STATE OF WISCONSIN CIRCUIT COURT OUTAGAMIE COUNTY

DIANE STUMPH,

Petitioner, Case No. 15 CV 1036

vs.

ONEIDA ZONING DEPT.,
ONEIDA POLICE DEPT.,
TROY PARR, and
BILL VANDENHEUVAL,

Respondents.

PETITIONER'S RESPONSE TO RESPONDENTS' MOTION TO DISMISS

Petitioner, Diane M. Stumph, by and through her attorneys, McDonald & Kloth, LLC, hereby provides her Response to Respondents' Motion to Dismiss.

I. Brief History of the Oneida Tribe of Indians, Sovereign Immunity, and Limitations Placed on Sovereign Immunity.

The U.S. District Court for the Eastern District of Wisconsin recently had occasion to review the history of the Oneida Tribe and the applicability of federal laws to the Tribe. *See* Oneida Tribe of Indians of Wisconsin v. Village of Hobart, WI, 2008 WL 821767, *1-*4 (E.D. Wis. 2008). The Oneida Tribe first established its reservation in 1838 pursuant to a Treaty between the United States and the Tribe. *Id.* At that time in history, the "several Indian nations [constituted] distinct political communities, having territorial boundaries, within which their authority [was] exclusive…." *Id., citing* Worcester v. Georgia, 6 Pet. 515, 556-57 (1832). However, the Constitution granted Congress the ability to regulate Commerce within Indian Tribes, and Congress determined "that all intercourse with [the tribes] would be carried on

exclusively by the Federal Government." *Id.*, *citing* County of Yakima v. Confederated Tribes and Bands of Yakima Nation, 502 U.S 251 (1992).

In the latter part of the 19th century and early part of the 20th century, the United States passed legislation with the purpose of assimilating American Indians into mainstream American culture. *Id., citing* General Allotment Act of 1887, 25 U.S.C. § 331 et seq., and the Burke Act of 1906, 25 U.S.C. § 349. In 1934, however, the United States changed its outlook from Indian assimilation to Indian sovereignty. *Id.* Among other things, the Indian Reorganization Act of 1934 ("IRA") "permitted tribes to organize and adopt constitutions with a congressional sanction of self-government, and it permitted tribes to form business committees or business corporations." *Id., citing,* 25 U.S.C. § 476. Pursuant to the IRA, the Oneida Tribe enacted its Constitution and By-Laws in 1936. *Id.*

Then, in 1953, Congress enacted Public Law 83 – 280 ("Public Law 280"). Public Law 280, which is comprised of three federal statutes, transferred legal authority effecting Indian tribes from the federal government to state governments. *See* 18 U.S.C. §1162, 28 U.S.C. §1360, and 25 U.S.C. 1321-1326. In particular Public Law 280 gave six states extensive criminal and civil jurisdiction over Indian lands. *Id.* The State of Wisconsin was one of the six states named under Public Law 280. *Id.*

The relevant text of Public Law 280 states as follows:

> **18 U.S.C. §1162. State Jurisdiction over offenses committed by or against Indians in the Indian country.**
>
> **(a) Each of the States or Territories listed in the following table shall have jurisdiction over offenses committed by or against Indians in the areas of Indian country listed opposite the name of the State or Territory to the same extent that such State or Territory has jurisdiction over offenses committed**

elsewhere within the State or Territory, and the criminal laws of such State or Territory shall have the same force and effect within such Indian country as they have elsewhere within the State or Territory:

State or Territory of	*Indian country affected*
Alaska	**All Indian country within the State, except that on Annette Islands, the Metlakatla Indian community may exercise jurisdiction over offenses committed by Indians in the same manner in which such jurisdiction may be exercised by Indian tribes in Indian country over which State jurisdiction has not been extended.**
California	**All Indian country within the State.**
Minnesota	**All Indian country within the State, except the Red Lake Reservation.**
Nebraska	**All Indian country within the State**
Oregon	**All Indian country within the State, except the Warm Springs Reservation.**
Wisconsin	**All Indian country within the State.**

28 U.S.C. § 1360. STATE CIVIL JURISDICTION IN ACTIONS TO WHICH INDIANS ARE PARTIES .

(a) Each of the States listed in the following table shall have jurisdiction over civil causes of action between Indians or to which Indians are parties which arise in the areas of Indian country listed opposite the name of the State to the same extent that such State has jurisdiction over other civil causes of action, and those civil laws of such State that are of general application to private persons or private property shall have the same force and effect within such Indian country as they have elsewhere within the State:

State of	*Indian country affected*
Alaska	**All Indian country within the State.**

California	**All Indian country within the State.**
Minnesota	**All Indian country within the State, except the Red Lake Reservation.**
Nebraska	**All Indian country within the State**
Oregon	**All Indian country within the State, except the Warm Springs Reservation.**
Wisconsin	**All Indian country within the State.**

25 U.S.C. § 1321. ASSUMPTION BY STATE OF CRIMINAL JURISDICTION

(a) ***Consent of United States; force and effect of criminal laws***
The consent of the United States is hereby given to any State not having jurisdiction over criminal offenses committed by or against Indians in the areas of Indian country situated within such State to assume, with the consent of the Indian tribe occupying the particular Indian country or part thereof which could be affected by such assumption, such measure of jurisdiction over any or all of such offenses committed within such Indian country or any part thereof as may be determined by such State to the same extent that such State has jurisdiction over any such offense committed elsewhere within the State, and the criminal laws of such State shall have the same force and effect within such Indian country or part thereof as they have elsewhere within that State.

25 U.S.C. § 1322. ASSUMPTION BY STATE OF CIVIL JURISDICTION

(a) ***Consent of United States; force and effect of civil laws***
The consent of the United States is hereby given to any State not having jurisdiction over civil causes of action between Indians or to which Indians are parties which arise in the areas of Indian country situated within such State to assume, with the consent of the tribe occupying the particular Indian country or part thereof which would be affected by such assumption, such measure of jurisdiction over any or all such civil causes of action arising within such Indian country or any part thereof as may be determined by such State to the same extent that such State has jurisdiction over other civil causes of action, and those civil laws of such State that are of general application to private persons or private property shall have the same force and effect within such Indian country or part thereof as they have elsewhere within that State.

…

(c) ***Force and effect of tribal ordinances or customs***
Any tribal ordinance or custom heretofore or hereafter adopted by an Indian tribe, band, or community in the exercise of any authority which it may possess shall, if not inconsistent with any applicable civil law of the State, be

given full force and effect in the determination of civil causes of action pursuant to this section.

See 18 U.S.C. §1162, 28 U.S.C. §1360, and 25 U.S.C. §1321 & §1322.

Section 2 of Public Law 280, 18 U.S.C. §1162, granted the State of Wisconsin broad criminal jurisdiction over offenses committed by or against Indians. Section 4 of Public Law 280, 28 U.S.C. §1360, granted the State of Wisconsin broad civil jurisdiction over civil actions involving Indians. However, Public Law 280 does not grant the State of Wisconsin general civil regulatory authority. *See* Bryan v. Itasca County, 426 U.S. 373 (1976).

Congress enacted Public Law 280 for the purpose of correcting the "problem of lawlessness on certain Indian reservations, and the absence of adequate tribal institutions for law enforcement." Bryan*, at 379,* citing, *Goldberg, Public Law 280: The Limits of State Jurisdiction over Reservation Indians,* 22 U.C.L.A.L.Rev. 535, 541-542 (1975). With regard to the grant of civil authority to the states, the Bryan Court went on to explain that:

> **"the sparse legislative history of s 4, subsection (a) seems to have been primarily intended to redress the lack of adequate Indian forums for resolving private legal disputes between reservation Indians, and between Indians and other private citizens, by permitting the courts of the States to decide such disputes; this is definitely the import of the statutory wording conferring upon a State 'jurisdiction over civil causes of action between Indians or to which Indians are parties which arise in . . . Indian country . . . to the same extent that such State . . . has jurisdiction over other civil causes of action.' With this as the primary focus of s 4(a), the wording that follows in s 4(a) 'and those civil laws of such state . . . that are of general application to private persons or private property shall have the same force and effect within such Indian country as they have elsewhere within the State' authorizes application by the state courts of their rules of decision to decide such disputes….The Act and its legislative history virtually compels our conclusion that the primary intent of s 4 was to grant jurisdiction over private civil litigation involving reservation Indians in state court."**

Bryan, at 383-84 (bold added). The Court further explained that several tribal reservations were specifically exempted from Public Law 280 because those reservations had adequate "law-and-order organizations" in place. *Id.,* citing H.R.Rep.No.848, p. 7, U.S.Code Cong. & Admin.News 1953, p. 2413. As Justice Diane S. Sykes of the Wisconsin Supreme Court put it, "Public Law 280 concerns providing Indian litigants with jurisdictional options beyond the tribal courts, not depriving tribal courts of jurisdiction that they otherwise rightfully possess as the courts of an independent sovereign." Teague v. Bad River Band of Lake Superior Tribe of Chippewa Indians, 265 Wis.2d 64, 665 N.W.2d 899 (2003). Wisconsin Courts have applied Public Law 280 consistently since its enactment. *See* Teague; In re Commitment of Burgess, 258 Wis.2d 548, 654 N.W.2d 81 (2002); State ex rel. Lykins v. Steinhorst, 197 Wis.2d 875, 541 N.W.2d 234 (Wis.App. 1995).

II. Limitations on Sovereign Immunity for Tribal Officials

Generally speaking, Indian Tribes enjoy sovereign immunity from lawsuits. *See* Landreman v. Martin, 191 Wis.2d 787, 801, 530 N.W.2d 62 (Ct.App. 1995), citing Santa Clara Pueblo v. Martinez, 436 U.S. 49 (1978). Indian tribes can be sued only under circumstances where Congress has authorized the suit or the tribe has waived its sovereign immunity. *See* Kiowa Tribe of Oklahoma v. Manufacturing Technologies, Inc., 523 U.S. 751, 754 (1998) (citations omitted).

Immunity from lawsuits applies to the Tribe, itself, not to its members. *See* Landreman*,* at 801. As discussed above, individual members of Indian tribes may be sued civilly in state courts pursuant to Public Law 280. The only circumstance under which an individual tribal member might enjoy sovereign immunity is where: (1) he or she is an officer or official of the tribe; and (2)

he or she is being sued for an act committed within the scope of his or her representative capacity. *Id.,* citing Davids v. Coyhis, 869 F.Supp. 1401, 1409 (E.D. Wis. 1994) (stating that the officers would be acting outside the scope of their representative capacity if their actions violated the law) (citation omitted). Logically speaking then, if the party-tribal member either is not an official or is not acting within the scope of his or her representative capacity, sovereign immunity does not apply. *See* Burlington Northern R. Co. v. Blackfeet Tribe of Blackfeet Indian Reservation, 924 F. 2d 899 (9th Cir. 1991) (reversed on other grounds), *citing* Puyallup Tribe, Inc. v. Department of Game, 433 U.S. 165, 171 (1977).

One test for determining whether the tribal officer or official was acting within the scope of his or her representative capacity is to investigate the intent of the alleged act and the outcome of the alleged act. If the alleged act was done with the intent for personal gain and not in furtherance of any legitimate tribal goal, the act falls outside the scope of his or her representative capacity. *See* Landreman *at 802-03.* Similarly, if the alleged act resulted in some personal gain to the officer or official and not in a gain to the Oneida Tribe, the act falls outside the scope of his or her representative capacity. *Id.*

However, if the tribal officer or official is accused of violating the law, he or she is not acting within the scope of his or her representative capacity, and, therefore, tribal sovereign immunity does not apply. *See* Burlington at 901*,* citing California v. Harvier, 700 F.2d 1217, 1218-20 (9th Cir. 1983)*;* see also Santa Clara Pueblo, Chemehuevi Indian Tribe v. Calif. Bd. Of Eqaulization, 757 F.2d 1047, 1051-52 (9th Cir. 1985) (rev'd in part on other grounds). Litigants may file and maintain lawsuits against tribal officials for the purpose of enjoining violations of state law. *See* Puyallup Tribe, Inc., at 171.

III. The Montana Rule.

The Supreme Court of the United States has repeatedly confirmed that, absent express authorization by federal statute or treaty, tribal jurisdiction over the conduct of non-tribal members exists only in extremely limited circumstances. *See* Strate v. A-1 Contractors, 117 S.Ct. 1404, 1409 (1997). The Supreme Court has repeatedly noted that the "sovereignty that the Indian tribes retain is of a unique and limited character." Plains Commerce Bank v. Long Family Land and Cattle Company, Inc., 128 S.Ct. 2709 (2008), *citing* United States v. Wheeler, 435 U.S. 313 (1978). "**It centers on the land held by the tribe and on tribal members within the reservation**." Plains Commerce Bank, 128 S.Ct. at 2718 (bold added).

In 1978, the Supreme Court in Oliphant v. Suquamish Tribe, 435 U.S. 191 (1978), held that Indian tribes lacked criminal jurisdiction over non-Indians. Then, in 1981, the Supreme Court in Montana v. United States, 450 U.S. 544 (1981) set the pathmarking case concerning tribal civil authority over nonmembers. The holding in Montana still stands today, and is controlling in this case.

In Montana, the Supreme Court held that a tribe has very limited civil regulatory authority over non-tribal members related to activities occurring on non-tribal land (i.e. "fee land") where there is no intervention of treaty or federal law. *See* Montana, 450 U.S. at 563-65. Applying the principles of Oliphant, the Montana Court stated "Stressing that Indian tribes cannot exercise power inconsistent with their diminished status as sovereigns…the Indian tribes have lost any 'right of governing every person within their limits except themselves.'" Id. *citing* Fletcher v. Peck, 6 Cranch 87, 147, 3 L. Ed. 162 (1810).

The Court in Montana then set forth a two-part rule to determine whether a tribe may exercise regulatory jurisdiction over a non-tribal member for activities arising out of non-tribal land (otherwise known as "fee land"). First, the Montana Court held that "A tribe may regulate, through taxation, licensing, or other means, the activities of nonmembers who enter consensual relationships with the tribe or its members, through commercial dealing, contracts, leases, or other arrangements." Montana, 450 U.S. at 565-566 (citations omitted). Montana listed a number of cases that it believed exhibited the type of activities that may fall within this exception. Id. Those cases all involved, in one form or another, situations where the non-tribal member had engaged in a commercial transaction with the tribe and where the legal dispute arose out of that specific transaction. Id. (citations omitted).

Subsequent cases have confirmed that the "consensual relationship" test cannot be merely "personal" in nature so as to give rise to tribal jurisdiction. *See* Boxx v. Warrior, 265 F.3d 771, 2001 WL 1012828 (CA9, 2001) (personal relationship between tribal member and non-tribal member insufficient to satisfy first test under Montana; thus tribal court did not have jurisdiction over legal dispute). Similarly, in Strate v. A-1 Contractors, the Supreme Court of the United States, applying the Montana rule, held that the tribe did not have jurisdiction over a legal dispute filed in tribal court where the plaintiff was not a tribal member but was the widow of a tribal member and mother of tribal members. 117 S.Ct. 1404 (1997).

In Plains Commerce Bank v. Long Family Land and Cattle Company, Inc., a non-Indian bank sought declaratory judgment that a tribal court judgment against the bank was null and void. 128 S.Ct. 2709 (2008). The Supreme Court of the United States applied the Montana rule and held, in pertinent part, that: (a) "consensual relationship exception to rule against tribal regulation

of use of non-Indian fee land did not apply to bank's sale;" and (b) "tribal court's jurisdiction could not be based on *Montana* exception concerning political integrity and health and welfare of tribe." Id.

Second, the Montana Court held that "A tribe may also retain inherent power to exercise civil authority over the conduct of non-Indians on fee lands within its reservation when that conduct threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe." Id. (citations omitted). In Plains Commerce Bank, the Supreme Court stated that "The conduct must do more than injure the tribe, it must 'imperil the subsistence' of the tribal community. Plains Commerce Bank, 128 S.Ct. at 2726, *citing* Montana, 450 U.S. at 1245. "One commentator has noted that 'th[e] elevated threshold for application of the second *Montana* exception suggests that tribal power must be necessary to avert catastrophic consequences.'" Plains Commerce Bank, 128 S.Ct. at 2726. The Court concluded that "The sale of formerly Indian-owned fee land to a third party is quite possibly disappointing to the Tribe, but cannot fairly be called 'catastrophic' for tribal self government." Plains Commerce Bank, 128 S.Ct. at 2726; *citing* Strate, 520 U.S. at 459.

IV. Jurisdiction is Proper in this Court. Therefore, Respondents' Motion to Dismiss Must be Denied in its Entirety.

Respondents contend that this court does not possess jurisdiction over Petitioner's legal action based on the Tribe's sovereign immunity. Respondent's contention is wrong in light of the controlling law set forth in Montana and its progeny.

In the present case, Petitioner has alleged that Respondents harassed her by unlawfully issuing "stop work orders," notices indicating that the building was "declared unsafe for human

occupancy or use," and other threatening conduct. Respondent engaged in this unlawful conduct at Petitioner's business, "Diane's Bar," located at W140 Service Road, Oneida, WI 54155 (the "Property"). *Stumph Aff. at ¶ 4, 5.* Petitioner has owned Diane's Bar for approximately two (2) years, and has been the sole owner of the business throughout its entire existence. *Id.* Petitioner holds a valid "Class B Retail License for the sale of Fermented Malt Beverages and Intoxicating Liquors" issued by the County of Outagamie, Wisconsin. *Id. at ¶ 4, Exh. B.* Petitioner also is the sole owner of the Property in which her business is located. *Id. at ¶ 5, Exh. C.* Petitioner pays property taxes on the Property to the State of Wisconsin. *Id. at ¶ 6.* The Property is considered "fee land." *Id.*

Petitioner is married to Terry Jordan, a member of the Oneida Tribe. *Id. at ¶ 3.* Petitioner is not a tribal member. *Id. at ¶ 2.* Prior to marrying Jordan, Petitioner and Jordan executed a Prenuptial Agreement. *Id. at ¶ 3.* The Prenuptial Agreement states, in pertinent part, that:

> "Terry R. Jordan agrees to relinquish all properties in his and [Petitioner's] names, to Diane M. Stumph during marriage."
>
> "Terry R. Jordan waives any share in each others estate upon death, whether by will, statutory right, statutory share, dower, curtsey, whether such right now exists by case law or by statute."
>
> "Terry R. Jordan waives the right to sharing in the increase in marital assets regarding all property during the marriage. Any and all joint named property is still owned by Diane M. Stumph only, Terry is listed only as a survivor in the event of Diane's death. This includes any and all business's, rental's, home's, and all other real property."

Id. at ¶ 3, Exhibit A.

Based on the foregoing undisputed facts, it is clear that Respondents cannot satisfy either exception to the Montana rule. First, Respondents' half-hearted attempt to argue that the Tribe has

jurisdiction over this matter under the first exception by virtue of Petitioner's "consensual relationship" with Jordan is completely devoid of merit. As explained in Boxx and Strate, it takes much more than a personal relationship between a tribal member and a non-tribal member to trigger tribal jurisdiction. Petitioner has no commercial dealings with the Tribe, nor does she have any contracts, leases, or other arrangements with the Tribe. Petitioner is the sole owner of her business and the Property. She runs her business on her own property, and obtains all necessary permits and licenses from the city and/or county where necessary. Accordingly, the Tribe does not have jurisdiction over Petitioner's business or property by virtue of her relationship with Jordan.

Second, Respondents cannot show that Petitioner's business or Property in any way, shape or form threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe. As explained by Plains Commerce Bank and Strate, this requires Respondent to establish that Petitioner engaged in some type of conduct that was "catastrophic" for tribal self government. This clearly is not the case, here. Petitioner owns and operates a small bar. A fire at the bar in December 2014 required Petitioner to perform some work on the building to make it suitable and safe for patrons. She conducted herself in accordance with City and County ordinances and regulations. At the end of the day, Petitioner simply wanted to get her business back up and running to make a living. She did nothing that by any stretch of the imagination could be considered "catastrophic" for tribal self government. The simple fact of the matter is that Respondents engaged in a vicious regime of harassment toward Petitioner with the primary goal to shut down her business. Hence, Petitioner's request for a harassment restraining order against the Respondents.

As noted above, if a tribal officer or official is accused of violating the law he or she is not acting within the scope of his or her representative capacity, and, therefore, tribal sovereign immunity does not apply. *See* Burlington at 901, citing California v. Harvier, 700 F.2d 1217, 1218-20 (9th Cir. 1983)*;* see also Santa Clara Pueblo, Chemehuevi Indian Tribe v. Calif. Bd. Of Eqaulization, 757 F.2d 1047, 1051-52 (9th Cir. 1985) (rev'd in part on other grounds). Here, Petitioner believes Respondents have engaged in unlawful conduct including, but not limited to, harassment, stalking, trespassing, defamation, negligence, and infliction of emotional distress. Accordingly, any potential argument that Respondents enjoy sovereign immunity based on their "official" positions with the Tribe is undermined by the fact that Respondents engaged in unlawful conduct.

CONCLUSION

For all the reasons stated herein, Petitioner respectfully requests this Court to deny Respondents' Motion to Dismiss in its entirety.

Dated this ____ day of January, 2016.

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