
**IN THE APPELLATE COURT OF ILLINOIS
FIRST DISTRICT**

ACF LEASING, LLC; ACF SERVICES, LLC; and GENERATION CLEAN FUELS, LLC,)	From the Circuit Court of Cook
)	County, Illinois; Law Division
)	Case No. 14 L 2768
Plaintiffs-Appellants,)	Honorable Margaret Ann Brennan
v.)	
)	
GREEN BAY RENEWABLE ENERGY, LLC; ONEIDA SEVEN GENERATIONS CORPORATION; and THE ONEIDA TRIBE OF INDIANS OF WISCONSIN,)	Notice of Appeal: November 7, 2014
)	Judgment Orders: October 8, 2014
)	October 27, 2014
Defendants-Appellees)	

**DEFENDANT-APPELLEES’
SEPARATE SUPPLEMENTARY APPENDIX**

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LAW DIVISION

IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT, LAW DIVISION

ACF LEASING, LLC, ACF SERVICES,
LLC, GENERATION CLEAN FUELS, LLC,

Plaintiffs,

v.

GREEN BAY RENEWABLE ENERGY,
LLC, ONEIDA SEVEN GENERATIONS
CORPORATION and THE ONEIDA TRIBE
OF INDIANS OF WISCONSIN,

Case No. 14 L 002768

Defendants.

**THE ONEIDA TRIBE OF INDIANS OF WISCONSIN'S
AND ONEIDA SEVEN GENERATIONS CORPORATION'S
BRIEF IN SUPPORT OF MOTION TO DISMISS FOR LACK OF SUBJECT
MATTER JURISDICTION**

INTRODUCTION¹

Defendant The Oneida Tribe of Indians of Wisconsin (“Tribe”) is a federally recognized Indian tribe. Hoeft Aff., ¶ 2. Defendant Oneida Seven Generations Corporation (“OSGC”) is a tribally chartered subordinate entity created under the Tribe’s Constitution to enhance the business and economic development of the Tribe. Hoeft Aff., ¶ 10 and Exh. 2. Plaintiffs (collectively referred to as “ACF” or “Plaintiffs”) claim damages arising out of two contracts: 1) a Master Lease Agreement, dated May 24, 2013, (“Lease”) entered into between defendant Green Bay Renewable Energy, LLC (“GBRE”) and ACF Leasing, LLC for the lease of three, forty-ton liquefaction machines and pretreatment equipment for purposes of processing waste plastic to generate electricity and create oil-based fuel products at locations in Monona, Wisconsin and Cheboygan, Michigan (the “Project”);² and 2) an Operation and Maintenance Agreement, dated May 24, 2013, (“O&M Agreement”) entered into between GBRE and ACF Services, LLC for the operation and maintenance of the Project. Financing for the Project hinged on a 90% guarantee by the United States Department of Interior, Bureau of Indian Affairs (“BIA”) of a \$21,777,777 loan. Complaint, Exh. A (Schedule 1, I-3 providing that the Lease Commencement Date would be the date on which the loan proceeds were received by GBRE). Plaintiffs allege that the Lease and O&M Agreement have been breached and the Project cannot proceed because financing failed when the Tribe, through its General Tribal Council and the Business

¹ Facts necessary to support the motion to dismiss are contained in the Affidavits of Patricia Ninham Hoeft and Gene Keluche, and the exhibits attached thereto, which have been submitted herewith, and which are incorporated herein fully by reference.

² OSGC is the sole owner of Oneida Energy, Inc. (“OEI”). OEI, a Wisconsin corporation, is the sole owner of Oneida Energy Blocker Corporation (“OEB”), a Delaware corporation. OEB is the sole member and owner of GBRE, a Delaware limited liability company. GBRE was set up as a single asset LLC for purposes of developing the Project. Keluche Aff., ¶5.

Committee—the governing bodies of the Tribe—voted to dissolve OSGC in December 2013. Complaint, ¶¶ 39-41; Hoeft Aff., ¶¶ 4-8 and 22.

Neither the Tribe nor OSGC is a party to the Lease or the O&M Agreement, both of which contain integration clauses. Complaint, Exhs. A and B. Nonetheless, plaintiffs assert that GBRE was acting as the “agent” of the Tribe and OSGC and, therefore, that they are bound by the agreements and are liable (directly or vicariously) for alleged breaches. Complaint, ¶¶ 49-54 and 71-79. Likely in recognition that the lack of privity is fatal to their contract claims, Plaintiffs also pleaded various tort claims against the Tribe and OSGC. Complaint, ¶¶ 60-91.

Disregarding the numerous, significant legal deficiencies with Plaintiffs’ claims for purposes of this motion, this Court need not, and indeed cannot, consider the sufficiency or merits of Plaintiffs’ claims against the Tribe and OSGC because it lacks subject matter jurisdiction to do so. The Tribe—a sovereign Indian Nation—and OSGC—a subordinate economic entity created by and for the benefit of the Tribe—enjoy sovereign immunity barring Plaintiffs’ suit as a matter of federal common law. *Kiowa Tribe of Okla. v. Mfg. Techs., Inc.*, 523 U.S. 751, 754-56 (1998); *Three Affiliated Tribes of the Fort Berthold Reservation v. Wold Eng’g*, 476 U.S. 877, 890 (1986).

Plaintiffs, who have the burden of proving that jurisdiction exists, cannot demonstrate that either the Tribe or OSGC waived their sovereign immunity. A waiver of sovereign immunity cannot be implied but must be unequivocally expressed. *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 58 (1978); *Alzheimer & Gray v. Sioux Mfg. Corp.*, 983 F.2d 803, 812 (7th Cir. 1993); *Kiowa Tribe*, 523 U.S. at 753. An Indian tribe or tribal entity may waive its sovereign immunity by contract but only if it does so with “requisite clarity.” *C & L Enters., Inc. v. Citizen Band of Potawatomi Indian Tribe of Okla.*, 532 U.S. 411, 418 (2001).

Here, the Tribe and OSGC did not sign the Lease or O&M Agreement and, further, there is no mention of waiver of their sovereign immunity in either agreement. Moreover, the Tribe has an ordinance prescribing that waiver of sovereign immunity by the Tribe or a Tribal entity such as OSGC must be by formal resolution or by a motion passed by the Tribe's Business Committee on behalf of the Tribe. Hoeft Aff., ¶ 23 and Exh. 5. It is indisputable that no such resolution was passed by the Tribe or OSGC, nor did the Business Committee pass such a motion. Hoeft Aff., ¶ 28; Keluche Aff., ¶ 9. As a matter of federal common law, where tribal law prescribes who has the authority to waive sovereign immunity and how sovereign immunity is to be waived, absent compliance with such tribal law sovereign immunity may not be, and is not, waived irrespective of any written or oral promises to the contrary by persons lacking authority to waive sovereign immunity. *Native Am. Distrib. v. Seneca Cayuga Tobacco Co.*, 546 F.3d 1288, 1289 (10th Cir. 2008); *World Touch Gaming, Inc. v. Massena Mgmt., LLC*, 117 F. Supp. 2d 271 (N.D.N.Y. 2000); *Danka Funding Co., LLC v. Sky City Casino*, 747 A.2d 837, 838-39 (N.J. Super. Ct. Law Div. 1999). As a matter of law, therefore, this court lacks subject matter jurisdiction and the Tribe and OSGC must be dismissed.

ARGUMENT

I. STANDARD OF REVIEW.

A complaint must be dismissed pursuant to Section 2-619(a)(1) of the Illinois Code of Civil Procedure when, as is the case here, "the court does not have jurisdiction of the subject matter of the action..." 735 ILCS 5/2-619(a)(1). "When ruling on a section 2-619 motion, the trial court may consider the pleadings, depositions, and affidavits." *Cohen v. McDonald's Corp.*, 347 Ill. App. 3d 627,632 (1st Dist. 2004) "[T]ribal sovereign immunity is a threshold jurisdictional question." *Amerind Risk Mgmt. Corp. v. Malaterre*, 633 F.3d 680, 684 (8th Cir.

2011). See also *Williams v. Davet*, 345 Ill. App. 3d 595, 600 (1st Dist. 2003) (sovereign immunity deprives the court of subject matter jurisdiction); *Cohen*, 347 Ill. App. 3d at 632. “On a motion invoking sovereign immunity to dismiss for lack of subject matter jurisdiction, the plaintiff bears the burden of proving by a preponderance of evidence that jurisdiction exists.” *Garcia v. Akwesasne Hous. Auth.*, 268 F.3d 76, 84 (2nd Cir. 2001); see also *Amerind Risk Mgmt.*, 633 F.3d at 685-86.

II. THE TRIBE AND OSGC HAVE SOVEREIGN IMMUNITY.

Indian tribes are immune from suit in both state and federal court unless “Congress has authorized the suit or the tribe has waived its immunity.” *Kiowa*, 523 U.S. at 754. Absent congressional abrogation or a clear and unequivocally expressed waiver of sovereign immunity, Indian tribes are not subject to civil suit in any state, federal, or arbitral tribunal. *C & L Enters.*, 532 U.S. at 418. The doctrine of tribal sovereign immunity is rooted in federal common law and reflects the federal Constitution’s treatment of Indian tribes as governments under the Indian commerce clause. See U.S. Const. Art. 1, § 8. As the Supreme Court has indicated, tribal sovereign immunity “is a necessary corollary to Indian sovereignty and self-governance.” *Three Affiliated Tribes*, 476 U.S. at 890.

Sovereign immunity extends to a tribe’s business activities. *Kiowa Tribe*, 523 U.S. at 760. “Tribes enjoy immunity from suits on contracts, whether those contracts involve governmental or commercial activities and whether they are made on or off reservation.” *Id.* “The perceived inequity of permitting the Tribe to recover from a non-Indian for civil wrongs in instances where a non-Indian allegedly may not recover against the Tribe simply must be accepted in view of the overriding federal and tribal interests in these circumstances, much in the same way that the perceived inequity of permitting the United States or [a State] to sue in cases

where they could not be sued as defendants because of their sovereign immunity also must be accepted.” *Three Affiliated Tribes*, 476 U.S. at 893.

Tribal sovereign immunity also extends to subordinate economic organizations of the tribe.³ In *Breakthrough Mgmt. Grp., Inc. v. Chukchansi Gold Casino and Resort*, 629 F.3d 1173 (10th Cir. 2010), the plaintiff and an “agent” of Chukchansi Gold Casino and Resort (“Casino”) executed a license agreement for online business management training and consulting service. *Id.* at 1176-77. The tribe allegedly paid for the license. *Id.* The Chukchansi Economic Development Authority (“Authority”) owned and operated the Casino. *Id.* The plaintiff alleged that the terms of the license were violated and sued the tribe, Authority, Casino and individual Casino employees. *Id.* at 1177.

The district court dismissed the tribe on sovereign immunity grounds but held that the Authority and the Casino were not immune from suit. *Id.* at 1181. The Tenth Circuit reversed, finding that the Authority and the Casino were also immune:

Tribal sovereign immunity may extend to subdivisions of a tribe, including those engaged in economic activities, provided that the relationship between the tribe and the entity is sufficiently close to properly permit the entity to share in the tribe’s immunity.... As the Ninth Circuit has noted, immunity for subordinate economic entities “directly protects the sovereign Tribe’s treasury, which is one of the historic purposes of sovereign immunity in general.”

* * *

³ See e.g., *Allen v. Gold Country Casino*, 464 F.3d 1044, 1046-47 (9th Cir. 2006) (casino organized pursuant to tribal ordinance and interstate gaming compact entitled to tribal sovereign immunity as arm of the tribe); *Native Am. Distrib. v. Seneca-Cayuga Tobacco Co.*, 546 F.3d 1288, 1292-96 (10th Cir. 2008) (tobacco manufacturer had sovereign immunity as enterprise of tribe); *Pink v. Modoc Indian Health Project Inc.*, 157 F.3d 1185 (9th Cir. 1998) (nonprofit health corporation created and controlled by Indian tribes entitled to tribal immunity); *Dillon v. Yankton Sioux Tribe Hous. Auth.*, 144 F.3d 581, 583 (8th Cir. 1998) (tribal housing authority – established by tribal council pursuant to its powers of self-government – is a tribal agency entitled to sovereign immunity); *Barker v. Menominee Nation Casino*, 897 F. Supp. 389, 393 (E.D. Wis.1995) (tribal gaming commission and casino found to be immune from suit).

A commentator has observed that “[t]ribal governments directly control or participate in commercial activities more frequently than other [types of] governments.... [T]he tribal organization may be part of the tribal government and protected by tribal immunity, even though it may have a separate corporate structure.”

Id. at 1183-84 (citations omitted).

The *Breakthrough* Court articulated six factors for determining whether a subordinate economic entity is entitled to sovereign immunity: (1) “the method of creation of the economic entities”; (2) “their purpose”; (3) “their structure, ownership, and management, including the amount of control the tribe has over the entities”; (4) “the tribe’s intent with respect to the sharing of its sovereign immunity”; (5) “the financial relationship between the tribe and the entities”; and (6) “the policies underlying tribal sovereign immunity and its connection to tribal economic development, and whether those policies are served by granting immunity to the economic entities.” *Id.* at 1187.

Concluding that the Authority and the Casino were entitled to sovereign immunity, the *Breakthrough* Court found the following facts significant: a) the Authority was created under tribal law; b) the Authority and Casino were created for the economic benefit of the tribe; c) Casino revenue was used for tribal governmental functions; d) seven members of the Authority were also members of the Tribal Council; e) the ordinance governing the Authority gave the Authority the right to waive its, but not the tribe’s, sovereign immunity under specific circumstances, which was “clear” evidence that the tribe considered the Authority immune from suit; and f) if judgment were entered against the Authority or Casino, the tribe’s economic position would be negatively impacted. *See Id.* at 1191-95.

ACF has conceded that the Tribe is a federally recognized Indian tribe. Complaint, ¶ 14; *see also* *Hoelt Aff.*, ¶ 2. Therefore, it is indisputable that the Tribe is immune from ACF’s suit. *Kiowa*, 523 U.S. at 754; *Three Affiliated Tribes*, 476 U.S. at 890-91.

With respect to OSGC, much like the Authority in *Breakthrough*, OSGC was created under, and is subject to, the laws, ordinances and jurisdiction of the Tribe. Hoeft Aff., ¶¶ 3-8, 10-12 and Exhs. 1-3. See *Breakthrough*, 629 F.3d at 1187 (factor number one). OSGC's purpose is to "promote and enhance the business and economic diversification" of the Tribe. Hoeft Aff., Exh. 3 (Charter, Art. VI(A)). Like the Authority and Casino in *Breakthrough*, OSGC promotes and funds the Tribe's self-determination through revenue generation and the funding of diversified economic development. See *Breakthrough*, 629 F.3d at 1187 (factor number two).

The Tribe has significant control over OSGC. *Breakthrough*, 629 F.3d at 1187 (factor number three). Pursuant to the bylaws of OSGC, the Business Committee acts on behalf of the Tribe in the role similar to shareholders of a corporation. Hoeft Aff., ¶ 19 and Exh. 4. OSGC's board members are appointed by the Business Committee, and at least 5 of 7 board members must be members of the Tribe. Hoeft Aff., ¶ 17 and Exh. 3 (Charter, Art VII(D)b. and e.). At all relevant times in 2012-2013, there was only one board member that was not a member of the Tribe. Hoeft Aff., ¶ 18. OSGC provides detailed reports quarterly to the Business Committee and General Tribal Council describing the development activities and financial condition of OSGC. Hoeft Aff., ¶ 20 and Exh. 3 (Charter, Art. XIII). Finally, the Business Committee retained the authority to dissolve OSGC. Hoeft Aff., ¶ 22 and Exh. 3 (Charter Art. XV(B)).

Consistent with the fourth *Breakthrough* factor, it is plain that the Tribe intended its sovereign immunity to extend to OSGC. *Breakthrough*, 629 F.3d at 1187. The Tribe conferred on OSGC "all rights, *privileges and immunities* existing under federal and Oneida tribal laws." Hoeft Aff., ¶ 11 and Exh. 3 (Charter, Art. I) (emphasis added). The General Tribal Council expressly reserved to the "Oneida Nation all its inherent sovereign rights as an Indian nation with regard to activities of" OSGC. Hoeft Aff., ¶ 12 and Exh. 3 (Charter, Art. IV). OSGC was

expressly precluded from waiving any “rights, privileges or immunities of the Oneida Nation.” Hoeft Aff., ¶ 13 and Exh. 3 (Charter, Art. XVII(F)). OSGC is authorized to waive its immunity, but not the Tribe’s immunity, for purposes of entering into contracts. Hoeft Aff., ¶ 14 and Exh. 3 (Charter, Art. XVII(E)). However, OSGC must strictly follow the Tribe’s Sovereign Immunity Ordinance § 14 for a waiver of sovereign immunity to be valid. Hoeft Aff., ¶ 23 and Exh. 5. See Argument, Part II.

The financial relationship between the Tribe and OSGC also supports the conclusion that it is immune from suit. *Breakthrough*, 629 F.3d at 1187. All profits of OSGC must be used to carry out the purposes and powers of OSGC (*i.e.*, to diversify the economic portfolio of the Tribe) and all profits not so utilized “will revert to and be designated for use by” the Tribe. Hoeft Aff., ¶ 16 and Exh. 3 (Charter Art. X). OSGC manages thirteen commercial properties located in Brown and Outagamie Counties, Wisconsin. Hoeft Aff., ¶ 21. The Tribe is the owner of eleven of those properties: six properties are held in trust by the federal government for the benefit of the Tribe, and five are properties held in fee title by the Tribe. *Id.* The profits of OSGC have reverted to the Tribe on at least two occasions, and the Tribe receives \$400,000-\$500,000 annually in lease payments from OSGC and its subsidiaries. Hoeft Aff., ¶ 16. The Tribe uses the lease payments received from OSGC and its subsidiaries to fund its Division of Land Management (“DLM”), which manages the Tribe’s residential, commercial and agricultural leases, easements and land use in general. The DLM also uses the lease payments to pay for property maintenance and to make home loans to tribal members. Hoeft Aff., ¶¶ 9 and 16.

OSGC “plainly promote[s] and fund[s] the Tribe’s self-determination through revenue generation and the funding of diversified economic development.” *Breakthrough*, 629 F.3d at

1195. Therefore, “extending immunity to [OSGC] ‘directly protects the sovereign Tribe’s treasury, which is one of the historic purposes of sovereign immunity in general....’” *Id.* As a subordinate economic enterprise of the Tribe, OSGC enjoys sovereign immunity, and ACF’s Complaint must be dismissed.

III. THE TRIBE AND OSGC DID NOT WAIVE THEIR SOVEREIGN IMMUNITY.

A waiver of sovereign immunity cannot be implied but must be unequivocally expressed. *Santa Clara Pueblo*, 436 U.S. at 58. In the absence of a clear waiver, suits against tribes (and tribal entities) are barred by sovereign immunity. *Alzheimer*, 983 F.2d at 812; *Kiowa Tribe*, 523 U.S. at 753. An Indian tribe or tribal entity may waive its sovereign immunity by contract but only if it does so with “requisite clarity.” *C & L Enters.*, 532 U.S. at 418.

In *Native American Distributing*, 546 F.3d at 1289, plaintiffs sued the Seneca Cayuga Tobacco Company (“SCTC”), which was an enterprise of the tribe, and three of SCTC’s officers. The tribe was governed by a business committee and the business committee created the SCTC as a tribal enterprise to manufacture, distribute and sell tobacco products. *Id.* at 1290-91. SCTC entered into a contract to distribute SCTC’s product and, when asked about sovereign immunity, “SCTC officials told [plaintiffs] that no waiver was necessary....” *Id.* at 1291. Plaintiffs sued for breach of the agreement, and SCTC raised sovereign immunity as a defense to the suit. *Id.* at 1292-93. The court rejected the plaintiffs’ argument that the tribe should be estopped from asserting sovereign immunity because of the oral representations made by SCTC’s officers:

We agree with the district court that the misrepresentations of the Tribe’s officials or employees cannot affect its immunity from suit. We have previously recognized that “officers of the United States possess no power through their actions to waive an immunity of the United States or to confer jurisdiction on a court” in the absence of an express waiver of immunity. We see no reason to treat tribal immunity any differently than federal sovereign immunity in this context.

Id. at 1295. (Internal citations omitted.)

In *World Touch Gaming*, 117 F. Supp. 2d at 271, the seller and lessor of gaming equipment sued a tribe, its casino, and its casino management company for breach of contract. The gaming equipment company and the casino entered into agreements for the lease and purchase of pull tab machines for use in the tribe's gaming enterprise. The Vice President of the casino's management company—a state incorporated LLC that had an agreement with the tribe to act as the managing agent of the casino—signed the relevant agreements. In deciding that neither the tribe nor the casino had waived sovereign immunity, the court relied on the “unequivocal language” of the tribe's Constitution and Civil Judicial Code whereby “only the Tribal Council can waive the Tribe's sovereign immunity, and such waiver must be express.” *Id.* at 275. The court also held that giving the management company authority to operate the casino was not the equivalent to authorizing the management company to waive the tribe's sovereign immunity. *Id.*

The court found that “as a sophisticated distributor of gaming equipment that frequently deals with Indian gaming enterprises, [plaintiff] should have been careful to assure that either the Management Company had the express authority of the Tribe to waive sovereign immunity, or that the Tribe itself expressly waived sovereign immunity with respect to the Sales and Lease Agreements.” *Id.* at 275. The court also held that, “regardless of any apparent or implicit, or even express, authority of the Management Company to bind the Casino and the Tribe to contract terms and other commercial undertakings, such authority is insufficient to waive the Tribe's sovereign immunity.” *Id.* at 276 (internal citations omitted).⁴

⁴ See also *Sanderlin v. Seminole Tribe of Fla.*, 243 F.3d 1282, 1288 (11th Cir. 2001) (rejecting argument that tribal Chief had actual or apparent authority to waive immunity because “[s]uch a finding would be directly contrary to the explicit provisions of the Tribal Constitution”).

In *Danka Funding*, 747 A.2d at 838-39, the controller of a casino owned by a Tribe signed equipment lease contracts containing forum selection clauses. The laws of the Tribe, however, described its immunity and prohibited waiver by anyone other than the Tribal Council. *Id.* at 841. The New Jersey court held that casino controller's execution of the contract did not waive the Tribe's sovereign immunity because the controller had no legal authority to waive immunity under the Tribe's laws. *Id.* at 842-44. In reaching this conclusion, the court held the plaintiff should have availed itself of the tribal procedure for obtaining a valid waiver:

Danka Business Services knew it was dealing with an Indian tribe and is charged with knowledge that the tribe possessed sovereign immunity. The tribe, through its laws, describes how one may obtain a legally enforceable waiver of that immunity. Neither Danka Business Services nor Danka Funding took advantage of those provisions.

* * *

By failing to avail themselves of the procedures for obtaining a waiver of immunity under tribal law, Danka Business Systems and Danka Funding failed to satisfy the conditions necessary for an unequivocal waiver identified in *Santa Clara Pueblo v. Martinez*, 436 U.S. at 58, 98 S.Ct. 1670.

Id. at 842-43.

There can be no dispute that Congress did not waive the Tribe's or OSGC's immunity with respect to ACF's claims, all of which are state law contract and tort claims. *Santa Clara Pueblo*, 436 U.S. at 58. Therefore, the only way for ACF to prove that the Tribe or OSGC waived sovereign immunity is to demonstrate that there has been an express, clear and unequivocal waiver in conformity with Tribal law. *Id.*

The Sovereign Immunity Ordinance § 14.6 prescribes who has authority to waive the Tribe's and OSGC's sovereign immunity and the process for obtaining a valid waiver:

14.6-2. *Waiver by Resolution.* The sovereign immunity of the Tribe or a Tribal Entity may be waived:

- (a) by resolution of the General Tribal Council;
- (b) by resolution or motion of the Oneida Business Committee; or
- (c) by resolution of a Tribal Entity exercising authority expressly delegated to the Tribal Entity in its charter or by resolution of the General Tribal Council or the Oneida Business Committee, provided that such waiver shall be made in strict conformity with the provisions of the charter or the resolution governing the delegation, and shall be limited to the assets and property of the Tribal Entity.

Hoefl Aff., Exh. 5. The Sovereign Immunity Ordinance, as well as the Tribe's Constitution and Bylaws and OSGC's Charter, are publicly available online. Hoefl Aff., ¶ 24. Neither the Tribe nor OSGC passed a resolution authorizing a waiver of sovereign immunity in connection with the Lease or O&M Agreement, nor did the Business Committee pass such a motion. Hoefl Aff., ¶ 28; Keluche Aff., ¶¶ 8-9.

ACF knew it was dealing with an entity, GBRE, whose indirect owners are the Tribe and OSGC, a tribal corporation. Complaint, Exh. A (Lease, Schedule 1, p. I-3 providing that Lease Commencement Date would be the date GBRE received loan proceeds with a guarantee by the United States Department of Interior, Bureau of Indian Affairs). "By failing to avail themselves of the procedures for obtaining a waiver of immunity under tribal law, ... [ACF] ... failed to satisfy the conditions necessary for an unequivocal waiver identified in *Santa Clara Pueblo v. Martinez*, 436 U.S. at 58, 98 S.Ct. 1670." *Danka Funding*, 747 A.2d at 843.

Furthermore, neither the Tribe nor OSGC are parties to the Lease or O&M Agreement and neither agreement contains any reference to the waiver of sovereign immunity by the non-parties. Complaint, Exh. A at p. 14 and Exh. B at 15. Had ACF wanted to hold the Tribe and OSGC accountable for GBRE's contractual obligations, its path was clear—require the Tribe and OSGC to be parties to the Lease and O&M Agreement and include waiver of sovereign

immunity provisions in the agreements. Both agreements have merger and integration clauses and, therefore, constitute the entire agreements between GBRE and ACF. Complaint, Exh. A at ¶ 14(i), p. 13 and Exh. B at ¶ 21, p. 14. It is contrary to well-established principles of contract law for ACF to assert that the Tribe and OSGC are bound by contracts to which they are not parties. *Baird & Warner, Inc. v. Addison Indus. Park, Inc.*, 70 Ill. App. 3d 59, 70 (1st Dist. 1979) (defendant “was not a party to the contract; indeed ... it did not even sign it. Therefore, ... it was not bound by the contract and could not have been guilty of a breach of contract.... [T]he mere fact a stockholder owns 100 percent of the stock is not enough to entitle a court to pierce the corporate veil and hold the stockholder liable on a contract made by the corporation.”).

Tacitly acknowledging this fatal flaw, ACF asserts that the GBRE acted as an agent for the Tribe and OSGC, implying that GBRE could and did waive the Tribe’s and OSGC’s sovereign immunity by entering into the Lease and O&M Agreement. Complaint, ¶ 49. However, a waiver of sovereign immunity cannot be implied; it must be unequivocally expressed. *Santa Clara Pueblo*, 436 U.S. at 58. Therefore, the contractual language waiving immunity must contain the “requisite clarity.” *C & L Enters.*, 532 U.S. at 418. In *Alzheimer*, 983 F.2d at 805-07, the Seventh Circuit found that a tribal entity had waived its and the tribe’s sovereign immunity when the vice-president and general manager of the tribal entity signed a contract containing provisions providing that the tribal entity and the tribe would “waive all sovereign immunity in regards to all contractual disputes,” “all agreements contemplated hereunder will be executed and interpreted in accordance with the laws of the State of Illinois,” and all parties “agree to submit to the venue and jurisdiction of the federal and state courts located in the State of Illinois.” *Id.* at 807. The choice of law and venue provisions in the Lease and O&M Agreement make no reference to the Tribe or OSGC, sovereign immunity or waiver,

and neither the Tribe nor OSGC signed them. Complaint Exh. A at ¶ 14(h), p. 13 and Exh. B at ¶ 15, p. 13.

Additionally, OSGC was granted the authority to “waive only the sovereign immunity [OSGC] possesses for the purposes of dispute resolution or contract enforcement in contracts, agreements or other similar documents for the furtherance of the Corporation’s business and/or purpose.” Hoeft Aff., Exh. 3 (Charter, Art. VI(E)). The General Tribal Council expressly reserved to the “Oneida Nation all its inherent sovereign rights as an Indian nation with regard to the activities of [OSGC].” Hoeft Aff., Exh. 3 (Charter, Art. V). GBRE, not the Tribe or OSGC, signed the Lease and O&M Agreement, like the management company in *Danka Funding*. 747 A.2d at 841-44. Waiver of immunity by the Tribe and OSGC is prescribed by Tribal law, like the tribe and Authority in *Danka Funding*. *Id.* GBRE has no authority under Tribal law to waive immunity of the Tribe or OSGC, like the management company in *Danka Funding*. *Id.* ACF knew that the Tribe and OSGC are indirect owners of GBRE, and it failed to demand that the Tribe and OSGC sign the Agreement, nor did it obtain sovereign immunity waivers from them.

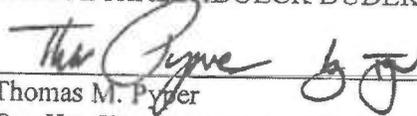
Even if GBRE’s employees made misrepresentations to ACF and those employees were deemed by this Court to be “agents” of the Tribe or OSGC, “misrepresentations of the Tribe’s officials or employees cannot affect its immunity from suit.” *Native Am. Distrib.*, 546 F.3d at 1295. “[R]egardless of any apparent or implicit, or even express, authority of ... [GBRE] ... to bind ... [OSGC] ... and the Tribe to contract terms and other commercial undertakings, such authority is insufficient to waive the Tribe’s sovereign immunity.” *World Touch Gaming*, 117 F. Supp. 2d at 276. The facts simply do not support a finding that the Tribe or OSGC waived their sovereign immunity.

CONCLUSION

For the reasons set forth herein, and as supported by the Affidavits of Patricia Ninham Hoeft and Gene Keluche, the exhibits attached thereto and all matters of record, ACF's Complaint against the Tribe and OSGC must be dismissed. As a matter of law, the Tribe and OSGC have sovereign immunity, depriving this Court of subject matter jurisdiction.

Dated this 5th day of May, 2014.

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IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT, LAW DIVISION

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CLERK OF CIRCUIT COURT
LAW DIVISION

ACF LEASING, LLC, ACF SERVICES, LLC,)
GENERATION CLEAN FUELS, LLC,)
)
Plaintiffs,)

-v-

No. 14 L 2768 (Y)

GREEN BAY RENEWABLE ENERGY, LLC,)
ONEIDA SEVEN GENERATIONS)
CORPORATION and THE ONEIDA TRIBE)
OF INDIANS OF WISCONSIN,)
)
Defendants.)

**PLAINTIFFS' RESPONSE IN OPPOSITION TO THE
MOTION TO DISMISS FOR LACK OF SUBJECT MATTER JURISDICTION**

NOW COME Plaintiffs ACF LEASING, LLC, ACF SERVICES, LLC and GENERATION CLEAN FUELS, INC. (collectively, "ACF"), by and through their attorneys, Sanchez Daniels & Hoffman LLP, and for their Response in opposition to the Defendants, ONEIDA SEVEN GENERATIONS CORPORATION ("OSGC") and THE ONEIDA TRIBE OF INDIANS OF WISCONSIN'S ("the Tribe") Motion to Dismiss for Lack of Subject Matter Jurisdiction pursuant to 735 ILCS 5/2-619(a)(1), states as follows:

FACTUAL BACKGROUND

The relationship between ACF and the Tribe/OSGC began in August of 2012. (See Affidavit of Michael Galich attached as Ex. 2, ¶2.) On or about August 7, 2012, Kevin Cornelius (CEO of OSGC, GBRE President and Tribe member) and Bruce King (CFO of OSGC, GBRE Treasurer and Tribe member) gave a presentation regarding energy projects related to the Tribe at a Department of Energy conference in Wisconsin. (Ex. 2, ¶2.) After the conference, Michael Galich (ACF operations executive) met with William Cornelius, (OSGC Board

President), Kevin Cornelius (OSGC CEO) and Bruce King (OSGC CFO), who held themselves out as representatives of the Tribe, to discuss energy projects for the Tribe. (Ex. 2, ¶2.) Shortly thereafter, Michael Galich met with Kevin Cornelius and Bruce King in Illinois to discuss pursuing a specific plastics to energy project (the "Project") with the Oneida Tribe. (Ex. 2, ¶2; *see also* the Tribe's and OSGC's Responses to Plaintiffs' First Request to Admit attached hereto as Exs. 3 and 4, respectively, ¶7.)

After this first meeting in Illinois, Eric Decator (ACF counsel) drafted a Joint Venture Agreement between OSGC and an ACF entity for the development and operation of the Project with the Tribe. (*See* a copy of the Affidavit of Eric Decator attached hereto as Ex. 5, ¶2; *see also* the Joint Venture Agreement attached thereto as Ex. 5-A; Ex. 2, ¶4.) In or about October, 2012, Eric Decator (ACF) and Michael Galich (ACF) participated in numerous weekly telephone calls in Illinois utilizing ACF's conference call number with Kevin Cornelius (OSGC CEO) and Bruce King (OSGC CFO) to discuss the Project. (Ex. 2, ¶4; Ex. 5, ¶3.) On or about October 22, 2012, Kevin Cornelius and Bruce King, who again introduced themselves as representatives of OSGC/the Tribe, met again in Illinois with ACF members regarding the Project. (Ex. 2, ¶6; Ex. 5, ¶4.) At this second meeting in Illinois, Kevin Cornelius and Bruce King advised ACF that the Tribe needed to revise the structure of the initial agreement for political reasons and would utilize an entity known as GBRE to lease the equipment for the Project. (Ex. 2, ¶6.; Ex. 5, ¶6.) ACF agreed to contract with GBRE for the Project given that Kevin Cornelius and Bruce King led ACF to believe that OSGC/the Tribe were utilizing GBRE for tax purposes. (Ex. 5, ¶6.)

On or about October 26, 2012, Equity Asset Finance, LLC ("EAF") and GBRE entered into a Commitment Letter for EAF to provide financing for the Project. (Ex. 5, ¶5.) Pursuant to the Commitment Letter, Bruce King arranged for \$50,000 to be wired from OSGC's bank

account to the bank account of EAF on November 6, 2012. (Ex. 5.) After OSGC wired the initial funds, ACF members, Matt Eden (OSGC's financial advisor), and Joseph Kavan (OSGC's counsel) participated in numerous weekly telephone conferences utilizing ACF's conference call number to negotiate the agreements and to discuss the Project. (Ex. 2, ¶7; Ex. 5, ¶6.)

On or about January 31, 2013, Louis Stern (ACF), Michael Galich (ACF), Kevin Cornelius (OSGC) and Bruce King (OSGC) attended a meeting with the Tribe's Business Committee to give a presentation and to answer questions regarding the Project (Ex. 2, ¶8; see Deposition of Patricia Hoeft attached as Ex. 6, p. 43 L. 1-8.) Between January and April of 2013, ACF continued to participate in weekly calls in Illinois with Kevin Cornelius and Bruce King regarding the details and financing of the Project and obtaining a Bureau of Indian Affairs loan guarantee for the Project, a guarantee only given to a tribe as a borrower. (Ex. 2, ¶¶9, 11; Ex. 5, ¶7, 9; see also Deposition of Gene Keluche attached as Ex. 7, p. 47 L. 9-20.) On March 11, 2013, Kevin Cornelius and Bruce King came to Illinois for a third meeting with ACF to review the approval letter issued by the Wisconsin Bank & Trust related to financing the Project. (Ex. 2, ¶10; Ex. 5, ¶8.)

In April, 2013, Kevin Cornelius advised Eric Decator that 3 of the OSGC Board members approved the loan commitment letter and that he needed one more Board member's approval before he could sign it. (Ex. 5, ¶10.) Kevin Cornelius repeatedly stated during the negotiations for the Project that he did not do anything without approval of the OSGC Board. (Ex. 5, ¶10.) In fact, the elected Secretary of the Tribe testified that "OSGC would have to approve anything that its entities did" and had control over the approval process of any contract of GBRE. (Ex. 6, p. 46 L. 1-5, 6-11, 20-23.) On or about May 3, 2013, Kevin Cornelius informed ACF that 4 out

of 5 OSGC Board members approved the Commitment Letter. (Ex. 2, ¶13; Ex. 5, ¶10; *see also* May 3, 2013 email attached as Ex. 5-C.)

On or about May 6, 2013, Michael Galich held a conference call with Kevin Cornelius and Bruce King to discuss financing, the agreements and the Project. (Ex. 2, ¶14.) Around the same time, OSGC's attorney, Joseph Kavan advised Eric Decator that he needed in-house legal and Board approval before the Master Lease Agreement and the Operations and Maintenance Agreement (collectively, "Agreements") could be signed. (Ex. 5, ¶11.) Louis Stern and Kevin Cornelius signed the Agreements in May and June, 2013. (Ex. 2, ¶14; Ex. 5, ¶12.)

From the beginning, the proposed agreements with the Tribe and OSGC contained choice of law and jurisdictional clauses waiving sovereign immunity. (See a copy of the Joint Venture Agreement attached as Ex. 2-A, ¶¶7.15 and 7.17.) The Master Lease Agreement provides, "This Agreement shall be deemed to be made in Illinois and shall be governed and construed in accordance with Illinois law. Lessee and Lessor agree that all legal actions shall take place in the federal or state courts situated in Cook County, Illinois." (See the Master Lease Agreement attached as Ex. 1-A, p. 13, ¶14(h).) Similarly, the Operations and Maintenance Agreement provides, "This Agreement shall be construed and governed by the laws of the State of Wisconsin. Any disputes pertaining to this Agreement shall be determined exclusively in a court of competent jurisdiction in the County of Cook, State of Illinois." (See the Operation and Maintenance Agreement attached as Ex. 1-B, p. 13, ¶15.)

Throughout the negotiations of the Agreements, OSGC and the Tribe representatives repeatedly represented to ACF that they were acting on behalf of OSGC/the Tribe and referred to the Tribe, OSGC and GBRE as though they were one and the same. (Ex. 2, ¶20; Ex. 5, ¶17.) Kevin Cornelius and Bruce King repeatedly corresponded with ACF regarding the Project,

utilizing OSGC email addresses and OSGC letterhead and utilizing OSGC's office. (Ex. 2, ¶21; Ex. 5, ¶17; Ex. 4, ¶11.) Kevin Cornelius and Bruce King represented to ACF that GBRE was only a vehicle for tax purposes, that the Agreements were with the Tribe/OSGC and that Kevin Cornelius had authority to enter into the Agreements and waive sovereign immunity on behalf of the Tribe, OSGC and GBRE. (Ex. 2, ¶22; Ex. 5, ¶17, 18.)

In reliance on the representations of Kevin Cornelius, Bruce King, and William Cornelius that they had the permission of the Tribe and OSGC to enter into the Agreements, ACF continuously performed a variety of tasks to meet its obligations under the Agreements once they were executed. (Ex. 2, ¶23; Ex. 5, ¶19.) In fact, Kevin Cornelius and Bruce King sent numerous documents related to the Project to Eric Decator in Illinois, but none of these documents referred to GBRE, which was consistent with ACF's understanding that the actual parties to the Project were OSGC/the Tribe. (Ex. 5, ¶13.)

In August, 2013, Bruce King advised Eric Decator that OSGC's Board wanted to review the Project again to determine whether to proceed and sent Eric Decator his slide presentation for the OSGC Board, which included a warning that OSGC "may have additional liability to [ACF] partners in project" if it did not proceed. (Ex. 5, ¶15.) On or about August 15, 2013, ACF sent a letter to OSGC's Board at the request of Bruce King regarding the Project. (Ex. 2, ¶17; Ex. 5, ¶16; *see also* the August 14, 2013 Letter attached as Ex. 5-E.) On August 30, 2013, Bruce King (CFO of OSGC/Treasurer of GBRE), Kathy Delgado (OSGC Board member), William Cornelius (OSGC Board President), Brandon Stevens (Tribe Business Committee member) and Michael Galich went to ACF's plant in Bakersfield, California to examine the type of machines that would be utilized in the Project. (Ex. 2, ¶19.) Based on all of the foregoing meetings, telephone conferences and visits to ACF's plant by the Tribe and OSGC, ACF believed it was

negotiating the Project with the Tribe and OSGC. (Ex. 2, ¶21; Ex. 5, ¶19.) ACF relied on the representations of OSGC/the Tribe that they were acting on behalf of the Tribe/OSGC. (Ex. 2, ¶20-23; Ex. 5, ¶17-19.) In December of 2013, the General Tribal Council of the Tribe voted to dissolve OSGC. (Exs. 3 and 4, ¶27.)

ARGUMENT

Under section 2-619, the defendant admits to all well-pled facts in the complaint, as well as any reasonable inferences that may be drawn from those facts. *Wright v. Pucinski*, 352 Ill. App. 3d 769, 772, 816 N.E.2d 808, 813 (1st Dist. 2004). In addition, the court must construe all the pleadings and supporting matter in the light most favorable to the party opposing the motion for involuntary dismissal. *Wright* at 773. The motion should be denied if a genuine issue of material fact exists. *Hagemann v. Illinois Workers' Comp. Comm'n*, 399 Ill. App. 3d 197, 207, 941 N.E.2d 878, 886 (3rd Dist. 2010). Disputed questions of fact should be reserved for trial proceedings. *Hagemann* at 207.

While Plaintiffs maintain that this court has subject matter jurisdiction over the Tribe/OSGC by virtue of the Agreements and the nature of the suits against these Defendants, there are a multitude of genuine issues of material fact as to whether immunity applies to the Tribe/OSGC in this suit and as to whether the Tribe/OSGC has waived its sovereign immunity. As such, Defendants' Motion to Dismiss for lack of subject matter jurisdiction should be denied.

I. Defendants' Motion to Dismiss Should Be Denied As The Issue Of Jurisdiction Is Inextricably Intertwined With The Merits.

Here, OSGC and the Tribe argue that this Court lacks subject matter jurisdiction based on their sovereign immunity. However, an Indian tribe is subject to suit where Congress has authorized the suit or the tribe has waived its immunity. *Kiowa Tribe of Oklahoma v. Mfg. Technologies, Inc.*, 523 U.S. 751, 754 (1998). Moreover, where jurisdictional issues are

inextricably intertwined with the merits of the case, it is proper for the court to deny a motion to dismiss for want of subject matter jurisdiction on the basis that there are genuine issues of material fact. See *Pratt Cent. Park Ltd. P'ship v. Dames & Moore, Inc.*, 60 F.3d. 350, 361, n. 8 (7th Cir. 1995); *Stiffel, Nicolaus & Co., Inc. v. Lac du Flambeau Band of Lake Superior Chippewa Indians et al.*, 980 F. Supp. 2d 1078 (W.D. Wisc. 2013) (holding that there existed a genuine issue of material fact when the determination of subject matter jurisdiction required a resolution of the merits as to whether the transaction documents were valid and enforceable).

As in *Stiffel*, this Court cannot decide the question of subject matter jurisdiction without going directly to the merits of this case, namely whether the Agreements, and consequently the forum and choice of law provisions, are enforceable against OSGC and the Tribe on theories of alter-ego and agency. As such, the jurisdictional issues are intertwined and clearly united with the main elements of the Plaintiffs' claims. Therefore, this Court should decline to resolve the merits of this case under the guise of jurisdiction. Defendants' Motion should be denied on the basis that there is a genuine issue of material fact.

II. OSGC And The Tribe Have Clearly Waived Sovereign Immunity Under The Master Lease And Operations And Maintenance Agreements.

The Tribe and OSGC have waived sovereign immunity given that: (1) the Agreements contain jurisdictional and choice of law clauses; (2) the Tribe and OSGC are indistinguishable entities; (3) GBRE is nothing more than the alter ego of the Tribe/OSGC such that waiver of immunity should be imputed to the Tribe/OSGC, regardless of any requisite tribal resolution; and (4) Kevin Cornelius had apparent authority to enter into the Agreements on behalf of GBRE/OSGC/Tribe and waive sovereign immunity.

A. The jurisdictional and choice-of-law provisions in the Agreements explicitly and clearly constitute a waiver of sovereign immunity.

To relinquish its immunity, a tribe's waiver must be clear. *C&L Enterprises, Inc. v. Citizen Band Potawatomi Indian Tribe of Oklahoma*, 532 U.S. 411, 418 (2001) (holding that the tribe waived its sovereign immunity with the requisite clarity when it consented to arbitration and choice of law clauses conferring jurisdiction in the Oklahoma state court). Further, "[t]o agree to be sued is to waive any immunity one might have from being sued." *Sokaogon Gaming Enterprise Corp. v. Tushie-Montgomery Associates, Inc.*, 86 F.3d 656, 659 (7th Cir. 1996).

In *Alzheimer & Gray v. Sioux Mfg. Corp.*, 983 F.2d 803 (7th Cir. 1993), the Sioux tribe and its wholly owned corporation negotiated with the plaintiff for business related to medical products. *Id.* at 806. The court held that not only did the tribal corporation's charter expressly waive sovereign immunity, the letter of intent agreement signed by the tribal corporation's vice-president clearly waived sovereign immunity when it provided that the tribe will waive all sovereign immunity in regards to all contractual disputes; that all agreements will be interpreted in accordance with Illinois law and that the parties agree to submit to the jurisdiction Illinois courts. *Id.* at 813-814.

In *Sokaogon Gaming Enterprise Corp.*, the plaintiff entered into a contract with a tribe and its casino subsidiary for architectural services. After the plaintiff performed substantial services, the tribe leadership repudiated the contract. The court found that the tribe agreed to submit disputes arising under contract to arbitration, to be bound by the arbitration award, and to have the arbitration award enforced in a court of law. *Id.* at 657. The court held that the tribe clearly waived sovereign immunity in the arbitration clause of its agreement. *Id.* at 660-661.

As the clauses in the contracts at issue in *C&L Enterprises, Inc.*, *Alzheimer & Gray*, and *Sokaogon Gaming Enterprise Corp.* clearly waived sovereign immunity, the Agreements in this

case clearly waived sovereign immunity when the parties agreed to be bound by Illinois/Wisconsin law and to sue or be sued in connection with any disputes related to the Agreements in the federal or state courts in Cook County, Illinois. (Ex. 1-A, ¶14(h); Ex. 1-B, ¶15.) Here, the Defendants' agreement to be sued in Illinois in this case is to waive any immunity the Defendants might have from being sued. *Sokaogon Gaming Enterprise Corp.* at 659. As such, the forum clause and choice of law clause clearly waived sovereign immunity.

B. OSGC and the Tribe are indistinguishable.

The evidence in the case establishes a unity between the Tribe and the OSGC such that any distinction between OSGC and the Tribe should be disregarded. In *Altheimer & Gray*, the court ignored the tribal corporation's corporate status and found that the contract was between the tribe and the plaintiff, even though the agreement was signed by the tribal corporation's vice president. The facts leading to the court's disregard of the tribal corporation as a separate entity from the tribe included the tribe and tribal corporation being referred to interchangeably; the plaintiff regarding the signature of the tribal corporation as binding on the tribe itself regarding waiver of immunity; and a unity between the tribal corporation and the tribe. *Id.* at 658-660.

Similarly here, OSGC and the Tribe were referred to interchangeably. (Ex. 2, ¶20; Ex. 5, ¶17.) In addition, just as the plaintiff in *Altheimer & Gray* regarded the tribal corporation's execution of the letter of intent binding on the tribe, ACF regarded the execution of the Agreements as binding on the Tribe itself regarding the choice of law and jurisdictional clauses. (Ex. 5, ¶¶17-19.) Further, OSGC has unequivocally demonstrated the unity between itself and the Tribe when it has declared, "OSGC is controlled by the Oneida Business Committee, on behalf of the Tribe, its sole shareholder." (See *Kroner v. Oneida Seven Generations Corp.*, Case No. 02-14-2011, Response brief of OSGC attached as Ex. 8 at p. 2.) In addition, OSGC has

declared, "...since the board of directors [of OSGC] is answerable to the Tribe, the decisions ... ultimately rest with the Tribe." (Ex. 8, p. 2) OSGC has further admitted, "[t]he Tribe's involvement in OSGC, both from a control and operational standpoint, is so pervasive, ..." (Ex. 8, p. 8.) These declarations regarding the control and unity between OSGC and the Tribe are further bolstered by the testimony in this case.

Namely, Patricia Hoeft, elected Secretary of the Tribe's Business Committee, testified that OSGC was essentially created to make money for the Tribe and was expected to share its profits with the Tribe. (Ex. 6, p. 56 L. 13-17, p. 67 L.22-24, p. 68 L. 1.) The Tribe provides funds to OSGC to be used for projects and has loaned money to OSGC due to OSGC's cash flow problem, and OSGC has not paid back those funds to the Tribe. (Ex. 3 and 4, ¶5; Ex. 6, p. 85 L. 15-23, p. 86 L. 9-14; Ex. 7, p. 43 L. 9-16.) Further, the Tribe has the power to dissolve OSGC. (Ex. 7, p. 23 L. 11-19.) All of these facts demonstrate a clear unity between OSGC and the Tribe. Accordingly, any claimed distinction between OSGC and the Tribe should be disregarded as a fiction.

C. GBRE is the alter ego of OSGC/the Tribe.

As GBRE is a Delaware limited liability company, Illinois courts would apply Delaware law in determining whether the entity's separate existence should be disregarded. *Old Orchard Urban Limited Partnership v. Harry Rosen, Inc.*, 389 Ill. App. 3d 58, 69 (1st 2009). Furthermore, the doctrine of piercing the corporate veil applies to Delaware limited liability companies. *Westmeyer v. Flynn*, 382 Ill. App. 3d 952, 958, 889 N.E.2d 671, 677 (1st Dist. 2008); see also *Wellman v. Dow Chemical Co.*, No. 05-280-SLR, at 2, 2007 WL 842084 (D.Del. March 20, 2007) ("Under Delaware law, a limited liability company formed under the Delaware Limited Liability Company Act is treated for liability purposes like a corporation"). Under

Delaware law, a court can pierce the corporate veil of an entity where there is fraud or where a subsidiary is in fact a mere instrumentality or alter ego of its owner. *Geyer v. Ingersoll Publications Co.*, 621 A.2d 784, 793 (Del. Ch. 1992) (denying the defendant's motion to dismiss when plaintiff sufficiently stated an alter ego claim).

The facts in this case demonstrate that GBRE was the alter ego and mere instrumentality of OSGC/the Tribe. First, OSGC/the Tribe controlled the day-to-day operations of GBRE. Testimony has established that while OSGC is ultimately the owner of GBRE; both the Tribe and OSGC have the power to dissolve GBRE. (Ex. 6, p. 52 L. 4-8, p. 37 L. 5-11; Ex. 7, p. 23 L. 21-24, p. 34 L. 17-20.) Moreover, "OSGC would have to approve anything that its entities did," and had control over the approval process of any contract of GBRE. (Ex. 6, p. 46 L. 1-5, 20-23.) The negotiations of the Agreements in this case establish OSGC's pervasive control over GBRE in practice when Kevin Cornelius (OSGC CEO/GBRE President) repeatedly represented that he did not do anything without the approval of the OSGC Board. (Ex. 5, ¶10; Ex. 5-C; Ex. 2, ¶13.) Second, GBRE and OSGC/the Tribe operated as a single economic entity when OSGC, not GBRE, wired \$50,000 to Equity Asset Finance LLC per the terms of GBRE's Commitment Letter. (Ex. 5, ¶5.) In addition, OSGC/the Tribe guaranteed loans and extensions of credit to GBRE for the Project. (Ex. 5, ¶7; Ex. 7, p. 47 L. 9-20.)

Lastly, an inference emerges that GBRE is operating as OSGC's instrumentality where the officers of GBRE and OSGC are wholly identical and where these officers only corresponded with ACF utilizing OSGC email addresses and letterhead and utilized OSGC's office. (Ex. 2, ¶21; Ex. 5, ¶17; Ex. 3, ¶11.) Furthermore, the officers of GBRE/OSGC repeatedly represented, and ACF always understood, that GBRE was merely a vehicle for tax purposes to facilitate the Project. (Ex. 5, ¶17.) The facts in this case unequivocally establish that GBRE is the alter ego

and merely an instrumentality of OSGC/the Tribe. *Geyer* at 793 such, the forum and choice of law clauses in the Agreements are enforceable against OSGC and the Tribe. Accordingly, OSGC and the Tribe have waived sovereign immunity and are subject to suit in Illinois and liability under the Agreements.

D. OSGC/the Tribe's waiver of sovereign immunity is effective regardless of any resolution approving such waiver.

Defendants, OSGC/the Tribe, claim that there could be no waiver of sovereign immunity without a resolution under the Tribe's Sovereign Immunity Ordinance. Neither the U.S. Supreme Court nor the Illinois courts have addressed this issue. The U.S. Supreme Court has not required anything other than clear unequivocal language for a valid waiver of sovereign immunity. *C&L Enterprises, Inc.*, 532 U.S. at 418; *see also Bates Associates, LLC v. 123 Associates, LLC*, 290 Mich. App. 52 (2010). The U.S. Supreme Court, however, observed that reference to uniform federal law governing immunities by foreign sovereigns is appropriate in deciding whether a particular act constitutes the waiver of tribal immunity. *C&L Enterprises, Inc.*, 532 U.S. at 421, footnote 3 (2001); *see also Smith v. Hopland Band of Pomo Indians*, 95 Cal. App. 4th 1, 10 (2002). Under federal law, "[w]hen a person has authority to sign an agreement on behalf of a state, it is assumed that the authority extends to a waiver of immunity contained in the agreement. *Id.*

In *Smith*, the court disregarded tribal law requiring a resolution and held that the tribe entered into the contract, which was signed by an authorized agent, and clearly waived sovereign immunity. Likewise in *Bates*, the court held that a tribe and its limited liability company waived their sovereign immunity and tribal jurisdiction when the tribe's CFO had authority to enter into the sale and settlement agreements containing the waivers of immunity. Similarly to *Smith* and *Bates*, the lack of a tribal resolution does not invalidate the waiver of sovereign immunity when

Kevin Cornelius, CEO of OSGC and President of GBRE, has authority to enter into the Agreements.

E. Cornelius had authority to sign the Agreements on behalf of OSGC/the Tribe and bind OSGC/the Tribe to the waiver of immunity.

Again, the U.S. Supreme Court has observed that reference to uniform federal law governing immunities by foreign sovereigns is appropriate in deciding whether a particular act constitutes the waiver of tribal immunity. *C&L Enterprises, Inc.*, 532 U.S. at 421, footnote 3 (2001). The 7th Circuit also recognized that agency principles are applicable for purposes of sovereign immunity. *Richman v. Sheahan*, 270 F.3d 430, 442 (7th Cir. 2001).

In *Storevisions, Inc. v. Omaha Tribe of Nebraska*, 281 Neb. 238 (S. Ct. of Neb. 2011), the Supreme Court of Nebraska applied agency principles to the waiver of tribal immunity and held that the chairman and vice chairman of a tribal council had apparent authority to waive the tribe's immunity. Similarly in *Rush Creek Solutions, Inc. v. Ute Mountain Ute Tribe*, 107 P.3d 402 (Colo. Ct. of App. 2004), the court applied agency law and held that the tribe's CFO had apparent authority to enter into the contract and the waiver contained therein.

Implied authority arises where the facts and circumstances show that the defendant exerted sufficient control over the alleged agent so as to negate that person's status as an independent entity, at least with respect to third parties. *Petrovich v. Share Health Plan of Illinois, Inc.*, 188 Ill. 2d 17, 42, 719 N.E.2d 756, 770 (1999). To prove the existence of apparent authority, the proponent must show: (1) the principal consented to or knowingly acquiesced in the agent's exercise of authority; (2) based on the actions of the principal and agent, the third person reasonably concluded that the party was an agent of the principal; and (3) the third person justifiably relied on the agent's apparent authority to his detriment. *Letsos v. Century 21-New W. Realty*, 285 Ill. App. 3d 1056, 1065, 675 N.E.2d 217, 224 (1st Dist. 1996).

Kevin Cornelius was an implied agent of OSGC/the Tribe when OSGC/the Tribe exerted sufficient control over GBRE/Cornelius so as to negate GBRE/Cornelius' status as independent. *Petrovich* at 42. Namely, GBRE/Cornelius could not act without approval of OSGC's Board, and OSGC/the Tribe guaranteed loans and extended funds and credit to GBRE for the Project. (Ex. 6, p. 52 L. 4-8; p. 37 L. 5-11, p. 46 L. 1-5, 20-23; Ex. 7, p. 23 L. 21-24; p. 34 L. 17-20, p. 47 L. 9-20; Ex. 5, ¶¶5, 7.) Nonetheless, Kevin Cornelius was an apparent agent of OSGC/the Tribe based on OSGC/the Tribe's acquiescence in Kevin Cornelius' exercise of authority in negotiating and executing the Agreements. (Ex. 5, ¶¶10, 11; Ex. 5-C.) Furthermore, OSGC/the Tribe and Kevin Cornelius made representations in which ACF reasonably concluded that Kevin Cornelius had authority to negotiate the Project, execute the Agreements and waive sovereign immunity on behalf of OSGC/the Tribe. (Galich, ¶¶20-23; Ex. 5, ¶¶13, 17, 19.) Clearly, the facts establish that GBRE/Cornelius was an apparent agent of OSGC/the Tribe when negotiating the Agreements for the Project with ACF. Hence, jurisdiction over OSGC/the Tribe is proper based on the activities of their subsidiary, GBRE, and their implied and apparent agents, GBRE/Cornelius.

II. As To ACF's Tort And Alternative Equitable Claims, OSGC And The Tribe Are Not Entitled To Sovereign Immunity.

In *Michigan v. Bay Mills Indian Community*, 134 S. Ct. 2024 (2014), the State of Michigan sought to enjoin a tribe from operating an off-reservation casino. The Court ultimately held that Michigan's suit was barred by tribal sovereign immunity. First, the Court found that Congress did not abrogate immunity under the *Indian Gaming Regulation Act* for gaming activity located off of reservation lands. Second, the Court found that the tribe was entitled to sovereign immunity for off-reservation commercial activity under its previous decision in *Kiowa Tribe of Oklahoma v. Manufacturing Technologies, Inc.*, 118 S. Ct. 1700 (1998).

The Court, however, stated, that “[w]e have never, for example, specifically addressed (nor, so far as we are aware has Congress) whether immunity should apply in the ordinary way if a tort victim, or other plaintiff who has not chosen to deal with a tribe, has no alternative way to obtain relief for off-reservation commercial conduct. The argument that such cases would present a “special justification” for abandoning precedent is not before us. [citations omitted].”

Bay Mills, n. 8.

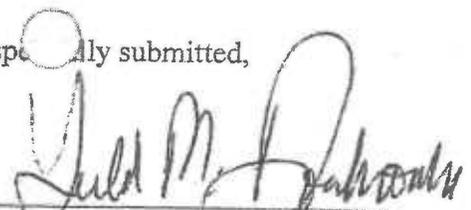
The tort claims in the present case, which are wholly unrelated to gaming and reservation lands, involve OSGC/the Tribe’s conduct directed toward Illinois plaintiffs and contracts. The Court has never addressed the application of sovereign immunity under these specific circumstances and has stated as such. Unlike Michigan, who had other remedies against the tribe, ACF is left with no way to obtain relief for OSGC/the Tribe’s tortious conduct. The tortious conduct of the Tribe giving rise to ACF’s tortious interference claims was the decision to dissolve OSGC, which in turn resulted in the breach of the Agreements and substantial injury to ACF. (Ex. 1, ¶¶40-43, 80-91.) Certainly, sovereign immunity should not, and the Court has never held, that immunity would apply here. As such, OSGC and the Tribe’s argument that they have the benefit of sovereign immunity to begin with is entirely without merit. Thus, this Court has subject matter jurisdiction over all of ACF’s claims against OSGC and the Tribe.

WHEREFORE, Plaintiffs respectfully request that this Court deny OSGC and the Oneida Tribe’s Motion to Dismiss for Lack of Subject Matter Jurisdiction with prejudice in its entirety, and grant all such other and further relief as is just and necessary.

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Respectfully submitted,

By:



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IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT, LAW DIVISION

ACF LEASING, LLC, ACF SERVICES,
LLC, GENERATION CLEAN FUELS, LLC,

Plaintiffs,

v.

GREEN BAY RENEWABLE ENERGY,
LLC, ONEIDA SEVEN GENERATIONS
CORPORATION and THE ONEIDA TRIBE
OF INDIANS OF WISCONSIN,

Defendants.

Case No. 14 L 002768

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OF COOK COUNTY

**THE ONEIDA TRIBE OF INDIANS OF WISCONSIN'S
AND ONEIDA SEVEN GENERATIONS CORPORATION'S
REPLY BRIEF IN SUPPORT OF MOTION TO DISMISS
FOR LACK OF SUBJECT MATTER JURISDICTION**

I. ACF¹ MAY NOT USE PAROL EVIDENCE TO CONTRADICT UNAMBIGUOUS CONTRACT PROVISIONS.

ACF submitted the Affidavits of Messrs. Galich and Decator in an attempt to repudiate the unambiguous language of the Lease and O&M Agreement (the "Agreements").² "In Illinois, a written contract is presumed to include all material terms agreed upon by the parties, and any prior negotiations or representations are merged into that agreement; extrinsic evidence, parol or otherwise, of antecedent understandings and negotiations is generally inadmissible to alter, vary, or contradict the written instrument." *K's Merch. Mart, Inc. v. Northgate Ltd. P'ship*, 359 Ill. App. 3d 1137, 1143 (4th Dist. 2005). "If [a contract] imports on its face to be a complete expression of the whole agreement, ... it is to be presumed that the parties introduced into it every material item and term, and parol evidence cannot be admitted to add another term to the agreement...." *Ringgold Capital IV, LLC v. Finley*, 2013 IL App (1st) 121702, ¶ 19.

The Agreements unambiguously provide that only GBRE is a party to the Agreements, and the Agreements have integration clauses. Compl., Ex. A at p. 1, p. 13 ¶ 14(i) & p. 14; Ex. B at p. 1, p. 14 ¶ 21 & p. 15. The Agreements do not identify the Tribe or OSGC as being contracting parties. ACF may not use parol evidence to contradict the Agreements.

¹ The shorthand references used in the Tribe's and OSGC's Initial Brief will be used herein.

² The alleged facts included in the Galich and Decator Affidavits are disputed. See Affidavits of Messrs. King, Cornelius and Kavan submitted herewith.

II. THE TRIBE AND OSGC HAVE NOT WAIVED THEIR SOVEREIGN IMMUNITY.

A. There Has Been No Unequivocal Waiver Of Immunity.

For waiver of tribal sovereign immunity, no distinction is made between governmental and commercial activities or whether the activities occur on or off the reservation.³ *Kiowa Tribe of Okla. v. Mfg. Techs., Inc.*, 523 U.S. 751, 754-760 (1998). A waiver of sovereign immunity may not be implied but must be 'unequivocally expressed.' *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 58 (1978); *Alzheimer & Gray v. Sioux Mfg. Corp.*, 983 F.2d 803, 812 (7th Cir. 1993), superceded by statute on other grounds as stated in, *GasPlus, LLC v. U.S. Dep't of the Interior*, 510 F. Supp. 2d 18, 32 (D.D.C. 2007).⁴

ACF does not dispute that the requirements of the Tribe's Sovereign Immunity Ordinance were not met. It argues instead that compliance with the Tribe's ordinance is not required, relying on *Bates Associates, LLC v. 132 Associates, LLC*, 799 N.W.2d 177 (Mich. Ct. App. 2010), and *Smith v. Hopland Band of Pomo Indians*, 115 Cal Rptr. 2d 455 (Ct. App. 2002). ACF Br., p. 12. First, the weight of authority requires adherence to the tribal law setting forth who has the authority to waive sovereign immunity and in what manner. See Initial Br., 9-13. Second,

³ Relying on *Michigan v. Bay Mills Indian Community*, 134 S. Ct. 2024, 2036 n. 8 (2014) ACF argues that even if the Tribe and OSGC are immune from suit for the contract claims, the tort claims should not be dismissed. ACF cites to a footnote in which the Supreme Court indicates, in dicta, that it has never addressed whether there could be "special justification" that would allow the Court to depart from the rule of *stare decisis* in the tribal sovereign immunity context, such as a situation involving a tort victim "who has not chosen to deal with a tribe" and had no alternative relief. *Id.* Importantly, there is no "special exception" to the binding precedent of *Kiowa*, *supra*; therefore, this Court may not, as a matter of law, abrogate the Tribe's and OSGC's sovereign immunity for ACF's tort claims. Moreover, ACF chose to contract with GBRE knowing that its upstream owners were the Tribe and OSGC and, therefore, it is not a tort victim who never chose to deal with a tribal entity with sovereign immunity, as described in *Bay Mills*.

⁴ Significantly, ACF has not disputed that OSGC is a subordinate economic entity of the Tribe that enjoys sovereign immunity. See Initial Br., pp. 5-9. ACF argues only waiver.

the cases relied on by ACF are inapposite. In *Bates Assocs.*, the tribe was a party to the contract, the contracts were signed by the tribe's CFO and the contracts both contained provisions expressly waiving the tribe's immunity. *Bates Assocs.*, 799 N.W.2d at 179. In *Smith*, the tribe was a party to the contract, the tribal chairperson signed the contract and the tribal council had unanimously voted to authorize the tribal chairperson to negotiate and execute the contract. *Smith*, 115 Cal. Rptr. 2d at 457-58.⁵ In contrast here, the Tribe and OSGC are not parties to the Agreements. There was no resolution or vote of the Tribe or OSGC authorizing Mr. Cornelius to sign the Agreements on behalf of the Tribe or OSGC, much less resolutions authorizing a waiver of their tribal sovereign immunity. *Hoelt Aff.* ¶¶ 23-28; *Keluche Aff.* ¶ 9. The Tribe's Sovereign Immunity Ordinance is publicly available on line, as are all Business Committee Agendas and Minutes. *Hoelt Aff.* ¶ 24. Messrs. Cornelius and King held no elected or other position with the Tribe. *Cornelius Aff.* ¶ 1; *King Aff.* ¶ 1. While Messrs. Cornelius and King held positions with OSGC, the Agreements are signed by Mr. Cornelius in his capacity as an officer of GBRE only. Compl., Exs. A and B.

ACF asserts that Messrs. Cornelius and King repeatedly told them that they spoke on behalf of the Tribe and OSGC. Even if true, which it is not, *see Cornelius, Kavan and King Affidavits*, ACF has cited no case in which a court concluded that a tribe or its subordinate economic entity waived sovereign immunity based on oral representations supposedly made by officers of a state-incorporated indirect subsidiary when the subsidiary entered into a contract

⁵ ACF fails to acknowledge a significant factual difference that distinguishes every sovereign immunity case cited in its brief: unlike here, either the tribe or its subordinate economic entity, were parties to the agreements in ACF's cases. *See C & L Enters., Inc. v. Citizen Band of Potawatomi Indian Tribe of Okla.*, 532 U.S. 411, 411 (2001); *Kiowa Tribe of Okla.*, 523 U.S. at 751; *Alzheimer & Gray*, 983 F.2d at 806; *Sokaogon Gaming Enter. Corp. v. Tushie-Montgomery Assocs., Inc.*, 86 F.3d 656, 657-58 (7th Cir. 1996); *Stifel, Nicolaus & Co. v. Lac du Flambeau Band of Lake Superior Chippewa Indians*, 980 F. Supp. 2d 1078 (W.D. Wis. 2013); *Bates Assocs.* 799 N.W.2d at 183-84; *Smith 115 Cal. Rptr. 2d at 457-58*; *StoreVisions, Inc. v. Omaha Tribe of Neb.*, 795 N.W.2d 271, 275 (Neb. 2011).

containing a standard forum selection clause, *See* Part II.B., *infra*. Such a ruling would violate the Supreme Court requirement that waiver be unequivocally expressed and not implied. *C & L Enters.*, 532 U.S. at 418.

B. The Forum Selection Clause In The Agreements Does Not Waive Sovereign Immunity.

ACF asserts that the forum selection clause in the Agreements waived sovereign immunity. There would be no reason for it to do so since GBRE is the only party to the Agreements, and it has no sovereign immunity. However, even assuming that the Tribe or OSGC was a party to the Agreements, the forum selection clause does not waive their sovereign immunity. ACF relies on three cases that held only that an agreement's arbitration clause constituted a waiver of sovereign immunity. *See C&L Enters.*, 532 U.S. at 412 (arbitration clause that also provided that "arbitral awards may be reduced to judgment"); *Altheimer & Gray*, 983 F.2d at 812 (arbitration clause with an express provision that the tribe and tribal entity would "waive all sovereign immunity in regards to all contractual disputes"); and *Sokaogon Gaming*, 86 F.2d at 659 (arbitration clause with a provision that "judgment may be entered upon [the arbitration award].") None of those cases involved a simple forum selection clause with no express waiver of sovereign immunity. That distinction is legally definitive.

In *Breakthrough Management Group, Inc. v. Chukchansi Gold Casino and Resort*, No. 06-CV-01596 MS, 2007 WL 2701995 (D. Colo. Sept. 12, 2007), *rev'd on other grounds*, 629 F.3d 1173 (10th Cir. 2010), the district court analyzed the difference between arbitration clauses and forum selection clauses for sovereign immunity waiver purposes. The court explained that, because no one can force a tribe to arbitrate, an agreement to arbitrate with the arbitration award being reduced to an enforceable judgment is an agreement to be sued and, thus, a sovereign immunity waiver. However, since a tribe cannot prevent a party from suing it, a forum selection

clause is merely a designation of where a tribe can be sued and not whether a tribe can be sued.

For that reason, a mere forum selection clause is not a waiver of sovereign immunity.

Here, the language of the parties' agreement is that "the sole and exclusive venue for any and all disputes involving...this Agreement shall be the state and federal courts located within the state of Colorado." . . .

Notably, the parties' agreement here speaks only to *where* a suit may be brought, but it does not expressly or impliedly address *whether* a suit may be brought. Unlike cases such as *C&L* [specifying arbitration], the Tribe here did not expressly agree to submit any dispute for adjudication; it merely agreed as to where such adjudication would take place, if an adjudication were to occur.

Breakthrough, 2007 WL 2701995, at *3 and *4 (emphasis in original). The forum selection clause in the Agreements merely specifies Illinois as the venue for a dispute. Compl., Ex. A, ¶ 14(h); Ex. B, ¶ 15. It says nothing about agreeing to be sued or waiver of sovereign immunity. Accordingly, even if the Tribe and OSGC were bound by the Agreements, those Agreements do not waive their sovereign immunity.

C. Alter Ego And Piercing The Corporate Veil Theories Are Not Applicable.

ACF next claims that GBRE is the "alter ego" of OSGC and the Tribe, such that it may "pierce the corporate veil" and bind OSGC and the Tribe to the forum selection clause. ACF Br., pp. 10-11. Tellingly, none of the cases ACF relied on involve tribal sovereign immunity.⁶ There is no Supreme Court precedent extending alter ego and piercing the corporate veil principles to the tribal sovereign immunity context. As a matter of federal Indian law, state law alter ego and piercing the corporate veil theories are inapplicable. *The Affiliated Tribes of Fort Berthold*

⁶ See, e.g., *Old Orchard Urban Ltd. P'ship v. Harry Rosen, Inc.*, 389 Ill. App. 3d 58, 69 (1st Dist. 2009); *Westmeyer v. Flynn*, 382 Ill. App. 3d 952, 958 (1st Dist. 2008); *Wellman v. Dow Chem. Co.*, No. 05-280-SLR, 2007 WL 842084, at *2 (D. Del. March 20, 2007); *Geyer v. Ingersoll Publ'ns Co.*, 621 A.2d 784, 793 (Del. Ch. 1992).

Reservation v. World, 476 U.S. 877, 890 (1986); see also *United States ex rel. Morgan Bldgs. & Spas, Inc. v. Iowa Tribe of Okla.*, No. CIV-09-730-M, 2011 WL 308889, at * 3 (W.D. Okla. Jan. 26, 2011) (alter ego analysis inapplicable to tribal sovereign immunity context).⁷

Even if ACF's alter ego or piercing the corporate theories were applicable, ACF has not made out a *prima facie* case. In *Mason v. Network of Wilmington, Inc.*, No. CIV.A.19434 NC, 2005 WL 1653954, at *3 (Del. Ch. 2005),⁸ the Court listed the alter ego factors, such as under capitalization, insolvency, whether the dominant shareholder siphoned corporate funds and whether corporate formalities were kept. However, piercing the corporate veil based on alter ego in the LLC context is a developing area and courts and commentators have noted that the factors for proving alter ego, particularly the corporate formalities factor, must be analyzed differently for LLCs because many corporate formalities do not apply. *Kaycee Land & Livestock v. Flahive*, 46 P.3d 323, 328 (Wyo. 2002) ("The LLC's operation is intended to be much more flexible than a corporation's."). Furthermore, "[p]iercing the corporate veil under the alter ego theory [also] requires that the corporate structure cause fraud or similar injustice. Effectively, the corporation must be a sham and exist for no other purpose than as a vehicle for fraud." *Mason*, 2005 WL 1653954, at * 3.

ACF argues that Messrs. Cornelius and King were officers of both OSGC and GBRE, used the same address as OSGC and used their OSGC email to communicate with them.⁹ Under

⁷ There is no authority for piercing the corporate veil of a state created corporation to reach the assets of a sovereign nation, *i.e.* the Tribe. The Tribe is not a corporation, it is a sovereign nation. If piercing the corporate veil of a state chartered corporation to get to a nation's assets were allowed, the United States would be liable for the debts of virtually every bankrupt state corporation.

⁸ Both parties rely on the Delaware piercing the corporate veil standards.

⁹ ACF argues, with no legal support, that because OSGC is the economic development arm of the Tribe, if it pierces the corporate veil to OSGC, it also reaches the Tribe. OSGC has a variety of assets, (footnote continued)

similar circumstances, the *Mason* court refused to pierce the corporate veil concluding that, “[b]eing the sole shareholder of two different legal entities, housed in the same office building and possessing the same phone number at separate (and not sequential) times does not constitute a sham that ‘exist[s] for no other purpose than as a vehicle for fraud.’” *Id.* at *4. See also *eCommerce Industries, Inc. v. MWA Intelligence, Inc.*, No. CV 7471-VCP, 2013 WL 5621678, at *28 (Del. Ch. Sept. 30, 2013). ACF presented no facts to support a finding that GBRE existed “for no other purpose than as a vehicle for fraud.” *Wallace ex rel. Cencom Cable Income Partners II, Inc. v. Wood*, 752 A.2d 1175, 1184 (Del Ch. 1999). ACF even agreed to take a 49% membership interest in GBRE as collateral for its loan, which is conclusive proof that ACF was aware that GBRE was responsible for the Project and existed for a purpose other than fraud. Compl., Ex. A at I-5.¹⁰

ACF was aware *before* it signed the Agreements that the borrower on the BIA-guaranteed loan for the Project was GBRE, not the Tribe or OSGC, a fact ACF failed to disclose to the Court in its brief.¹¹ Compl., Ex. A at I-3; Cornelius Aff. Ex. A. To obtain financing, the bank

has created many state-incorporated entities and exists to diversify the income of the Tribe. Hoelt Aff. ¶ 14-21. Even if Delaware alter ego law were applicable to the Tribe and OSGC, which it is not as a matter of federal law, there is no evidence suggesting that OSGC is a sham entity that exists for no purpose other than fraud.

¹⁰ OSGC is the sole owner of Oneida Energy, Inc. (“OEI”), a Wisconsin corporation, which is the sole owner of Oneida Energy Blocker Corporation (“OEB”), a Delaware corporation. OEB is the sole member and owner of GBRE, a Delaware LLC. Keluche Aff. ¶5. ACF would need to pierce through all of these entities, using the law of the state of incorporation for each, in order to reach the Tribe or OSGC. ACF has not attempted to do so.

¹¹ ACF claims that the Tribe would have to be the borrower on the loan, based on the testimony of Mr. Keluche. ACF Br., p. 3. However, Mr. Keluche acknowledged that he was not certain who could be the borrower on a BIA-guaranteed loan (ACF Br., Ex. 7 at Keluche Dep. Tr., 47, lns. 9-14), and the relevant federal regulations prove that GBRE could be the borrower. 25 C.F.R. § 103.25(a)(2) (state incorporated entity majority owned by tribal entity could be borrower). The bank commitment letter and Agreements also identify GBRE as the borrower. This is one example of many in which ACF makes misleading factual arguments in an effort to create factual disputes where none exist.

required guarantees from ACF, OSGC, OEI and OEB. Cornelius Aff. Ex. A. Had ACF wanted OSGC and the Tribe to be bound by the Agreements, like the bank it should have required that they be parties to the Agreements. In fact, however, in its August 13, 2013 letter to OSGC, ACF asks OSGC to “support the Waste to Energy Project on which *we are partnering with your subsidiary ... GBRE.*” Galich, Ex. B (emphasis added). The undisputed facts demonstrate that ACF was aware when it signed the Agreements that GBRE was the entity responsible for the Project. ACF’s attempted reliance on inadmissible parol evidence to contradict the unambiguous language of the Agreements and pierce GBRE’s corporate veil is legally impermissible, *see* Part I, *supra*.

D. State Law Apparent/Implied Authority Is Inapplicable.

Finally, ACF asserts that Kevin Cornelius was the “apparent agent” of OSGC and the Tribe and, therefore, bound the Tribe and OSGC to the Agreements and waived their sovereign immunity. ACF Br., pp. 13-14. The Supreme Court has never applied state law agency principles in the tribal sovereign immunity context. While ACF cites to two state court cases that applied agency law, the cases are considered the “minority view.” *MM&A Prods., LLC v. Yavapai-Apache Nation*, 316 P.3d 1248, 1253 (Ariz. Ct. App. 2014). The majority view has refused to apply state agency law in the tribal sovereign immunity context because tribal sovereign immunity is a matter of federal law that may not be diminished by the state law. *Id.* at 1252-53; *see also Memphis Biofuels, LLC v. Chickasaw Nation Indus., Inc.*, 585 F.3d 917, 918-19 (6th Cir. 2009); *Amerind Risk Mgmt. Corp. v. Malaterre*, 633 F.3d 680, 688 (8th Cir. 2011); *World Touch Gaming, Inc. v. Massena Mgmt., LLC*, 117 F. Supp. 2d 271, 276 (N.D.N.Y. 2000); *Dilliner v. Seneca-Cayuga Tribe*, 258 P.3d 516, 520 (Okla. 2011); *Chance v. Coquille Indian Tribe*, 963 P.2d 638, 640-42 (Or. 1998) (rejecting apparent authority argument and holding that, even if contract’s language waiving immunity was express, contract not valid because the

signing official lacked authority under tribal law to waive immunity); *Calvello v. Yankton Sioux Tribe*, 1998 S.D. 107, ¶ 12, 584 N.W.2d 108 (S.D.1998) (without clear expression of waiver by tribal council, acquiescence of tribal officials cannot waive immunity). Under federal law, sovereign immunity “cannot be waived by officials” in a way that “subject[s] the [sovereign] to suit in any court in the discretion of its responsible officers.” *United States v. U.S. Fid. & Guar. Co.*, 309 U.S. 506, 513 (1940). This is true even if the officials make affirmative misrepresentations. See *Native Am. Distrib. v. Seneca-Cayuga Tobacco Co.*, 546 F.3d 1288, 1295 (10th Cir. 2008) (“misrepresentations of the Tribe’s officials or employees cannot affect its immunity from suit”).

Even if state agency law were applicable, none of the cases cited by ACF support its position. In every case, the question was whether the entity that was expressly a party to the agreement could be bound by the agreement when signed by the individual with apparent authority. Here, neither the Tribe nor OSGC is a party to the Agreements, only GBRE is. The apparent authority cases cited by ACF are legally inapposite.

Moreover, agency law requires that the apparent authority arise from the “principal’s manifestations,” and “cannot be established [solely] by the agent’s acts, declarations, or conduct.” *StoreVisions*, 795 N.W.2d at 279. See also *Schoenberger v. Chicago Transit Authority*, 84 Ill. App. 3d 1132, 1136 (1st Dist. 1980). The principal must make “explicit statements” and act in a way that induces a reasonable person to believe that the agent has authority to act on the principal’s behalf. *StoreVisions*, 795 N.W.2d at 279. Thus, the disputed oral representations by Messrs. Cornelius, King and Kavan concerning their authority to bind the Tribe and OSGC and waive their immunity would be insufficient to establish apparent authority. *Id.* The only other facts offered by ACF are: a) one presentation made to the Tribe’s Business

Committee concerning the Project technology in January 2013 before the Agreements were signed; b) OSGC's agreement to guarantee the bank loan for the Project; and c) one presentation made to the Business Committee concerning the Project and two demonstration plant site visits made *after* the Agreements were signed. See Decator Aff. ¶ 10; Galich Aff. ¶¶ 8, 12, 16 and 19-20. Absent from ACF's affidavits, however, are any facts demonstrating that the Tribe's Business Committee or OSGC's board made "explicit statements" that would lead ACF to believe that Mr. Cornelius was authorized to negotiate and execute the Agreements on *their* behalf and to waive *their* immunity at any of these meetings.¹²

Instead, the evidence proves conclusively that the procedure for obtaining a valid waiver of the Tribe's or OSGC's sovereign immunity, *i.e.*, a motion passed or resolution adopted in accordance with the Sovereign Immunity Ordinance, was not followed. See Hoeft Aff. ¶¶ 23-28; Keluche Aff. ¶¶ 8-9; ACF Br., Ex. 6 (Hoeft Dep., p. 59, ln. 1 – p. 64, ln. 9; ACF Br., Ex. 7 (Keluche Dep., p. 24, ln. 21 – p. 25, ln. 23 and p. 35, ln. 2 – p. 41, ln. 24). Simply because the Tribe and OSGC may have wanted to have some knowledge of the Project and the technology does not support an inference that they authorized Mr. Cornelius to negotiate and enter into the Agreements on their behalf or waive their sovereign immunity.¹³

¹² ACF claims that it reasonably relied on oral representations of Messrs. Cornelius, King and Kavan, that they were waiving OSGC's and the Tribe's sovereign immunity. Both Messrs. Decator and Galich are attorneys. Decator Aff. ¶ 1; Galich Aff. ¶ 1. They could not "reasonably" rely on any such alleged allegations, as a matter of law. None of the three held an elected position with the Tribe, a fact that could easily have been discovered by going online, see <https://oneida-nsn.gov/Templates/OneColumn.aspx?id=102>. Messrs. Cornelius and King were each one of 16,000 Tribal members. They could no more orally waive the Tribe's sovereign immunity than a citizen of Wisconsin could waive the State's sovereign immunity. Any "reasonable" attorney would know that.

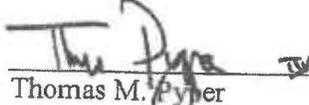
¹³ Regular reporting to a parent corporation's board on what a down-stream subsidiary is doing is neither unusual nor grounds for holding the parent financially responsible for the LLC's contractual obligations. Furthermore, the loan guarantee was a commitment to the bank, not a commitment to ACF. If agreement by a parent corporation to guarantee a bank loan of one of its single asset subsidiaries would operate to bind the (footnote continued)

CONCLUSION

ACF tries to create a factual dispute to avoid dismissal of the Tribe and OSGC, but, at best, ACF has created a question of fact as to what Messrs. Cornelius, King and Kavan told them. However, those disputes of fact are irrelevant because ACF's allegations, even if true, are not sufficient to establish an unequivocal waiver of sovereign immunity by the Tribe and OSGC. *Native Am. Distrib.*, 546 F.3d at 1295; *U.S. Fid. & Guar. Co.*, 309 U.S. at 513. For the reasons set forth herein and in the Tribe's and OSGC's Initial Brief, the Complaint against them should be dismissed with prejudice.

Dated this 28th day of August, 2014.

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parent to all the subsidiary's contractual obligations, no parent would ever guarantee a subsidiary's bank loans, which is a customary practice in the corporate context.

#42258

In The Matter Of:
ACF LEASING, LLC, et al., vs.
GREEN BAY RENEWABLE ENERGY, LLC, et al.

REPORT OF PROCEEDINGS
October 8, 2014

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Page 1

1 STATE OF ILLINOIS)
 2 COUNTY OF COOK) SS.
 3 IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS
 4 COUNTY DEPARTMENT - LAW DIVISION

5 ACF LEASING, LLC, ACF
 6 SERVICES, LLC; and GENERATION
 7 CLEAN FUELS, LLC,)
 8 Plaintiffs,)
 9 vs.) No. 14 L 2768
 10 GREEN BAY RENEWABLE ENERGY,
 11 LLC; ONEIDA SEVEN GENERATIONS
 12 CORPORATION; and THE ONEIDA
 13 TRIBE OF INDIANS OF
 14 WISCONSIN,)
 15 Defendants.)

16 REPORT OF PROCEEDINGS at the hearing
 17 of the above-entitled case before the HONORABLE
 18 MARGARET ANN BRENNAN, Judge of said Court, on
 19 October 8, 2014, at 12 p.m.
 20
 21
 22
 23
 24

Page 3

1 THE COURT: Okay. Why don't we begin with
 2 the motions concerning sovereign immunity. I think
 3 that's the easiest way to start here.
 4 MR. DOMBROWSKI: Morning, your Honor.
 5 Jerry Dombrowski for the plaintiffs.
 6 THE COURT: Okay.
 7 MR. PYPYER: Tom Pyper for the Oneida Tribe
 8 and Oneida Seven Generations Corporation.
 9 THE COURT: I don't know if I disclosed
 10 this earlier to all of you. Although I have not
 11 spoken with her in any way, shape or form about this,
 12 I do have a friend of mine who is an administrative
 13 assistant for the tribal council up in Presque Isle.
 14 I don't know if that -- I haven't talked to her in
 15 months. Actually, we grew up next to each other.
 16 We still talk to each other. It's just we've been
 17 so busy, we honestly have not spoken to each other
 18 in months. It just happens. I don't know if --
 19 she's in Presque Isle and she works for the council
 20 up there, Northern Wisconsin.
 21 MR. DOMBROWSKI: I'm okay with that.
 22 THE COURT: Okay. I didn't think it would
 23 be a problem.
 24 MR. PYPYER: No, it probably would not be --

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 Seven Generations Corporation and
 The Oneida Tribe of Indians of
 Wisconsin.
 CSR License No. 084-003278.

Page 4

1 THE COURT: I know Ojibwa would be near
 2 the Hayward area. I'm trying to think.
 3 MR. PYPYER: There's Bad River. The Bad
 4 River tribe is up there.
 5 THE COURT: That might be it. It's the
 6 council -- it's several tribes. She does a lot in
 7 Wisconsin.
 8 MR. PYPYER: It could be GLIFWC, which is
 9 the -- I never know what the acronym is.
 10 THE COURT: She's Boulder Junction,
 11 Presque Isle and up, but she's been all throughout
 12 Wisconsin dealing with various issues that are
 13 affecting a number of --
 14 MR. PYPYER: I'll bet she's with GLIFWC.
 15 THE COURT: Okay. Well, see, and I knew
 16 so little that you can see it really isn't going
 17 to have an impact. Okay. So let's begin with the
 18 motion to dismiss.
 19 MR. PYPYER: Thank you, your Honor.
 20 I think that the material operative facts are really
 21 pretty straightforward and not much in dispute. The
 22 Oneida tribe is a federally registered Indian tribe
 23 and Oneida Seven Gens is a tribally chartered
 24 corporation. The tribe is a governmental agency.

1 It has a whole variety of services it provides
2 to its over 16,000 members, housing, elderly care,
3 everything typical that a government would do. In
4 order to diversify from its gaming operations, it
5 created Oneida Seven Generations Corporation under
6 tribal charter law, and it is an entity that manages
7 over 13 individual businesses and has created other
8 entities so as to keep its business activities
9 separate from the tribe; although if it generates
10 more profits than it needs for its operating
11 expenses, some of those profits will spill over
12 into the tribe. But it has its own assets, its
13 own businesses that are separate and distinct from
14 the tribes.

15 It created Oneida Energy to
16 start diversifying into -- to have corporations
17 separate from itself to start diversifying into
18 the energy development business. And Oneida Energy
19 then in turn created Oneida Blocker, which then
20 created Green Bay Renewable Corporation, and Green
21 Bay Renewable is not a tribally chartered entity.
22 It's a Delaware LLC.

23 Green Bay Renewable had as its
24 president Kevin Cornelius from January 2012 through

1 No official action took place
2 at those meetings. No official action was requested
3 to be taken by either the business committee of the
4 tribe or OSGC. It was an informational presentation.
5 The tribe is -- as a governmental agency it has a
6 legislative branch and the legislative branch is the
7 general tribal council. The general tribal council
8 is made up of every member of voting age of the
9 tribe. So we're talking about thousands of people
10 on that legislative branch of the general tribal
11 council.

12 Between January and May there
13 were some dissatisfactions starting to boil under
14 with regard to whether this was an appropriate type
15 of an activity to be taking place on tribal land.
16 There were some cultural push-backs about it related
17 to questions as to whether this would create an
18 unacceptable level of air pollution.

19 So in early May, May 5, there was a
20 meeting of the general tribal council where there was
21 a vote taken that this process if it were in fact --
22 became a real project between GBRE and ACF would not
23 take place on tribal land. It was voted it could not
24 take place on tribal land. As a result, on

1 August 2013, which is really the distinct period of
2 time that's applicable to the case. Mr. Cornelius
3 also was the CEO of Oneida Seven Generations. While
4 Mr. Cornelius was a member of the tribe, he was one
5 of over 16,000 members of the tribe. He held no
6 official position with the tribe at any time material
7 to this case. Bruce King was the vice president and
8 treasurer of Green Bay Renewable. He also was the
9 CFO of Oneida Seven Gens. Just like Mr. Cornelius,
10 he was a member of the tribe but he held no official
11 position at any time with the tribal entity itself.

12 Mr. King and Mr. Cornelius started
13 talking with the principals of ACF about going into
14 the energy development business, which is the reason
15 that GBRE was created, and it was a plastic waste
16 to oil with also an energy generation component
17 with it through a pyrolysis analysis. And they
18 negotiated with ACF about how they would structure
19 it, who would get what money. And in January, in
20 fact, ACF principals came up and made a presentation
21 to the business committee of the tribe and to OSG's
22 board to give them a general description of how the
23 technology would work that was being negotiated
24 between GBRE and ACF.

1 May 24 the operative agreements were executed;
2 one was a master lease, the other was an operation
3 and maintenance agreement. Kevin Cornelius signed
4 those on behalf of GBRE. He did not sign on behalf
5 of the tribe. He did not sign on behalf of OSGC.
6 The project was then designated to take place in a
7 location in Monona, Wisconsin and in a place in
8 Sheboygan, Michigan off reservation property.

9 Nonetheless, there was also some
10 still dissatisfaction starting to even boil over
11 farther, and that became known to the ACF entities.
12 On August 13 of 2013 the ACF entities wrote a letter
13 to OSGC saying that it was asking for OSGC's support
14 for the project, and in that letter the ACF entity
15 said we want your support for the project with which
16 we are partnering with GBRE. Did not say it was
17 a project with OSGC, certainly did not say it was
18 a project with the tribe. It was strictly we are
19 partnering with GBRE.

20 Eventually in December there was
21 another meeting of the general tribal council and
22 because of issues unrelated to this project, there
23 was a vote to dissolve OSGC. When that happened,
24 then there was some concern about the funding

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1 or the funder of the GBRE project. There was no
 2 vote taken to dissolve GBRE and GBRE has not been
 3 dissolved. It is still a corporate entity -- or LLC
 4 under Delaware law. The operative agreements said
 5 they would not become effective unless and until GBRE
 6 obtained its funding for the project because that's
 7 where the capital was going to come from. This is
 8 \$21 million worth of capitalization for this project.
 9 It was to be capitalized or funded by Wisconsin
 10 Bank & Trust. When WBT heard that -- and, excuse me.
 11 It was funded by WBT, but it had to be guaranteed by
 12 the Bureau of Indian Affairs and WBT had a request
 13 in for the guarantee approval for BIA.
 14 When WBT heard that OSGC was to be
 15 dissolved, it created a lot of uncertainty for WBT.
 16 So it withdrew its request to have the BIA guarantee
 17 the loan and it wasn't going to make the loan unless
 18 that guarantee was in place. So, in fact, the
 19 agreements never really became effective because they
 20 couldn't become effective until such time as GBRE
 21 received its funding. When ACF heard that the OSGC
 22 was to be dissolved and the request for guarantee
 23 was withdrawn, that's when ACF started the lawsuit.
 24 The lawsuit brought claims for breach

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1 of contract in a variety of claims, intentional
 2 interference claims both with existing contract
 3 rights as well as prospective business relationships,
 4 and it also brought a claim for unjust enrichment.
 5 Those claims are suspect because the operative
 6 agreements never really became effective and, quite
 7 frankly, I don't understand unjust enrichment because
 8 no project ever took place and my clients have never
 9 received any benefits from the negotiation.
 10 But for purposes of the motion
 11 we brought, we are assuming that the contracts
 12 are in play here and we brought a motion to dismiss
 13 based on the sovereign immunity rights of both of
 14 my clients. In order to get around the sovereign
 15 immunity issue -- and by the way, in our first brief
 16 we argued at length in the Breakthrough Management
 17 case all the factors by which OSGC would obtain
 18 sovereign rights. I don't think it was ever disputed
 19 that the Nation has -- or the tribe has sovereign
 20 rights, and in response we didn't get any
 21 contradiction to that. So I'm assuming that the
 22 only issue here is not whether both my clients have
 23 sovereign immunity but, in fact, whether it has been
 24 waived.

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1 In order to claim waiver here
 2 there are many theories that have been advanced
 3 by the ACF entities. Most of them deal with
 4 negotiations and alleged statements that were made
 5 by Mr. King, Mr. Cornelius before the contracts were
 6 executed as well as their attorney, a senior partner
 7 from Kutak Rock out of Omaha, Nebraska. We got
 8 declarations from all three, which put into dispute
 9 whether they really made those allegations, but we
 10 don't think those are material to the motion that we
 11 brought.
 12 Whether or not they made
 13 those statements, whether or not they made any
 14 misrepresentations and said yes, we're waiving the
 15 sovereign immunity of the tribe at OSGC, although
 16 those are disputed, we don't think it matters if
 17 they had made those for two very important reasons.
 18 No. 1, there's an integration clause in both of these
 19 contracts. The integration clause is very specific.
 20 It says any prior representations, any negotiations
 21 made by anybody are all merged within the contracts
 22 themselves and cannot be used to argue a position
 23 inconsistent with what the four corners of the
 24 contracts would say. These contracts were signed

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1 by one entity and one entity only, GBRE. So those
 2 are barred by the Parol evidence rule and they can't
 3 be considered by the Court.
 4 The other reason is sovereign
 5 immunity is based on federal common law. It is
 6 not based on underlying state -- and I'll get into it
 7 in a minute -- piercing the corporate veil, apparent
 8 authority principles. And under the federal common
 9 law it is pretty clear both in the Native American
 10 Distributing case and the World Touch Gaming case we
 11 cited that statements made by alleged representatives
 12 of a sovereign do not impact whether the sovereign
 13 has, in fact, waived sovereign immunity. And both
 14 cases stand for that position, and the reason is
 15 really clear.
 16 If all it took was for a contracting
 17 party that was not paid to sue and then be able to
 18 say, well, a representative of the sovereign made
 19 these statements, said they were waiving sovereign
 20 immunity and that factual dispute put into question
 21 whether sovereign immunity had been waived, that
 22 would require the sovereign to go through a trial
 23 and that process alone is an infringement on the
 24 sovereign rights of the sovereignty. So the case

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1 law is very clear. Waiver cannot be implied.
 2 It must be unequivocally expressed. In addition --
 3 and that's the Santa Clara Pueblo, pretty standard
 4 case. Also, when there is a process that is clear
 5 and publicly available and everybody can know what
 6 it is, in order for a sovereign to say we will waive
 7 sovereign immunity if this process is followed, that
 8 process must be followed.
 9 And here the sovereign, the
 10 tribe has Ordinance 14.6 and it provides three
 11 ways in which they can waive sovereign immunity; by
 12 resolution passed upon motion of the general tribal
 13 council, by resolution of the business committee
 14 and for Oneida Seven Gens by a resolution passed by
 15 the board but then only waiving Oneida Seven Gens'
 16 sovereign immunity, not the tribal sovereign immunity
 17 and that's detailed in the ordinance itself. And
 18 it's undisputed here that none of those three things
 19 took place.
 20 ACF knew it was dealing with GBRE,
 21 as its August 13 letter states. All it had to do was
 22 ask to have a waiver signed if that's what it wanted.
 23 All it had to do was ask for Oneida Seven Gens and
 24 the tribe to sign the contracts. If it really

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1 believed it was negotiating with them, they would
 2 be bound by it, but they failed to do so. So now
 3 ACF relies on two principal theories to pierce the
 4 corporate veil, to pierce GBRE's corporate veil,
 5 to get through Oneida Blocker, to get through Oneida
 6 Energy, to get to Seven Gens and bind Seven Gens
 7 and then again to pierce the corporate veil of Seven
 8 Gens to get to the tribe.
 9 First of all, the case law is
 10 we believe clear that with regard to piercing the
 11 corporate veil, that has never been done. That would
 12 in essence make -- if I were to make representations
 13 on behalf of the State of Wisconsin and my business
 14 entity went belly up and I had not been properly
 15 capitalized, they could allege that they could
 16 pierce my corporate veil and get to the assets
 17 of the sovereign.
 18 Piercing the corporate veil has
 19 never been, as far as I know, applied in a federal
 20 common law situation of sovereignty, and there were
 21 no cases cited by ACF in the briefs where it has
 22 ever been applied. They were all typical corporate
 23 piercing. Under the Tower Investors case, an
 24 Illinois appellate court case, 2007, the Court

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1 said that when you're dealing in a contractual
 2 relationship situation, there's even a heightened,
 3 more heightened standard for piercing the corporate
 4 veil because the party has chosen to contract with
 5 a corporation. And choosing to contract with that
 6 corporation doesn't then allow them to turn around
 7 and say, well, I want to pierce and get to another
 8 party. It's more frequently applied in a
 9 noncontractual position where there has been a tort
 10 of some kind and they want to pierce to get through
 11 the person, the corporate entity. But even if
 12 piercing the corporate veil did apply here, there
 13 haven't been allegations, nor any factual showing
 14 that that would be appropriate here.
 15 Under Illinois law the entity at
 16 issue whose veil is sought to be pierced must really
 17 be a sham entity. It must really -- the party needs
 18 to show fraud, that it was only created as a fraud
 19 to allow the principal, or the parent corporation to
 20 conduct the parent corporation's activities through
 21 the fraudulent sham of this corporate entity. It has
 22 to be shown undervaluation -- or undercapitalization
 23 and that they're really doing the business of the
 24 corporate parent rather than their own, and that's

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1 just not the situation here.
 2 GBRE was going to be adequately
 3 financed -- or capitalized by \$21 million and if
 4 it wasn't, there would be no project. It was in
 5 the business of doing this and it would have to be
 6 recognized in that business for WBT to loan the money
 7 and for BIA to guarantee the money. At all stages
 8 throughout this the ACF entities knew they were
 9 dealing with a tribal entity in terms of owning GBRE.
 10 They know OSG was there and they knew GBRE actually
 11 existed. So even if corporate -- piercing the
 12 corporate veil applied in any respect, the elements
 13 are not present here.
 14 The other issue that is raised
 15 is the apparent authority issue. Again, the
 16 overwhelming majority of cases say apparent authority
 17 does not apply in this federal common law area.
 18 Now, ACF cited two cases, the Bates case and the
 19 Hopland case where they went and did look at apparent
 20 authority principals but those cases are factually
 21 distinguishable. In both of those cases the actual
 22 entity was the signatore on the contract. And
 23 the question was, was the principal who signed it
 24 on behalf of that entity, did he have authority in

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1 that circumstance. Here the sovereign entity never
 2 signed this. We don't have that circumstance.
 3 So we don't believe apparent
 4 authority is applicable at all in a sovereignty
 5 situation. But if it did, again, it doesn't apply
 6 here because you don't look at the representations
 7 of the alleged agent. You don't look at the conduct
 8 of the alleged agent. The apparent authority is
 9 a top-down projection. It has to be the activities
 10 of in this case the tribe or Seven Gens who is giving
 11 the impression that the people below them have the
 12 authority to do these things. Here we have a tribe
 13 who has an ordinance in place as to the only way it
 14 can waive sovereign immunity, and that same ordinance
 15 applies to OSGC. They've given every appearance that
 16 there is nobody below those entities who can waive
 17 sovereign immunity.
 18 So for ACF principals -- and the
 19 two that put in declarations here are attorneys --
 20 to say that they reasonably relied on representations
 21 of this apparent authority when there's no indication
 22 that anybody at the tribe told them there was
 23 authority or gave an appearance of authority, they
 24 could not make the showing that they would need to

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1 immunity. The third case is the Sokaogon case --
 2 Gaming case, Judge Posner's case, where he also found
 3 a waiver based on an arbitration clause, exactly
 4 similar to C&L Enterprises. That is a very legally
 5 significant difference.
 6 In the most recent case --
 7 well, the Danka Funding case also, that was an
 8 earlier case out of New Jersey, said that forum
 9 selection clause was definitely not a waiver of
 10 sovereign immunity. But most recently there have
 11 been addressed in the Breakthrough Management case,
 12 Judge Krieger gave I thought a very compelling
 13 explanation of what the distinction is. Nobody can
 14 make a sovereign entity, in this case my client,
 15 the tribe or OSGC arbitrate, whereas anybody can sue
 16 a sovereign entity. And when a sovereign entity
 17 agrees to arbitrate, they are saying we agree that
 18 you can have a forum to have a resolution of our
 19 dispute and it's saying we agree that we will be
 20 bound by the outcome of that. And that is in fact
 21 some of the cases have said -- three relied upon by
 22 ACF -- a waiver of sovereign immunity.
 23 That is a whether we can be sued
 24 issue. A forum selection clause is only a where

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1 on the apparent authority issue.
 2 So let's assume, however, that
 3 now the corporate rule that my clients are somehow
 4 bound to these contracts they didn't sign because
 5 of representations of apparent authority or piercing
 6 the corporate veil. We don't believe that gets ACF
 7 entities anywhere because there's nothing in these
 8 contracts that waives sovereign immunity. The only
 9 thing in the contract upon which ACF relies is the
 10 forum selection clause. The forum selection clause
 11 says nothing about sovereign immunity and the only --
 12 and there were no cases cited to the Court where
 13 it has ever been found that a forum selection clause
 14 is a waiver of sovereign immunity.
 15 The cases relied upon by ACF is the
 16 C&L Enterprises case, which is a US Supreme Court
 17 case. In that case it was an arbitration clause,
 18 and in the arbitration clause there was an agreement
 19 by the sovereign that they would arbitrate and they
 20 would be bound by the outcome of the arbitration
 21 award. The second case is the Alzheimer & Gray
 22 case, the 7th Circuit case. It was an arbitration
 23 case that had the same language. On top of that it
 24 actually said that the entity was waiving sovereign

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1 we can be sued because they can't protect themselves
 2 as to whether they can be sued. And they say, well,
 3 if you're going to sue us, you can sue us in the
 4 State of Illinois, but it doesn't say and we agree
 5 you can sue us. And that was Judge Krieger's
 6 analysis, and she distilled it down to a whether
 7 clause or a where clause. And if it's a where
 8 clause, forum selection, that's not a waiver. That's
 9 not agreeing to be sued. A whether clause is in fact
 10 that. And when that was taken up on appeal, the
 11 court of appeals embraced that analysis but it wasn't
 12 an issue directly in front of them. So this is the
 13 district court, Judge Krieger.
 14 So we don't think even if they
 15 get to the contract, that there's anything in that
 16 contract that waives sovereign immunity. There
 17 wouldn't have been any reason for there to be a
 18 sovereign immunity waiver in the contract because
 19 it was with GBRE, a Delaware LLC, which doesn't have
 20 sovereign immunity. That handles the breach of
 21 contract claim.
 22 The tort claims, just very briefly,
 23 the only allegation that sovereign immunity should
 24 not apply to the tort claims is based upon the Bay

1 Mills case out of 2014, US Supreme court case,
 2 in footnote 8. And in that case the Court was not
 3 asked to hold on it but said there we never really
 4 addressed the issue as to if there is an injured
 5 plaintiff who has never chosen to deal with a tribal
 6 entity and has damages whether there are "special
 7 justifications" that would say that sovereign
 8 immunity should not bar such a claim in that case.
 9 If, in fact, that were an area to
 10 be developed somewhere in the future, and no case
 11 as I understand it has done that since the Bay Mills
 12 case, there are not special justification issues
 13 here. This isn't a situation where a person walks
 14 into a casino owned by a sovereign and part of the
 15 building falls on the person and they never really
 16 chose to deal with the sovereign and now they're
 17 injured and the sovereign raises sovereign immunity.
 18 This is an issue where ACF knew from day one that
 19 GBRE was a subsidiary of a tribally chartered
 20 corporation which was owned by a tribal governmental
 21 agency.
 22 They chose to enter into
 23 this structure. They knew full well about the
 24 sovereigns and could have suggested that they all

1 of jurisdiction here and there's no possible way
 2 I submit that this court can grant their motion and
 3 cut loose OSGC and the Oneida tribe because of this
 4 circumstance. These facts are this case. These
 5 facts are trial issues that cannot be decided here.
 6 They have not met their burden in that regard, Judge.
 7 Before we talk about the
 8 Solargenix case we first must state, Judge, is
 9 sovereign immunity really available for OSGC and
 10 the tribe. The Bay Mills case, not only footnote 8
 11 but throughout the case, seems to cast significant
 12 doubt whether in this particular case where you have
 13 a breach of contract and three tort victims whether
 14 sovereign immunity actually applies. The Bay Mills
 15 court this year took great pains to state if you're
 16 a tort victim and you have no other remedy, we're not
 17 deciding that. We're not saying there is sovereign
 18 immunity and cast significant doubt on it. And if
 19 you go, delve into the facts of the Bay Mills case,
 20 that was the State of Michigan stating to a tribe
 21 in Michigan you are operating an illegal casino.
 22 Instead of going to other avenues, such as injunction
 23 or suing the individuals who set up the illegal
 24 casino or pursuing them criminally, they went

1 sign these agreements and they did not. If special
 2 justification were ever sometime applied in a case
 3 so as to be precedent, that special justification as
 4 articulated by the Supreme Court in Bay Mills just
 5 doesn't exist here.
 6 So we believe that there isn't
 7 any waiver of sovereign immunity, there's nothing
 8 to be shown, and we would ask that the case against
 9 my client be dismissed.
 10 MR. DOMBROWSKI: Thank you, Judge.
 11 Mr. Pyper did give a nice recitation of the facts,
 12 but 75 percent of what Mr. Pyper has stated are
 13 closing arguments at trial that should be done in
 14 this courtroom. Judge, first, it is their burden
 15 right now, 2-619 motion to show that there's no
 16 issue of material fact regarding sovereign immunity.
 17 Judge, there's a whole host of factual issues that
 18 cannot be decided on motion.
 19 Everything is intertwined here.
 20 This is a very complex case. We have dueling
 21 affidavits, the other side claiming that, well,
 22 there was no sovereign immunity, even though we have
 23 clear clauses that I'm going to talk about. These
 24 facts are all intertwined with the subject matter

1 straight to sue.
 2 Here, Judge, if you cut loose on
 3 this motion where there's an abundance of questions
 4 of fact, cut loose OSGC and the tribe, we are left
 5 with GBRE only, a shell created for the particular
 6 purpose created by the tribe, created by OSGC to
 7 engage in energy projects. We would be a victim
 8 without a remedy.
 9 Moving forward, Judge, if you do
 10 believe sovereign immunity is available to OSGC,
 11 we must go to the specific wording of the choice
 12 of law of venues provisions that both sides agreed
 13 to. Both sides had attorneys. Both sides came to
 14 Evanston, Illinois where we are based, negotiated
 15 these contracts. And this has nothing to do with
 16 Parol evidence, Judge. We're just responding to
 17 their 2-619 motion. We have to bring in these facts.
 18 It says in bold and capital letters
 19 in the contract signed by Kevin Cornelius, OSGC's
 20 CEO, "This agreement shall be deemed to be made in
 21 Illinois and shall be governed by and construed in
 22 accordance with Illinois law. Lessee and lessor" --
 23 that's all of us -- "agree that all legal actions
 24 in connection with this agreement shall take place

<p style="text-align: right;">Page 25</p> <p>1 in federal or state courts situated in Cook County, 2 Illinois." That's why we're here, Judge. That's 3 why we filed suit. 4 The operation and maintenance 5 agreement, paragraph 15 specifically states, 6 "Any disputes pertaining to this agreement shall 7 be determined exclusively in a court of competent 8 jurisdiction in the County of Cook, State of 9 Illinois." Any disputes, Judge. That means 10 breach of contract. That means intentional torts. 11 We are in the right courtroom. We have the right 12 defendants. 13 Not only did OSGC, GBRE and 14 the tribe breach the contracts, but separately and 15 distinctly OSGC and the tribe committed an abundance 16 of torts which we have laid out in our very long 17 complaint. They couldn't be more clear. And as to 18 Mr. Pyper's argument, well, these choice of law and 19 choice of venue provisions don't mention sovereign 20 immunity, the Supreme Court says you don't have to. 21 And if you look at the Supreme Court decisions and 22 the 7th Circuit decisions, those are arbitration 23 decisions stating you must arbitrate. 24 We're not even saying that. We're</p>	<p style="text-align: right;">Page 27</p> <p>1 because that's what your subsidiary agreed to. 2 The Solargenix wording is quite 3 similar to our wording. They mention disputes. 4 They mention Cook County. They mention competent 5 court of jurisdiction. The Court says and the 6 7th Circuit said in Hugel, H-u-g-e-l, that you can't 7 ask someone who is closely related to the action step 8 back and say I didn't sign that, you can't bring me 9 to Cook County. 10 Now, in the Hugel case, which 11 was decided in 1990, the 7th Circuit affirmed it, 12 the plaintiff was complaining about the choice of 13 law and the choice of venue. In that case they said, 14 no, you must go to England. So the plaintiff there 15 had to go 2,000 miles away. All we're stating is 16 that the Wisconsin border from this courthouse is 17 about 57 miles. There's nothing unfair about these 18 choice of law provisions. They agreed to them and 19 you'll notice, Judge, they never really mentioned 20 whether they thought they were improper form or 21 whether they were unfair to the Wisconsin defendants 22 because they're clear. You cannot argue that with 23 a straight face. 24 Also, Judge, the other question,</p>
<p style="text-align: right;">Page 26</p> <p>1 saying you have a fair shot in Cook County, Illinois. 2 Bring your facts to the table. We will try this case 3 in Cook County. And they agreed to that, Judge. 4 Both sides agreed to it. Both sides had attorneys. 5 Both sides negotiated this contract for months and 6 months. You don't need to mention the words 7 sovereign immunity to waive sovereign immunity. 8 Those aren't my words. Those in essence are the 9 words of the US Supreme Court. If you look to the 10 pleadings and the affidavits, Judge, again, there's 11 no way that this motion, this particular subject 12 matter motion can be granted. We haven't even been 13 to discovery yet, Judge. There's more facts coming. 14 As to the Solargenix case, 15 which came out August 1, 2014, Judge, emanating 16 from this division within this courthouse, two 17 Spanish defendants asserted that you can't bring me 18 to Cook County because I didn't sign the contract. 19 This is what the tribe and OSGC are saying. Well, 20 I didn't sign this contract. How can you possibly 21 bring me here. Well, the Solargenix court said, 22 yes, even though you didn't sign the contract, 23 even though you're over 4,000 miles away, you must 24 come to Cook County, Illinois and defend this case</p>	<p style="text-align: right;">Page 28</p> <p>1 OSGC and the tribe are so closely related to 2 the contract, as they were in Solargenix, that 3 they had to be expected to be bound by this choice 4 of law provision. They -- we're not talking about 5 individuals who are coming to the table who are 6 only GBRE people. We have the CEO of OSGC, who's 7 also a tribal member. We have the CFO of OSGC, 8 who's also a tribal member. And our joint venture 9 agreement, which we attached to one of our 10 affidavits, that was initially, Judge, with OSGC. 11 GBRE wasn't even mentioned in the joint venture 12 agreement, and actually Solargenix also had a joint 13 venture agreement. 14 Now, that wasn't -- initially, 15 Judge, as our affidavits state, we were dealing 16 with the tribe from day one. We were dealing with 17 OSGC from day one. GBRE wasn't even in the picture 18 when we started this whole thing. It came in later. 19 Why would we make presentations before the Oneida 20 tribe up in Green Bay if we didn't know they were 21 closely related to this contract. Why would we write 22 a letter to OSGC's board of directors if we didn't 23 know and if they didn't know that they were closely 24 related to this contract. At the bare minimum --</p>

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1 they've admitted this -- OSGC and the tribe would
 2 have been third-party beneficiaries of this contract.
 3 And the purpose of GBRE is to make money. We don't
 4 create corporations in the United States for charity.
 5 This was an LLC to make OSGC money. OSGC is there
 6 to make the tribe money. And God love them, they're
 7 practicing free enterprise, but you can't back off of
 8 a contract after your CEO signs and say, well, you
 9 know, that's not us. That's just him acting on his
 10 own.

11 We've talked about in our brief
 12 and Mr. Pyper's talked about the corporate veil. We
 13 don't have to prove that the corporate veil has been
 14 pierced here. I think we've shown enough through our
 15 affidavits and even through their affidavits that
 16 the corporate veil has been pierced, Judge. And
 17 if we just concentrate on their affidavits and what
 18 they attached to their affidavits, there is a loan
 19 document from the Wisconsin Bank & Trust regarding
 20 this particular project. We're talking big money
 21 here. They're agreeing to fund the project because
 22 OSGC has requested it and OSGC is mentioned three
 23 times within that document. And this is just
 24 one document that OSGC has attached to one of

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1 tribe looking at our machines that are going to be
 2 used in the GBRE project if they're not intricately
 3 involved in this project.

4 Moving forward, Judge, I think
 5 with their affidavits too, I think we have some
 6 key admissions here. Now, Mr. Pyper wants to have
 7 it both ways as far as the Bay Mills decision is
 8 concerned. He at once states, well, they knew --
 9 the ACF guys knew they were dealing with the tribe
 10 but his briefs say another thing. His briefs say,
 11 well, you weren't dealing with the tribe. So which
 12 is it, are we dealing with the tribe as they state
 13 or as Mr. Pyper states today, well, you should have
 14 known you were dealing with the tribe. However, you
 15 weren't really dealing with the tribe; therefore,
 16 Bay Mills doesn't apply. Which is it?

17 Finally, Judge, the issue that
 18 we've pled in our complaint -- and we really all
 19 have to go back to the complaint. We've got all
 20 these facts and affidavits dueling against each
 21 other. We can go back to the complaint and I think
 22 defeat their motion. We know that the tribe
 23 was intricately and intimately involved with this
 24 project because it was their vote in December of

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1 their affidavits.
 2 OSGC is mentioned three times.
 3 If they're not a part of this deal, why are they
 4 mentioned in the covenants, why are they mentioned
 5 for financing, why is their board of directors at all
 6 involved. We have an email that we attached from
 7 Kevin Cornelius stating to our people, well, I've
 8 got four of the five board of directors onboard of
 9 OSGC. They're onboard. He didn't need them all.
 10 He wanted them all for the financing of the project.
 11 And the project is -- it's an integral part, the
 12 financing. Obviously you can't complete a project
 13 if you don't have financing.

14 And Mr. Pyper pointed out our
 15 August 2013 letter to the OSGC board. We are asking
 16 the board to support the completion of the project --
 17 those are our words -- and we're directing it to
 18 OSGC. If we take what Mr. Pyper and his briefs are
 19 stating, that it was just GBRE, well, why is OSGC and
 20 the tribe so involved with this project if it's just
 21 the GBRE project. We know we have business committee
 22 members from the tribe who go to California -- it's
 23 in our affidavits -- to look at our machinery. Why
 24 is someone from the business committee of the Oneida

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1 2013, as Mr. Pyper referred to, that dissolved OSGC
 2 and then destroyed the project. If the tribe and
 3 OSGC are completely separate from this project,
 4 why did the tribe's own vote destroy the project.
 5 It just doesn't make any sense at all. Common sense
 6 and the facts state that this was a tribal project.
 7 This was an OSGC project. This was a GBRE project.
 8 You cannot separate these three entities.

9 There's also the issue, Judge,
 10 of fundamental fairness. This is my last comment.
 11 It is not unfair to these three entities that we
 12 are suing to try their case in Cook County. They
 13 agreed to it through their subsidiary. The
 14 Solargenix case absolutely rules. The Hugel
 15 case rules.

16 As you pointed out and as some
 17 of the litigants pointed out in the arbitration case
 18 three cases before us, words have meaning, especially
 19 when you have -- you're well represented by smart
 20 lawyers on both sides. They negotiate every part
 21 of that contract and included in that contract were
 22 the choice of law and the choice of venue provisions.
 23 We don't need to state you waive sovereign immunity.
 24 And their internal machinations at the tribe as far

1 as ordinances, they don't matter according to the
2 US Supreme Court, according to the 7th Circuit.
3 That doesn't matter. If they did it wrong in some
4 fashion at the Oneida tribe or at OSGC and maybe
5 didn't go through certain steps or the Robert's rules
6 of procedures, it doesn't matter. They're in this.
7 They're in this case. If they are let out of this
8 case, it's fundamentally unfair.

9 And, Judge, with the Solargenix
10 and Hugel cases, I don't think you can let them out.
11 So I'd just ask that you deny their motion.

12 MR. PYPER: Your Honor, just very
13 briefly. I didn't say that ACF was dealing with
14 the tribe. I said they knew where the tribe was.
15 They knew the structure. They could have dealt
16 with the tribe. They never did deal with the tribe.
17 And why would the business committee and OSGC be
18 interested, because this is one of their
19 subsidiaries. Just because a parent would like to
20 know what a subsidiary is doing doesn't somehow then
21 implicate them to be bound by any contract that their
22 subsidiary signed.

23 Counsel said both sides agreed
24 to this, both sides agree. Mr. Cornelius signed

1 underlying contract that was in dispute. And what
2 they said was but we didn't specify we'd be bound
3 by the forum selection clause. The Court said,
4 well, that's not enough to get you out because the
5 forum selection clause is embedded in every single
6 provision of the contract because it says if there's
7 a dispute in what was then a cooperation agreement,
8 if there's a dispute with regard to anything in
9 here, the forum selection clause applies. So when
10 you said in your letter of adhesion you agreed to be
11 bound by and comply with provisions that are now in
12 dispute, you also bought into the forum selection
13 clause.

14 All that is is the where provision,
15 using Judge Krieger's analysis, where a dispute can
16 be brought. It has nothing to do with whether it can
17 or whether somebody can consent to the dispute. So
18 the Solargenix case is a personal injury case. It's
19 not a subject matter jurisdiction case, your Honor.

20 MR. DOMBROWSKI: Can I say one thing
21 about the Solargenix case? Judge, only one of those
22 Spanish defendants signed that letter of adhesion.
23 The second one did not. Both were not signatories
24 to the contract. And as to the second Spanish

1 on behalf of GBRE. He agreed to it. And the
2 factual disputes here are simply not material given
3 the integration clause and given the common law where
4 individual statements by representatives have no
5 bearing on waiver of sovereign immunity issues.

6 The last thing I want to touch
7 on is the Solargenix case. I don't understand how
8 that plays any role in this case at this stage. It
9 certainly does on personal jurisdiction. That's a
10 personal jurisdiction case, has nothing to do with
11 the subject matter jurisdiction, nor with sovereign
12 immunity. There was no sovereign at issue in that
13 case. But what counsel didn't point out was this --
14 it was -- the Court ruled that the Spanish parents
15 were sufficiently on notice that they could be
16 brought into the State of Illinois.

17 Well, of course they were. They
18 signed a letter of adhesion. A letter of adhesion
19 means you can stick parts of the contract at issue
20 in the fight. We agreed to those provisions. In
21 fact, the Court -- and this was in the personal
22 jurisdiction note -- the letter of adhesion said
23 that the Spanish parents "accepted and consented
24 to be bound by and comply with" provisions of the

1 defendant that didn't even sign the letter of
2 adhesion, the Court said you're coming along too.
3 You're coming along to Cook County.

4 THE COURT: All right. Thank you,
5 Counsel. It's been a very interesting argument.
6 Where I come back to with regards to the tribe and
7 OSGC is, as counsel stated, there's no dispute that
8 these two entities, that sovereign immunity would
9 apply to them. It's whether or not there's been a
10 waiver of that. And where that comes down on a 619,
11 I'm looking at the competing affidavits which does
12 allow the Court here to make a determination based
13 on those affidavits, there has -- everything I've
14 seen says it has to be a knowing waiver, not an
15 implied, not that just because our subsidiary entered
16 into contracts or things like that.

17 I do not find that there's been
18 a knowing waiver. And, therefore, under sovereign
19 immunity, I believe that this case cannot go forward
20 as to Oneida Seven Generations Corporation,
21 The Oneida Tribe of Indians of Wisconsin.

22 MR. PYPER: Thank you, your Honor.

23 THE COURT: We're up to --

24 MR. TEMPLE: GBRE's motion, your Honor.

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1 THE COURT: Yes.
 2 MR. TEMPLE: Your Honor, the issues are
 3 far similar for our motion. Counsel for Oneida and
 4 OSG laid out the facts nicely, so I won't reiterate
 5 all those facts. But simply put, as they stated,
 6 this is a commercial partnership that did not come
 7 to fruition. GBRE is a signatory to both the master
 8 lease and the maintenance agreement, which are
 9 attached to the complaint.
 10 Assuming the factual allegations
 11 of the complaint to be true, we also have to look
 12 to the fact in that master lease, which is attached
 13 to the complaint, becomes a part of the pleading.
 14 And the most important fact of that is there's a
 15 condition precedent contained in the very first
 16 paragraph of the master lease that says that
 17 the contract doesn't become effective until GBRE
 18 takes certain action.
 19 The plain language of that
 20 contingency is clear, and I quote, "The agreement
 21 shall not become effective until such time as
 22 lessee," lessee being defined as the plaintiff --
 23 excuse me, as GBRE -- "has notified lessor," the
 24 plaintiff, "in writing that lessee has entered into

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1 financing arrangements with Wisconsin Bank &
 2 Trust Company on such terms and conditions as are
 3 reasonably acceptable to lessee."
 4 The language is very specific.
 5 There's no allegation in the complaint that
 6 that notification in writing regarding financing
 7 arrangements ever took place. We would argue that
 8 the failure to allege sufficient facts, that that
 9 condition was met, plaintiffs' claim No. 1 for breach
 10 of contract against GBRE, also Claim 3 for promissory
 11 estoppel and -- because GBRE's obligations to the
 12 plaintiffs, contractual or otherwise, were clearly
 13 subject to that condition. And, finally, Claim 5 for
 14 unjust enrichment should also be dismissed because
 15 the claim's either barred by the existence of a valid
 16 contract here, all but an unenforceable one against
 17 GBRE, or at the very least the plaintiffs have not
 18 pled sufficient facts to establish either the unjust
 19 retention of a benefit or really any benefit at all
 20 that was conveyed to GBRE as a part of the
 21 negotiation of these contracts.
 22 Looking at the condition precedent,
 23 your Honor, to establish a claim for breach of
 24 contract, they've got to establish the existence

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1 of a valid, enforceable contract. For purposes
 2 of this motion, GBRE is not denying the existence
 3 of the contract. As you heard from counsel a moment
 4 ago at great length, these contracts were negotiated
 5 heavily by both sides. Both sides were represented
 6 by counsel. There's no question that they had a
 7 meeting of the minds. They entered into contracts.
 8 For purposes of our motion we're
 9 not denying the existence of a valid contract.
 10 There's a second step to that. And under *Carollo v.*
 11 *Irwin*, where a contract contains a condition
 12 precedent, the contract's not enforceable against
 13 one party as far as their obligations are concerned
 14 until the condition is performed or the contingency
 15 occurs. So in this case we have a valid contract.
 16 Part of that contract is a contingency, a condition
 17 precedent. There's no obligation that can be
 18 enforced against GBRE until that condition is met.
 19 Now, plaintiffs haven't pled facts
 20 that establish that that condition was met. They
 21 want to point to the allegation they've made that
 22 there was a commitment from Wisconsin Bank & Trust
 23 for financing. That glosses over the full language
 24 of that condition precedent. The contingency

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1 language of paragraph 1 doesn't just say that
 2 GBRE has to enter into financing arrangements. In
 3 fact, there's three elements of that, that they
 4 entered into financing arrangements, that those were
 5 reasonably acceptable to GBRE, but most importantly
 6 that they notified ACF in writing of those
 7 arrangements.
 8 Now, going further and looking at
 9 the maintenance agreement, the second of these two
 10 contracts -- and I note that in the response brief
 11 the plaintiffs brought up the commencement date
 12 and the maintenance agreement -- the maintenance
 13 agreement commences upon commencement of the master
 14 lease. And the Schedule 1 of the master lease says
 15 that it commences when the loan proceeds are
 16 disbursed -- or, excuse me, when the loan proceeds
 17 are received by GBRE.
 18 So there's really two dates here.
 19 The first is the effective date of the contract
 20 when the notification in writing occurs. The second
 21 is the receipt of the actual loan proceeds which
 22 causes the lease to commence and then also triggers
 23 the second contract, which is the maintenance
 24 and operation agreement. In this case there's no

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1 allegation that GBRE ever provided that notification
 2 in writing.
 3 Now, plaintiffs want you to accept
 4 that their allegation that WBT agreed to provide
 5 financing is sufficient to fulfill that contingency.
 6 But as counsel noted earlier, words have meaning.
 7 For whatever reason as these parties negotiated at
 8 great length these contracts, both represented by
 9 counsel, they reserved to GBRE the discretion to
 10 provide notification in writing when the financing
 11 commitment was reasonably acceptable to them. The
 12 parties decided that the requirement of written
 13 notice was important. We're not talking about
 14 a condition that's buried in this contract, your
 15 Honor. We're talking about paragraph 1 on the first
 16 page of the master lease, notification in writing
 17 of financing arrangements that were reasonably
 18 acceptable to GBRE.
 19 Because there are no facts pled
 20 to establish that that notification ever occurred
 21 and that that contingency was met, we'd argue that
 22 they failed to state the breach of contract claim and
 23 it must be dismissed.
 24 With regard to promissory estoppel,

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1 obviously under the case law to establish promissory
 2 estoppel you've got to argue a promise that's
 3 unambiguous in its terms, reasonably foreseeable
 4 reliance on the promise to the parties' detriment.
 5 First, we've argued that the existence of a valid
 6 contract in this case bars the claim for promissory
 7 estoppel. Promissory estoppel is available in the
 8 absence of a contract. Plaintiffs' counsel in their
 9 response brief notes that, well, we've made an
 10 argument that there's an unenforceable contractual
 11 obligation here so, therefore, they should be allowed
 12 to bring their promissory estoppel claim.
 13 Again, for purposes of this motion
 14 we're not arguing there's no valid contract here.
 15 We're arguing that as a result of that condition in
 16 that contract, there's no enforceable promise against
 17 GBRE. On the other hand, as they would argue,
 18 anytime you have a condition in a contract that's not
 19 met, it opens the doors to any number of equitable
 20 claims.
 21 So the parties at great length here,
 22 represented by counsel, negotiate a contract in which
 23 it reserves to GBRE the notification in writing,
 24 reserves that condition there for the contract to be

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1 effective and enforceable and then somehow because
 2 that condition is not met, GBRE is still held to
 3 every other promise in that contract under an
 4 equitable theory. Your Honor, we would argue that
 5 that's not the purpose of promissory estoppel, and
 6 certainly the failure of a condition precedent does
 7 not suddenly open the floodgates to equitable claims.
 8 But even if there is not a valid contract in this
 9 case, you still have a condition promise. Promissory
 10 estoppel, they have to show reasonable reliance.
 11 Your Honor, looking here to
 12 In Re Midway Airlines, which we've cited in our
 13 brief, you cannot reasonably rely on a condition
 14 promise. Whether it's in the contract or not, GBRE's
 15 promises are clearly conditioned on this notification
 16 in writing requirement. The parties negotiated that
 17 at length. It's in writing, you know. It states
 18 that that is the condition there.
 19 Plaintiffs must show that they had
 20 some sort of reasonable reliance on GBRE's promises.
 21 And I'll note in their pleading, the reliance that
 22 they allege is actually reliance on, and I quote,
 23 "contractual promises," that's at paragraph 56, and
 24 that they reasonably relied on the -- capital A --

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1 Agreements in paragraph 58. So they don't even hide
 2 the fact that the promises that they're relying on
 3 are those that are laid out in the contract, the
 4 contract that contains a clear condition.
 5 So even if they argued that their
 6 promissory estoppel claim can be brought because
 7 there's no valid contract, you still have promises
 8 that they claim to be relying on that are subject
 9 to a condition. Their reliance is unreasonable as
 10 a matter of law because it's a conditional promise.
 11 It's not a definite, unambiguous promise. In this
 12 case GBRE said we're going to do all of these things,
 13 we're going to take necessary steps to carry out this
 14 contract. But paragraph 1, page 1, this is not
 15 effective until such time as we notify you in writing
 16 that we have a financing commitment that's reasonably
 17 acceptable to us. For that reason, because that
 18 reliance is unreasonable as a matter of law, we'd
 19 argue that the claim for promissory estoppel must
 20 also be dismissed.
 21 Finally, as far as unjust enrichment
 22 goes, your Honor, there are no facts alleged either
 23 to the conveyance of any kind of benefit, nor
 24 the unjust nature of the retention of such benefit.

1 Counsel in their response has argued that, they've
2 alleged proprietary and exclusive information. But
3 there's no allegation as to how GBRE would use that
4 information, how they have used that information,
5 no allegation as to how GBRE has benefited from that
6 information, no allegation as to how the information
7 benefited any other project that GBRE is using.

8 Plaintiffs' conclusory claim
9 that they shared information that has some enormous
10 benefit without any supporting facts simply doesn't
11 establish the conveyance of a benefit there to
12 support unjust enrichment. But even so, even if
13 there were a benefit conveyed there by the sharing
14 of information in the negotiation of a contract,
15 they fail to allege any facts that would support
16 the unjust enrichment of that benefit.

17 In this case the parties
18 at arm's length represented by counsel traveling
19 down to Evanston, Illinois, as plaintiffs' counsel
20 noted, negotiated this, shared information, visited
21 facilities all with the understanding that this
22 was a contract which on the first page in the
23 first paragraph contained the condition to its
24 effectiveness and its enforceability. For them

1 For those reasons, your Honor,
2 we would ask that the Court dismiss Counts I, III and
3 V of plaintiffs' complaint.

4 MR. DOMBROWSKI: Judge, obviously this is
5 a 2-615 motion. We have to go back to the specific
6 wording of the complaint, which I don't think counsel
7 really has done. He's thrown in in his brief a bunch
8 of things that were not within the body of the
9 complaint.

10 Regardless, we plead on page 6
11 of the complaint several paragraphs regarding
12 funding, regarding a guarantee of loan, regarding
13 the loan being approved. We also specifically
14 plead 43 paragraphs regarding the specifics of the
15 contract, and obviously we have attached A and B
16 to our complaint, which is incorporated within the
17 complaint. Illinois does not require you to go
18 forth every paragraph of every contract in a breach
19 of contract action and lay out those contracts. A
20 breach of contract action if that were such would be
21 40 pages.

22 So, Judge, here we specifically
23 plead that every -- all conditions precedent
24 were met. We detailed the funding. We attached

1 to now argue that the sharing of that information
2 is part of that negotiation, such retention was
3 unjust, ignores all the other language that was
4 negotiated in the contract. To simply say because
5 this contract didn't work out, it's unjust for you
6 to keep anything we told you and that you owe us
7 for all of that disregards all the language of the
8 contract.

9 For example, if the plaintiffs
10 had wanted to create some sort of protections for
11 themselves on the conveyance of proprietary exclusive
12 information, they could have worked that into the
13 contract. They could have negotiated those terms
14 in, understanding that it was a conditional promise.
15 Perhaps this doesn't come to fruition, perhaps the
16 financing commitment isn't provided, perhaps GBRE
17 doesn't find it reasonably acceptable, what is our
18 protection for this information that we've shared.
19 Nothing like that is incorporated into the agreement.
20 There's no protections in that case there. And as
21 both sides articulated earlier, this is a fully
22 integrated agreement so any assurances that might
23 have been made outside of the agreement are not
24 incorporated therein.

1 the complaint. As to Count I, it's properly
2 pled. Also paragraphs 1 through 43 go into Count I,
3 so all of that detail goes into Count I. We have
4 specifically pled. We've put them on notice. They
5 should be required to answer it.

6 Judge, as to the promissory
7 estoppel, this again is pleading in the alternative.
8 We not only refer to the complaint in our promissory
9 estoppel, which is Count III, but we also -- counsel
10 didn't read this part. "ACF and ACF Services relied
11 on GBRE's contractual promises and/or all promises
12 to proceed with the project." Now, if they're
13 willing to say this is a valid contract, we might
14 have another issue on promissory estoppel. But
15 Illinois law is clear we can plead it even if
16 there's a breach of contract action.

17 Same goes for unjust enrichment,
18 which is Count V. We specifically state in Count V
19 how they're unjustly enriched not only within the
20 body of Count V but the paragraphs 1 through 43,
21 which specifically state this is our exclusive
22 technology, oral and written presentations to the
23 tribe, to OSGC. It is exclusive. It is proprietary.
24 They were unjustly enriched because of the knowledge

1 they gained from us before they walked away. So,
2 Judge, I'd ask that you deny his motion in its
3 entirety.

4 MR. TEMPLE: Your Honor, with respect
5 to the allegations about the facts, again, I would
6 point back to the very specific condition on the
7 first page of the master lease. As counsel noted,
8 it's attached to the complaint. That becomes part of
9 the complaint. Yes, that is the focus of our motion,
10 is that particular element and the fact that there's
11 no other facts pled in the complaint that support
12 the fulfillment of that condition.

13 I understand counsel's point that
14 we need not go through every single paragraph of
15 the lease to determine whether, you know, every
16 single aspect of that is pled, but in this case they
17 pled a breach of the contract generally for us not
18 continuing through with the project. And I can point
19 to the language right here, but specifically they've
20 said that we have breached by abandoning and refusing
21 to implement the master lease and maintenance
22 agreements.

23 There's a clear condition on the
24 first page that says it's not effective unless that

1 All the plaintiffs have alleged
2 is that information was shared in the negotiation
3 of a contract that contained a condition to
4 enforceability and effectiveness and that somehow
5 the retention of that information was unjust. Again,
6 in this case any party that is negotiating a contract
7 with a condition in it must now be aware under
8 plaintiffs' theory that they are at risk of an
9 equitable claim for unjust enrichment if they
10 don't carry through with this contract. There's
11 no allegation here of any bad faith by GBRE. Any
12 failure by GBRE to take the necessary steps to ensure
13 the condition was fulfilled.

14 And, finally, with regards to
15 plaintiffs' comment that they have generally and
16 conclusory pled that all conditions were met, they
17 simply pled that all conditions precedent to the
18 contract were met by ACF Leasing or ACF Services.
19 We've not argued that they failed to meet any
20 condition. We've argued that there's a general
21 condition to the effectiveness of the contract.
22 They've made no argument that that was fulfilled.
23 This was not something that they could fulfill.
24 The parties in negotiating this clearly reserved to

1 contingency is met. That is a fact necessary to show
2 that we've somehow abandoned this contract. To argue
3 that we abandoned/refused to implement the contract
4 when there's a clear condition that says we don't
5 continue with this unless A, B and C happens and
6 they haven't pled A, B and C, I would argue that
7 that is the facts required to be pled under Illinois
8 law in this case.

9 As far as the other two claims go,
10 again, as far as promissory estoppel is concerned,
11 they have not pled any sort of reasonable reliance.
12 Given the fact that this is a condition promise, I
13 have not heard any arguments from plaintiffs' counsel
14 that they believe there was an unconditional promise
15 made. And unjust enrichment, there are no
16 allegations under the count for unjust enrichment
17 as to what that benefit was but, more importantly,
18 where's the injustice? And looking at the case law,
19 and this is the Galvan v. Northwestern Memorial
20 Hospital case that we cited, "A cause of action for
21 unjust enrichment must allege the defendant retained
22 a benefit to the plaintiffs' detriment in violation
23 of the fundamental principles of justice, equity
24 and good conscious."

1 GBRE the discretion to provide that notification that
2 would then trigger the effectiveness of the contract.
3 For that reason, your Honor, I'd ask that the three
4 counts be dismissed.

5 THE COURT: Well, I did have an
6 opportunity, of course, to go through the briefs
7 and read through the complaint and everything. And
8 based upon your arguments, first of all, as to the
9 breach of contract, we're at a pleading stage.
10 You're asking plaintiff at this point in time to
11 plead evidentiary facts, not just sufficient facts
12 to state a cause of action. Therefore, the breach of
13 contract count will go forward.

14 As to the promissory estoppel, it is
15 being pled in the alternative, but I do find that
16 it's lacking because if you look at your paragraphs,
17 you start at 55, and in your own argument you said
18 we have pled numerous facts to support the cause of
19 action in 1 through 43. Those are never even alleged
20 or realleged in your Count III as to promissory
21 estoppel on that. So it is dismissed with leave
22 to replead within 28 days, and I find a similar
23 need to plead your unjust enrichment claim more
24 clearly as to Green Bay Renewable Energy as well.

1 Therefore, Counts III and V are dismissed with leave
2 to replead within 28 days.

3 Given the fact that defendant is
4 to answer the breach of contract, but you're going
5 to have to respond to that, I'm going to put it all
6 in the same schedule. So with plaintiff repleading
7 III and V, 28 days would put you at November 5th,
8 I believe, yes. So we'll have the defendant answer
9 or otherwise plead as to III and V and answer
10 Count I by December 3rd.

11 Let's give a future status date.
12 Let me just write this down. Okay. Let's get back,
13 how's December 10th? Let's do it at 9:30. I think
14 we should be able to do that, okay?

15 MR. DOMBROWSKI: Thank you.

16 MR. TEMPLE: Thanks, your Honor.

17 THE COURT: Have a good day.

18 WHICH WERE ALL THE PROCEEDINGS
19 HAD OR OFFERED AT SAID HEARING
20 OF THE ABOVE-ENTITLED CAUSE.

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FILED
CIRCUIT COURT OF ILLINOIS
2014 DEC 17 PM 3:32
CIVIL APPEALS DIVISION
CLERK

1 STATE OF ILLINOIS)
2 COUNTY OF COOK) SS.

3

4 I, MARY MASLOWSKI, CSR, do hereby
5 certify that I reported in shorthand the proceedings
6 had at the hearing aforesaid, and that the foregoing
7 is a true, complete and accurate transcript of the
8 proceedings at said hearing as appears from the
9 stenographic notes so taken and transcribed on the
10 9th day of October, 2014.

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Certified Shorthand Reporter

Chapter 14
SOVEREIGN IMMUNITY
Yukwatatwani'yó
we are free from foreign powers

14.1. Purpose and Policy
14.2. Adoption, Amendment, Repeal
14.3. Definitions

14.4. Sovereign Immunity of the Tribe
14.5. Sovereign Immunity of Tribal Entities
14.6. Waiver of Sovereign Immunity

14.1. Purpose and Policy

14.1-1. The purpose of this Law is to protect and preserve the sovereign immunity of the Oneida Tribe of Indians of Wisconsin, to define the entities and individuals entitled to the protection of such immunity, and to specify the manner in which such immunity may be waived.

14.1-2. It is the policy of the Oneida Tribe of Indians of Wisconsin to exercise its sovereign immunity, and to grant limited waivers of such immunity, as dictated by the best interests of the Oneida Tribe of Indians of Wisconsin and its citizens. The Oneida Tribe of Indians of Wisconsin recognizes that Tribal sovereign immunity, as defined in numerous federal court decisions, is an inherent and indispensable aspect of Tribal sovereignty. The Oneida Tribe of Indians of Wisconsin also recognizes that Tribal sovereign immunity affords necessary protection of Tribal resources, and necessary protection for Tribal officers, employees, and agents in both governmental and commercial settings.

14.2. Adoption, Amendment, Repeal

14.2-1. This Law is adopted by the Oneida Business Committee by resolution # BC-10-20-04-C, and amended by resolution #BC-02-12-14-D.

14.2-2. This Law may be amended or repealed by the Oneida Business Committee and/or the Oneida General Tribal Council pursuant to the procedures set out in the Legislative Procedures Act.

14.2-3. Should a provision of this Law or the application thereof to any person or circumstances be held as invalid, such invalidity shall not affect other provisions of this Law which are considered to have legal force without the invalid portions.

14.2-4. In the event of a conflict between a provision of this Law and a provision of another law, the provisions of this Law shall control.

14.2-5. This Law is adopted under authority of the Constitution of the Oneida Tribe of Indians of Wisconsin.

14.3. Definitions

14.3-1. This section shall govern the definitions of words and phrases used within this Law. All words not defined herein shall be used in their ordinary and everyday sense.

(a) "Agent" shall mean a person who is authorized to act on behalf of the Oneida Tribe of Indians of Wisconsin with respect to a specific transaction or transactions.

(b) "Employee" shall mean any individual who is employed by the Tribe and is subject to the direction and control of the Tribe with respect to the material details of the work performed, or who has the status of an employee under the usual common

law rules applicable to determining the employer-employee relationship. For the purposes of this Policy, employee shall include elected or appointed officials, individuals employed by a Tribally Chartered corporation, and, individuals employed under an employment contract as a limited term employee are employees of the Tribe, not consultants.

(c) "Officer" shall mean a person elected or appointed to serve on a board, committee, or commission of the Oneida Tribe of Indians of Wisconsin.

(d) "Tribal Entity" shall mean a corporation or other organization which is wholly owned by the Oneida Tribe of Indians of Wisconsin, is operated for governmental or commercial purposes, and may through its charter or other document by which it is organized be delegated the authority to waive sovereign immunity.

(e) "Tribal property" shall mean property that is owned by the Oneida Tribe in fee, or property that is held in trust for the Oneida Tribe by the United States of America.

(e) "Tribe" shall mean the Oneida Tribe of Indians of Wisconsin, and includes all departments, divisions, business units, and other subdivisions of the Tribe.

14.4. Sovereign Immunity of the Tribe

14.4-1. The sovereign immunity of the Tribe, including sovereign immunity from suit in any state, federal or Tribal court, is hereby expressly reaffirmed. No suit or other proceeding, including any Tribal proceeding, may be instituted or maintained against the Tribe unless the Tribe has specifically waived sovereign immunity for purposes of such suit or proceeding. No suit or other proceeding, including any Tribal proceeding, may be instituted or maintained against officers, employees or agents of the Tribe for actions within the scope of their authority, unless the Tribe has specifically waived sovereign immunity for purposes of such suit or proceeding.

14.5. Sovereign Immunity of Tribal Entities

14.5-1. The sovereign immunity of Tribal Entities, including sovereign immunity from suit in any state, federal or Tribal court, is hereby expressly reaffirmed. No suit or other proceeding, including any Tribal proceeding, may be instituted or maintained against a Tribal Entity unless the Tribe or the Tribal Entity has specifically waived sovereign immunity for purposes of such suit or proceeding. No suit or other proceeding, including any Tribal proceeding, may be instituted or maintained against officers, employees or agents of a Tribal Entity for actions within the scope of their authority, unless the Tribe or the Tribal Entity has specifically waived sovereign immunity for purposes of such suit or proceeding.

14.6. Waiver of Sovereign Immunity

14.6-1. All waivers of sovereign immunity shall be made in accordance with this law.

14.6-2. *Waiver by Resolution.* The sovereign immunity of the Tribe or a Tribal Entity may be waived:

- (a) by resolution of the General Tribal Council;
- (b) by resolution or motion of the Oneida Business Committee; or
- (c) by resolution of a Tribal Entity exercising authority expressly delegated to the Tribal Entity in its charter or by resolution of the General Tribal Council or the

Oneida Business Committee, provided that such waiver shall be made in strict conformity with the provisions of the charter or the resolution governing the delegation, and shall be limited to the assets and property of the Tribal Entity.

14.6-3. *Automatic Waiver to Allow Testimony and Production of Documents.* The Tribe hereby waives sovereign immunity to permit Tribal officers, employees and agents to testify as witnesses and to produce documents in the following circumstances:

(a) a court of competent jurisdiction or a duly authorized official has issued a subpoena requiring the Tribal officer, employee or agent to appear as a witness and/or to produce documents with respect to the prosecution of a juvenile or criminal offense committed on Tribal property; or with respect to the prosecution of a juvenile or criminal offense committed against the Tribe; against or by a member of the Tribe, an employee of the Tribe, a business owned or operated by the Tribe, or a patron of a business owned or operated by the Tribe.

(b) a court of competent jurisdiction or a duly authorized official has issued a subpoena require the Tribal officer, employee or agent to appear as a witness and/or to produce documents with respect to an emergency detention or the prevention and control of alcoholism in accordance with Chapter 51 of the Wisconsin State Statutes.

This automatic waiver of sovereign immunity shall not extend to and shall not be deemed to include any testimony or the production of any documents which are not directly relevant to the aforementioned purposes.

14.6-4. Waivers of sovereign immunity shall not be general but shall be specific and limited as to duration, grantee, transaction, property or funds subject to the waiver, the court having jurisdiction and applicable law.

14.6-5. No waiver of sovereign immunity shall be deemed to be consent to the levy of any judgment, lien, or attachment upon the property of the Tribe or a Tribal Entity other than property specifically pledged, assigned or identified.

End.

Emergency Adoption	BC# 5-04-04-D
Adopted	BC# 10-20-04-C
Amended	BC# 02-12-14-D

