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
2:08-bk-53104

BRIEF OF DEFENDANTS-APPELLANTS

ORAL ARGUMENT REQUESTED

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DISCLOSURE OF CORPORATE AFFILIATIONS AND FINANCIAL INTEREST

Pursuant to 6th Cir. R. 26.1, Appellants Dimitrios Papas, a/k/a Jim Papas, Viola Papas, Ted Gatzaros, and Maria Gatzaros make 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 this appeal, that has a financial interest in the outcome?

   Answer: No.

s/Nancy K. Stone
(Signature of Counsel)

February 1, 2013
(Date)

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STATEMENT IN SUPPORT OF ORAL ARGUMENT

This is a complex commercial fraudulent transfer matter involving claims against individuals for millions of dollars. The District Court committed reversible error when, among other things, it erroneously granted the Litigation Trustee's Settlement Motion containing an all-encompassing, overbroad and prejudicial Claims Bar, thus extinguishing potential future claims of Defendants-Appellants, non-debtor individuals. The District Court compounded its error by denying Defendants-Appellants' motion for reconsideration when they raised viable future claims against the Tribe Defendants. Defendants-Appellants urge this Court to provide Defendants-Appellants an opportunity for oral argument on these issues and the many other errors committed below. Moreover, due to the complex nature of this case, Defendants-Appellants believe this Court would benefit from the opportunity to hear argument and to question counsel directly. Accordingly, Defendants-Appellants request oral argument on their appeal.

STATEMENT REGARDING SUBJECT MATTER AND APPELLATE JURISDICTION

The United States District Court for the Eastern District of Michigan maintained subject matter jurisdiction of this matter under 28 U.S.C. § 1334 because this matter involves a civil proceeding arising in and related to a case under 11 U.S.C. § 101, *et seq*.

Appellate jurisdiction rests upon 28 U.S.C. §§ 1291 & 1294(1), this being an appeal from a final order of judgment of the United States District Court for the Eastern District of Michigan, dated August 9, 2012, approving a settlement agreement in a bankruptcy case, which Order states that it is a "final and appealable order" (*see* RE 16, Page ID #430) and the order denying the Appellants' motion for reconsideration of that final order, dated September 27, 2012 (RE 31, Page ID # 678-683). An order approving a settlement in a bankruptcy case is final order for purposes of conferring appellate jurisdiction. *See In re Media Cent., Inc.*, 190 B.R. 316, 321 (E.D. Tenn. 1994).

Defendants-Appellants timely filed their Notice of Appeal on October 25, 2012.

STATEMENT OF ISSUES PRESENTED FOR REVIEW

I. Whether the District Court abused its discretion when it erroneously granted the Appellee Litigation Trustee's Settlement Motion with the Tribe Defendants and approved an all-encompassing and overbroad Claims Bar Order barring claims of non-settling defendants that had not yet accrued and which cannot accrue until final adjudication of the Adversary Proceeding, when it was unfair and highly prejudicial to the Papas and Gatzaros individual non-debtor defendants/appellants, stripping them of their due process rights, and when no unusual circumstances existed for the District Court to use such a dramatic measure.

II. Whether the District Court erred in denying Appellants Papas and Gatzaros' motion for reconsideration when they raised viable claims against the settling Tribe Defendants not barred by any immunity or the statute of limitations, which may be eviscerated by the expansive Claims Bar Order, and by the District Court's refusal to clarify and/or amend the Claims Bar Order in the face of such viable claims.

STATEMENT OF THE CASE

This appeal involves a fundamental unfairness to four individuals defending against a complex commercial fraudulent transfer claim that have now been stripped prematurely of their ability to raise certain future claims. The appeal arises from an order entered by the United States District Court for the Eastern District of Michigan ("District Court")[1] granting the Appellee-Plaintiff Litigation Trustee's motion to approve a settlement agreement with Appellees-Defendants Sault Ste. Marie Tribe of the Chippewa Indians and Kewadin Gaming Authority (collectively "the Tribe Defendants"), which includes an all-encompassing Claims Bar Order, extinguishing valid potential claims, known or unknown, that could be raised against the non-debtor Tribe Defendants by any entity in the future (whether debtor or not); such claims not even being ripe at this time. The broad scope of this District Court-approved Claims Bar Order is breathtaking. The Court transplanted an extraordinary bankruptcy court remedy into a litigation context that is worlds apart from the specific disputes that give rise to this remedy.

The issue on appeal is whether the District Court erred in approving and entering this expansive Claims Bar Order over the objection of the non-settling

[1] The District Court record is referred to as "RE" in this brief. The appeal arises from an Adversary Proceeding pending in the U.S. Bankruptcy Court for the Eastern District of Michigan, Case No. 10-05712. The Adversary Proceeding record is referred to as "Adv. Proc. RE" in this brief. The Adversary Proceeding is related to *In re Greektown Holdings, LLC, et al*. Bankr. Case No. 08-53104. The bankruptcy record will be referred to as "Bankr. RE" in this brief.

defendants, Appellants Mr. and Mrs. Papas (jointly "Papas") and Mr. and Mrs. Gatzaros (jointly "Gatzaros"), when the Sixth Circuit has instructed that involuntary releases of third party claims against non-debtors are disfavored as a matter of bankruptcy law, and such dramatic measures are to be used cautiously and only in unusual circumstances.

Papas and Gatzaros are non-debtor individuals facing a claim of $145 million on an alleged constructive fraudulent transfer claim pending in the Bankruptcy Court under the Michigan Uniform Fraudulent Transfer Act ("MUFTA"). The claim is based on payments that were made to them (and others, including the Tribe Defendants) in December 2005; payments which no party disputes were due and owing to Papas and Gatzaros, and which were the subject of a guaranty executed by the Tribe Defendants. The Litigation Trustee is seeking to have Papas and Gatzaros disgorge this money years later, claiming that the payments caused a special purpose holding company, Greektown Holdings, to become insolvent or unable to pay its debts despite the fact that the Greektown Casino entities did not file for bankruptcy until close to three (3) years after the payments were made.

This is not a typical appeal that is governed by clear statutory text. The Supreme Court's mandate of "fairness" to parties with widely variant and divergent interests renders the formulation of precise rules elusive at best. This

appeal cries out for a sensible, reasonable result that is fair to all of the parties. The Claims Bar Order could bar future claims based on intricate commercial contracts and a guaranty agreement entered into by and between the Tribe Defendants and Papas and Gatzaros stemming from a business relationship between those parties that spanned over a decade. The Claims Bar – as applied to Papas and Gatzaros – does nothing to protect the debtors' estate or to provide finality to the debtors relative to the settled claims. Rather, the District Court has stripped four individuals of the ability to raise certain claims based on those commercial agreements and has forever barred them from asserting any claim against the Tribe Defendants "reasonably flowing from" the MUFTA case, whether such claims are known or unknown at this time, whether accrued or not.

Upon having an opportunity to clarify and amend its imposition of this expansive Claims Bar on Papas and Gatzaros' motion for reconsideration and/or clarification, the District Court wrongfully decided instead to affirm its decision. The District Court abused its discretion in imposing the dramatic measure of a Claims Bar against the Papas and Gatzaros individuals and the portion of its order approving such a bar warrants reversal because its decision did not support a

finding of fairness to third-parties as is required under controlling Sixth Circuit precedent.[2]

I. Nature of the Case

A. Background

Papas and Gatzaros are long-time Detroit business leaders[3], having invested heavily in real estate, restaurants, hospitality and, most recently, gaming. They were instrumental in the ongoing vitality of the area known as Greektown and bringing gaming to Detroit. Prior to 2000, Papas and Gatzaros collectively owned 86% of the membership interest of Monroe Partners, LLC ("Monroe"), and had effective ownership of 48% of Greektown Casino, LLC. (*See* Papas and Gatzaros' Motion for Reconsideration, RE 17, Ex. A thereto, Monroe Ownership Chart, Page ID # 456-457.)

On July 28, 2000, Papas and Gatzaros each entered into an Amended and Restated Limited Liability Company Redemption Agreement with Monroe, whereby Monroe redeemed all of the membership interests of Papas and Gatzaros in exchange for specified installment payments. (*Id.*, RE 17, Ex. B thereto, excerpts of "the Redemption Agreements"). Simultaneously, Monroe entered into a Subscription Agreement with Kewadin Greektown ("Kewadin"), agreeing to sell

[2] Papas and Gatzaros are only appealing the paragraph of the District Court's Order containing the Claims Bar. (*See* Order Approving Settlement Agreement, RE 16, Page ID # 430.)

[3] Mr. Ted Gatzaros recently died on January 10, 2013, at age 69.

Kewadin the interests it redeemed from Papas and Gatzaros. (*Id.*, RE 17, Ex. C thereto, excerpts of the "Subscription Agreement"). On the same date, the Tribe and the Authority entered into a Guaranty Agreement to Fund Subscription Amount on behalf of Monroe and Papas and Gatzaros (the "Guaranty Agreement"). (*Id.*, RE 17, Ex. D thereto.[4])

In 2005, Greektown Casino sought formal approval from the Michigan Gaming Control Board ("MGCB") for an overall debt restructuring, which was to include a global refinance of Greektown Casino's senior debt and the debt owed to Papas and Gatzaros in connection with the redemption of their interests in Monroe. As alleged in Plaintiff's Complaint, a new entity called Greektown Holdings, LLC was formed specifically to effectuate the refinancing of the debt of Greektown Casino. (Complaint, Adv. Proc. RE 1, ¶ 32, Page ID # 37.) As a condition to the debt restructuring, Monroe and Kewadin each conveyed their 50% ownership interests in Greektown Casino, LLC to the newly formed Greektown Holdings in consideration for Greektown Holdings' undertaking to issue certain senior notes ("Senior Notes") and make payments to allow Monroe to pay the debts owed to Papas and Gatzaros.

After extensive analysis and investigation spanning the course of over six months, which included an opinion from the accounting firm of Grant Thornton

[4] Exhibits B through E to the Motion for Reconsideration (RE 17) were filed with the District Court under seal.

LLP in support of the debt restructuring, the MGCB approved the offering of the Senior Notes whereby the proceeds from the sale of the Senior Notes were to specifically be paid in part to Papas and Gatzaros in partial satisfaction of Monroe's outstanding redemption obligations to them.

B. Status of the Adversary Proceeding

On May 28, 2010, Plaintiff commenced its adversary proceeding (the "Adversary Proceeding") against the Papases; the Gatzaroses; Barden Development, Inc. and Barden Nevada Gaming, LLC (collectively, the "Barden Defendants"); Lac Vieux Desert Band of Lake Superior Chippewa Indians ("Lac Vieux"); and the Tribe Defendants, seeking to avoid and recover more than $177 million in payments made by Greektown Holdings from the proceeds of the Senior Notes. The Complaint alleges that $155 million of that amount was made for the "benefit of the [Tribe Defendants]," even though they only received $6 million in a direct transfer. (Complaint, Adv. Proc. RE # 1, ¶¶ 45, 62, Page ID # 8, 11.)

Almost immediately after the Complaint was filed, the Tribe Defendants filed a motion to dismiss based on sovereign immunity; never answering the Complaint or submitting to the Bankruptcy Court's jurisdiction. The Tribe Defendants were not subject to any discovery because they maintained their sovereign immunity status from when the Complaint was filed in May 2010 up

until the time the District Court entered the Settlement Order and Claims Bar on July 13, 2012, thus preventing Papas and Gatzaros from conducting any discovery of the Tribe Defendants. The Tribe Defendants' motion to dismiss was still pending before the Bankruptcy Court as of the time the settlement was reached, and the Bankruptcy Court never ruled on that issue.

Papas and Gatzaros, on the other hand, filed an Answer to the Complaint and maintained a cooperative working defense relationship with the Tribe Defendants in a joint effort to defend against the MUFTA claim. Papas and Gatzaros have been aggressively pursuing documents in discovery from the MGCB, the Litigation Trustee and Reorganized Greektown (among many other third-parties involved in the transaction). This has been a difficult, expensive and time-consuming process. In fact, Papas and Gatzaros have had a Motion to Compel pending against the Litigation Trustee for years.

Papas and Gatzaros have, so far, filed two dispositive motions based on legal issues: (1) a summary judgment motion based on preemption under the Michigan Gaming Control and Revenue Act ("Preemption Motion"); and (2) a motion for summary judgment under 11 U.S.C. § 546(e), which provides a complete defense to a fraudulent transfer claim when the transfers were "settlement payments" made by financial institutions or payments made in connection with a securities contract ("546(e) Motion"). The Bankruptcy Court has not ruled on either of these

dispositive motions.[5] Either or both motions, if granted, would be a complete dismissal of the claims asserted against Papas and Gatzaros. At this time, the Bankruptcy Court has not issued a scheduling order or trial date.

II. Course of Proceedings

While defending against the underlying claims in the MUFTA action, and unbeknownst to Papas and Gatzaros, the Tribe Defendants negotiated a settlement with the Litigation Trustee. On April 13, 2012, the Litigation Trustee filed a "*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" in Bankruptcy Court. (Settlement Motion, Ex. A to Motion to Withdraw Reference, RE 1, Page ID # 28-34.)

As part of the Settlement Motion, it was revealed for the first time that the Tribe Defendants were demanding that the Court approve an all-encompassing and expansive "Claims Bar" against the non-settling defendants, which states:

> 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 our of or reasonably flowing from the facts or allegations or claims in this MUFTA Adversary Proceeding, whether arising out of or

[5] The Preemption Motion was filed July 13, 2011, and oral argument was held November 21, 2011; the 546(e) Motion was filed April 25, 2012, and oral argument was held August 15, 2012.

> reasonably flowing from the facts or allegations or claims in this MUFTA Adversary Proceeding, 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.

(*See Id.*, Ex. B to Settlement Motion, RE 1, ¶ 6, Page ID # 44).

The Tribe Defendants were attempting to force this all encompassing claims bar through their settlement with the Litigation Trustee, which effectively meant that the Papas and Gatzaros individuals' potential non-bankruptcy claims against the Tribe Defendants would be eradicated without these individual defendants' consent, agreement, mutual acceptance, or any consideration. Likewise, Papas and Gatzaros would be denied of their day in court to raise these claims against the Tribe Defendants. In fact, the Tribe Defendants made this demand having already objected to such a broad claims bar order with the previously settling Barden defendants, which resulted in the claims bar being omitted from the settlement agreement with those defendants.

What made this even more troubling was that it was also revealed for the very first time that the Litigation Trustee was changing its theory of liability against the Tribe Defendants set forth in the Complaint, when such complaint had been pending for close to two years and was still the operative complaint in the

case. The Litigation Trustee and Tribe Defendants reached a settlement in the amount of $2.75 million on the $155 million claim. While Plaintiff's Complaint continued to allege that the payments made to the other defendants were for "the benefit of the Tribe" (*see* Complaint, ¶ 43[6]), in response to Papas and Gatzaros' objection to the Settlement Motion in the Bankruptcy Court, the Litigation Trustee completely switched course and revealed that it had changed its entire theory of liability against the Tribe Defendants and only was seeking recovery of $6 million that was directly transferred to the Tribe Defendants and not the full $155 million as alleged in the Complaint. The Litigation Trustee claimed that "[a]fter extensive investigation and analysis, including several in-person and telephonic meetings with the Tribe Defendants, and the review of hundreds of pages of documents, the Trustee concluded that he would be unlikely to prove an indirect benefit to the Tribe Defendants." (*See* Plaintiff's Response in Support of Settlement Agreement, Bankr. RE 3423, at p. 2).

Obviously, caught completely by surprise by the Tribe Defendants' request for an over-reaching claims bar, and having had their hands tied from obtaining any discovery from the Tribe Defendants due to sovereign immunity, Papas and Gatzaros were forced to scramble and identify all potential claims they could raise against the Tribe Defendants should they be held liable from a transaction that

[6] Adv. Proc. RE 1, Page ID #8.

began 12 years ago and involved literally hundreds of documents setting forth and amending the transaction over the years between the parties, while simultaneously defending the substantive claims against them. Up until this point, these premature contingent claims were not an issue in the case. Yet Papas and Gatzaros were forced to immediately conduct an analysis of all future potential and hypothetical claims in the event they may be held liable, all within the confines of responding to a Settlement Motion within the short time-frame they were allotted under the court rules.

Papas and Gatzaros filed an objection to the Settlement Motion, and a motion to withdraw the reference to the District Court. (Motion to Withdraw Reference, RE 1, Page ID # 3-78.) The other parties then stipulated to withdraw the reference. In the District Court, Papas and Gatzaros objected to the Claims Bar on a number of grounds.[7] (*See* Response Brief in Opposition to Settlement Motion, RE 6, Page ID # 90-228.) Papas and Gatzaros argued that the Claims Bar Order was highly prejudicial when, at the early stage of discovery in what all parties agreed was a complex case, where there had been no depositions, no expert

[7] Papas and Gatzaros did not object to the settlement amount but rather objected to the imposition of the Claims Bar among other issues, such as the one-sided discovery cooperation provision in the Settlement Agreement. The Tribe Defendants agreed at the hearing to cooperate with Papas and Gatzaros' reasonable discovery requests in the same manner equivalent to that which the Tribe Defendants have agreed to provide the Litigation Trustee. This agreement was included in the District Court's Order approving the settlement agreement (RE 16, Page ID # 430). Papas and Gatzaros are not appealing this aspect of the Order.

disclosure, and very few documents exchanged, it was impossible for Papas and Gatzaros to determine all of the claims they may have against the Tribe Defendants. Using the operative Complaint in which an "indirect" theory of liability was asserted against the Tribe Defendants, Papas and Gatzaros argued that they had potential claims against the Tribe Defendants for indemnity and/or contribution. They also could have a potential fraud claim if it was found through discovery that the Tribe Defendants submitted false projections and other financial information to the various parties and the MGCB, misleading them into the transaction. These were just examples of potential claims. Among other issues, they also argued that they were entitled to an evidentiary fairness hearing before the Court could decide whether to approve a settlement with a Claims Bar.

The Tribe Defendants raised one purported hurdle after another in seeking their limitless and overbroad Claims Bar Order, raising such issues as sovereign immunity and statute of limitations. After engaging in their protracted and secretive investigation, the Tribe Defendants then saw fit to chastise Papas and Gatzaros for not reviewing the hundreds of documents in a matter of weeks, that the Litigation Trustee reviewed over the course of years, to determine what claims against the Tribe Defendants might be made and to do it without the review of documents and Tribe witness interviews that Plaintiff had.

III. Disposition Below

A. The District Court's Opinion and Order

After hearing oral argument on the Settlement Motion, including Papas and Gatzaros' objection to the imposition of a Claims Bar (*see* Transcript dated 6/27/12, RE 11, Page ID # 331-407), the District Court granted the Settlement Motion, including the expansive Claims Bar. (*See* District Court's Opinion and Order dated 7/13/12, RE 10, Page ID # 300-330). The District Court recognized that the court is under a mandatory duty to consider the fairness of the settlement to those affected. (*Id.* at Page ID # 307.) Nevertheless, the District Court held that despite not having a duty to justify the need for their claims bar, the Tribe Defendants demonstrated at the hearing and by way of affidavit, a financial need for such a bar because the Tribe Defendants are allegedly having difficulty renegotiating their debt financing. (*Id*. at Page ID # 310.)

Without citing any legal authority, the District Court further held that "[o]nly if the Court concludes that the Papas and Gatzaros Defendants have potential viable claims against the Settling Defendants that are barred by the Claims Bar Order is the Court obligated to conduct a fairness hearing." (*Id.* at Page ID # 312.) The District Court then effectively dismissed (with no discovery, let alone a trial) each of the potential theories of recovery that Papas and Gatzaros had proffered as examples of potential claims they could raise should they

eventually be found liable on the MUFTA claim. (*Id.* at Page ID # 312-320.) The District Court set forth no reason as to why Papas and Gatzaros should have added cost and complexity to an already multifarious case by filing a cross-claim when such claim was contingent on the Tribe's pending sovereign immunity motion and a number of other issues. (*Id.* at Page ID # 308.)

The District Court swiftly found in the course of one hearing that the Tribe Defendants had sovereign immunity and had not waived such immunity for each and every potential future claim raised by Papas and Gatzaros. (*Id.* at Page ID # 321-326.) Based on these findings, the District Court refused to hold an evidentiary fairness hearing. (*Id.* at Page ID # 326-327.) On August 9, 2012, the District Court entered an Order approving the Settlement Motion and entering the broad and all-encompassing Claims Bar Order, barring any and all claims, known or unknown, that "reasonably flow" from the MUFTA Adversary Proceeding. (*See* Settlement Order, RE 16, Page ID # 429-431.)[8]

B. Papas and Gatzaros' Motion for Reconsideration

On August 23, 2012, Papas and Gatzaros timely filed a "Motion for Reconsideration and/or Clarification of the August 9, 2012 Order Approving

[8] The Tribe Defendants have attempted to make an issue out of the fact that Papas and Gatzaros filed a limited objection to the proposed Order as somehow acquiescing in the Claims Bar itself. This is completely incorrect as Papas and Gatzaros were simply agreeing to the form, but certainly not the substance, of the order, as evidenced by their objections previously filed and argued before the District Court.

Settlement Agreement with Expansive Claims Bar" under Federal Rule of Civil Procedure 59(e) (which allows a court to alter or amend a judgment). (*See* Motion for Reconsideration, RE 17, Page ID # 432-457.) Papas and Gatzaros argued that the District Court should grant reconsideration and clarification of its August 9, 2012 Order granting the Tribe Settlement with a broad Claims Bar Order which bars legitimate claims and might be interpreted as barring claims not related to the MUFTA Adversary Proceeding. Papas and Gatzaros asserted that based on an extensive review and analysis of numerous contract documents, the District Court's Order warranted reconsideration. In light of the fact that Papas and Gatzaros are intended third-party beneficiaries of the Guaranty Agreement, they argued that they may have legitimate claims against the Tribe and the Defendants thereunder.[9]

Despite these arguments, the District Court denied Papas and Gatzaros' motion for reconsideration. (*See* Order Denying Motion for Reconsideration dated

[9]Specifically, the Tribe and the Authority guaranteed payments to Papas and Gatzaros. However, the Gatzaroses were never fully paid for their redemption amount, only receiving about half the sum owed. Thus, the Gatzaroses have legitimate claims for the monies they are still owed under the Guaranty Agreement. In their Motion for Reconsideration, Papas and Gatzaros argued that the District Court should clarify that the Claims Bar Order was not intended to apply to any claim for this unpaid amount (see RE 17, Page ID # 448-449) and the Tribe Defendants agreed (*see* Limited Response, RE 26, Page ID #523, fn 8). Gatzaros now has a separate lawsuit pending for these unpaid monies. The District Court failed to clarify its order as requested in the Motion for Reconsideration, and the case should be remanded, at a minimum, to require the District Court to conform its order to the parties' position on this issue.

9/27/12, RE 31, Page ID # 678-683.) The District Court held that because Papas and Gatzaros did not raise this theory earlier, it "decline[d] to consider it." (*Id*. at Page ID # 683.)

STATEMENT OF FACTS

The Guaranty Agreement at issue in this appeal was entered into on July 28, 2000 by the Tribe and the Authority in favor of Monroe and Papas and Gatzaros. The key provision in the Guaranty Agreement is the "Funding Obligation" provision of Section 2, which provides that subject to certain limitations, the Tribe and the Authority guaranty to fund the Subscription Amount owed by the Kewadin Casino to Monroe upon default payment obligations *and* upon notice and demand of Monroe. However, according to the Guaranty Agreement, the Tribe and Authority's payment obligations were limited to a fund comprised of those Greektown Distributions which the Tribe and/or Authority received from Greektown Casino, LLC, Kewadin Greektown Casino and/or Monroe Partners by virtue of the Tribe and/or Authority's ownership interest, affiliation with, or lending arrangements with those entities. The relevant provision states:

> The aggregate Funding Obligations are limited to the sum of the following amounts:
>
> (a) The amount by which the Greektown Distributions exceed any portion of the Greektown Distributions which is restricted from use for these purposes or similarly sequestered from time to time ("Restriction"), if such Restriction is required by National City Bank in connection with the replacement letter of credit facility for the existing Greektown $75 Million LaSalle Bank letter of credit facility,

> ;contemplated by the commitment from National City Bank commitment letter dated as of June 22, 2000, and any renewals thereof ("Replacement Credit Facility") provided however, that (i) the Subscriber and the Guarantors shall use commercially reasonable best efforts in negotiating the terms of the Replacement Credit Facility, so as to eliminate such a Restriction and/or cause such a Restriction to be as limited as possible so as to make as much of the Greektown Distributions available for purposes of payment of the Funding Obligations as possible, (ii) as and when the pledge and/or restrictions on Greektown Distributions shall be released, the corresponding Greektown Distributions shall be available for funding on account of the Subscription Amount, and (iii) Subscriber and Guarantors shall not grant any new or further pledge or otherwise agree to sequester or restrict the Greektown Distributions; and
>
> (b) The amount of the Tribal Tax Receipts, to the extent, and only to the extent not included in calculating the Greektown Distributions.[10] [Ex. D to Motion for Reconsideration, RE 17, Section 3, filed under seal.]

There are many fact questions that would determine what the Tribe and the Authority are obligated to pay under the Guaranty Agreement, and there are conditions that must be met as defined in the Guaranty Agreement. It is

[10] "Greektown Distributions" are defined as "any and all distributions and payments of whatever nature made by any of the Greektown Casino, LLC ("Greektown"), [Kewadin Casino] and/or Monroe, to either the Authority or the Sault Tribe on account of their ownership interest in, affiliation with or lending arrangements with [Kewadin Casino], Greektown and/or Monroe whether of capital, income, cash-flow, profits or loan payments but does not include (i) Retained Tax Distributions, or (ii) repayment of principal and interest on loans from either … [the Authority or the Tribe] to any of Greektown, [Kewadin Casino] and/or Monroe, which loans were extended as of June 8, 2000, or (iii) return of capital contributions by [Kewadin Casino] to Greektown and any return thereon provided for in the Operating Agreement of Greektown dated February 27, 1997, as amended prior to June 8, 2000 and/or the Member Agreement between Monroe and [Kewadin Casino] dated February 27, 1997, as amended prior to June 8, 2000, or (iv) an additional amount of Twenty Million ($20,000,000) Dollars." (Ex. D to Motion for Reconsideration, RE 17, Section 1(b), filed under seal).

uncontested that Monroe defaulted in its obligation to pay. Thus, under the Guaranty Agreement, the Tribe and Authority are liable to Papas and Gatzaros. It appears that in December of 2005, pursuant to an Offering Memorandum, Kewadin Greektown Casino made a distribution of $6,000.000 to the Tribe. This sum could be subject to the Funding Obligation of the Guaranty Agreement. There may even be more money subject to the Funding Obligation. However, this is precisely why the District Court abused its discretion; the Claims Bar Order may preclude potential, viable claims which may not accrue until certain conditions occur in the MUFTA Adversary Proceeding or which have to be determined by litigating certain agreements. To bar these claims now would be unjust.

Section 7 of the Guaranty Agreement further provides that the Guaranty "shall automatically continue or be reinstated" if at some future point any payments are disgorged. Specifically, the Agreement states:

> [n]otwithstanding any prior revocation, termination, surrender or discharge of the Guaranty Agreement (or of any lined, pledge or security interest securing this Guaranty Agreement) in whole or in part, *the effectiveness of this Guaranty Agreement, and all of liens, pledges and security interests securing this Guaranty Agreement, shall automatically continue or be reinstated in the event that any payment received or credit given by Monroe in respect of the Funding Obligation is returned, disgorged or rescinded under any applicable state or federal law, including, without limitation, laws pertaining to bankruptcy or insolvency, in which case this Guaranty Agreemen*t, and all liens, pledges and security interests securing this Guaranty Agreement, shall be enforceable against the Sault Tribe and the Authority as if the returned, disgorged or rescinded payment or credit had not been received or given by Monroe….(emphasis added)

(Ex. D to Motion for Reconsideration, RE 17, filed under seal.) Under this section, should Papas or Gatzaros ultimately be ordered to disgorge any payments it received from Monroe, and those payments were received by Monroe from either the Tribe or the Authority as a result of the Funding Obligation, then Papas and Gatzaros would have a claim against either the Tribe or the Authority related to such payments.

In the Guaranty Agreement, the Tribe and Authority explicitly waived sovereign immunity in the section entitled "*Waiver of Sovereign Immunity*." Specifically, under Section 11 of the Guaranty Agreement, the Tribe and the Authority waive their sovereign immunity from suit if an action is commenced under the Guaranty Agreement to enforce the Funding Obligations by either Monroe or any recognized third-party beneficiaries: "The Sault Tribe and the Authority hereby expressly waive their sovereign immunity from suit should an action be commenced by Monroe on this Guaranty Agreement or regarding the subject matter of this Guaranty Agreement . . . This waiver (i) shall terminate upon the satisfaction of all the Funding Obligations relating to the Subscription Agreement; (ii) is granted solely to Monroe, its successors and assigns ***and any Third-Party Beneficiaries recognized herein***…." (emphasis added) (Ex. D to Motion for Reconsideration, RE 17, p. 6, ¶ 11). Under Section 13 of the Guaranty

Agreement, "Retiring Members"[11] are intended third-party beneficiaries. Accordingly, each and every representation, warranty, agreement and guaranty made by the Tribe and the Authority in the Guaranty Agreement is for the express benefit of the Retiring Members as if made directly to them. Monroe also assigned the Guaranty Agreement and the Security Agreement to Gatzaros and Papas in separate assignment documents. *Id.*

By 2004, Monroe was in default on its installment payments to Papas and Gatzaros. In February 2005 with subsequent amendments, Papas and Gatzaros executed a Forbearance and Standstill Agreement and an amended Redemption Agreement. (*See* Ex. E to Motion for Reconsideration, RE 17, filed under seal.) There, Papas agreed to a discounted cash buy-out of $94,860,000, while Gatzaros agreed to a partial payment of approximately $57,740,377, leaving nearly $73,000,000 outstanding. The debt payments due to Papas and Gatzaros were to be financed by the issuance of the Senior Notes.

[11] Nowhere is "Retiring Members" defined in the Guaranty Agreement. Capitalized terms in the Guaranty Agreement not otherwise defined have the meaning ascribed to them in the Subscription Agreement (*See* Guaranty Agreement, Section 1(a)). Nowhere is "Retiring Members" defined in the Subscription Agreement, although that agreement similarly provides that all capitalized terms not specifically defined therein have the same definition as provided for in the Redemption Agreement (*See* Section 1). As stated above, the Redemption Agreements define "Retiring Members" as Dimitrios Papas, Viola Papas, Ted Gatzaros and Maria Gatzaros.

SUMMARY OF THE ARGUMENT

Justice for these individual defendants requires looking to the substance and not just the procedure involved in determining whether the District Court abused its discretion in eviscerating any and all claims, potentially including a claim against the Tribe Defendants under a guaranty agreement under which the Tribe Defendants do not dispute they explicitly waived sovereign immunity. Under appellate precedent, this Court should render a sensible, reasonable result that is fair to the parties. That result requires reversal of the District Court's order approving the Claims Bar and amend or clarify to preserve claims by Papas and Gatzaros set forth below.

STANDARD OF REVIEW

The parties stipulated to withdraw the reference to the District Court; consequently, the Appellees' Motion for Approval of the Settlement was decided by the District Court, rather than the Bankruptcy Court. This Court reviews the District Court's approval of the settlement for an abuse of the discretion accorded the District Judge. *Lyndon Prop. Ins. Co., v. Eastern Ky. Univ.,* 200 Fed. Appx. 409, 413 (6th Cir. 2006). At the same time, however, the District Court "is charged with an affirmative obligation to apprise itself of all facts necessary to evaluate the settlement and make an 'informed and independent judgment' as to whether the compromise is fair and equitable." *In re Bard,* 49 Fed. Appx. 528, 530 (6th Cir.

2002); *see also Protective Comm. for Indep. Stockholders of TMT Trailer Ferry, Inc. v. Anderson*, 390 U.S. 414, 424 (1968) (observing that the court reviewing the settlement has a duty to "apprise [itself] of all facts necessary for an intelligent and objective opinion of the probabilities of ultimate success should the claim be litigated"). Thus, it would be appropriate for this Court to conclude that the District Court has abused its discretion where the District Court did not engage in this analysis.

ARGUMENT

I. THE DISTRICT COURT ABUSED ITS DISCRETION WHEN IT ERRONEOUSLY GRANTED THE LITIGATION TRUSTEE'S SETTLEMENT MOTION AND APPROVED AN ALL-ENCOMPASSING AND OVERBROAD CLAIMS BAR ORDER, AN EXTRAORDINARY REMEDY TO BE USED CAUTIOUSLY AND IN UNUSUAL CIRCUMSTANCES NOT PRESENT HERE.

The Litigation Trustee brought its Settlement Motion pursuant to Bankruptcy Rule 9019(a), which provides: "On motion by the trustee and after notice and a hearing, the court may approve a compromise or settlement." A court can only endorse a settlement upon a determination that the settlement is "fair and equitable." *See In re Dow Corning Corp.*, 192 B.R. 415, 421 (Bankr. E.D. Mich. 1996) (citations omitted).

When determining the overall fairness of a settlement, the court must look to what effect, if any, the settlement should have upon the on-going litigation between plaintiffs and the remaining defendants. *McDonnold v. Star Bank, N.A.*,

261 F.3d 478, 484 (6th Cir. 2001). "[W]here the rights of one who is not party to a settlement are at stake, the fairness of the settlement to the settling parties is not enough to earn the judicial stamp of approval." *In re Masters Mates & Pilots Pension Plan & IRAP Litig*., 957 F.2d 1020, 1026 (2d Cir. 1992). Instead, where the rights of third parties are affected, their interests too must be considered. *Id.*, *citing Williams v. Vukovich*, 720 F.2d 909, 921 (6th Cir. 1983) ("In making the reasonableness determination the court is under the mandatory duty to consider the fairness of the decree to those effected.") (other citations omitted).

This Court held in *McDonnold, supra*, 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***." *Id.* at 484-85 (emphasis added) (citation omitted).

Involuntary releases of third-party claims against non-debtors such as the Tribe Defendants are disfavored as a matter of bankruptcy law. This Court has instructed that such "dramatic measure[s] [are] to be used cautiously" and are "only appropriate in 'unusual circumstances'." *In re Dow Corning Corp.*, 280 F.3d 648, 658 (6th Cir. 2002) (internal citations omitted). The hallmarks of permissible non-consensual releases, e.g., fairness, necessity to the reorganization, and specific factual findings to support these conclusions, are all absent in the case at hand.

As rare as such injunctions are in bankruptcy cases generally, they are even rarer when they are requested outside of plan confirmation proceedings such as in the case at hand. Notably, this remedy has its origins in mass tort cases which have precipitated bankruptcy filings. *See Official Comm. of Unsecured Creditors v. Artra Group, Inc. (In re Artra Group, Inc.)*, 300 B.R. 699, 704 (Bankr. N.D. Ill. 2003) (citing Cole, Marcus G., "A Calculus Without Consent: Mass Tort Bankruptcies Future Claimants and the Problem of Third Party Non-Debtor 'Discharge,'" 84 Iowa L Rev. 753, 799-800 (1999)). In such cases, the number of potential claimants is unknown. The corresponding interest in protecting a settling party from limitless, unknown number of claims is not present here. This case, on the other hand, has a defined number of defendants (all of which have settled but for Papas and Gatzaros) and does not involve a class of people or even a large number of parties, let alone an unknown number of claimants.

A moving party will be hard-pressed to demonstrate that the injunction is essential to reorganization of the debtor's estate when it is requested well before plan confirmation occurs or well after plan confirmation has occurred. Although the case law regarding such requests is fairly sparse – on balance, courts are even less disposed to grant broad releases and injunctions when they are not bundled with a Chapter 11 plan. In one such case, the bankruptcy court specifically noted that the moving party "asks the court to go much farther than the *Specialty*

Equipment decision[12] and enter an injunction, not in a plan, but in a settlement agreement." *Official Comm. of Unsecured Creditors v. Artra Grp, Inc. (In re Artra Grp, Inc.)*, 300 B.R. 699, 704 (Bankr. N.D. Ill. 2003). In denying the injunction request, the court held: "***The scope of this Permanent Injunction is breathtaking.*** The Committee proposes to bind any entity that might have any sort of claim whatsoever against Entrade, its insiders or subsidiaries if such claim is in anyway connected with Artra or its subsidiaries." *Id.* at 702 (emphasis added).

Here, too, the scope of the Claims Bar Order protecting non-debtors (i.e., the Tribe Defendants) outside of plan confirmation is "breathtaking." It provides, in part, 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…" (Opinion and Order, RE 16, Page ID # 430.) The Litigation Trustee here cannot plausibly assert that the Claims Bar is essential to the reorganization of the Debtors. The Bankruptcy Court entered an Order confirming the Second Amended Joint Plans of Reorganization on January 22,

[12] *Specialty Equipment* involved a requested permanent release of claims of non-debtors against non-debtors in the context of plan confirmation. *See In re Specialty Equip. Cos., Inc.*, 3 F.3d 1043, 1045-46 (7th Cir. 1993). There, the Seventh Circuit Court of Appeals held that releases would only be binding against the parties who voted in favor of confirmation. *Id.*

2010—***nearly two and a half years ago***. Since then, the reorganization of the Debtors has been in progress without any such releases being in place. Indeed, the Confirmation Order itself specifically carved-out the very release that the Litigation Trustee and Tribe Defendants now champion: "[T]he Papas Claimants, Gatzaroses, and the Tribe, or any of them, shall not be deemed to have released each other." (*See* Response Brief in Opposition to Settlement, RE 6, Page ID # 104.) The District Court failed to recognize in its Opinion and Order that even before this action was filed, Papas, Gatzaros and the Tribe all ***preserved claims against each other.*** It did so even though Papas and Gatzaros raised this point. *Id.*

The District Court abused its discretion in failing to limit the overbroad, one-sided and prejudicial Claims Bar Order that was forcefully urged by the Tribe Defendants and by utterly failing to adhere to the "overall fairness" requirement as it pertained to Papas and Gatzaros. *See McDonnold*, *supra*. The District Court slanted its analysis to protect the Tribe Defendants and their settlement with the Litigation Trustee, while at the same time creating a fundamentally unfair result for Papas and Gatzaros. The District Court provided no response to Papas and Gatzaros' argument that it was too early in discovery to determine all of the potential claims and that it was unfair and prejudicial to force them to conjure up all such potential hypothetical claims at the beginning of discovery and in a matter of weeks. The District Court failed to address the argument as to what would

happen if evidence were revealed in discovery that brought forth theories of recovery against the Tribe Defendants that were presently unknown – and failed to limit the Claims Bar to protect such unknown claims.

Instead, the District Court accepted each of the Tribe Defendants' arguments and defenses on the potential claims set forth by Papas and Gatzaros – thereby prematurely eradicating them in an action akin to a dismissal on the merits – before they were even ripe to be adjudicated. The District Court simply ignored basic concepts of fundamental due process and fairness by approving a Claims Bar Order that extends the scope of the claims bar protection to non-debtor defendants in an adversary proceeding, for claims that do not currently exist and that may ripen into viable claims in the future. With no factual findings or evidence, the District Court decided that every potential claim was barred by the statute of limitations; that the Tribe Defendants enjoyed sovereign immunity on those claims; and that the Tribe Defendants had not waived such immunity. (*Id*. at Page ID # 321-325.) The District Court did not rely on any case in its Opinion and Order that provides precedential support for such an extreme and swift action.

After having been blindsided by the request for a premature Claims Bar and with limited time to respond, Papas and Gatzaros were forced (years before they otherwise should have been required), to conduct an analysis and then prove each element of every possible cause of action (and every defense) they may have

against the Tribe Defendants, without knowing what facts may be revealed in discovery. The District Court abused its discretion in forcing Papas and Gatzaros to do this without the benefit of any discovery on any of the potential claims or defenses, and by entering this premature Claims Bar.

II. THE DISTRICT COURT ERRED IN DENYING PAPAS AND GATZAROS' MOTION FOR RECONSIDERATION WHEN THEY RAISED VIABLE CLAIMS AGAINST THE TRIBE DEFENDANTS NOT BARRED BY ANY IMMUNITY OR THE STATUTE OF LIMITATIONS.

A. The Broad Claims Bar Order Improperly Extinguishes Claims That Are Viable, But Have Not Yet Accrued Pending The Adjudication Of The MUFTA Adversary Proceeding

In Papas and Gatzaros' motion for reconsideration, after a more detailed analysis and review of the hundreds of documents setting forth and amending the commercial transactions over the years between the Tribe and Papas and Gatzaros, they identified a potential claim under the Guaranty Agreement that may arise should they be found liable in the MUFTA Adversary Proceeding. The Tribe Defendants surprisingly foisted this settlement and forced through an overly broad claims bar despite Papas and Gatzaros' objections - thereby denying them a fair chance to investigate all theoretical claims. When Papas and Gatzaros presented contract documents to the District Court and a theory of recovery that was revealed with diligence soon after the first notice of any such issue concerning such a broad claims bar, the District Court rejected them as untimely. The District Court

effectively dismissed in advance (without even a summary judgment level of due process, let alone discovery and trial) potential future claims between two adversary proceeding co-defendants; even claims that were not and could not be raised in the Adversary Proceeding. (Order Denying Motion for Reconsideration, RE 31, Page ID # 682-683.)

The Tribe Defendants argued in response that because Papas and Gatzaros already were in possession of those documents, that they should have raised the guaranty issue in their initial objection to the Settlement Motion. The Tribe Defendants made this procedural argument while at the same time not disputing that they had waived sovereign immunity and that the claim was not barred by the statute of limitations because it would not accrue until Papas and Gatzaros were ever found liable on the MUFTA Claim and forced to disgorge the $145 million, if at all. Nevertheless, because of the expansive Claims Bar Order, the Tribe Defendants will argue that these potentially valid claims have been wiped out - before the MUFTA Adversary Proceeding is even resolved. Papas and Gatzaros urged that this warranted reconsideration. (Motion for Reconsideration, RE 17, Page ID # 432.)

The District Court's ruling is akin to a dismissal on the merits, with prejudice, on a future contingent claim that was not ripe, had not yet accrued and was not at issue. This was not a situation where a party failed to submit certain

evidence in opposition to a motion for summary judgment and tried to submit it later. This claims bar arose in the context of a settlement agreement to which Papas and Gatzaros were not even parties. Nor are Papas and Gatzaros attempting to re-litigate a claim such that it would be barred by claim preclusion or res judicata. It was not even ripe in the first place. The District Court imposed a severely harsh sanction when it could have simply amended the Claims Bar to preserve this claim as requested by Papas and Gatzaros or held an evidentiary hearing on the issue. The Court-ordered Claims Bar went too far and the District Court abused its discretion in failing to correct this when Papas and Gatzaros presented a viable future claim to the District Court.

Certainly some latitude is warranted here. First, nowhere in the 224-paragraph Complaint does Plaintiff mention the Guaranty Agreement as a basis for its "indirect benefit" theory against the Tribe Defendants, nor was that agreement attached as an exhibit to the Complaint or any other pleading. Second, it must be noted that Papas and Gatzaros were completely in the dark as to the investigation and analysis that the Litigation Trustee had been conducting with the Tribe Defendants for apparently over two years – or even that settlement negotiations were taking place. Papas and Gatzaros were focusing on defending the $145 million MUFTA claim against them by preparing and filing two lengthy dispositive motions and engaging in protracted and expensive discovery, discovery

thwarted at every turn by the Litigation Trustee and debtor Reorganized Greektown. In fact, with the Tribe's motion to dismiss based on sovereign immunity pending, Papas and Gatzaros were reasonably focusing on the substantive claims against them and not on what claims they may bring against the Tribe in the future should the Tribe's motion to dismiss on sovereign immunity fail and should Papas and Gatzaros be found liable on the underlying claims.

Third, the District Court erred by potentially dismissing claims by non-debtors on the Guaranty Agreement when not even ripe for adjudication. "'[A] claim is not ripe for adjudication if it rests upon contingent future events that may not occur as anticipated, or indeed may not occur at all.'" *Wignet v. JP Morgan Chase Bank, N.A.*, 537 F.3d 565, 581 (6th Cir. 2008). Papas and Gatzaros are entitled to a potential recovery from the Tribe Defendants under the Guaranty Agreement should they have to disgorge any of their money in the MUFTA Adversary Proceeding. However, until such time as a decision is made in the MUFTA Adversary Proceeding, whether the terms of the Guaranty Agreement have been triggered remain open questions. This Court has held that such claims are not ripe and litigation over such claims is not permissible:

> The district court correctly held that to the extent that Wignet's claims challenge the Defendants' compliance with the Last Resort Conditions, such claims are premature. These claims are premature because the Defendants have not yet enforced the Guaranty Documents; when they do so, Wignet may then bring a claim that the Defendants' actions violated the Last Resort Conditions. Any attempt to bring the claim before the Defendants attempt to

> possess the collateral is premature. " '[A] claim is not ripe for adjudication if it rests upon contingent future events that may not occur as anticipated, or indeed may not occur at all.'… As a rule, we do not allow litigation on premature claims to ensure that courts litigate only existing, substantial controversies, not hypothetical questions or possibilities.

Id. at 581. Because this claim was not ripe, and was a premature claim, Papas and Gatzaros should not have been required to raise it at the demand of the Tribe Defendants simply because the Tribe Defendants decided to settle with the Litigation Trustee, or forever be barred as having waived that claim. This is a wholly unfair result.

B. The District Court Erred In Not Preserving Papas and Gatzaros' Future, Contingent Claim Under The Guaranty Agreement When The Tribe Defendants Expressly Waived Their Sovereign Immunity And the Statute Of Limitations Has Not Begun To Run.

The Tribe Defendants guaranteed the payments that were to be made to Papas and Gatzaros in exchange for their interests in Greektown. However, there is no question that the Guaranty Agreement is complex, places a number of conditions upon the obligation of the Tribe Defendants to make payments, and indeed, some of these conditions have not even come to fruition. Both Papas and Gatzaros are entitled to a potential recovery from the Tribe and the Authority under the Guaranty Agreement should Papas and Gatzaros have to disgorge any of their money in the MUFTA Adversary Proceeding.[13] Further, the Tribe Defendants

[13] There is also a potential theory of recovery for Papas and Gatzaros under the Guaranty Agreement because, as third party beneficiaries of Monroe, they can

waived their sovereign immunity as it relates to the Guaranty Agreement, extending this waiver of sovereign immunity to the "Third-Party Beneficiaries," *i.e.*, Papas and Gatzaros. Therefore, sovereign immunity is no bar to claims under the Guaranty Agreement.

The statute of limitations for a breach of guaranty claim is six years. *See* MCL 600.5807(8). A claim for breach of contract generally accrues when the promisor fails to perform under the contract. *Cordova Chem. Co. v. Dep't of Natural Res.*, 212 Mich. App. 144, 153; 536 N.W.2d 860 (1997). By its very nature, a claim here for breach of guaranty cannot factually arise until, and only if, Papas and Gatzaros are required to disgorge any redemption payments previously received. Thus, the six-year statute of limitation would not begin to run until minimally, Papas and Gatzaros are disgorged of any payments.

Not only does logic support the conclusion that the statute cannot commence until disgorgement, the Guaranty Agreement expressly says so. Specifically, the Guaranty Agreement states that "the effectiveness of this Guaranty Agreement, and all of liens, pledges and security interests securing this Guaranty Agreement, shall automatically continue or be reinstated in the event that any payment received or credit given by Monroe in respect of the Funding Obligation is returned, disgorged

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exercise their contractual rights under Section 8 to modify, extend, increase, and accelerate the Funding Obligations. Papas and Gatzaros request that the Claims Bar Order be modified to preserve this claim as well.

or rescinded under any applicable state or federal law, including, without limitation, laws pertaining to bankruptcy or insolvency, ….” (Ex. D to Motion for Reconsideration, RE 17, Section 7). Moreover, under the specific language of the Guaranty Agreement, the claim does not accrue until Papas and Gatzaros demand payment from the Tribe. *See United States v. Brown*, 833 F. Supp. 625, 629 (E.D. Mich. 1993) (“The point at which plaintiff’s cause of action accrued is governed by the language of the guaranties”). The Guaranty Agreement requires “an event of default by the Subscriber . . . when due, and receipt by the Guarantors of notice and demand from Monroe.” With respect to the payments previously received, none of those events have occurred. Therefore, the statute of limitations is no bar to claims under the Guaranty Agreement.

Finally, in their briefing in the District Court, the Tribe Defendants argued that Papas and Gatzaros signed releases which bar any claims they may have against the Tribe. (*See* Limited Response of Tribe Defendants, RE 7, Page ID # 229-270 and attached exhibits.) Importantly, the Tribe ignores that the Releases were only given in exchange for consideration; and now, that very consideration that served as the basis for those Releases is being challenged in the MUFTA Adversary Proceeding. In other words, the Trustee seeks to have Papas and Gatzaros disgorge the consideration that they received in exchange for the signed Releases. If this happens, the Releases fail for want of consideration. *See, e.g.*,

Rosenthal v. Triangle Dev. Co., 261 Mich. 462, 463; 246 N.W. 182 (1933) ("rescission is permissible when there is failure to perform a substantial part of the contract or one of its essential items, or where the contract would not have been made if default in that particular had been expected or contemplated").

Papas and Gatzaros entered into a Release in exchange for money, which served as the consideration for the Release. If that consideration is disgorged, the Releases can and should be rescinded under Michigan law; therefore, the Guaranty Agreement is of full force and effect. Further, the Guaranty Agreement states explicitly that if any money has to be disgorged, regardless of any other termination, surrender or discharge of the Guaranty Agreement, the Guaranty Agreement "shall automatically continue or be reinstated." (Ex. D, Section 7). However, none of this can be determined until *after* the MUFTA Adversary Proceeding is fully adjudicated. If the proceeding is dismissed, this issue is potentially moot; however, if Papas and Gatzaros are required to disgorge any money, then viable, legitimate claims may exist against the Tribe and Authority.

Wiping out these claims at this stage is improper and unjust. The District Court abused its discretion in doing so.

CONCLUSION

For the foregoing reasons, Appellants/Defendants Papas and Gatzaros request that this Honorable Court find that the District Court abused its discretion

in approving a one-sided, prejudicial and over-reaching Claims Bar Order and in denying Papas and Gatzaros' motion for reconsideration to clarify and/or amend such order. A reversal of the District Court's order is required to provide a sensible, reasonable result that is fair to all the parties.

Respectfully Submitted,

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CERTIFICATE OF COMPLIANCE WITH RULE 32(a)

Certificate of Compliance with Type-Volume Limitation,
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 9,418 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 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.

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CERTIFICATE OF SERVICE

Nancy K. Stone, undersigned attorney for Appellants Dimitrios Papas, aka Jim Papas, Viola Papas, Ted Gatzaros, and Maria Gatzaros, certifies that a copy of

BRIEF OF DEFENDANTS-APPELLANTS

was filed with the Sixth Circuit Court of Appeals on February 1, 2013 using the ECF system which will send notification of such filing to all attorneys of record.

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DESIGNATION OF APPENDIX CONTENTS

Plaintiffs/Appellants, per Sixth Circuit Rule 28(d), 30(b), hereby designate the following portions of the record below for inclusion in the Joint Appendix:

DESCRIPTION OF ENTRY	DATE	RECORD ENTRY NO.	PAGE ID
United States District Court 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	05-30-12	1	3-78
Papas and Gatzaros Defendants' Response Brief in Opposition to the Tribe Settlement Motion	06-14-12	6	90-228
Limited Response of the Sault Ste. Marie Tribe of Chippewa Indians and Kewadin Casinos Gaming Authority to Papas and Gatzaros Defendants' Response Brief in Opposition to The Tribe Settlement Motion	06-21-12	7	229-270
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)	07-13-12	10	300-330
Transcript for Motion for Order to Approve Settlement Agreement (Wednesday, June 27, 2012 at 2:16 p.m.)	07-16-12	11	331-407

DESCRIPTION OF ENTRY	DATE	RECORD ENTRY NO.	PAGE ID
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	08-09-12	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	08-23-12	17	432-457
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)	09-27-12	31	678-683
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DESCRIPTION OF ENTRY	DATE	RECORD ENTRY NO.	PAGE ID
Distribution Trustee, and Sault Ste. Marie Tribe of 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	05-29-12	3423	1-14

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