UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MICHIGAN – SOUTHERN DIVISION

LITTLE TRAVERSE BAY BANDS OF ODAWA INDIANS, a federally recognized Indian tribe,

Plaintiff,

v.

Court File No.15-cv-850
Hon. Paul L. Maloney

RICK SNYDER, Governor of the State of Michigan, *et al.*,

Defendants.

Tribe's Combined Reply in Support of Rule 56 Motion for Partial Summary Judgment or Alternative Rule 12(f) Motion to Strike Defenses and Rule 26(b) Motion to Limit Discovery

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I. The Defendants misapprehend the nature of the Tribe's suit and this motion.

This case is not a land claim. Land claims assert a current right of possession. Remedies for land claims may be barred by equitable and expectation defenses. *See City of Sherrill v. Oneida Indian Nation of New York*, 544 U.S. 197 (2005); *Cayuga Indian Nation of New York v. Pataki*, 413 F.3d 266 (2d Cir. 2005) ("*Cayuga 2d Circuit*").[1] But as the Tribe has repeated early and often, it does not seek and this suit cannot disturb any title or eject any landowner.[2] Rather, this is a treaty-reservation-boundary case to settle jurisdiction; it cannot and will not disturb title. Compl. ¶ 1, PageID.1 (1855 Treaty created the Reservation); ¶ 3, PageID.2 (Congress has not diminished the Tribe's Reservation); Demand for Relief ¶ I, PageID.17 (seeking declaratory judgment that Reservation created by 1855 Treaty exists today).

The Tribe does not seek to "unilaterally" assert sovereignty. *Sherrill* addresses courts' concerns in fashioning modern-day remedies when tribes seek to "unilaterally . . . initiate" a "piecemeal shift in governance" through litigation. 544 U.S. at 221. It responded to the Oneida Nation's argument that a tribe's fee-simple purchase of land within its aboriginal homeland—

[1] For ease of the review, this Reply adopts the shortened case names assigned by the Defendants. Where the Defendants did not assign shortened case names, the Tribe assigns the non-conflicting case names identified here.

[2] Although the Tribe's Complaint offers the historical background that it has "continuously asserted its right to occupy" the Reservation, PageID.2, the right to occupy does not include and the Tribe does not seek any right of title. *Contra, e.g., Yankton Sioux Tribe of Indians v. United States*, 272 U.S. 351 (1926) (claim to title and current right of possession); *Onondaga Nation v. New York*, 500 F. App'x 87 (2d Cir. 2012) ("*Onondaga II*") (claim for recovery of ancestral land); *Oneida Indian Nation of New York v. County of Oneida*, 617 F.3d 114 (2d Cir. 2010) (claims for possession, ejectment, and other claims derivative of claimed current possessory interest); *Onondaga Nation v. New York*, No. 5:05-cv-0314, 2010 WL 3806492 (N.D.N.Y. Sept. 22, 2010) ("*Onondaga I*") (claim to title); *Cayuga 2d Circuit*, 413 F.3d 266 (claim for title and possession).

land it had not occupied for 200 years—"unified fee and aboriginal title" so that the modern-day purchase allowed it to assert sovereign dominion. *Id*. at 199. The Oneida Nation claimed that its own modern-day actions occasioned its sovereign rights. That is not this case.

In this case, the Tribe asks the Court to interpret and enforce a *bilateral* 1855 Treaty between the United States and the Tribe. Without a doubt, the Tribe performed its obligations under the Treaty long ago. Its suit today asks the Court to recognize the bilateral bargained-for rights that the 1855 Treaty secured. Moreover, the1994 Reaffirmation Act demonstrates that in modern times, Congress has reaffirmed its commitment to the 1855 Treaty promises *and* agreed to vest the Tribe with additional lands. 25 U.S.C. §§ 1300k-1300k(6). According to Congress, the 1855 Treaty created the Little Traverse Reservation. *Id.* § 1300k(3). "Article I, paragraphs third and fourth of the Treaty of 1855" set out the boundaries of that Reservation. *Id.* § 1300k-2(b)(2)(A). Congress pegged a federal service area to that existing Reservation boundary, defining the exposure of federal programs because it specifically contemplated the establishment of *additional* reservation land "after the date of the enactment of the Act." *Id*. That land-to-trust procedure is set forth in 25 U.S.C. § 1300k-4.[3]

But Congress was clear: "*All* rights and privileges of the Bands . . . which may have been abrogated or diminished before the date of the enactment of this Act are *hereby reaffirmed*." *Id*. §

[3] A parcel's title designation as trust land is separate from (but not exclusive of) its territorial designation as reservation land. The distinction is important because different federal laws apply to the different land statuses. Defendants would like to limit the Tribe's territory to the trust process, but the law does no such thing. *Sherrill* contrasts the trust-acquisition process from the Oneida's unilateral purchase, *Sherrill*, 544 U.S. at 220-21, but it did not foreclose judicial recognition of earlier-promised reservations. *Id*. at 215 n.9 (leaving an earlier reservation-boundary recognition undisturbed), *Nebraska v. Parker*, 136 S. Ct. 1072 (2016) (recognizing treaty reservation boundaries without application of *Sherrill*).

1300k-3(a) (emphasis added). Indeed, "*Nothing* in this Act shall be construed to diminish any right or privilege of the Bands, or of their members, that existed prior to the date of enactment of this Act." *Id*. § 1300k-3(b) (emphasis added). Against its findings that the Bureau of Indian Affairs repeatedly mishandled Tribal affairs, Congress emphasized that unless it said otherwise in the 1994 Act (and on the point of the Reservation, it did not),

> *nothing* in this Act shall be construed as altering or affecting any legal or equitable claim the Bands might have to enforce any right or privilege reserved by or granted to the Bands which were wrongfully denied to or taken from the Bands prior to the enactment of this Act.

Id. (emphasis added). The suggestion that the Reaffirmation Act undercut the Tribe's 1855 Treaty right is negated by the text of the Act itself—thrice. But the Act also demonstrates that unlike the Oneida in *Sherrill*, the Tribe does not "unilaterally" assert its sovereignty. Hardly 20 years ago, Congress reaffirmed the United States's bilateral commitment to *all* rights promised to the Tribe by the 1855 Treaty.

Nor does the Tribe ask this Court to "create" Indian Country. Certainly, asserting new sovereign boundaries today—as the tribe in *Sherrill* did—asks a court to fashion a disruptive remedy. But the Tribe does not ask this. The very first paragraph of the Tribe's Complaint grounds its claim in the 1855 Treaty. PageID.1. Its single count for relief asserts that the Treaty created the Reservation, PageID.16, as the Tribe will prove at trial.[4] The treating

[4] For sake of completeness, the Tribe disputes the Defendants' arguments that the 1855 Treaty did not create a reservation and that the Tribe has not asserted jurisdiction within or has been absent from the Reservation as occurred in *Sherrill*. No less an authority than Congress agrees that the Tribe "continued their political and social existence with viable tribal governments," and "carried out many of their governmental functions[,]" 25 U.S.C. § 1300k(6)-(7) *even though* it was sometimes stymied by the federal government. *Id.* § 1300k(5), (8). Indisputably, "the United

parties drew the Reservation's boundaries; this suit asks the Court to recognize that bargain.

And this motion seeks to strike *defenses*, not witnesses.[5] As detailed below, certain of the parties witnesses may be relevant to other defenses that the Tribe agrees require discovery. That is precisely why the Tribe did not offer the Court a list of witnesses to strike. Instead, it suggested that the Court order the parties "including the Tribe" to revise their initial disclosures. PageID.704 n.4; *see also* PageID.807 (proposed order).

The distinction is important. For example, the Emmet Township group has identified 25 witnesses with knowledge of: (1) the "Historical relationship between the Tribe and the Emmet County Townships"; and (2) "the disruptive effect that a declaration of a reservation would have

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States Government, the government of the State of Michigan, and local governments have had continuous dealings with the recognized political leaders of the Bands from 1836 to the present." *Id*. § 1300k(9). In due time, this Court will weigh the inconsistent assertions of the Bureau of Indian Affairs against a full factual record, including the contrary fact finding of Congress (and admissions of the State of Michigan, Exs. J-L) that the Tribe has occupied the Reservation and exercised political and governmental powers within that territory since time immemorial.

[5] This motion is proper under either Rules 12(f) or Rule 56. The Defendants agree that the case is at an "early stage" (*see, e.g.*, PageID.881), and can claim no prejudice in the Court's hearing a Rule 12(f) motion now. Indeed, Defendants do not dispute that Fed. R. Civ. P. 12(f)(1) includes a built-in grant of judicial discretion that "has been interpreted to allow the district court to consider untimely motions to strike and to grant them if doing so seems proper." *Ameriwood Indus. Int'l Corp. v. Arthur Andersen & Co.*, 961 F. Supp. 1078, 1083 (W.D. Mich. 1997). Moreover, the suggestion that this partial-summary-judgment motion is not properly supported because the Tribe did not offer a catalogue of undisputed facts ignores controlling law. Defendants did not address *any* of the various cases that the Tribe identified allowing partial-summary judgment against legally inapplicable defenses. *See* Tribe Br., PageID.691-93 (citing cases). On such motions, a disputed fact, "even if proved . . . is not a material fact," and summary judgment is proper. *Office & Prof'l Emps. Int'l Union, Local No. 9 v. Allied Indus. Workers Int'l Union*, 397 F. Supp. 688, 691 (E.D. Wis. 1975), *aff'd sub nom. Office & Prof'l Emps. Int'l, Local No. 9 v. Allied Indus. Workers Int'l Union*, 535 F.2d 1257 (7th Cir. 1976).

on Township government."[6] PageID.720-27. The first subject is relevant under the reservation-diminishment test (detailed below), but under that test, such evidence can only "reinforce" what a court has already determined from a review of statutory language and history. *Parker*, 136 S. Ct. at 1082. The "Court has never relied solely" on jurisdictional-history evidence to find diminishment. *Id.* The second subject could have significant weight in a case applying *Sherrill* equitable and expectation defenses to bar a claim, but is irrelevant to the analysis that controls treaty-boundary claims like this case. The Defendants' legally inapplicable equitable and expectations defenses thus prejudice the Tribe by forcing it to prioritize discovery of the modern-day thinking of non-parties who, as a matter of law, cannot affect the United States's treaty promises, and whose behavior has only negligible relevance under the controlling test. In contrast, granting the Tribe's motion will preserve all parties —and the Court's—resources by focusing the case on relevant evidence.[7] But the parties themselves should take the first cut at which witnesses have evidence that is relevant to their legally applicable defenses.

II. The Defendants seek to merge three separate tests, but only two apply here.

This year, every Supreme Court Justice agreed that equitable defenses and "modern expectations" are irrelevant to treaty-reservation-boundary claims like this case. Instead, an

[6] The Tribe disputes that recognition of the reservation will be disruptive as a practical matter—the governmental parties have shown over the last twenty years that they can and do accommodate respective sovereign interests. *See, e.g.*, PageID.12 (describing various intergovernmental agreements already in place).

[7] Several municipal Defendants have expressed concern about complying with federal Electronically Stored Information requirements. As the Tribe's attorneys have already discussed with these Defense attorneys, if the Defendants drop their legally inapplicable modern-day defenses (or if those defenses are disposed of by this motion), the Tribe will not seek ESI from these Defendants *at all* because it agrees that the burden to discover minimally relevant third-prong-diminishment ESI is not proportional to its probative value.

entirely different, much more "well settled" test controls. *Id.* at 1078-79.

A. Controlling law separates treaty-reservation claims from other claims and applies different tests to each.

The Defendants direct the Court to a thicket of Second Circuit cases that are heavily fact-dependent and limited to their facts by *Parke*r. On their facts, these cases are night-and-day different from this treaty-boundary case.[8] But as a matter of law, their equitable and expectation defenses have no place in treaty-boundary claims.

Treaty-reservation creation: Defendants correctly argue that the Tribe must establish that the 1855 Treaty created a reservation,[9] but misstate the controlling test. To determine whether a treaty created a reservation, the Supreme Court asks whether a particular tract of land

[8] The suggestion that the Defendants' mere utterance of the specter of equitable defenses merits summary judgment in their favor before any party has answered a single discovery request is as surprising as it is unsupported. In each of the cases Defendants cite for the proposition, the relevant court was well familiar with the facts before applying any equitable defense to bar a claim. *Cayuga 2d Circuit*, 413 F.3d at 269-73 (describing the lengthy procedural history of the case, including 1991 opinions rejecting abandonment and laches defenses); *Seneca-Cayuga Tribe of Oklahoma v. Town of Aurelius*, 233 F.R.D. 278, 281 (N.D.N.Y. 2006) ("*Seneca-Cayuga II*") (at the time of the *Sherrill* motion, "discovery has been closed for more than one year"); *Cayuga Indian Nation of New York v. Village of Union Springs*, 390 F. Supp. 2d 203 (N.D.N.Y. 2005) ("*Cayuga II*") (after 25 years and a trial on the merits, the pending appeal was remanded with direction to reconsider in light of *Sherrill*). Where *Sherrill* defenses are appropriate defenses, they are fact-intensive and cannot be resolved before development of the factual record. *New York v. Shinnecock Indian Nation*, 400 F. Supp. 2d 486, 496 (E.D.N.Y. 2005) ("*Shinnecock I*") ("There are, of course, differences in the *City of Sherrill* case and the case at bar, not the least of which may be the question of the extent of the impact of the 'disruptive' claims, the nature of the Indians' present titles and possibly the length of the delay and the question of laches, and appropriate remedies. These are factual and legal determinations which may only be resolved at a trial.").

[9] The Tribe will prove the 1855 Treaty's creation of the Reservation at trial through historic, ethnohistoric, and linguistic evidence. But because the Defendants' equitable and expectation defenses can only apply *after a tribe establishes a right*, this motion (like the defenses) assumes that the Tribe has already proven this issue.

has been set aside for a tribe's use. *Oklahoma Tax Comm n v. Citizen Band Potawatomi Indian Tribe*, 498 U.S. 505, 511 (1991) ("[W]e ask whether the area has been validly set part for the use of the Indians as such, under the superintendence of the Government." (quotations omitted)). In answering these questions, courts must interpret treaties broadly, looking "beyond the written words to the larger context that frames the treaty, including the history of the treaty, the negotiations, and the practical construction adopted by the parties." *Minnesota v. Mille Lacs Band of Chippewa Indians*, 526 U.S. 172, 196 (1999) (quotation omitted). Courts must "give effect to the terms as the Indians themselves would have understood them." *Id.* (citing cases). Further, "treaties are to be interpreted liberally in favor of the Indians, and treaty ambiguities to be resolved in their favor." *Id.* at 194 n.5 (citation omitted).

The Tribe is not aware of any case—and the Defendants have cited none—where a Court relied on modern-day non-party behavior to determine whether a treaty *created* a reservation in the first place. The Tenth Circuit's *Shawnee Tribe v. U.S.*, 423 F.3d 1204 (10th Cir. 2005) is not contrary.[10] Although it "look[ed] to federal and local authorities approaches to the land in question," *id.* at 1222, it only did so to determine whether the treaty-created reservation was *diminished* (and then only at the confirmatory third step described below). It answered the

[10] Although the Defendants seek to paint this case as a repeat-S*hawnee* case, the Tenth Circuit well recognized that the Shawnee's "1854 Treaty's multi-step transaction is unique." *Shawnee Tribe*, 423 F.3d at 1223. For example, the article that the Shawnee argued created a reservation ended with the Shawnee's agreement to "cede, relinquish, and convey to the United States" every tract of land sold under that treaty's allotment scheme. Treaty with the Shawnee, art. 2, 10 Stat. 1053 (1854). The 1855 Treaty has no comparable language, and the Supreme Court has "stressed that reservation status may survive the mere opening of a reservation to settlement. . . ." *DeCoteau v. District County Court*, 420 U.S. 425, 444 (1975). Certain Defendants' decision to stress allotment and fee sale of land within the Reservation only begs the question of whether the treating parties or Congress intended allotment to diminish the Reservation.

separate threshold question of whether the treaty *created* a reservation by determining whether the treaty set apart "a certain defined tract appropriated for certain purposes" without any reference to modern-day defenses. *Id.* at 1225.

Indeed, in a case the Defendants rely on, the Supreme Court expressly refused to rely on claims of impossibility or impracticability to defeat a tribe's attempt to establish a treaty right, preferring instead to "rest our decision upon other considerations." *Yankton Sioux Tribe of Indians*, 272 U.S. at 357. The Supreme Court reasoned that to rely on the impossibility-of-performance doctrine to block the United States's treaty promise "and at the same hold these wards of the government to the terms of the cession for which the undertaking formed so important an element of consideration, would be most inequitable and utterly indefensible upon any moral ground." *Id.* What the Court called "impossible" was the prospect of *rescinding* the treaty (a remedy that the Sioux did not call for, but that the Court considered a consequence of refusing to honor the treaty rights the United States promised) and restoring the Yankton to possession of their treaty-ceded lands. *Id.*

Treaty-reservation diminishment: Where a treaty creates a reservation, opponents may seek to prove that Congress diminished or disestablished the reservation. Reservations are "diminished" when Congress removes portions of a reservation from a tribe's jurisdiction (for example, by cutting off acreage from an existing reservation or by deciding that when parcels of land within a reservation are sold to non-members, the tribe loses jurisdiction over the parcel). Reservations are "disestablished" when, through the same process, Congress terminates the reservation status of the entire tract. But as the Supreme Court repeated *twice* in its brief opinion this year, "*Only Congress* can divest a reservation of its land and diminish its boundaries, and its

intent to do so must be clear." *Parker*, 136 S. Ct. at 1078-79 (quotation omitted); *see also id*. at 1082 ("*Only Congress* has the power to diminish a reservation." (emphasis added)); *Solem v. Bartlett*, 465 U.S. 463, 470 (1984) ("The first and governing principle is that only Congress can divest a reservation of its land and diminish its boundaries.").

The three-step test to determine whether Congress intended to diminish a reservation is "well settled." *Parker*, 136 S. Ct. at 1078. After looking first at the statutory language, and second at the history surrounding enactment, courts look lastly to "the subsequent demographic history of opened lands" and "the United States' treatment of the affected areas." *Id.* at 1081. This "demographic history" may include information about historical presence and exercise of jurisdiction in addition to census numbers. *See id*. The Supreme Court drew from this "related" but fundamentally "different" context when it built *Sherrill*. *Sherrill*, 544 U.S. at 215. But unlike in *Sherrill*, in treaty-reservation-boundary cases, evidence of nonparties behavior is *only* relevant as circumstantial evidence of *congressional* intent. The Court well recognizes that this last prong is "unorthodox and potentially unreliable," *Solem*, 465 U.S. at 472 n.13, and has only "limited interpretive value[,]" *South Dakota v. Yankton Sioux Tribe*, 522 U.S., at 329, 255 (1998), so is the "least compelling" evidence to determine diminishment. *Parker*, 136 S. Ct. at 1082 (quotation omitted).

Moreover, because only Congress can abrogate treaties, "[l]aches or estoppel is not available to defeat Indian treaty rights. This is true even where the Indians have long acquiesced in use by others of affected lands or have purported to grant away their occupancy and use rights without federal authorization." *Swim v. Bergland*, 696 F.2d 712, 718 (9th Cir. 1983); *see also* Tribe Br., PageID.10-11 (citing cases). That the law distinguishes between treaty-claim cases and

cases that rely on actions and events extraneous to a treaty makes sense. In a treaty case, any "disruption" or other impact is not the result of unilateral actions of tribes—it is incidental to the bargain the United States struck. In these cases, jurisdictional status changes at the ratification of the treaty, not its recognition by a court. Modern-day non-Indian expectations and misunderstandings about this jurisdiction, even when "compelling," cannot revoke a promise of the United States because "we cannot remake history." *Parker*, 136 S. Ct. at 1082.

Disruptive claims: In contrast to treaty-rights claims, a series of claims out of the Second Circuit have raised what the Supreme Court recently termed "disruptive" claims. Certain of these cases seek to oust modern landowners based on nineteenth-century violations of the Non-Intercourse Act; others seek to "unify" aboriginal title that was long-ago lost with a modern fee-simple purchase to create jurisdiction despite a tribe's centuries-long absence from the area. But each of these disruptive claims relies on events *outside* of a treaty and treaty implementation (most often an allegedly void Non-Intercourse transfer or a modern-day purchase) to establish present rights.[11]

Under a line of cases much less pedigreed than the reservation-diminishment case line, when a tribe's claim relies on these subsequent events, a court may consider equitable defenses, which "share the common characteristic" of relying on "events that are extraneous to the interpretation of the treaties and later acts of Congress." *Saginaw Chippewa Indian Tribe v.*

[11] The facts of some of these cases involved underlying treaties; some did not. But to the extent any asserted a treaty right, that right depended on determining whether an intervening conveyance either merged aboriginal title with a modern purchase or was void under the Non-Intercourse act, reinstating an abrogated treaty. In contrast, treaty-rights-claims assert a right grounded in a treaty independent of intervening events.

Granholm, No. 05-10296-BC, 2008 WL 4808823, at *7 (E.D. Mich. Oct. 22, 2008). Although the *Sherrill* case first set forth the doctrine, the Second Circuit, facing a tide of land-claims and non-Intercourse cases, extended *Sherrill* well beyond its holding. Kathryn Fort, *Disruption and Impossibility: The New Laches and the Unfortunate Resolution of the Modern Iroquois Land Claims*, 11 Wyo. L. Rev. 375, 394 (2011) ("[*Cayuga 2d Circuit*] changed the legal landscape for the New York land claims far more than the *Sherrill* decision."). It is those Second Circuit disruptive-claim cases that the Defendants rely on today. But as the *Saginaw Chippewa* court held, "there is a fundamental difference" between any disruption incidental to treaty claims and the disruption occasioned by *Sherrill*. "The disruption at issue in *Sherrill* would have arisen from the Court's task of fashioning a judicial remedy for the ancient wrongs. In the immediate case, if a remedy is appropriate, any disruption will follow from the treaties themselves and any act of diminishment thereafter by Congress." *Saginaw Chippewa*, 2008 WL 4808823, at *23.

B. Equitable and expectation defenses cannot defeat treaty claims.

The Defendants struggle to cloud the Supreme Court's treaty-boundary analysis with cases that raised non-treaty-boundary claims only proves the Tribe's point. None of the stew of cases that the Defendants cite as support for equitable and expectation defenses apply those defenses directly *to a treaty*. In contrast, the Tribe's claim is resolved solely by reference to whether the 1855 Treaty created a right and whether Congress diminished that Treaty right. The Tribe does not ask the Court to rely on the Non-Intercourse Act to void a tribe's subsequent

conveyances to other parties.[12] It does not rely on the BIA's 150-year-old failure to set aside land long-since occupied.[13] And it does not ask the Court to merge long-ago-lost title with a present-day fee-simple purchase to create modern-day jurisdiction.[14] Rather, the Tribe asks the Court to interpret and apply the 1855 Treaty.

As *Parker* confirmed, there are treaty cases and there are *Sherrill* cases. But *Sherrill* equities and expectations cannot apply to treaty-reservation claims. The Supreme Court—not the Tribe—created the heavy black line between the cases Defendants rely on and treaty-boundary cases. The Defendants urge that the Court did not reach equitable defenses in *Parker* because they were not raised below—but that is not what *Parker* said. It specifically addressed the non-Indian petitioners' "justifiable expectations," calling them "compelling," but nevertheless unanimously refused to apply them to block the Omaha treaty-boundary right. *Parker*, 136 S. Ct. at 1082. Compelling or not, those non-Indians' expectations could not

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[12] *Contra County of Oneida v. Oneida Indian Nation of New York State*, 470 U.S. 226 (1985); *Shinnecock Indian Nation v. New York*, 628 F. App'x 54, 55 (2d Cir. 2015) ("*Shinnecock v. New York II*"); *Stockbridge-Munsee Cmty. v. New York*, 756 F.3d 163 (2d Cir. 2014); *Onondaga II*, 500 F. App'x 87; *Canadian St. Regis Bank of Mohawk Indians v. New York*, Nos. 5:82-cv-783 *et al.*, 2013 WL 3992830 (N.D.N.Y. July 23, 2013); *Onondaga I*, 2010 WL 3806492; *Seneca-Cayuga II*, 233 F.R.D. 278; *Shinnecock Indian Nation v. New York*, No. 05-cv-2887, 2006 WL 3501099 (N.D.N.Y. Nov. 28, 2006) ("*Shinnecock v. New York I*"); *Cayuga 2d Circuit*, 413 F.3d 266.

[13] *Contra Wolfchild v. Redwood County*, 91 F. Supp. 3d 1093 (D. Minn. 2015), *aff'd on other grounds* __ F.3d __, 2016 WL 3082341 (8th Cir. 2016) (attached as Ex. M).

[14] *Contra Sherrill*, 544 U.S. 197; *New York v. Shinnecock Indian Nation*, 686 F.3d 133 (2d Cir. 2012) ("*Shinnecock III*"); *Oneida Indian Nation of New York v. County of Oneida*, 617 F.3d 114 (2d Cir. 2010); *New York v. Shinnecock Indian Nation*, 523 F. Supp. 2d 185 (E.D.N.Y. 2007) ("*Shinnecock II*"); *Seneca-Cayuga II*, 233 F.R.D. 278; *Cayuga II*, 390 F. Supp. 2d 203; *Shinnecock I*, 400 F. Supp. 2d 486; *Cayuga Indian Nation of New York v. Village of Union Springs*, 317 F. Supp. 2d 128 (N.D.N.Y. 2004) ("*Cayuga I*"); *Seneca-Cayuga Tribe of Oklahoma v. Town Aurelius*, No. 5:03-cv-690, 2004 WL 1945359 (N.D.N.Y. Sept. 1, 2004) ("*Seneca-Cayuga I*").

"remake history." *Id*. (quotation omitted). Neither can the Defendants here.

Arguably, earlier diminishment cases signaled that expectations and jurisdictional history alone may result in diminishment. *See, e.g.*, *Hagen v. Utah*, 510 U.S. 399, 422 (1994) ("This jurisdictional history, . . . demonstrates a practical acknowledgment that the Reservation was diminished; a contrary conclusion would seriously disrupt the justifiable expectations of the people living in the area."); *Solem*, 465 U.S. at 471 n.12 ("When an area is predominately populated by non-Indians with only a few surviving pockets of Indian allotments, finding that the land remains Indian country seriously burdens the administration of State and local governments. Conversely, problems of an imbalanced checkerboard jurisdiction arise if a largely Indian opened area is found to be outside Indian country." (citation omitted)); *Rosebud Sioux Tribe v. Kneip*, 430 U.S. 584, 604-05 (1977) ("The longstanding assumption of jurisdiction by the State over an area that is over 90% non-Indian both in population and in land, use, not only demonstrates the parties' understanding of the meaning of the Act, but has created justifiable expectations which should not be upset by so strained a reading of the Acts of Congress . . . ."). But lower courts questioned parties' attempts to prioritize this third factor. *See, e.g.*, *Duncan Energy v. Three affiliated Tribe of Fort Berthold Reservation*, 27 F.3d 1294, 1298 (8th Cir. 1994) ("We find . . . exclusive reliance on the third *Solem* factor to create a quasi-diminishment totally inappropriate."). This year, *Parker* unanimously cabined this less-than-reliable evidence to solely "reinforc[ing]" what a court has already determined at the first and second reservation-diminishment-analysis steps. 136 S. Ct. at 1082. It cautioned that "this Court has never relied solely on this third consideration to find diminishment." *Id*. That is the opportunity the Defendants seek. But that is what *Parker* forecloses. This Court should do the same.

C. This case, like *Saginaw Chippewa*, only raises a treaty-reservation claim, so equitable and expectation defenses cannot lie.

The Defendants argue that the Tribe's claims mirror *Sherrill* or *Cayuga 2d Circuit*. They want this to be a land claim, a non-Intercourse claim, or a unification-theory case—any case but a treaty case—so that *Sherrill* applies. But the test is not what Defendants argue. It is what the Tribe pled. The Tribe *only* seeks the benefit of its 1855 bargain with the United States, and that makes this case a treaty case. PageID.1, 2, 17. Indeed, despite the Defendants' argument that the Tribe seeks "broader" relief than the *Saginaw Chippewa*, the Tribe demonstrated in its opening motion that its Complaint follows the *Saginaw Chippewa* structure—describing the treaty rights, describing the injury in the Governor's refusal to follow the treaty rights, and seeking a declaration that the treaty-created rights continue and injunction against their further violation. *Compare* PageID.1-18 (Compl.), *with* Tribe Br. Ex. G (*Saginaw Chippewa* Complaint), PageID.787-800. *Not one of the nineteen defendants addressed this*. With claims and relief substantially identical to the *Saginaw Chippewa* case, just as in *Saginaw Chippewa*, equitable and expectation defenses are inapplicable to this case as a matter of law.

To the extent they address the law of *Saginaw Chippewa*, the Defendants are left to argue that the case was wrongly decided because that court improperly limited *Sherrill* to only possessory land claims. Not so. The *Saginaw Chippewa* Court *did* focus on the nature of that tribe's claim. It recognized that *Sherrill* defenses apply to land claims (like *Cayuga 2d Circuit*) *and* Non-Intercourse claims (like *Sherrill*) because they both relied on post-treaty wrongs for which Congress did not provide a remedy. "By reason of that fact, the courts were reasonably, indeed necessarily, involved in the task of fashioning a remedy." *Saginaw Chippewa*, 2008 WL

4808823, at *22. Equitable defenses could thus lie against those claims. *Id*. In contrast, *Saginaw Chippewa* recognized that the remedy in a treaty-boundary case "will be closely tied to the treaties and later congressional action. The undertaking will be a decidedly different task than fashioning a remedy for a two century old violation of law out of whole cloth." *Id*. Whereas *Sherrill* and *Cayuga 2d Circuit* "at their core, sought resurrection of an ancient claim to the land[,]" *id*., the Saginaw Chippewa (like the Tribe here), did not seek to void or "reunify" modern title. It (like the Tribe here) sought confirmation of what already is and has been since 1855. Thus, *Saginaw Chippewa*'s reasoning *did* hinge on "the character of the legal issues" raised in *Sherrill* and *Cayuga 2d Circuit*.[15] But *Saginaw Chippewa* did not purport to draw a line between *Cayuga 2d Circuit* land claims and *Sherrill* defenses; it respected the already-drawn line between *Sherrill* claims that ask courts to fashion modern remedies and treaty claims that ask courts to enforce treaty-made bargains.

Defendants also argue that *Saginaw Chippewa* distinguished *Sherrill* and its progeny on their facts, but it did not do so on the factual record that the Defendants argue. The years of discovery in the *Saginaw Chippewa* case all focused on expert *historical* testimony, not equitable- and expectation-defense discovery. *Saginaw Chippewa* granted the defendants leave to amend their answers to assert equitable defenses *in the same order* that struck those defenses as a matter of law—well before any discovery on the modern-day defenses had begun. *Id*. at *24.

[15] To be sure, the United States was a co-plaintiff in *Saginaw Chippewa* when that motion was decided but has not yet joined this case. But *Saginaw Chippewa*'s reasoning favors the Tribe, regardless of the United States presence. That court offered five reasons that *Sherrill* defenses could not lie against the United States and the Saginaw Chippewa's treaty claims—only the fourth was specific to the United States. *Saginaw Chippewa*, 2008 WL 4808823, at *22-23.

To the extent *Saginaw Chippewa* drew factual distinctions from *Sherrill*, it relied on the same sort of judicially noticeable facts available here. Foremost, as in *Saginaw Chippewa* (but unlike in *Sherrill* and *Cayuga 2d Circuit*), the Tribe claims treaty rights. As in *Saginaw Chippewa* (but unlike in *Sherrill* and *Cayuga 2d Circuit*), this case involves interpretation of a treaty penned in 1855.[16] As in *Saginaw Chippewa* (but unlike in *Sherrill* and *Cayuga 2d Circuit*), the Tribe never left the disputed area. *Compare Sherrill*, 455 U.S. at 216 n.10 (relying on the Oneida's 200-year absence to distinguish cases that hold that only Congress can terminate tribal rights as ones where "the Indians had continuously occupied" the land) *with* 25 U.S.C. 1300k(3) (members of the Tribe "continue to reside close to their ancestral homeland").

Indeed, *unlike* in *Saginaw Chippewa*, in 1994 Congress expressly reaffirmed and re-pledged the United States's commitment to "[*a*]*ll rights and privileges*" of the Tribe, whether they were or were not "abrogated or diminished before the date of the enactment of this Act. . . ." 25 U.S.C. § 1300k-3(a) (emphasis added). Even if laches could apply to this case, the question is not 200 years versus 150 years. Congress reset the clock on the Tribe's treaty rights hardly 20 years ago. Since then, the Tribe has not slept. It has bustled with jurisdictional activity, actively entering into intergovernmental agreements with the Defendants, *see, e.g.*, PageID.12 (describing various intergovernmental agreements already in place), and defending its boundary in litigation.

[16] At trial, expert testimony will demonstrate the strong parallels between the Saginaw Chippewa's 1855 treaty and the Tribe's 1855 Treaty. Indeed, expert testimony in *Saginaw Chippewa* (including testimony from Governor Granholm's experts) relied on the record of negotiations of the 1855 Treaty at issue in this case because the parties could not locate the treaty journal for the Saginaw Chippewa's 1855 treaty. Similarities and differences in treaty language and party understanding are precisely the sort of questions that this Court will consider at a treaty-interpretation trial.

Sault Ste. Marie Tribe of Lake Superior Chippewa Indians v. U.S., 78 F. Supp. 2d 699, 705 n.8 (W.D. Mich. 1999) (describing the Tribe's argument that the parcel at issue is within the Tribe's Reservation). On judicially noticeable facts alone, this case offers an even stronger case for distinguishing *Sherrill* and *Cayuga 2d Circuit* than *Saginaw Chippewa* presented.

The Tribe does not argue that *Saginaw Chippewa* controls this Court's decision; *Parker* does. But *Saginaw Chippewa* persuasively applied the treaty-claim/disruptive-claim distinction that *Parker* elucidates. As in *Saginaw Chippewa*,

> The analytical framework outlined in *Rosebud Sioux*, with its focus on congressional intent as expressed in the treaties and later legislation provides the appropriate analytical framework for the resolution of this case. Extending *Sherrill's* holding to defeat the interpretation of Treaties approved by Congress would fundamentally conflict with the provisions of the United States Constitution that allocate those responsibilities to Congress and the executive branch of the United States government.

Saginaw Chippewa, 2008 WL 4808823, at *23. Said differently, "It would be remarkable to hold that the commitments and obligations of the United States embodied in its treaties may be altered by a judicially endorsed equitable defense based upon the State of Michigan's inconsistent incremental exercise of governmental authority over time." *Id*. It would indeed. *Saginaw Chippewa* correctly held that as a matter of law, such defenses cannot lie against treaty claims.

III. Discovery of "future effects" should be limited.

Because *Sherrill* defenses cannot lie against this treaty claim, much of the testimony that the Defendants expect they may rely on is irrelevant.[17] Tribe Br., PageID.704-707. The Tribe

[17] Even if *Sherrill* could lie, the Defendants' reliance on the "new laches" is misplaced. Defendants correctly identify that, as Indian law scholar Kate Fort described, the Second Circuit's application of *Sherrill* departs significantly from the traditional elements of the equitable doctrines *Sherrill* relied on. Kathryn E. Fort, *The New Laches: Creating Title Where*

identified this testimony in Exhibit A to its brief. PageID.715 (noting the designation with bold and underlined text). The Defendants work to shoehorn this speculative testimony into the public-interest factor of the permanent-injunction test, but their argument that that factor invites evidence of the *difficulty of complying with federal law* turns equity on its head.

eBay Inc. v. MercExchange, L.L.C. stated a permanent-injunction test, but did not address what evidence to consider at the public-interest factor. 547 U.S. 388 (2006). When *Audi AG v. D Amato* applied the *eBay* test, it looked to the future *only* to determine the "potential for future harm" *to the plaintiff*. 469 F.3d 534, 550 (6th Cir. 2006). The court ordered the defendant to disable a profitable-but-infringing website without regard to its effect on the defendant infringer. *Id*. "The purpose of an injunction is to prevent future *violations*" of the law. *In re Auto. Parts Antitrust Litig.*, 50 F. Supp. 3d 836, 868 (E.D. Mich. 2014) (emphasis added) (citing *Swift & Co. v. United States*, 276 U.S. 311, 326 (1928)); *see also Atmos Nation, LLC v. Kashat*, No. 5:14–cv–11019, 2014 WL 2711961, at *4 (E.D. Mich. June 16, 2014) ("In regards to the third factor,

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None Existed, 16 Geo. Mason L. Rev. 357, 380-83 (2009) (describing cases from the Second Circuit). But as the same commentator has explained more recently, the Second Circuit's invention of a "new laches" was an overreading of *Sherrill*. Fort, *Disruption and Impossibility*, 11 Wyo. L. Rev. at 394 ("Rather than reading *Sherrill* narrowly, the Second Circuit decided to read it broadly, extending it far beyond the *Sherrill* holding. . . . [*Cayuga 2d Circuit*] changed the legal landscape for the New York land claims far more than the *Sherrill* decision."). In contrast, other circuit courts (including the Sixth Circuit) actively avoid *Sherrill* and the Second Circuit's "new laches" formulation. *Wolfchild*, Ex. M, 2016 WL 3082341, *5 n.3 (8th Cir. 2016) (deciding statutory claim on its merits and refusing to reach *Sherrill* questions); *Lyon v. Gila River Indian Cmty.*, 626 F.3d 1059, 1076 (9th Cir. 2010) (reviewing lower-court application of laches to Indian land claim by applying traditional elements of laches); *Ottawa Tribe of Oklahoma v. Logan*, 577 F.3d 634, 637 n.5, 639 n.6 (6th Cir. 2009) (deciding treaty claim on treaty-interpretation grounds and not "difficult issues of first impression," including specifically "whether laches could apply to defeat the rights at issue here"); *Delaware Nation v. Pennsylvania*, 446 F.3d 410, 415 n.8 (3d Cir. 2006) (deciding aboriginal-title claim and non-intercourse claims on their merits instead of applying equitable defenses).

the balance of hardships between plaintiff and defendant weighs in favor of relief in equity. The only harm to defendant is the potential loss of revenue from illegal sales of infringing materials; compliance with the law is not cognizable harm under a permanent injunction analysis.").

The public interest is in the enforcement of federal law. *CoxCom, Inc. v. Chaffee*, 536 F.3d 101, 112 (1st Cir. 2008); *Fialka-Feldman v. Oakland Univ. Bd. of Trs.*, 678 F. Supp. 2d 576, 588 (E.D. Mich. 2009). And treaties are the supreme law of the land. U.S. Const. art. VI, cl. 2. If the Tribe establishes its treaty right to the Reservation and that the Reservation was not diminished, there can be no public interest in disobeying that supreme law of the land.

IV. This Court should strike the Defendants' reservations of the right to add additional defenses.

There is plenty of meat on the bones of this case without inapposite defenses and pleading surplusage. The Tribe brought this motion to trim the fat from this case so that the parties—principally governmental parties with more to do than litigate cases—can focus their resources on the relevant issues that control this treaty-boundary claim. In responding to the Tribe's motion to strike the Intervenor Defendants' reservations of rights to add defenses at a later date, those Defendants essentially argue "no harm no foul." But as this Court's decision in *Kelley v. Thomas Solvent Co.* made clear, such extraneous assertions cloud the pleadings and are properly stricken. 714 F. Supp. 1439, 1452 (W.D. Mich. 1989). The Tribe does not object to setting a cut-off date for the addition of defenses or to the Defendants' ability to bring a motion under Rule 15 of the Federal Rules of Civil Procedure (though it may dispute the contents of that motion). It objects to Defendants' purported unilateral and unrestricted reservation of the right to try to change the complexion of this case without leave of court. The result they seek (should they ever seek it) is "properly achieved by the terms of the Rules." *Id.*

Conclusion

"Great nations, like great men, should keep their word . . . ." *Hagen*, 510 U.S. at 422 (Blackmun, J., dissenting). If the very fact of asking a court to honor the United States's promise of a small reservation homeland in exchange for a tribe's already-performed cession of land were "disruptive" as the Defendants claim, the Supreme Court would have said so in *Sherrill* (instead of leaving the boundary decision undisturbed) and would have applied equitable defenses to the treaty-reservation-boundary claim in *Parker*. It refused—twice. Because controlling law establishes that equitable and expectation defenses cannot lie against treaty rights, the Tribe respectfully requests that the Court strike or grant partial summary judgment disposing of the inapposite defenses.

/s/ Jessica Intermill
Dated: June 23, 2016

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Certificate of Service

I hereby certify that on June 23, 2016, I electronically filed the above Tribe's Combined Reply in Support of Rule 56 Motion for Partial Summary Judgment or Alternative Rule 12(f) Motion to Strike Defenses and Rule 26(b) Motion to Limit Discovery with the Clerk of Court for the United States District Court for the Western District of Michigan using the CM/ECF system. All of the participants in the case are registered CM/ECF users and will be served by the CM/ECF system.

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