement Team, acting for the Department, seized the Community's cigarettes, the truck, and the trailer. Upon information and belief, Defendant Sgt. Christopher Crowley is the Michigan State Police officer who authorized and executed the seizure.

72. Upon information and belief, the Department inventoried, or caused to be inventoried, the seized shipment of cigarettes. Following inventory, the Department provided to a Community employee a "Notice of Seizure and Inventory Statement of Property Seized"

("2015 Notice of Seizure"). The 2015 Notice of Seizure stated that the property, including the cigarettes, truck and trailer, had been seized as contraband pursuant to Section 205.429 of the Tobacco Products Tax Act, and described the procedures for demanding a hearing for determination of whether the property was lawfully subject to seizure, confiscation, or forfeiture.

73. After receipt of the 2015 Notice of Seizure on December 11, 2015, the Community timely requested an administrative hearing with respect to the seized property pursuant to Mich. Comp. Laws § 205.429(3).

74. On January 22, 2016, the Department of Treasury held a hearing to determine whether the cigarettes, truck, and trailer were lawfully subject to seizure and forfeiture to the State of Michigan. The Department and its presiding hearing referee presumed the Act to be constitutional and did not permit the Community to present arguments or evidence on whether the seizure violated the United States Constitution or other federal law. Despite a request to do so, the Department and its presiding officer also did not permit the Community to question the Department's witnesses during the hearing so that a full factual record could be developed.

75. The hearing referee recommended that the Department find that the Community's cigarettes and trailer were lawfully seized and subject to forfeiture, but that the seizure of the Community's truck was unlawful. The hearing referee found that the Department had seized two vehicles, the Community's truck and the Community's trailer. Only one of the vehicles—the trailer—contained alleged contraband. The truck did not. The Act only allows seizure of vehicles if they contain contraband. The hearing referee concluded that, because the truck did not contain alleged contraband, the Department's seizure of the truck was unlawful.

76. The Department rejected the hearing referee's recommendation to find that the seizure of the Community's truck was unlawful. On February 5, 2016, the Department issued a

Decision and Order of Determination that the Community's truck, trailer, and cigarettes were lawfully seized and subject to forfeiture.

77. The Community timely commenced an action in Michigan state court to challenge the Department's February 5, 2016 Decision and Order.

78. The Community intends to seek a stay of the state court proceeding pending the outcome of this federal court action.

The February 9, 2016 Tobacco Seizures

79. On or around January 28, 2016, the Community contracted to purchase 184 cases (11,040 cartons) of Seneca brand cigarettes for $197,715 from Native Wholesale Supply. The contract was entered into by the Community on its Reservation.

80. The cigarettes were shipped, in two shipments of 92 cases each, to the Community by XPO Logistics Freight, Inc. ("XPO"). XPO is licensed as a common carrier trucking company (DOT #241829) by the U.S. Department of Transportation Federal Motor Carrier Safety Administration ("FMCSA"). (The FMCSA assumed responsibility for regulation of interstate trucking after the Interstate Commerce Commission was dissolved in 1996.)

81. XPO is a provider of less-than-truckload ("LTL") shipping services. LTL carriers transport goods from more than one customer in a single truck, and may make cargo pick-ups and deliveries at multiple locations on a single trip. On information and belief, in addition to the Community's cigarettes, each of the XPO trucks carried non-tobacco cargo belonging to several different customers.

82. On February 9, 2016, the Michigan State Police stopped one of the XPO trucks carrying the Community's cigarettes on M-95 near County Road 601, Humboldt Township, Marquette County, Michigan. The location of this stop is in the Ceded Area. On information and belief, the XPO truck was stopped for several hours. As a result of the stop, the Department

seized the 92 cases of the Community's cigarettes based on its determination that the cigarettes were "untaxed."

83. On that same day, the MSP stopped the second XPO truck carrying the other 92 cases of the Community's cigarettes, on U.S. Highway 2 near Crystal Falls, Iron County, Michigan. The location of this stop is in the Ceded Area. On information and belief, the second XPO truck was stopped for several hours. As a result of the stop, the Department seized the other 92 cases of the Community's cigarettes based on its determination that the cigarettes were "untaxed."

84. In total, on February 9, 2016, the Department seized 184 cases (11,040 cartons) of the Community's cigarettes. Upon information and belief, Sgt. Christopher Crowley is the Michigan State Police officer who authorized and executed the seizures.

85. Upon information and belief, the Department inventoried, or caused to be inventoried, both seized shipments of cigarettes following the seizures. Following inventory, the Department sent the Community a "Notice of Seizure and Inventory Statement of Property Seized" ("2016 Notices of Seizure") for both seized shipments of cigarettes. The 2016 Notices of Seizure indicated that the property had been seized as contraband pursuant to Mich. Comp. Laws § 205.429, and described the procedures for demanding a hearing for determination of whether the property was lawfully subject to seizure, confiscation or forfeiture.

86. Upon receipt of the 2016 Notices of Seizure, the Community requested administrative hearings with respect to the seized cigarettes pursuant to Mich. Comp. Laws § 205.429(3). The Department held a hearing regarding the seized cigarettes on March 16, 2016. The Department and its presiding hearing referee presumed the TPTA to be constitutional and did not permit the Community to present argument or evidence on whether the seizure violated

the United States Constitution or other federal law. Despite a request to do so, the Department and its presiding officer also did not permit the Community to question the Department's witnesses during the hearing so that a full factual record could be developed.

87. The hearing referee recommended that the Department find that the seizures of the cigarettes were lawful and that the cigarettes were subject to forfeiture.

88. The hearing referee found that "when an individual package of cigarettes is in Michigan without the required Michigan tobacco tax stamp, there is a presumption that the package is kept in violation of the Act." March 28, 2016, Decision and Order of Determination ("Decision and Order,") at 6. The hearing referee found that the seized cigarettes "were in Michigan without the required Michigan tobacco tax stamp" and "are therefore contraband." *Id*.

89. The hearing referee further found that the Community "was acting as an unclassified acquirer without a license and the tobacco products at issue were possessed by [the Community] in violation of the Act and are therefore contraband." *Id*.

90. The hearing referee further found that the "cigarettes that were seized in this matter were sold to Petitioner by Native, an unlicensed supplier" and were therefore "contraband." Decision and Order at 7.

91. The hearing referee further found that the stop and search of the XPO truck was lawful. Decision and Order at 8.

92. The hearing referee rejected the Community's argument "that, per MCL 205.429(2), an inspector may search a 'vehicle of transportation' and the word 'vehicle' must be strictly construed since the TPTA is a penal statute" and "that a strict construction does not allow the Department to search the trailers at issue because they are not self-propelled and therefore are not vehicles." Decision and Order at 8. The hearing referee referred to the Michigan Vehicle

Code to determine that a trailer is a "vehicle" within the meaning of Mich. Comp. Laws § 205.429(2). *Id*.

93. The hearing referee further found that "the transportation of the unstamped tobacco products on the roads of Michigan was a violation of the TPTA. The tobacco products were therefore contraband and were subject to seizure and forfeiture." Decision and Order at 9.

94. The hearing referee also found that for purposes of the seizure and forfeiture, "ownership is irrelevant" and that it "has been shown that tobacco products were held, owned, possessed, transported, or in control of a person in violation of the TPTA, therefore they are contraband and may be seized and confiscated." Decision and Order at 10.

95. At the hearing, the Community had argued, among other things, that the seizures were unlawful because the cigarettes were taken from XPO, a common carrier who violated no law by possessing unstamped tobacco products. The Act provides that "a person shall not purchase, possess, acquire for resale, or sell a tobacco product as a manufacturer, wholesaler, secondary wholesaler, vending machine operator, unclassified acquirer, transportation company, or transporter in this state unless licensed to do so." Mich. Comp. Laws § 205.423. A "transporter" means a person importing or transporting into the State, or transporting in the State, a tobacco product obtained from a source located outside the State, or from any person not duly licensed under the Act—but specifically excludes an interstate commerce carrier licensed by the interstate commerce commission to carry commodities in interstate commerce. Mich. Comp. Laws § 205.422(t). XPO is a licensed common carrier transporting the tobacco products when they were seized. XPO was specifically permitted to transport the tobacco products under the Tobacco Products Tax Act, and the seizure was therefore unlawful. The hearing referee did not address this argument.

96. The Department accepted the hearing referee's recommendation and on March 28, 2016, issued a Decision and Order of Determination that the seizure and forfeiture of the cigarettes was lawful.

97. The Community timely commenced actions in Michigan state court to challenge the Department's March 28, 2016 Decision and Order.

98. The Community intends to seek a stay of the state court proceeding pending the outcome of this federal court action.

Irreparable Harm to the Community and its Members

99. Defendants' actions as described in paragraphs 58 to 98 have caused and will continue to cause irreparable harm to the Community because, among other reasons, they violate the federal rights of the Community, constitute a violation of the Community's sovereignty recognized by longstanding federal law, impose unlawful administrative obligations on the Community that effectively deprive it of the enjoyment of the tax immunities to which it is entitled under federal law, threaten the Community's government operations and continued vitality, and diminish Community funds and resources available to provide health care, day care, other social services, police, natural resources management, education, and other essential governmental services for Community members, residents, and visitors, as well as to provide employment for Community members. Defendants' continued collection of unlawful tobacco taxes, imposition of unlawful administrative obligations, and unlawful enforcement actions will further diminish Community funds and resources available to provide these services and employment and will delay or possibly eliminate these services and employment. None of these serious and potentially devastating harms to the Community and its members can be measured in dollars.

COUNT I
Sales Tax – Sales to Community and its Members – *Per Se* Rule Against State Taxation of Indian Traders
(Declaratory Judgment, 28 U.S.C. § 2201)

100. The Community realleges the allegations set forth in paragraphs 1 through 57 inclusive, and by this reference incorporates each such allegation herein as if set forth in full.

101. The imposition of sales tax on retail sellers with respect to their sale, lease, or rental of motor vehicles, office furniture and equipment, household appliances and furnishings, clothing, prepared food and beverages, nonprescription medications, toiletries, electricity, gas, and other tangible personal property to the Community and its members within the Reservation and trust lands is invalid as a matter of federal law under the *Per Se* Rules, because (a) the legal incidence of the Michigan sales tax falls upon the retail sellers, (b) the retail sellers are Indian traders (and in some cases also are Community members), (c) the Community's Reservation and trust lands constitute Indian country, and (d) Congress has not permitted the tax.

102. Accordingly, the Community is entitled to declaration pursuant to 28 U.S.C. § 2201 that:

(a) the imposition of sales tax and other requirements of the Sales Tax Act on retail sellers with respect to their sale, lease, or rental of tangible personal property to the Community and its members within the Reservation and trust lands is invalid as a matter of federal law and violates the Supremacy Clause in Article VI of the United States Constitution;

(b) subjecting the Community and its members to the Department's process, as described in paragraphs 39-56, above, for claiming exemption from, or refund of, sales tax imposed on retail sellers with respect to their sale, lease, or rental of tangible personal property to the Community and its members within the Reservation and trust lands

violates federal law and the Supremacy Clause in Article VI of the United States Constitution; and,

(c) such retail sellers are not subject to civil or criminal liability for any failure to pay sales tax or otherwise satisfy the requirements of the Sales Tax Act with respect to such sales, leases, or rentals.

103. The Community is further entitled to a declaration pursuant to 28 U.S.C. § 2201 that any actions by Defendants Khouri, Fratzke, or Johnson, or their successors, to assess or collect the Michigan sales tax, to impose or enforce other requirements of the Sales Tax Act, or to require application to the Department for exemption or refund on a case-by-case basis with respect to such sales, leases, or rentals, or to provide erroneous or misleading information to retailers with respect to the applicability of the Sales Tax Act to such sales, leases, or rentals, would constitute an act in excess of these Defendants' or their successors' authority and any authority that the State of Michigan could confer on these Defendants, their successors, or any of its officials.

COUNT II
Sales Tax – Sales to Community and its Members – *Bracker* Balancing Test
(Declaratory Judgment, 28 U.S.C. § 2201)

104. The Community realleges the allegations set forth in paragraphs 1 through 57 inclusive, and by this reference incorporates each such allegation herein as if set forth in full.

105. Under the *Bracker* Balancing Test, the federal and tribal interests against the imposition of Michigan's sales tax on retail sellers with respect to their sale, lease, or rental of motor vehicles, office furniture and equipment, household appliances and furnishings, clothing, prepared food and beverages, nonprescription medications, toiletries, electricity, gas, and other tangible personal property to the Community and its members within the Reservation and trust lands outweigh any legitimate interest of Michigan in imposing its sales tax and, therefore, the

imposition of such taxes with respect to such sales, leases, and rentals is invalid as a matter of federal law and violates the Supremacy Clause in Article VI of the United States Constitution.

106. Accordingly, the Community is entitled to declaration pursuant to 28 U.S.C. § 2201 that:

(a) the imposition of sales tax and other requirements of the Sales Tax Act on retail sellers with respect to their sale, lease, or rental of tangible personal property to the Community and its members within the Reservation and trust lands is invalid as a matter of federal law and violates the Supremacy Clause in Article VI of the United States Constitution;

(b) subjecting the Community and its members to the Department's process, as described in paragraphs 39-56, above, for claiming exemption from, or refund of, sales tax imposed on retail sellers with respect to their sale, lease, or rental of tangible personal property to the Community and its members within the Reservation and trust lands violates federal law and the Supremacy Clause in Article VI of the United States Constitution; and,

(c) such retail sellers are not subject to civil or criminal liability for any failure to pay sales tax or otherwise satisfy the requirements of the Sales Tax Act with respect to such sales, leases, or rentals.

107. The Community is further entitled to a declaration pursuant to 28 U.S.C. § 2201 that any actions by Defendants Khouri, Fratzke, or Johnson, or their successors, to assess or collect the Michigan sales tax, to impose or enforce other requirements of the Sales Tax Act, or to require application to the Department for exemption or refund on a case-by-case basis with respect to such sales, leases, or rentals, or to provide erroneous or misleading information to

retailers with respect to the applicability of the Sales Tax Act to such sales, leases, or rentals, would constitute an act in excess of these Defendants' and their successors' authority and any authority that the State of Michigan could confer on these Defendants, their successors, or any of its officials.

COUNT III
Sales Tax – Sales to Community and its Members – Infringement of Rights of Tribal Self-Government
(Declaratory Judgment, 28 U.S.C. § 2201)

108. The Community realleges the allegations set forth in paragraphs 1 through 57 inclusive, and by this reference incorporates each such allegation herein as if set forth in full.

109. Under *Williams v. Lee*, 358 U.S. at 217, and its progeny, the imposition of Michigan's sales tax on retail sellers with respect to their sale, lease, or rental of motor vehicles, office furniture and equipment, household appliances and furnishings, clothing, prepared food and beverages, nonprescription medications, toiletries, electricity, gas, and other tangible personal property to the Community and its members within the Reservation and trust lands unlawfully infringes on the rights of self-government of the Community and violates the Community's inherent sovereign right to make its own laws and be ruled by them and, therefore, is invalid as a matter of federal law and violates the Supremacy Clause in Article VI of the United States Constitution.

110. Accordingly, the Community is entitled to declaration pursuant to 28 U.S.C. § 2201 that:

(a) the imposition of sales tax and other requirements of the Sales Tax Act on retail sellers with respect to their sale, lease, or rental of tangible personal property to the Community and its members within the Reservation and trust lands is invalid as a matter

of federal law and violates the Supremacy Clause in Article VI of the United States Constitution;

(b) subjecting the Community and its members to the Department's process, as described in paragraphs 39-56, above, for claiming exemption from, or refund of, sales tax imposed on retail sellers with respect to their sale, lease, or rental of tangible personal property to the Community and its members within the Reservation and trust lands violates federal law and the Supremacy Clause in Article VI of the United States Constitution; and,

(c) such retail sellers are not subject to civil or criminal liability for any failure to pay sales tax or otherwise satisfy the requirements of the Sales Tax Act with respect to such sales, leases, or rentals.

111. The Community is further entitled to a declaration pursuant to 28 U.S.C. § 2201 that any actions by Defendants Khouri, Fratzke, or Johnson, or their successors, to assess or collect the Michigan sales tax, to impose or enforce other requirements of the Sales Tax Act, or to require application to the Department for exemption or refund on a case-by-case basis with respect to such sales, leases, or rentals, or to provide erroneous or misleading information to retailers with respect to the applicability of the Sales Tax Act to such sales, leases, or rentals, would constitute an act in excess of these Defendants' and their successors' authority and any authority that the State of Michigan could confer on these Defendants, their successors, or any of its officials.

COUNT IV
Sales Tax – Sales to Community and its Members – Indian Commerce Clause
(Declaratory Judgment, 28 U.S.C. § 2201)

112. The Community realleges the allegations set forth in paragraphs 1 through 57 inclusive, and by this reference incorporates each such allegation herein as if set forth in full.

113. The imposition of Michigan's sales tax on retail sellers with respect to their sale, lease, or rental of motor vehicles, office furniture and equipment, household appliances and furnishings, clothing, prepared food and beverages, nonprescription medications, toiletries, electricity, gas, and other tangible personal property to the Community and its members within the Reservation and trust lands unlawfully interferes with commerce with the Indian tribes and, therefore, violates the Indian Commerce Clause in Article I, Section 8, Clause 3 of the United States Constitution.

114. Accordingly, the Community is entitled to declaration pursuant to 28 U.S.C. § 2201 that:

(a) the imposition of sales tax and other requirements of the Sales Tax Act on retail sellers with respect to their sale, lease, or rental of tangible personal property to the Community and its members within the Reservation and trust lands violates the Indian Commerce Clause of the United States Constitution;

(b) subjecting the Community and its members to the Department's process, as described in paragraphs 39-56, above, for claiming exemption from, or refund of, sales tax imposed on retail sellers with respect to their sale, lease, or rental of tangible personal property to the Community and its members within the Reservation and trust lands violates the Indian Commerce Clause of the United States Constitution; and,

(c) such retail sellers are not subject to civil or criminal liability for any failure to pay sales tax or otherwise satisfy the requirements of the Sales Tax Act with respect to such sales, leases, or rentals.

115. The Community is further entitled to a declaration pursuant to 28 U.S.C. § 2201 that any actions by Defendants Khouri, Fratzke, or Johnson, or their successors, to assess or

collect the Michigan sales tax, to impose or enforce other requirements of the Sales Tax Act, or to require application to the Department for exemption or refund on a case-by-case basis with respect to such sales, leases, or rentals, or to provide erroneous or misleading information to retailers with respect to the applicability of the Sales Tax Act to such sales, leases, or rentals, would constitute an act in excess of these Defendants' and their successors' authority and any authority that the State of Michigan could confer on these Defendants, their successors, or any of its officials.

COUNT V
Use Tax – Use by Community and its Members – *Per Se* Rule Against State Taxation of Tribes and Tribal Members
(Declaratory Judgment, 28 U.S.C. § 2201)

116. The Community realleges the allegations set forth in paragraphs 1 through 57 inclusive, and by this reference incorporates each such allegation herein as if set forth in full.

117. The imposition of use tax on the Community and its members with respect to their use, storage, or consumption of (a) motor vehicles principally garaged within the Reservation and trust lands, (b) other tangible personal property or services principally used, garaged, stored, or consumed within the Reservation and trust lands is invalid as a matter of federal law under the *Per Se* Rules, because (c) the legal incidence of the Michigan use tax falls upon the consumer, (d) the consumers in these situations are the Community and its members, (e) the Community's Reservation and trust lands constitute Indian country, (f) the statute does not apportion the tax to actual use outside the Reservation and trust lands, and (g) Congress has not permitted the tax.

118. Accordingly, the Community is entitled to declaration pursuant to 28 U.S.C. § 2201 that:

(a) the imposition of use tax and other requirements of the Use Tax Act on the Community and its members with respect to such use, storage, or consumption is

invalid as a matter of federal law and violates the Supremacy Clause in Article VI of the United States Constitution;

(b) subjecting the Community and its members to the Department's process, as described in paragraphs 39-56, above, for claiming exemption from, or refund of, use tax with respect to such use, storage, or consumption violates federal law and the Supremacy Clause in Article VI of the United States Constitution; and,

(c) the Community and its members and their retail sellers are not subject to civil or criminal liability for any failure to pay or collect use tax or otherwise satisfy the requirements of the Use Tax Act with respect to such use, storage, or consumption.

119. The Community is further entitled to a declaration pursuant to 28 U.S.C. § 2201 that any actions by Defendants Khouri, Fratzke, or Johnson, or their successors, to assess or collect the Michigan use tax, to impose or enforce other requirements of the Use Tax Act, or to require application to the Department for exemption or refund on a case-by-case basis with respect to such use, storage, or consumption, or to provide erroneous or misleading information to retailers with respect to the applicability of the Use Tax Act to such use, storage, or consumption, would constitute an act in excess of these Defendants' and their successors' authority and any authority that the State of Michigan could confer on these Defendants, their successors, or any of its officials.

COUNT VI
Sales and Use Taxes –Violations of Article II of the 1842 Treaty

120. The Community realleges the allegations set forth in paragraphs 1 through 57 inclusive, and by this reference incorporates each such allegation herein as if set forth in full.

121. Under Article II of the 1842 Treaty, federal law governing Indian trade and intercourse remains applicable to the Community's trade and intercourse within the Ceded Area.

Congress has never repealed this provision of Article II and thus, within the Ceded Area, the federal trade and intercourse laws continue in force and preempt state laws with respect to the trade and intercourse of the Community and its members. In so providing, the treaty provision creates rights that cannot be burdened with a state tax.

122. The imposition of sales tax on retail sellers with respect to their sale, lease, or rental of motor vehicles, office furniture and equipment, household appliances and furnishings, clothing, prepared food and beverages, nonprescription medications, toiletries, electricity, gas, and other tangible personal property to the Community and its members within the Ceded Area is invalid under Article II of the 1842 Treaty because the Ceded Area must be treated as if it is Indian country under Article II and, therefore, among other reasons, (a) the tax is preempted by the *Per Se* Rules, (b) the tax is invalid under the *Bracker* Balancing Test, (c) the tax infringes on the rights of tribal self-government of the Community and violates the Community's inherent sovereign right to make its own laws and be ruled by them, and (d) the tax unlawfully interferes with commerce with the Indian tribes and, therefore, violates the Indian Commerce Clause in Article I, Section 8, Clause 3 of the United States Constitution.

123. Accordingly, the Community is entitled to declaration pursuant to 28 U.S.C. § 2201 that:

(a) the imposition of sales tax and other requirements of the Sales Tax Act on retail sellers with respect to their sale, lease, or rental of tangible personal property to the Community and its members within the Ceded Area is invalid under Article II of the 1842 Treaty and the Supremacy Clause in Article VI of the United States Constitution;

(b) subjecting the Community and its members to the Department's process, as described in paragraphs 39-56, above, for claiming exemption from, or refund of, sales

tax imposed on retail sellers with respect to their sale, lease, or rental of tangible personal property to the Community and its members within the Ceded Area violates Article II of the 1842 Treaty and the Supremacy Clause in Article VI of the United States Constitution; and,

(c) such retail sellers are not subject to civil or criminal liability for any failure to pay sales tax or otherwise satisfy the requirements of the Sales Tax Act with respect to such sales, leases, or rentals.

124. The Community is further entitled to a declaration pursuant to 28 U.S.C. § 2201 that any actions by Defendants Khouri, Fratzke, or Johnson, or their successors, to assess or collect the Michigan sales tax, to impose or enforce other requirements of the Sales Tax Act, or to require application to the Department for refund or exemption on a case-by-case basis with respect to such sales, leases, or rentals, or to provide erroneous or misleading information to retailers with respect to the applicability of the Sales Tax Act to such sales, leases, or rentals, would constitute an act in excess of these Defendants' and their successors' authority and any authority that the State of Michigan could confer on these Defendants, their successors, or any of its officials.

125. The imposition of use tax on the Community and its members with respect to their use, storage, or consumption of motor vehicles principally garaged within the Ceded Area, and other tangible personal property or services principally used, garaged, stored, or consumed within the Ceded Area is invalid under Article II of the 1842 Treaty because (a) the legal incidence of the Michigan use tax falls upon the consumer, (b) the consumers in these situations are the Community and its members, (c) the Ceded Area must be treated as if it is Indian country

under Article II, (d) the statute does not apportion the tax to actual use outside the Ceded Area, and (e) Congress has not permitted the tax.

126. Accordingly, the Community is entitled to declaration pursuant to 28 U.S.C. § 2201 that:

(a) the imposition of use tax and other requirements of the Use Tax Act on the Community and its members with respect to such use, storage, or consumption is invalid under Article II of the 1842 Treaty and violates the Supremacy Clause in Article VI of the United States Constitution;

(b) subjecting the Community and its members to the Department's process, as described in paragraphs 39-56, above, for claiming exemption from, or refund of, use tax with respect to such use, storage, or consumption violates Article II of the 1842 Treaty and the Supremacy Clause in Article VI of the United States Constitution; and

(c) the Community and its members are not subject to civil or criminal liability for any failure to pay or collect use tax or otherwise satisfy the requirements of the Use Tax Act with respect to such use, storage, or consumption.

127. The Community is further entitled to a declaration pursuant to 28 U.S.C. § 2201 that any actions by Defendants Khouri, Fratzke, or Johnson, or their successors, to assess or collect the Michigan use tax, to impose or enforce other requirements of the Use Tax Act, or to require application to the Department for exemption or refund on a case-by-case basis with respect to such use, storage, or consumption, or to provide erroneous or misleading information to retailers with respect to the applicability of the Use Tax Act to such use, storage, or consumption, would constitute an act in excess of these Defendants' and their successors'

authority and any authority that the State of Michigan could confer on these Defendants, their successors, or any of its officials.

COUNT VII
Sales and Use Taxes – Claims for Exemption or Refund Requirements – Violation of Equal Protection and Due Process Rights
(Declaratory Judgment, 28 U.S.C. § 2201)

128. The Community realleges the allegations set forth in paragraphs 1 through 57 inclusive, and by this reference incorporates each such allegation herein as if set forth in full.

129. Defendants Khouri and Fratzke, without statutory authority, impose a system of requiring the Community and its members to file with the Department claims for exemption from or refund of sales and use taxes with respect to nontaxable purchases, leases, rentals, use, storage, or consumption of tangible personal property and services. These Defendants' system requiring the Community and its members to file claims for exemption or refund is significantly more burdensome than the systems the Department has in place for purchasers, lessees, renters, and users in transactions that are tax-exempt as a matter of state law. Namely, the Department permits such purchasers, lessees, renters, and users to provide documentation to the seller of their exemption at the time of the transaction and to make tax-exempt purchases, leases, rentals, use, storage, or consumption without seeking advance permission of the Department or paying the tax in the first instance. These purchasers, lessees, renters, and users are not required to apply to the Department for exemption or refund on a case-by-case basis.

130. Defendants Khouri and Fratzke treat the Community and its members far differently than such other tax-exempt purchasers, lessees, renters, and users, and to the detriment of the Community and its members, with respect to the exercise of their tax immunities. Accordingly, the Community is entitled to a declaration pursuant to 28 U.S.C.

§ 2201 that these Defendants' system violates the rights of the Community and its members to equal protection of the laws under the Fourteenth Amendment of the United States Constitution.

131. While Defendants Khouri and Fratzke require the Community and its members to file claims for exemption from or refund of sales and use taxes with respect to their nontaxable transactions, these Defendants do not act on all such claims, do not explain the bases for denying applications, and deny applications arbitrarily and in violation of federal law. Accordingly, the Community is entitled to a declaration pursuant to 28 U.S.C. § 2201 that these Defendants' system violates the rights of the Community and its members to due process of law under the Fourteenth Amendment of the United States Constitution.

132. The Community is further entitled to a declaration pursuant to 28 U.S.C. § 2201 that, with respect to nontaxable purchases, leases, rentals, use, storage, or consumption of tangible personal property and services, any attempt by Defendants Khouri or Fratzke, or their successors, to impose or enforce any system requiring an advance determination by the Department that the transaction is not subject to sales and use tax or initial payment of the sales and use tax with refunds available only through a post-transaction claim process, or any other system requiring affirmative acts that burden the exercise by the Community and its members of their rights to make nontaxable purchases, leases, rentals, use, storage, or consumption of tangible personal property or services, is invalid under the Fourteenth Amendment of the United States Constitution.

133. The Community is further entitled to a declaration pursuant to 28 U.S.C. § 2201 that any further action by Defendants Khouri or Fratzke, or their successors, to impose or enforce any such system with respect to such nontaxable purchases, leases, rentals, use, storage, or

consumption would constitute an act in excess of any authority that the State of Michigan could confer on these Defendants, their successors, or any of its officials.

COUNT VIII
Sales and Use Taxes –Claims for Exemption or Refund Requirements – Other Violations of Federal Law
(Declaratory Judgment, 28 U.S.C. § 2201)

134. The Community realleges the allegations set forth in paragraphs 1 through 57 inclusive, and by this reference incorporates each such allegation herein as if set forth in full.

135. The Department's system, carried out by Defendants' Khouri and Fratzke, of requiring the Community and its members to file claims for exemption from or refund of sales and use taxes with respect to nontaxable purchases, leases, rentals, use, storage, and consumption of tangible personal property and services imposes significant, time-consuming, costly, and unnecessary burdens—documenting and filing a claim for exemption or refund, and waiting weeks or months for the Department's decision—even on small, routine transactions. Exercising tax immunity for something as simple as the purchase of toothpaste could take weeks or months, and there is no guarantee that the Department will actually act—much less act correctly—on every claim that is filed. As noted above, the Community, and especially its members, do not have the time or resources to file claims for all of the hundreds and thousands of transactions that occur each day and week for which the imposition of Michigan sales and use taxes is unlawful. The Department's system imposes impermissible burdens on the right of the Community and its members to exercise their tax immunities under federal law and is invalid as a matter of federal law and violates the Supremacy Clause in Article VI of the United States Constitution, for the following separate and independent reasons, among others:

(a) The Department's system, carried out by Defendants' Khouri and Fratzke, is preempted by federal law because the sales and use taxes are preempted by federal law;

(b) This system is preempted by federal law under the *Bracker* Balancing Test;

(c) This system unlawfully infringes on the rights of tribal self-government of the Community and violates the Community's inherent sovereign right to make its own laws and be ruled by them;

(d) This system unlawfully interferes with commerce with the Indian tribes and, therefore, violates the Indian Commerce Clause in Article I, Section 8, Clause 3 of the United States Constitution;

(e) This system violates Article II of the 1842 Treaty; and

(f) This system violates the Community's right, as a sovereign Indian tribe, to sovereign immunity from unconsented suit, seizures of property, or other judicial or administrative process.

136. The Community is accordingly entitled to a declaration pursuant to 28 U.S.C. § 2201 that, with respect to nontaxable purchases, leases, rentals, use, storage, or consumption of tangible personal property and services, any attempt by Defendants Khouri or Fratzke, or their successors, to impose or enforce any system requiring an advance determination by the Department that the transaction is not subject to sales and use tax or initial payment of the sales and use tax with refunds available only through a post-transaction claim process, or any other system requiring affirmative acts that burden the exercise by the Community and its members of their rights to make nontaxable purchases, leases, rentals, use, storage, or consumption of tangible personal property or services, is invalid as a matter of federal law and violates the Indian Commerce Clause in Article I, Section 8, Clause 3 of the United States Constitution and the Supremacy Clause in Article VI of the United States Constitution.

137. The Community is further entitled to a declaration pursuant to 28 U.S.C. § 2201 that any further action by Defendants Khouri or Fratzke, or their successors, to impose or enforce any such system with respect to such nontaxable purchases, leases, rentals, use, storage, or consumption would constitute an act in excess of any authority that the State of Michigan could confer on these Defendants, their successors, or any of its officials.

COUNT IX
Tobacco Tax – *Bracker* Balancing Test
(Declaratory Judgment, 28 U.S.C. § 2201)

138. The Community realleges the allegations set forth in paragraphs 1 through 24 and 58-99 inclusive, and by this reference incorporates each such allegation herein as if set forth in full.

139. Under the factual circumstances of this case, the tax imposed by the Tobacco Products Tax Act with respect to the Community's sales of tobacco products within the Reservation and trust lands , and the seizure and forfeiture of the Community's property in connection with such sales, is preempted under the *Bracker* Balancing Test.

140. Accordingly, the Community is entitled to declaration pursuant to 28 U.S.C. § 2201 that:

(a) under the factual circumstances of this case, any attempt by Defendants Khouri, Fratzke, or Crowley, or their successors, to enforce the Tobacco Products Tax Act against the Community with respect to the Community's sales of tobacco products within the Reservation and trust lands, and with respect to any purchase, acquisition, possession, or transport of tobacco products by the Community for or in connection with such sales, is invalid as a matter of federal law and violates the Supremacy Clause in Article VI of the United States Constitution;

(b) the Community is not subject to civil or criminal liability for (1) any failure to pay, collect or remit the tobacco products tax with respect to such sales, (2) any purchase, acquisition, possession or transport of tobacco products by the Community for or in connection with such sales, (3) any failure to submit to the licensing and reporting requirements of the Tobacco Products Tax Act with respect to the foregoing activities, or (4) any other act or failure to act which is proscribed by the Tobacco Products Tax Act with respect to the foregoing activities; and

(c) the seizure of the Community's truck, trailer, and cigarettes on December 11, 2015, and the seizures of the Community's cigarettes on February 9, 2016, are unlawful.

COUNT X

Tobacco Tax -- Infringement of Rights of Tribal Self-Government and Sovereign Immunity (Declaratory Judgment, 28 U.S.C. § 2201)

141. The Community realleges the allegations set forth in paragraphs 1 through 24 and 58-99 inclusive, and by this reference incorporates each such allegation herein as if set forth in full.

142. Under the factual circumstances of this case, the tax imposed by the Tobacco Products Tax Act, with respect to the Community's sales of tobacco products within the Reservation and trust lands , and the seizure and forfeiture of the Community's property in connection with such sales, infringes on the rights of self-government of the Community and violates the Community's inherent sovereign right to make its own laws and be ruled by them and, therefore, is invalid as a matter of federal law and violates the Supremacy Clause in Article VI of the United States Constitution.

143. Accordingly, the Community is entitled to declaration pursuant to 28 U.S.C. § 2201 that:

(a) under the factual circumstances of this case, any attempt by Defendants Khouri, Fratzke, or Crowley, or their successors, to enforce the Tobacco Products Tax Act against the Community with respect to the Community's sales of tobacco products within the Reservation and trust lands, and with respect to any purchase, acquisition, possession, or transport of tobacco products by the Community for or in connection with such sales, is invalid as a matter of federal law and violates the Supremacy Clause in Article VI of the United States Constitution;

(b) the Community is not subject to civil or criminal liability for (1) any failure to pay, collect or remit the tobacco products tax with respect to such sales, (2) any purchase, possession or transport of tobacco products by the Community for or in connection with such sales, (3) any failure to submit to the licensing and reporting requirements of the Tobacco Products Tax Act with respect to the foregoing activities, or (4) any other act or failure to act which is proscribed by the Tobacco Products Tax Act with respect to the foregoing activities; and

(c) the seizure of the Community's truck, trailer, and cigarettes on December 11, 2015 is unlawful, and the seizures of the Community's cigarettes on February 9, 2016 are unlawful.

COUNT XI
Tobacco Tax – Indian Commerce Clause of the United States Constitution
(Declaratory Judgment, 28 U.S.C. § 2201)

144. The Community realleges the allegations set forth in paragraphs 1 through 24 and 58-99 inclusive, and by this reference incorporates each such allegation herein as if set forth in full.

145. Under the factual circumstances of this case, the tax imposed by the Tobacco Products Tax Act with respect to the Community's sales of tobacco products within the

Reservation and trust lands, and the seizure and forfeiture of the Community's property in connection with such sales, is preempted under the Indian Commerce Clause of the United States Constitution.

146. Accordingly, the Community is entitled to declaration pursuant to 28 U.S.C. § 2201 that:

(a) under the factual circumstances of this case, any attempt by Defendants Khouri, Fratzke, or Crowley, or their successors, to enforce the Tobacco Products Tax Act against the Community with respect to the Community's sales of tobacco products within the Reservation and trust lands, and with respect to any purchase, acquisition, possession, or transport of tobacco products by the Community for or in connection with such sales, is invalid under the Indian Commerce Clause of the United States Constitution;

(b) the Community is not subject to civil or criminal liability for (1) any failure to pay, collect or remit the tobacco products tax with respect to such sales, (2) any purchase, acquisition, possession, or transport of tobacco products by the Community for or in connection with such sales, (3) any failure to submit to the licensing and reporting requirements of the Tobacco Products Tax Act with respect to the foregoing activities, or (4) any other act or failure to act which is proscribed by the Tobacco Products Tax Act with respect to the foregoing activities; and,

(c) the seizure of the Community's truck, trailer, and cigarettes on December 11, 2015 is unlawful, and the seizures of the Community's cigarettes on February 9, 2016 are unlawful.

COUNT XII
Tobacco Tax – Interstate Commerce Clause of the United States Constitution
(Declaratory Judgment, 28 U.S.C. § 2201)

147. The Community realleges the allegations set forth in paragraphs 1 through 24 and 58-99 inclusive, and by this reference incorporates each such allegation herein as if set forth in full.

148. The treatment of the Community's cigarettes as contraband and the seizure of the Community's property under the Tobacco Products Tax Act violates the Interstate Commerce Clause of the United States Constitution, because the Tobacco Products Tax Act purports to treat unstamped cigarettes and related property as contraband before the cigarettes have come to rest in Michigan and purports to require a transporter to be licensed even in circumstances when the cigarettes may never come to rest or be sold in Michigan.

149. Accordingly, the Community is entitled to declaration pursuant to 28 U.S.C. § 2201 that:

(a) any attempt by Defendants Khouri, Fratzke, or Crowley, or their successors, to enforce Section 205.429 of the Tobacco Products Tax Act against the Community with respect to cigarettes and related property before the cigarettes have come to rest in Michigan is invalid under the Interstate Commerce Clause of the United States Constitution; and

(b) the seizure of the Community's truck, trailer, and cigarettes on December 11, 2015 is unlawful, and the seizures of the Community's cigarettes on February 9, 2016 are unlawful.

COUNT XIII
Tobacco Tax and Seizures of Community's Property – Violation of Article II of the 1842 Treaty
(Declaratory Judgment, 28 U.S.C. § 2201)

150. The Community realleges the allegations set forth in paragraphs 1 through 24 and 58-99 inclusive, and by this reference incorporates each such allegation herein as if set forth in full.

151. Under Article II of the 1842 Treaty, federal law governing Indian trade and intercourse remains applicable to the Community's trade and intercourse within the Ceded Area. Congress has never repealed this provision of Article II and thus, within the Ceded Area, the federal trade and intercourse laws continue in force and preempt state laws with respect to the trade and intercourse of the Community and its members. In so providing, the treaty provision creates rights that cannot be burdened with a state tax or with seizures of the Community's property.

152. Under the factual circumstances of this case, the tax imposed by the Tobacco Products Tax Act with respect to the Community's sales of tobacco products in the Ceded Area, and the seizure and forfeiture of the Community's property in connection with such sales, is unlawful under Article II of the 1842 Treaty because the Ceded Area must be treated as if it is Indian country under Article II and, therefore, among other reasons, (a) the tax is invalid under the *Bracker* Balancing Test, (b) the tax infringes on the rights of tribal self-government of the Community and violates the Community's inherent sovereign right to make its own laws and be ruled by them, and (c) the tax unlawfully interferes with commerce with the Indian tribes and, therefore, violates the Indian Commerce Clause in Article I, Section 8, Clause 3 of the United States Constitution.

153. The seizure of the Community's truck, trailer, and cigarettes in the Ceded Area on December 11, 2015, and the seizures of the Community's cigarettes in the Ceded Area on February 9, 2016, are unlawful under Article II of the 1842 Treaty for the additional reason that federal law applies to the Community's trade and intercourse within the Ceded Area and preempts state laws with respect to the trade and intercourse of the Community and its members.

154. Accordingly, the Community is entitled to declaration pursuant to 28 U.S.C. § 2201 that:

(a) under the factual circumstances of this case, any attempt by Defendants Khouri, Fratzke, or Crowley, or their successors, to enforce the Act against the Community with respect to the Community's sales of tobacco products within the Ceded Area, and with respect to any purchase, acquisition, possession, or transport of tobacco products by the Community for or in connection with such sales, is invalid under Article II of the 1842 Treaty and the Supremacy Clause in Article VI of the United States Constitution;

(b) seizure of the Community's property within the Ceded Area is invalid under Article II of the 1842 Treaty and the Supremacy Clause in Article VI of the United States Constitution;

(c) the Community is not subject to civil or criminal liability for (1) any failure to pay, collect or remit the tobacco products tax with respect to the aforementioned sales, (2) any purchase, acquisition, possession or transport of tobacco products by the Community for or in connection with such sales, (3) any failure to submit to the licensing and reporting requirements of the Act with respect to the foregoing

activities, or (4) any other act or failure to act which is proscribed by the Act with respect to the foregoing activities; and,

(d) the seizure of the Community's truck, trailer, and cigarettes on December 11, 2015 is unlawful, and the seizures of the Community's cigarettes on February 9, 2016 are unlawful.

COUNT XIV
Seizures of Community's Property – Violation of Community's Sovereign Immunity
(Declaratory Judgment, 28 U.S.C. § 2201)

155. The Community realleges the allegations set forth in paragraphs 1 through 24 and 58-99 inclusive, and by this reference incorporates each such allegation herein as if set forth in full.

156. The Community is a sovereign Indian tribe, enjoying all benefits and rights of a sovereign, including the right to sovereign immunity from uncontested suit, seizures of property, or other judicial process.

157. On December 11, 2015 and February 9, 2016, Defendants Khouri, Fratzke, and Crowley caused to be seized property destined for delivery to the Community. To the extent that the seized property was owned by the Community, the seizures violated the sovereign immunity enjoyed by the Community.

158. In *Keweenaw Bay Indian Cmty. v. Rising*, 569 F.3d 589 (6th Cir. 2009), a three-judge panel held that seizures by Michigan officials of tobacco products and related property owned by the Community did not violate the Community's sovereign immunity under the factual circumstances of that case. The Community believes that the panel misapplied the precedents of *Washington v. Confederated Tribes of the Colville Indian Reservation*, 447 U.S. 134 (1980), and *Oklahoma Tax Comm'n v. Citizen Band Potawatomi Indian Tribe of Okla.*, 498 U.S. 505 (1991), to reach that holding, and that the panel decision should be overturned to the extent that the

holding might be interpreted to apply to the seizures on December 11, 2015 and February 9, 2016.

159. The Community is entitled to a declaration pursuant to 28 U.S.C. § 2201 that the seizures of tribal property carried out by Defendants Khouri, Fratzke, and Crowley on December 11, 2015 and February 9, 2016, and any effort by these Defendants or their successors to enforce the Act with respect to such seizures, are precluded by the sovereign immunity enjoyed by the Community.

160. The Community also is entitled to a declaration pursuant to 28 U.S.C. § 2201 that any future seizures of the Community's property by these Defendants or their successors, and any effort by these Defendants or their successors to enforce the Act with respect to any future seizures of the Community's property, would constitute an act in excess of these Defendants' and their successors' authority and any authority that the State of Michigan could confer on Defendants, their successors, or any of its officials.

COUNT XV
Seizure of Community's Property on December 11, 2015 – Violation of the Tobacco Products Tax Act
(Declaratory Judgment, 28 U.S.C. § 2201, 28 U.S.C. § 1367(a))

161. The Community realleges the allegations set forth in paragraphs 1 through 24 and 58-99 inclusive, and by this reference incorporates each such allegation herein as if set forth in full.

162. Should the Court find that the Tobacco Products Tax Act is not preempted by federal law, the Department's seizure of property on December 11, 2015 is still improper under the provisions of the Tobacco Products Tax Act. The Department and the Michigan State Police purported to search, seize and confiscate the Community's truck, trailer, and cigarettes on grounds that the search and seizure was permissible under Section 205.429 of the Act. The Act

gives a police officer the right to search a "vehicle of transportation" in which tobacco products constituting contraband are located. The Community's trailer is not a "vehicle of transportation"—it cannot propel itself and thus cannot be a "vehicle" or a "vehicle of transportation" under a strict construction of those terms—and therefore could not be searched as provided for in Section 205.429(2) of the Act. Likewise, tobacco products are only subject to seizure under Section 205.429(2) of the Act if they are "found in a vehicle," and the trailer is not a "vehicle."

163. The seizure of the Community's truck as contraband was also improper because the Tobacco Products Tax Act only permits seizure of tobacco products and the tangible personal property containing such products. The Community's truck did not contain any contraband tobacco products, and the Department's seizure of it was therefore improper under Section 205.429(1) and (2) of the Act.

164. Accordingly, the Community is entitled to a declaration pursuant to 28 U.S.C. § 2201 that the search and seizure of the Community's property on December 11, 2015, and the efforts of Defendant Khouri, Fratzke, and Crowley to enforce the Tobacco Products Tax Act with respect to such seizure, violated the Act.

COUNT XVI
Seizures of Community's Property on February 9, 2016 –Violation of the Tobacco Products Tax Act
(Declaratory Judgment, 28 U.S.C. § 2201, 28 U.S.C. § 1367(a))

165. The Community realleges the allegations set forth in paragraphs 1 through 24 and 58-99 inclusive, and by this reference incorporates each such allegation herein as if set forth in full.

166. Should the Court find that the Tobacco Products Tax Act is not preempted by federal law, the Department's seizures of property on February 9, 2016 are still improper under

the provisions of the Act. The Department and the Michigan State Police purported to search XPO's trailer, and seize the Community's cigarettes on grounds that the searches and seizures were permissible under Section 205.429 of the Act. However, the tobacco products that were seized on February 9, 2016 were not "held, owned, possessed, transported, or in control of a person in violation of" the Act and therefore were not subject to seizure, because, among other reasons, the Act does not require interstate commerce carriers such as XPO to be licensed under the Act.

167. In addition, the Act gives a police officer the right to search a "vehicle of transportation" in which tobacco products constituting contraband are located. XPO's trailer is not a "vehicle of transportation"—it cannot propel itself and thus cannot be a "vehicle" or a "vehicle of transportation" under a strict construction of those terms—and therefore could not be searched as provided for in Section 205.429(2) of the Tobacco Products Tax Act. Likewise, tobacco products are only subject to seizure under Section 205.429(2) of the Tobacco Products Tax Act if they are "found in a vehicle," and the trailer is not a "vehicle."

168. Accordingly, the Community is entitled to a declaration pursuant to 28 U.S.C. § 2201 that the search and seizures of the Community's property on February 9, 2015, and the efforts of Defendants Khouri, Fratzke, and Crowley to enforce the Act with respect to such seizures, violated the Act.

COUNT XVII
Sales and Use Tax and Claims Process – Deprivation of Federal Rights – 42 U.S.C. § 1983 (Monetary Damages)

169. The Community realleges the allegations set forth in paragraphs 1 through 57 inclusive, and by this reference incorporates each such allegation herein as if set forth in full.

170. The actions of Defendants Khouri and Fratzke have deprived the Community and its members of clearly established federal rights of which a reasonable person would have known by imposing:

(a) the Michigan sales tax on retail sellers with respect to their sale, lease, or rental of motor vehicles, office furniture and equipment, household appliances and furnishings, clothing, prepared food and beverages, nonprescription medications, toiletries, electricity, gas, and other tangible personal property to the Community and its members within the Reservation, trust lands, and Ceded Area;

(b) the Michigan use tax on the Community and its members with respect to their use, storage, or consumption of (1) motor vehicles principally garaged within the Reservation and trust lands, and (2) other tangible personal property or services principally used, garaged, stored, or consumed within the Reservation, trust lands, and Ceded Area; and,

(c) a system of requiring the Community and its members to file with the Department claims for exemption from or refund of sales and use taxes with respect to such nontaxable purchases, leases, rentals, use, storage, and consumption of tangible personal property and services.

171. The clearly established federal rights of the Community and its members referred to in paragraph 170 include, but are not limited to: the right to exercise of their tax immunities guaranteed by the Indian Trader Statutes, 25 U.S.C. §§ 261-264, federal common law, the Indian Commerce Clause of the United States Constitution, Article II of the 1842 Treaty, and the right to equal protection of the laws and due process of law under the Fourteenth Amendment of the United States Constitution.

172. Upon information and belief, the deprivation of the Community's and its members' rights occurred by or at the direction of Defendants Khouri and Fratzke or with the knowledge and consent of these Defendants.

173. Upon information and belief, the aforementioned Defendants' deprivations of the federal rights of the Community and its members were conducted under color of state law, including but not limited to actions taken by or at the direction of these Defendants pursuant to the Sales and Use Tax Acts. These Defendants' actions involved an exercise of power made possible only because these Defendants are or were at the time of the deprivations clothed with the authority of state law.

174. The aforementioned Defendants' actions giving rise to the deprivations of federal rights of the Community were and continue to be conducted in these Defendants' individual capacities.

175. The Community and its members have suffered damage as a result of these Defendants' actions, including but not limited to money damages for state taxes that were collected unlawfully and for the cost of preparing and filing claims for exemption from or refund of sales and use taxes.

176. Upon information and belief, these Defendants' actions were and continue to be motivated by evil motive or intent, or reckless or callous indifference to the federally protected rights of the Community and its members.

COUNT XVIII
Seizures of Property – Deprivation of Federal Rights – 42 U.S.C. § 1983
(Monetary Damages)

177. The Community realleges the allegations set forth in paragraphs 1 through 24 and 58-99 inclusive, and by this reference incorporates each such allegation herein as if set forth in full.

178. The actions of Defendants Khouri, Fratzke, and Crowley in planning, authorizing, and conducting the seizures of the Community's truck, trailer, and cigarettes on December 11, 2015 is unlawful, and the seizures of the Community's cigarettes on February 9, 2016, have deprived the Community of clearly established federal rights of which a reasonable person would have known, including but not limited to:

(a) the rights, under the factual circumstances of this case, to purchase and sell tobacco products within the Community's Reservation and trust lands and within the Ceded Area, and to purchase, acquire, possess, and transport tobacco products for or in connection with such sales, free of state taxation and regulation, as secured by the 1842 Treaty, the Indian Commerce Clause of the States Constitution, and other federal law;

(b) the right to be free of seizures within the Ceded Area that are made pursuant to state law, as secured by the 1842 Treaty; and

(c) the right to possess and transport cigarettes in interstate commerce free of state taxation and regulation under the Interstate Commerce Clause of the United States Constitution.

179. Upon information and belief, the deprivation of the Community's rights occurred by or at the direction of Defendants Khouri, Fratzke, and Crowley or with the knowledge and consent of these Defendants.

180. Upon information and belief, the aforementioned Defendants' deprivations of the federal rights of the Community were conducted under color of state law, including but not limited to actions taken by or at the direction of those Defendants pursuant to the Tobacco Products Tax Act. These Defendants' actions involved an exercise of power made possible only

because these Defendants are or were at the time of the deprivations clothed with the authority of state law.

181. These Defendants' actions giving rise to the deprivations of federal rights of the Community were and continue to be conducted in their individual capacities.

182. The Community has suffered damage as a result of these actions, including but not limited to money damages for the value of the seized property, the loss of use of use of the seized property, lost governmental revenue, and the cost of challenging these Defendants' actions.

183. Upon information and belief, these Defendants' actions were and continue to be motivated by evil motive or intent, or reckless or callous indifference to the federally protected rights of the Community.

COUNT XIX
Preliminary and Permanent Injunction
(Fed. R. Civ. P. 42, 65, 28 U.S.C. § 1983)

184. The Community realleges the allegations set forth in paragraphs 1-183 inclusive, and by this reference incorporates each such allegation herein as if set forth in full.

185. Defendants' or their predecessors' actions with respect to the impositions of the Sales, Use, and Tobacco Products Tax Acts described in paragraphs 1-99 are invalid because, among other things, said actions violate the Interstate Commerce Clause of the United States Constitution, the Indian Commerce Clause of the United States Constitution, the Supremacy Clause of the United States Constitution, Article II of the 1842 Treaty, the Community's sovereign immunity and right to self-governance, the rights of the Community and its members to equal protection and due process under law, other federal laws, including but not limited to the Indian Trader Statutes, 25 U.S.C. §§ 261-264, and 42 U.S.C. § 1983, and the Tobacco Products Tax Act.

186. These actions have irreparably harmed, and continue to irreparably harm the Community.

187. The Community is entitled to injunctive relief pursuant to Fed. R. Civ. P. 65 and 42 U.S.C. § 1983 as follows:

(a) enjoining Defendants Khouri, Fratzke, and Johnson, and their successors, from taking any further actions to impose or collect Michigan's sales and use taxes with respect to nontaxable purchases, leases, rentals, use, storage, or consumption of tangible personal property and services by the Community and its members within the Community's Reservation and trust lands and within the Ceded Area, and from taking any further actions to impose or enforce other requirements of the Sales and Use Tax Acts with respect to such purchases, leases, rentals, use, storage, and consumption;

(b) enjoining Defendants Khouri and Fratzke, and their successors, from imposing or enforcing the Department's process, as described in paragraphs 39-56 above, for claiming exemption from, or refund of, sales and use tax imposed with respect to nontaxable purchases, leases, rentals, use, storage, or consumption of tangible personal property and services by the Community and its members within the Community's Reservation and trust lands and within the Ceded Area, or from imposing or enforcing any other system requiring affirmative acts or reporting that constitutes a burden on the exercise by the Community and its members of their right to make nontaxable purchases, leases, rentals, use, storage, or consumption of tangible personal property and services within the Community's Reservation and trust lands and within the Ceded Area;

(c) enjoining Defendants Khouri, Fratzke, and Crowley, and their successors, from taking any further actions to impose or collect Michigan's tobacco products tax, or

otherwise enforce the Act, with respect to the Community's sales of tobacco products within its Reservation and trust lands and within the Ceded Area under the factual circumstances of this case, and with respect to any purchase, acquisition, possession, or transport of tobacco products by the Community for or in connection with such sales, including seizures of tobacco products and related property in connection with such sales;

(d) enjoining Defendants Khouri, Fratzke, and Crowley, and their successors, from making any further seizures of the Community's property within the Ceded Area;

(e) ordering Defendants Khouri, Fratzke, and Crowley, and their successors, to take all necessary steps to facilitate the issuance of an order by the Department vacating the February 5, 2016 Decision and Order of Determination in the matter *In re: The pickup truck, utility trailer, and tobacco products listed on Notice of Seizure and Inventory Statement of Property Seized, dated December 11, 2015* (Department of Treasury Docket No. 20160001) , and the March 28, 2016 Decision and Order of Determination in the matter *In re: Tobacco products listed on Notice of Seizure and Inventory Statement of Property Seized, for Seizures Occurring on February 9, 2016 on M-95 near County Road 601 in Marquette County and on US 2 near Crystal Falls in Iron County* (Department of Treasury Docket No. 20160406); and

(f) ordering Defendants Khouri, Fratzke, and Crowley, and their successors, to take all necessary steps to facilitate the return to the Community of all property seized on December 11, 2015, and February 9, 2016.

COUNT XX
Costs and Attorneys' Fees
(28 U.S.C. § 1988)

188. The Community realleges the allegations set forth in paragraphs 1 through 187 inclusive, and by this reference incorporates each such allegation herein as if set forth in full.

189. The Community has incurred substantial costs of suit and attorneys' fees in prosecuting their claims against Defendants.

190. The Community respectfully requests that the Court order Defendants, or any of them, to pay the Community's reasonable costs and attorneys' fees pursuant to 42 U.S.C. § 1988.

WHEREFORE, the Community respectfully requests that this Court:

(a) Enter the declaratory judgments requested in the foregoing paragraphs;

(b) Award the injunctive relief requested in the foregoing paragraphs;

(c) Award the Community all of its costs and expenses, including attorneys' fees;

(d) Award the Community its actual damages from Defendants Khouri, Fratzke, and Crowley; and

(e) Award the Community such other relief as the Court deems just and appropriate.

Dated: May 20, 2016.

Respectfully submitted,

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