

**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' SECOND
MOTION FOR SUMMARY
JUDGMENT**

ORAL ARGUMENT REQUESTED

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

I. INTRODUCTION

This lawsuit is about the lengths to which the Keweenaw Bay Indian Community (Community) will go to force the State of Michigan to make tax concessions so the Community can gain an advantage over its non-Indian business competitors who must pay these taxes. This motion for summary judgment focuses on the Community's undisputed obligation to pay lawfully-imposed sales and use taxes for tax years 1993 and 1994 and the offsets the State took in 1996 and 2005 to obtain payment for those tax liabilities. Defendants are entitled to summary judgment of the Community's thirteen counts related to the 1993 and 1994 sales and use taxes and subsequent offsets (see attached summary Table) for the following reasons:

- **Counts VI, XXXII, and XXXIII** – Defendants Rising, Reynolds, and Fratzke are entitled to summary judgment in their favor for the claims concerning the 2005 offsets pleaded against them in their individual capacities because the Community has no evidence in support of these claims. In any event, qualified immunity bars these claims.
- **Counts I through VIII, XXVII through XXX, and XXXIII** – The Community's claims for the tax assessments for 1993 and 1994 and the 1996 and 2005 offsets are barred by waiver, the Tax Injunction Act, and a collateral estoppel statute.

This motion is being filed now because Defendants served discovery requests on the Community on March 26, 2007, but only received the documents requested on September 17, 2007.

II. FACTS

A. **The 1977 Tax Agreement**

In 1977, the State of Michigan and the Community entered into an agreement (the 1977 Tax Agreement) concerning taxes for the Community and its members, including Michigan's sales tax and use tax. **1977 Tax Agreement**, p 1-10, Ex. A to Second Amended Complaint (Complaint). The 1977 Tax Agreement required Community-owned businesses and enrolled members of the Community to pay sales and collect use taxes, except when one of four limited

exceptions applied.¹ The sales tax did not apply when an enrolled member of the Community who lived on the L’Anse Reservation (1) purchased items from K-BIT-C, the Community-owned store on the Reservation and any gasoline station it might own and operate or (2) purchased a “car, truck, boat, airplane, home (including mobile or prefabricated), or materials bought to build a new home (this does not include repairs to home)” when the “transaction takes place” on the Reservation. *Id.* at 4. In all other circumstances the 1977 Tax Agreement required members of the Community living on the Reservation to “pay sales tax to all sellers regardless whether the seller is located on or off the Reservation[.]” See *id.* The use tax did not apply when an enrolled member of the Community who lived on the L’Anse Reservation (1) purchased telephone services from the Baraga Telephone Company and the General Telephone Company if the Community provided a list of eligible members to the State or (2) purchased a “vehicle, watercraft or snowmobile . . . , providing the transaction takes place within the exterior boundaries of the L’Anse Indian Reservation.” *Id.* at 8.

The 1977 Tax Agreement was clear in its default position that issues not addressed specifically were to be resolved by Michigan law because it required “all persons” on the Community’s Reservation conducting retail sales, including the K-BIT-C store owned by the Community, to obtain a retail sales tax license. *Id.* at 3-4. This sales tax license is the method by which the State compels all retailers “to comply with this [sales tax] act or a rule promulgated by the department [of Treasury] under this act.” M.C.L. §205.53(2). This same sales tax license also obligates a retail seller to collect the use tax. M.C.L. §205.95(1). As a licensee, the Community was subject to “administration, audit, assessment, interest, penalty, and appeal”

¹ Defendants maintain that the legal incidence of the tax is relevant to its preemption under federal law and that any reimbursement of the party with the legal incidence of a tax does not constitute imposition of a tax on or payment of a tax by the reimbursing party.

under the Revenue Act. M.C.L. §205.20; see also **Ex. ZZ**, p 114-119, 128, 133, 134. The Community applied for and obtained a sales tax license from the State, as required. **Ex. A.**²

The 1977 Tax Agreement was amended just once, in 1979, to address the gasoline tax, but otherwise remained in effect through 1997. See **1977 Tax Agreement, Amendment Number 1**, attached to Complaint. On April 20, 1994, Community President Fred Dakota wrote to State Treasurer Douglas Roberts to inform him that the 1977 Tax Agreement “has expired of its own terms” and that the Community “intends to re-negotiate its terms.” **Ex. B.** Subsequent tax agreement discussions between the Community and the State prompted President Dakota to write to Roger Ruppel at Treasury in September 1994 to confirm that the State would “continue to adhere to the terms and conditions of the previous [tax] agreement (which has now expired) until a final accord can be reached on a new agreement.” **Ex. C.** As President Dakota put it, “I agree that this would be the best way to proceed as we renegotiate the tax agreement.” *Id.* As a result, the Community agreed to abide by the terms of the 1977 Tax Agreement even after 1994.

B. The Sales And Use Tax Audits And The 1996 Offsets

From the very earliest years under the 1977 Tax Agreement, Treasury routinely conducted annual audits of the Community’s taxes at least in part to calculate the relevant refund (if any) of taxes to the Community pursuant to the formulas included in that agreement. **Ex. DDD.** In 1995, Treasury began auditing the Community’s sales and use taxes for the fiscal years that ended September 30, 1993 ended September 30, 1994. **Exs. D, E, F, G.** The audits revealed that the Community owed the State \$59,498 in sales tax and \$18,214 in use tax for 1993, plus

² Given the large number of documents referenced, Defendants have filed an index of all of their exhibits and where they may be located in the record. Additionally, the parties have stipulated to file some of the exhibits under seal because of the significant redaction that would otherwise be necessary. Those exhibits to be filed under seal are identified in the index.

\$82,587 in sales tax and \$25,978 in use tax for 1994 for its commercial operations at its casino gaming facility, motel, restaurant, bar, bowling center, and gift shop on the L'Anse Reservation. **Ex. D, p 5; Exs. E, F, G, p 4.** In total, the Community had failed to pay or collect taxes on taxable transactions under the 1977 Tax Agreement in the amount of \$186,277.00. Complaint/Answer, ¶32, 34. In other words, the Community had failed to pay sales tax or collect use tax for transactions involving individuals who were not entitled to an exemption under the 1977 Tax Agreement. In fact, the Community had failed to remit to the State any sales or use taxes in 1994. **Exs. F and G, p 2.**

Following the audit, Treasury auditor James Brulla contacted the Community's accountant and chief financial officer, Gerald Hays, to inform the Community about these tax liabilities. **Ex. D, p 4, 6; see also Exs. E, F, G, p 3, 5.** Hays, "the tribal representative, expressed agreement with the determination," meaning that the Community did *not* contest that it owed the State these taxes. **Ex. D, p 6; see also Exs. E, F, G, p 5.** Rather, Hays informed Brulla that "they (Tribal Chairman Fred Dakota) has [sic] decided to withhold payment until there is [sic] meaningful discussions between the tribe and the Department with respect to a new [tax] agreement"—a subject under discussion with the State since at least 1994. **Ex. D, p 6; see also Exs. E, F, G, p 5.** As part of the 1996 audits, the State offset tax refunds for the Community in the amount of \$87,839, reducing the Community's assessment for sales and use taxes for the 1993 and 1994 tax years to \$98,465. **Complaint/Answer, ¶33.**

C. The End Of The 1977 Tax Agreement

Tax agreement negotiations continued even after the State partially offset the Community's sales and use tax liabilities in 1996, with both the State and the Community proposing new drafts of agreements. **Ex. H.** On January 14, 1997, Treasury sent tax bills to the

Community for the balance due for the 1993 and 1994 sales and use taxes. **Ex. I.** The tax bills explained how the Community could request an informal conference, which is a hearing process. *Id.* On February 12, 1997, the Community requested an informal conference with Treasury to contest the assessments of the outstanding balance for the 1993 and 1994 sale and use taxes, making no mention of the 1996 offsets in its request. **Ex. J.** Treasury forwarded the Community's request to the Audit Division in an attempt to resolve the issue without referring it to a hearing referee. **Ex. K.**

Roughly two months later Jesse Weaver, the Acting Commissioner of Revenue for the State of Michigan, sent a letter to President Dakota informing him that the "State of Michigan has chosen to exercise its option to terminate any and all of its prior agreements with the Keweenaw Bay Indian Community regarding the payment and exemption of Michigan taxes" and proposing a new agreement. **Ex. L.** In response, Tribal Attorney Joseph O'Leary wrote to Defendant Walter Fratzke, the Native American Affairs Specialist at Treasury, to protest the State's decision to end the 1977 Tax Agreement. **Ex. M**, p 1. O'Leary stated that "[a]ny amounts owing under the existing agreement will be calculated through the date [May 29, 1997] and thereafter the Community will cease its efforts to cooperate with you in collecting legitimate state taxes which arise on this Reservation." *Id.* at 2 (emphasis added). In other words, the Community once again acknowledged its obligation to pay any taxes it owed under the 1977 Tax Agreement through May 29, 1997, which included the period for the 1993 and 1994 sales and use taxes. Fratzke responded to O'Leary in a conciliatory manner, explaining that Weaver's had been sent to all federally recognized Indian tribes in Michigan that had a tax agreement with the State as a step toward voluntarily negotiating substantially identical but new individual tax agreements with all Michigan tribes, which was intended to make it easier to administer taxes

involving Indian tribes. **Ex. N.**

D. Renewed Tax Negotiations Through 2002 And The Informal Conference

The Audit Division at Treasury did not find an informal manner in which to resolve the sales and use tax assessments with the Community, and so referred the matter for a hearing in June 1997. **Ex. P.** The hearing did not occur at that time, however, because the State and Community continued to negotiate a new tax agreement over the next five years.

In June 1999, Governor Engler wrote to Community President Wayne Swartz to address a variety of issues that existed between the State and the Community. **Ex. Q.** With respect to the Community's tax agreement, Governor Engler explained that

the State does not have the legal ability to compromise taxes without an enactment of the Legislature. Consequently, the State can do no more than enter into an agreement that recognizes (1) Tribal exemptions from State tax authorized by State law and (2) instances where federal law clearly preempts the imposition of a State tax. [Id. at 3 (emphasis added).]

Evidently, Governor Engler was responding to the Community's interest in tax exemptions for transactions that did not occur on the Reservation or when the Community or its members did not bear the legal incidence of the tax. In light of these negotiations with the Community and other tribes, Treasury decided to continue to assess "any tax liability that Indian Tribes/Communities may occur [sic: incur]," but as of December 1999, "[a]ny collection activity or enforcement action is delayed on these types of accounts until the new agreements are in place or until the Collection Division is directed to take action in these accounts." **Ex. R.**

The year 2002 was a turning point in these tax agreement negotiations. In anticipation of having a new tax agreement between the State and the Community, Fratzke emailed Tribal Attorney Chad DePetro to follow-up on the Community's request for an informal conference

regarding the 1993 and 1994 sales and use tax assessments, saying:

According to the audit notes, *the Tribe did not disagree with the amount of the liability* as it was consistant [sic] with the agreement in place during the audit period. However, because there was no agreement when the State attempted collection the Tribe refused to pay until there were “meaningful discussions” taking place with regards to a new agreement.

As it appears that KBIC’s concerns regarding discussions are being met, is the Tribe willing to pay the amount due or does it want to pursue the hearing? I pose this to you now so that you can talk to the appropriate people and perhaps we can talk at “sidebar” on the eleventh. . . . [Ex. S. (emphasis added).]

DePetro did not reply to this email. *Id.*

On March 25, 2002, Treasury sent a notice to DePetro informing the Community that the 1993 and 1994 sales and use tax assessments had been assigned to Treasury Hearing Referee Mark Meyer. **Ex. T.** The notice provided the Community with additional information regarding how the informal conference would proceed and included a power of attorney form for the Community to designate a representative to participate in the informal conference. *Id.* The next day Treasury sent DePetro a notice scheduling the informal conference for April 16, 2002. **Ex. U.** On April 3, 2002, DePetro left a voicemail for Referee Meyer, evidently inquiring about why the informal conference had been scheduled. **Ex. V.** Referee Meyer explained that the Community had requested the informal conference and when Fratzke had emailed DePetro to determine it was still necessary, he had received no response. *Id.* Accordingly, Referee Meyer indicated that he planned to hold the informal conference. *Id.*

To prepare for the informal conference, the Community requested copies of the audits and designated DePetro as its representative. **Ex. W.** Treasury sent the requested information to DePetro by facsimile the same day, **Ex. X,** and the informal hearing was rescheduled for May 14, 2002, **Ex. Y.** Treasury Auditors Ronald Neaves and James Brulla requested that Fratzke attend

the informal conference because the tax liability did not appear to be in dispute, only whether the Community's demand that there be "meaningful discussions" toward a new agreement. **Ex. Z.** Referee Meyer conducted the informal conference on May 14, 2002. **Ex. AA**, p 1. Auditors Brulla and Neaves (not Fratzke) participated by telephone, but the Community did not participate in the conference even though it had received notice and designated DePetro as the representative. *Id.*; **Ex. ZZ**, p 150-151.

In his written Informal Conference Recommendation, Referee Meyer summarized the history surrounding the tax audits and assessments, their relationship to the 1977 Tax Agreement, and the Community's apparent agreement that the audits were accurate. **Ex. AA**, p 1-3. He also reviewed the applicable law, including those instances when federal law preempts state tax law, and noted that sales and use tax assessments are statutorily considered "prima facie correct" and that a taxpayer challenging a sales or use tax assessment bears the burden of "refuting" the assessments. *Id.* at 4, citing M.C.L. § 205.67 and M.C.L. §205.104. As he saw it:

the department appears to concede that no agreement was in force when it attempted to *collect* the taxes determined owing under a prior agreement. However, according to the record, KBIC "agreed with the amount[s] due . . . and with the figures used to determine [such amounts]." Importantly, I believe, an agreement pertaining to the taxes at issue, their collection and associated recordkeeping *was* in force between the parties *both during* the pertinent tax periods *and* course of conducting the individual audits relating to such tax periods. See *Citizen Band Potawatomi Indian Tribe of Oklahoma, supra*. Notwithstanding this factual evidence, KBIC "refused to pay the amount due until meaningful discussions [took] place with respect to a new agreement [between the parties]," ostensibly pertaining to *future* tax determinations. Clearly, KBIC's refusal to pay taxes based on computations it agreed with, and which were determined pursuant to a valid agreement between the parties, is, in my judgment, nothing more than an attempt to "hold hostage" payment of taxes legitimately owed until the department accedes to negotiating an agreement apparently more favorable to the tribal community. KBIC provided no authority in support of its refusal to pay taxes legitimately owed, and likewise presented no evidence refuting the presumed correctness of the departments assessments. . . . [*Id.* at 5 (footnote omitted, alterations and emphasis in the original).]

Referee Meyer recommended that the assessments for the 1993 and 1994 sales and use taxes "be

finalized as originally determined[.]” On September 20, 2002, Treasury issued a Decision and Order of Determination in which it accepted Referee Meyer’s recommendation and ordered that the sales and use tax assessments for the 1993 and 1994 tax years be assessed. **Ex. BB.**

When Treasury sent a copy of the Decision and Order of Determination to the Community, it included a form letter stating that final tax assessments would be issued within thirty days and transferred to the Collection Division, but Community could appeal to the Tax Tribunal within thirty-five days or to the Michigan Court of Claims within ninety days. **Ex. CC.** On September 27, 2002, Treasury sent the Community final bills for the unpaid sales and use taxes for 1993 and 1994, which prominently stated, “SEE PAGE 2 FOR APPEAL, TELEPHONE AND CORRESPONDENCE INFORMATION.” **Ex. DD.** Though the bills gave details regarding how to file an appeal and the time allowed for doing so, the Community did not appeal. *Id.* at 5. As a result, the tax assessments for the 1993 and 1994 sales and use taxes became “final and . . . not reviewable in any court by mandamus, appeal, or other method of direct or collateral attack.” M.C.L. §205.22(4).

E. The 2002 Offsets And The 2002 Tax Agreements With Other Tribes

In November 2002, less than a month before the signing ceremony for the tax agreements with several tribes, the “State Treasurer’s Accounts Receivable” (STAR) computer system automatically offset money that was payable to the Community as a credit against the sales and use tax assessments. **Ex. EE**, p 2-3. DePetro contacted Fratzke and asked for the offsets to be refunded, but did not challenge the basis for the assessments or the offset. **Ex. FF; Ex. BBB**, Ans. to Interog. 2. Fratzke arranged for the offsets to be refunded and for the Community’s account to be placed *temporarily* on “bypass” status so that no further offsets would take place while negotiating the Community’s tax agreement, which was intended to address payment of

this tax liability. *Id.*; **Ex. ZZ**, p 175-176; **Ex. AAA**, p 63-66; **Ex. BBB**, Ans. to Interog. 2. As Fratzke wrote in an email to DePetro, “As we discussed, it is my hope that the [Tribal] Council sees this as a good faith gesture as to our original intent and that a ‘voluntary’ payment for the tax will be forthcoming.” *Id.*; **Ex. ZZ**, p 122, 176. Notations in the STAR computer system for November 26, 2002 indicated that “acct placed on bypass per [Michael] Reynolds,” “refund of offsets that have occurred since 9/20/02 are 2 [be] done ASAP,” and that Reynolds had requested a “rush” for the refund. **Ex. EE**, p 5. The refund was processed on November 27, 2002. *Id.*

Two days before the December 20, 2002 signing ceremony for the new tax agreements, Fratzke emailed DePetro to finalize the tax agreement and ask again about the payment of the sales and use tax assessments. **Ex. FF**. After talking to DePetro, Fratzke believed that DePetro “was going to go to the tribal council and they were looking into it [payment of the tax assessments], and [DePetro] was expecting Keweenaw Bay to show up for the signing and have the tax agreement[.]” **Ex. ZZ**, p 122. Though a Community representative attended the signing ceremony for these tax agreements, the Community did not enter into a new agreement. **Complaint/Answer, ¶25**. Nor did the Community pay its sales and use tax assessments.

The State did enter into new tax agreements with several tribes on December 20, 2002. See Michigan Department of Treasury, *State/Tribal Tax Agreements and Amendments* (visited October 13, 2007) <http://www.michigan.gov/taxes/0,1607,7-238-43513_43517---,00.html>; **Ex. R**. In fact, the State was ultimately able to enter into tax agreements with eight of the twelve federally-recognized Indian tribes in Michigan and continues to negotiate with the remaining interested tribes. *Id.* These tax agreements ended the need for the blanket stay on collection proceedings and enforcement actions involving Native American accounts. Still, none of the Defendants in this action or anyone else employed at Treasury made any decision, issued any

order or directive, or took any affirmative action to remove the Community's account from bypass status or direct an offset to satisfy the Community's tax liability. **Ex. EE**, p 5; **Ex. BBB**, Ans. to Interog. 3 and Doc. Response 10; **Ex. CCC**, ¶3.

F. The 2005 Offsets And Community's New Use For The Tax Assessments

The Community received monthly account statements indicating the balance due and any payments made or offsets taken in full or partial payment of the bill. **Ex. HH**. When the Community received its monthly statement for January 2005, Community Treasurer Jennifer Misegan forwarded the statement to the Tribal Council along with the 1996 sales and use tax audit reports. **Ex. II**. The Community still did not pay the tax bills.

On several days in May 2005, the State of Michigan's MAIN computer system prepared to issue warrants (electronic or paper payments) to taxpayers. **Ex. AAA**, p 30-36. The MAIN computer compared the taxpayer accounts slated to receive payments against the accounts listed in the STAR computer system as owing money to the State. *Id.* The STAR computer system showed that the Community had a tax liability and it offset the funds that would have otherwise been paid to the Community before the warrants could be issued by the MAIN computer system. **Ex. EE**, p 1-2; **Ex. HH**, p 11. After the offsets were taken the STAR computer system generated notice letters informing the Community of the offsets. **Ex. AAA**, p 34-36; **Ex. EEE**. By the Community's account, roughly 38% of the funds offset were federal payments to the Community and approximately 62% of the funds offset were state tax refunds. **Ex. OO**; M.C.L. §205.30(2) and M.C.L. §205.30a (requiring tax refund offsets).

These offsets were a routine and automatic process solely between the two computer systems that occurred without regard to or knowledge of the source of funds being offset, and

without advance notice of the offset to anyone in Treasury. **Ex. VV**, p 5; **Ex. WW**, p 16 (flow chart); **Ex. XX**; **Ex. EE**, p 5; **Ex. ZZ**, p 102-103; **Ex. AAA**, p 10, 28, 30-36, 60, 112; **Ex. CCC**, ¶4. Treasury has codes to flag individual accounts so that no offsets occur without a manual review by personnel; however, Treasury does not have a policy requiring that taxpayer accounts for all Indian tribes be flagged to prevent offsets or that federal fund be exempt from offsets. **Ex. YY**; **Ex. ZZ**, p 49; **Ex. AAA**, p 38-40, 47-48, 60-61, 82-85. Rather a bypass code is available only for a “TA,” an account for an Indian tribe with a “tax agreement” with the State, which does not apply to the Community. **Ex. YY**.

The May 2005 offsets prompted Tribal Attorney John Baker to contact Fratzke to request a refund because, in the Community’s view, the offsets were for federal funds that could not be offset and because the Community was in litigation with the State. **Ex. JJ**; see *Keweenaw Bay Indian Community v Rising*, 477 F.3d 881 (6th Cir., 2007). A second set of offsets occurred in June 2005 involving both federal funds and refunds of state taxes and once again Baker asked Fratzke to refund the offsets for the same reasons. **Ex. KK**; **Ex. EEE**. Immediately after Baker contacted him, Fratzke began investigating the May and June offsets and funds affected, also and contacting other Treasury staff as well as counsel at the Department of Attorney General. **Ex. LL**; **Ex. ZZ**, p 174, 180-184, 188; **Ex. BBB**, Ans. to Interog. 2. On June 28, 2005, Fratzke wrote to Baker explaining that the State has the common law right to offset funds payable to taxpayers in order to satisfy unpaid liabilities and clarifying that the pending litigation involved tobacco taxes, not the sales and use tax assessments. **Ex. MM**; **Ex. UU**. Fratzke asked Baker if the Community was relying “on any particular federal or Michigan law in determining that such offsets were inappropriate,” and if so, asked him to provide that information. *Id.* Fratzke closed the letter by stating, “Upon receiving the Tribe’s reasoning and support for its position the State

will further evaluate the situation and refund any offsets where warranted.” *Id.* Baker responded by telephone, seeking additional information regarding the tax liabilities, which Fratzke provided. **Ex. NN.**

Finally, on August 10, 2005, Tribal Counsel Christopher Geiger wrote to Fratzke to explain the Community’s position concerning the use of federal funds for offsets against tax liabilities. **Ex. OO.** For the first time ever, the Community contended that – irrespective of the terms of the 1977 Tax Agreement, the informal conference, and the 2002 Decision and Order of Determination – the tax assessments themselves were unlawful. *Id.* at 2. The Community also contended that the State had no common law right to offset because it disputed that it owed a tax liability to the State and, in any event, the State could not offset federal funds. *Id.* at 2-3. Though the Community had been receiving monthly invoices listing interest on the assessment for three years, it also asserted for the first time that the interest could not be assessed. *Id.* at 2. The Community claimed a full refund and demanded that the refund occur within seven days, even though it did not challenge the State’s right to offset state tax refunds. *Id.* at 3-4.

When Fratzke received the August 10, 2005 letter from Geiger, he and other Treasury officials once again sought privileged advice from the Department of the Attorney General concerning the basis for the Community’s position cited in the letter, talking to Assistant Attorneys General Russell Prins, Elaine Fischhoff, and Peg Housner. **Ex. ZZ**, p 154-157, 178-184, 195-202. The Community complicated the decision regarding a refund because at about the same time it demanded a refund it recouped the full amount of the 2005 offsets by withholding a portion of the 8% net win payments it is obligated to make to the Michigan Economic Development Corporation under the 2001 Consent Decree with the State of Michigan. **Letter from Susan LaFernier to Jennifer Granholm (September 8, 2005)**, Ex. E to Defendants’

Reply Brief (March 12, 2007); **Consent Judgment**, Ex. A to Defendants' Brief (January 8, 2007); **Ex. ZZ**, p 257, 280; see also **Exhibits RR and SS**; **Letter from Jennifer Misegan to Menash Modie (December 2, 2005)**, Ex. F to Defendants Reply Brief (March 12, 2007).

Though the Departments of Treasury, Community Health, and Attorney General had previously discussed whether federal funds could be used to offset state liabilities as a matter of general policy, that issue had never been resolved. **Ex. AAA**, p 46-51. Nor had Fratzke reached any conclusion concerning the issue as applied to Indian tribes. **Ex. ZZ**, p 205-206. Fratzke was waiting to be informed by higher-level Treasury officials and the Assistant Attorneys General involved whether the offset issues were allowable. **Ex. ZZ**, p 203-204. If the offsets were not permissible, Fratzke would "have moved forward to get with the [Chief Deputy Treasurer, Julie Croll], and get the refunds refunded back. But [he] never received word, and the research was being conduct[ed] to . . . set[] up meetings to try and discuss Mr. Baker's response and try to get conclusions." *Id.*; **Ex. BBB**, Ans. to Interog. 2. Likewise, Reynolds was waiting for the issue to be resolved and for instructions to process a refund, had that been the decision by Treasury on the advice of their attorneys. **Ex. AAA**, 137-138. On September 16, 2005, before Treasury could decide whether to refund any or all of the 2005 offsets, the Community cut-off any further consideration of its position by filing this lawsuit, leaving the resolution of substantive issues to this Court.

III. THIS LAWSUIT

For almost a decade, the Community has used the 1993 and 1994 sales and use taxes for leverage in tax agreement negotiations with the State, but has never been able to obtain all the tax advantages it desired. **Ex. Q**, p 3. At the same time, the Community has never been willing to make the concessions that Michigan's other tribes made when entering into their respective

agreements with the State, such as granting the waiver of sovereign immunity mandated by M.C.L. §205.30c(12)(c)(v) and offering the cooperation necessary to enforce the collection of taxes under the agreements. **Ex. PP**; *State/Tribal Tax Agreements and Amendments, supra*. The Community's new strategy is to use litigation to force the tax concessions it wants from the State without making any compromises. See *Keweenaw Bay Indian Community, supra* at 884-886 (discussing State's attempts to negotiate tax agreement with Community and Community's challenge to tobacco tax after State confiscate its contraband cigarettes).

While its tactics (negotiations versus litigation) may have changed, the Community's goal remains the same: the Community has persistently attempted to establish that all transactions with it and its members are tax-free, regardless of where the transaction takes place; who bears the legal incidence of the tax; whether an essential governmental function is at issue; whether a member resides on the L'Anse Reservation; and the State's legitimate interest in collecting taxes. The Community is clearly seeking an advantage over its business competitors who must pay or collect these taxes. Since at least 1996, if not earlier, the Community has been representing to its vendors that transactions with it are tax-free without establishing any process by which Treasury can verify and enforce the collection or payment of taxes on taxable transactions. **Ex. O** (a selection of documents, more are available). The Community has admitted it attempts to avoid all taxes, but downplays its conduct by merely stating that it "generally has been able to purchase, lease, or rent goods and services without being charged Michigan sales and use taxes in transactions not involving motor vehicles, without involvement by Defendant Fratzke or other representatives of the Department of the State." **Ex. TT**, p 16; see also **Complaint**, ¶49. The State has no way to learn of the Community's self-determined tax exemptions, nor to dispute any of them, unless a vendor contacts Treasury. **Ex. ZZ**, p 209.

Regardless of whether the Community would have been entitled to a tax exemption for any particular transaction, the Community is not entitled to decide unilaterally that a transaction is tax-exempt in order to deprive the State of an opportunity to collect a lawful tax. See **Affidavit of Walter Fratzke**, ¶30, 34-38, Ex. A to Defendants' Brief Opposing Plaintiff's Motion for Partial Summary Judgment (November 22, 2006); see also *Department of Taxation and Finance of New York v. Milhelm Attea & Bros., Inc.*, 512 U.S. 61, 73; 114 S. Ct. 2028; 129 L. Ed. 2d 52 (1994) (acknowledging legitimate State interest in collecting lawful taxes even if it denies Indian tribe opportunity to offer tax exemption to tribal customers).

Though not a new position, the Community began aggressively pushing its "tax-free" status just two weeks before it filed this lawsuit by filing hundreds of refund claims at Treasury for taxes paid in connection with vehicle transactions dating back several years, all of which the individual members had assigned to the Community and none of which provided sufficient details to make a determination of whether the transaction was taxable. **Letter from Susan LaFerner to Jennifer Granholm (September 8, 2005)**, Ex. E to Defendants' Reply Brief (March 12, 2007); **Ex. ZZ**, p 257, 280. The claims for tax refunds by Community members have increased markedly since the Community filed this suit. **Fratzke Affidavit**, *supra*, ¶27-30. At the same time, the Community also began using these 1993 and 1994 tax assessments and offsets and the taxes imposed on vehicle transactions in the past as an excuse to eliminate or lower the 8% net win payments it must make for its casino operations, not merely to recoup the amount of money the State offset. **LaFerner Letter to Granholm**, *supra*. These setoffs by the Community have continued to occur. **Exhibits RR and SS; Letter from Jennifer Misegan to Menash Modie (December 2, 2005)**, Ex. F to Defendants Reply Brief (March 12, 2007).

Regardless of whether there is merit to the Community's claims for a prospective

declaration regarding the application of the sales and use taxes, it has no valid basis to resurrect these claims regarding the old tax assessments and offsets and only seeks to embroil this Court in its gamesmanship. Granting summary judgment in Defendants' favor of these claims related to the assessments and offsets is also warranted as a matter of law.

IV. LEGAL STANDARD FOR SUMMARY JUDGMENT

Defendants seek summary judgment under Fed. R. Civ. P. 56 ("Rule 56"), 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).

If the Court concludes that it lacks subject matter jurisdiction over any of the claims at issue in this motion, then it may treat this as a motion to dismiss under Fed. R. Civ. P. 12(b)(1) with respect to those claims. See *Ohio Nat'l Life Ins. Co. v. United States*, 922 F. 2d 320, 325 (6th Cir., 1990). It is proper for a court considering a factual challenge to subject matter

jurisdiction to “weigh the conflicting evidence to arrive at the factual predicate that subject matter jurisdiction exists or does not exist. In reviewing these speaking motions, a trial court has wide discretion to allow affidavits, documents and even a limited evidentiary hearing to resolve disputed jurisdictional facts.” *Id.*

V. DEFENDANTS RISING, REYNOLDS, AND FRATZKE ARE ENTITLED TO SUMMARY JUDGMENT OF THE CLAIMS AGAINST THEM IN THEIR INDIVIDUAL CAPACITIES (COUNTS VI, XXXII, AND XXXIII)

The Community claims that former Treasurer Jay Rising, Collection Division Administrator Michael Reynolds, and Native American Affairs Specialist Walter Fratzke are *individually* liable under 42 U.S.C. §1983 for the 2005 offsets taken *by the State of Michigan* and must pay the Community damages that cover “lost governmental revenue and lost federal program services” in an unspecified amount. Count VI, p 28-29. Count XXXII, p 55-57, seeks injunctive relief for the 2005 offsets and other claims. Count XXXIII, p 57, seeks costs and attorney fees under 42 U.S.C. §1988, which relates back to the §1983 claim in Count VI.

According to the Complaint, ¶ 85, “Defendants Rising’s, Reynolds’, and Fratzke’s . . . actions and failures to act relating to the 2005 Offsets have deprived the Community of clearly established federal rights of which a reasonable person would have known” The Community claims that these three Defendants were “responsible for the making of the offsets in 2005, the continuation of such offsets after the Community raised an objection on or about May 25, 2005, and the failure to reverse any of the offsets.” **Ex. TT**, p 27, 28, 30. These actions, the Community contends, violated the Fifth and Fourteenth Amendments of the United States Constitution by constituting a taking of property, an unreasonable seizure of property, and a deprivation of property without due process of law. Complaint, ¶85.

A. The Community Has Failed To Support Its Claims Against Defendants In Their Individual Capacities

In order to prove an individual-capacity claim against Defendants Rising, Reynolds, and Fratzke under 42 U.S.C. §1983, the Community must provide evidence of their “active unconstitutional behavior.” *Bass v. Robinson*, 167 F.3d 1041, 1048 (6th Cir., 1999) (internal citations omitted). The Community’s claims are meritless because none of these three Defendants actually took the 2005 offsets or directed them to be taken, failing this legal standard.

In May and June 2005, the STAR system accurately determined that the Community had an unpaid liability to the State for the 1993 and 1994 sales and use tax assessments and that money was being routed to the Community through Treasury. Whether an offset occurs is solely a computer process. **Ex. VV**, p 5. “The State Accounts Receivable (STAR) system matches vendor payables (warrants to be issued) to accounts receivable and automatically offsets and applies payments to STAR,” unless an exception exists that requires a manual review. **Ex. XX**, p 1. The computer offset system is not designed with any particular taxpayer’s account in mind. **Ex. AAA**, p 10. In order for this manual review by Treasury staff to occur, there must be a code associated with a taxpayer’s account that “allow vendor payments to be bypassed automatically . . .” **Ex. VV**, p 5; see also **Exs. XX** and **YY**. There is no legal requirement or policy that all taxpayer accounts for Indian tribes be flagged for bypass at all times. Rising, Reynolds, and Fratzke did not know about the 2005 offsets before they happened. **Ex. ZZ**, p 103, 175; **Ex. AAA**, p 137; **Ex. CCC**, ¶4. Once the offsets were taken, the money was deposited directly into the State Treasury without ever being possessed by any of these three Defendants. **Affidavit of Palmer Giron (March 9, 2007)**, Ex. D to Defendants’ Reply Brief (March 12, 2007).

Nor can Rising, Reynolds, or Fratzke be liable for allowing the offsets to occur. In 2002,

Reynolds and Fratzke arranged for the Community's account to be placed on bypass specifically to facilitate tax agreement negotiations so that the Community would pay the sales and use tax assessments voluntarily. **Exs. FF and GG**. But the Community failed to sign the tax agreement, did not pay the assessments even though there was a Decision and Order of Determination that those assessments were due and payable, and the Community did not contest the assessments through the appeal process. Rising, Reynolds, and Fratzke had no obligation to continue the Community's account in bypass status given that the Community was unwilling to pay the assessments voluntarily and did not challenge their validity. Nevertheless, they did not take any action to remove the Community's account from bypass status after 2002, nor did they know that the bypass status had been removed. Had the account been removed from bypass status there would have been a notation in the STAR or the MARCS computer systems, but there are no such notations. **Ex. EE; Ex. AAA**, p 69-94; **Ex. BBB**, Doc. Response 10. Treasury has not conclusively determined why the bypass status did not prevent the 2005 offsets. **Ex. AAA**, p 97, 108-109. As Reynolds explained, "[S]ometimes it [the bypass] doesn't catch everything and we have done research trying to figure out why and we haven't. So occasionally even though we put an account on bypass occasionally an offset still occurs." **Ex. AAA**, p 96. It is possible that routine computer systems maintenance removed the bypass status. **Ex. BBB**, Ans. to Interog. 3 and Doc. Response 10. Furthermore, the Community has failed to present any theory or evidence that would demonstrate that Rising, Reynolds, and Fratzke had a responsibility to place the Community's account on bypass status before or after the Community objected to the first series of offsets on May 25, 2005, while the questions about the offsets were being considered.

Rising, Reynolds, and Fratzke cannot be held liable for failing to order a refund of the 2005 offsets. Whether to grant a refund was actively being discussed at Treasury in June and

July 2005. **Ex. LL; Ex. CCC**, ¶6. Fratzke acted reasonably by asking the Community to provide a legal basis for its refund claim. **Ex. MM**. The Community provided that explanation in August 2005, and claimed at least six bases for a refund. **Ex. OO**. Over the next month Treasury personnel discussed whether there should be a refund and consulted with the Department of the Attorney General to obtain privileged legal advice on these myriad issues, including the effect of the Community's own (continuing) setoffs of funds it was obligated to pay to the Michigan Economic Development Corporation. However, before the refund issue was decided, the Community sued. The evidence indicates that Rising, Reynolds, and Fratzke would have complied with the law if they been given an opportunity to resolve the complex issues that the Community raised and the law required refunding the 2005 offsets. As Fratzke said in his June 28, 2005 letter, a refund would be granted "where warranted," which he reconfirmed at his deposition. **Ex. MM; Ex. ZZ**, p 203-204. Reynolds also said that he was prepared to process a refund if it were required. **Ex. AAA**, p 91, 137-138.

The Community's theory of §1983 liability is that Rising, Reynolds, and Fratzke all had some "overall responsibility," "specific responsibility for administration," or "responsibility for overseeing" the Department of Treasury (Rising), Native American affairs issues at Treasury (Fratzke), or the computer systems used for offsets (Reynolds) and that they should have taken some unspecified action to prevent the 2005 offsets or order a refund. **Ex. TT**, p 27, 29, 30, 32, 33, 44. In other words, the Community claims that Rising, Reynolds, and Fratzke each had a *supervisory* role in connection with the offsets, but failed to act or direct others to act to prevent the 2005 offsets or refund those monies. That is not an actionable theory of liability because "[p]ersonal participation is a *sine qua non* of individual capacity § 1983 suits; *respondeat superior* is not within the purview of § 1983 liability." *Johnson v. Daniels*, 769 F. Supp. 230

(E.D. Mich., 1991). As the Sixth Circuit explained in *Bass, supra* at 1048, “Supervisory liability under § 1983 cannot attach where the allegation of liability is based upon a mere failure to act. . . . Liability under this theory must be based upon more than a mere right to control employees and cannot be based upon simple negligence.” Internal citations omitted.

There is no issue of material fact in the evidence on the record suggesting that the individual acts of Rising, Reynolds, or Fratzke actually caused the 2005 offsets or denied the Community a refund to which it was actually entitled, thereby depriving them of a federal right. Summary judgment of Counts VI, XXXII, and XXXII should be granted in Defendants’ favor.

B. Defendants Are Entitled To Qualified Immunity

Defendants Rising, Reynolds, and Fratzke are entitled to qualified immunity for their actions or failure to act in connection with the 2005 offsets.

Qualified immunity is not a defense to liability; where it is applicable, its purpose is to shield the official from suit altogether, saving the official from the burdens of discovery and costs of trial. . . . Qualified immunity is intended to serve the public interest by permitting officials to take action with independence and without fear of consequences. [*Crockett v. Cumberland College*, 316 F.3d 571 (6th Cir., 2003) (internal citations and quote marks omitted).]

Qualified immunity “shields government officials ‘from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.’” *Estate of Carter v. Detroit*, 408 F.3d 305, 310 (6th Cir., 2005) (quoting *Harlow v. Fitzgerald*, 457 U.S. 800, 818, 102 S. Ct. 2727, 73 L. Ed. 2d 396 (1982)); see also **Answer**, p 48, ¶3 (pleading qualified immunity as a defense).

The Community bears the burden of satisfying a three-part test to demonstrate that Defendants Rising, Reynolds, and Fratzke are *not* entitled to qualified immunity. See *Higgason v. Stephens*, 288 F.3d 868, 876 (6th Cir., 2002) (test); *Spurlock v. Satterfield*, 167 F.3d 995, 1005

(6th Cir., 1999) (burden on plaintiff). The Community must demonstrate (1) “a violation of a constitutionally protected right;” (2) the constitutionally protected right must have been “clearly established at the time such that a reasonable official would have understood that his behavior violated that right;” and (3) the Community must have “alleged sufficient facts, and supported the allegations by sufficient evidence, to indicate that what the official allegedly did was objectively unreasonable in light of the clearly established rights.” *Higgason, supra* at 876. The Community’s §1983 claim in Count VI for the 2005 offsets fails all three prongs of this test.

First, the Community has not demonstrated that Defendants Rising, Reynolds, or Fratzke violated any constitutional rights regarding the 2005 offset because these three Defendants did not engage in any action whatsoever to take the 2005 offsets. Nor did they order other people to take the 2005 offsets. There is no precedent whatsoever for the proposition that taking a month to consider and seek counsel regarding a claim for a refund of offsets that asserted no fewer than six complex bases in federal and state law and facts going back almost thirty years is a violation of any constitutional rights, especially when the party claiming the right to a refund has taken its own setoff. Rather, this is the process by which the Community would have been able to vindicate its rights – whatever those rights to a refund may have been – had the Community not cut short that process before a decision was ever made.

Second, Defendants Rising, Reynolds, and Fratzke cannot be said to have violated a constitutional right so clearly established that a reasonable official would have known that his conduct was in violation of that right. The Community has never pleaded or proved that its rights were actually violated by the offset. Count VI merely recites the Community’s summary conclusion that the offsets were a taking without compensation, an unreasonable seizure, and a violation of its rights to due process, takings with compensation, and only reasonable seizures

were violated. See *Jefferson v. Jefferson County Public School System*, 360 F.3d 583, 588 (6th Cir., 2004) (must plead/prove details of rights allegedly violated for a § 1983 claim).

Whether the Community was actually entitled to a refund of any portion of the 2005 offsets need not be decided by this Court in order to recognize Defendants' qualified immunity. Rather, looking at the evidence of Defendants' actual conduct, the pertinent question is whether Rising, Reynolds, and Fratzke each individually had a "clear" obligation under constitutional law to refund the offsets before they, other Treasury officials, and the Attorney General's Office had considered the Community's arguments, conducted their own research, and made a decision regarding the merits of the claim for a refund. In other words, because the Community's actions cut-off a decision on the claim for a refund, the Community's theory of liability begs the question whether the mere occurrence of the 2005 offsets required that a refund be processed regardless of whether there were grounds for a refund. The unequivocal answer to that question is: no.

Neither the fact that an offset occurred nor that federal funds were involved would have alerted a reasonable official that a violation of a "clearly established" constitutional right had occurred. Treasury's right to take offsets has been acknowledged or affirmed on multiple occasions. See, e.g., *Knisley v. Bowman*, 656 F. Supp. 1540 (W.D. Mich., 1987) (finding statutory and common law authority for offsets and that Treasury granted adequate due process); *Whispering Pines AFC, Home, Inc. v. Department of Treasury*, 212 Mich. App. 545, 553-554; 538 N.W. 2d 452 (1995) (finding common law right to offset); 1979-1980 Michigan Attorney General Opinion No. 5794 (acknowledging right of state agencies to setoff against tax refunds) (available at 1980 WL 113946). The United States Treasury even operates an offset program for federal funds as a way to collect debts owed to the United States. See *Lockhart v. U.S.*, 546 U.S.

142, 144; 126 S. Ct. 699; 163 L. Ed. 2d 557 (2005) (describing federal offset program under the Debt Collection Act). Rather than seeing a violation of a right, a reasonable official would have known that it is critically important for the State to offset funds before they are disbursed because the Community has sovereign immunity and cannot be sued without its consent. See *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 58; 98 S. Ct. 1670; 56 L. Ed. 2d 106 (1978) (recognizing tribal immunity). Once the money reaches the Community it is uncollectible because the Community will not pay the taxes voluntarily. **Ex. TT**, p 34; **Ex. ZZ**, p 277.

Substantively, the 2005 offsets did not violate the Fifth Amendment Takings Clause because “regulatory actions requiring the payment of money are not takings[.]” *Commonwealth Edison Co. v. United States*, 271 F.3d 1327, 1339 (Court of Federal Claims, 2001); see also *Coleman v. C.I.R.*, 791 F. 2d 68, 70 (7th Cir., 1986) (taxes are not takings). Moreover, “to make a § 1983 claim for a taking without just compensation, a plaintiff must have attempted to obtain compensation through established state procedures.” *Macene v. MJW, Inc.*, 951 F. 2d 700, 704 (6th Cir., 1991). However, the Community abandoned its attempt to obtain a refund for the 2005 offsets by filing suit. Therefore, the offsets and the failure to obtain a refund were not a violation of the Fifth Amendment’s Takings Clause. *Id.*

Nor can the 2005 offsets be considered an unreasonable seizure in violation of the Fourth Amendment considering all the circumstances. The Community had a hearing on the tax audits, received a written decision and assessments, which it did not appeal, and the offsets occurred without any intrusion into the Community’s privacy because they were funds within the State’s warrant disbursement computer system. See *G.M. Leasing Corp. v. United States*, 429 U.S. 338, 351-352; 97 S. Ct. 619, 50 L. Ed. 2d 530 (1977) (seizure of property to satisfy a tax liability does not violate the Fourth Amendment if the seizure does not violate privacy right). The Fourth

Amendment implications of a seizure of funds before they are remitted to the Community are much like the seizure of contraband cigarettes before they are delivered to the Community's Reservations, which has been upheld as constitutional. See *Keweenaw Bay Indian Community*, *supra* at 894. Also, from the United States Supreme Court's perspective, an offset of a liability is not necessarily a Fourth Amendment issue, but a common law right of a creditor. See *United States v. Munsey Trust Co. of Washington, D.C.*, 332 U.S. 234, 239; 67 S. Ct. 1599; 91 L. Ed. 2022 (1947) ("The government has the same right which belongs to every creditor, to apply the unappropriated moneys of his debtor, in his hands, in extinguishment of the debts due to him.") (internal citation and quote marks omitted). Therefore, the offsets and the failure to obtain a refund were not a violation of the Fourth Amendment.

Finally, the offsets did not deny the Community its right to due process because (1) the Community had a pre-deprivation hearing on the tax audits in 2002 that led to the assessments and offsets; (2) it was given prompt notice of the offset after they occurred, which is why Baker was able to contact Fratzke so quickly in both May and June 2005; (3) the Community actually began the post-deprivation administrative process by contacting Fratzke and claiming the refund in the August 10, 2005 letter; (4) had Treasury not granted a refund, the Community would have had a right to judicial review; and (5) if the Community had been entitled to a refund, not only would it have received some or all of the money offset, but statutory interest on that refund. M.C.L. §205.30(1). This is more than the mere notice and meaningful opportunity to be heard due process requires. See *Howard v. Grinage*, 82 F.3d 1343, 1349 (6th Cir., 1996). Given that Treasury oversees more than one million taxpayer accounts and has the responsibility for collecting debts owed to the State, any additional process would seriously impede the State's ability to operate an efficient tax system and system to collect those liabilities. See *Knisley v.*

Bowman, 656 F. Supp. 1540, 1552 (W.D. Mich., 1987) (noting other precedent holding that a pre-offset procedure “is not only impractical but is also more burdensome than a full post-intercept [offset] hearing.”). Therefore, the offsets were not a violation of due process.

As for the third and final prong of the test for qualified immunity, Defendants’ course of conduct with respect to the 2005 offsets was objectively reasonable. Rising, Reynolds, and Fratzke were not personally involved in taking the offsets. As soon as Fratzke learned of the offsets from the Community in May 2005, he began investigating the matter and continued to discuss the issues with representatives of the Community, even providing Baker with background information. **Exhibits LL and MM.** When the Community wrote to Treasury in May and June 2005, Fratzke replied with a written explanation of Treasury’s perspective on the common law right to offset liability and invited the Community to provide additional arguments, authority, and evidence in support of its claim to a refund for the offsets. **Exs. JJ, KK, NN.** After the Community presented its more extensive arguments in its August 10, 2005 letter, Reynolds and Fratzke were engaged in discussions with other officials and the Attorney General’s Office to determine the legally correct response to the Community’s claim for a refund. **Ex. OO; Ex. ZZ**, p 154-157, 178-184, 195-202. This open communication with the Community, serious consideration of the Community’s arguments, discussions with other agencies affected by the offsets, and attempts to obtain legal advice was eminently reasonable under the circumstances.

This course of conduct was also reasonable because of the statutory limitations on refunds. M.C.L. §205.28(1)(e) states in relevant part that “the state treasurer or an employee of the department shall not compromise or reduce in any manner the taxes due to or claimed by this state or unpaid accounts or amounts due to any department, institution, or agency of state

government.” Under this statute, Rising, Reynolds, and Fratzke had an affirmative obligation *not* to refund the 2005 offsets to the Community unless it was actually determined that the taxes were not due, a decision that had not been reached at the time this lawsuit was filed. Additionally, M.C.L. §205.22(5) provides, “An assessment is final, conclusive, and not subject to further challenge after 90 days after the issuance of the assessment, decision, or order of the department, and *a person is not entitled to a refund of any tax, interest, or penalty paid pursuant to an assessment unless the aggrieved person has appealed the assessment* in the manner provided by this section.” Emphasis added. Making an improper refund is also a felony subject to fine and imprisonment. M.C.L. §205.28(2). As a result, consulting with the Department of Attorney General when the Community claimed a refund for the 2005 offsets was the most reasonable thing that Defendants could have done to determine whether there was any merit to the Community’s claim and, if a refund was due, how to process it lawfully.

Had the Community failed to provide evidence of even one prong of the *Higgason* test it would be fatal to its claims and entitled Defendants to qualified immunity. *Higgason, supra* at 876. Here, the Community has failed all three prongs of the test, which entitles Defendants to qualified immunity for their acts or failure to act in connection with the 2005 offsets. Therefore, summary judgment of Counts VI, XXXII, and XXXII should be granted in Defendants’ favor.

VI. THE COMMUNITY’S CLAIMS CONCERNING THE TAX ASSESSMENTS AND OFFSETS ARE BARRED BY WAIVER, THE TAX INJUNCTION ACT, AND STATUTORY COLLATERAL ESTOPPEL (COUNTS I THROUGH VIII, XXVII THROUGH XXX, AND XXXII)

The Community has attempted to allege every possible theory in an effort to find some way to challenge the 1993 and 1994 sales and use tax assessments, the 1996 offsets, and the 2005 offsets years after those issues should have been raised. However, these claims are barred by waiver, the Tax Injunction Act, and statutory collateral estoppel.

A. Waiver Bars The Claims For the Tax Assessments And The 1996 Offsets

The federal courts recognize that a “waiver is the intentional relinquishment of a known right.” *Jones v. Jackson Nat. Life Ins. Co.*, 819 F. Supp. 1372, 1378 (W.D. Mich., 1993). A waiver can be effective even when it involves the relinquishment of important rights, such as those rights guaranteed by the Constitution. See *Palfy v. Cardwell*, 448 F. 2d 328, 332 (6th Cir., 1971). Once an issue has been waived, it cannot be raised in court again. See, generally, *Gilbert v. Ferry*, 413 F. 3d 578, 580 (6th Cir., 2005) (discussing preclusive effect of waiver).

In this case the Community intentionally waived its right to dispute the 1993 and 1994 sales and use tax assessments and any offsets taken by the State to satisfy the liability when Gerald Hays, the Community’s accountant, told Treasury auditor James Brulla that the Community agreed with the amounts determined to be owed during the 1996 audits. **Ex. D**, p 6; see also **Exs. E, F, G**, p 5. The Community confirmed its waiver again in 1997, when it stated in writing that it intended to calculate all taxes due under the 1977 Tax Agreement through May 1997, directly suggesting that it not only agreed that the State had the right to collect these taxes but that it would pay the taxes that were due. **Ex. M**, p 2. When Referee Mark Meyer conducted the informal conference in 2002 to hear the Community’s challenge to the assessments, he found the record settled and that the assessments were not in dispute. **Ex. AA**, p 5. The Community did not even challenge the State’s right to take the 1996 offsets for these assessments or to assess taxes calculated under an expired tax agreement. The Community’s subsequent failure to appeal the Order and Decision of Determination affirming the assessments after being advised in writing of its appeal rights is yet another point at which it expressed its voluntary and intentional choice not to challenge the validity of the assessments and their collection. The Community did not even challenge the assessments and offsets in 2002 when asked for a refund for the purpose

of negotiating the tax agreement. **Ex. BBB**, Ans. to Interog. 2.

The only reason the Community did not pay these taxes was because the Community had an express strategy of using the tax liabilities to encourage “meaningful discussions” regarding a new tax agreement. **Ex. D**, p 6; see also **Exs. E, F, G**, p 5. As Referee Meyer found, the Community has “attempt[ed] to ‘hold hostage’ payment of taxes legitimately owed until the department accedes to negotiating an agreement apparently more favorable to the tribal community.” **Ex. AA**, p 5. This litigation is merely a new example of that same old strategy. Having had so many opportunities to object to the assessments and the 1996 offsets, but having chosen not to object or contest them, the Community cannot challenge the assessments and offsets now that doing so would serve its interest in obtaining tax concessions from the State.

B. The Tax Injunction Act Bars The Claims Concerning The 1993 and 1994 Sales And Use Tax Assessments, 1996 Offsets, And 2005 Offsets

The Tax Injunction Act, 28 U.S.C. §1341, provides that “[t]he district courts shall not enjoin, suspend or restrain the assessment, levy or collection of any tax under State law where a plain, speedy and efficient remedy may be had in the courts of such State.” As the Sixth Circuit has recognized:

A federal district court is under an equitable duty to refrain from interfering with a State's collection of its revenue except in cases where an asserted federal right might otherwise be lost. . . . The overall purpose of the Tax Injunction Act is consistent with the view that the ‘plain, speedy and efficient remedy’ exception to the Act's prohibition was only designed to require that the state remedy satisfy certain procedural criteria. . . . [A] district court does not have jurisdiction over state and local tax matters where a plain, speedy and efficient remedy is available in state court. [*Colonial Pipeline Co. v. Morgan*, 474 F.3d 211, 217-218 (6th Cir., 2007) (internal citations and quote marks omitted).]

The Tax Injunction Act “bars even claims that the state tax is illegal or unconstitutional.”

Kistner v. Milliken, 432 F. Supp. 1001, 1004 (E.D. Mich., 1977).

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The Tax Injunction Act does not bar claims by a federally recognized Indian tribe if the United States could have brought the same claim on behalf of the tribes. See *Moe v. Confederated Salish and Kootenai Tribes of Flathead Reservation*, 425 U.S. 463, 473-474; 96 S. Ct. 1634; 48 L. Ed. 2d 96 (1976). In this case, however, the United States could not sue on behalf of the Community to challenge the 1993 and 1994 sales tax assessments and the offsets that occurred in 1996 and 2005. As Defendants explained in their first Motion for Summary Judgment (January 8, 2007), the claims that relate to the assessments and offsets seek retroactive (declaratory) relief and money damages, both of which are barred by the limited exception to a state's sovereign immunity under *Ex Parte Young*, 209 U.S. 123, 28 S. Ct. 441, 52 L. Ed. 714 (1908).³ Indeed, the Community has alleged separate counts not addressed in this Motion that seek solely prospective, injunctive relief concerning the application of the sales and use taxes to it, its members, and its contractors. Thus, because the United States could not sue Defendants on behalf of the Community with respect to the assessments and offsets, *Moe* does not bar this Court from examining whether the Tax Injunction Act provides an additional or alternate ground to grant summary judgment of or dismiss these claims.

Michigan law provided the Community plain, speedy and efficient remedy on which it could rely to seek any refund to which it believes it is entitled. See *Chippewa Trading Co. v. Cox*, 365 F.3d 538, 543-544 (6th Cir., 2004) (approving of the state administrative and judicial processes to challenge imposition of tobacco tax); *Lake Lansing Special Assessment Protest*

³ Though the Tax Injunction Act applies only to claims for equitable relief, the doctrine of comity provides an independent but parallel form of analysis and relief for the Community's veiled attempt to recover money damages in these claims. See *Fair Assessment in Real Estate Ass'n, Inc. v. McNary*, 454 U.S. 100, 116; 102 S. Ct. 177; 70 L. Ed. 2d 271 (1981). As explained in this brief, plain, speedy, and efficient administrative and judicial processes in Michigan exist for the Community to seek money damages, including a refund, and therefore any claims for damages related to the assessments and offsets are barred by the comity doctrine.

Ass'n v. Ingham County Bd. of Com'rs, 488 F. Supp. 767, 774-775 (W.D. Mich., 1980) (approving of remedy in Tax Tribunal). The Revenue Act, M.C.L. §205.30(2), provides, “A taxpayer who paid a tax that the taxpayer claims is not due may petition the department for refund of the amount paid within the time period specified as the statute of limitations in section 27a.” Assuming that the Community’s August 10, 2005 letter in which it claimed a right to a refund for the 2005 offsets was the petition required under M.C.L. §205.30(2), this claim triggered no less than four separate administrative and judicial appeals processes in which the Community could have sought a refund by right: (1) the original decision concerning the claim for a refund, see M.C.L. §205.30(2); (2) an informal conference to review a refund denial, see M.C.L. §205.21(2)(d) and M.C.L. §205.21a; (3) an appeal to the Michigan Tax Tribunal or the Michigan Court of Claims, see M.C.L. §205.22; and (4) an appeal as of right to the Michigan Court of Appeals, M.C.L. §205.22(3). If the Court of Appeals did not reverse the refund denial, the Community could have filed an application for leave to appeal with the Michigan Supreme Court, providing the possibility of a fifth opportunity for relief. See M.C.R. 7.302(C)(2).

The Community has always been well aware of its opportunities to resolve issues concerning the payment of Michigan taxes with the Department of Treasury, whether that is contacting Defendant Fratzke to resolve claims for exemptions or refunds informally or filing a request for a hearing. **Fratzke Affidavit**, *supra*, ¶¶22-23. This is why the Community knew exactly how to proceed when it discovered the 2005 offsets. Unfortunately, however, the Community never allowed Treasury to make a decision concerning the refund in the first place. Treasury might have granted a partial or full refund. Only the Community’s decision to initiate this lawsuit stopped that from happening. The Community has never articulated why that administrative process and judicial process under the Revenue Act should be considered

inadequate. As Referee Meyer's analysis of the case demonstrated, the personnel involved in the administrative process are aware of the effect of federal law on cases involving Indian tribes. **Ex. AA**, p 5. And, in any event, the Community could have brought suit in Michigan's circuit court to make a constitutional challenge to the sale or use tax laws. See *Ammex, Inc. v. Department of Treasury*, 272 Mich. App. 486, 494-495; 726 N.W.2d 755 (2006); see also *Chippewa Trading, supra* at 542 ("State remedies are plain, adequate, and complete if they provide the taxpayer with a full hearing and judicial determination at which the taxpayer may raise any federal constitutional objections to the tax.") (internal citation and quote mark omitted). As the case law interpreting the Tax Injunction Act indicates, the Community should not be allowed to interfere with the State's ability to administer its tax system by resorting to this Court.

C. Statutory Collateral Estoppel Bars The Claims For The 1993 And 1994 Taxes

Treasury issued the Decision and Order of Determination assessing the sales and use taxes on September 20, 2002. According to M.C.L. § 205.22(1), the Community had thirty-five days to appeal the unfavorable decision to the Tax Tribunal or ninety-days to appeal to the Michigan Court of Claims. The letter that Treasury sent to the Community with the Decision and Order of Determination specifically noted these time limitations and the process to file an appeal. **Ex. CC**. However, because the Community did not appeal, the Decision and Order of Determination became "final and is not reviewable in any court by mandamus, appeal, or other method of direct or collateral attack." M.C.L. §205.22(4); see also M.C.L. §205.22(5). In short, this provision is intended to give finality to Treasury decisions after a fair opportunity to appeal. This lawsuit, filed more than ten years after the taxes were due and in federal court instead of with the Tax Tribunal or Court of Claims, is exactly the type of lawsuit precluded by this provision. Therefore, Defendants are entitled to summary judgment of these claims.

VII. CONCLUSION AND REQUEST FOR RELIEF

Defendants respectfully request that this Court grant summary judgment in their favor of the claims identified in this brief and grant any other relief it believes just and equitable. Should summary judgment be denied, the Community will have moved a step closer to obtaining tax concessions from the State without entering into a tax agreement, disrupting the administration of the existing tax agreements and the negotiation of new tax agreements with other federally recognized tribes. After all, no tribe would be willing to enter into or comply with a tax agreement with the State if it could obtain the same or more benefits without a tax agreement.

Respectfully submitted,

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