UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

MILLE LACS BAND OF OJIBWE, a federally recognized Indian tribe; SARA RICE, in her official capacity as the Mille Lacs Band Chief of Police; and DERRICK NAUMANN, in his official capacity as Sergeant of the Mille Lacs Band Police Department,

Plaintiffs,

v.

COUNTY OF MILLE LACS, MINNESOTA; JOSEPH WALSH, individually and in his official capacity as County Attorney for Mille Lacs County; BRENT LINDGREN, individually and in his official capacity as Sheriff of Mille Lacs County,

Defendants.

and

COUNTY OF MILLE LACS, MINNESOTA,

Counterclaim Plaintiff,

v.

MILLE LACS BAND OF OJIBWE, a federally recognized Indian tribe; SARA RICE, individually and in her in official capacity as the Mille Lacs Band Chief of Police; DERRICK

Case No. 17-cv-05155-SRN-LIB

MEMORANDUM OF LAW IN SUPPORT OF MOTION TO DISMISS OR STRIKE COUNTERCLAIM UNDER RULES 12(b)(1), 12(b)(6) AND 12(f)

NAUMANN, individually and in his official capacity as Sergeant of the Mille Lacs Band Police Department; and MELANIE BENJAMIN, CAROLYN SHAW-BEAULIEU, SANDRA BLAKE, DAVID AUBID, and HARRY DAVIS, individually and in their official capacities as the elected officials of the Mille Lacs Band Assembly,

Counterclaim Defendants.

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I. INTRODUCTION.

Counterclaim Defendants, the Mille Lacs Band of Ojibwe ("Band") et al., submit this memorandum in support of their motion to dismiss or strike the counterclaim filed by Mille Lacs County ("County"). The counterclaim should be dismissed because the County lacks standing and has failed to allege a cognizable legal theory on which relief can be granted, and it should be stricken because it is redundant of the claims and defenses presented in the Band's complaint and the County's answer and affirmative defenses. This memorandum: (1) summarizes plaintiffs' complaint, the County's answer, affirmative defenses and counterclaim, and the motion to dismiss or strike; (2) discusses the standard of review for the motion; and (3) presents argument in support of the motion.

II. SUMMARY OF THE PLEADINGS.

A. Plaintiffs' Complaint.

The Plaintiffs in this case are the Band, the Band's Chief of Police, Sara Rice, and a Band Police Sergeant, Derrick Naumann, who bring suit in their official capacities. Complaint at 1 (ECF 001). The Defendants are the County, County Attorney Joseph Walsh and County Sheriff Brent Lindgren, who are sued in their official and individual capacities. *Id*. at 2.

Plaintiffs' complaint alleges that the Mille Lacs Indian Reservation ("Reservation") was established in an 1855 treaty and comprises approximately 61,000 acres of land, including trust and non-trust lands. *Id.* at 2. "Trust lands" are lands owned by United States in trust for the Band, the Minnesota Chippewa Tribe or individual Indians. *Id.* There

are approximately 3,572 acres of trust lands within the Reservation. *Id.* In addition, the Band and its members own approximately 6,100 acres within the Reservation in fee simple. *Id.*

The complaint alleges that the boundaries of the Reservation have not been disestablished or diminished, and that all lands within the Reservation, including trust and non-trust lands, are Indian country within the meaning of 18 U.S.C. § 1151. *Id*. at 2-3. The complaint further alleges that, as a matter of federal common law, the Band possesses inherent sovereign authority to establish a police force and to authorize Band police officers to investigate violations of federal, state and tribal law within the Reservation, and to apprehend suspects and turn them over to jurisdictions with criminal prosecutorial authority. *Id*. at 4.[1] In addition, the complaint alleges that the United States Bureau of Indian Affairs ("BIA") has entered into a Deputation Agreement with the Band that authorizes Band police officers to investigate violations of federal law throughout the Reservation and to arrest suspects as federal law enforcement officers. *Id.* at 4-5.

The complaint makes specific allegations that the County Attorney and County Sheriff, acting on behalf of the County, have made threats and taken other actions that have deterred Band police officers from exercising the Band's inherent sovereign and federally delegated law enforcement authority on non-trust lands and with respect to non-Band members within the Reservation. *Id.* at 5-6. For example, the complaint alleges the County

[1] For a recent decision regarding the scope of an Indian tribe's inherent law enforcement authority, *see Bishop Paiute Tribe v. Inyo Cnty*., No. 1: 15-cv. 00367-DAD-JLT, 2018 U.S. Dist. LEXIS 4643 (E.D. Cal. Jan. 10, 2018).

Attorney "has threatened Band police officers, including Plaintiffs Rice and Naumann, with arrest and prosecution if they exercise law enforcement authority on non-trust lands within the Reservation or with respect to non-Band members" and that "[t]hose threats have deterred Plaintiffs Rice and Naumann and other Band police officers from exercising law enforcement authority they possess as a matter of federal law." *Id*. at 5. Similarly, the complaint alleges that "[t]he County Sheriff and the County Attorney have instructed the Sheriff's deputies not to arrest suspects apprehended by Band police officers exercising their inherent tribal and federally delegated law enforcement authority." *Id*. at 6.

The complaint alleges that Defendants' actions have harmed the Band by deterring "Band police officers from responding to criminal activity within the Reservation, including drug trafficking, gang activity and violence that threatens the safety, health, welfare and well-being of Band and non-Band members who live and work within, and visit, the Reservation." *Id*. at 6-7. Further, Defendants' actions "have interfered with the lawful exercise of federal and tribal law enforcement authority." *Id*. at 7.

The complaint seeks two declarations under 28 U.S.C. § 2201: first, that, as a matter of federal law, the Band possesses inherent sovereign authority to authorize Band police officers to investigate violations of federal, state and tribal law within the Reservation, and, in exercising that authority, to apprehend suspects (including Band and non-Band members) and turn them over to jurisdictions with prosecutorial authority; and second, that under 18 U.S.C. § 1162(d), 25 U.S.C. §§ 2801 and 2804, and the Deputation Agreement with the BIA, Band police officers have federal authority to investigate violations of federal law within the Reservation and, in exercising that authority, to arrest suspects (including

Band and non-Band members) for violations of federal law. *Id*. at 7. The complaint also seeks an injunction enjoining Defendants from taking or failing to take any actions that interfere with the authority of Band police officers as declared by the Court. *Id*. at 8.

B. The County's Answer, Affirmative Defenses and Counterclaim.

Defendants filed separate answers to the complaint on December 21, 2017. ECF 017 (County's Answer); ECF 018 (County Attorney's Answer); ECF 019 (County Sheriff's Answer); *see also* ECF 021 (County Attorney's Amended Answer). The County's Answer contains at least 16 separate assertions either denying Plaintiffs' claim that the Reservation has not been diminished or disestablished or affirmatively alleging that the Reservation has been diminished or disestablished or that it no longer exists. *See* County Answer at 3-8. In addition, the County's Answer contains 33 affirmative defenses, including an alleged statute of limitations and jurisdictional bar in § 12 of the Indian Claims Commission Act of 1946, 60 Stat. 1049, res judicata, collateral estoppel, and judicial estoppel. *Id.* at 9-10. The County's affirmative defenses allege that "[f]ee lands within the original boundaries of the 1855 Mille Lacs Reservation, which have passed at any time into non-Indian fee ownership, are no longer Indian country and are no longer part of the 1855 Reservation, which has been disestablished." *Id*. at 11.

The County (but not the other defendants) also filed a counterclaim, which is the subject of the motion to dismiss or strike and this memorandum. *Id.* at 13-34. The counterclaim names as defendants the Band, Chief of Police Rice and Sergeant Naumann, in their official and individual capacities, and five elected Band officials, also in their official and individual capacities. *Id.* at 15. However, after naming and describing the

individual counterclaim defendants, the counterclaim *never again mentions them*; it makes no allegation that any individual counterclaim defendant has taken or failed to take any particular action.

Instead, the counterclaim devotes the next eight pages to the County's argument that the Reservation has been disestablished. *See id.* at 16-23. The County does not dispute that trust lands have Indian country status or that the Band may exercise law enforcement and other governmental authority on trust lands. *See id.* at 21. However, it asserts that, because the Reservation has been disestablished, the Band has no law enforcement or other governmental authority on other lands within the original Reservation boundaries (including on Band-owned fee lands). *Id.*

The counterclaim then makes a series of allegations against the Band. However, it does not allege that the Band has exercised any jurisdiction or taken any other action on non-trust lands. Instead, the counterclaim alleges only that the Band has asserted that the Reservation continues to exist and has disputed the County's disestablishment claim. *Id.* at 23-24. For example, it alleges that the Band "quietly began a campaign to influence state and federal agencies that the 1855 Reservation was never diminished or disestablished," and that several federal agencies (the Bureau of Indian Affairs, the Corps of Engineers, the Environmental Protection Agency, the Department of Justice, and the Department of the Interior) have agreed with the Band's position. *Id.* at 24-26.

The counterclaim's only allegation regarding an actual exercise of jurisdiction on non-trust lands within the Reservation concerns EPA, not the Band. Specifically, the counterclaim alleges, "on information and belief, [that] the Band has participated and

cooperated with EPA in asserting jurisdiction over all lands within the original 1855 Reservation boundaries on the basis that the lands constitute Indian country." *Id*. at 26. The "specific[]" basis for this allegation is the alleged regulation and permitting of underground storage tanks on Band-owned fee lands "*by the EPA*, instead of the Minnesota Pollution Control Agency." *Id*. (emphasis added). The counterclaim does not allege that the Band itself has regulated or permitted underground storage tanks on Band-owned fee lands or on any other non-trust lands. Nor does the counterclaim allege that the County has any responsibility for the regulation or permitting of underground storage tanks or that EPA's alleged regulation and permitting of such tanks on Band-owned fee lands injured the County.

Instead, to the extent the counterclaim alleges injury, it alleges only that it is injured by the dispute over the Reservation boundaries, not the actual exercise of Band jurisdiction or other governmental authority on non-trust lands. *See id.* at 27 ("[t]hese efforts by the Band to incrementally reestablish the 1855 Reservation, beginning in the early 1990s, have caused an ongoing dispute and controversy between the Band and the County, and confusion for the residents of Mille Lacs County"); *see also id*. at 29 (alleging "[*t]hese controversies* further undermine property tax values for residents … and reduce the tax base and income for the County") (emphasis added). And, while the counterclaim alleges that the dispute and a series of *federal* actions (specifically, the United States Attorney General's assumption of concurrent federal law enforcement authority within the Reservation and the Bureau of Indian Affairs' approval of the Deputation Agreement with the Band and its issuance of Special Law Enforcement Commissions to Band police

officers) "has injured the County in the exercise of its criminal and civil regulatory authority outside of trust lands," it does not allege that the Band or any Band official has interfered with the exercise of County authority on such lands. Nor does the counterclaim make a single allegation that the County has been unable to exercise or has refrained from exercising any such authority due to any action by the Band or the Federal Government. *Id*. at 28.

The counterclaim presents four "counts" and corresponding claims for relief. *Id.* at 29-34. The first count alleges the Band "has repeatedly attempted to resurrect the 1855 Reservation boundaries" and seeks a declaratory judgment that the Reservation has been disestablished. *Id.* at 29-30. The second seeks to enjoin the Band and Band officials "from exercising tribal inherent criminal authority or federal criminal authority outside of Indian country in Mille Lacs County … except for such authority, if any, as declared by the Court and as may otherwise be exercised outside of Indian country." Id. at 30-31. The third count alleges that the Band asserted that the Reservation had been extinguished in a 1912 lawsuit, and asks the court to hold that the Band and Band officials "are estopped from contesting the disestablished status of the 1855 Reservation." *Id.* at 31-32. The fourth count asserts that the Indian Claims Commission Act "precludes the Mille Lacs Band from resurrecting the 1855 Reservation." *Id.* at 32.

C. The Motion to Dismiss or Strike the Counterclaim.

The Band and the Band officials named in the counterclaim ("Counterclaim Defendants") move to dismiss the counterclaim on three grounds. First, the County lacks standing, just as it did in 2002, the last time it sued Band officials for a declaration that the

Reservation had been disestablished. *See Cnty. of Mille Lacs v. Benjamin*, 262 F. Supp. 2d 990 (D. Minn. 2003), *aff'd*, 361 F.3d 460 (8th Cir.), *cert. denied*, 543 U.S. 956 (2004).

It is well established that the mere existence of a dispute, no matter how sharp or acrimonious it may be, is insufficient to give rise to Article III standing. In contrast to the Band's complaint, which alleges specific actions by County officials that have injured the Band (such as threats to arrest Band police officers that have deterred the exercise of Band law enforcement authority), the counterclaim does not allege any actions by the Band or Band officials that have injured the county or deterred it from exercising its governmental authority. The fact that the Band has a different position than the County regarding the Reservation, and that it has sought continued federal recognition of the Reservation, does not confer standing on the County in the absence of any allegation that the Band has actually exercised jurisdiction or taken some other action beyond its lawful authority that has injured the County.

Second, the counterclaim should be dismissed for failure to allege a cognizable legal theory on which relief can be granted. To state a claim for relief, the County must allege that the counterclaim defendants have engaged in some unlawful activity that has injured the County. However, the counterclaim does not make a single allegation against the individual Band officials, and the only allegations it makes against the Band are that it has lawfully expressed its views regarding the Reservation and sought the continued support of the Federal government for those views. There is no allegation that the Band has engaged in any unlawful action, such as by exercising jurisdiction beyond its lawful authority.

Third, the court should strike the counterclaim because it is entirely redundant of the claims and defenses presented in plaintiffs' complaint and the County's answer and affirmative defenses. The request for a declaratory judgment that the Reservation has been disestablished (the first count in the counterclaim) raises the same issue that the County raised at least 16 times in its answer and again in its affirmative defenses. The requests that the Band be estopped or barred from asserting that the Reservation still exists (the third and fourth counts in the counterclaim) are affirmative defenses that have already been pled by the County as such. The County's request for an injunction regarding the scope of the Band's law enforcement authority (the second count in the counterclaim) also raises no new issues, since the scope of the Band's law enforcement authority is the central issue in the complaint and the subject of plaintiffs' request for a declaratory judgment. Because any party can seek entry of an appropriate injunction once the Court resolves that issue, the counterclaim adds nothing to the case.

III. STANDARD OF REVIEW.

A. Fed. R. Civ. P. 12(b)(1).

A motion under Fed. R. Civ. P. 12(b)(1) addressing a deficiency in the pleadings is a facial attack on subject matter jurisdiction; "the court restricts itself to the face of the pleadings, and the non-moving party receives the same protections as it would defending against a motion brought under Rule 12(b)(6)." *Carlsen v. GameStop, Inc.*, 833 F.3d 903, 908 (8th Cir. 2016); *Osborn v. United States*, 918 F.2d 724, 729 n.6 (8th Cir. 1990). Federal jurisdiction is limited by Article III of the Constitution to cases or controversies; if a plaintiff lacks standing to sue, the district court has no subject matter jurisdiction. *ABF*

Freight Sys. v. Int'l Bhd. of Teamsters, 645 F.3d 954, 958 (8th Cir. 2011). "While on a motion to dismiss we presume that general allegations embrace those specific facts that are necessary to support the claim," the court should not be left to guess "who suffered an injury, what the injury is, or who caused the injury alleged by [plaintiff]." *Delorme v. United States*, 354 F.3d 810, 815-16 (8th Cir. 2004) (internal quotations omitted).

B. Fed. R. Civ. P. 12(b)(6).

When reviewing a motion to dismiss under Fed. R. Civ. P. 12(b)(6), the Court accepts as true the factual allegations contained in the complaint and grants the plaintiff "the benefit of all reasonable inferences that can be drawn from those allegations." *Gomez v. Wells Fargo Bank, N.A.*, 676 F.3d 655, 660 (8th Cir. 2012). A pleading must contain a "short and plain statement of the claim showing that the pleader is entitled to relief." Fed. R. Civ. P. 8(a)(2). A complaint or counterclaim may be dismissed pursuant to Rule 12(b)(6) for one of two reasons: (1) lack of a cognizable legal theory or (2) insufficient facts under a cognizable legal claim. *Somers v. Apple, Inc.*, 729 F.3d 953, 959 (9th Cir. 2013); *Brown v. Mortgage Electronic Registration Sys., Inc.*, 738 F.3d 926, 933 n.7, 934 (8th Cir. 2013).

C. Fed. R. Civ. P. 12(f).

Under Fed. R. Civ. P. 12(f), the court may strike an insufficient defense or any redundant, immaterial, impertinent, or scandalous matter that is contained in the pleadings, including counterclaims that are "repetitious of issues already before the court via the complaint or affirmative defenses." *Gratke v. Andersen Windows, Inc.*, No. 10-CV-963 (PJS/LIB), 2010 U.S. Dist. LEXIS 137047 at *7 (D. Minn. Dec. 8, 2010).

IV. ARGUMENT.

A. The Court Should Dismiss the Counterclaim Because the County Lacks Standing.

Article III extends judicial power only to "cases" and "controversies." *Kuhns v. Scottrade, Inc.*, 868 F.3d 711, 716 (8th Cir. 2017). To establish the existence of an Article III case or controversy, the plaintiff must, as an "irreducible constitutional minimum," have "(1) suffered an injury in fact, (2) that is fairly traceable to the challenged conduct of the defendant, and (3) that is likely to be redressed by a favorable judicial decision." *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1547 (2016) (quotation omitted). The "presence of a disagreement, however sharp and acrimonious it may be, is insufficient by itself to meet Article III's requirements." *Diamond v. Charles*, 476 U.S. 54, 62 (1986).

An injury in fact is "an invasion of a legally protected interest that is concrete and particularized and actual or imminent, not conjectural or hypothetical.'" *Spokeo, Inc.*, 136 S. Ct. at 1548 (quotations omitted). A "concrete injury must be de facto; that is, it must actually exist" and it must be "real, and not abstract." *Id.* (citations and internal quotation marks omitted). Standing cannot rest "on a highly attenuated chain of possibilities." *Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 410 (2013), or "the right, possessed by every citizen, to require that the Government be administered according to law," *Valley Forge Christian Coll. v. Ams. United for Separation of Church & State*, 454 U.S. 464, 482-83 (1982). "[T]he psychological consequence presumably produced by observation of conduct with which one disagrees … is not an injury sufficient to confer standing under Art. III …." *Id.* at 485.

The County lacks standing to bring its counterclaim because the counterclaim fails to allege it has suffered an actual or imminent injury caused by the actions of the Band or Band officials. In 2002, the County filed a complaint containing nearly identical allegations against the Band's elected officials.[2] In 2003, this Court granted the Band officials' motion for summary judgment on standing and ripeness grounds because the mere existence of a controversy over the Reservation boundary was insufficient to confer standing on the County. *See Cnty. of Mille Lacs*, 262 F. Supp. 2d at 995-1001. The Court distinguished cases that "involved *explicit* efforts by one sovereign to exercise particular powers beyond [its] lawful jurisdiction," finding that the County had presented only "abstracted concerns over reservation boundaries." *Id.* at 1000 (emphasis added). The Eighth Circuit affirmed:

> The County has failed to establish standing. We agree with the Band that the County has been unable to point to any definite controversy that exists from the Band's purported expansion of tribal jurisdiction over the disputed portion of the reservation. The County presented no evidence that its ability to enforce state or local law on the reservation has been usurped or even affected by the Band's alleged intentions. In order to demonstrate standing, a plaintiff must demonstrate that he has suffered an injury or a threatened injury. [The County] has not shown that it is in immediate danger of

[2] We submit a copy of the County's 2002 complaint as Exhibit A accompanying the motion to dismiss or strike. As a pleading filed in a prior case before the same Court and between the same parties, the Court may take judicial notice of the 2002 complaint without converting the motion to one for summary judgment. *Levy v. Ohl*, 477 F.3d 988, 991 (8th Cir. 2007). The similarity of the allegations in the 2002 complaint and the current counterclaim is striking. *Cf., e.g.,* Counterclaim ¶ 32 *with* 2002 Compl. ¶ 29; Counterclaim ¶ 37 *with* 2002 Compl. ¶ 37; Counterclaim ¶ 42 *with* 2002 Compl. ¶ 53; Counterclaim ¶¶ 53 and 54 *with* 2002 Compl. ¶¶ 49 and 50.

> sustaining threatened injury traceable to an action of the Band. Therefore, they are unable to demonstrate standing.

361 F.2d at 464. Although the dismissal of the County's 2002 complaint came at the summary judgment stage, its current counterclaim contains no allegations of concrete actions by the Band that would support its standing today any more than they did in 2002.

As discussed above, the counterclaim's primary claim of injury arises from the mere existence of a dispute over the continued existence of the Reservation. *See* County Answer, Affirmative Defenses and Counterclaim (ECF 017) at 27 ("[t]hese efforts by the Band to incrementally reestablish the 1855 Reservation, beginning in the early 1990s, have caused an ongoing dispute and controversy between the Band and the County, and confusion for the residents of Mille Lacs County"). It was precisely this type of "abstracted concern" that this Court and the Eighth Circuit rejected as a basis for standing in the County's prior lawsuit. The counterclaim does not allege that the current "dispute and controversy" is a new one that arose after 2002; to the contrary, it alleges that it arose in the early 1990s and has been ongoing since then. *Id.* Accordingly, the existence of this controversy remains insufficient to confer standing on the County today.

The counterclaim also alleges that "[t]hese controversies further undermine property tax values for residents … and reduce the tax base and income for the County." *Id*. at 29. The Court rejected the same claim of injury in 2002 for three reasons. First, "[t]aking into account the historically strong interest in owning lakefront property, and the absence of evidence of so much as a single sale where proximity to Indian Country affected price, the Court [found] plaintiffs [the County and its co-plaintiff, the First National Bank of Milaca]

allege no injury or risk of future injury." *Cnty. of Mille Lacs*, 262 F. Supp. 2d at 998. Second, "[s]etting aside the utter paucity of admissible evidence supporting this claim," the Court found that "any claimed diminution of value would result from the disinterest of third-party potential-purchasers in owning land on the reservation – not from legal uncertainty." *Id*. at 999. As a result, the County's alleged injury was not fairly traceable to the actions of the Band, but to the "actions of third-party property buyers and owners who are not parties to this litigation." *Id*. (citing *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992) ("there must be a causal connection between the injury and the conduct complained of – the injury has to be 'fairly … traceable to the challenged action of the defendant, and not … the result [of] the independent action of some third party not before the court")). Third, the Court found that the County's "devaluation argument … reflects confusion as to the nature of declaratory relief." *Id*. It explained that the County's "complaints stem … not from uncertainty, but from fears and perceptions concerning an unfavorable decision on the lawsuit they have themselves initiated. This is not the kind of injury the law recognizes as conferring standing." *Id.*

The allegations in the counterclaim do not overcome the deficiencies identified by the Court. First, the counterclaim still does not allege there has been a single sale where proximity to Indian country affected price. Second, as in 2002, the alleged injury to the County is attributable to "actions of third-party property buyers and owners who are not parties to this litigation," 262 F. Supp. 2d at 999, and thus does establish an essential element of standing (an injury-in-fact fairly traceable to the challenged conduct of the defendant). Indeed, because the County's property tax revenues are a product of assessed

values *and* the levy rate *set by the County*, any reduction in such revenues would be a result of the County's own action in setting the levy rate.[3]

An alleged injury is "conjectural or hypothetical" when "it depends on how legislators respond to a reduction in revenue …." *DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 344 (2006). Here, the County's alleged property tax injury depends on how elected County officials respond to a speculative decline in property values. Moreover, establishing redressability (the third essential element of standing) requires speculating that resolving the dispute over the Reservation boundary will cause property values to increase or at least, not decrease further and that property tax levies will not change. "Neither sort of speculation suffices to support standing." *Id.* Thus, just as this Court held in 2002, the County's alleged devaluation injury is insufficient to establish standing.

The counterclaim also points to uncertainty about the scope of the County's civil-regulatory authority as a source of injury. The counterclaim acknowledges that, because of Public Law 83-280, 18 U.S.C. § 1162, the dispute over the Reservation boundary does *not* affect the County's criminal jurisdiction. County Answer, Affirmative Defenses and Counterclaim (ECF 017) at 27. However, it asserts that, because it lacks authority to prosecute Band members for civil-regulatory offenses, including certain traffic offenses, in Indian country, the dispute over the existence of the Reservation "creates conflict over the enforcement of these civil regulatory laws." *Id*. at 28.

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[3] *See* Minnesota Dep't of Revenue, *How the Assessor Estimates Your Market Value*, Property Tax Fact Sheet 2 at 1 (rev'd Oct. 2015) ("Increasing or decreasing your property's market value does not change the overall amount of property tax that is collected."), *available at* http://www.revenue.state.mn.us/propertytax/factsheets/factsheet_02.pdf.

This Court rejected this claim of injury in 2002 as well. It found:

> The Mille Lacs Band and its members have consistently complied – however grudgingly – with the County's zoning regulations and state traffic laws. The deposition testimony of the Mille Lacs County Sheriff, Dennis Boser, indicates the Mille Lacs Band has taken no actions which adversely affect the County's ability to enforce state or county law, and that any legal conflicts which do exist have not harmed public safety. … Even assuming the Mille Lacs Band members obey the County's ordinances only "under protest," plaintiffs have not shown that their compliance "under protest" has created a real injury. When examined, the County's position appears to be that the Court should hold that defendants' *compliance* with County law constitutes injury. The Court is unable to find any legal precept that can support this theory.

Cnty. of Mille Lacs, 262 F. Supp. 2d at 997 (emphasis in original) (footnote omitted).

The counterclaim makes no allegations that would lead to a different result today. It alleges only the existence of "legal conflicts," but not of any concrete actions by the Band or Band officials that have interfered with the County's enforcement of civil-regulatory laws. And, it makes no allegation that the County has refrained from enforcing civil-regulatory laws in any way. Its allegation that the dispute over the existence of the Reservation, coupled with *federal* actions, "has injured the County in the exercise of its criminal and civil regulatory authority outside of trust lands," County Answer, Affirmative Defenses and Counterclaim (ECF 017) at 28, is insufficient, since it leaves the Court to guess "what the injury is" and "who caused [it]." *Delorme*, 354 F.3d at 815-16. Moreover, the actions of federal agencies are "independent action[s] of some third party not before the court" and, therefore, cannot confer standing on the County to sue the Band or Band officials. *Bennett v. Spear*, 520 U.S. 154, 167 (1997).[4]

[4] Furthermore, the 2015 Solicitor's opinion, cited in the counterclaim (ECF 017) at 25 (¶¶ 46, 47), was prepared by the Department of the Interior in response to the County's own

Finally, the counterclaim's assertion that the Band "participated and cooperated with the EPA" when EPA asserted its regulatory authority over the Band's fee lands does not satisfy Article III's standing requirements. "[W]hen a plaintiff is not the direct subject of government action, but rather when the asserted injury arises from the government's allegedly unlawful regulation (or lack of regulation) of someone else, satisfying standing requirements will be 'substantially more difficult.'" *Frank Krasner Enterprises, Ltd. v. Montgomery Cty., MD*, 401 F.3d 230, 234-35 (4th Cir. 2005) (quoting *Lujan*, 504 U.S. at 562). Here, the County does not allege that EPA's regulation and permitting of underground storage tanks on Band-owned fee land had any impact on any County regulatory authority, or that it injured the County in any other way. And, even if it did, the injury would be the result of EPA's actions, that is, of "independent action[s] of some third party not before the court," and thus could not confer standing on the County. *Spear*, 520 U.S. at 167.

For these reasons, the Court should dismiss the counterclaim for lack of standing. It makes no allegation of an actual or imminent injury fairly traceable to the actions of the Band or Band officials, and no allegation that distinguishes this case from the 2002 case.

B. The Court Should Dismiss the Counterclaim Because It Fails to State a Claim Upon Which Relief Can Be Granted.

The County's counterclaim fails to allege a single violation of federal law committed by any Counterclaim Defendant; as discussed above, it alleges only that the

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submissions regarding the Reservation boundary. *See* Solicitor's Opinion M-37032 at 1-2 (filed herewith at Exhibit B) (stating opinion prepared in response to County comments disputing Reservation's existence).

Band has asserted that the Reservation still exists and has sought continued federal support for its position, actions which the County does not even allege are unlawful. Moreover, the counterclaim fails to identify any federal law that creates a cause of action against a party for asserting that a reservation exists or for seeking federal support for the existence of a reservation, no matter how mistaken those assertions may be. Without such allegations, the counterclaim does not meet the minimum pleading standards of Rule 8 and must be dismissed under Rule 12(b)(6), because the County neither establishes a cognizable legal theory nor alleges sufficient facts to support a cognizable claim.

"To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (citing *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is *liable for the misconduct alleged*." *Id*. (emphasis added). "[N]aked assertions devoid of further factual enhancement" cannot survive a motion to dismiss. *Id.* (quotations omitted); *Kuhns*, 868 F.3d at 717-18. At a minimum, a complaint must demonstrate "more than a sheer possibility that a defendant has *acted unlawfully*." *Id.* (emphasis added). "Where a complaint pleads facts that are 'merely consistent with' a defendant's liability,' it 'stops short of the line between possibility and plausibility of entitlement to relief.'" *Id.* (quoting *Twombly,* 550 U.S. at 557).

Put another way, Rule 8(a)(2) "requires a 'showing,' rather than a blanket assertion, of entitlement to relief." *Twombly*, 550 U.S. at 555 n.3. Without factual allegations stating

occurrences and events supporting the claim presented, the claimant fails to provide grounds on which the claim rests; Rule 8(a) "does not authorize a pleader's 'bare averment that he wants relief and is entitled to it.'" *Id.* (quoting 5 Wright & Miller § 1202, at 94).

The County's counterclaim does not satisfy these requirements. Critically, none of the "counts" allege that the Counterclaim Defendants "acted unlawfully," *Iqbal*, 556 U.S. at 678, or identify a law violated by the Counterclaim Defendants, a valid cause of action, or the elements necessary to prove a claim. *See* County's Answer, Affirmative Defenses and Counterclaim (ECF 017) at 29-32. Count I alleges the Band "has repeatedly attempted to resurrect the 1855 Reservation" and seeks a declaratory judgment that the Reservation was disestablished. *Id.* at 29-30. Even if the County were correct that the Reservation was disestablished and the Band was attempting to resurrect it (as opposed to attempting to preserve the existence of a reservation that had not been disestablished), the County identifies no law that makes that attempt unlawful or creates a cause of action against the Band for taking the position that the Reservation still exists. The Declaratory Judgment Act does not fill this void, because it provides a remedy, not a cause of action. *Schilling v. Rogers*, 363 U.S. 666, 677 (1960); *W. Cas. & Sur. Co. v. Herman*, 405 F.2d 121, 124 (8th Cir. 1968); *Wolff v. Bank of N.Y. Mellon*, 997 F. Supp. 2d 964, 979 (D. Minn. 2014).

Count II requests stand-alone injunctive relief without any supporting allegations that Counterclaim Defendants have or will soon take any of the actions the County wants enjoined. Like a declaratory judgment, an injunction is a remedy, not a cause of action. *Newman v. JP Morgan Chase Bank, N.A.*, 81 F. Supp. 3d 735, 746 (D. Minn. 2014) (citing *Great-West Life & Annuity Ins. Co. v. Knudson*, 534 U.S. 204, 211 (2002)).

Count III alleges that a Court of Claims case determined the status of the Reservation and seeks to estop the Band from asserting the Reservation exists, but there is no federal cause of action for collateral estoppel. *See Sprint Communs. Co. L.P. v. Crow Creek Sioux Tribal Court*, No. 4:10-CV-04110-KES, 2015 U.S. Dist. LEXIS 44287, at *13-16 (D.S.D. Apr. 1, 2015) (dismissing collateral estoppel counterclaim under Rule 12(b)(6) because "the court is not aware of . . . a federal . . . cause of action for collateral estoppel."). And to the extent that Count IV alleges that the Indian Claims Commission Act of 1946 deprives this court of subject matter jurisdiction over Plaintiffs' claims, *see* County Answer, Affirmative Defenses and Counterclaim (ECF 017) at 3 (¶ 3), 9 (¶¶ 1-2), lack of jurisdiction is a defense, not a stand-alone cause of action.

Aside from the "counts," most of the counterclaim is devoted to explaining why, in the County's view, the Court should not grant the relief sought by the Band. *See, e.g.*, *id.* at 16-23. A counterclaim that seeks only to negate the plaintiff's claims and requested relief is a defense; calling it a "counterclaim" does not transform those defenses into a "cognizable legal theory" necessary to state a claim. *See Somers*, 729 F.3d at 959; *Tenneco, Inc. v. Saxony Bar & Tube, Inc.*, 776 F.2d 1375, 1379 (7th Cir. 1985) ("The label 'counterclaim' has no magic. What is really an answer or defense to a suit does not become an independent piece of litigation because of its label.").

The counterclaim's only allegations against the Band concern what the County describes as the Band's attempt to "reassert" claims to the Reservation. *See* County Answer, Affirmative Defenses and Counterclaim at 23-27. However, the counterclaim does not tie these allegations to *any* instance of the Band (or any other Counterclaim

Defendant): (1) exercising tribal power on non-trust lands within the Reservation; (2) exercising tribal power over the County or in a manner that actually injured the County; or (3) exercising tribal power in a manner that limited or deterred the exercise of the County's own governmental authority. Indeed, the counterclaim alleges *no* unlawful conduct by *any* Counterclaim Defendant *at all*.[5] Instead, the allegations in the counterclaim exclusively concern the Band's assertion of its position and communications with the Federal Government regarding the Reservation, and various *federal* actions supporting the Band's position. These allegations do not demonstrate "more than a sheer possibility that [any Counterclaim Defendant] has acted unlawfully," as required by Rule 8. *Iqbal*, 556 U.S. at 678. Indeed, they do not demonstrate *even a possibility* of any unlawful act.[6]

In these respects, there are fundamental differences between Plaintiffs' complaint and the County's counterclaim. Unlike the County, the Plaintiffs specifically identify and

[5] The absence of *any* allegations against the individual Counterclaim Defendants is striking and compels dismissal of the counterclaim against them. *See Alfaro Motors v. Ward*, 814 F.2d 883, 886 (2nd Cir. 1987) (plaintiffs, "having failed to allege, as they must, that these defendants were directly and personally responsible for the purported unlawful conduct, their complaint is 'fatally defective' on its face") (citations omitted); *Dove v. Fordham Univ.*, 56 F. Supp. 2d 330, 335 (S.D.N.Y. 1999) ("It is well-settled that 'where the complaint names a defendant in the caption but contains no allegations indicating how the defendant violated the law or injured the plaintiff, a motion to dismiss the complaint in regard to that defendant should be granted.'") (quoting *Morabito v. Blum*, 528 F. Supp. 252, 262 (S.D.N.Y. 1981)); *see also Harrington v. Hall Cnty. Bd. of Supervisors*, No. 4:15-CV-3052, 2016 U.S. Dist. LEXIS 43541, at *37 (D. Neb. Mar. 31, 2016) ("generalized allegations and legal conclusions are insufficient to state a plausible claim for relief against any particular defendant").

[6] To the extent the counterclaim suggests that the decades-long, consistent acknowledgement of the Reservation by Federal agencies violates the law, *see* County Answer, Affirmative Defenses and Counterclaim at 24-27 (¶¶ 43-50), it names the wrong defendants and fails to join the parties about whom it complains. *See* Fed. R. Civ. P. 19(a).

plausibly allege violations of federal law by the Defendants. *See* Complaint (ECF 001) at 5-7 (¶¶ 5.M-V). The Band has a federal common-law cause of action to prevent interference with its treaty rights and inherent sovereign authority. *See Minnesota v. Mille Lacs Band of Chippewa Indians*, 526 U.S. 172, 185 (1999); *Washington v. Wash. State Commercial Passenger Fishing Vessel Ass'n*, 443 U.S. 658, 693 n.33 (1979) (concluding that treaties at issue were self-enforcing and gave rise to tribe's valid claims); *see also Bishop Paiute Tribe v. Inyo County,* note 1 *supra* (denying motions to dismiss Indian tribe's claim for declaratory and injunctive relief regarding the tribe's inherent law enforcement authority). The County's counterclaim alleges no violations of federal law by the Counterclaim Defendants and identifies no cause of action for the conduct it seeks to challenge – the Band's mere assertion of its position regarding the Reservation. Because the County does not, and cannot, identify any cognizable legal theory or sufficient facts under a cognizable legal claim, the counterclaim must be dismissed.

C. The Court Should Strike the Counterclaim Because It Is Redundant of the Plaintiffs' Claims and the County's Answer and Affirmative Defenses.

Under either Rule 12(f) or Rule 12(b)(6), the Court may strike or dismiss a counterclaim in its entirety when a counterclaim seeks relief and raises questions redundant of the primary suit. *See Malibu Media, LLC v. Ricupero*, 705 Fed. App'x 402, 405 (6th Cir. 2017). Where a "proposed counterclaim and the plaintiffs' claim raise identical factual and legal issues[, the] proposed counterclaim is redundant and will be moot upon disposition of the plaintiffs' claims;" because "[a] redundant declaratory judgment claim is not a proper declaratory judgment claim," it should be dismissed. *Mille Lacs Band of*

Chippewa Indians v. Minnesota, 152 F.R.D. 580, 582 (D. Minn. 1993) (citing *Aldens, Inc. v. Packel*, 524 F.2d 38, 51-52 (3d Cir. 1975)). When deciding whether to dismiss or strike a redundant counterclaim, courts consider "whether resolution of the plaintiff's claim, along with affirmative defenses asserted by defendants, would resolve all questions raised by the counterclaim." *Great Lakes Gas Transmission Ltd. P'ship v. Essar Steel Minn., LLC*, 871 F. Supp. 2d 843, 862 (D. Minn. 2012) (citation omitted). Counterclaims that are "repetitious of issues already before the court via the complaint or affirmative defenses" should be dismissed. *Gratke*, 2010 U.S. Dist. LEXIS 137047 at * 7 (internal citations omitted). "Counterclaims that 'merely repackage affirmative defenses should also be dismissed,' because '[w]hat is really an answer or defense to a suit does not become an independent piece of litigation because of its label.'" *ACIST Med. Sys. v. Opsens, Inc.*, No. 11-539 ADM/JJK, 2011 U.S. Dist. LEXIS 114636, at *4-5 (D. Minn. Oct. 4, 2011) (citation omitted).

The counterclaim's four counts raise factual and legal questions that are fully encompassed by Plaintiffs' complaint and its own answer and affirmative defenses. Count I asks the Court to declare that the 1855 Reservation was disestablished by 1863 and 1864 treaties with the Chippewa and the Nelson Act of 1889, and as "so held and affirmed" by the Supreme Court in 1913. County Answer, Affirmative Defenses and Counterclaim (ECF 017) at 29-30 (¶¶ 57-62), 33 (¶ 1). Plaintiffs' complaint raises the same factual and legal question by asserting that the same treaties and statute "did not disestablish or diminish the Reservation or alter the Reservation boundaries." Complaint (ECF 001) at 3 (¶ 5.B). The County's answer denies that allegation, County Answer, Affirmative

Defenses and Counterclaim (ECF 017) at 4 (¶ 5.B), and contains at least 15 additional statements either denying Plaintiffs' claim that the Reservation has not been diminished or disestablished or affirmatively alleging that the Reservation has been diminished or disestablished or that it no longer exists, *id.* at 3-8. Count I of the counterclaim thus adds no new factual or legal issues to the litigation.

Count II seeks an injunction against Counterclaim Defendants exercising "tribal inherent criminal authority or federal criminal authority outside of Indian country in Mille Lacs County," along with a declaration that the Band's Indian country is limited to lands held in trust by the United States for the Band, the Minnesota Chippewa Tribe or Band members. *Id.* at 30 (¶ 64), 33 (¶¶ 2-3). Plaintiffs' complaint makes specific allegations and seeks specific relief regarding the extent of the Band's Indian country and the scope of the Band's inherent and federal law enforcement authority within Indian country. Complaint at 3-6 (¶¶ 5.C, 5.H-K, 5.M-Q), 7 (¶¶ 1.A-B). In responding to these allegations, the County's answer sets forth its position on these issues, making allegations that are identical to (but more detailed than) the allegations and relief sought in the counterclaim. *See* County Answer, Affirmative Defenses and Counterclaim at 5-9 (¶¶ 5.C, 5.H-K, 5.M-Q). Thus, Count II also adds no new factual or legal issues to the litigation.

Furthermore, the declaratory and injunctive relief the County seeks in Counts I and II is no different than the relief the County would receive if the Court rules for the County on the merits of Plaintiffs' complaint. To determine whether the Band's inherent sovereign and federally delegated law enforcement authority extends throughout the Reservation, the Court will need to determine whether the Reservation still exists (making all lands within

the Reservation Indian country under 18 U.S.C. § 1151) or whether, as the County contends, it was disestablished or diminished (such that only trust lands comprise Indian country). And, to determine the extent of the Band's inherent sovereign and federally delegated law enforcement authority within Indian country, the Court will need to address the County's arguments regarding the extent of that authority in Indian country. If the Court agrees with the County, the County will receive the exact same relief that it seeks in its counterclaim.

Such a counterclaim is redundant and should be dismissed. *Hardee's Food Sys. v. Hallbeck*, 776 F. Supp. 2d 949, 954 (E.D. Mo. 2011) (dismissing as redundant a claim that "essentially seeks a declaratory judgment that the [defendant's] position on [plaintiff's] claims is right"). Even if the County's counterclaim could be interpreted as seeking injunctive relief not sought by Plaintiffs, dismissal of the counterclaim will not prevent the County from seeking such relief later if the court issues declaratory judgment on Plaintiffs' claims in the County's favor. *See Powell v. McCormack*, 395 U.S. 486, 499 (1969) ("A declaratory judgment can then be used as a predicate to further relief, including an injunction."); *see also Dahhane v. Stanton*, No. 15-1229 (MJD/JJK), 2015 U.S. Dist. LEXIS 112306, at *7-8 (D. Minn. Aug. 4, 2015) ("dismissal of the mistakenly designated counterclaims will not bar Defendants from … seeking other relief as may be appropriate").

Counts III and IV are duplicative of affirmative defenses pleaded in the County's answer. Count III seeks a declaration that a prior court case estops the Counterclaim Defendants from asserting that the 1855 Reservation was not disestablished. Counterclaim ¶¶ 65-71, p. 33 ¶ 4. The County's answer includes affirmative defenses of res judicata,

claim preclusion, collateral estoppel, issue preclusion, judicial estoppel, sale and relinquishment, accord and satisfaction, release, arbitration and award, and waiver. County Answer, Affirmative Defenses and Counterclaim at 10-12. Those affirmative defenses clearly raise the effect of the prior court case in this proceeding.

Count IV seeks a declaratory judgment that the Indian Claims Commission Act "precludes" or "bars" the Band from "resurrecting the 1855 Reservation." *Id.* at 32 (¶ 730, 33 (¶ 5). The County makes the same claim in its Answer, asserting that Plaintiffs' claims are "barred by the jurisdictional limitations contained in the Indian Claims Commission Act of 1946, 60 Stat. 1049, § 12," *id.* at 3 (¶ 3), and citing that Act as the basis for at least four affirmative defenses, *id.* 9 (¶¶ 1-2), 10 (¶ 12), 12 (¶ 25).

The County's addition of the Band's elected officials in their individual and official capacities, and Plaintiffs Rice and Naumann in their individual capacities, does not make the counterclaim any less redundant. As discussed above, the counterclaim makes *no allegations* against the individual counterclaim defendants. Moreover, because official capacity claims are treated as claims against the government entity that the official represents, *Kentucky v. Graham*, 473 U.S. 159, 165-66 (1985), the inclusion of the Band's elected officials in their official capacity adds nothing to the litigation between the Band and the County. The County's decision to include plaintiffs Rice and Naumann and the Band's elected officials as counterclaim defendants in their individual capacities also adds nothing to the litigation. The counterclaim not only fails to make any allegations against any individual defendant in his or her individual capacity, it *seeks no relief* against any individual defendant in his or her individual capacity. And, to the extent the inclusion of

the individual defendants in their individual capacities was an attempt to avoid the Band's sovereign immunity, *see Ex parte Young*, 209 U.S. 123 (1908), the Band is already before the Court as a Plaintiff asserting claims that raise the same legal issues as the counterclaim.

The counterclaim merely repeats issues that are already before the Court via Plaintiffs' complaint and the County's answer and affirmative defenses. Because adjudication of the Plaintiffs' claims, along with affirmative defenses asserted by Defendants, would resolve all questions raised by the counterclaim, the County's counterclaim is redundant, fails to state a valid claim under 28 U.S.C. § 2201, and should be stricken or dismissed.

V. CONCLUSION.

The Court should dismiss the County's counterclaim for lack of subject matter jurisdiction because the County has not demonstrated that it has standing to bring its counterclaim. The counterclaim should also be dismissed because it fails to state a claim against the Counterclaim Defendants upon which relief can be granted. And, the counterclaim should be dismissed or stricken because it is an entirety redundant pleading.

Respectfully submitted,

ZIONTZ CHESTNUT

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By s/Marc Slonim

Marc Slonim, WA Bar #11181
Beth Baldwin, WA Bar #46018
2101 – 4th Ave., Suite 1230
Seattle, WA 98121
Phone: 206-448-1230
Email: mslonim@ziontzchestnut.com
bbaldwin@ziontzchestnut.com

Todd R. Matha, MN Reg. No. 391968
Solicitor General of the Mille Lacs Band
43408 Oodena Drive
Onamia, MN 56359
Phone: 320-532-4181
Email: todd.matha@millelacsband.com

Attorneys for Plaintiffs and Counterclaim Defendants