Case No. 12-2434

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

IN RE: GREEKTOWN HOLDINGS, LLC
Debtor,

DIMITRIOS PAPAS, a/k/a JIM PAPAS; VIOLA PAPAS;
TED GATZAROS; MARIA GATZAROS,
Appellants,

v.

BUCHWALD CAPITAL ADVISORS LLC,
Litigation Trustee for the Greektown Litigation Trust;
SAULT STE. MARIE TRIBE OF CHIPPEWA INDIANS;
KEWADIN CASINOS GAMING AUTHORITY,
Appellees.

On Appeal From the United States District Court
for the Eastern District of Michigan, Southern Division
Honorable Paul D. Borman
Civil Action No. 12-cv-12340
E.D. Bankr. Case No. 2:08-bk-53104

BRIEF OF PLAINTIFF-APPELLEE, BUCHWALD CAPITAL ADVISORS LLC, LITIGATION TRUSTEE

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DISCLOSURE OF CORPORATE AFFILIATIONS AND FINANCIAL AFFAIRS

Pursuant to 6th Cir. R. 26.1, Appellee, Buchwald Capital Advisors LLC makes the following disclosure:

1. Is said party a subsidiary or affiliate of a publicly owned corporation?

   Answer: No.

2. Is there a publicly owned corporation, not a party to the appeal, that has a financial interest in the outcome?

   Answer: Appellee, Buchwald Capital Advisors LLC, is the Trustee of the Greektown Litigation Trust which was created pursuant to the confirmed plan of reorganization of Greektown Holdings, LLC, *et al.* As beneficiaries of the Greektown Litigation Trust, the entities identified below have a financial interest in the outcome of this appeal. These entities include or may include publicly owned corporations or affiliates thereof.

KNOWN BENEFICIARIES OF GREEKTOWN LITIGATION TRUST

JOHN HANCOCK BOND FUND
JOHN HANCOCK INCOME SECURITIES TRUST
JOHN HANCOCK INVESTORS TRUST
JOHN HANCOCK FUNDS III LEVERAGED COMPANIES FUND
JOHN HANCOCK FUNDS II ACTIVE BOND FUND
JOHN HANCOCK FUNDS TRUST ACTIVE BOND TRUST
MANULIFE GLOBAL FUND U.S. BOND FUND
MGF US SPECIAL OPPORTUNITIES BOND FUND
MANULIFE GLOBAL FUND STRATEGIC INCOME
JOHN HANCOCK TRUST STRATEGIC INCOME TRUST
JOHN HANCOCK TRUST HIGH INCOME TRUST
JOHN HANCOCK FUNDS II HIGH INCOME FUND
JOHN HANCOCK FUNDS II STRATEGIC INCOME FUND
JOHN HANCOCK HIGH YIELD FUND
JOHN HANCOCK STRATEGIC INCOME FUND
OPPENHEIMER CHAMPION INCOME FUND
OPPENHEIMER STRATEGIC INCOME FUND
OPPENHEIMER STRATEGIC BOND FUND V/A

OPPENHEIMER HIGH INCOME FUND V/A
ING OPPENHEIMER STRATEGIC INCOME PORT
BRIGADE LEVERAGED CAPITAL STRUCTURES FUND LTD
SOLA LTD
SOLUS CORE OPPORTUNITIES MASTER FUND LTD
BROOKVILLE HORIZONS FUND LP
FRONT PART BROOKVILLE CAPITAL MASTER FUND LP
HALBIS DISTRESSED OPPORTUNITIES MASTER FUND LTD
STANDARD GENERAL FOCUS FUND LP
STANDARD GENERAL MASTER FUND LP
STANDARD GENERAL OC MASTER FUND LP
MARINER TRICADIA CREDIT STRATEGIES MASTER FUND LTD
STRUCTURED CREDIT OPPORTUNITIES FUND II LP
TRICADIA DISTRESSED AND SPECIAL SITUATIONS MASTER FUND
BLACK ROCK HIGH INCOME VI FUND
BLACK ROCK HIGH INCOME PORTFOLIO
BLACK ROCK CORPORATE HIGH YIELD FUND INC
BLACK ROCK HIGH INCOME SHARES
BLACK ROCK HIGH INCOME FUND
BLACK ROCK CORPORATE HIGH YIELD FUND III
BLACK ROCK CORPORATE HIGH YIELD FUND VI
BLACK ROCK CORPORATE HIGH YIELD FUND V INC
BLACK ROCK INCOME OPPORTUNITY TRUST
BLACK ROCK HIGH YIELD TRUST
BLACK ROCK CORE BOND TRUST
BLACK ROCK STRATEGIC BOND TRUST
BLACK ROCK LIMITED DURATION INCOME TRUST
BLACK ROCK FLOATING RATE INCOME TRUST
BLACK ROCK HIGH YIELD BOND PORTFOLIO
BGF US DOLLAR HIGH YIELD BOND FUND
RB-U-FONDS-HYBO
BAV RBI RENTEN US HYI
MANAGED ACCOUNT SERIES HIGH INCOME PORTFOLIO
REGIMENT CAP

s/ Joel D. Applebaum
(Signature of Counsel)

March 6, 2013
(Date)

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STATEMENT IN OPPOSITION TO ORAL ARGUMENT

While the underlying litigation seeks to recover from Appellants constructively fraudulent transfers totaling over $145 Million, the issues presented in this appeal are not complex and do not necessitate oral argument. The only issues are whether the District Court abused its discretion in approving a settlement between the Litigation Trustee, the Sault Ste. Marie Tribe of Chippewa Indians, and Kewadin Casinos Gaming Authority, Appellees herein, and in denying Appellants' motion for reconsideration. The District Court conducted a lengthy evidentiary hearing on the proposed settlement. The District Court's 30-page opinion reveals that the District Court fully considered all factual and legal issues and properly approved the proposed settlement. Moreover, the District Court properly denied Appellants' motion for reconsideration because that motion was premised entirely on evidence in Appellants' possession for over 12 years, which evidence was certainly available, but was not presented to the District Court in connection with the evidentiary hearing or during oral argument on the Settlement Motion. Nor does that evidence, even had it been considered, mandate a different result. Simply put, there are no reasons to justify oral argument in this case. *See* Fed. R. App. P. 34(a)(2).

CONCURRENCE IN STATEMENT REGARDING SUBJECT MATTER AND APPELLATE JURISDICTION

Appellee concurs in Appellants' Statement Regarding Subject Matter and Appellate Jurisdiction.

STATEMENT OF ISSUES PRESENTED FOR REVIEW

I. Whether the District Court properly exercised its discretion when it approved a settlement between Plaintiff, the Litigation Trustee, and Defendants, Sault Ste. Marie Tribe of Chippewa Indians and Kewadin Casinos Gaming Authority, two defendants in a multi-defendant bankruptcy adversary proceeding, after first conducting an evidentiary hearing and then listening to oral argument on the propriety of the proposed settlement, and after it fully set forth its findings and conclusions in a 30-page opinion and order.

II. Whether the District Court properly denied Appellants' motion for reconsideration where the basis for the motion for reconsideration was evidence that was available to Appellants for over 12 years but was not presented to the District Court during the evidentiary hearing or during oral argument on the proposed settlement.

COUNTER-STATEMENT OF THE CASE

This appeal involves an unremarkable order of the United States District Court for the Eastern District of Michigan (the "District Court") approving a settlement[1] with two of several defendants in a multi-defendant bankruptcy adversary proceeding brought to set aside and recover fraudulent transfers totaling in excess of $175 Million (the "Settlement Order") (Settlement Order, RE 16, Page ID # 429-431).[2] The settlement relates to an adversary proceeding that was originally initiated by the Official Committee of Unsecured Creditors of Greektown Holdings, LLC (the "Committee"). Following confirmation of the Plan (as defined below), the Litigation Trustee (also as defined below) was substituted as party-plaintiff in the place and stead of the Committee (Substitution Order, Bankr. Adv. Pro. RE 64, pp. 1-2.) Appellants are non-settling defendants in this adversary proceeding. Between them, Appellants received constructively fraudulent transfers totaling over $145 Million. If the settlement at issue in this

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[1] The terms of the settlement are described *infra* at pp. 11 - 12.

[2] In this Brief the Litigation Trustee will cite to the District Court record as "RE __, Page ID # __." The Litigation Trustee will cite to the record of the United States Bankruptcy Court for the Eastern District of Michigan in *In re Greektown Holdings, LLC, et al.*, Bankruptcy Case No. 08-53104, as "Bankr. RE __, p. ___." The Litigation Trustee will cite to the record of the Bankruptcy Court adversary proceeding captioned, *Buchwald Capital Advisors LLC, solely in its capacity as Litigation Trustee for the Greektown Litigation Trust v. Papas, et al.*, Adversary Proceeding No. 10-05712, as "Bankr. Adv. Pro. RE __, p. __."

appeal is finally approved, Appellants will be the sole remaining defendants in this case.

The Settlement Order was entered over Appellants' objection following extensive briefing in both the United States Bankruptcy Court for the Eastern District of Michigan (the "Bankruptcy Court") and the District Court, and after a lengthy evidentiary hearing and oral argument in the District Court held on June 27, 2012. Appellants do not and cannot challenge the reasonableness of the Settlement Agreement or its underlying economic terms because Appellants are not creditors of Greektown Holdings, LLC ("Greektown Holdings") and lack standing to raise such an objection. Thus, the principal issue on appeal is whether the District Court abused its discretion by entering the Settlement Order which contains a claims bar order in favor of the settling defendants (the "Claims Bar"). The Claims Bar is neither "breathtaking" in scope, nor "extraordinary." Appellants' adjective-laden hyperbole notwithstanding, the Claims Bar tracks Michigan (and New York) law, and such claims bar orders are common in connection with a settlement with some, but not all, defendants in multi-defendant litigation.

A. The Bankruptcy Proceedings and the Initiation of the Fraudulent Transfer Action.

On May 29, 2008 (the "Petition Date"), Greektown Holdings and its subsidiary, Greektown Casino, LLC ("Greektown Casino"), along with several affiliated entities filed their voluntary petitions for relief under chapter 11 of the United States Bankruptcy Code (the "Bankruptcy Proceedings") in the Bankruptcy Court. On December 7, 2009, the Second Amended Joint Plans of Reorganization for the Debtors Proposed by Noteholder Plan Proponents Including Official Committee of Unsecured Creditors and Indenture Trustee (Plan, Bankr. RE 1907, pp. 1-83) (the "Plan") was filed. On January 22, 2010, the Bankruptcy Court entered the Order Confirming Second Amended Joint Plans of Reorganization for the Debtors Proposed by the Noteholder Plan Proponents Including the Official Committee of Unsecured Creditors and Indenture Trustee (Confirmation Order, Bankr. RE 2046, pp. 1-61) The Plan went effective on or about June 30, 2010. Pursuant to the terms of the Plan, a litigation trust was created and Buchwald Capital Advisors LLC was designated as the Litigation Trustee for the newly-formed Greektown Litigation Trust.

Prior to confirmation of the Plan, on or about May 28, 2010, the Bankruptcy Court authorized the Committee to file an adversary complaint (the "Fraudulent Transfer Action") against the Sault Saint Marie Tribe of Chippewa Indians, the Kewadin Casinos Gaming Authority (collectively, the "Tribe Defendants"),

Dimitrios ("Jim") and Viola Papas and Ted and Maria Gatzaros (collectively, the "Appellants"), Barden Nevada Gaming, LLC and Barden Development, Inc. (collectively, the "Barden Defendants") and the Lac Vieux Desert Band of Lake Superior Chippewa Indians ("Lac Vieux").[3] (Standing Order, Bankr. RE 2279, pp. 1-2) The Fraudulent Transfer Action complaint alleges, among other things, that the defendants received transfers from the Debtor Greektown Holdings totaling over $175 Million for which the defendants provided no or inadequate consideration, and which transfers may be avoided and recovered pursuant to Sections 544 and 550 of the United States Bankruptcy Code, 11 U.S.C. § 101, *et. seq.* (the "Bankruptcy Code") and the Michigan Uniform Fraudulent Transfer Act, Mich. Comp. Laws Ann. § 566.31, *et seq.* (Complaint, Bankr. Adv. Pro. RE 1, pp. 1-37) Pursuant to a consent order of the Bankruptcy Court dated August 14, 2010 (Substitution Order, Bankr. Adv. Pro. RE 64, pp. 1-2), the Litigation Trustee was substituted as plaintiff in the Fraudulent Transfer Action.

B. Nature of the Fraudulent Transfer Action.

The Fraudulent Transfer Action arises out of a December 2005 transaction whereby Greektown Holdings incurred $185 Million of debt by selling notes to various noteholders (the "2005 Debt Transaction") and then immediately

[3] The Litigation Trustee has since settled the Fraudulent Transfer Action as to the Barden Defendants and Lac Vieux, and final orders approving those settlements have been entered by the Bankruptcy Court.

distributed substantially all of that $185 Million to the defendants in the Fraudulent Transfer Action, including Appellants, for no consideration. Because Greektown Holdings was rendered insolvent or left undercapitalized by these transfers, the transfers are avoidable and recoverable as fraudulent transfers. (Complaint, Bankr. Adv. Pro. RE 1, p. 1 – 37; *see e.g.* p. 13-14, ¶¶ 77, 79, p. 14, ¶ 85, p. 18, ¶¶ 109, 111, p. 19, ¶¶ 117, 119)

The $145 Million of cash transferred by Greektown Holdings to Appellants was to pay down debts owed by Monroe Partners, LLC and Kewadin Greektown Casino, LLC, the owners of Greektown Holdings. Greektown Holdings itself had no liability to Appellants and, therefore, Greektown Holdings did not receive any consideration whatsoever for these transfers. As a result of these transfers, however, Greektown Holdings was rendered insolvent or undercapitalized. (Complaint, Bankr. Adv. Pro. RE 1, p. 1 – 37; *see e.g.* p. 13-14, ¶¶ 77, 79, p. 14, ¶ 85, p. 18, ¶¶ 109, 111, p. 19, ¶¶ 117, 119) The Papases received approximately $90 Million and the Gatzaroses received approximately $55 Million. (Complaint, Bankr. Adv. Pro. RE 1, p. 8, ¶ 42)

In addition to the $145 Million in transfers to Appellants, Greektown Holdings also transferred $6 Million directly to the Tribe Defendants, and the Fraudulent Transfer Action seeks to recover this amount as well. (Complaint, Bankr. Adv. Pro. RE 1, p. 8, ¶ 42) Because the Tribe Defendants executed a

Guaranty Agreement to Fund Subscription Amount (the "Guaranty Agreement") (Guaranty Agreement, RE 20, Page ID # __-__)[4] in July 2000, the Tribe Defendants were believed to have guaranteed the debt owed by Greektown Holdings' owners to Appellants. Thus, the complaint alleges that the Tribe Defendants were indirectly benefitted by, and are equally liable for the transfers to Appellants, because these transfers reduced the Tribe Defendants' exposure under the Guaranty Agreement. (Litigation Trustee's Response in Support of Settlement Motion, Bankr. RE 3423, pp. 1-2; *see e.g.* Complaint, Bankr. Adv. Pro. RE 1, p. 8, ¶ 43)

C. The Settlement Motion and Withdrawal of Reference to District Court.

After extensive analysis and lengthy negotiations with the Tribe Defendants, the Litigation Trustee was persuaded that the Tribe Defendants' obligations under the Guaranty Agreement were never triggered and, therefore, the Litigation Trustee was unlikely to prevail on this "indirect benefit" theory. (Transcript, RE 11, Page ID # 342-343) The Litigation Trustee and the Tribe Defendants entered into a settlement agreement (the "Settlement Agreement") and, on April 13, 2012, the Litigation Trustee filed its *Corrected* Motion for Order Approving Settlement Agreement Between Buchwald Capital Advisors LLC, in its Capacity as the

[4] The Guaranty Agreement is attached as Exhibit D to Appellants' Motion for Reconsideration (defined below) and was filed under seal.

Litigation Trustee and Distribution Trustee, and Sault Ste. Marie Tribe of Chippewa Indians and Kewadin Casinos Gaming Authority (the "Settlement Motion") in the Bankruptcy Court.[5] (Settlement Motion, Bankr. RE 3359, pp. 1-34)

In response, Appellants filed their objections to the proposed settlement and argued that, as a result of the United States Supreme Court's decision in *Stern v. Marshall*, ___ U.S. ___, 131 S. Ct. 2594 (2011), the Bankruptcy Court lacked the constitutional authority to grant the Settlement Motion. Simultaneously, Appellants filed a Motion to Withdraw the Reference of the Settlement Motion to the District Court. (Motion to Withdraw Reference, RE 1, Page ID # 1-78) Although the Litigation Trustee disagreed that the Bankruptcy Court lacked the constitutional authority to grant the Settlement Motion, the Litigation Trustee nevertheless consented to have the Settlement Motion heard by the District Court. On June 6, 2012, the District Court entered its order withdrawing the reference on the Settlement Motion and setting a hearing date and additional briefing schedule (Order Withdrawing Reference, RE 5, Page ID # 87-89). Supplemental briefs were subsequently filed with the District Court by Appellants, the Litigation Trustee and the Tribe Defendants.

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[5] The "corrected" Settlement Motion was filed solely to correct the notice section of the original settlement motion to reflect that unsecured creditors would be receiving notice of the motion by first class mail.

D. Evidentiary Hearing on Settlement Motion and Entry of Settlement Order.

On June 27, 2012, the District Court conducted an evidentiary hearing and heard extensive oral argument on the Settlement Motion. At that hearing, the Litigation Trustee and the Chief Financial Officer of the Sault Ste. Marie Tribe of Chippewa Indians, Victor Matson, Jr., testified in favor of the settlement. Appellants offered no witnesses or direct testimony at the hearing in support of their objection to the Settlement Motion.

At the conclusion of the hearing, the District Court took the matter under advisement and, on July 13, 2012, issued its 30-page Opinion and Order granting the Settlement Motion. (District Court Opinion, RE 10, Page ID # 300-330) Thereafter, the Litigation Trustee and the Tribe Defendants filed their Notice Pursuant to E.D. Mich. L.R. 58.1 of Proposed Judgment and Entry of Judgment (Notice of Proposed Judgment, RE 12, Page ID # 408-413) to which the Appellants filed a Limited Objection (Objection to Notice of Proposed Judgment, RE 14, Page ID # 415-422) and proposed revised order. The Litigation Trustee and Tribe Defendants consented to Appellants' proposed revised order (Consent of Litigation Trustee and Tribe Defendants, RE 15, Page ID # 423-428) and, on August 9, 2012, the District Court entered the Settlement Order (Settlement Order, RE 16, Page ID # 429-431).

E. Appellants' Motion for Reconsideration.

Approximately two weeks after entry of the Settlement Order, the Appellants filed their Motion for Reconsideration and/or Clarification of August 9, 2012 Order Approving Settlement With Expansive Claims Bar (the "Motion for Reconsideration") (Motion for Reconsideration, RE 17, Page ID # 432-457). In the Motion for Reconsideration, Appellants argued that only subsequent to the Evidentiary Hearing did they rediscover the Guaranty Agreement, that they possibly have claims against the Tribe Defendants under the Guaranty Agreement, and that those claims might possibly be impaired by the Claims Bar. The District Court ordered the Litigation Trustee and the Tribe Defendants to file responses (Order Requiring Responses, RE 23, Page ID # 504-505), which responses were filed by the Tribe Defendants on September 11, 2012 (Tribe Response, RE 26, Page ID # 514-531), and the Litigation Trustee on September 12, 2012 (Litigation Trustee Response, RE 29, Page ID # 650-654). In their response, the Tribe Defendants thoroughly analyzed the relevant agreements and showed that Appellants had no claim against the Tribe Defendants thereunder. Appellants filed a motion for leave to file a reply brief in support of their Motion for Reconsideration which contained their proposed reply brief as an exhibit (Motion for Leave to Reply, RE 30, Page ID # 655-677).

The District Court granted Appellants' motion for leave to file a reply brief, but denied the Motion for Reconsideration in an order dated September 27, 2012 (Order Denying Reconsideration, RE 31, Page ID # 678-683). The District Court found that Appellants failed to raise a claim under the Guaranty Agreement despite having had copies of the Guaranty Agreement in their possession for over 12 years, and despite receiving additional copies from the Litigation Trustee and in response to a subpoena that Appellants themselves issued. The District Court, acting within its authority, declined to consider this evidence that was available to, but not presented by, Appellants in connection with their objection to the Settlement Motion, either in their written submissions or during the Evidentiary Hearing.

Appellants filed their Notice of Appeal on October 25, 2012 (Notice of Appeal, RE 33, Page ID # 693-737).

COUNTER-STATEMENT OF FACTS

On April 13, 2012, the Litigation Trustee filed the Settlement Motion (Settlement Motion, Bankr. RE 3359, pp. 1-34) seeking court approval of the Settlement Agreement between the Litigation Trustee and the Tribe Defendants. The pertinent terms of the Settlement Agreement include: (i) a settlement payment by the Tribe Defendants to the Litigation Trust of $2,750,000; (ii) the withdrawal of certain unsecured claims filed by the Tribe Defendants in the Bankruptcy Court; (iii) the dismissal of the Tribe Defendants only from the Fraudulent Transfer

Action and the dismissal of a separate adversary proceeding to recover preferential transfers; (iv) a mutual release of claims; (v) the Tribe Defendants' agreement to cooperate with the Litigation Trustee in connection with the Fraudulent Transfer Action; and (vi) entry of a final order approving the settlement which contains, in paragraph 6, the following Claims Bar:

> IT IS FURTHER ORDERED that all persons and entities are hereby permanently BARRED, ENJOINED and RESTRAINED from commencing, prosecuting, or asserting any claim against the Tribe Defendants, including claims for indemnity or contribution, arising out of or reasonably flowing from the facts or allegations or claims in this MUFTA Adversary Proceeding [the Fraudulent Transfer Action], whether arising under state, federal or foreign law as claims, cross-claims, counterclaims, or third-party claims, in this MUFTA Adversary Proceeding Action, in any federal or state court, or in any other court, arbitration, proceeding, administrative agency, or other forum in the United States or elsewhere (collectively, the "Barred Claims"). These Barred Claims include, but are not limited to, any and all claims arising out of or reasonably flowing from the transfers which are the subject of this MUFTA Adversary Proceeding.

(Settlement Agreement, Exhibit 2 to Settlement Motion, Bankr. RE 3359, p. 15-17, ¶¶ 1-6)

Appellants objected to the Settlement Motion in the Bankruptcy Court and filed a motion to withdraw the reference to the District Court. The parties stipulated to the withdrawal of reference and, after the filing of supplemental briefs and affidavits, the District Court held an evidentiary hearing on the Settlement Motion on June 6, 2012 (the "Evidentiary Hearing").

The first witness to testify at the Evidentiary Hearing was Lee Buchwald, president of Buchwald Capital Advisors LLC, the Litigation Trustee appointed pursuant to the confirmed bankruptcy Plan. Mr. Buchwald is an experienced trustee, having served as a litigation trustee or liquidation trustee under eight trusts, and also having served as chapter 7 bankruptcy trustee or chapter 11 bankruptcy trustee in other bankruptcy cases. (June 27, 2012 Transcript, RE 11, Page ID # 338-339) As part of those engagements, and also in connection with his work as a financial advisor in financial restructurings, Mr. Buchwald has had the opportunity to evaluate settlements "probably hundreds of times." (June 27, 2012 Transcript, RE 11, Page ID # 339)

Mr. Buchwald first explained the specific allegations against the Tribe Defendants in the Fraudulent Transfer Action; that the Tribe Defendants were sued to recover direct transfers to them of $6 Million and approximately $150 Million in transfers to other defendants that indirectly benefited the Tribe Defendants. (*Id.*) Mr. Buchwald noted that, in response to the complaint, the Tribe Defendants filed a motion to dismiss on the grounds of sovereign immunity, which motion is presently under advisement with the Bankruptcy Court. (June 27, 2012 Transcript, RE 11, Page ID # 339-340)

In addition to describing the terms of the settlement, Mr. Buchwald detailed how the negotiations with the Tribe Defendants began, how the negotiations were

conducted, and the various analyses that he or his professionals performed. Mr. Buchwald testified that the Tribe Defendants requested a meeting to initiate settlement discussions because they needed to refinance a large amount of debt, and they were having difficulty doing so with the Fraudulent Transfer Action hanging over them. (June 27, 2012 Transcript, RE 11, Page ID # 340-341) He testified that a first meeting was held in Detroit, Michigan which lasted approximately one-half day. (June 27, 2012 Transcript, RE 11, Page ID # 341) In attendance were Mr. Buchwald and his attorneys, Victor Matson, Jr., Chief Financial Officer of the Tribe Defendants, and the Tribe Defendants' general counsel, outside counsel and outside auditor. (*Id.*) At this meeting, the Tribe Defendants sought to demonstrate why they were not indirectly benefited by the transfers to the Appellants. In addition, the Tribe Defendants discussed their current financial condition, their difficulty in refinancing their large debt, and the difficulties associated with trying to collect a judgment against a sovereign entity, even were the motion to dismiss denied and such a judgment obtained. (*Id.*)

Following this meeting, Mr. Buchwald instructed his professionals to analyze the Tribe Defendants' claims, particularly regarding whether their obligations under the Guaranty Agreement were triggered and whether they received an indirect benefit from the transfers to the other defendants. This analysis included reviewing numerous documents received from the Tribe

Defendants, the Michigan Gaming Control Board and Reorganized Greektown. Additional negotiations were held over a three to four month period, both in person and by conference call. Among other things, Mr. Buchwald analyzed legal memoranda prepared by his counsel, as well as exchanges between his professionals and professionals for the Tribe Defendants. (June 27, 2012 Transcript, RE 11, Page ID # 341-342) Mr. Buchwald described these negotiations as "protracted, but arm's length negotiations. We were in a position of having to be extremely careful evaluating the merits and deficiencies in our case because there was quite a lot of money involved." (June 27, 2012 Transcript, RE 11, Page ID # 342)

Ultimately, Mr. Buchwald concluded that the agreed-upon settlement was very reasonable because the Litigation Trustee was unlikely to prevail on its "indirect benefit" theory and, therefore, what initially appeared to be a much larger claim was likely a $6 Million claim. (June 27, 2012 Transcript, RE 11, Page ID # 342-343) The financial recovery on the settlement of this $6 Million direct claim was at least 50 percent. (June 27, 2012 Transcript, RE 11, Page ID # 343) The settlement allowed the Litigation Trustee to avoid potential collectability issues and the costs associated with appeals if the Tribe Defendants' motion to dismiss was successful. (*Id.*) The settlement also allowed the Litigation Trustee to obtain discovery from the Tribe Defendants, including access to witnesses and

documents, that the Litigation Trustee would not otherwise be able to compel. (*Id.*) Mr. Buchwald also testified that he believed that the Claims Bar was a critical aspect of the settlement because, in order to obtain replacement financing, the Tribe Defendants needed to eliminate the risks inherent in having these claims hanging over them. (June 27, 2012 Transcript, RE 11, Page ID # 343) Importantly, Mr. Buchwald did not believe that he would have been able to achieve this settlement without agreeing to the Claims Bar. (June 27, 2012 Transcript, RE 11, Page ID # 345) Appellants were provided the opportunity to cross-examine Mr. Buchwald, which they did. (June 27, 2012 Transcript, RE 11, Page ID # 345-350)

The second witness at the Evidentiary Hearing was Victor Matson, Jr., Chief Financial Officer for the Tribe Defendants. In connection with the Tribe Defendants' briefs in support of the Settlement Motion, Mr. Matson provided two filed affidavits which were proffered as his direct testimony, and he was sworn and subject to cross-examination. (June 27, 2012 Transcript, RE 11, Page ID # 351-360) In his first affidavit, Mr. Matson explained the Tribe Defendants' unsuccessful efforts to find replacement financing, and the negative impact that the Fraudulent Transfer Action was having on those efforts. As a result, the Tribe Defendants sought to settle the Fraudulent Transfer Action on the negotiated terms contained in the Settlement Agreement. (Declaration of Victor Matson, Jr., Exhibit 1 to Tribe Defendants' Response to Appellants' Response Brief in Opposition to

Settlement Motion, RE 7, Page ID # 249-251) A material condition of the Settlement Agreement is the Claims Bar. (*Id.* at Page ID # 250, ¶ 9) Mr. Matson's supplemental affidavit disputed Appellants' contention that they hold or may hold claims against the Tribe Defendants. Attached to the Declaration of Grant S. Cowan (Cowan Declaration, RE 27, Page ID # 532-534) were copies of comprehensive releases of the Tribe Defendants executed by each of the Appellants. (Releases, RE 28, Page ID # __-__)[6]

Appellants were provided the opportunity to cross-examine Mr. Matson, which they did (June 27, 2012 Transcript, RE 11, Page ID # 354- 358). Although they were provided the opportunity to do so, Appellants did not present evidence and did not call any witnesses to testify against the settlement at the Evidentiary Hearing. (June 27, 2012 Transcript, RE 11, Page ID # 360) Similarly, Appellants did not request a recess or adjournment of the Evidentiary Hearing for the purpose of returning and presenting witnesses, nor did Appellants request an opportunity for further briefing.

After the conclusion of testimony, the District Court heard extensive oral arguments from counsel for the Litigation Trustee, the Tribe Defendants and the Appellants. The District Court then took the matter under advisement. On July 13, 2012, the District Court issued a 30-page Opinion and Order granting the

[6] The Releases were filed under seal.

Settlement Motion (District Court Opinion, RE 10, Page ID # 300-330) and, on August 9, 2012, the District Court entered the Settlement Order (Settlement Order, RE 16, Page ID # 429-431). In its Opinion, the District Court concluded that the proposed settlement was fair and reasonable after thoroughly considering all of the applicable factors, including probability of success on the merits; anticipated difficulties, if any, in matters of collection; the complexity and expense of the underlying litigation; and the paramount interest of creditors. (District Court Opinion, RE 10, Page ID # 327-329) *See, e.g., Hindelang v. Mid-State Aftermarket Body Parts, Inc. (In re MQVP, Inc.)*, 477 F. App'x 310, 313 (6th Cir. 2012) (applicable settlement factors). Based upon the uncontested testimony of Mr. Buchwald and Mr. Matson, the District Court found that the terms of the Settlement Agreement were the result of protracted arm's length negotiations, that the settlement represented a near 50% recovery of complicated litigation involving significant legal issues, including sovereign immunity, and significant collection issues as well. The settlement also requires the cooperation of the Tribe Defendants that would otherwise not be available. (District Court Opinion, RE 10, Page ID # 327-329) The District Court further determined that imposition of the Claims Bar was necessary to enable the Tribe Defendants to refinance significant debt obligations (District Court Opinion, RE 10, Page ID # 310-312) and, therefore, was a critical element of the settlement. The District Court also

concluded that Appellants were not prejudiced by the Claims Bar because the Claims Bar did not extinguish any viable claims that Appellants alleged to have against the Tribe Defendants. (District Court Opinion, RE 10, Page ID # 312-320)

As more fully described *supra*, Appellants' Motion for Reconsideration was denied on September 27, 2012 (Order Denying Reconsideration, RE 31, Page ID # 678-683). This appeal followed.

SUMMARY OF APPELLEE'S ARGUMENT

The District Court approved a settlement between the Litigation Trustee and the Tribe Defendants, two of several defendants in a multi-defendant adversary proceeding to recover fraudulent transfers totaling over $175 Million. Because they are not creditors of Greektown Holdings, Appellants did not have standing to object to the reasonableness of the settlement or its underlying economic terms. The Settlement Agreement contains a Claims Bar that bars claims by the non-settling defendants against the settling defendants. The Claims Bar was incorporated into the Settlement Order, and the District Court found that it was an essential aspect of the settlement. The District Court also recognized that claims bar orders are not unusual in connection with a settlement with some, but not all, defendants in a multi-defendant litigation and, in fact, Michigan law precludes contribution claims by non-settling defendants. Mich. Comp. Laws Ann. § 600.2925d. Despite the fact that claims bar orders are commonplace, Appellants

objected to the Claims Bar, arguing that it precluded Appellants from bringing certain claims against the settling Tribe Defendants.

While a court need only canvass the issues in considering a proposed bankruptcy settlement, the District Court held an evidentiary hearing to consider the proposed settlement, and subsequently issued a 30-page opinion and order carefully considering and rejecting each of Appellants' various objections to the Claims Bar. Unquestionably, the District Court properly exercised its discretion.

After the District Court issued its opinion and order, Appellants moved for reconsideration, arguing that *perhaps* the Claims Bar *might* bar claims under the Guaranty Agreement executed in July 2000; an agreement that Appellants have had in their possession for over 12 years. Lest they forgot about it, Appellants also received two additional copies of the Guaranty Agreement in the year or so prior to the settlement hearing, including one copy that was provided in response to a subpoena that they themselves issued. Appellants were unable to credibly show why they failed to mention possible claims under the Guaranty Agreement in their briefs, during their cross-examination of witnesses who testified about the guaranty on direct examination, or during oral argument on their objections to the settlement, despite their obvious knowledge of it. The District Court properly exercised its discretion when it declined to consider this evidence because it was

clearly available, but was not presented by Appellants at the hearing on the Settlement Motion, despite multiple opportunities to do so.

Nevertheless, even had they been raised, any alleged claims under the Guaranty Agreement would have been rejected as specious. The Tribe Defendants' obligations under the Guaranty Agreement were deliberately limited and would only be triggered if and when the Tribe Defendants received distributions from Greektown Casino in excess of a certain threshold. Appellants have never alleged that the Tribe Defendants received distributions in excess of the established threshold prior to December 2006. Since December 2006, it is undisputed that the Tribe Defendants have not received any distributions from Greektown Casino, nor will they ever receive distributions in the future, having ceased to have any direct or indirect ownership interest in Greektown Casino since the Plan went effective in June 2010. In short, the Tribe Defendants' obligations under the Guaranty Agreement were never triggered and can never be triggered regardless of whether Appellants are required to disgorge all or any portion of the $145 Million in fraudulent transfers they received.

STANDARD OF REVIEW

Ordinarily, this Court reviews "the bankruptcy court's decision directly, according no deference to the district court." *Nat'l Union Fire Ins. Co. v. VP Bldgs., Inc.*, 606 F.3d 835, 837 (6th Cir. 2010) (internal quotation marks omitted).

However, in this case, the District Court was assigned the task of approving the Settlement Agreement, and thus the District Court's decision is at issue.

The District Court's approval of the settlement at issue herein is reviewed by this Court for an abuse of discretion. *Lyndon Prop. Ins. Co. v. E. Ky. Univ.*, 200 F. App'x 409, 413 (6th Cir. 2006). In exercising its discretion, the District Court was "charged with an affirmative obligation to apprise itself of the underlying facts and to make an independent judgment as to whether the compromise is fair and equitable." *In re MQVP, Inc.*, 477 F. App'x at 313 (quoting *Reynolds v. C.I.R.*, 861 F.2d 469, 473 (6th Cir. 1988)). In making this determination, the District Court was required to consider "'(a) The probability of success in the litigation; (b) the difficulties, if any, to be encountered in the matter of collection; (c) the complexity of the litigation involved, and the expense, inconvenience and delay necessarily attending it; (d) the paramount interest of the creditors and a proper deference to their reasonable views in the premises.'" *Id.* at 313 (quoting *Bard v. Sicherman* (*In re Bard)*, 49 F. App'x 528, 530 (6th Cir. 2002)). In considering whether to approve a bankruptcy settlement, a bankruptcy or district court "need not hold a mini-trial or write an extensive opinion every time he approves or disapproves a settlement. The judge need only apprise himself of the relevant facts and law so that he can make an informed and intelligent decision, and set out the reasons for his decision." *In re MQVP,* 477 F. App'x at 313. In this case, the

District Court did both and, as discussed below, properly fulfilled its obligations thereby.

The District Court denied Appellants' Motion for Reconsideration because it was premised entirely on evidence that was in Appellants' possession for over 12 years prior to, but was not raised during, the Evidentiary Hearing. The District Court's denial of Appellants' Motion for Reconsideration is also reviewed under an abuse of discretion standard. *Huff v. Metropolitan Life Ins. Co.*, 675 F.2d 119, 122 (6th Cir. 1982).

ARGUMENT

Appellants do not and cannot challenge the reasonableness of the Settlement Agreement or its underlying economic terms because Appellants are not creditors of Greektown Holdings and lack standing to raise such an objection. *See Kabro Assocs., LLC v. Colony Hill Assocs. (In re Colony Hill Assocs.),* 111 F.3d 269, 273 (2d Cir. 1997). Thus, Appellants' *sole* focus is the propriety of the Claims Bar.

Appellants' protestations to the contrary, claims bar orders are commonly used to encourage partial settlement of litigation involving multiple defendants by barring contribution claims litigation against the settling defendants by the non-settling defendants. *In re Tribune Co.*, 464 B.R. 126, 176 (Bankr. D. Del. 2011). "'Without the ability to limit the liability of settling defendants through bar orders it is likely that no settlements could be reached.'" *Id.* at 177 (quoting *In re*

Worldcom, Inc. ERISA Litig., 339 F. Supp. 2d 561, 568 (S.D.N.Y. 2004)). This Court similarly has approved of the use of claims bar orders in connection with court-approved settlements. *McDannold v. Star Bank, N.A.*, 261 F.3d 478, 484-486 (6th Cir. 2001). In considering the settlement and Claims Bar in this case, the District Court recognized that "where the rights of third parties are affected, their interests too must be considered." (District Court Opinion, RE 10, Page ID # 305, quoting *Williams v. Vukovich,* 720 F.2d 909 (6th Cir. 1983)) In making this consideration, however, the District Court was not required to consider the interests of Appellants in a vacuum. As the sole objecting parties to the settlement, Appellants had an obligation to credibly show that they had potentially viable claims against the Tribe Defendants that would be "unfairly" or "inequitably" impacted by the Claims Bar; something that they utterly failed to do. *See McDannold,* 261 F.3d at 485, n. 4 (in rejecting an objection to claims bar order because of failure to show harm, this Court stated "Appellants have not explained how these third-party defendants are liable to plaintiffs in any amount or on any theory giving rise to a claim for contribution from the settling defendants.")

I. APPELLANTS DID NOT IDENTIFY ANY VIABLE CLAIMS, POTENTIAL OR ACTUAL, THAT WOULD BE ADVERSELY AFFECTED BY THE CLAIMS BAR.

Although Appellants argue that the Claims Bar was not fair and equitable to them, they have never credibly explained why. In the District Court, for example,

Appellants raised potential claims for common law indemnity, contribution, fraud, and deepening insolvency.[7] As discussed below, far from abusing its discretion, the District Court thoroughly considered each of these claims and discounted them as factually and legally untenable.

A. Appellants Cannot Assert a Contribution Claim Against the Tribe Defendants.

Under Michigan law, Appellants do not have any contribution claims against the Tribe Defendants for several reasons. First, the claims against Appellants, as well as each of the other defendants, arise out of separate and discrete transfers made to and received by each of the defendants. All of the defendants know exactly the amount of money that was transferred to them following the 2005 Debt Transaction. Therefore, there is not a single, indivisible injury from which the defendants could seek contribution from each other under a theory of common liability. *See Gerling Konzern Allgemeine Versicherungs AG v. Lawson*, 472 Mich. 44, 56, 693 N.W. 2d 149, 155 (2005) (noting that "'common liability' exists in situations in which multiple tortfeasors are liable for the same injury to a person

[7] In this Court, Appellants do not even attempt to identify claims affected by the Claims Bar. Rather, they feign ignorance, alleging that its "too early in discovery to determine all of the potential claims," Appellants' Brief on Appeal at p. 36, and that it was "unfair and prejudicial [of the District Court] to force them to conjure up all such potential hypothetical claims at the beginning of discovery and in a matter of weeks." *Id.* As discussed *infra*, however, there can be no "potential future claims." All operative facts upon which such claims could be based have long been known.

or property or for the same wrongful death. Common liability exists in such cases because multiple tortfeasors are alleged to be 'responsible for an accident which produced a single indivisible injury.'")

Moreover, neither common-law nor statutory contribution is available to Appellants arising out of the Fraudulent Transfer Action. It is well-settled law in Michigan that there is no cause of action for common-law contribution. *See Hastings Mut. Ins. Co. v. State Farm Ins. Co.*, 177 Mich. App. 428, 437, 442 N.W.2d 684, 688 (1989) (recognizing that contribution is controlled entirely by statute).

Statutory contribution is equally unavailable to Appellants. As a threshold issue, Appellants would need to successfully show that claims arising out of allegedly fraudulent transfers are subject to Michigan's statutory contribution scheme. There are no Michigan cases supporting this argument. It is, however, likely that a court would rule that this statutory scheme, which was enacted as part of Michigan's 1995 tort reform legislation, does not apply to fraudulent transfers. The statute provides that contribution is only available in cases involving "the same injury." *See* Mich. Comp. Laws Ann. §§ 600.2925a, 600.2925d. This is consistent with traditional common-law contribution jurisprudence, which provides that contribution may be available in cases involving multiple tortfeasors who are liable for a common injury. As the District Court properly concluded, in this case

there is no common injury. Each defendant is liable for a discrete and separate fraudulent transfer received by it. The injury suffered by the Litigation Trustee relating to the transfers received by the Tribe Defendants is separate and distinct from the injury suffered by the Litigation Trustee relating to the transfers received by Appellants. Accordingly, the statutory contribution scheme does not apply.

Nevertheless, the District Court properly held that, even assuming the statutory contribution scheme somehow applies, the Tribe Defendants would be similarly immune from a claim for statutory contribution pursuant to Mich. Comp. Laws Ann. § 600.2925d, which provides that a settlement release entered into in good-faith "**discharges the person to whom it is given from all liability for contribution to any other person for the injury or wrongful death**." (emphasis added) Appellants have not alleged that the Settlement Agreement was not entered into in good faith, nor could they. *See Miller v. Riverwood Rec. Ctr.*, 215 Mich. App. 561, 570, 546 N.W.2d 684, 689 (1996) ("Instead of concentrating on whether the settlement amount is reasonably related to the settling defendant's proportional liability as compared to other tortfeasors, we conclude that 'good faith' should be analyzed with respect to the settling parties' negotiations and intent.")

It is apparent that the District Court thoroughly considered whether Appellants had a contribution claim under Michigan law,[8] and properly concluded that the Tribe Defendants were immune from any contribution claim by statute even without reference to the Claims Bar. It simply cannot be said that the District Court abused its discretion by failing to properly consider the relevant facts and law so as to make an informed and intelligent decision.

B. Appellants Do Not Have an Indemnity Claim Against the Tribe Defendants.

Under applicable Michigan law, even without the Settlement Agreement's Claims Bar, Appellants are similarly precluded from bringing any claims for indemnification against the Tribe Defendants. There are two types of indemnification in Michigan – contractual and common law. Appellants did not identify *any* contract with the Settling Defendants that would provide them with a contractual indemnification claim – because none exists.

With respect to common law indemnification, it is well-settled in Michigan that common law indemnification is only available to a party that is free from

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[8] In the District Court, for the first time, Appellants claimed that New York law *may* apply to their hypothetical contribution claim against the Tribe Defendants. Under New York law, the Tribe Defendants are similarly relieved from any contribution claims by nonsettling tortfeasors. N.Y. Gen. Oblig. § 15-108(a). To the extent Appellants' liability is limited to their equitable share of the damages, that amount will be determined at trial. The Settlement Agreement does nothing to alter that result.

negligence or fault. *Farmer v. Christensen*, 229 Mich. App. 417, 426, 581 N.W.2d 807, 812 (1998). "The requirement that the indemnitee be without fault is based in part on the underlying principle that liability should fall on the party best able to adopt preventive measures." *Id.* Common law indemnification only applies in situations where a party may be found to be vicariously liable for the acts of another, but was not actively at fault. This rule clearly does not apply in this situation. The Fraudulent Transfer Action relates to individual fraudulent transfers made to various defendants, including Appellants. There is no allegation that Appellants are somehow vicariously liable for the acts of the Tribe Defendants, arguably entitling them to common law indemnification. Instead, the allegations against Appellants relate to their direct receipt of transfers totaling $145 Million, irrespective of any actions taken by the Tribe Defendants. (District Court Opinion, RE 10, Page ID # 313-314) Accordingly, as the District Court correctly concluded, common law indemnification cannot be asserted by Appellants against the Tribe Defendants. Again, the District Court, properly apprised, made an informed and intelligent decision on this potential claim.

C. Appellants Cannot Bring a Claim Based on Deepening Insolvency.

In the District Court, Appellants asserted a potential claim based on the "emerging theory" of deepening insolvency. In support of this theory, they cite to *MCA Financial Corp. v. Grant Thornton, LLP*, 263 Mich. App. 152, 687 N.W.2d

850 (2004). Yet, since the *MCA Financial* case was decided eight years ago, the theory of deepening insolvency has been rejected by numerous courts. *See Trenwick Am. Litig. Trust v. Ernst & Young, L.L.P.*, 906 A.2d 168, 174 (Del. Ch. 2006) ("Equally important, however, is that Delaware law does not recognize this catchy term as a cause of action, because catchy though the term may be, it does not express a coherent concept.") Thus, it is unclear whether such a claim was ever viable under Michigan law. Even assuming such a claim is viable, the District Court correctly concluded that Appellants would not have the right to bring it. Deepening insolvency is a derivative claim that belongs to the Greektown Holdings' estate. *Official Comm. of Unsecured Creditors v. R.F. Lafferty & Co., Inc.*, 267 F.3d 340, 348 (3d Cir. 2001) Such a claim would have to be brought on behalf of the estate by the debtor, a subsequently appointed trustee or, as in the *R.F. Lafferty* case, with bankruptcy court authorization by the creditors' committee or a creditor of the estate. *See Canadian Pac. Forest Prods. v. J.D. Irving, Ltd. (In re The Gibson Group, Inc.)*, 66 F.3d 1436, 1446 (6th Cir. 1995) (setting forth the criteria for granting committee derivative standing). Appellants clearly do not have the right to assert such a claim. Indeed, Appellants are not even creditors of Greektown Holdings. (District Court Opinion, RE 10, Page ID # 306)

Equally important, even assuming "deepening insolvency" remains a viable tort action, the District Court properly determined that such an action could only be

brought against officers and directors of the debtor, all of whom -- current and former -- were released years ago in connection with the Plan and Plan confirmation order. (District Court Opinion, RE 10, Page ID # 320) *See e.g.*, Confirmation Order, Bankr. RE 2046, p. 59, ¶ 71(b). The Tribe Defendants were not officers and directors of Greektown Holdings, although certain of the Tribe's members did serve in those capacities. Thus, the District Court properly considered and rejected Appellants' "one-sentence claim that discovery 'may reveal' such a claim . . . ." (District Court Opinion, RE 10, Page ID # 320)

D. Appellants Were Not Defrauded.

In the District Court, Appellants identified a "potential" fraud claim, asserting that it is possible that projections submitted to the Michigan Gaming Control Board in 2005 – at the time Appellants *received* $145 million – were misleading to them. But they failed to identify how they could possibly have been defrauded. As the District Court correctly noted, Appellants did not invest new money in 2005 in reliance on such projections; the misrepresentations, if any, were not made to them, but to the Michigan Gaming Control Board; and, most importantly, the projections enabled them to *actually receive* cash transfers totaling $145 million. (District Court Opinion, RE 10, Page ID #318-319)

E. The District Court Is Not Required to Hold a Second Evidentiary Hearing.

Relying exclusively on this Court's opinion in *McDannold v. Star Bank, N.A.*, *supra*, Appellants argue that "where there exists a bar order extinguishing possible legal claims of non-settling defendants, an evidentiary fairness hearing and court approval of the bar are 'necessary to protect the due process rights of third parties.'" Appellants' Brief on Appeal, p. 33. Appellants, of course, ignore the fact that the District Court did hold the Evidentiary Hearing to consider the settlement and Claims Bar in which Appellants participated. Appellants, for reasons they have not shared, chose not to call any witnesses or introduce any evidence at this hearing, electing instead to rely on their cross-examination of Appellees' witnesses and oral argument.

Even had the District Court not conducted the Evidentiary Hearing, however, *McDannold* does not require that an evidentiary hearing be held in this case in any event. In *McDannold, supra*, the district court approved of a claims bar in a multi-defendant litigation involving ERISA. The district court concluded that a hearing was unnecessary because the non-settling defendants had no right of contribution under ERISA or Ohio law. The *McDannold* Court concluded that, only where there is a basis under applicable law for asserting contribution claim liability, an evidentiary hearing is required to determine whether the settling defendants are paying their share of that liability. *McDannold*, 261 F.3d at 484.

Thus, where there is no basis for such an assertion of a contribution claim, a fairness hearing is not required.

The *McDannold* Court remanded the proposed settlement back to the district court to evaluate whether possible contribution claims existed under ERISA because:

> the basis for the District Court's rejection of the right [of contribution] has been modified by a recent Supreme Court decision and we remand for reconsideration in light of that authority. In short, the District Court premised its ruling on the absence of common liability under ERISA. Because the settling defendants served as legal and financial advisors only, the District Court found that they were not fiduciaries of the plan and therefore not liable under ERISA. Though we agree that the settling defendants did not serve as plan fiduciaries, we do not think this status necessarily defeats common liability under ERISA of disposes of appellants' claimed right to contribution [under ERISA].

Id. at 485-486.

In this case, unlike the ERISA issues presented in *McDannold*, the claims raised by Appellants are governed exclusively by Michigan law. The District Court carefully considered the proffered bases for common liability and concluded that Appellants could not establish a "common injury" entitling them to assert contribution claims. (District Court Opinion, RE 10, Page ID# 315) In the absence of colorable contribution claims, a fairness hearing was simply not required.

Moreover, even were such contribution claims available to Appellants, Michigan law precludes contribution claims by non-settling defendants against settling defendants. Mich. Comp. Laws Ann. § 600.2925d. Rather, any allocation or fairness hearing would be conducted during the actual trial, at which time the trier of fact is required to apportion fault among multiple tortfeasors, including those released from liability under section 600.2925d and who are no longer parties to the action. Mich. Comp. Laws Ann. § 600.6304.

F. The Claims Bar is Not an Improper Third-Party Release.

Misconstruing this Court's opinion in *Class Five Nev. Claimants v. Dow Corning Corp. (In Re Dow Corning Corp.)*, 280 F.3d 648 (6th Cir. 2002), Appellants argue that the Claims Bar constitutes an improper release of third-party claims. In *Dow Corning*, the very specific issue considered by this Court was "whether a bankruptcy court has the authority to enjoin a non-consenting creditor's claims against a non-debtor to facilitate a reorganization plan." *Id.* at 656. The Court approved the use of a non-consensual injunction under certain circumstances not applicable to this case. Appellants essentially argue that the holding in *Dow Corning* effectively precludes the use of claims bar orders in settlements in multi-defendant litigation. Appellants are wrong.

In the first instance, Appellants were not creditors of the debtors Greektown Holdings and Greektown Casino in the underlying bankruptcy case and, therefore,

the narrow issue presented in *Dow Corning* is inapplicable here. Second, and more importantly, claims bar orders are common in multi-defendant litigation where the rights of non-settling defendants are protected by "defendants paying their fair share of liability," *McDannold*, 261 F.3d at 484, or by apportioning fault among multiple tortfeasors under state statute or other applicable law. *See* Mich. Comp. Laws Ann. § 600.6304. These mechanisms provide non-settling defendants with alternatives to protect their interests when co-defendants settle during the case. *See In re Tribune Co.*, 464 B.R. at 178 (rejecting similar argument that claims bar is an improper nonconsensual release of third-party claims) In *Dow Corning*, by contrast, creditors were being permanently enjoined from pursuing colorable claims against non-debtor third parties where there was no alternative method of protecting such claims because fault allocation concepts were inapplicable and plan distributions would be the creditors' only source of financial recovery.

Finally, and perhaps more importantly, the Fraudulent Transfer Action here was pending for over two years when the District Court approved the Claims Bar. In that time, Appellants have never raised or asserted any claims against the Tribe Defendants. During the Evidentiary Hearing in the District Court, Appellants were unable to articulate any claim that was legally or factually defensible despite being given repeated opportunity to do so. Remarkably, in their Brief on Appeal in this Court, Appellants do not even bother to try to identify possible claims, and what

claims they did raise in the District Court get only a passing reference in their Statement of the Case. Appellants' Brief on Appeal, p. 22. In the absence of more, the District Court's refusal to accept unsubstantiated conjecture to withhold approval of a good faith, arm's length settlement was an entirely proper exercise of the District Court's discretion.

II. THE DISTRICT COURT PROPERLY DENIED APPELLANTS' MOTION FOR RECONSIDERATION BECAUSE IT WAS BASED ENTIRELY ON AVAILABLE EVIDENCE THAT WAS NOT PRESENTED TO THE DISTRICT COURT IN CONNECTION WITH THE SETTLEMENT MOTION OR EVIDENTIARY HEARING.

In July 2000, twelve years before the District Court denied Appellants' Motion for Reconsideration, Appellants and the Tribe Defendants executed the Guaranty Agreement and, presumably, Appellants have maintained a copy of the Guaranty Agreement since that time. The Guaranty Agreement was also produced to Appellants in connection with the Litigation Trustee's initial disclosures on March 3, 2011, almost a year and a half before the Evidentiary Hearing on the approval of the Settlement Motion, and by the Chapter 7 Trustee of co-debtor Monroe Partners in response to a subpoena issued by Appellants' counsel. That same guaranty was referenced in briefing on the Settlement Motion and was the subject of direct testimony by Lee Buchwald and Victor Matson, Jr. during the Evidentiary Hearing. Notwithstanding these facts, all of which are undisputed, Appellants never raised a possible claim under the Guaranty Agreement, regardless

of whether such claim was fixed or contingent, ripe or unripe, prior to filing the Motion for Reconsideration and, in any event, such a claim simply does not exist.

A. The District Court Did Not Abuse Its Discretion by Refusing to Consider Evidence in Possession of Appellants for Over 12 Years but Which Was Not Presented in Connection With the Settlement Motion or Evidentiary Hearing.

As the District Court correctly noted, because the Federal Rules of Civil Procedure do not provide for a motion for reconsideration, such motions, if timely served, are considered motions to alter or amend judgments pursuant to Fed. R. Civ. P. 59(e). *Huff,* 675 F.2d at 122. This Court generally reviews for an abuse of discretion a district court's order denying a motion for reconsideration. *Id.* A district court's decision on whether to consider untimely evidence is in the nature of a "trial conduct issue," which generally is left to the district court's discretion. Therefore, this Court reviews the district court's refusal to consider untimely evidence for abuse of discretion. It is not an abuse of discretion for a district court to decline to consider evidence submitted on motion for reconsideration when such evidence is not newly discovered and its credibility is doubtful. *Id.* at 122-23.

Appellants failed to raise any claim against the Tribe Defendants under the Guaranty Agreement despite the fact that Appellants had the Guaranty Agreement in their possession for over 12 years and despite the fact that they received two additional copies of the Guaranty Agreement before the Evidentiary Hearing; one

copy from the Litigation Trustee and one copy in response to a subpoena that they issued. Appellants never raised the Guaranty Agreement at the Evidentiary Hearing, during cross-examination or in oral argument, despite the fact that it was the principal subject of direct testimony. Appellants' argument, that they only subsequently identified a potential claim under the Guaranty Agreement, is singularly incredible and, therefore, the District Court did not abuse its discretion by denying the Motion for Reconsideration.

B. Any Claim Under the Guaranty Agreement is Not Subject to Future Conditions.

Appellants attempt to argue that, by denying their Motion for Reconsideration, the District Court essentially dismissed "a future contingent claim that was not ripe, had not yet accrued and was not at issue." Appellants' Brief on Appeal, p. 39. This argument is patently false. The Tribe Defendants' obligations under the Guaranty Agreement were carefully and deliberately limited. The Tribe Defendants' guaranty obligations would not be triggered *unless and until* the Tribe Defendants received distributions from Greektown Casino in excess of an established floor calculated by the parties to the Guaranty Agreement on a regular basis. Appellants have never alleged that the Tribe Defendants received distributions in excess of the established floor prior to December 2006. Since December 2006, it is undisputed that the Tribe Defendants have not received any distributions from Greektown Casino, nor will they ever receive distributions in the

future, having ceased to have any direct or indirect ownership interest in Greektown Casino since the Plan went effective in June 2010. In short, the Tribe Defendants' obligations under the Guaranty Agreement were never triggered and can never be triggered regardless of whether the Litigation Trustee is ultimately successful against Appellants in the Fraudulent Transfer Action. Therefore, Appellants simply do not have a "future contingent claim."

CONCLUSION

A district court is not required to withhold approval of a settlement agreement negotiated in good faith where the objecting party cannot articulate any legitimate basis to do so. Here, Appellants utterly failed to identify any viable claims against the Tribe Defendants that would be adversely impacted by the Claims Bar. Therefore, the District Court did not abuse its discretion by approving the Settlement Agreement containing the Claims Bar. Similarly, where Appellants were given ample opportunity to raise possible claims under the Guaranty Agreement but elected not do so, the District Court did not abuse its discretion by denying Appellants' Motion for Reconsideration. Therefore, for all of the foregoing reasons, Appellee respectfully requests this Court to affirm the District Court's Order approving the Settlement Motion and the District Court's Order denying Appellants' Motion for Reconsideration.

Respectfully submitted,

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Typeface Requirements, and Type Style Requirements

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains _____ words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type of style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word in 14 point Times New Roman style.

Respectfully submitted,

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CERTIFICATE OF SERVICE

Joel D. Applebaum, undersigned attorney for Appellee Buchwald Capital Advisors, LLC, Litigation Trustee for the Greektown Litigation Trust, certifies that a copy of

BRIEF OF PLAINTIFF – APPELLEE

BUCHWALD CAPITAL ADVISORS LLC, LITIGATION TRUSTEE

was filed with the Sixth Circuit Court of Appeals on March 6, 2013 using the ECF System which will send notification of such filing to all counsel of record.

Respectfully submitted,

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DESIGNATION OF RECORD

Litigation Trustee-Appellee, per 6 Cir. R. 28(b) and 6 Cir. R. 30(g), hereby designates the following portions of the record below:

DESCRIPTION OF ENTRY	DATE	RECORD ENTRY NO.	PAGE ID #
United States District Court for the Eastern District of Michigan Southern Division Case No. 2:12-cv-12340-PDB-RSW			
Defendants Dimitrios ("Jim") Papas, Viola Papas, Ted Gatzaros and Maria Gatzaros' Motion to Withdraw the Reference Regarding *Corrected* Motion for Order Approving Settlement Agreement Between Buchwald Capital Advisors LLC, in its Capacity as the Litigation Trustee and Distribution Trustee, and Sault Ste. Marie Tribe of Chippewa Indians and Kewadin Casinos Gaming Authority	5-30-12	1	3-78
Order (1) Withdrawing the Reference with Respect to *Corrected* Motion for Order Approving Settlement Agreement Between Buchwald Capital Advisors LLC, in its Capacity as the Litigation Trustee and Distribution Trustee, and Sault Ste. Marie Tribe of the Chippewa Indians and Kewadin Casinos Gaming Authority; (2) Setting Hearing Date; and (3) Revising the Briefing Schedule Attached to the Parties' June 5, 2012 Stipulation to Entry of Order Withdrawing the Reference (Dkt. No. 4, Ex. A)	6-6-12	5	87-89
Limited Response of the Sault Ste. Marie Tribe of Chippewa Indians and Kewadin Casinos Gaming Authority to Papas and Gatzaros Defendants' Response Brief in	6-21-12	7	229-270

Opposition to the Tribe Settlement Motion			
Opinion and Order Granting Corrected Motion for Order Approving Settlement Agreement Between Buchwald Capital Advisors LLC, in its Capacity as the Litigation Trustee and Distribution Trustee, and Sault Ste. Marie Tribe of the Chippewa Indians and Kewadin Gaming Authority (Bankr. Dkt. No. 3359)	7-13-12	10	300-330
Transcript for Motion for Order to Approve Settlement Agreement (Wednesday June 27, 2012 at 2:16 p.m.)	7-16-12	11	331-407
Notice Pursuant to E.D. Mich. LR 58.1 of Proposed Judgment and Entry of Judgment	7-19-12	12	408-413
Papas and Gatzaros Defendants' Limited Objection to Notice Pursuant to E.D. Mich. LR 58.1 of Proposed Judgment and Entry of Judgment	7-26-12	14	415-422
Notice of Consent to Entry of Revised Proposed Order Submitted by the Papas and Gatzaros Defendants	8-1-12	15	423-428
Order Approving Settlement Agreement Between Buchwald Capital Advisors LLC, in its Capacity as the Litigation Trustee and Distribution Trustee, and Sault Ste. Marie Tribe of Chippewa Indians and Kewadin Casinos Gaming Authority and Entry of Claims Bar Order	8-9-12	16	429-431
Defendants Dimitrios ("Jim") Papas, Viola Papas, Ted Gatzaros and Maria Gatzaros' Motion for Reconsideration and/or Clarification of August 9, 2012 Order Approving Settlement with Expansive Claims Bar	8-23-12	17	432-457

Guaranty Agreement – Exhibit D to Defendants Dimitrios ("Jim") Papas, Viola Papas, Ted Gatzaros and Maria Gatzaros' Motion for Reconsideration and/or Clarification of August 9, 2012 Order Approving Settlement with Expansive Claims Bar	8-23-12	20	SEALED
Order Requiring Responses to the Papas and Gatzaros Defendants' Motion for Reconsideration and/or Clarification (ECF No. 17)	8-29-12	23	504-505
Limited Response of the Sault Ste. Marie Tribe of Chippewa Indians and Kewadin Casinos Gaming Authority to the Papas and Gatzaros Defendants' Motion for Reconsideration/Clarification	9-11-12	26	514-531
Declaration of Grant S. Cowan in Connection with Tribe Defendants' Limited Response to Papas and Gatzaros Defendants' Motion for Reconsideration/Clarification	9-11-12	27	532-535
Gatzaros release Agreement dated as of December 1, 2005 (Exhibit F) and Papas release letter agreement dated December 1, 2005 (Exhibit G)	9-11-12	28	SEALED
Response of Buchwald Capital Advisors in Opposition to the Papas and Gatzaros Defendants' Motion for Reconsideration and Joinder in Limited Response of the Sault Ste. Marie Tribe of Chippewa Indians and Kewadin Casinos Gaming Authority to the Papas and Gatzaros Defendants' Motion for Reconsideration/Clarification	9-12-12	29	650-654
Papas and Gatzaros Defendants' Motion for Leave to File a Reply Brief in Support of Their Motion for Reconsideration and/or Clarification of August 9, 2012 Order Approving Settlement with Expansive Claims Bar and Brief in Support	9-17-12	30	655-677

Order (1) Granting the Papas and Gatzaros Defendants' Motion for Leave to File a Reply Brief in Support of Their Motion for Reconsideration (ECF No. 30) and (2) Denying the Papas and Gatzaros Defendants' Motion for Reconsideration and/or Clarification of the Court's August 9, 2012 Order Approving the Settlement Agreement Between the Tribe Defendants and the Trustees (ECF No. 17)	9-27-12	31	678-683
Notice of Appeal of Defendants Dimitrios ("Jim") Papas, Viola Papas, Ted Gatzaros and Maria Gatzaros	10-25-12	33	693-737

United States Bankruptcy Court for the Eastern District of Michigan Southern Division Case No. 08-53104			
Second Amended Joint Plans of Reorganization for the Debtors Proposed by Noteholder Plan Proponents Including Official Committee of Unsecured Creditors and Indenture Trustee	12-7-09	1907	1-83
Order Confirming Second Amended Joint Plans of Reorganization for the Debtors Proposed by Noteholder Plan Proponents Including Official Committee of Unsecured Creditors and Indenture Trustee	1-22-10	2046	1-61
Order Granting Motion of the Official Committee of Unsecured Creditors and Deutsche Bank Trust Company Americas for Order Authorizing Committee and Deutsche Bank to Initiate and Prosecute Avoidance Claims on Behalf of the Debtors' Estates	4-22-10	2279	1-2
Corrected Motion for Order Approving Settlement Agreement Between Buchwald Capital Advisors LLC, in its Capacity as the Litigation Trustee and Distribution Trustee,	4-13-12	3359	1-34

and Sault Ste. Marie Tribe of the Chippewa Indians and Kewadin Casinos Gaming Authority			
Buchwald Capital Advisors LLC's Response in Support of *Corrected* Motion for Order Approving Settlement Agreement Between Buchwald Capital Advisors LLC, in its Capacity as the Litigation Trustee and Distribution Trustee, and Sault Ste. Marie Tribe of Chippewa Indians and Kewadin Casinos Gaming Authority	5-29-12	3423	1-14

United States Bankruptcy Court for the Eastern District of Michigan Southern Division Adv. Pro. No. 10-05712			
Complaint	5-28-10	1	1-37
Consent Order for Substitution of Party Plaintiff Under Fed. R. Civ. P. 25(c) and Fed. R. Bankr. P. 7025	8-14-10	64	1-2