UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MICHIGAN

KEWEENAW BAY INDIAN COMMUNITY, Plaintiff, v. KHOURI, et al., Defendants.	File No. 2:16-cv-00121 Hon. Paul L. Maloney

THE KEWEENAW BAY INDIAN COMMUNITY'S REPLY MEMORANDUM IN SUPPORT OF ITS MOTION FOR PARTIAL SUMMARY JUDGMENT

ORAL ARGUMENT REQUESTED

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INTRODUCTION

Defendants' Response to the Community's Motion for Partial Summary Judgment fails to rebut the Community's *Bracker* balancing, self-government and sovereignty, and Treaty arguments. The Community addresses the most egregious flaws in Defendants' Response here.[1]

ARGUMENT

I. FEDERAL LAW PREEMPTS THE SALES AND TOBACCO TAXES.

A. Defendants' Statements regarding *Bracker* Balancing Law are Incorrect.

The Community correctly applied the legal principles established by *Bracker* balancing case law to the facts in the record regarding Sales and Tobacco Taxes, showing that the Community and federal interests decisively outweighed the relevant state interest. Defendants' response incorrectly claims that the Community is relying on "categorical preemption" rules and has abandoned the *Bracker* balancing test. PageID.3828. This accusation completely misrepresents the Community's actual argument. The Community's application of the *Bracker* balancing test, in fact, simply follows the legal principles developed by *Bracker* balancing test precedents, according significant weight to factors, such as pervasive federal regulatory scheme

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[1] Defendants' criticism of the Community's Summary Chart (PageID.5312-13) is unfounded. The Chart is admissible under Federal Rule of Evidence 1006. While the Community believes that Defendants have not identified any legitimate discrepancy in any claim, the factual details of only 14 of the 1,395 claims are even potentially at issue. PageID.3823. Defendants contend that the Community does not say "whether claims are for sales or use tax," but this does not matter because the Community's position is that *all* of the denials were improper whether the Department viewed the tax at issue in a particular circumstance as Sales Tax or Use Tax. The Community's chart does identify the claims involving purchases from out of state retailers that the Department treated as Use Tax claims. Moreover, the Community desribes in its Nov. 9, 2017 Summary Judgment Motion – the only motion where Use Tax is at issue – the other two categories of transactions in which Defendants improperly denied Use Tax claims: (1) Community member claims involving purchases of motor vehicles and a purchase of clothing, on the basis that these goods will be used in part outside the Community's Reservation, and (2) all Community claims for items leased from out-of-state lessors. Defendants have since conceded that the claims in the second category were improperly denied.

and economic burden, held to be important over many decades by federal courts.[2]

Defendants' position appears to be that *Bracker* and *Ramah* stand for nothing beyond the adjudication of the specific tax disputes in those cases – and, indeed, permit a preemption conclusion only when the facts at issue are exactly like those in *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136 (1980) and *Ramah Navajo Sch. Bd. v. Bureau of Revenue of New Mexico*, 458 U.S. 832 (1982). PageID.5322-25.[3] Defendants ignore the substance of the principles and analysis in each case, and disregard the significance of the Supreme Court's decision to even *consider* the cases. In exercising its discretionary review of lower court decisions, the Court generally chooses cases to resolve significant matters of unsettled federal law and to provide guidance to the lower courts for resolving future cases. *See* Sup. Ct. R. 10; *see also United States v. Mandycz*, 321 F. Supp. 2d 862, 865 (E.D. Mich. 2004) (discussing factors Supreme Court considers in deciding whether to grant certiorari).

B. The Sales Tax is Preempted Under *Bracker* Balancing.

1. The Community Interests Favor Preemption of the Sales Tax.

Defendants cannot seriously dispute "that the tribe and its members bear the economic burden of Sales Tax in their purchases on the Reservation" or that "[w]hen the Community is required to pay the [sales] tax, it decreases the funds available to provide government programs, services, and economic development." PageID.5326. Defendants also cannot seriously dispute that when Community members bear the economic burden of the Sales Tax, this burden

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[2] When the Community argues that a categorical rule should apply, it says so plainly. PageID.1616-22 (discussing the categorical rules established by *Warren Trading* and *Central Machinery* as to Sales Tax, and by *Chickasaw* as to Use Tax).

[3] Defendants attempt to further cloud the issue of how *Bracker* balancing is applied by citing cases like *Chickasaw* in which *Bracker* balancing was not at issue (and the Community has previously explained in detail why Defendants are wrong at PageID.5352).

diminishes their financial resources, adversely affects their quality of life, and impedes their ability to invest and participate in the Community's governance and economic development.[4]

Instead, Defendants introduce an economic argument that "[h]ow much (if any) of the economic burden the purchaser bears depends on a number of different factors, including how sensitive the buyer is to price changes." PageID.5323. Defendants appear to suggest that the retailer might indirectly bear some economic burden of the tax, because perhaps the retailer might decide to lower the retail price to counteract an actual or perceived depressive effect that the tax might have on the retailer's sales volume and revenues. *Id.* But Defendants have not offered any factual evidence or expert opinion that the Sales Tax has any measurable impact on retail prices in the transactions at issue here, or that any such impact would be greater in these transactions than in transactions involving non-Indian purchasers. The actual factual evidence could not be more clear: in each Exemplar Claim, the Sales Tax was separately itemized by the retailer on the receipt and fully collected by from the Community or the Members, constituting the entire direct economic burden of the Sales Tax. PageID.4326-63

Defendants attempt to legitimize their economic burden argument by relying on the testimony of Dr. Benton, a purported economic development expert. But Dr. Benton admitted that she did not understand how state tax burdens might affect business and economic development in a geographic area or other community. PageID.4895-98. She could not (or would not) even explain what the term "tax burden" even means. PageID.4898. Dr. Benton is not a competent witness and the Court should disregard all argument based on her testimony—

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[4] Defendants claim, with no support, that the Community was required to quantify the "impact of the sales tax on its economy or members." PageID.5327-28. There is no requirement for such a showing, and no legitimate dispute that the economic burden of the Sales Tax falling on the Community and its members is a strong tribal interest against imposition of the Sales Tax.

and the Community intends to file a motion to exclude it. In any event, the most that could be said for Dr. Benton's analysis is that she identified factors in addition to taxation that might also have an impact on the Community's economic development. The Community has never suggested otherwise, and that does not undermine any of its arguments here.

2. Federal Interests Favor Preemption of the Sales Tax.

As explained in the Community's Nov. 9, 2017 Summary Judgment Memorandum, the Indian Trader Statutes categorically bar the Sales Tax. *Central Mach. Co. v. Ariz. State Tax Comm'n*, 448 U.S. 160 (1980); *Warren Trading Post Co. v. Arizona Tax Comm'n*, 380 U.S. 685 (1965). Even if this Court were to revisit the *Warren Trading* and *Central Machinery* holdings and conduct balancing, the comprehensive federal regulatory scheme embodied in the Indian Trader Statutes demonstrates a decisive federal interest against imposing the tax. Contrary to Defendants' contention, the Indian Trader Statutes *do* regulate the transactions at issue and "no room remains" for the state to impose the Sales Tax. *Warren Trading*, 380 U.S. at 690. To the Community's knowledge, every state with Indian country within its territory that imposes a sales tax on the retail seller – except Michigan – recognizes that the tax cannot be imposed on a reservation sale to a tribe or tribal member. PageID.1735-1762.[5] The most obvious reason for this recognition by these states is the preemptive effect of the Indian Trader Statutes.

As if the preemptive effect of the Indian Trader Statutes were not enough by itself, two additional comprehensive federal regulatory schemes – the Indian Gaming Regulatory Act ("IGRA") and Indian Self Determination Act ("ISDEEA") – strengthen the federal interests

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[5] In each of Arizona and Wisconsin, whose exemption certificates for tribal and tribal member purchases are referenced in the Response Brief, the legal incidence of the sales tax falls on the seller as it does in Michigan. Ariz. Rev. Stat. § 42-5008; Wis. Stat.§ 77.52 (legal incidence of sales tax falls on seller because sellers are substantively liable for the tax under the taxing statute and may, but are not required, to collect the tax from the buyers).

against imposing the Sales Tax on Community purchases. Defendants cannot deny that IGRA facilitates "gaming by Indian tribes as a means of promoting tribal economic development, self-sufficiency, and strong tribal governments," 25 U.S.C. § 2702(1), or that the benefits of tribal gaming enterprises must flow to the tribes, and not state or local taxation. Defendants also conceded that the Sales Tax burdens the Community's gaming enterprises. PageID.5331. A state tax "undermines the objective of IGRA" when it "is passed . . . to the Tribe which interferes with the Tribe's ability to make a profit from gaming activities." *Flandreau Santee Sioux Tribe v. Sattgast*, 325 F. Supp. 3d 995, 1002 (D.S.D. 2018).[6] Likewise, the federal policies of tribal self-determination and self-governance as set forth in ISDEAA weigh in favor of Indian tribes under the *Bracker* analysis. *Ramah*, 458 U.S. at 840 (finding a federal policy "encouraging the development of Indian-controlled institutions on the reservation" as "codified . . . most notably in the Self-Determination Act"). Defendants do not dispute that when the Community is forced to pay the Sales Tax, that decreases the funding available to its ISDEAA programs.

Defendants erroneously contend that the federal interest embodied in these statutes is only relevant in the case of direct conflict with the state tax. PageID.5330-32; 5334-35. If that were the case, there would no need for *Bracker* balancing, traditional notions of preemption would be sufficient.[7] Federal regulation weighs in the Community's favor even in the absence

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[6] *Mashantucket Pequot Tribe v. Town of Ledyard*, 722 F.3d 457, 464 (2d Cir. 2013), does not support Defendants' position. That case involved a property tax, not a transaction tax, and, while the court recognized a federal interest set forth in IGRA in ensuring that the tribe was the primary beneficiary of the gaming operation, the court concluded that a property tax on non-Indians was only a "tangential" intrusion on that interest. Moreover, *Mashantucket* was wrongly decided because the Court did not follow the principles for balancing established by Supreme Court precedent as discussed above—it improperly minimized the federal and tribal interests, greatly relaxed the required nexus between state services and the tax, and improperly relied on generalized state interests in raising revenue and administering the tax. *Id*. at 474-76.

[7] In a similar fashion, Defendants rely on *United States v. California*, 507 U.S. 746, 753-54

of direct conflict with a state tax, and a state must show its own regulatory interest to overcome the federal interest in such a case. *Compare Cotton Petroleum Corp. v. New Mexico*, 490 U.S. 163, 185-86 (1989) (finding a stronger state interest based on the state's regulation of oil-well spacing and integrity, such that federal regulation, while extensive, was not exclusive) with *Seminole*, 799 F.3d at 1339 (finding a stronger federal interest where the state failed to show "any Florida regulation of the commercial leasing of Indian land or regulation of the activities occurring under the lease."). Assuming for the sake of argument that the federal interests here are more akin to those at issue in *Cotton* than *Seminole*, Defendants' argument fails because they cannot identify any relevant state regulatory interest, much less one that one that competes with the strong federal interests embodied in the federal statutes at issue here.

3. No State Interest Justifies Imposition of the Sales Tax.

Defendants' claim that imposition of the Sales Tax is justified by services the State provides on the Reservation lacks all merit. To establish a legitimate state interest under *Bracker*, Defendants must show that the tax relates to services it provides on the Reservation with a "critical" connection with the entity and activity being taxed. *See, e.g., Seminole Tribe of Fla. v. Stranburg*, 799 F.3d 1324, 1342 (11th Cir. 2015); *see also Ramah*, 458 U.S. at 842-43. Defendants cannot show that the State relies on Sales Tax collections to provide services on the Reservation because (1) the services funded by Sales Tax collections, to the extent they are

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(1993), and *United States v. New Mexico*, 455 U.S. 720, 734 (1982), to suggest that a state tax which falls on non-Indians within Indian country will only be preempted if expressly authorized by Congress. These cases addressed immunities from state taxation in transactions between the federal government and its contractors, which are only available when the tax falls on the federal government itself or when preemption is otherwise expressly authorized by Congress. In *Arizona Department of Revenue v. Blaze Construction Co.*, 526 U.S. 32 (1999), the Supreme Court sharply distinguished the federal tax immunity principles that apply in transactions involving the federal government from those that apply in transactions involving Indian tribes and tribal members, noting that *Bracker* balancing applies to the latter category of transactions but not to the former. 526 U.S at 36.

provided on the Reservation, are not sufficiently connected to the activity being taxed (PageID.5285-87); (2) the Community already compensates the State for the services it does provide (PageID.4395; 5285-87)); and (3) the Community provides substantial government services to members, other residents, and visitors on the Reservation (PageID.4284-90). Because Defendants cannot refute these points, they characterize the Community's arguments as an attempt to "distract the court" (PageID.5342) or turn *Bracker* into a "math problem" (PageID.5340). The two main services that Defendants rely on—roads and education—are particularly weak in this respect. *Seminole* specifically rejected the same type of argument that Defendants make regarding roads. PageID.5343; *Seminole*, 799 F.3d at 1342. Defendants cannot show any connection between education and the transactions on the Reservation, and admit that they do not have the information to substantiate the education service they claim to provide. PageID.5343. In fact, the Community contributes funding directly to provision of roads and education on the Reservation. PageID.4434-63; 4465-69. The Community has never claimed, as Defendants suggest (PageID.5341), that the State provides no services to the Community or members. But the relevant question is whether those services indicate a state interest sufficient to overcome the strong federal and tribal interests, and the answer is clearly no.

Defendants also fail to identify any legal authority for their claims of a strong state interest in tax administration under *Bracker* balancing. PageID.5339-40. In a misguided attempt to illustrate the alleged importance of this interest, Defendants attack the Community's CAP program—through which the Community pays utility bills for members on the Reservation who could not otherwise afford to do so—claiming that,

> [a]llowing the Community to transfer or share its federal tax immunities by reimbursing or making payment for a third party confuses which facts and interests are relevant to a *Bracker* analysis, complicates Treasury's administration of the sales tax, and sets up the potential for transactions to be manipulated to take advantage of federal Indian tax immunities.

PageID.5339. Nothing in Defendants' statement is true. The beneficiaries of the CAP payments are tribal members living on the Reservation who are entitled immunity from Sales Tax in their own right if Defendants applied the law correctly. PageID.4287. Moreover, *Bracker* and *Ramah* involved tribes agreeing to reimburse non-Indian third parties for the tax payments at issue, and this factor demonstrated the strong tribal interest present when tribes or tribal members bear the direct economic burden of the tax. *Ramah*, 458 U.S. at 835-36 (non-Indian contractor "was reimbursed by the [Tribal Education] Board for the full amount paid"); *Bracker*, 448 U.S. at 140 ("Tribe agreed to reimburse Pinetop for any tax liability incurred as a result of its on-reservation business activities"). Thus, the Community's CAP payments present circumstances similar to – and frankly more compelling – than those in *Bracker* or *Ramah*, and entirely unsusceptible to the bogeyman of "transaction manipulation" that Defendants fear. PageID.4481. Defendants fail to establish a legitimate interest in administration of the Sales Tax, much less one that would be harmed by recognizing the Community and members' rights.

4. Defendants Make Other Substantial Errors in the Balancing Test.

Defendants' purported application of *Bracker* balancing to the Refund and Exemption Claims of the Community and its members was – and in their *Bracker* balancing arguments in this Court are – deeply flawed. First, Defendants violated their own Sales Tax Sourcing Rule set forth in Michigan Compiled Laws § 205.69 and suggested that they are entitled to use a non-statutory multifactor test of their own devising. Section 205.69 sets forth a mandatory and conclusive statutory rule for determining exactly where, for purposes of the Michigan Sales Tax Act, a sales transaction takes place. Nothing supports Defendants' argument that the language of Section 205.69 determines only the *state* in which a sale takes place; the plain language of the provision determines the *exact location* of a sale transaction, allowing conclusive determination of whether the sale takes place within Indian country. Michigan added the language to its Sales

Tax Act in order to comply with the Streamlined Sales and Use Tax Agreement ("SSUTA"), and that unauthorized deviation from the provision threatens Michigan with sanctions under the SSUTA.[8] Moreover, the Supreme Court has recognized that "dispositive language" in a state taxing statute regarding the taxable event must be followed to determine whether that event has occurred within Indian country for *Bracker* balancing purposes. *Wagnon v. Prairie Band Potawatomi Nation*, 546 U.S. 95, 102 (2005). In sum, Defendants' violation of Section 205.69 flouts the Michigan Sales Tax Act, the SSUTA, and Supreme Court precedent on balancing.[9]

Second, Defendants attached great weight to whether a purchase fulfilled an "essential governmental function," an alien concept created by Defendants that is completely absent from *Bracker* balancing case law. Defendant Fratzke invented the essential governmental function concept and claimed that it ties together "all three interests, the Federal interests, the Tribe's interests and the State interests" consistent with case law. PageID.4514-18. Fratzke could not, however, identify any legal authority as the source of the "essential government functions" concept. PageID.4517-18. Notwithstanding the lack of legal foundation, Defendants relied on the concept to reject all Sales Tax claims except those involving Community purchases deemed to serve "essential government functions" – as judged by the Department. PageID.5336-37. The "essential government services" concept is not merely a component of the analysis Defendants applied to the Community and Members' claims, it is the whole of the analysis.

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[8] SSUTA, § 805, *available at* https://www.streamlinedsalestax.org/docs/default-source/agreement/ssuta/ssuta-as-amended-2018-05-03.pdf?sfvrsn=c5876d7_11 (visited Nov. 30, 2018).

[9] After all their protestations that Section 205.69 does not apply to determine the location of the sale, Defendants nevertheless attempt to reassure the Court that they assumed in addressing each Exemplar Claims that the transaction occurred on the Reservation. PageID.5323. The Community and its members are not reassured and, indeed, have no doubt that Defendants will continue to attempt to thwart their enjoyment of federal tax immunities on this basis after the conclusion of this litigation if the Court does not address this issue.

Moreover, Defendants falsely claim that "Treasury does not use the essential governmental function exemption to exclude tribal commercial enterprises from benefitting from the balancing test." PageID.5338. Defendant Fratzke decided the refund claims at issue in this case and testified as a 30(b)6 witness that the purpose of the concept is "removing the commercial component of the activity that would be in question." PageID.4515. There is no basis in law for concluding that the Community's revenue-raising enterprises may not benefit from the Community's tax immunity—after all, as Fratzke acknowledged, *Bracker* itself involved a tribe's commercial operation—which would not be an "essential government function" according to Defendants. PageID.4492.[10]

Defendants erroneously claim that "the Community misunderstands how Treasury applies this concept to *expand the number of refunds it grants*." PageID.5337 (emphasis added). Defendants cannot identify a single instance where Treasury applied this or any other concept to "expand" the number of refunds it grants. In fact, they go on to make up yet another new rule to avoid recognizing the Community's federal rights, arguing that "the Community purchases uniforms for the maintenance department at its casino [the Community's most important revenue-raising enterprise] but did not explain to Treasury how something any business could buy are connected to tribal sovereignty and self-government." PageID.5337-38. The "essential governmental function" test is a fraudulent test that has nothing to do with anything in the balancing analysis or any other applicable law.

C. The Tobacco Tax is Preempted Under *Bracker* Balancing.

Contrary to Defendants' assertion, the Community's Tobacco Tax argument differs from

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[10] After criticizing the Community for purportedly claiming that *Bracker* and its progeny established general principles, Defendants ask the Court to endorse a categorical rule that they created, and which they admit is contrary to *Bracker*.

those at issue in *Moe* and *Colville*. In *Moe*, the Court did not conduct a balancing analysis and thus did not address the significance of tribal interests in self-determination, economic development, and protecting value generated on the reservation from burdens of state taxation. 425 U.S. 463 at 481-83 (1976). And in *Colville*, the Court specifically contrasted the situation before it with a situation in which the revenues burdened by the tax "are derived from value generated on the reservation by activities involving the Tribes," and therefore the tribal interests are strong. 447 U.S. 134, 156-57 (1980). Here, tobacco sales are an integral part of the Community's gaming, hospitality, and retail enterprises, which attract customers to the Reservation where they benefit from the Community's offerings and government services. PageID.4389-93. Additionally, the Community purchased its untaxed tobacco from other tribal enterprises (PageID.4392-93; 5264), further advancing Indian economic development, an important federal and tribal interest. *Gila River Indian Comty. v. Waddell*, 91 F.3d 1232, 1237 (9th Cir. 1996). Visitors may stay many days at the Community's hotels and campgrounds, and access to lower cost tobacco is a meaningful complement to the other amenities. PageID.4392. Darragh's "opinion" that the Community's untaxed tobacco sales are not complements to its gaming and hospitality enterprises ignores the facts of the Community's business.

Defendants' argument also fails because it relies improperly on off-Reservation services provided to the Community's customers to support State interests in the balancing analysis. PageID.5343. Defendants ignore the well-established law that a state's off-Reservation services are not relevant to *Bracker* balancing. *Ramah*, 458 U.S. at 843-44.

II. IMPOSITION OF THE SALES AND TOBACCO TAXES INFRINGE THE COMMUNITY'S SELF GOVERNMENT AND SOVEREIGNTY.

Defendants have no substantive response to the Community's arguments that the Sales and Tobacco Taxes infringe on the Community's rights of self-government and sovereignty. With respect to Sales Tax, Defendants simply assert that because concurrent taxing jurisdiction

may exist in some circumstances, that it permits enforcement of the Sales Tax here (PageID.5328)—with no regard for the significant injury that this inflicts on the Community's ability to govern transactions involving its own members in its own territory. And with respect to the Tobacco Tax, Defendants ignore the well-established federal law that they cannot conduct law enforcement operations against the Community on the Reservation—which is precisely what Defendants did, and it is the basis for all of the Tobacco Tax enforcement measures they have taken against the Community. PageID.4712.

III. THE 1842 TREATY PREEMPTS SALES AND USE TAXES.

The Community's opening brief showed that Article II of the 1842 Treaty expressly provided that the federal Indian trade and intercourse laws would continue in force within the area ceded by the 1842 Treaty (the "Ceded Area"), even though such federal laws by their terms applied only unceded Indian lands, *i.e.*, "Indian country." PageID. 101-03; PageID.5171-72, 5173-75, 5168-70; Nichols Decl. Exs. 1. Both supporters and opponents of Article II recognized, moreover, that enforcement of the federal Indian trade and intercourse laws would preempt inconsistent state laws, and federal agents ignored state laws by completely excluding alcohol from the Ceded Area and requiring merchants to obtain federal Indian traders licenses to trade with Indians within the Ceded Area. PageID.5102; 5173-75; Nichols Rep. Decl. Exs. 2-3. Because Congress has never terminated Article II, the current federal Indian trade and intercourse laws continue to apply to the Ceded Area as though it remains Indian country, a position confirmed by the Sixth Circuit, which held based on federal case law regarding Indian country that Indians can be required to collect taxes on non-Indians within the Ceded Area. PageID.5298 (citing *Rising*, 477 F.3d at 893). As such, Defendants are preempted from enforcing the Sales Tax or Use Tax on purchases or the use, storage or consumption of property by the Community or its members within the Ceded Area, including the Reservation.

None of Defendants' arguments against the Community's Article II claims has any legal merit. First, Defendants erroneously claim that the language of Article II does not preempt inconsistent state law, noting that Article II does not include express language of preemption. PageID.5351. By providing that the federal Indian trade and intercourse laws would continue in force within the Ceded Area, however, Article II ensured that these federal laws would continue to exert their traditional effect of displacing and preempting inconsistent state laws on the same subject matter. As the Community showed in its November 16, 2018 response brief, both supporters and opponents of Article II expressly recognized that Article II preempted states rights, PageID.5613, and federal Indian agents relied on Article II to enforce federal rules inconsistent with state and territorial law, such as the exclusion of all alcohol from the Ceded Area. Subagent Alfred Brunson, stationed at La Pointe in the Ceded Area, noted in 1843 that Wisconsin Territory laws "authorizes licenses to sell spirituous liquors," but the federal Indian trade and intercourse laws "prohibits their introduction into the country." PageID.5095; 5168-70. Though no fan of Article II, Brunson concluded that "[t]he lesser must yield to the greater, & of course the Territorial law must yield to that of Congress," a conclusion latter expressly confirmed by Commissioner Crawford. PageID.5095; 5168-70, 5173-75. Defendants' claims against Article II's preemptive effect are contradicted by historical facts and have no merit.

Second, Defendants erroneously deny that Article II authorized enforcement of the federal Indian trade and intercourse laws within the Ceded Area as if the Ceded Area remained Indian country. As the Community showed in its Response Brief, the intent, contemporary understanding and federal application of Article II was to enforce the federal Indian trade and intercourse laws in the Ceded Area even though such laws by their terms applied only to Indian country, i.e. unceded Indian land. PageID.5613. As Commissioner of Indian Affairs Crawford confirmed in 1843, Article II required enforcement of the federal Indian trade and intercourse

laws in the Ceded Area "as if the Indian title to the lands ceded have not been extinguished," i.e., as if it were Indian country. PageID.4877, 4881, 4885; PageID.5086-87, 5101, 5091. As in 1843, the current federal Indian trade and intercourse laws apply to areas that qualify as "Indian country," which is currently defined in 18 U.S.C. § 1151. The actual definition in 18 U.S.C. § 1151, however, does not determine the scope of Article II, because Article II continues in force within the Ceded Area the federal Indian trade and intercourse laws without respect to the geographical limitations of such federal laws. In order to give Article II its intended effect, therefore, the current federal Indian trade and intercourse laws clearly must be enforced within the Ceded Area *as if* such area qualified as Indian country.

Third, Defendants erroneously claim that Article II continued within the Ceded Area only the alcohol-related provisions of the federal Indian trade and intercourse laws. This argument flatly contradicts the plain language of Article II, which broadly provides that "the laws of the United States shall be continued in force, in respect of [the Indians'] trade and intercourse with the whites," not a subset of such laws. PageID.5615 Defendants' attempt to restrict the plain meaning of Article II to its alcohol provisions violates the central canon of Indian treaty interpretation, which requires that language in Indian treaties "be liberally construed" in their favor. *Keweenaw Bay Indian Cmty. v. Naftaly*, 370 F. 2d 620, 624 (W.D. Mich. 2005) (citing *Washington State Commercial Passenger Fishing Vessel Ass'n*, 443 U.S. 658, 676 (1979)).[11]

Fourth, Defendants erroneously claim that the Lake Superior Land District Act terminated Article II. The Community has shown that this Act did not even mention, much less

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[11] Paul Driben's opinion that the Indians understood Article II as nothing more than an alcohol provision relies on speculation and irrelevant evidence, ignores contemporary evidence of the Indian understanding, violates the plain language of Article II and violates the canons for interpretation of Indian treaties. PageID.5616.

terminate Article II; that the Michigan legislature's protests about Article II have no connection to the passage of the Act, which resulted solely from its separate grievance that the federal government leased, rather than sold, mineral lands within the Ceded Area; that Defendants' expert Emily Greenwald admitted that the evidence showed no connection between Michigan's Article II complaints and the Lake Superior Land District Act; that the federal government continued to require and grant federal Indian trader licenses for years after passage of the Act; and that the 1854 Treaty provides no confirmation that Article II had been repealed. PageID.5609-17. Defendants provide zero evidence that Congress repealed Article II, much less the required clear evidence of congressional intent to terminate a treaty-protected right.

For the reasons set forth above, Article II of the 1842 Treaty preempts within the Ceded Area Defendants' imposition of Sales Tax and Use Tax on transactions involving the Community or its members.

CONCLUSION

For all of these reasons, the Community's Motion for Partial Summary Judgment should be granted.

Dated: November 30, 2018

Respectfully submitted,

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