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

REPLY BRIEF IN SUPPORT OF DEFENDANTS' SECOND MOTION FOR SUMMARY JUDGMENT

ORAL ARGUMENT REQUESTED

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I. DEFENDANTS ARE ENTITLED TO SUMMARY JUDGMENT OF THE §1983 CLAIM (COUNT V)

Defendants are entitled to have summary judgment entered in their favor on the claim under 42 U.S.C. §1983 related to the 2005 Offsets in Count V because the Community has presented no evidence of any conduct for which they can be held individually liable and because they are entitled to qualified immunity. Instead, the Community resorts to calling Defendants' position "breathtakingly absurd" and declines to address the issues presented in their motion.

A. Defendants Cannot Be Held Liable Under §1983

The Community states on page 22 of its responsive brief that the facts in evidence to this date establish their theory of Defendants' liability under §1983, which is that "Defendants Rising, Reynolds, and Fratzke oversaw the Department's offset program" and that they "had the ability to reverse and refund the 2005 Offsets, but chose not to." Defendants contest the representation that they denied the Community a refund and the insinuation that they may authorize a refund before determining that one is due. See M.C.L. §205.28(1)(e) and (2) (making an improper refund a felony). The evidence cited in the Brief In Support of Defendants' Second Motion for Summary Judgment (Defendants' Brief), p 11-14, 19-21, indicates that whether to grant a refund was being considered *but had not been decided* at the time the Community filed this lawsuit. The Community fails to cite any place in the record where there is evidence that Defendants had actually decided to deny the refund.

More critically, however, this theory concedes the argument that Defendants raised in this motion, namely, that the Community is attempting to hold Defendants liable as supervisors of the offset program and the Treasury computer systems. However, the Community has not cited a single source of authority that would permit a §1983 claim to proceed on a *respondeat superior*

theory. Rather, as Defendants have argued, "[s]ection 1983 will not support a claim based on a *respondeat superior* theory of liability." *Polk County v. Dodson*, 454 U.S. 312, 325; 102 S.Ct. 445; 70 L.Ed.2d 509 (1981). Where supervisory liability is the theory underlying a §1983 claim, it "fail[s] to present a federal claim." *Id.* The evidence on the record is uncontroverted that the named Defendants did not take the 2005 Offsets, did not take any action or make any decision so that the 2005 Offsets would be taken, and had not resolved the refund issue when the Community sued. If the Community meant to sue the State of Michigan for owning, operating, or programming a computer system that would automatically take offsets to satisfy state tax liabilities, it has clearly failed to do so in this litigation and Defendants cannot be held personally liable in place of the State. *Johnson v. Daniels*, 769 F. Supp. 230 (E.D. Mich., 1991) (personal participation, not vicarious liability, is the basis for a §1983 claim).

B. Defendants Are Entitled To Qualified Immunity

Defendants stand by their brief in support of their second motion for summary judgment to explain why they are entitled to qualified immunity of Count V. In reviewing the Community's responsive brief, the Court should take note that Count V does not plead any of the federal statutes the Community now cites on page 16 of its brief and no other necessary details of the nature of the claim are incorporated in Count V by reference.

The Community cites *Gamble v. Ohio Dep't of Jobs and Families*, unpublished opinion of the United States District Court for the Southern District of Ohio, No. 1:03-cv-452 (January 5, 2006) as authority that §1983 claims involving federal funds should survive summary judgment. But that case is irrelevant here. *Gamble* is unpublished and not binding on this Court. It also distinguishable because it involved sovereign immunity under the Eleventh Amendment, not

qualified immunity, and only claims against a state officer in her official capacity for prospective injunctive relief survived summary judgment, not individual capacity claims and claims for money damages like those at issue in Count V. See *id*. at 2006 WL 38996, *4 n 12, *17.

Moreover, *Gamble* concerned the interpretation and application of federal and state laws that required parents receiving public assistance to make a temporary assignment of any child support payments they received to the State of Ohio. See *id*. at *1-2. *Gamble* did not overrule the precedent holding that governments have a common-law right to offset funds to repay debts, much less establish that state officials must automatically refund an offset of federal funds before reaching a conclusion regarding whether a refund is due. See *United States v. Munsey Trust Co*., 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 quote marks omitted); see also *In re Brewster-Raymond Co*., 344 F.2d 903, 908 (6th Cir., 1965) ("There is no question but what the government had a right of set-off for any legal tax claims."); *In re Lanny Jones Welding & Repair, Inc*., 106 B.R. 446, 448-449 (Bkrtcy. E.D. Va., 1988) (holding federal government's right to a common law setoff to pay a tax debt is superior to the rights of other creditors under *Munsey Trust*). A reasonable official reading *Gamble* would not know that seeking counsel and considering whether to reverse an offset automatically taken under the common law violated a constitutional right held by the Community, much less that such a constitutional right had been clearly established. See, generally, *Saucier v. Katz*, 533 U.S. 194, 201; 121 S.Ct. 2151; 150 L.Ed.2d 272 (2001) (describing two-part inquiry into constitutional violation for purposes of qualified immunity analysis). Thus, *Gamble* does not defeat Defendants' claim of qualified immunity.

C. Qualified Immunity Bars Count V In Its Entirety

The Community contends that qualified immunity only bars claims for monetary damages, and not for declaratory or injunctive relief. Community Brief Opposing Summary Judgment (Community's Brief), p 12, n 9. Defendants have asserted qualified immunity for the claims against them in their *individual* capacities, not for claims against them in their *official* capacities in which the declaratory and injunctive relief are germane. The two cases that the Community cites do not hold that qualified immunity is an incomplete bar to a claim against Defendants in their *individual* capacities.

The first case that the Community cites, *Mitchell v Forsyth*, 472 U.S. 511; 105 S.Ct. 2806; 86 L.Ed.2d 411 (1985), addressed whether the United States Attorney General was entitled to absolute immunity or qualified immunity in a case involving warrantless domestic wiretaps. The portion of *Mitchell* that the Community cites addressed whether the Courts of Appeals have jurisdiction over interlocutory appeals involving qualified immunity when the defendant would remain in the case in his official capacity. *Id.* at 519, n 5. The Supreme Court noted that the Fourth Circuit had held that "a district court's denial of qualified immunity is not immediately appealable when the plaintiff's action involves claims for injunctive relief that will have to be adjudicated regardless of the resolution of any damages claims." *Id.* The Supreme Court, however, stated that, "[b]ecause this case does not involve a claim for injunctive relief, the propriety of the Fourth Circuit's approach [to interlocutory appeals] is not before us, and we express no opinion on the question." *Id.*.

Mitchell actually supports Defendants' contention that all relief the Community seeks under the §1983 claim against them in their individual capacities is barred entirely by qualified

immunity. In *Mitchell,* the Court reaffirmed its decision in *Harlow v. Fitzgerald*, 457 U.S. 800; 102 S. Ct. 2727; 73 L. Ed. 2d 396 (1982), noting that the essential holding in *Harlow* was that "[t]he conception animating the qualified immunity doctrine . . . is that 'where an official's duties legitimately require action in which clearly established rights are not implicated, the public interest may be better served by action taken "with independence and without fear of consequences."' " *Mitchell*, *supra* (quoting *Harlow*, *supra* at 818, in turn quoting *Pierson v. Ray*, 386 U.S. 547, 554; 87 S.Ct. 1213; 18 L.Ed.2d 288 (1967)). As *Mitchell* then explained, these other "consequences" that are eliminated by qualified immunity "***are not limited to liability for money damages*** . . . . ." *Id*. at 526 (emphasis added).

The second case that the Community cites as support for its theory is *Kennedy v City of Cleveland*, 797 F.2d 297, 305-306 (6th Cir., 1986). The dispositive issues in *Kennedy* related to whether the defendants were subject to the time limits for appeal and the trial court's time limits on filing motions. *Id*. at 298. As with the *Mitchell* opinion, the portion of *Kennedy* that the Community cites relates to whether an order denying summary judgment on qualified immunity grounds is subject to interlocutory appeal. *Id*. *Kennedy*, however, followed *Mitchell's* lead by rejecting the Fourth Circuit's conclusion that an order denying qualified immunity for a claim of individual liability is not immediately subject to appeal if the defendant would remain in the case in an official capacity even though immune from individual liability. *Kennedy*, *supra* at 306. With respect to whether qualified immunity is a complete defense to individual liability, the Sixth Circuit in *Kennedy* explained that

> [t]the exposure to personal liability in damages and the potential need for retention of private counsel to protect against that risk is quite different from the problem faced by an official who is charged only in an official capacity. The dilemma arising from the dual capacity in which a defendant is sued is

> particularly evident here where in fact it caused a mistrial. We believe that the rationale of *Mitchell v. Forsyth should apply equally whether only personal liability for damages is sought or whether added relief against the defendant in his official capacity is also sought*. [*Id*. (emphasis added).]

In other words, *Kennedy* held that qualified immunity fully bars claims against a defendant in his individual capacity regardless of whether the same defendant would remain a party in his official capacity. Under both *Kennedy* and *Mitchell*, Defendants Rising, Reynolds, and Fratzke are entitled to qualified immunity of Count V and all relief requested in connection with that claim.

II. DEFENDANTS ARE ENTITLED TO SUMMARY JUDGMENT OF THE CLAIMS CONCERNING THE 1993 AND 1994 SALES AND USE TAXES AND THE 1996 AND 2005 OFFSETS (COUNTS I - VIII, XXVII - XXX, AND XXXIII)

Defendants rely on their previous briefing of the waiver issues. Only three elements of the Community's arguments concerning waiver require additional attention. First, for reasons that Defendants cannot explain, the Community attempts to argue that the waiver concerning the offsets was a matter of tribal sovereign immunity. See Community's Brief, p 11-12. However, the Community has failed to explain why taking an offset of money that had not yet reached the Tribe is an invasion of its sovereign immunity, much less why it is relevant when Defendants have not sued the Community. See *Keweenaw Bay Indian Community v Rising*, 477 F.3d 881, 895 (6th Cir., 2007) (tribal sovereign immunity "prevents in-court remedies").

Second, none of the affidavits that the Community has now submitted actually disputes the facts as stated in Defendants' brief. The affidavits dance around whether the Community's Chief Financial Officer Gerald Hays, Community President Fred Dakota, and Community Attorney Joseph O'Leary meant to concur in the amount of taxes found owing for 1993 and 1994 rather than the right to collect those taxes and whether any of them had the actual authority to bind the payment of those taxes. However, all of the written communication between the

Community and the State confirmed the message that Dakota sent through Brulla that the taxes were owed but were being withheld by the Community as leverage in their tax agreement negotiations. See **Defendants' Brief, p 3-10 and exhibits cited**. In each of these documents the writer gave the direct impression that he acted on behalf of the Community as a governmental entity and made no statement about a need for additional permission from the Tribal Council. See, e.g., **Exs. C and M attached to Defendants' Brief**. If this was not actual authority, then these individuals certainly exercised sufficient apparent authority to waive the Community's right to challenge the 1993 and 1994 sales and use taxes and 1996 Offsets after so many years. See *Capital Dredge and Dock Corp. v. City of Detroit*, 800 F.2d 525 (6th Cir., 1986) (explaining that apparent authority depends on agent's representation to the third party, not the principal's relationship with the agent). The fact that the Community was sent two written notices of its right to appeal after the 2002 Treasury decision that it owed these taxes but did not do so can only be evidence that the Community itself had actually waived its rights to challenge the taxes and offsets, regardless of these individual representatives' authority to waive any objections. See **Exs. CC and DD attached to Defendants' Brief**.

Finally, while waiver is a valid defense to claims asserted in connection with the 1993 and 1994 sales and use taxes and their subsequent offsets, it serves as a separate but equally important reminder of the limits *Ex Parte Young*, 209 U.S. 123; 28 S. Ct. 441; 52 L. Ed. 714 (1908), places on the ability of a plaintiff to sue a state official in lieu of the state itself. In order to address these waiver arguments, both the Community and Defendants have had to rely on affidavits and other documents to identify what occurred in the long-ago past and those events' relationship to amounts of money the Community claims Defendants (acting in their official capacities) owe it. In other words, these waiver arguments clarify that the Community's claims

concerning the 1993 and 1994 taxes and subsequent offsets beg for purely *retrospective* and *monetary* relief. See *Green v. Mansour*, 474 U.S. 64, 68-70; 106 S.Ct. 423; 88 L.Ed.2d 371 (1985) (discussing requirement that suits against state officials be for prospective and injunctive relief only to avoid Eleventh Amendment immunity). Because that relief is prohibited under *Ex Parte Young*, these claims must fail and summary judgment must be granted.

III. NO MORE DISCOVERY IS PERMITTED AT THIS TIME

Plaintiff's counsel has filed a second affidavit in this case to which the Community repeatedly refers in its brief opposing Defendants' Brief. In effect, counsel has made himself both a witness and an attorney in this case. The Durocher affidavit does not meet the purpose of Fed. R. Civ. P. 56(f) because it identifies discovery the Community would like to conduct, but does not identify specific pieces of evidence it hopes to obtain and how that evidence would help oppose the motion for summary judgment. See *Summers v. Leis*, 368 F.3d 881, 887 (6th Cir., 2004) (explaining purpose of affidavit under Rule 56(f)). Rather, the affidavit runs on at length in an attempt to avoid acknowledging the depth of evidence already produced and its heavy weight in Defendants' favor, simply noting information that the Community would like to explore. Suffice it to say, Defendants do not concur in counsel's characterization of discovery in this matter,[1] as the July 24, 2007 letter from Defense Counsel to Mr. Durocher, attached as exhibit H to Mr. Durocher's second affidavit, makes clear. A party "has no absolute right to additional time for discovery" under Rule 56(f) and it is not appropriate to grant additional time to allow the Community to fish for evidence that does not exist and, if it did, is not claimed or likely to make a difference to the outcome of this motion. *Lewis v. ACB Bus. Servs., Inc.*, 135

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[1] In particular, Defendants do not agree that the courtesy copies they provided to opposing counsel in November 2007 were first-time responses to discovery.

F.3d 389, 409 (6th Cir., 1998); see also *Schaffer v. A.O. Smith Harvestore Prods., Inc.*, 74 F.3d 722, 732 (6th Cir., 1996) ("Rule 56(f) is not a substitute for diligently pursuing discovery.").

What is important to note, however, are the essential facts that are not in dispute: the Community filed this action in September 2005; the Community had almost two years in which to conduct discovery before the Court stayed discovery in this case on July 27, 2007; the Community did engage in discovery, submitting interrogatories, requests for admissions, and requests for documents to Defendants, with which they complied; the Community has never filed a motion to compel discovery of any point on which the parties have disagreed; and the Community examined Defendants Reynolds and Rising under oath during the first week of May 2007, but did not seek to depose them further before stipulating to the discovery stay almost three months later. Whether Defendants gave advance notice to the Community of their intentions to file a second motion for summary judgment does nothing to alter the fact that the Community has had a substantial opportunity to conduct discovery. The Community's failure to obtain evidence in support of its claims is not because summary judgment is premature, but because the evidence it seeks does not exist.

The Community is not entitled to further discovery *before* this Court rules on the pending motions for summary judgment, which is essential for narrowing discovery to any issues left for trial. The parties' stipulation to stay discovery was intended to preserve both the parties' resources and the procedural posture of the case while the Court is considered the pending motions. Additional discovery will be appropriate and consistent with the parties' stipulation only if the Court rules on the pending dispositive motions and concludes that there are issues left

for trial.[2]

Case law is also unambiguous in holding that once a defendant asserts qualified immunity, no further discovery is even *permitted* until the qualified immunity issue is resolved, regardless of the stage of the proceedings and even if discovery has not yet commenced. See *Mitchell*, *supra* at 526; *Harlow*, *supra* at 818; *Kennedy*, *supra* at 299. In *Skousen v. Brighton High School*, 305 F.3d 520, 527 (6th Cir., 2002), the Sixth Circuit directly held that the district court's failure to rule on the motion for summary judgment asserting qualified immunity because discovery was not yet complete was error requiring reversal. Therefore, Defendants respectfully maintain that this Court is not at liberty to allow discovery to proceed until it resolves the qualified immunity issue. The Community has conveniently ignored this well-settled principle.

IV. CONCLUSION

Defendants respectfully request that this Court grant summary judgment in their favor of all the claims challenged in their second motion for summary judgment and any other relief it believes just and equitable.

Respectfully submitted,

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[2] Defendants reserve their right to depose the Community's witnesses before trial.