

STATE OF MICHIGAN
IN THE SUPREME COURT

ISKANDAR MANUEL, MAGGIE MANUEL,
JIMMY MANUEL, JOSEPH MANUEL, IMAD
MANUEL, and ADEL MANUEL,

Plaintiffs-Appellants^{ees}

v

TIMOTHY J. GILL, COUNTY OF CLINTON,
COUNTY OF EATON, RUSTY BANEHOFF,¹
COUNTY OF INGHAM, EATON COUNTY
SHERIFF, CLINTON COUNTY SHERIFF,
KENNETH KNOWLTON, LANSING CHIEF OF
POLICE, CITY OF LANSING, LANSING
POLICE COMMISSION, JIMMY PATRICK,²
TRI-COUNTY METRO NARCOTICS SQUAD,
and INGHAM COUNTY SHERIFF,

Defendants-Appellees.

and ↓

Defendant-Appellant.

Agency,

Defendants-Appellees,

FOR PUBLICATION

Opn - March 23, 2006
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No. 258933
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LC No. 03-001944-NO

P. Manderfeld

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APPLICATION FOR LEAVE TO APPEAL

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QUESTIONS PRESENTED FOR REVIEW

- I. **Under the plain language of the Urban Cooperation Act, interlocal agreements create separate legal or administrative entities only if they elect to do so, and those entities have only the powers designated to them by the agreement. Here, Tri-County Metro Narcotics Squad through its interlocal agreement did not opt to create a separate legal or administrative agency subject to suit. Therefore, Tri-County Metro Narcotics Squad is not a juridical entity and the Court of Appeals should have dismissed the contract claim against Tri-County Metro Narcotics Squad on that basis.**

- II. **Under this Court's case law precedent, entities are State agencies only where their relevant characteristics, when taken as a whole, indicate State dominance. Additionally, United States Supreme Court and federal cases place primary importance on whether judgments will be paid from State funds. Here, the Court of Appeals erroneously focused only on the Michigan State Police's day-to-day supervision of task force operations, ignoring the fact that a Command Board made up of local, state and federal constituent members sets policy and provides continuous oversight and ultimate control over operations. Also, the interlocal agreement does not contemplate that judgments will be paid out of the State treasury. Therefore, TCM is not the equivalent of a State agency and Plaintiffs-Appellants' breach of contract claim would have to be remanded to the circuit court if not dismissed under any other theory.**

STATEMENT OF ORDER APPEALED FROM, GROUNDS, AND RELIEF SOUGHT

Defendant-Appellee Tri-County Metro Narcotics Squad (TCM) appeals from the March 23, 2005 published opinion of the Court of Appeals holding that TCM is both a juridical entity capable of being sued and the equivalent of a State agency such that a contract claim against TCM would be properly brought in the Court of Claims.

This case involves the significant question of the status and characterization of multijurisdictional police concept teams such as drug task forces that are formed through interlocal agreements under the Urban Cooperation Act. The answer to this question is crucial in determining where and in what manner plaintiffs may bring claims against the activities arising out of these multijurisdictional police efforts, and how any resultant judgments will be paid.

On March 24, 2006, the Court of Appeals issued an Opinion for publication in *Manuel v Gill*, No. 258933, affirming the trial court's grant of summary disposition for defendants on all of the Manuels' claims. While we do not dispute the Court of Appeals' ultimate disposition of the case, the Court erred in two of its holdings in connection with that disposition: 1) that TCM is a juridical entity capable of being sued; and, 2) that the Court of Claims has exclusive jurisdiction over claims for money damages against TCM because TCM is equivalent to a State agency since it operated under the direction and supervision of the MSP.¹

The Court of Appeals' holding that TCM is a juridical entity is contrary not only to the plain language of sections 124.505 and 124.507 of the Urban Cooperation Act when read together, but also to federal case law precedent indicating that concept teams such as TCM cannot be sued unless they have clearly indicated their intent to be sued. Correction of this error would result in this Court dismissing Plaintiffs-Appellants' Breach of Contract Claim on the basis that TCM cannot be sued rather than on the circuit court's lack of jurisdiction. This error

¹ *Manuel v Gill*, 2006 Mich App LEXIS 744, at *32 (2006).

has far greater significance than its effect on TCM. It is important to every multijurisdictional police concept team and cooperative government exercise of power formed under the Urban Cooperation Act for whatever purpose.² Under the Court of Appeals' statutory analysis of the Act—which essentially rewrites the plain language of the Act—it could be argued that every cooperative, multijurisdictional program formed between or among governmental units under the Act may be sued, regardless of the language of the interlocal agreement or the intent of the contracting parties. If left standing, this holding will discourage the formation of police concept teams capable of investigating complex criminal activity on a larger scale and in geographic areas of the State where such investigative services are not otherwise available.

Even if TCM can be sued, the Court of Appeals' holding that TCM is the equivalent of a State agency subject to suit only in the Court of Claims is palpable error. This conclusion contradicts case law precedent from this Court concluding that Court of Claims jurisdiction is determined by considering all characteristics of an entity. The Court of Appeals ignored the terms and conditions of the interlocal agreement itself and the multijurisdictional nature of the Team, including the involvement of the FBI. In terms of funding sources for the Team's operations, TCM's interlocal agreement designates that each participating member contribute manpower, equipment, and/or money toward the operation of the team. While a Michigan State Police Lieutenant supervises the day-to-day police operations of the Team, the Team's Command Board has both executive and administrative authority over the Team's operations and finances. The Michigan State Police is but one participating member of the Team and one representative on the Command Board.

² For example, the Urban Cooperation Act is the authority under which such cooperative functions as parks and recreation programs, water and sewerage programs, trash disposal, and other multijurisdictional functions are or can be operated.

The Court of Appeals' conclusion also contradicts United States Supreme Court and federal case law indicating that a critical inquiry in determining the existence of a State agency is whether judgments will be paid from the State treasury. If allowed to stand, this error could have a significant negative impact on the State treasury. The Court's conclusion that jurisdiction lies in the Court of Claims implies that judgments against TCM and other similar concept teams must be satisfied out of the State treasury. If left to stand, this conclusion will, at a minimum, invite additional litigation on the question of responsibility for the satisfaction of a judgment against TCM and other such teams. At its worst, and contrary to the clear intent of the Urban Cooperation Act and the interlocal agreement at issue, the obligation will be imposed on the State treasury.

Additionally, the Court of Appeals' conclusion will discourage State agencies such as the Michigan State Police from taking a leadership role, or even participating, in a cooperative task force. Even more broadly, no constituent member, whether local, state, or federal, will want to step forward and take a leadership role in supervising or managing the day-to-day operations of a concept team of any type when that leadership role is tantamount to assuming liability for the actions or omissions of all team members. Correction of the erroneous holding that TCM is a State agency would necessitate either dismissing Plaintiff's breach of contract claim on other grounds or remanding it to the circuit court.

Defendant-Appellee TCM requests this Court to peremptorily reverse the Court of Appeals' March 24, 2006 holding as to these issues. In the alternative, Defendant-Appellee TCM requests this Court to grant this Application for Leave to Appeal.

This case meets the criteria of MCR 7.302(B) because the characterization and liability of multijurisdictional concept teams formed under the Urban Cooperation Act involves legal

principles of major significance to this State's jurisprudence. Additionally, the questions of whether concept teams such as TCM are juridical entities or alternatively, the equivalent of State agencies, are of great importance to the citizens of Michigan, who will be significantly affected if State entities are discouraged from participating in multijurisdictional efforts.

STATEMENT OF PROCEEDINGS AND FACTS

Procedural Facts

On November 5, 2003, Plaintiffs-Appellants filed this action in the Ingham County Circuit Court seeking damages for alleged violations of their state and federal rights. On December 9, 2003, Appellants served an eleven-count Amended Complaint claiming Defendants-Appellees were liable on theories of state-created danger, gross negligence, intentional infliction of emotional distress, and breach of contract. (Pl. First Amend Comp. ¶ 56.) Appellants alleged that members of TCM disclosed to persons in the drug trade that Iskandar Manuel was a confidential informant. As a result of these alleged disclosures, Appellants claimed they suffered monetary losses in their used car business and now fear retaliation by drug dealers for their involvement in TCM's investigations.

All Appellees in this case filed motions for summary disposition. The Michigan Department of Attorney General filed a motion for summary disposition on behalf of Lieutenants Gill and Knowlton, and TCM. On October 4, 2004, the Circuit Court entered a lengthy opinion and order granting summary disposition to all defendants pursuant to MCR 2.116(C)(8). (Circuit Court Opinion and Order, 10/4/04.) Specifically as to the MSP officers, the court held that their conduct did not amount to a constitutional violation and that, in any case, they would be entitled to qualified immunity. (Circuit Court Opinion and Order, p. 8, 10.) The court further held that Appellants failed to state a valid cause of action against Lts. Gill and Knowlton for gross negligence or intentional infliction of emotional distress. (Circuit Court Opinion and Order, pp. 12-13.) As to TCM, the court dismissed all claims against TCM, holding that Appellants could not sustain a constitutional claim against TCM under 42 USC §1983, (Opinion and Order, p. 10) and that Appellants' breach of contract allegations were both conclusory and barred by the statute of frauds. (Circuit Court Opinion and Order, p. 14-15.)

Appellants did not perfect an appeal of right within twenty-one days; however, on November 8, 2004, Appellants filed a Delayed Application for Leave to Appeal. On April 14, 2005, the Court of Appeals granted Appellants' application.

The Court of Appeals heard oral arguments on February 14, 2006. On March 23, 2006, the Court of Appeals issued a published opinion holding that TCM was a juridical entity and the equivalent of a State agency capable of being sued in the Court of Claims.³

Substantive Facts

The Michigan State Police is a signatory to an interagency agreement creating the Tri-Metro Narcotics Squad (TCM). TCM is not a separate legal or administrative entity but, rather, a cooperative task force among the Michigan Department of State Police (MSP), the Ingham County Sheriff's Office, the Eaton County Sheriff's Department, the Clinton County Sheriff's Department, the City of Lansing Police Department, the City of East Lansing Police Department, the Lansing Township Police Department, and the Lansing Office of the Federal Bureau of Investigation. (Attachment 1, Tri-County Metro Narcotics Squad interlocal agreement, preamble.) The task force allows the represented agencies to combine their investigative services, manpower, and resources to enforce drug laws and deter criminal activity. (Attachment 1, Art. I, § 1.)

Under the TCM interagency agreement, the MSP appoints a commander, in this case MSP Lieutenant Gill, to supervise TCM and run its day-to-day operation, (Attachment 1, Art. I, §VI), while a Command Board oversees the overall operation. (Attachment 1, Art. I, § II.) MSP Lieutenant Knowlton is TCM's assistant commander.

³ *Manuel*, 2005 Mich App LEXIS, at *32.

Law enforcement agencies each designate at least one officer to the task force, and these officers remain agents of their own police agency. (Attachment 1, Art. I, § III.) They operate under the day-to-day direction and supervision of the MSP. (Attachment 1, Art. I, § VI.) TCM participants also operate under policies established by the MSP, including those related to handling narcotic cases and confidential informants. (Attachment 1, Art. I, § III.) Each participating agency retains responsibility for the costs of its assigned personnel and any necessary legal representation. (Attachment 1, Art. I, VII.) All monies and forfeited assets are held by the City of Lansing, as trustee for TCM. (Attachment 1, Art. II, II.)

Appellant Iskandar Manuel began cooperating with TCM as an informant in 1999, after discovering that his son was involved with drugs and then being approached by Lt. Knowlton. (Pl. First Amend. Compl., ¶¶ 37-43.) Iskandar Manuel states that he acted as a confidential informant by apprising TCM of various planned drug deals, shootings, and other criminal activity. (Pl. First Amend. Compl. at ¶ 44.) He also states that he allowed TCM to install surveillance equipment both in his home and his used car business, and allowed tracking devices to be placed on automobiles he sold to various suspected drug dealers. (Pl. First Amend. Compl. at ¶¶ 51-52.)

Iskandar Manuel alleges that in 2001, he was part of a drug deal set up by TCM involving large quantities of marijuana and cocaine. He further claims that he received 500 pounds of marijuana from drug dealers, but refused to pay the drug dealers the agreed upon \$300,000 for the marijuana because the drug dealers failed to also deliver a large amount of cocaine as promised. (Pl. First Amend. Compl. ¶¶ 57-60.) Plaintiffs-Appellants filed a motion for mandamus and/or preliminary injunction seeking an order compelling TCM to pay Iskandar

Manuel \$300,000 to pay the drug dealers' extortionate demands. The trial court wisely denied this frivolous motion.

ARGUMENT

I. Under the plain language of the Urban Cooperation Act, interlocal agreements create separate legal or administrative entities only if they elect to do so, and those entities have only the powers designated to them by the agreement. Here, Tri-County Metro Narcotics Squad through its interlocal agreement did not opt to create a separate legal or administrative agency subject to suit. Therefore, Tri-County Metro Narcotics Squad is not a juridical entity and the Court of Appeals should have dismissed the contract claim against Tri-County Metro Narcotics Squad on that basis.

A. Standard of Review.

This Court reviews *de novo* a trial court's decision regarding a motion for summary disposition.⁴ This case involves a question of statutory interpretation, which this Court also reviews *de novo*.⁵

B. TCM was not formed under the Urban Cooperative Act of 1967 as a separate legal or administrative agency subject to suit.

A law enforcement drug task force may be formed pursuant to various statutes, including the Intergovernmental Contracts Between Municipalities Act⁶ and the Urban Cooperative Act of 1967.⁷ It is well-established that this Court must give effect to every clause and sentence of the Urban Cooperation Act.⁸ It "may not speculate about an unstated purpose where the unambiguous text plainly reflects the intent of the Legislature."⁹ Similarly, it should avoid a construction that renders any part of the statute surplusage or nugatory.¹⁰

In determining that TCM was a legal entity capable of being sued, both the Court of Appeals and the trial court erroneously relied on only a small portion of the language of the Urban Cooperative Act

⁴ *Ostroth v Warren Regency, GP, LLC*, 474 Mich 36, 2006; 709 NW2d 589, 592 (2006) (citing *Spiek v DOT*, 456 Mich 331, 337; 572 NW2d 201 (1998)).

⁵ *Ostroth*, 709 NW2d at 592.

⁶ MCL 124.1 *et seq.*

⁷ MCL 124.501 *et seq.*

⁸ See *Pohutski v City of Allen Park*, 465 Mich 675, 684; 641 NW2d 219 (2002.)

⁹ *Pohutski*, 465 Mich at 684.

¹⁰ *Pohutski*, 465 Mich at 684.

—"[t]he entity may sue and be sued in its own name."¹¹ In relying on this statutory language alone, the Court took the language entirely out of the context of that provision—an enumeration of the possible powers of an already-created legal or administrative entity:¹²

A separate legal or administrative entity created by an interlocal agreement *shall possess the common power specified in the agreement* and may exercise it in the manner or according to the method provided in the agreement. The entity *may* be, in addition to its other powers, authorized in its own name to make and enter into contracts, to employ agencies or employees, to acquire, construct, manage, maintain, or operate buildings, works, or improvements, to acquire, hold, or dispose of property, to incur debts, liabilities, or obligations that, except as expressly authorized by the parties, do not constitute the debts, liabilities, or obligations of any of the parties to the agreement, to cooperate with a public agency, an agency or instrumentality of that public agency, or another legal or administrative entity created by that public agency under this act, to make loans from the proceeds of gifts, grants, assistance funds, or bequests pursuant to the terms of the interlocal agreement creating the entity, and to form other entities necessary to further the purpose of the interlocal agreement. *The entity may sue and be sued in its own name.*

The plain language of the statute clearly does not create, nor mandate the powers and authority of, a separate legal entity. Rather, the statute leaves it to the participating parties to make that determination. According to the permissive "may" language,¹³ where an interlocal agreement does create a separate legal or administrative entity, it may also designate additional powers of that legal entity. Among those additional powers that may be designated is the "right" to sue and be sued in its own name. Even where an interlocal agreement clearly creates a separate legal or administrative entity, absent an additional express declaration in the agreement, that legal or administrative entity does not possess the power to sue or consent to being sued in its own

¹¹ *Manuel*, 2006 Mich App LEXIS, at *32; *John Roe #1, et al v Gill, et al*, 03-1944-NO, at p 14, ¶ 1 (Opinion and Order).

¹² MCL 124.507(2) (emphasis added).

¹³ See *Murphy v Michigan Bell Tel Co*, 447 Mich 93, 120; 523 NW2d 310 (1994)).

name. Under the mandatory "shall" language of this provision,¹⁴ a separate legal or administrative agency possesses only the common powers specified in the agreement.

TCM's interlocal agreement contains no express declaration creating a separate legal or administrative entity. Nor does the interlocal agreement contain an express declaration that TCM possesses the power to sue or consents to suit in its own name. Contrary to the Court of Appeals' interpretation, the interlocal agreement expresses the opposite intent: to *exclude* TCM from liability by stating that "[i]n no event, shall TCM indemnify assigned personnel . . . against actual or punitive damages." (Attachment 1, Art. II, VIII.)

Even more importantly, the previously-quoted language of § 7¹⁵ must be interpreted in light of § 5 of the Act, which makes clear that in a joint exercise of power such as that undertaken by TCM, the formation of a separate legal or administrative entity is *optional*:¹⁶

A joint exercise of power pursuant to this act shall be made by contract or contracts in the form of an interlocal agreement which *may* provide for: . . ."(c) the precise organization, composition, and nature of any *separate* legal or administrative entity created in the local agreement with the powers designated to that entity.

The use of the permissive "may" language plainly indicates the intent of the legislature to give concept teams the option of creating separate administrative or legal entities that can decide for themselves the extent of their designated powers—including the power to sue or be sued.¹⁷ To parse out the phrase "can sue or be sued" as applying to all joint exercises of power under the Urban Cooperation Act, as the Court of Appeals did, contradicts the clear intent of the legislature

¹⁴ See *People v Francisco*, 2006 Mich LEXIS 426 (March 23, 2006) (citing *Burton v Reed City Hosp Corp*, 471 Mich 745, 752; 691 NW2d 424 (2005)).

¹⁵ MCL 124.507(2).

¹⁶ MCL 124.505(c) (emphasis added).

¹⁷ MCL 124.507.

and renders § 5¹⁸ nugatory. Absent such express declarations, the entity that is formed is no more than a joint power-sharing exercise that is not subject to suit.

No provision of TCM's interlocal agreement indicates that its members intended to form an entity capable of being sued. In fact, because the multijurisdictional task force was not established as a separate administrative or legal entity, the interlocal agreement specifically provided that task force expenditures of court-ordered forfeiture proceeds be made pursuant to City of Lansing appropriations. (See e.g., Attachment 3, Michigan Office of the Auditor General, Audit Report, Criminal Investigation Program, MSP, p 23, citing Attorney General Opinion No. 6561).¹⁹ In contrast, for example, the interlocal agreement for the West Michigan Enforcement Team (WEMET) expressly declares, "'WEMET' refers to the West Michigan Enforcement Team, as separate legal entity established under Section 7 of the Urban Cooperation Act, created pursuant to this Agreement." (Attachment 2, §2.14.) That agreement also declares, "WEMET, through its Board, shall be a legal entity separate and independent from the participating public agencies." (Attachment 2, §3.1.) Moreover, in contrast to TCM's limited powers, WEMET's Policy Board can acquire, hold or dispose of property; lease property; construct, manage or operate buildings or improvements; and incur debts and liabilities. (Attachment 2, §3.2A(2)).

In short, TCM was not formed as a separate legal or administrative entity under the Act. Rather, TCM is a multijurisdictional concept team—a joint exercise of power among various separate agencies, each of whom retains its separate legal and administrative identity. In holding otherwise, the Court of Appeals essentially rewrote the plain language of the Urban Cooperation Act.

¹⁸ MCL 124.505.

¹⁹ 1989 OAG 6561 (opining that task forces that are not created as separate legal entities may not hold forfeiture funds).

C. Under federal case law precedent, the Timberlake factors indicate that TCM cannot be sued because it did not express an intent to be sued.

Federal courts that have addressed the legal capacity of drug task forces have concluded that they are not legal entities subject to suit unless the task force agreement so indicates. In *Timberlake v Benton*,²⁰ for example, the Court examined an interlocal agreement to create a drug task force similar to TCM.²¹ The court noted that the agreement did not explicitly state whether it was a legal entity.²² The court therefore examined: (1) the language of the authorizing statute; (2) whether a person is employed by the assigning member or the task force; (3) who pays the salary of the person; (4) whether each assigning member maintains liability and financial responsibility; and, (5) the property rights of assigning members if and when they choose to terminate their membership.²³ The fact that the task force members were employed and paid by their respective agencies, and did not hold property, compelled the court to conclude that it was not a legal entity.²⁴

The Court in *Timberlake* specifically noted the provision of the interlocal agreement at issue, whereby each party agreed "to defend, indemnify, and save harmless the other parties from any and all claims . . . resulting from or arising out of the actions of the parties' employees in connection with task force activities."²⁵ The court stated that although "the section could be read to suggest the possibility of lawsuits brought against the task force itself, it could also merely envision a lawsuit brought jointly against all the separate entities participating in the

²⁰ *Timberlake v Benton*, 786 F Supp 676 (WD Tenn, 1992).

²¹ *Timberlake*, 786 F Supp at 682-83.

²² *Timberlake*, 786 F Supp at 683.

²³ *Timberlake*, 786 F Supp at 682-84.

²⁴ *Timberlake*, 786 F Supp at 683-84.

²⁵ *Timberlake*, 786 F Supp at 683.

agreement."²⁶ The Court concluded that if the forming members of a Task Force have not intended a legal entity to be created, the court will not "imply its existence."²⁷

The Ninth Circuit employed the *Timberlake* factors in *Hervey v Estes*,²⁸ in determining whether an intergovernmental narcotics enforcement team was subject to suit.²⁹ Similarly to *Timberlake*, that court concluded that the association was only subject to suit if the members who created it intended to create a separate legal entity capable of being sued.³⁰

Applying the *Timberlake* factors here, TCM did not intend to form a separate legal entity. The Act does not mandate that TCM must be a juridical entity. Additionally, TCM does not have the power to dispose of property, open bank accounts, or hold forfeited assets. Rather, the City of Lansing holds all monies and forfeited assets as trustee for TCM.³¹ The City of Lansing manages TCM's financial business, including opening and maintaining bank accounts, holding and accounting for forfeiture funds, paying all TCM's bills, and authorizing and paying for all purchases. (Attachment 1, Art II, III.) Further, TCM is governed by a Command Board comprised of representatives from each participating agency, including the Michigan State Police and the FBI. Each participating member has an equal voice on the Board, and the Board directs the administrative and executive functions of TCM. It is the final authority for all decision related to TCM's operations.

As a practical matter, the Board has agreed to utilize the MSP personnel to supervise the day-to-day operations and MSP official Orders as the general operating procedures. This creates one unified chain of command, provides one operating protocol, and avoids chaos and confusion

²⁶ *Timberlake*, 786 F Supp at 683.

²⁷ *Timberlake*, 786 F Supp at 683.

²⁸ *Hervey v Estes*, 65 F3d 784 (9th Cir, 1995).

²⁹ *Hervey*, 65 F3d at 791.

³⁰ *Hervey*, 65 F3d at 791.

³¹ See, e.g., 1989 OAG 6561.

in the daily operations. However, each assigned officer remains accountable to his or her employer. For example, law enforcement agencies that participate in TCM are responsible for assigning and disciplining their own personnel. Each participating agency also retains responsibility for all costs of its assigned personnel, including wages, insurance, and fringe benefits. Equipment is also provided through local and county funding, as well as forfeitures. Additionally, TCM does not own the equipment or other property. Finally, participating agencies may withdraw from TCM upon written notice to the Board, and property is returned to each respective agency upon withdrawal or termination. TCM does not impose shared liability on members who have left or on new members as they are added.

In light of these factors, as in *Timberlake* and *Hervey*, TCM did not intend to be a separate administrative entity subject to suit. The language of the interlocal agreement neither explicitly nor implicitly gives TCM the power to sue or be sued. Absent this language, this power should not be imputed to TCM members where the Urban Cooperation Act states that a separate administrative entity possesses only the common power specified in the agreement.³² To hold otherwise would be contrary to federal precedent and expose TCM to liability it expressly rejects, as is its right under statutory authority. In the broader sense, the Court of Appeals' holding exposes all concept teams to potential liability under 42 USC § 1983 or, at the very least, repeated litigation based on the conduct of assigned personnel, despite a team's express intent to the contrary.

D. Section VIII of the interlocal agreement envisions potential lawsuits brought jointly against the constituent members of TCM and not lawsuits brought against TCM as a juridical entity.

Article I, § VIII of the interlocal agreement states:

³² MCL 125.507(2).

Liability insurance and/or legal representation in civil suits against TCM personnel, participating agencies, and/or the agency's representatives on the Command Board for alleged intentional or negligent acts or omissions arising out of activities performed by TCM shall be provided by the participating agency employing that personnel or appointing that representative to the Tri-County Metro Command Board. "In no event shall TCM indemnify assigned personnel, a participating agency, or its appointed representative to the Command Board, or its insurer against actual or punitive damages."

(Attachment 1, Art I, VIII.)

Contrary to the Court of Appeals', and the trial court's, erroneous interpretation of this provision, the plain language only contemplates civil suits against assigned personnel, individual participating agencies, and/or an agency's representatives on the Command Board for alleged intentional or negligent acts or omissions arising out of TCM activities." It does not contemplate suit against TCM itself as an entity. Noticeably, § VIII does not contain any language recognizing civil suits *against* TCM whatever the theory of liability. Nor does § VIII specify under what conditions or in what proportions each constituent member would provide insurance or the cost of representation for suits, or the payment of settlements or judgments, against TCM as an entity. Additionally, and contrary to the Court of Appeals' interpretation, TCM effectively expressed its intent not to be sued by requiring that each constituent member be responsible for suits against its personnel, its representative, and itself.

Federal case law also supports this interpretation of TCM's civil suit provision. The agreement in *Timberlake* contained a similar provision and the court held that it could merely envision a lawsuit brought jointly against the separate constituent entities rather than against the task force as legal entity.³³ Here, the provision is even stronger than the one analyzed in *Timberlake* because TCM included language clearly indicating it had no intention of indemnifying its members.

³³ *Timberlake*, 786 F Supp at 683.

In sum, TCM is not a separate legal entity under the Urban Cooperative Act of 1967, and its constituent agencies clearly did not intend to form an entity capable of being sued.

II. Under this Court's case law precedent, entities are State agencies only where their relevant characteristics, when taken as a whole, indicate State dominance. Additionally, United States Supreme Court and federal cases place primary importance on whether judgments will be paid from State funds. Here, the Court of Appeals erroneously focused only on the Michigan State Police's day-to-day supervision of task force operations, ignoring the fact that a Command Board made up of local, state, and federal constituent members set policy and provides continuous oversight and ultimate control over operations. Also, the interlocal agreement does not contemplate that judgments will be paid out of the State treasury. Therefore, even if this Court concludes that TCM can be sued, it is not the equivalent of a State agency and Plaintiffs-Appellants' breach of contract claim would have to be remanded to the circuit court if not dismissed under any other theory.

A. Standard of Review.

Defendant-Appellee adopts the standard of review articulated in Issue I.

B. The plain language of the Urban Cooperation Act compels the conclusion that TCM is not the equivalent of a State entity.

The Urban Cooperation Act contemplates that State government may participate in a concept team formed under its provisions. Section 4 of the Act authorizes a public agency of this State to exercise jointly with any other public agency "any power, privilege, or authority that the agencies share in common and that each might exercise separately."³⁴ A public agency is defined for purposes of this provision to include, "a political subdivision of this state or another state of the United States or of Canada, including, but not limited to, a state government, . . ."³⁵ The entity created by these cooperating public agencies "shall be a public body, corporate or politic for the purposes of this act."³⁶

³⁴ MCL 124.504.

³⁵ MCL 124.502(e).

³⁶ MCL 125.507(1).

Thus, the Legislature contemplated the State's participation in the various types of entities created under the Urban Cooperation Act and the joint exercise of the State's power, privilege, or authority with the participating public agencies. The Legislature expressly identified the entity created in which the State's power, privilege, or authority is jointly exercised to be a public body corporate or politic. The Legislature did not identify such a power-sharing entity to be a State entity or the equivalent of a State entity. The fact that the Michigan State Police is one participating member in TCM, which jointly exercises the MSP's power, privilege, or authority, does not create a State entity or the equivalent of a State entity under the plain language of the Urban Cooperation Act.

C. When TCM's relevant characteristics are taken as a whole, as this Court's precedent mandates, TCM is not a State agency.

In addition to ignoring the plain language of the Urban Cooperation Act, the Court of Appeals' holding that TCM is under the direction and supervision of the Michigan State Police and, thus, is the equivalent of a State entity, also ignores clearly-established case law precedent of this Court. In *Hanselman v Wayne Co v Killen*, this Court reversed a court of appeals' decision holding that the Wayne County Concealed Weapons Board was a "state" board.³⁷ The Court of Appeals had concluded that the Weapons Board was a "state" board because it was created by state statute; because the director of the Michigan State Police or his deputy was a member and the director was an official of a State department; and because the state was substantially involved in forming a comprehensive scheme of the state - imposed rules to determine who may receive a concealed weapon license.³⁸

³⁷ *Hanselman v Killen*, 419 Mich 168, 186-87; 351 NW2d 544 (1984), on remand *Hanselman v Wayne County Concealed Weapon Licensing Bd*, 416 Mich App 616; 381 NW2d 778 (1985).

³⁸ *Hanselman*, 419 Mich at 186-87.

This Court held that in evaluating whether a board is a State agency, it was not proper to focus only upon selected characteristics, noting instead that a court must "review[] all relevant characteristics, which, when *considered together*, indicate the overall character of the board."³⁹ This Court rejected the Court of Appeals' focus only the "state-like characteristics of the licensing board to the exclusion of non-state-like characteristics,"⁴⁰ and agreed with the Board that the court specifically erred in finding "'substantial state involvement' because of the state-imposed rules and the role of the state police in the workings of the concealed weapons licensing boards."⁴¹ Instead, this Court evaluated the Board's character, relations, and functions, noting specifically that the Board had more local officials than state officials; that the state-imposed requirements were general in nature; and that the statutory provision that the state police check fingerprints was "nothing more than common sense."⁴²

Similarly, in *League General Insurance Company v The Michigan Catastrophic Claims Association* this Court overruled the court of appeals' holding that defendant was a State agency because the court of appeals selectively focused on certain characteristics of the Michigan Catastrophic Claims Association (MCCA).⁴³ This Court found that, when taken as a whole, the characteristics of the MCCA indicated a private association, specifically noting that the catastrophic plan of operation and amendments to the plan were subject to the majority approval of the board and therefore did not indicate dominate state control.⁴⁴

³⁹ *Hanselman*, 419 Mich at 186-87 (emphasis added); see also, *In re Advisory Opinion re Constitutionality of 1966 PA 346*, 380 Mich 554, 571; 148 NW2d 416 (1968) (holding that a court must examine an entity's character, relations, and functions to determine whether it is an agency or instrumentality of State government).

⁴⁰ *Hanselman*, 419 Mich at 186.

⁴¹ *Hanselman*, 419 Mich at 186.

⁴² *Hanselman*, 419 Mich at 186-192.

⁴³ *League Gen'l Ins Co v MCAA*, 435 Mich 338, 349-50 (1990).

⁴⁴ *League*, 435 Mich at 347, 349-50.

As in *Hanselman* and *League General*, TCM's characteristics, when take as a whole, clearly indicate it is not the equivalent of a State agency. In concluding that TCM was a State agency, the Court of Appeals improperly focused on only one characteristic: the day-to-day supervision of the MSP.⁴⁵ Although a MSP Lieutenant supervises the day-to-day operations of the police personnel under the terms of the interlocal agreement, that Lieutenant (Team Commander) reports to the Command Board for his direction and supervision. The TCM Command Board has continuous oversight of the Team Commander, sets TCM administrative and operations policy, approves expenditures, and authorizes overall police operations. (Attachment 1, Art I, VI.) The Command Board meets bi-monthly on matters concerning the day to day operations of the Team. (Attachment 1, Art I, VI.) Likewise, although personnel and equipment are under the immediate control of the Team Commander, Defendant Gill, (Attachment 1, Art I, VI), the Board retains ultimate control over operations, and the constituent members retain ultimate control over their equipment and their assigned personnel. TCM's constituent members, and not State officials, with the exception of the MSP representative, make up its Command Board. As in *Hanselman*, MSP does not control the Board. It has but one vote. Decisions require a majority of the Board's votes.

Additionally, TCM and its Command Board have no inherent powers, only those expressed in the interlocal agreement chosen from among the limited powers authorized by the Urban Cooperation Act. Under its interlocal agreement, TCM does not hold property, cannot hold funds or assets, open bank accounts, or assess its constituent members beyond those agreed contributions. Further, TCM is not funded by the Michigan State Police or the State's general

⁴⁵ *Manuel*, 2006 Mich App LEXIS, at *32.

fund. TCM's obligations are not paid by the Michigan State Police or out of the State's general fund.

Equally significant, TCM does not operate under a "comprehensive scheme of state-imposed rules." For example, assigned personnel are still subject to discipline by their employing agency for violation of its rules and protocols. The fact that constituent members agree to have MSP personnel supervise the day-to-day police operations, utilize MSP's Official Orders as operating guidelines, and utilize MSP report forms evidences only common sense needed for uniform supervision, operations, and reporting. It is the Command Board that oversees the supervision and practices of the Team. This is clearly consistent with the language of the Urban Cooperation Act and the interlocal agreement's recognition that the State would participate as an equal, but not superior, member of the Team.

Applying the *Hanselman* analysis here warrants the conclusion that the Court of Appeals erred in concluding TCM is the equivalent of a State entity simply because it is under the day-to-day supervision of the MSP. TCM possesses many more non-state-like characteristics than state characteristics and its composite character is not that of a State agency. The Court of Appeals' erroneous conclusion should be reversed.

D. In determining whether an entity is State agency, United State Supreme Court and federal cases place primary importance on whether judgments will be paid from State funds. If TCM is a State agency, payment of any judgment against TCM on a breach of contract claim would have to be paid out of the State treasury, in direct contradiction to the interlocal agreement's express language in Article VII.

In determining whether an institution can be characterized as an arm or alter ego of the state for purposes of Eleventh Amendment immunity, the United States Supreme Court has made clear that "when the action is in essence one for the recovery of money from the state, the

state is the real, substantive party in interest."⁴⁶ This "financial obligation factor" is critical to the determination of an entity's status even when other factors exist to support a different conclusion.⁴⁷ For example, the United States Supreme Court not only looks at whether there is state oversight by State officials, but also on the entity's reliance on State appropriations.⁴⁸

Relying on the Supreme Court's focus on whether a judgment would be paid from State funds,⁴⁹ federal courts too, have focused on whether any judgments would be paid from State funds. Thus, for example, federal courts have determined that universities are within the meaning of 'State' because judgments against universities are paid out of the State's tax revenues.⁵⁰

In its ruling here, the Court of Appeals failed to even consider the issue of funding in determining that TCM was the equivalent of a State entity. Such a characteristic is clearly relevant not only under the *Hanselman* analysis discussed above but also in light of the United States Supreme Court and federal precedent related to Eleventh Amendment jurisdictional immunity.

Applying that reasoning, TCM operates on cash contributions from three participating Counties, not on cash funds from the Michigan State Police. The counties are reimbursed, in part, from the proceeds of forfeiture property. Any property seized by TCM and forfeited to the Command Board, "shall be used to enhance law enforcement efforts pertaining to the Controlled

⁴⁶ *Ford Motor Co v Dep't of Treasury*, 323 US 459, 464; 65 S Ct 347; 89 L Ed 389 (1945).

⁴⁷ *Regents of the University of California v Doe*, 519 US 425, 429; 117 S Ct 900; 137 L Ed 2d 55 (1997).

⁴⁸ *Mt Healthy City Sch Dist Bd of Educ v Doyle*, 429 US 274, 280; 97 S Ct 568; 50 L Ed 2d 471 (1977).

⁴⁹ *Hall v Medical College of Ohio at Toledo*, 742 F2d 299, 304 (1984); see also *Brotherton v P. Cleveland, M.D.*, 173 F3d 552 (6th Cir, 1999) (emphasizing the financial responsibility factor of who will pay the claims).

⁵⁰ See *Hutsell v Sayre*, 5 F3d 996, (6th Cir 1993); *United States v Moore*, 860 F Supp 400, 403 (1994).

Substance Act." (Attachment 1, Art II, I.) The Controlled Substance Act specifically designates how this money is to be spent, including expenses for sale and storage of forfeited property, "buy money," and rent and utilities for a facility to house TCM; it does not, however, include indemnification of all constituent members.⁵¹ (Attachment 1, Art II, I, ¶ 6, (1) – (8)). Forfeiture funds remaining after payment of these specified expenses shall be used to enhance drug-related law enforcement effort as indicated in the Michigan Public Health Code, Part 75.⁵² (Attachment 1, Art. II, III.) The interlocal agreement also provides that the participating entities "*shall* jointly determine how such remaining monies shall be spent or allocated." (Attachment 1, Art II, III, emphasis added.)

Significantly, TCM's annual budgets do not include a line item for payment of costs or judgments against TCM, funding that would be necessary given restrictions on the use of forfeiture funds. This demonstrates that TCM neither intended to be sued nor contemplated payment for such suits out of its operating budget. (See Attachment 4, TCM budgets for years 2000-2007.)⁵³ Further, TCM's interlocal agreement does not authorize judgments to be paid out of TCM's forfeiture funds. Payment of judgments against TCM from the State Treasury would violate the interlocal agreement. Moreover, the agreement affirmatively states that TCM must not indemnify assigned personnel, a participating agency, or its appointed representative to the Command Board, or its insurer against actual or punitive damage. (Attachment 1, Art I, VIII.) Thus, no State funds are used for the operations of TCM other than the salary and benefits paid to State employees assigned to TCM, and the equipment purchased and assigned to the Team.

⁵¹ MCL 333.7524.

⁵² MCL 333.7502 *et seq.*

⁵³ TCM budgets are not part of the record below because they were not necessary information until the Court of Appeals issued its Opinion characterizing TCM as the equivalent of a State agency.

In sum, TCM is not the equivalent of a State agency. In so holding, the Court of Appeals, in effect, imputes the intentional or negligent acts of local or federal agencies to the Michigan State Police and thereby forces TCM to indemnify assigned personnel. Further, if contract claims against TCM must be filed in the Court of Claims, the Court of Appeals has erroneously forced the State Treasury to fund judgments against TCM even when TCM's budget has not appropriated money for this purpose.

E. The Court of Claims lacks jurisdiction over claims for money damages asserted against TCM.

The Court of Claims has jurisdiction to hear claims "against the state and any of its departments, commissions, boards, institutions, arms, or agencies."⁵⁴ This jurisdiction generally extends to all claims for money damages against the State and its agencies.⁵⁵ There are exceptions to this jurisdiction, though. For example, cases against the State's trial courts are brought in the circuit court rather than the Court of Claims because, despite the fact that the court is part of State government, the State is neither a party nor the funding source for the court and would not be liable to pay any judgment.⁵⁶

Here, as with the Probate Court in *Cameron v Monroe County Probate Court*,⁵⁷ the State is not a party to the action. TCM is the defendant. The State is not the funding source for TCM and it would not be liable for any judgment in this case. Further, TCM consists of county and municipal entities in addition to the Michigan State Police. Counties and cities are never within

⁵⁴ MCL 600.6419; *Lowery v Dep't of Corrections*, 146 Mich App 342, 348; 380 NW2d 99 (1985); *Silverman v U of M*, 445 Mich 209, 217; 516 NW2d 54 (1994).

⁵⁵ *Lowery*, 146 Mich App at 348; *Silverman*, 445 Mich at 217.

⁵⁶ *Cameron v Monroe County Probate Court*, 457 Mich 423, 427-28; 579 NW2d 859 (1998)— This case against the Probate Court was filed in the circuit court and sought damages for discrimination and various civil rights violations. This Court noted that despite the fact the courts have always been regarded as part of state government, they have operated historically on local funds and resources. Further, although the expenses of justice are incurred for the benefit of the State, they are charged against the counties as a proper method of distributing the burden.

⁵⁷ *Cameron*, 457 Mich at 427-28.

the jurisdiction of the Court of Claims.⁵⁸ Thus, even being the "equivalent of a State entity" does not bring that entity within the jurisdiction of the Court of Claims where the State is not the actual party or the funding source, is not liable for any judgment against the entity, and the entity is comprised of counties and cities in addition to State representation. To hold otherwise would imply an obligation on the part of the State to fund this entity and to pay its obligations, including any judgment entered against TCM.

⁵⁸ *Doan v Kellogg Community College*, 80 Mich App 316, 320; 263 NW2d 357 (1977).

CONCLUSION

WHEREFORE, Defendant-Appellee Tri-County Metro Narcotics Squad respectfully request this Court grant leave to appeal and peremptorily reverse the Court of Appeals' holdings that TCM is a juridical entity and the equivalent of a State agency. If this Court finds that TCM is not a juridical entity, Defendant-Appellee TCM requests this Court dismiss Plaintiffs-Appellants' breach of contract claim on the basis that TCM is not an entity subject to suit. Alternatively, Defendant-Appellee TCM requests this Court peremptorily reverse the Court of Appeals' holding that TCM is a State entity subject to the jurisdiction of the Court of Claims, and if not dismissed on any other basis, remand Plaintiffs-Appellants' breach of contract claim to the circuit court and take whatever other action it determines appropriate.

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