UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MICHIGAN
NORTHERN DIVISION

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

Plaintiff,

v

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 CROLEY, Detective/Sergeant of the Michigan State Police; DANIEL C. GRANO, Assistant Attorney General for the State of Michigan; and, TIMOTHY SPROULL, Detective of the Michigan State Police,

Defendants.

No. 2:16-cv-00121

HON. PAUL L. MALONEY

**ORAL ARGUMENT REQUESTED**

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**BRIEF IN SUPPORT OF DEFENDANTS' SECOND MOTION FOR JUDGMENT ON THE PLEADINGS OF THE TOBACCO CLAIMS**

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## CONCISE STATEMENT OF ISSUES PRESENTED

1. Does res judicata bar the official-capacity tobacco claims against Defendants Khouri, Fratzke, Croley, Grano, and Sproull?

2. Does qualified immunity bar the individual-capacity tobacco claims against Defendants Khouri, Fratzke, Croley, Grano, and Sproull?

## CONTROLLING OR MOST APPROPRIATE AUTHORITY

*Authority*:

*Keweenaw Bay Indian Cmty. v. Rising*, 477 F.3d 881 (6th Cir. 2007).

*Kane v. Magna Mixer Co.*, 71 F.3d 555, 560 (6th Cir. 1995).

*Pearson v. Callahan*, 555 U.S. 223, 231 (2009).

## INTRODUCTION

Selling cigarettes that have not been taxed under the Tobacco Products Tax Act (TPTA), Mich. Comp. Laws § 205.421 *et seq.*, is big business for the Keweenaw Bay Indian Community (Community). The Community has engaged in "repeated, brazen, and willful attempts to avoid remittance of the [Michigan tobacco] tax so as to profit from illegal sales of tax-free cigarettes to non-tribal members - which have wrongfully deprived the state of legitimate revenue[.]" *Keweenaw Bay Indian Cmty. v. Rising*, 477 F.3d 881, 892 (6th Cir. 2007) (*Rising I*).

*Rising I* held that Michigan may impose the tax under the TPTA on the Community's sales of tobacco products on its reservation and trust lands to consumers who are not qualified tribal members. Both this Court and the Sixth Circuit upheld the Michigan Department of Treasury's "refund method," which requires the Community to purchase *only* tax-prepaid and stamped tobacco products and then seek a refund for exempt sales to qualified tribal members in their Indian country. Both courts also concluded that Treasury and the Michigan State Police may seize and forfeit untaxed, unstamped tobacco products in transit to the Community. But the Community continues to defy the holdings in *Rising I* by smuggling large amounts of untaxed, unstamped cigarettes into Michigan for resale, as three recent seizures demonstrate.

The Community now seeks to overturn *Rising I* so it may sell contraband tobacco products without the risk of seizure or other sanctions. The official-capacity tobacco claims in Counts IX, X, XI, XII, XIII, XIV, and XVII against Defendants Khouri, Fratzke, Croley, Grano, and Sproull are barred by res judicata because they were or could have been litigated in *Rising I*. In light of *Rising I*, Defendants Khouri, Fratzke, Croley, Grano, and Sproull also have qualified immunity for the individual-capacity tobacco claims in Counts XVI and XVIII under 42 U.S.C. § 1983 and § 1988. The Community has not filed any tobacco claims against Defendant Johnson. Defendants are entitled to judgment on the pleadings in their favor of all the tobacco claims.

## REGULATORY OVERVIEW

Cigarettes are "tobacco products" under the TPTA. *See* Mich. Comp. Laws § 205.422(w). The TPTA levies a tax of $0.10 per cigarette on consumers. *See* Mich. Comp. Laws § 205.427(1) (tax) and § 205.427a (tax is on consumer). Thus, a consumer must pay $20.00 in tax on a ten-package carton containing two hundred cigarettes.

Treasury pre-collects the tax on cigarettes in the stamping process before sale to consumers. *See* Mich. Comp. Laws § 205.427(2), (3), (7). Cigarette packages intended to be sold for consumption in Michigan must have a Treasury-approved stamp (or other mark) affixed to indicate the tax has been paid. *See* Mich. Comp. Laws § 205.422(u) and § 205.426a(2)-(4). The stamp is so critical that the TPTA imposes a mandatory "presumption" that unstamped cigarettes are "kept in violation of this act." Mich. Comp. Laws § 205.426(6).

Treasury maintains lists of manufacturers and brands eligible for stamping. *See* Mich. Comp. Laws § 205.426c(8). The TPTA prohibits stamping unauthorized cigarette brands, which means the tax cannot be prepaid on those brands and they cannot be acquired for resale in Michigan. *See* Mich. Comp. Laws § 205.426a(3) and (11) and § 205.426d. Untaxed, unstamped, and unapproved brands of cigarettes are subject to a range of sanctions, including seizure and forfeiture of the cigarettes and other contraband under Mich. Comp. Laws § 205.429.

## STATEMENT OF FACTS

The tobacco tax claims in this case arise out of three traffic stops and seizures carried out by the Michigan State Police (MSP) under the TPTA, Mich. Comp. Laws § 205.429, outside the Community's reservation and trust lands on lands ceded by treaty to the United States in 1842. (PageID.795, ¶ 14.) All references to the "tobacco tax" or the "tax" in this brief are to the tax levied under the TPTA, Mich. Comp. Laws § 205.427, unless otherwise stated.

**Seizure on December 11, 2015**

In December 2015, the Community purchased 3,360 cartons of Seneca brand cigarettes from HCI Distribution in Nebraska. (PageID.811, ¶ 67.) The Community paid $65,620.80 for the cigarettes. (PageID.811-812, ¶¶ 67-68.) The tax on the 672,000 cigarettes in these 3,360 cartons would have totaled $67,200 before any refunds by Treasury. But the Community does not claim that it prepaid any tax on these cigarettes; that any cigarette packages had a Treasury-approved tax stamp affixed; or that Seneca brand cigarettes were authorized for sale in Michigan.

The Community sent its employees/agents/tribal members John Davis and Gerald Magnant with its pickup truck and utility trailer to Nebraska to transport the cigarettes back to the Community's reservation and trust lands in Michigan. (PageID.812, ¶ 69.) Mr. Davis was driving the truck in Marquette County (with Mr. Magnant as a passenger) on December 11, 2015 when the MSP stopped him for speeding. (PageID.812, ¶ 69.) The stop occurred *outside* the Community's reservation and trust lands. (PageID.813, ¶ 71.)

The MSP seized all 56 cases (3,360 cartons) of cigarettes, the pickup truck, and the utility trailer as contraband under the TPTA, Mich. Comp. Laws § 205.429(1) and (2). (PageID.813, ¶ 73.) Following an administrative hearing, Treasury determined the seizure was lawful under the TPTA and all the seized property was subject to forfeiture. (PageID.814, ¶ 78.) The Community has challenged this seizure and forfeiture in state court. (PageID.814, ¶79.)

The State of Michigan has charged Mr. Magnant and Mr. Davis each with one felony count of violating Mich. Comp. Laws § 205.428(3). (PageID.820, ¶¶ 104, 106.) Treasury also initiated the process to assess the Community for the unpaid taxes on these cigarettes. (PageID.819, ¶ 101.)

**Two Seizures on February 9, 2016**

In January 2016, the Community purchased 184 cases (11,040 cartons) of Seneca brand

cigarettes from Native Wholesale Supply in New York. (PageID.814, ¶ 81.) The Community paid $197,715 for the cigarettes and had XPO Logistics Freight, Inc. (XPO), a commercial carrier, transport them in two 92-case shipments to Michigan. (PageID.815, ¶ 82.) The tobacco tax on these 2,208,000 cigarettes would have amounted to $220,800 before any refunds by Treasury. But the Community does not claim that it prepaid any tax on these cigarettes; that any cigarette packages had a Treasury-approved tax stamp affixed; or that Seneca brand cigarettes were authorized for sale in Michigan.

The MSP stopped both trucks transporting the cigarettes from New York on February 9, 2016. (PageID.815, ¶¶ 84-85.) One traffic stop occurred in Marquette County and the other stop in Iron County. (PageID.815, ¶¶ 84-85.) Both stops occurred *outside* the Community's reservation and trust lands. (PageID.795, ¶ 14; 815, ¶¶ 84-85.) The MSP seized all the cigarettes. (PageID.816, ¶ 86.)

Following a single administrative hearing, Treasury determined that both seizures were lawful under the TPTA and the contraband cigarettes were subject to forfeiture. (PageID.818, ¶ 98.) The Community has challenged these seizures and forfeitures in state court. (PageID.818, ¶ 99.) Treasury has initiated the process to assess the Community for the unpaid tax on these shipments. (PageID.819, ¶ 101.)

**JUDGMENT ON THE PLEADINGS**

"A motion brought pursuant to Rule 12(c) is appropriately granted 'when no material issue of fact exists and the party making the motion is entitled to judgment as a matter of law.'" *Tucker v. Middleburg-Legacy Place*, 539 F.3d 545, 549 (6th Cir. 2008) (quoting *JPMorgan Chase Bank, N.A. v. Winget*, 510 F.3d 577, 582 (6th Cir. 2007)). A court must "construe the complaint in the light most favorable to the nonmoving party, accept the well-pled factual allegations as true, and determine whether the moving party is entitled to judgment as a matter of

law." *Commercial Money Ctr., Inc. v. Illinois Union Ins. Co.*, 508 F.3d 327, 336 (6th Cir. 2007). However, a court "need not accept as true legal conclusions or unwarranted factual inferences." *Mixon v. Ohio*, 193 F.3d 389, 400 (6th Cir. 1999).

The decision on the motion "rests primarily upon the allegations of the complaint," but the court may also consider "matters of public record," "orders," and materials in "the record of the case," among other things. *Barany-Snyder v. Weiner*, 539 F.3d 327, 332 (6th Cir. 2008) (internal citations and quote marks omitted). A "court may take judicial notice of its own record of another case between the same parties." *Harrington v. Vandalia-Butler Bd. of Educ.*, 649 F.2d 434, 441 (6th Cir. 1981); *see, generally, Nixon v. Warner Commc'ns, Inc.*, 435 U.S. 589, 597 (1978) (judicial records are public records); Fed. R. Evid. 201(b) (judicial notice).

## ARGUMENT

### I. Res judicata bars the official-capacity tobacco claims against Defendants Khouri, Fratzke, Croley, Grano, and Sproull.

The Community argues that Michigan's tobacco tax does not apply to its sales on its reservation and trust lands (Indian country) and that untaxed, unstamped tobacco products in transit are not subject to seizure, assessment, or any other criminal or civil sanctions. The Community recites a litany of legal bases for its claims in various combinations: the Supremacy Clause, U.S. Const., art. VI; the *Bracker* balancing test; infringement of tribal self-government and sovereign immunity; the Indian and Interstate Commerce Clauses, U.S. Const., art. I, § 8, cl. 3; and the Treaty of LaPointe, 7 Stat. 591 (Oct. 4, 1842) (1842 Treaty). But *Rising I* litigated or could have litigated each of these claims. Res judicata, thus, bars these official-capacity claims.

#### A. The res judicata doctrine.

Res judicata "provides that a final judgment on the merits of an action precludes the 'parties or their privies from relitigating issues that were or could have been raised' in a prior

action." *Kane v. Magna Mixer Co.*, 71 F.3d 555, 560 (6th Cir. 1995) (quoting *Federated Dep't Stores, Inc. v. Moitie*, 452 U.S. 394, 398 (1981)). Under federal law principles, res judicata requires: "(1) a final decision on the merits by a court of competent jurisdiction; (2) a subsequent action between the same parties or their privies; (3) an issue in the subsequent action which was litigated or which should have been litigated in the prior action; and (4) an identity of the causes of action." *Kane*, 71 F.3d at 560; *see also Mitchell v. Chapman*, 343 F.3d 811, 819 (6th Cir. 2003) (four-factor test in federal question litigation).

**B. Element 1 – *Rising I* resulted in a proper judgment on the merits.**

This Court issued two opinions granting summary judgment to the defendants in *Rising I*, as well as an additional clarifying opinion. (2:03-cv-00111 PageID.870-896, 1146-1152, 6599-6632.) Summary judgment is judgment on the merits for the purpose of res judicata. *See Mayer v. Distel Tool & Mach. Co.*, 556 F.2d 798, 798 (6th Cir. 1977). The district court was a court of competent jurisdiction when it decided *Rising I*. *See* 28 U.S.C. § 1331 and § 1362. Thus, these official-capacity tobacco claims satisfy the first res judicata element.

**C. Element 2 – This action is between the *Rising I* parties or their privies.**

The official-capacity tobacco claims in this case and *Rising I* frame the Community's ongoing dispute with the State. *See Will v. Michigan Dep't of State Police*, 491 U.S. 58, 71 (1989) (official-capacity suit "is no different from a suit against the State itself"). The Community was plaintiff in *Rising I*. Defendants Khouri, Fratzke, Croley, Grano, and Sproull were not parties in *Rising I*, but they are all in privity with Treasurer and members of the MSP the Community sued in their official capacity in that case. (2:03-cv-00111 PageID.1582, ¶¶ 5-7.) *See Pittman v. Michigan Corrs. Org.*, 123 F. App'x 637, 640 (6th Cir. 2005) (quoting *Sunshine Anthracite Coal Co. v. Adkins*, 310 U.S. 381, 402-03 (1940) (officers in same government have privity)).

While the Community did not sue the Attorney General in *Rising I*, there is no question that Defendant Grano is also in privity with the defendants in that case. As *Micklus v. Greer*, 705 F.2d 314, 317 (8th Cir. 1983), explained:

> A plaintiff may not sue a succession of state employees on the same claim solely on the ground that each employee is not 'identical' to previously sued employees. There is added force for this holding here where all defendants were sued in their official capacities for acts expressly alleged to have been committed by the state itself rather than by the employees as individuals.

The Sixth Circuit has applied *Micklus* to conclude that res judicata bars a second suit against state employees on the basis of privity even when different state officials were sued in the first case. *See Jackson v. Pline*, 974 F.2d 1338 (6th Cir. 1992). Thus, the official-capacity tobacco claims in this case satisfy the second res judicata element.

### D. Element 3 – The claims were litigated or could have been litigated in *Rising I*.

"The doctrine of res judicata prohibits not only re-litigation of all claims or issues which were actually litigated, but also those which could have been litigated in a prior action." *Bragg v. Flint Bd. of Educ.*, 570 F.3d 775, 777 (6th Cir. 2009); *see also* 46 Am. Jur. 2d Judgments § 475 (res judicata bars re-litigation of issues that could have, should have, or might have been previously litigated). A court does not have to "specifically address" each claim in a first action for res judicata to apply in a subsequent case. *Pittman*, 123 F. App'x at 640.

#### 1. Count IX – The *Bracker* balancing test.

In Count IX, the Community claims that the "*Bracker* Balancing Test" preempts the tax under the TPTA "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" in this case. (PageID.837, ¶ 148.) *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 144-45 (1980), explained that when state jurisdiction is not categorically barred, precedent calls "for a particularized inquiry into the nature of the state, federal, and tribal

interests at stake, an inquiry designed to determine whether, in the specific context, the exercise of state authority would violate federal law." That "particularized inquiry" is the *Bracker* test. (PageID.799, ¶ 26.)

The Community invoked the *Bracker* test in *Rising I* by alleging that federal and tribal interests in tribal sovereignty and self-government "outweighed" Michigan's interest in imposing the tax and enforcing the TPTA for the Community's sales. (2:03-cv-00111 PageID.15-16 (Count III), 88-89 (Count IV), 873.) Due to the balance of interests, the Community claimed it could not be liable for failing to cooperate with the payment, collection, or remittance of the tax, or subject to seizures under the TPTA. (2:03-cv-00111 PageID.89, ¶¶ 56-57.)

This Court examined a series of Supreme Court cases recognizing that tribes have little interest in marketing their tax exemptions to non-Indians purchasing tobacco in Indian country, while states have a strong interest in taxing those transactions. (2:03-cv-00111 PageID.876.) This Court expressly recognized that the Community could not prevail under *Bracker* because the balance of interests favors states, which is why it then proceeded to consider whether federal law categorically barred the tobacco tax. (2:03-cv-00111 PageID.877-886.) This Court granted partial summary judgment to the *Rising I* defendants because the legal incidence of the tax "rests on the end consumer of the tobacco products and that appropriate accommodations are made for qualified tribal members to purchase cigarettes within their own Indian country without paying the Michigan tax." (2:03-cv-00111 PageID.886.)

To avoid a complete and immediate loss, the Community altered its *Bracker* claim in *Rising I* to allege that Treasury's refund method was invalid because it imposed more than minimal burdens. (2:03-cv-00111 PageID.1600-1601 (Count IV).) The parties filed cross-motions for summary judgment arguing the governmental interests at issue in allowing the

Community to market its tax exemption and in requiring it to purchase tax-paid tobacco products and then seek refunds for sales in Indian country to qualified members. (2:03-cv-00111 PageID.2170-2180, 2736-2743, 4007-4010.)

This Court applied *Bracker* in *Rising I* and noted the competing tribal and state interests, but held that Michigan's interests in imposing the tax clearly outweighed the Community's interests in marketing its exemption. (2:03-cv-00111 PageID.6608-6611.) This Court also concluded that Treasury's refund method did not impose more than minimal burdens and was necessary to prevent fraud and tax avoidance. (2:03-cv-00111 PageID.6611-6618.) Accordingly, the defendants won summary judgment on these claims. On appeal, the Sixth Circuit affirmed this Court's holding that Michigan may impose the tax and use the refund method. *Rising I*, 477 F.3d at 886-92. The *Bracker* claim was actually litigated in *Rising I*.

**2. Count X – Tribal self-government or sovereign immunity.**

In Count X, the Community claims that the tobacco tax infringes on its sovereign immunity and right to self-government, both for its tobacco sales in Indian country and in connection with the seizures and forfeitures used to enforce the TPTA. (PageID.839, ¶ 151.) The Community repeatedly claimed in *Rising I* that the tobacco tax, the refund method, and seizures and forfeitures infringed on its rights to self-government and sovereignty or sovereign immunity. (2:03-cv-00111 PageID.13-15, 18-19 (Counts I-III, VI), 83, 86-87, 89-90, 94-95 (Counts I, II, V, IX), 1596, 1599, 1606, 1608 (Counts I, III, VI, VIII).)

Whether a state tax and its enforcement improperly infringe on tribal self-government and sovereignty is the "backdrop" of every Indian tax case. *See McClanahan v. State Tax Comm'n of Arizona*, 411 U.S. 164, 172 (1973) (sovereignty does not resolve tax issues, but "provides a backdrop against which the applicable treaties and federal statutes must be read"). Courts analyze the legal incidence of a tax, the balance of interests in imposing the tax, and

whether certain procedures impose impermissible burdens to decide whether state actions improperly infringe on tribal sovereignty and self-governance. *See, generally*, *Oklahoma Tax Comm'n v. Sac & Fox Nation*, 508 U.S. 114, 124 (1993) (legal incidence); *Moe v. Confederated Salish & Kootenai Tribes of Flathead Reservation*, 425 U.S. 463, 483 (1976) (minimal burdens); *Bracker*, 448 U.S. at 142-145 (balancing test). The *Rising I* defendants won each of these claims, which confirms that imposing the tobacco tax and enforcing it through the refund method and other sanctions *does not* improperly infringe on tribal sovereign immunity or the right to self-government. This claim has been litigated.

**3. Count XI – The Indian Commerce Clause.**

In Count XI, the Community claims that the Indian Commerce Clause preempts the tobacco tax on sales by the Community in its Indian country and bars seizures and forfeitures in connection with those sales. (PageID.840, ¶ 154.) The Community brought this same claim in *Rising I*, contending that imposing the tobacco tax and enforcing the TPTA's other requirements for sales in Indian country violated the 1842 Treaty and the Indian Commerce Clause. (2:03-cv-00111 PageID.90-91 (Count VI), 737, 874.) The Community also sought an injunction in *Rising I* because it claimed that the manner in which the defendants enforced the TPTA violated the Indian Commerce Clause, as well as other federal laws. (2:03-cv-00111 PageID.18-19 (Count VI), 90-91 (Count VI), 1608-1609 (Count X).)

*Rising I* rejected this claim by holding that Treasury may impose and enforce the tobacco tax under the refund method and that it may seize and forfeit untaxed/unstamped tobacco shipments in transit to the Community. (2:03-cv-00111 PageID.886-888, 6609, 6615, 6617-6618.) When analyzing the claims concerning the 1842 Treaty, this Court also concluded that "the TPTA does not conflict with federal laws governing Indian trade" and that "federal law permits the states to impose their tobacco taxes on cigarettes sales to nonmembers of the Tribe."

(2:03-cv-00111 PageID.6620.) The Sixth Circuit reached the same conclusions and affirmed. *Rising I*, 477 F.3d at 892. This claim has been litigated.

**4. Count XII – Interstate Commerce Clause.**

In Count XII, the Community claims that the Interstate Commerce Clause preempts the TPTA because it "purports to treat unstamped cigarettes and related property as contraband before the cigarettes have come to rest in Michigan" and because the TPTA "purports to require a transporter to be licensed even in circumstances when the cigarettes may never come to rest or be sold in Michigan." (PageID.841-842, ¶ 157.) The Community also alleges that the TPTA does not require interstate commercial carriers like XPO to obtain a transporter's license. (PageID.810, ¶ 61; 815, ¶ 82; 817, ¶ 97.) *See* Mich. Comp. Laws § 205.422(y) and § 205.423(1). In short, the Community claims that its untaxed and unstamped cigarettes are not contraband and cannot be seized and forfeited while in transit because: (1) they are not yet subject to the tobacco tax; and (2) the TPTA allows interstate commercial carriers to transport untaxed and unstamped cigarettes because they may pass through Michigan and never become subject to the TPTA.

The Community claimed in *Rising I* that untaxed, unstamped tobacco products in transit to its Indian country are not contraband subject to seizure and forfeiture under the TPTA. (2:03-cv-00111 PageID.92, ¶¶ 67-69 (Count VII), 95, ¶¶ 82-84 (Count X), 1603-1604, ¶¶ 67-69 (Count VI), 1607-1608, ¶¶ 82-84 (Count X).) The Community also claimed that parties that do not need a transporter's license under the TPTA may transport untaxed, unstamped cigarettes lawfully without a license, citing the same TPTA provisions cited in this case. (2:03-cv-00111 PageID.72, ¶ 14, 74, ¶ 19, 1585, ¶ 14, 1586-1587, ¶ 19.)

*Rising I* held that the Community's untaxed, unstamped tobacco products were contraband subject to seizure while in transit because they were being acquired by the Community for resale in Michigan without an unclassified acquirer's license. (2:03-cv-00111

PageID.6621, 6628-6632.) *See* Mich. Comp. Laws § 205.422(z) (unclassified acquirer) and § 205.423(1) (license). This Court quoted *Washington v. Confederated Tribes of the Colville Indian Reservation*, 447 U.S. 134, 161-62 (1980), which concluded that even when "'*cigarettes in transit are as yet exempt from state taxation, they are not immune from seizure* when the Tribes, as here, have refused to fulfill collection and remittance obligations which the State has validly imposed.'" (2:03-cv-00111 PageID.6630 (emphasis added).) This Court also observed that in *Oklahoma Tax Comm'n v. Citizen Band Potawatomi Indian Tribe of Okla.*, 498 U.S. 505, 514 (1991), the Supreme Court continued to "endorse" seizing contraband tobacco outside of Indian country as a valid method to enforce state tobacco tax laws. (2:03-cv-00111 PageID.6630-6631.) The Sixth Circuit affirmed and held that, "contrary to the Community's argument, the Supreme Court has clearly endorsed state seizures as a remedy where sovereign immunity prevents in-court remedies." *Rising I*, 477 F.3d at 895. This transit claim was litigated.

Regardless of whether the Community intended for its transit claim in *Rising I* to be based specifically on the Interstate Commerce Clause, it clearly could have been and should have been litigated in that case because the Community sought to protect its deliveries by *all* shippers, including interstate commercial carriers. After all, the dispute in *Rising I* arose because the MSP had seized shipments of the Community's contraband tobacco products from private trucks and commercial carriers like UPS and Yellow Freight. (2:03-cv-00111 PageID.2163.) The Community only switched to shipping its contraband cigarettes by United States mail because of those earlier seizures. (2:03-cv-00111 PageID.528-531, 6602.)

Due to this history of seizures from third-party commercial carriers, the Community expressly sought a declaration in *Rising I* that "seizing unstamped cigarettes en route to the

Community (via U.S. mail *or otherwise*)" was lawful. (2:03-cv-00111 PageID.14, ¶ 53 (emphasis added).) It also alleged that Treasury and MSP had been "disrupting deliveries of unstamped cigarettes to the Community" separately from its allegations concerning seizures from the United States mail. (2:03-cv-00111 PageID.1608, ¶ 83.) The Community repeatedly sought a declaration that it is exempt from liability for the "transportation of tobacco products[.]" (2:03-cv-00111 PageID.83-91, 97 (Counts I-VI, XI), 1597-1603, 1609 (Counts I-V, X).) Further, the Community asked this Court to issue an injunction preventing "any further seizures of tobacco products for such sales from the Community, any seller to the Community, *any transporter transporting cigarettes or tobacco products to the Community*, or the United States Postal Service." (2:03-cv-00111 PageID.1609, ¶ 85(b) (emphasis added).)

*Rising I* actually litigated whether tobacco products in transit to the Community's Indian country are immune from seizure under both of the Community's theories, and that case could have litigated the Interstate Commerce Clause theory more specifically. To paraphrase the Sixth Circuit, res judicata does not permit the Community to use a new theory to revive this old contraband-in-transit claim from *Rising I*. *See Thomas v. Miller*, 329 F. App'x 623, 627 (6th Cir. 2009) (quoting *Roach v. Teamsters Local Union No. 688*, 595 F.2d 446 (8th Cir.1979)).

**5. Count XIII – The 1842 Treaty Ceded Area.**

In Count XIII, the Community argues that Article II of the 1842 Treaty requires the land ceded to the United States (the Ceded Area) to "be treated as if it is Indian country." (PageID.843, ¶ 162.) The Community contends that "the treaty provision creates rights that cannot be burdened with a state tax or with seizures of the Community's property." (PageID.843, ¶ 160.) In plain terms, the Community claims immunity from state law throughout the western Upper Peninsula and northern Wisconsin.

The Community made the same claims in *Rising I*, including the allegation that the

Ceded Area should be treated "as if it" were Indian country. (2:03-cv-00111 PageID.15-16 (Count III), 90-91 (Count VI), 1602-03 (Count V).) This Court rejected the 1842 Treaty claims, concluding that: the Community's sovereignty did not extend to the Ceded Area; the 1842 Treaty did not require federal law to apply exclusively in the Ceded Area; and the TPTA as administered and enforced by Treasury is consistent with federal law. (2:03-cv-00111 PageID.894-896, 1149-52, 6618-6620.) The Sixth Circuit affirmed. *Rising I*, 477 F.3d at 893. This claim was litigated.

**6. Count XIV – Seizure.**

In Count XIV, the Community alleges that seizures under the TPTA violate its sovereign immunity, which it claims includes "the right to sovereign immunity from uncontested suit, seizures of property, or other judicial process." (PageID.845, ¶ 165.) The Community brought the identical claim in *Rising I*. (2:03-cv-00111 PageID.94-95 (Count IX), 1606 (Count VIII).) This Court concluded that state officials may seize untaxed, unstamped tobacco products outside of Indian country and the seizures are not barred by sovereign immunity. (2:03-cv-00111 PageID.6629-6631.) The Sixth Circuit affirmed, stressing that sovereign immunity is immunity from suit, not seizure. *Rising I*, 477 F.3d at 894-95. This claim was litigated.

The Community also asserts that the Sixth Circuit in *Rising I* incorrectly applied *Colville* and *Citizen Band* to hold that sovereign immunity does not bar seizures and forfeitures. (PageID.845, ¶ 167.) Defendants strongly disagree. But even if the Sixth Circuit misapplied *Colville* and *Citizen Band*, its decision in *Rising I* remains binding on the parties and their privies. As the Supreme Court has explained, "the res judicata consequences of a final, unappealed judgment on the merits" are not "altered by the fact that the judgment may have been wrong or rested on a legal principle subsequently overruled in another case." *Federated*, 452 U.S. at 398. The Community's only option to advance this argument concerning *Rising I* was a

direct appeal to the Supreme Court. *See id.* (quoting *Baltimore S.S. Co. v. Phillips*, 274 U.S. 316, 325 (1927)) ("A judgment merely voidable because based upon an erroneous view of the law is not open to collateral attack, but can be corrected only by a direct review and not by bringing another action upon the same cause [of action]."") (alteration in *Federated*). But the Community did not seek further appellate review after the Sixth Circuit's decision on rehearing *en banc*, so the *Rising I* decision remains good law.

**7. Count XVII – Injunctive relief.**

In Count XVII, the Community seeks in relevant part injunctive relief to bar Defendants and their successors from enforcing the tobacco tax. Count XVII merely articulates the legal theories alleged in other counts.

This Court did not issue a preliminary injunction in *Rising I* and rejected the Community's claim for a permanent injunction because it had not prevailed on the merits of *any* claim. (2:03-cv-00111 PageID.6631.) *See Am. Civil Liberties Union of Ky. v. McCreary County, Kentucky*, 607 F.3d 439, 445 (6th Cir. 2010) (preliminary injunction requires likelihood of success on merits and permanent injunction requires actual success on merits). Defendants are entitled to the same result in this case. The substance of *Rising I* indicates that the Community is not likely to succeed on the merits of legal claims it previously lost. Likewise, the fact that these claims were litigated in *Rising I* means that the Community cannot actually prevail on them in this case because they are barred by res judicata.

**8. The new factual allegations do not raise claims that avoid res judicata.**

The third amended complaint added Defendants Grano and Sproull and alleged three additional sets of facts: (1) the State has charged Mr. Magnant and Mr. Davis for committing a felony under Mich. Comp. Laws § 205.428(3); (2) the MSP had investigated the Community/or engaged in surveillance on the L'Anse Indian Reservation; and (3) Treasury had initiated the

process to assess the Community for the unpaid tax (and penalty) in Mich. Comp. Laws § 205.428(1), for the cigarettes seized in these three traffic stops.[1] (PageID.819-821, ¶¶ 101-106.) These allegations, however, do not raise claims or legal theories distinct from the official-capacity tobacco claims in Counts IX, X, XI, XII, XIII, XIV, and XVII. Thus, the foregoing analysis demonstrates that these claims were actually or could have been litigated in *Rising I*.

Even if the court were to look at these allegations on their own – as if they could be separated from the legal claims the Community pleaded in this case – each was actually litigated or could have been litigated in *Rising I*. For instance, in *Rising I*, the Community asked this Court no less than five times to prohibit both civil and *criminal liability* for any aspect of its enterprise, including "any purchase, acquisition, possession or transport of tobacco products by the Community" for its sales. (2:03-cv-00111 PageID.1597, ¶ 44(b); 1598, ¶ 48(b); 1599-1600, ¶ 52(b); 1601, ¶ 56(b); 1603, ¶ 60(b).) That reference to the purchase, acquisition, possession, and transportation of tobacco products comes directly from Mich. Comp. Laws § 205.428(3) and (4), which makes those activities a crime when they occur in a manner contrary to the TPTA. In *Rising I*, the Community recognized the likelihood that tribal employees transporting untaxed, unstamped cigarettes outside the Community's Indian country without a license under the TPTA would be caught and charged with violating Mich. Comp. Laws § 205.428(3) or (4). Virtually identical language now appears in the third amended complaint in this case asking the court to recognize immunity from criminal liability. (PageID.838, ¶ 149(b) (Count IX); 839, ¶ 152(b) (Count X); 841, ¶ 155(b) (Count XI); 844, ¶ 163(c) (Count XIII); 851, ¶ 188(c) (Count XVII).)

[1] The Community claims the assessments violate state law, but does not raise state law claims. (PageID.819, ¶ 101). Sovereign immunity would bar any state law claims in federal court against Defendants in their official capacity. *See Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 106 (1984).

The Community also sought immunity from MSP investigations in *Rising I* because members of the MSP had engaged in an investigation that extended into Indian country, including controlled purchases of untaxed, unstamped contraband tobacco products at businesses the Community owned on its reservation and trust lands. (2:03-cv-00111 PageID.229, ¶ 5; 273, ¶ 6.) Much of the case focused on the search warrants that were issued as a result of the investigation. (2:03-cv-00111 PageID.1604-1606.) But the Community also asserted that the defendants had taken "various actions against the Community" that led up to the seizures, which encompassed the wider investigation. (2:03-cv-00111 PageID.1608, ¶ 83.) As a result, the Community broadly asked the court to declare that "any attempt to enforce" the TPTA against the Community violated federal law and to enjoin that enforcement. (2:03-cv-00111 PageID.1597, ¶ 44(a); 1598, ¶ 48(a); 1599-1600, ¶ 52(a); 1601, ¶ 56(a); 1603, ¶ 60(a); 1608, ¶¶ 82-83; 1609, ¶ 85(a).) The third amended complaint in this case includes the same requests for declarations and an injunction preventing Defendants and their successors from enforcing the TPTA. (PageID.837-838, ¶ 149(a) (Count IX); 839, ¶ 152(a) (Count X); 840, ¶ 155(a) (Count XI); 844, ¶ 163(a) (Count XIII); 851, ¶ 188(c) (Count XVII).) The Community leaves no doubt that when it requests relief from TPTA enforcement, it seeks an injunction that bars "*conducting surveillance or investigations* on the Community's Reservation and filing or pursuing criminal prosecutions against Community members or employees . . . ." (PageID.851, ¶ 188(c).)

Finally, *Rising I* also expressly challenged Treasury's right to "assess or collect the Michigan tobacco products tax" and asked for an injunction that would bar Treasury from assessing the tax and penalty prescribed in Mich. Comp. Laws § 205.428(1) when it sought relief from civil liability. (2:03-cv-00111 PageID.1597, ¶ 45; 1598, ¶¶ 48(b), 49; 1599, ¶ 52(b); 1600, ¶ 53; 1601, ¶¶ 56(b), 57; 1603, ¶¶ 60(b), 61; 1609, ¶ 85.) Once again in this case, the

Community asks the court to declare that it has no civil liability, including liability for its failure to pay or remit the tobacco tax or to comply with any aspect of the TPTA. (PageID.838, ¶ 149(b) (Count IX); 839, ¶ 152(b) (Count X); 841, ¶ 155(b) (Count XI); 844, ¶ 163(c) (Count XIII); 851, ¶ 188(c) (Count XVII).)

*Rising I* flatly rejected the merits of the Community's claims that any of the federal Indian law principles it cited made the manner in which Michigan enforces the TPTA unlawful. (2:03-cv-00111 PageID.6631, 6633.) Having failed to prevail, the courts denied the Community all the relief it requested in *Rising I*, including its extremely broad requests for immunity from all civil liability, all criminal liability, and all other actions that Michigan might take to enforce the TPTA. *Rising I* put the Community on notice that if it continued to willfully acquire untaxed, unstamped cigarettes for resale to individuals liable for the tax under the TPTA, Michigan could pursue both civil and criminal liability for the Community and the individuals engaged in its scheme. The new allegations in the third amended complaint simply ask this Court to protect the Community and its employees from the fully predictable consequences of this ongoing refusal to cooperate with Treasury's refund method. But those claims concerning immunity from TPTA enforcement were actually litigated in *Rising I*.

**E. Element 4 – There is an identity of the causes of action with *Rising I*.**

For res judicata to apply, "there must be an identity of the causes of action that is, an identity of the facts creating the right of action and of the evidence necessary to sustain each action." *Westwood Chem. Co. v. Kulick*, 656 F.2d 1224, 1227 (6th Cir. 1981); *see also* 46 Am. Jur. 2d Judgments § 482 ("If the same facts or evidence would sustain both [suits], the two actions are considered to be on the same cause of action . . . ."). The Community attempts to distinguish six of the seven official-capacity tobacco claims from the cause of action in *Rising I* by claiming that the alleged violations of law occurred "[u]nder the factual circumstances of this

case." (PageID.837, ¶¶ 148 and 149(a) (Count IX); 839, ¶¶ 151 and 152(a) (Count X); 840, ¶¶ 154 and 155(a) (Count XI); 843, ¶¶ 161 and 844, 163(a) (Count XIII); 845, ¶ 167 (Count XIV); 851, ¶ 188(c).) The Community only omits this factual qualification for the Interstate Commerce Clause Count (Count XII). But the Community fails to allege what relevant and material fact could possibly distinguish this cause of action from the cause of action in *Rising I*.

The official-capacity tobacco claims all present questions of law concerning whether the State of Michigan is entitled to administer and enforce the TPTA against the Community. This is the same tobacco tax and enforcement scheme upheld in *Rising I*. The Community does not contend that Treasury's refund method has changed, nor that it has entered into a tax agreement with Treasury or obtained any TPTA license that made it lawful to traffic untaxed, unstamped cigarettes in Michigan. There is no reason why this Court would revisit any of these legal issues. Even if these claims were not res judicata, the legal conclusions in *Rising I* would be enforceable in this case as a matter of *stare decisis* and require dismissing the tobacco claims.

Moreover, to decide whether the seizures and other sanctions in this case were lawful under the legal principles articulated in *Rising I*, a court needs only two facts: (1) whether the tobacco products were contraband, and (2) whether the seizures occurred outside of Indian country. *See Colville*, 447 U.S. at 161-62. The MSP seized the tobacco products in *Rising I* because they were untaxed and unstamped and the Community did not have an unclassified acquirer's license that would have allowed it to acquire the tobacco products lawfully for resale. (2:03-cv-00111 PageID.6627-6629, 6631.) The seizures in *Rising I* occurred outside of the Community's reservation and trust lands. (2:03-cv-00111 PageID.894-896, 1149-1152, 6618-6620.) Thus, this Court concluded that it "was sufficient that the cigarettes were contraband under state law and that they were seized off reservation." (2:03-cv-00111 PageID.6631.)

This case presents exactly the same factual scenario involving contraband seized outside of Indian country as in *Rising I* and the material facts concerning these three seizures are undisputed. The Community does not plead a single fact suggesting it purchased tax-paid, stamped cigarettes or that it had the proper license to acquire untaxed, unstamped cigarettes for lawful resale in Michigan. The only reason the Community would go to the expense and effort of buying cigarettes from out-of-state sellers is to purchase *untaxed* cigarettes to sell at a $20-per-carton "discount" by refusing to collect the Michigan tobacco tax from the consumers who are liable for the tax. The 2.88 million cigarettes seized (and the vehicle containing the first cigarette shipment) were contraband under the TPTA, making them subject to seizure and forfeiture under Mich. Comp. Laws § 205.429. As in *Rising I*, there is no dispute that the seizures in this case occurred in the Ceded Area, outside the Community's reservation or trust lands. The other civil and criminal sanctions Michigan is pursuing stem specifically from that contraband found and seized *outside* of Indian country. There is no variation in facts here that allows the Community to challenge the legal principles established in *Rising I*. The identity of these causes of action is the same, meeting the last res judicata element.

**F. Res judicata bars the Community from bringing these claims.**

*Rising I* was never intended to be limited to the facts of the specific seizures in that case. The Community filed *Rising I* to establish the rules of play between the Community and Treasury in *all* future cases. That is why the Community sought broad declaratory and injunctive relief in *Rising I* that would apply to all of its efforts to sell untaxed, unstamped tobacco products and would also apply to the defendants' successors. The courts established binding rules of play in *Rising I*, properly choosing to adopt Treasury's rulebook because it complies with federal law.

Res judicata does not permit the Community to re-litigate the same legal claims to achieve a different and better outcome for seizures presenting the same essential facts. See

*Astoria Fed. Sav. & Loan Ass'n v. Solimino*, 501 U.S. 104, 107 (1991) (a "losing litigant deserves no rematch after a defeat fairly suffered"). To the contrary, courts apply res judicata "to promote the finality of judgments and thereby increase certainty, discourage multiple litigation, and conserve judicial resources." *Westwood*, 656 F.2d at 1227. To allow the Community to re-litigate its official-capacity tobacco claims would deny state officials and employees the benefits of having prevailed on the claims in *Rising I*, unsettle binding precedent while this case proceeds through the courts, and impose unnecessary effort and expense in litigating the case. Defendants Khouri, Fratzke, Croley, Grano, and Sproull are entitled to judgment on the pleadings of these claims because they are barred by res judicata.

## II. Qualified immunity bars the individual-capacity tobacco claims against Defendants Khouri, Fratzke, Croley, Grano, and Sproull.

The Community alleges in Count XVI that Defendants Khouri, Fratzke, Croley, Grano, and Sproull are liable under 42 U.S.C. § 1983 for "planning, authorizing, and conducting" the three seizures and related criminal prosecutions under the TPTA. (PageID.848, ¶ 179.) The Community also claims in Count XVIII that these Defendants are liable for costs and attorney fees under 42 U.S.C. § 1988. (PageID.852, ¶ 191.) But they are entitled to qualified immunity based on *Rising I* and must be granted judgment on the pleadings for these counts.

### A. The qualified immunity doctrine.

Qualified immunity is not a defense, but "an entitlement not to stand trial or face the other burdens of litigation." *Mitchell v. Forsyth*, 472 U.S. 511, 526 (1985). The qualified immunity doctrine provides that "government officials performing discretionary functions generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982). "Qualified immunity balances two

important interests – the need to hold public officials accountable when they exercise power irresponsibly and the need to shield officials from harassment, distraction, and liability when they perform their duties reasonably." *Pearson v. Callahan*, 555 U.S. 223, 231 (2009). The doctrine requires examining (1) whether the "facts alleged" demonstrate that the defendants violated the plaintiff's constitutional rights; and (2) whether that right was "clearly established." *See Saucier v. Katz*, 533 U.S. 194, 201 (2001).

### B. *Rising I* clearly established that seizing contraband outside of Indian country does *not* violate the Community's rights.

Qualified immunity is a shield from personal liability when government actors "reasonably" believe that their conduct "complies with the law." *Pearson*, 555 U.S. at 245. The Community states three theories in Count XVI for why Defendants Khouri, Fratzke, Croley, Grano, and Sproull can be held liable for enforcing the TPTA. But each of these Defendants have qualified immunity under all three of these theories based on *Rising I*.

First, the Community claims that, "under the factual circumstances of this case," the seizures deprived it of its rights under the 1842 Treaty, Indian Commerce Clause, and "other federal" law to "purchase, acquire, possess, and transport tobacco products for or in connection with such sales, free of state taxation and regulation." (PageID.849, ¶ 170(a).) However, *Rising I* concluded that the manner in which Michigan applies and enforces the TPTA with respect to the Community does not violate its rights under the 1842 Treaty or the Indian Commerce Clause. *See Rising I*, 477 F.3d at 886-893. The Community does not allege what factual circumstances distinguish this case from *Rising I*. *Rising I* is directly applicable here because it involves the same tax, the same refund method, and contraband seizures under the TPTA at locations outside the Community's Indian country.

Second the Community asserts that the 1842 Treaty entitles it to be "free of seizures

within the Ceded Area." (PageID.849, ¶ 170(b).) Again, *Rising I*, 477 F.3d at 894-895, concluded that seizing contraband under the TPTA at locations outside of the Community's reservation and trust lands inside the Ceded Area is lawful. The Community does *not* allege that there are any factual circumstances that distinguish this case from *Rising I* with respect to whether the 1842 Treaty guarantees a right to be free from seizures in the Ceded Area.

Third, the Community alleges that the Interstate Commerce Clause permits it to "possess and transport cigarettes in interstate commerce free of state taxation and regulation[.]" In *Rising I*, 477 F.3d at 885, just as in this case, Seneca brand cigarettes were being shipped from New York to Michigan when they were seized, and yet the courts still concluded that they were subject to seizure. *Rising I* did *not* recognize a clearly established right under the Interstate Commerce Clause to purchase untaxed/unstamped tobacco products or to transport that contraband without risk of seizure. Nor did *Rising I* hold that other contraband described in the TPTA, Mich. Comp. Laws, § 205.429(1) and (2), is immune from seizure.

Instead, *Rising I* approved of taking action to seize contraband outside of the Community's reservation and trust lands "as a remedy where sovereign immunity prevents in-court remedies." *Rising I*, 477 F.3d at 895 (discussing *Citizen Band*, 498 U.S. at 514). The Community's sovereign immunity from suit poses a challenge for collecting the tobacco tax under the TPTA regardless of whether its contraband tobacco products are moving in interstate commerce. *Rising I* did not put Defendants on notice that contraband tobacco products should be treated differently based on whether they are in interstate commerce.

*Rising I* is the definitive case concerning whether the Michigan tobacco tax applies to the Community and whether Treasury and MSP can seize and forfeit contraband under the TPTA. Though the Community shoehorns a reference to the criminal prosecutions into Count XVI, the

legal theories it pleads relate solely to the seizures. Whatever new federal right that the Community seeks to establish in this case for its ongoing smuggling scheme, whether under the Interstate Commerce Clause or "other federal law" the Community never cites, that right was not "clearly established" prior to the seizures at issue in this case. Therefore, Defendants Khouri, Fratzke, Croley, Grano, and Sproull have qualified immunity for this claim under § 1983 and are entitled to judgment on the pleadings.

### C. Defendants Khouri, Fratzke, Croley, Grano, and Sproull are not liable for costs and attorney fees under 42 U.S.C. § 1988.

Costs, including a "reasonable attorney's fee," *may* be awarded to the "prevailing party" in an action brought under 42 U.S.C. § 1983. 42 U.S.C. § 1988(b). To be a prevailing party, the Community would have to win on a significant issue that alters its relationship with Treasury and MSP. *See Farrar v. Hobby*, 506 U.S. 103, 109-12 (1992). Because Defendants Khouri, Fratzke, Croley, Grano, and Sproull have qualified immunity from the claim under § 1983, the Community cannot be a prevailing party within the meaning of § 1988(b). *Id*. at 109 (not a prevailing party where defendants have immunity). They are entitled to judgment on the pleadings to the extent that Count XVIII seeks costs and attorney fees in connection with any of the individual-capacity tobacco claims.

## CONCLUSION AND RELIEF REQUESTED

*Rising I* fully resolved that Michigan lawfully applies and enforces the tobacco tax for the Community's tobacco sales inside its own Indian country. Defendants dispute much of the factual assertions and legal arguments in the third amended complaint and have other substantial defenses. But even the Community's version of events make clear that it has defied the federal courts' decisions in *Rising I* to continue its repeated, brazen, and willful attempts to deprive Michigan of lawful tax revenue. Res judicata and qualified immunity bar these tobacco claims.

Defendants respectfully ask this Court to grant judgment on the pleadings in their favor of all tobacco claims in this case.

To obtain complete relief, Defendants ask that this Court affirmatively declare that:

(1) the Community must purchase only tax-paid tobacco products bearing a stamp or other mark approved by Treasury under the TPTA and then may seek a refund of the state tobacco tax for sales on its reservation or trust lands to its qualified members;

(2) the Community is not entitled to purchase, acquire, possess, or transport untaxed tobacco products in and through Michigan for resale on the Community's reservation and trust lands, in the area ceded to the United States in the 1842 Treaty, or elsewhere in Michigan; and

(3) Defendants, their successors, and their privies may seize contraband and otherwise enforce the TPTA in connection with the Community's contraband found at locations outside of its reservation and trust lands, including in the area ceded to the United States in the 1842 Treaty.

Defendants also ask this Court to exercise continuing jurisdiction over the judgment in their favor on the tobacco claims so that they may obtain further relief if necessary. Continuing jurisdiction is just and equitable in light of the Community's continuing misconduct and the manner in which tribal sovereign immunity complicates Michigan's efforts to enforce the TPTA against the Community in court.

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