

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MICHIGAN

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

Plaintiff,

v.

ROBERT J. KLEINE, Treasurer of the State
of Michigan; JAY RISING, former Treasurer
of the State of Michigan; MICHAEL
REYNOLDS, Administrator of the Collection
Division of the Michigan Department of
Treasury; WALTER A. FRATZKE, Native
American Affairs Specialist of the Michigan
Department of Treasury; and TERRI LYNN
LAND, Secretary of State of Michigan,

Defendants.

Case No. 2:05-cv-0224

Hon. Gordon J. Quist

**BRIEF IN SUPPORT OF
DEFENDANTS' MOTION FOR
SUMMARY JUDGMENT**

ORAL ARGUMENT REQUESTED

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MILLER, CANFIELD, PADDOCK AND STONE, P.L.L.C.

I. INTRODUCTION

The Keweenaw Bay Indian Community (“Community”) has filed a *thirty-three count* complaint in search of a theory – any theory – that will bar the State of Michigan from collecting lawful, nondiscriminatory sales tax M.C.L. §205.51 *et seq.*, and use tax, M.C.L. §205.91 *et seq.*, on tangible personal property where the legal incidence of the tax does not fall on the Community or its members and even when the transaction occurs outside of Indian Country. Defendants are entitled to summary judgment of this **entire lawsuit** entered in their favor because:

- Defendants as state officials have immunity under the Eleventh Amendment and the exception to immunity in *Ex Parte Young* does not apply in this case.
- The State of Michigan is an indispensable party that cannot be joined in this suit and it would be unjust to allow these named Defendants to defend this suit alone.

Defendants are also separately entitled to summary judgment of **multiple counts** within the Complaint entered in their favor, including:

- **Counts VI and XXXII** – The Community cannot bring claims under 42 U.S.C. §1983 because it is not a “person” within the meaning of the statute and the Community did not state a claim against Defendants.
- **Counts XX, XXI, and XXVI** – The Community’s theory that land ceded to the United States under the Treaty of 1842 can be considered equivalent to Indian Country is barred by the doctrine of *res judicata*.
- **Count XXVII** – The Community cannot claim that Defendants breached a 1977 Tax Agreement because Defendants are not parties to the agreement.
- **Count XXXI** – The Community is not entitled to a declaration regarding its alleged right to setoff under tribal law because it has not alleged what right to setoff exists under tribal law and there is no mutual debt between the parties.
- **Count XXXIII** – The Community cannot recover its costs, including its attorney fees, under 42 U.S.C. §1988 because it cannot prevail under §1983.

II. LEGAL STANDARD FOR SUMMARY JUDGMENT

Defendants seek summary judgment under Fed. R. Civ. P. 56 (“Rule 56”),¹ which is properly regarded, “not as a disfavored procedural shortcut, but rather as an integral part of the Federal Rules as a whole, which are designed ‘to secure the just, speedy and inexpensive determination of every action.’” *Celotex Corp. v. Catrett*, 477 U.S. 317, 327; 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986), quoting Fed. Rule Civ. P. 1. Summary judgment is granted “if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.” Rule 56(c). The party opposing summary judgment “may not rest upon the mere allegations or denials” of the reasons asserted in favor of summary judgment. Rule 56(e). As a result, summary judgment can only be denied if “there is sufficient evidence favoring the nonmoving party for a jury to return a verdict for that party. If the evidence is merely colorable, or is not significantly probative, summary judgment may be granted.” *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249-250; 106 S.Ct. 2505; 91 L.Ed.2d 202 (1986) (internal citations omitted).

III. DEFENDANTS ARE IMMUNE FROM SUIT (ALL COUNTS)

A. State Officers Are Entitled To Immunity Under The Eleventh Amendment

The Eleventh Amendment states that “[t]he Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.” This provision prevents the federal courts from exercising jurisdiction over the states without their

¹ Defendants rely extensively on the pleadings in arguing that summary judgment is appropriate. Therefore, should the Court conclude that additional evidence is unnecessary to decide these issues, it may grant judgment on the pleadings and dismiss this action pursuant to Fed. R. Civ. P. 12(b) and (c) as an alternative to summary judgment.

consent, *Seminole Tribe of Florida v. Florida*, 517 U.S. 44, 54; 116 S.Ct. 1114; 134 L.Ed.2d 252 (1996), regardless of the nature of the relief sought, *Pennhurst State School & Hosp. v. Halderman*, 465 U.S. 89, 100; 104 S.Ct. 900; 79 L.Ed.2d 67 (1984). States are also immune from suits brought by an Indian tribe without their consent. *Blatchford v. Native Village of Noatak*, 501 U.S. 775, 782; 111 S.Ct. 2578; 115 L.Ed.2d 686 (1991); see also *Seminole Tribe*, *supra* at 72 (“Even when the Constitution vests in Congress complete law-making authority over a particular area, [such as Indian commerce,] the Eleventh Amendment prevents congressional authorization of suits by private parties against unconsenting States.”).

Because the State of Michigan will not consent to be sued in federal court in this matter, the Community has attempted to avoid this bar by naming State officials as defendants. But the

Eleventh Amendment bars a suit against state officials when the state is the real, substantial party in interest. Thus, [t]he general rule is that relief sought nominally against an officer is in fact against the sovereign if the decree would operate against the latter. And, as when the State itself is named as the defendant, a suit against state officials that is in fact a suit against a State is barred regardless of whether it seeks damages or injunctive relief. [*Pennhurst*, *supra* at 101 (internal quote marks and citations omitted, alteration in the original).]

The State of Michigan is the real, substantial party in interest in this case, not Defendants.

The substance of the Community’s claims is that the State, acting through the Department of Treasury (“Treasury”), engaged in allegedly improper acts related to Michigan taxes imposed on the Community, its members, its members’ business entities, and the retailers, contractors, and subcontractors with whom they do business. This true focus on the State is why the Community alleges that the “*Department*” audited the Community’s sales tax and use tax payments for fiscal years 1993 and 1994; the “*Department*” issued letters to the Community identifying tax deficiencies; the “*Department*” held a hearing and issued a decision regarding the Community’s tax deficiencies; the “*Department*” issued tax bills to the Community; the

“*Department*” reversed tax offsets taken in 2002; and the Community urged the “*Department*” to reverse tax offsets the Department took in 2005. Complaint, ¶¶32, 33, 36-38, 41, 59 (emphasis added). The Community even claims that the “*Department*[’s]” tax audits and assessments breached a tax agreement “the Community and the *State of Michigan* executed” in 1977 and a 2001 consent judgment between “the Community and the *State of Michigan*” concerning gaming under the Community’s 1993 compact with the State. Complaint, ¶¶20, 45, 175 (emphasis added); see also 1977 Tax Agreement, attached as Exhibit A to Complaint; **Exhibit A**, *Keweenaw Bay Indian Community v. United States of America*, No. 2:94-cv-262 (W.D. Mich., February 2, 2001) (“Consent Judgment”); **Exhibit B**, Gaming Compact (Aug. 20, 1993), p 1.

The Community also challenges generally applicable sales and use tax statutes enacted by the Legislature and enforced by Treasury, which are alter egos of the State. Complaint, ¶¶26-31, 100, 104, 108, 112, 116, 120, 124, 128, 132, 136, 140. The Community notes its decision not to enter a new comprehensive tax agreement with the “*State of Michigan*” that would resolve the issues in this case. Complaint, ¶¶25; see also *Fratzke Affidavit*, ¶¶6-10, attached as Exhibit A to Defendants’ Brief Opposing Plaintiff’s Motion for Partial Summary Judgment. More tellingly, the Community repeatedly seeks relief that extends beyond Defendants and would apply to their “successors,” the entire Department of Treasury, and “any other Michigan agency or official.” Complaint, ¶¶67, 71, 79, 83, 94, 98, 102, 106, 110, 114, 118, 122, 126, 130, 134, 138, 142, 147, 150, 156, 160, 163, 164, 168, 169, 173, 179, 182, 186, 194(e), and p 58 (sub. f).

Fairly read, the Complaint is intended to change Michigan’s tax policies and so the State inevitably has “a continuing interest in the litigation” *Idaho v Coeur d’Alene Tribe of Idaho*, 521 US 261, 269; 117 S Ct 2028, 138 L Ed 2d 438 (1997). Because this suit is directed at the State, Defendants are immune from suit in federal court for all actions made in their official

capacities. Second Amended Complaint (May 25, 2006), ¶7-10 (“Complaint”); see *California v. Deep Sea Research, Inc.*, 523 U.S. 491, 502; 118 S.Ct. 1464; 140 L.Ed.2d 626 (1998).

B. *Ex Parte Young* Does Not Permit Plaintiff’s Claims

Ex Parte Young, 209 U.S. 123, 28 S.Ct. 441, 52 L.Ed. 714 (1908) provides a narrow exception to the Eleventh Amendment, allowing a plaintiff to bring suit “for prospective injunctive relief against state officials acting in violation of federal law.” *Frew ex rel Frew v. Hawkins*, 540 U.S. 431, 437; 124 S.Ct. 899; 157 L.Ed.2d 855 (2004). The sole purpose of this exception is to allow federal courts to “enjoin state officials to conform their *future conduct* to the requirements of federal law” *Quern v. Jordan*, 440 U.S. 332, 337; 99 S.Ct. 1139; 59 L.Ed.2d 358 (1979) (emphasis added).

Ex Parte Young does not apply because the Community is seeking *retrospective* relief. The Community seeks a declaration that Defendants have violated federal law in the past when it petitions this Court to declare the illegality of the Treasury’s tax assessments for 1993 and 1994, Treasury’s 1996 Offsets, and Treasury’s 2005 Offsets, all of which occurred in the past. Complaint, ¶66(a) and (b), 70(a) and (b), 74(a) and (b), 78(a) and (b), 82(a), 97, 175, 181, 185, and p 57 (sub. a). The Community also requests a declaration that when the Department included penalties and interest in the tax bills prepared in 2002 for the 1993 and 1994 tax years, it violated its previous decision regarding the applicability of penalties and interest, a decision also made in 2002. Complaint, ¶36-38, 178. Defendants are immune from all claims concerning past actions because *Ex Parte Young* simply “does not permit judgments against state officers declaring that they violated federal law in the past.” *Puerto Rico Aqueduct and Sewer Authority v. Metcalf & Eddy, Inc.*, 506 U.S. 139, 146; 113 S.Ct. 684; 121 L.Ed.2d 605 (1993).

Ex Parte Young also does not apply in this case because the Community seeks money damages. The Community cleverly asks this Court to order Defendants to “reverse” the 2005 Offsets and “restore” the money to the Community. Complaint, ¶¶66(c), 70(c), 74(c), 78(c), 82(b), 194(b), p 57 (sub. b), and p 58 (sub. h). In truth, the Community is asking this Court to order a refund of the tax offsets, which is outside the scope of the *Ex Parte Young* doctrine. *Edelman v. Jordan*, 415 U.S. 651, 663; 94 S.Ct 1347; 39 L.Ed.2d 662 (1974). No matter how described, relief that is “in practical effect indistinguishable in many aspects from an award of damages against the State” is barred because it “will to a virtual certainty be paid from state funds, and not from the pockets of the individual state officials who [are] the defendants in the action.” *Id.* at 668-669.

If this Court were to order Defendants to “reverse” the offsets and “restore” the money to the Community, the refund would come from the State’s coffers because Defendants received no portion of the offsets. Indeed, the Community does not allege that Defendants have the money from the offsets. Tax refunds, though labeled some form of “equitable restitution,” are prohibited by *Ex Parte Young*. *Edelman, supra* at 668-669. *Standing Rock Sioux Indian Tribe v Dorgan*, 505 F.2d 1135, 1136-1139 (8th Cir., 1974), also reached this conclusion when the Eighth Circuit held that the plaintiff tribe could not sue the North Dakota Tax Commissioner in federal court to collect a refund of taxes that had already been declared unconstitutional because the suit was essentially against the state, which had not consented to be sued.

The Community also requests a series of declarations that fall outside of *Ex Parte Young* because they are intended solely for their *res judicata* effect in a subsequent action. *Green v. Mansour*, 474 U.S. 64, 72-73; 106 S.Ct. 423, 88 L.Ed.2d 371 (1985). The Community asks this Court to declare that no sales tax or use tax applied to the construction materials, supplies, and

equipment used to build the Niiwinakeaa Center in 2003 so they cannot be collected in the future. Complaint, ¶¶56, 120-121, 128-129, 128-129. The Community also seeks a declaration that the past refusal by the Community, its members, retailers, and contractors or contractors to pay taxes was legal and, therefore, does not subject them to any future criminal or civil liability. Complaint, ¶¶125, 129, 133, 137, 141, 146, 149. The Community even seeks a declaration regarding its right under tribal law to engage in its own setoff by withholding payments it was obligated to make in 2005 to the Michigan Economic Development Corporations (“MEDC”) in order to head-off future litigation by the State or MEDC. Complaint, ¶¶189. Seeking these declarations solely to preclude a subsequent action is an impermissible “end run” around the limits *Edelman* imposes on *Ex Parte Young*. *Green, supra*.

Not even the few requests that the Community makes for declarations regarding future enforcement of Michigan sales and use taxes fit within the Supreme Court’s narrow interpretation of *Ex Parte Young*. *Coeur d’Alene, supra* at 270, rejected a formalistic application of *Ex Parte Young* that would allow suits in federal courts that were nominally against state officers but substantively against states. Instead, *Coeur d’Alene* instructs that a suit in federal court that would otherwise fit within *Ex Parte Young* because it solely seeks prospective injunctive relief against a state officer will nevertheless be barred by the Eleventh Amendment if the suit involves a state’s “special sovereignty interests.” *Id.* at 281. In *Coeur d’Alene*, the plaintiff tribe was using the federal litigation to transfer public property from state control to tribal control. *Id.* at 282-287. The Court concluded that *Ex Parte Young* did not allow the plaintiff tribe to avoid Idaho’s immunity by suing state officials because “if the Tribe were to prevail, Idaho’s sovereign interest in its lands and waters would be affected in a degree fully as intrusive as almost any conceivable retroactive levy upon funds in its Treasury.” *Id.* at 287.

In *ANR Pipeline Co. v. Lafaver*, 150 F.3d 1178 (10th Cir., 1998), the Court considered what constitutes the “special sovereignty interests” that *Coeur d’Alene* held are protected under the Eleventh Amendment despite *Ex Parte Young*. The *ANR* decision involved a federal court challenge to the valuation and assessment of taxes on Kansas gas pipelines and named as defendants a variety of state and local officials who participated in assessing and collecting those taxes. *Id.* at 1183-1186. *ANR* held that states have a special sovereignty interest in taxation because “it is impossible to imagine that a state government could continue to exist without the power to tax” and Congress had acknowledged that such a special sovereignty interest exists when it enacted the Tax Injunction Act, 28 U.S.C. §1341, to limit the power of federal courts over state taxes. *Id.* at 1193. Further, the Court noted, the plaintiffs’ demand that Kansas rewrite its tax code was as intrusive as a retroactive money judgment proscribed by *Ex Parte Young*. *Id.* at 1194.

The reasoning in *ANR* applies equally well in this case. The State of Michigan could not conduct any essential governmental functions that accompany its sovereignty if it were unable to levy taxes on its citizens, including the Community’s members. The Community’s request for declaratory relief also effectively asks this Court to order the State of Michigan to rewrite its tax code, which *ANR* holds is impermissible. For instance, the Community would have this Court order the State to: rewrite M.C.L. §205.30c so that it can obtain the preferential tax treatment offered to tribes that enter into comprehensive tax agreements with the State without making any of the statutory concessions; rewrite M.C.L. §205.52 so that the legal incidence of the sales tax falls on a purchaser so that the Community and its members can market their tax exemptions to retailers; and alter its tax code to preempt state sales and use taxes for transactions that occur outside of Indian Country, which are lawfully taxable. See *Mescalero Apache Tribe v. Jones*,

411 U.S. 145, 148-149; 93 S.Ct. 1267; 36 L.Ed.2d 114 (1973) (non-discriminatory state laws apply to Indians outside of Indian country).

In addition to Michigan's special sovereignty interest in taxation, Counts XX, XXI, and XVI literally attempt to divest a portion of the State's sovereignty over the land and people in the western Upper Peninsula in the area the Community and other tribes ceded to the United States in the 1842 Treaty with the Chippewa at LaPointe (the "Ceded Area"). See *Treaty with the Chippewa at La Pointe*, 7 Stat. 591 (Oct. 4, 1842) ("1842 Treaty"); **Exhibit C**, Michigan State University, Michigan Geography 333, *Indian Land Cessions Map* (visited Dec. 15, 2006) <<http://www.geo.msu.edu/geo333/images/indianreservation.jpg>> (map); see also Copper Harbor, Michigan, *History* (visited Dec. 15, 2006) <<http://www.copperharbor.org/history.html>> (describing Ceded Area as "roughly that area between Marquette, Michigan and Duluth, Minnesota"). According to the Community, Article II of the 1842 Treaty divests Michigan of complete sovereignty over the Ceded Area by preempting Michigan tax law and imposing federal law for all matters concerning trade and intercourse with Indians. Complaint, ¶12. Divesting state sovereignty over land was at the heart of the conclusion in *Coeur d'Alene* that the State of Idaho and other governmental officials were immune from suit. See *Coeur d'Alene*, *supra* at 282. Like the tribe in *Coeur d'Alene*, the Community is seeking to remove the Ceded Area from "the regulatory jurisdiction of the State," in this case with respect to the right to govern trade and intercourse with Indians. *Id.*

This case, however, is even more serious than *Coeur d'Alene*. Unlike the submerged lake and river lands at issue in that case, the area ceded in the 1842 Treaty is much larger and extends into Wisconsin. Were this Court to conclude that the 1842 Treaty divested Michigan of sovereignty over the Ceded Area, it would essentially create a tax-free, quasi-federal installation

in Michigan and Wisconsin that does not meet the definition of Indian Country, is not governed by the tribes in those areas, and yet is not governed fully by the states in which they are located. See *Oklahoma Tax Com'n v. Chickasaw Nation*, 515 U.S. 450, 453 n 2; 115 S.Ct. 2214 132 L.Ed.2d 400 (1995), citing 18 U.S.C. §1151 (defining Indian Country).

When the Supreme Court decided *Coeur d'Alene*, *supra* at 264, it had to consider whether a state has a special sovereignty interest in lands that were *unpopulated* by humans because they are submerged, such as lake beds and river banks. In this case, the Community is attempting to divest the State of its sovereignty over *populated* lands. Even if this Court were to conclude that the special and highly significant state interest in taxation is different in kind than the property interests at stake in *Coeur d'Alene*, the fact that this case involves populated lands and a claim that the 1842 Treaty precludes the application of state law in the Ceded Area elevates the State's sovereignty interests. Even those courts that have been critical of *ANR* would likely concede that the Community's effort to transfer this authority over State land and State citizens is "so much of a *divestiture* of the state's sovereignty as to render the suit as one *against the state itself*." *Agua Caliente Band of Cahuilla Indians v. Hardin*, 223 F.3d 1041 (9th Cir., 2000) (emphasis in the original). The Eleventh Amendment bars this case in its entirety regardless of *Ex Parte Young*.

IV. THIS ACTION MUST BE DISMISSED BECAUSE THE STATE IS NEEDED FOR A JUST ADJUDICATION BUT CANNOT BE JOINED (ALL COUNTS)

Federal Rules of Civil Procedure 19 ("Rule 19") permits a federal court to dismiss an action if the plaintiff has failed to join a necessary party. A motion to dismiss for failure to join a party under Rule 19 should be granted if the absent party "is necessary," the absent party's "joinder cannot be effected," and the Court "determines that it will dismiss the pending case rather than proceed in the case without the absentee" in light of the factors in Rule 19(b). *Glancy*

v. Taubman Centers, Inc., 373 F.3d 656, 666 (6th Cir., 2004). The Court must dismiss this action because the Community must, but cannot, join the State of Michigan as a defendant.

First, the State is a necessary party to this action under Rule 19(a). Without the State as a party, “complete relief cannot be accorded among those already parties” because the Community seeks relief that extends beyond Defendants and their successors to the entire Department of Treasury and “any other Michigan agency or official.” Complaint, ¶¶67, 71, 79, 83, 94, 98, 102, 106, 110, 114, 118, 122, 126, 130, 134, 138, 142, 147, 150, 156, 160, 163, 164, 168, 169, 173, 179, 182, 186, 194(e), and p 58 (sub. f); Rule 19(a)(1). At best, any injunctive relief the Community could obtain in this action would apply solely to Defendants and their direct successors for the claims in which they are alleged to have acted in their official capacities. See, generally, *Westside Mothers v. Haveman*, 289 F.3d 852 (6th Cir., 2002) (suit properly avoided state immunity because it sought “only prospective injunctive relief from a federal court against state officials *for those officials' alleged violations of federal law*”) (emphasis added). At the same time, if the Community were entitled to some relief under 42 U.S.C. §1983 for alleged acts in their individual capacities, any resulting judgment would operate only against Defendants alone and not their successors. See *Brandon v. Holt*, 469 US 464, 466; 105 S Ct 873; 83 L Ed 2d 878 (1985) (holding that new official could not be held individually liable for acts of predecessors); see also *Harrington v. Grayson*, 764 F.Supp. 464, 478 (E.D. Mich., 1991) (suit against state official acting in individual capacity remains against the named defendant even after he leaves office). Unnamed State agencies and officials could only be made subject to relief granted in this case if that relief were imposed against the State itself.

The State is also a necessary party because the State has an interest in the subject of this litigation and disposing of this case without the State “may . . . as a practical matter impair or

impede” the State’s “ability to protect that interest.” Rule 19(a)(2)(i). In *Glancy, supra* at 669-670, the Sixth Circuit explained that this analysis does not require evidence of whether the named party would provide adequate representation of the absent party’s interests; rather, the plain language of this rule determines whether a party is necessary. For *Glancy*, that meant that the absent party was necessary because its interest in corporate shares would be impaired or impeded because they were at the heart of litigation and their exercise could be affected by an injunction issued in the litigation. See *id.* at 671. Were this Court to issue any of the declarations or injunctions that the Community requests, the State’s ability to protect its interests would be impaired or impeded because the Court decide that there was a breach of the State’s 1977 Tax Agreement with the Community, that the State lacks complete sovereignty over the territory ceded under the 1842 Treaty, that it is unable to levy its sales and use taxes, or that the Community is entitled to withhold from the State the 8% net win payments required under the 2001 Consent Judgment. The State is a necessary party because its financial, contractual, and sovereign interests could be affected by this litigation. See, generally, *Kickapoo Tribe of Indians v. Babbitt*, 43 F.3d 1491, 1500 (D.C. Cir. 1995) (state indispensable because financial and contractual rights under gaming compact at issue).

Second, though necessary, the State cannot be joined in this action because it has not and will not consent to be sued in federal court. See *Blatchford, supra* at 782 (tribe cannot sue state in federal court without its consent). Indeed, the Community has made no attempt to allege or prove that the State will consent to be sued. As the Sixth Circuit noted in *Keweenaw Bay Indian Community v. State*, 11 F.3d 1341, 1347 (6th Cir., 1993) (“*KBIC*”), sovereigns typically do not consent to be sued because they “have an interest in preserving their own sovereign immunity.”

Third, “equity and good conscience” dictate that this Court dismiss this action because the State is “regarded as indispensable” to this action under Rule 19(b). Four factors are usually relevant to determining whether the State is indispensable, but when the absent party is “immune from suit, there is very little room for balancing of other factors set out in Rule 19(b), because immunity may be viewed as one of those interests compelling by themselves.” *Enterprise Mgmt. Consultants, Inc. v. United States ex rel. Hodel*, 883 F.2d 890, 894 (10th Cir., 1989) (internal citations and quote marks omitted); see also *Niagara Mohawk Power Corp v. Tonawanda Band of Seneca Indians*, 862 F. Supp. 995, 1004 (W.D. N.Y., 1994); *Kickapoo*, *supra* at 1496.

Were the four factors in Rule 19(b) relevant despite the State’s immunity, they would still weigh heavily in favor of dismissal. The first factor asks “to what extent a judgment rendered in the person's absence might be prejudicial to . . . those already parties.” *Id.* If this Court rendered judgment in this case without the State as a party, it would be highly prejudicial to the named Defendants. For instance, the Court might order Defendants to pay the amount of the tax offsets personally, even though Defendants were never personally in possession of those funds and Treasury took those offsets for the benefit of the State, not Defendants’ benefit.

The second factor in Rule 19(b) asks “the extent to which, by protective provisions in the judgment, by the shaping of relief, or other measures, the prejudice can be lessened or avoided.” Even if the Court were to order the most narrow injunctive relief, it would still have negative implications for Defendants, who would then be required to follow certain rules concerning taxation defined by this Court that no other State official or employee would have to follow. Allowing such an inconsistent application of state law would put Defendants at risk of being discharged from their jobs for their inability to follow State law and policy. It would also force them to violate the uniformity of taxation required by Const. 1963, art. 9, §3.

The third factor in Rule 19(b) asks “whether a judgment rendered in the person's absence will be adequate.” Without the State as a party to this action, the Community cannot even hope to accomplish the significant alteration of Michigan tax law it seeks in this case. At best, it can only obtain an injunction that affects these Defendants in their official capacities and their successors in office. Nor can the Community obtain a true refund of the tax offsets because the State collected the offsets, but any money damages would be paid from Defendants’ pockets.

The fourth factor in Rule 19(b) asks “whether the plaintiff will have an adequate remedy if the action is dismissed for nonjoinder.” The Community is free to challenge the State’s tax policies in the Michigan Tax Tribunal or Michigan Court of Claims.² More importantly, the Community does not need to seek any sort of declaration or refund of the tax offsets in this case. As the Community freely admits, it has withheld its 8% net win payments that are due under a consent judgment with the State and, therefore, is owed nothing. In fact, if there is an accounting of the money withheld by the Community, it may show that the amount it has withheld exceeds the amount it claims it is owed. There is little or no prejudice that would result to the Community if it were forced to press its claims in a state forum. See *Coeur d’Alene, supra* at 275 (Kennedy, J.), at 293 (O’Connor, J. with Scalia and Thomas, JJ.), (commenting that state courts are not inferior to the federal courts when deciding federal questions).

When weighed, these factors require that the Community be prevented from suing Defendants when its claims are against the State, which is an indispensable party that cannot be joined. Courts have not hesitated to dismiss actions in which Indian tribes are indispensable parties but cannot be joined because they have sovereign immunity, see *KBIC, supra* at 1348; *Niagara Mohawk, supra* at 1004; *Pit River Home and Agricultural Co-Op Ass’n v. U.S.*, 30 F.3d

² Defendants do not waive any defense, claim, or issue for a future action.

1088, 1105 (9th Cir. 1994), and this Court should not hesitate to do the same when the State is indispensable but immune from suit by a tribe, see *Kickapoo Tribe, supra* at 1499.

V. THE COMMUNITY HAS FAILED TO STATE A CLAIM UNDER 42 USC §1983 (COUNTS VI AND XXXII)

A. The Community Is Not A “Person” Within The Meaning Of §1983

In Count VI the Community alleges that Defendants Rising, Reynolds, and Fratzke denied the Community its federal rights by taking the 2005 Offsets, which in turn violated 42 U.S.C. §1983. Similarly, in Count XXXII, the Community alleges that all the Defendants violated §1983 by assessing the sales and use taxes and taking the offsets. However, §1983 provides in relevant part:

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or *other person within the jurisdiction thereof* to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress
[Emphasis added.]

In *Inyo County, Cal v Paiute-Shoshone Indians of the Bishop Community of the Bishop Colony*, 538 US 701, 123 S Ct 1887; 155 L Ed 2d 933 (2003), the United States Supreme Court held that Indian tribes, like states, cannot be considered a “person” within the meaning of §1983 and, therefore, cannot be a claimant under this statute.

Furthermore, the Community’s §1983 claims are solely for injuries to itself. Complaint, ¶¶85-88, 191-193. As a result, this Court need not consider whether the Community can press these §1983 claims on behalf of its members as “citizens” under §1983 because it does not claim that its members have suffered injuries because of Treasury’s offsets. Nor is there a possibility that the §1983 claims could be amended to include claims by individual members of the

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Community because the very essence of Counts VI and XXXII relate to the effect that the offsets Treasury took and the taxes that the State imposes have on the Community's sovereignty, including the ability to carryout its programs with money it does not have available because of taxes or offsets. Complaint, ¶88, 191. In *Winnebago Tribe of Nebraska v. Kline*, 297 F.Supp.2d 1291, 1297-1298 (D. Kan., 2004) the District Court held that §1983 claims that substantively involve an injury to a tribe's sovereignty fall squarely within the holding in *Inyo, supra*, that tribes cannot sue under §1983 – even if individual tribal members are added to the complaint.

B. The Community Failed To State A Claim Against Defendants As Individuals

The Community has attempted to plead claims under §1983 against Defendants Rising, Reynolds, and Fratzke in their individual capacities in order to circumvent the limitation under *Ex Parte Young* that any relief awarded against a state official in his official capacity be solely for prospective injunctive relief. Complaint, ¶87 (Count VI claim for individual liability under §1983, naming only Defendants Rising, Reynolds, and Fratzke); see also Complaint, ¶190, 194 (Count XXXII seeking injunctive relief on the basis of allegations in Count VI); *Edelman, supra* at 668-669. In short, the Community wants money damages, but knows that it cannot obtain money damages from the State or from Defendants for acts taken in their official capacity. So the Community sued these three Defendants in their individual capacities.³

The Community has failed to state a §1983 claim against Defendants Rising, Reynolds, and Fratzke in their individual capacities because the Community attempts to impute the acts of others to them instead of holding them liable for their own acts. See *Harrington, supra* at 476 (“[P]ersonal capacity suits for damages require personal involvement . . .”). For instance, the

³ Defendant Kleine is Defendant Rising's successor. However, under *Brandon, supra*, Defendant Kleine cannot be held individually liable for Defendant Rising's individual conduct, and the Community has not pleaded a §1983 claim against him or Defendant Land.

Community claims that “Defendants *or their predecessors* offset or caused to be offset” the 1993-1994 assessments. Complaint, ¶39. Similar allegations regarding Defendants’ predecessors or other State employees appear in Paragraphs 46, 47, 48(a), 48(b), 52, 54, 191, and 192. However, there is no continuity of liability between individuals when a party is named a defendant in her or his individual capacity. See *Kentucky v Graham*, 473 U.S. 159, 165-166; 105 S.Ct. 3099; 87 L.Ed.2d 114 (1985) (distinguishing between individual- and official-capacity lawsuits). The same problem occurs with the section of Count XXXII that requests a tax refund. Complaint, ¶194(b). Count VI provides the allegations in support of the request for relief in Count XXXII. Though Count VI is pressed solely against Defendants Rising, Reynolds, and Fratzke, the Community nevertheless seeks to make all the Defendants subject to the injunction it seeks under Count XXXII, ostensibly when they had no personal involvement in the alleged acts supporting the substantive §1983 claim.

It is not enough for the Community to seek to hold Defendants liable for some vague supervisory role they may have had over the unnamed individuals who actually took the acts about which it complains. See *Johnson v. Daniels*, 769 F.Supp. 230, 234 (E.D. Mich., 1991) (no individual liability under §1983 for defendants’ action as supervisor). The Complaint fails to plead a claim against Defendants because it leaves unanswered what, exactly, each Defendant did that would establish his or her liability under §1983. See *Graham, supra* at 166 (“On the merits, to establish personal liability in a § 1983 action, it is enough to show that the official, acting under color of state law, caused the deprivation of a federal right.”). More importantly, the Complaint as a whole really makes claims against the State or Defendants acting in their official capacities, which prevents the money damages that Defendants seek. See *Edelman, supra* at 668-669.

Pleading §1983 claims against these Defendants in their individual capacities is not a harmless fiction this Court should indulge. Damages for claims brought against a defendant in his individual capacity are paid by the defendant, not the State. See *Graham, supra* at 166. The Community is actually asking the Court to order Defendants to pay thousands of dollars out of their own pockets when it asks for the Court to award the alleged “money damages for lost governmental revenue and lost federal program services” and to “reverse the 1996 Audit Offsets and the 2005 Offsets and restore to the Community the funds improperly withheld as a result of the offsets.” Complaint, ¶88, 194(b); see also page 58 (sub. h). The absurdity of this prayer for money damages is that there appears to be no dispute that the State of Michigan – not these Defendants – has the money from the offsets. Complaint, ¶44. If the Community might argue that the State would actually pay these damages for alleged acts by Defendants in their individual capacities, it only reinforces that the action is substantively against the State and these claims should be dismissed because the State is not a person under §1983. See *Will v. Michigan Dept of State Police*, 491 U.S. 58, 71; 109 S.Ct. 2304; 105 L.Ed.2d 45 (1989).

VI. RES JUDICATA BARS THE COMMUNITY’S CLAIMS CONCERNING THE EFFECT OF THE 1842 TREATY (COUNTS XX, XXI, XVI)

This suit is not the Community’s first effort to have a federal court expand its Indian Country to include the Ceded Area in order to preempt state tax law. Complaint, ¶12, 144, 149, 171. In *Rising I*, the Community sued State Treasurer Jay Rising and two members of the Michigan State Police who enforced Michigan’s taxes for the sale of tobacco to non-Indians. *Keweenaw Bay Indian Community v. Rising*, No. 2:03-CV-111(W.D. Mich., Mar. 24, 2005) (Second Amended Complaint) (“*Rising I* Complaint”), ¶1. *Rising I* alleged that the 1842 Treaty requires that federal law control trade and intercourse with Indians in the Ceded Area and, therefore, precludes the State of Michigan from collecting taxes in that area. *Id.* at 8, 59.

When the Defendants in *Rising I* moved for summary judgment of the Community's treaty claim, the District Court considered the language of Article II of the 1842 Treaty, which says that "the laws of the United States shall be continued in force, in respect to their trade and intercourse with the whites, until otherwise ordered by Congress." *Keweenaw Bay Indian Community v. Rising*, No. 2:03-CV-111(W.D. Mich., Sept. 12, 2005) (opinion), available at 2005 WL 2207224 ("*Rising I Opinion*") at *10. The Court assumed that this treaty provision was still in effect, but noted that the federal Indian Trader statutes granted the Commissioner of Indian Affairs the "sole power to appoint Indian traders and make comprehensive rules and regulations governing 'the kind and quantity of goods and the prices at which such goods shall be sold to the Indians.'" *Id.* at * 11, quoting 25 U.S.C. § 261. However, the Court found no conflict with the Indian Trader statutes because Michigan's tobacco tax "does not purport to regulate who the Indians may buy goods from, who they may sell goods to, or even what goods they may purchase or sell," it "merely requires the payment of Michigan State taxes when sales of tobacco products are made to non-Indians." *Id.* Further, the Court rejected as "unconvincing" the Community's argument that the 1842 Treaty bars the State from collecting tobacco taxes for sales to non-Indians in the Ceded Area because federal law, including statutory and common law, allowed those taxes to be collected. *Id.* As the Court put it, "The 1842 Treaty does not limit the State's ability to impose minimal burdens on the Community to assist in the collection of the State's cigarette taxes." *Id.* Consequently, the Court granted summary judgment of the treaty claim to Defendants. *Id.* *Rising I* is on appeal to the Sixth Circuit. *Keweenaw Bay Indian Community v. Rising*, No. 05-2398 (6th Cir., Sept. 11, 2006) (oral argument).

Res judicata prevents the Community from relitigating its claim that the 1842 Treaty preempts state tax law in the Ceded Area. See *Driskell v. General Motors Corp.*, 21 F.3d 427

(6th Cir, 1994). *Res judicata* requires a claim to be dismissed where there is evidence of

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

There is evidence of each of these factors here.

First, the Court's order granting summary judgment to Defendants in *Rising I* constitutes a "final decision on the merits." See *Mayer v. Distel Tool and Machine Co.*, 556 F.2d 798, 798 (6th Cir., 1977) (concluding that summary judgment was a final decision for *res judicata*). Additionally, "[i]t should be noted that the established rule in the federal courts is that a final judgment retains all of its preclusive effect pending appeal." *Erebia v. Chrysler Plastic Products Corp.*, 891 F.2d 1212, 1215 n 1 (6th Cir., 1989). Second, both this suit and *Rising I* are substantively between the same parties: the Community and the State. See *Rising I Opinion*, *supra* at *1 (calling defendants "the State"). These actions are both nominally between the Community and Defendant Rising. While Defendant Fratzke was not a named defendant in *Rising I*, he nevertheless provided the central testimony on behalf of the defendants in *Rising I*. *Rising I Opinion*, *supra* at *1-4, 9-10. Defendants in this action are also Defendant Rising's privies because they are either his successor-in-interest, like Defendant Kleine the new State Treasurer, or because Defendant Rising adequately represented their interests in *Rising I*. See *McCormick v. Braverman*, 451 F.3d 382, 396 n 8 (6th Cir., 2006).

Third, the Community raised the identical claims regarding the preemptive effect it claims that the 1842 Treaty has within the Ceded Area. The alleged history and supposed legal effect of the 1842 Treaty described in paragraphs 8 and 59 in the *Rising I* Complaint are virtually

identical to paragraphs 11, 12, and 144 in this Complaint. The treaty allegations in paragraphs 149-150 and 171-173 in this Complaint also rely on the earlier premise that the 1842 Treaty bars state taxes in the Ceded Area. Fourth and finally, there is an “an identity of the causes of action” between this case and *Rising I*, meaning that there is “an identity of the facts creating the right of action and of the evidence necessary to sustain each action.” *Westwood Chemical Co., Inc. v. Kulick*, 656 F.2d 1224, 1227 (6th Cir., 1981). The fact that there are different taxes at issue in *Rising I* and this case is distracting but irrelevant to concluding that *res judicata* bars this action. The Community alleges in both *Rising I* and this case that the 1842 Treaty “creates rights that cannot be burdened with a state tax.” *Rising I* Complaint, ¶59; Complaint, ¶144. In other words, the Community’s argument in both cases is that the 1842 Treaty precludes the application of *all* types of state taxes within the Ceded Area. The evidence needed to support or rebut this claim is the same in both cases because it would *not* focus on the facts surrounding the individual taxes at issue, but would look at the meaning of the 1842 Treaty as understood by the Indians in 1842 when it was signed. See *Minnesota v. Mille Lacs Band of Chippewa Indians*, 526 U.S. 172, 196; 119 S.Ct. 1187; 143 L.Ed.2d 270 (1999). The Court in *Rising I* has already concluded that the evidence did not support the Community’s contention that the 1842 Treaty preempts state taxes in the Ceded Area. Having satisfied each of the four elements of *res judicata*, this Court must grant summary judgment of the Community’s treaty claims.

VII. THE COMMUNITY CANNOT STATE A CLAIM AGAINST DEFENDANTS FOR BREACHING A CONTRACT TO WHICH THEY ARE NOT PARTIES (COUNT XXVII)

In Count XXVII, the Community seeks a declaration that Defendants breached the 1977 Tax Agreement when they assessed taxes for fiscal years 1993 and 1994, offset the unpaid tax liability, and assessed penalties and interest. Every breach of contract claim depends on “the existence of a contract *between the parties . . .*” *Timmis v. Sulzer Intermedics, Inc.*, 157

F.Supp.2d 775, 777 (E.D. Mich., 2001) (emphasis added). These Defendants were not parties to the 1977 Tax Agreement. Rather, as the Community concedes, the agreement was made with “the State of Michigan.” Complaint, ¶ 20. Regardless of whether the Community could sue the State for breach of the 1977 Tax Agreement, it cannot sue these Defendants for breaching an agreement under which they have no obligations and are not parties.

VIII. THE COMMUNITY IS NOT ENTITLED TO A DECLARATION REGARDING SETOFF (COUNT XXXI)

The Community and the State of Michigan are parties to a Compact that permits the Community to conduct Class III gaming under specific terms and conditions. See **Exhibit B**, Gaming Compact, p 1. The Compact is subject to a federal consent judgment between the Community and the State executed in 2001 that requires the Community to make semi-annual payments to the Michigan Economic Development Corporation (“MDEC”) in the amount of 8% of its net win derived from Class III gaming with electronic games of chance at each of its casinos. See **Exhibit A**, Consent Judgment, ¶4(B), 5(B).

The Community alleges that more than ten years ago Treasury audited its payment of sales and use tax for 1993 and 1994 and found that the Community had underpaid these taxes by \$186,304. Complaint, ¶32-33. In 1996, the Community says, Treasury offset part of the amount the Community owed for the tax deficiencies. Complaint, ¶33. Treasury reversed its second attempt to offset the Community’s tax liability in 2002. Complaint, ¶39-41. In 2005, Treasury took its third offset aimed at reducing or eliminating the 1993 and 1994 tax deficiencies by withholding from the Community more than \$100,000 in federal social service program monies, state tax refunds, and other funds (the “2005 Offsets”). Complaint, ¶42. According to the Community, when Treasury would not reverse the 2005 Offset, it withheld the 8% net win payments. Complaint, ¶45. Though the Community does not state the dollar amount of the win

payments it withheld, in Count XXXI the Community asks this Court to declare that its setoff is “a lawful exercise of the Community’s set off rights under tribal law.” Complaint, ¶189.

The Community, however, utterly failed to provide any basis on which this Court can even guess what tribal law says, if anything, regarding the right to setoff, not to mention that tribal law would not govern in such instance. Summary judgment should be granted for those reasons alone. Assuming that the right to setoff under tribal law is similar to the right to setoff under state or federal law, this claim still fails. “Setoff is a legal or equitable remedy that may occur when two entities [or parties] that *owe money to each other* apply their mutual debts *against each other.*” *Walker v. Farmers Ins. Exchange*, 226 Mich. App. 75, 19; 572 N.W.2d 17 (1997) (emphasis added). The right of setoff is to “avoid[] the absurdity of making A pay B when B owes A.” *Citizens Bank of Maryland v. Strumpf*, 516 U.S. 16, 18; 116 S.Ct. 286; 133 L.Ed.2d 258 (1995) (internal quote marks omitted). The obligation and debt between parties must be mutual in order for a setoff to occur lawfully. *Check Reporting Services, Inc. v. Michigan Nat. Bank-Lansing*, 191 Mich.App. 614, 627; 478 N.W.2d 893 (1991).

The Community is not entitled to have its alleged right to setoff be declared in this action because it has no mutuality of obligation or debt with Defendants. The 1993 Compact and the 2001 Consent Judgment establish obligations between the State of Michigan and the Community, including the Community’s obligation to make the 8% payments to the MEDC. Defendants Kleine, Rising, Reynolds, Fratzke, and Land were not parties to and do not have any obligations to the Community under the 1993 Compact or the 2001 Consent Judgment. See **Exhibits A and B**. Likewise, the Community has no obligations to Defendants under the 1993 Compact or 2001 Consent Judgment. *Id.* Indeed, the tax bills that Treasury sent to the

Community do not indicate that the Community has an obligation to Defendants; the obligation was to pay taxes to the State. Complaint, ¶¶37-38. There is no obligation between the parties.

Nor is there mutual debt between the parties. The Community does not claim that the Defendants received the alleged 2005 Offsets, which is why the Community asked *Treasury* to reverse the 2005 Offsets. Complaint, ¶44. And the 8% net win payment that the Community setoff in May and November 2005 is payable to the MEDC, not to Defendants. See **Exhibit A**, Consent Judgment, ¶4(B), 5(B). Even the Community concedes that the 8% payments are “for the benefit of the State of Michigan.” Complaint, ¶45. Accepting the Community’s allegations as true only for the sake of analysis, there may be debts between the State and the Community, but there are no debts between the parties in this action.

With no mutuality of debt or obligation between the parties, the Court cannot declare the Community’s setoff to have been lawful. Further, because there is no statute providing for setoff here, setoff operates as an equitable doctrine. See *Walker, supra* at 19. The Court should not make any declaration regarding the lawfulness of the Community’s setoff because it is inequitable to do so in an action in which the alleged debtor, the State, is not a party and cannot present its counter-arguments. Even assuming that a setoff would be appropriate between these particular parties, the Community has not alleged the dollar amount of the payments it has failed to make to MEDC, so it is impossible to tell whether the Community has actually setoff the amount it claims it is owed, or whether it has withheld a windfall.

IX. THE COMMUNITY CANNOT OBTAIN COSTS AND ATTORNEY FEES UNDER 42 USC §1988 (COUNT XXXIII)

In Count XXXIII, the Community claims that it is entitled to costs and attorneys fees pursuant to 42 U.S.C. §1988, a companion provision to 42 U.S.C. §1983. Under §1988(b), a

court may award attorneys fees to a “prevailing party” in a §1983 action. The Community cannot be a “prevailing party” under §1983 because it is not a “person” entitled to be a claimant under the statute and it has failed to and cannot allege conduct by the named Defendants acting in their individual capacities to avoid the State’s sovereign immunity under the Eleventh Amendment. Because the Community cannot prevail against these Defendants under §1983, it cannot obtain costs and attorney fees under § 1988. *National Private Truck Council, Inc. v. Oklahoma Tax Com'n*, 515 U.S. 582, 592; 115 S.Ct. 2351, 132 L.Ed.2d 509 (1995).

X. CONCLUSION AND REQUEST FOR RELIEF

For the reasons stated in this Brief, Defendants respectfully request that this Court grant summary judgment to Defendants of all counts in this lawsuit. If the Court concludes that summary judgment on all counts is not appropriate, then Defendants respectfully request summary judgment in their favor of those claims specifically identified in this brief, as well as summary judgment of all requests for relief that are retrospective, monetary, or intended only for their *res judicata* effect in subsequent actions.

Respectfully submitted,

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