No. 14-3443

IN THE APPELLATE COURT OF ILLINOIS
FIRST DISTRICT

ACF LEASING, LLC, ACF SERVICES, LLC, and GENERATION CLEAN FUELS, LLC,	)	
	)	Appeal from the Circuit Court of Cook County, Illinois
Plaintiffs-Appellants,	)	County Department, Law Division
vs.	)	Circuit Court No. 14 L 2768
GREEN BAY RENEWABLE ENERGY, LLC, ONEIDA SEVEN GENERATIONS CORPORATION and THE ONEIDA TRIBE OF INDIANS OF WISCONSIN,	)	Honorable Margaret Ann Brennan, Judge Presiding
Defendants-Appellees.	)	

BRIEF OF PLAINTIFFS-APPELLANTS

ORAL ARGUMENT REQUESTED

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NATURE OF CASE

This appeal involves a case of first impression for Illinois appellate courts in connection with the availability of sovereign immunity to an Indian tribe and its corporate entity for off-reservation activities. This case arose out of the business relationship and agreements between the Plaintiffs and the Defendants for the off-reservation lease and service of three liquefaction machines for use in a plastics-to-oil energy project. This project was to use a pyrolytic process to produce oil from waste plastics. When the Defendants breached or otherwise caused the agreements to be breached, the Plaintiff's filed the instant lawsuit. Defendants, The Oneida Tribe of Indians of Wisconsin (the "Tribe") and Oneida Seven Generations Corporation ("OSGC") claimed sovereign immunity and moved to dismiss the lawsuit based on lack of subject matter jurisdiction. On October 8, 2014, the trial court entered an order granting the Tribe and OSGC's Motion and dismissed the Tribe and OSGC for lack of subject matter jurisdiction. On October 27, 2014, the trial court entered an order pursuant to Rule 304(a), from which this appeal is taken.

ISSUES PRESENTED FOR REVIEW

I. Whether the trial court erred in granting the Tribe and OSGC's Motion to Dismiss for lack of subject matter jurisdiction when sovereign immunity is not available under the circumstances of this case.

II. Whether the trial court erred in granting the Tribe and OSGC's Motion to Dismiss for lack of subject matter jurisdiction when there was a question of fact as to whether sovereign immunity exists or was waived.

III. Whether the trial court erred in granting the Tribe and OSGC's Motion to Dismiss for lack of subject matter jurisdiction when the Tribe and/or OSGC waived sovereign immunity.

STATEMENT OF JURISDICTION

This Court has jurisdiction pursuant to Illinois Supreme Court Rule 304. On October 8, 2014, the trial court granted the Defendants, the Tribe and OSGC's Motion to Dismiss for lack of subject matter jurisdiction and dismissed the Tribe and OSGC with prejudice from the lawsuit. (R. C00368.) On October 27, 2014, the trial court granted the Tribe and OSGC's Motion for an Illinois Supreme Court Rule 304(a) finding and found that there was no just reason for delaying appeal from its October 8, 2014 Order granting the Defendants' Motion to Dismiss for lack of subject matter jurisdiction. (R. C00375.) On November 7, 2014, Plaintiffs filed their Notice of Appeal. (R. C00378-79.)

STATEMENT OF FACTS

The relationship between ACF and the Tribe/OSGC began in August of 2012. (Supp. R. C86-87, ¶2.) On or about August 7, 2012, Kevin Cornelius (OSGC CEO, GBRE President and Tribe member) and Bruce King (CFO of OSGC, GBRE Treasurer and Tribe member) gave a presentation regarding energy projects related to the Tribe at a U.S. Department of Energy conference in Wisconsin. (Supp. R. C86-87, ¶2.) After the conference, Michael Galich (ACF operations executive) met with William Cornelius, (OSGC Board President), Kevin Cornelius (OSGC CEO) and Bruce King (OSGC CFO), who held themselves out as representatives of the Tribe, to discuss energy projects for the Tribe. (Supp. R. C86-87, ¶2.) Shortly thereafter, Michael Galich met with Kevin Cornelius and Bruce King in Illinois to discuss pursuing a specific plastics-to-energy project (the "Project") with the Tribe. (Supp. R. C86-87, ¶2; Supp. R. C129-30, ¶7; Supp. R. C144-45, ¶7.)

After this first meeting in Illinois, Eric Decator (ACF counsel) drafted a joint venture agreement between OSGC and an ACF entity for the development and operation of the Project with the Tribe. (Supp. R. C156, ¶2; Supp. R. C163-90; Supp. R. C86-87, ¶4.) In or about October 2012, Eric Decator (ACF) and Michael Galich (ACF) participated in numerous weekly telephone calls in Illinois utilizing ACF's conference call number with Kevin Cornelius (OSGC CEO) and Bruce King (OSGC CFO) to discuss the Project. (Supp. R. C87, ¶4; Supp. R. C156, ¶3.) On or about October 22, 2012, Kevin Cornelius and Bruce King, who again introduced themselves as representatives of the Tribe/OSGC, met again in Illinois with ACF members regarding the Project. (Supp. R. C87, ¶6; Supp. R. C156, ¶4.) At this second meeting in Illinois, Kevin Cornelius and

Bruce King advised ACF that the Tribe needed to revise the structure of the initial agreement for political reasons and would utilize an entity known as GBRE to lease the equipment for the Project. (Supp. R. C87, ¶6.; Supp. R. C157, ¶6.) Prior to this meeting, ACF believed the agreement would be with OSGC as GBRE was never mentioned. (Supp. R. C87, ¶¶2-4.; Supp. R. C157, ¶¶2-4.) ACF agreed to contract with GBRE for the Project given that Kevin Cornelius and Bruce King led ACF to believe that the Tribe/OSGC was utilizing GBRE solely for tax purposes. (Supp. R. C157, ¶6.)

On or about October 26, 2012, Equity Asset Finance, LLC ("EAF") and GBRE entered into a Commitment Letter for EAF to provide financing for the Project. (Supp. R. C156, ¶5.) Pursuant to the Commitment Letter, Bruce King arranged for $50,000 to be wired from OSGC's bank account to the bank account of EAF on November 6, 2012. (Supp. R. C156, ¶5.) After OSGC wired the initial funds, ACF members, Matt Eden (OSGC's financial advisor), and Joseph Kavan (OSGC's counsel) participated in numerous weekly telephone conferences utilizing ACF's conference call number to negotiate the agreements and to discuss the Project. (Supp. R. C87-88, ¶7; Supp. R. C157, ¶6.)

On or about January 31, 2013, Louis Stern (ACF), Michael Galich (ACF), Kevin Cornelius (OSGC) and Bruce King (OSGC) attended a meeting with the Tribe's Business Committee to give a presentation and to answer questions regarding the Project (Supp. R. C88, ¶8; Supp. R. C225, p. 43 L. 1-8.) Between January and April of 2013, ACF continued to participate in weekly calls in Illinois with Kevin Cornelius and Bruce King regarding the details and financing of the Project and obtaining a Bureau of Indian Affairs of the United States Department of the Interior (the "BIA") loan guarantee for the

Project, a guarantee only given to an Indian tribe as a borrower. (Supp. R. C88, ¶¶9, 11; Supp. R. C157-58, ¶¶7, 9; Supp. R. C267, p. 47 L. 9-20.) On March 11, 2013, Kevin Cornelius and Bruce King came to Illinois for a third meeting with ACF to review the approval letter issued by the Wisconsin Bank & Trust related to financing the Project. (Supp. R. C88, ¶10; Supp. R. C157, ¶8.)

In April 2013, Kevin Cornelius advised Eric Decator that 3 of the OSGC Board members approved the loan commitment letter and that he needed one more Board member's approval before he could sign it. (Supp. R. C158, ¶10.) Kevin Cornelius repeatedly stated during the negotiations for the Project that he did not do anything without approval of the OSGC Board. (Supp. R. C158, ¶10.) In fact, the elected Secretary of the Tribe testified that "OSGC would have to approve anything that its entities did" and had control over the approval process of any contract of GBRE. (Supp. R. C226, p. 46 L. 1-5, 6-11, 20-23.) On or about May 3, 2013, Kevin Cornelius informed ACF that 4 out of 5 OSGC Board members approved the commitment letter. (Supp. R. C89, ¶13; Supp. R. C158, ¶10; Supp. R. C200.)

On or about May 6, 2013, Michael Galich held a conference call with Kevin Cornelius and Bruce King to discuss financing, the agreements and the Project. (Supp. R. C89, ¶14.) Around the same time, OSGC's attorney, Joseph Kavan advised Eric Decator that he needed in-house legal and Board approval before the Master Lease Agreement and the Operations and Maintenance Agreement (collectively, "Agreements") could be signed. (Supp. R. C158, ¶11.) Louis Stern and Kevin Cornelius signed the Agreements in May and June, 2013. (Supp. R. C89, ¶14; Supp. R. C158, ¶12.)

From the beginning, the proposed agreements with the Tribe and OSGC contained choice of law and jurisdictional clauses waiving sovereign immunity. (Supp. R. C105, ¶¶7.15 and 7.17.) The Master Lease Agreement provides, "**THIS AGREEMENT SHALL BE DEEMED TO BE MADE IN ILLINOIS AND SHALL BE GOVERNED AND CONSTRUED IN ACCORDANCE WITH ILLINOIS LAW. LESSEE AND LESSOR AGREE THAT ALL LEGAL ACTIONS SHALL TAKE PLACE IN THE FEDERAL OR STATE COURTS SITUATED IN COOK COUNTY, ILLINOIS.**" (Supp. R. C52, ¶14(h).) Similarly, the Operations and Maintenance Agreement provides, "Any disputes pertaining to this Agreement shall be determined exclusively in a court of competent jurisdiction in the County of Cook, State of Illinois." (Supp. R. C78, ¶15.)

Throughout the negotiations of the Agreements, OSGC and the Tribe representatives repeatedly represented to ACF that they were acting on behalf of the Tribe/OSGC and referred to the Tribe, OSGC and GBRE as though they were one and the same. (Supp. R. C90, ¶20; Supp. R. C160, ¶17.) Kevin Cornelius and Bruce King repeatedly corresponded with ACF regarding the Project, utilizing OSGC email addresses and OSGC letterhead and utilized OSGC's office. (Supp. R. C90, ¶21; Supp. R. C160, ¶17; Supp. R. C146, ¶11.) Kevin Cornelius and Bruce King represented to ACF that GBRE was only a vehicle for tax purposes, that the Agreements were with the Tribe/OSGC and that Kevin Cornelius had authority to enter into the Agreements and waive sovereign immunity on behalf of the Tribe, OSGC and GBRE. (Supp. R. C90, ¶22; Supp. R. C160, ¶¶17, 18.)

In reliance on the representations of Kevin Cornelius, Bruce King, and William Cornelius that they had the permission of the Tribe and OSGC to enter into the Agreements, ACF continuously performed a variety of tasks to meet its obligations under the Agreements once they were executed. (Supp. R. C90, ¶23; Supp. R. C160, ¶19.) In fact, Kevin Cornelius and Bruce King sent numerous documents related to the Project to Eric Decator in Illinois, but none of these documents referred to GBRE, which was consistent with ACF's understanding that the actual parties to the Project were OSGC/the Tribe. (Supp. R. C158-160, ¶13.)

In August 2013, Bruce King advised Eric Decator that OSGC's Board wanted to review the Project again to determine whether to proceed and sent Eric Decator his slide presentation for the OSGC Board, which included a warning that OSGC "may have additional liability to [ACF] partners in project" if it did not proceed. (Supp. R. C159, ¶15.) On or about August 15, 2013, ACF sent a letter to OSGC's Board at the request of Bruce King regarding the Project. (Supp. R. C89, ¶17; Supp. R. C159, ¶16; Supp. R. C210-11.) On August 30, 2013, Bruce King (CFO of OSGC/Treasurer of GBRE), Kathy Delgado (OSGC Board member), William Cornelius (OSGC Board President), Brandon Stevens (Tribe Business Committee member) and Michael Galich went to ACF's plant in Bakersfield, California to examine the type of machines that would be utilized in the Project. (Supp. R. C89-90, ¶19.) Based on all of the foregoing meetings, telephone conferences and visits to ACF's plant by the Tribe and OSGC, ACF believed it was negotiating the Project with the Tribe and OSGC. (Supp. R. C90, ¶21; Supp. R. C160, ¶19.) ACF relied on the representations of the Tribe/OSGC that they were acting on behalf of the Tribe/OSGC. (Supp. R. C90, ¶20-23; Supp. R. C160, ¶17-19.) In

December 2013, the General Tribal Council of the Tribe voted to dissolve OSGC. (Supp. R. C135, ¶27; Supp. R. C150, ¶27.)

On March 6, 2014, ACF filed a ten-count Complaint against the Tribe, OSGC and GBRE asserting claims for breach of contract, promissory estoppel, unjust enrichment, tortious interference with contract, and tortious interference with prospective economic advantage. (Supp. R. C00003-63.) The Complaint alleges that the Tribe's vote to dissolve OSGC resulted in the withdrawal of the application for the guarantee to the BIA and commitment to finance the Project which in turn caused the BIA and GBRE to abandon the Project and GBRE to breach the Agreements. (Supp. R. C00003-63.)

On May 5, 2014, the Tribe/OSGC filed a Motion to Dismiss for lack of subject matter jurisdiction based on sovereign immunity. (R. C0000101A-124.) The Tribe, as a sovereign Indian Nation, and OSGC, as a subordinate economic entity created by and for the benefit of the Tribe, claimed sovereign immunity from the Plaintiffs' suit as a matter of federal common law. (R. C0000101A-124.) The Tribe and OSGC's Motion further claimed that there was no waiver of sovereign immunity by contract with "requisite clarity." (R. C0000122.) ACF filed its response brief asserting that the Tribe and OSGC were not entitled to sovereign immunity, and alternatively, that The Tribe and OSGC were bound by the forum selection clauses contained in the Agreements and thereby clearly waived sovereign immunity. (Supp. R. C5-306.) On October 7, 2014, the trial court found that there was no dispute sovereign immunity applied to the Tribe and OSGC and further found that there was no knowing waiver of immunity by the Tribe and OSGC. (R. C368; R. Vol. 3, C00013, p. 36, l.4-21.) Based on these findings, the trial court dismissed the suit against the Tribe and OSGC. (R. C368.)

ARGUMENT

I. STANDARD OF REVIEW

The standard of review applied to a trial court's ruling on a section 2–619 motion to dismiss is *de novo*. *Wright v. Pucinski*, 352 Ill. App. 3d 769, 773, 816 N.E.2d 808, 813 (1st Dist. 2004). The appellate court interprets all pleadings and supporting documents in the light most favorable to the nonmoving party. *Magnetek, Inc. v. Kirkland & Ellis*, LLP, 2011 IL App (1st) 101067, ¶ 22, 954 N.E.2d 803, 810 (1st Dist. 2011). With a section 2–619 motion to dismiss, the defendant admits the legal sufficiency of the Plaintiff's complaint but raises an affirmative defense or other matter that avoids or defeats the plaintiff's claim. *Sellers v. Rudert*, 395 Ill. App. 3d 1041, 1045, 918 N.E.2d 586, 590 (4th Dist. 2009). The defendant bears the burden of proving any affirmative defense it relies upon and admits to all well-pled facts in the complaint, as well as any reasonable inferences that may be drawn from those facts. *Wright*, 352 Ill. App. 3d at 773; *Sellers*, 395 Ill. App. 3d at 1045.

The affirmative defense asserted by a defendant pursuant to section 2–619 must appear on the face of the plaintiff's complaint or be supported by affidavit or other evidentiary material. *Nichol v. Stass*, 192 Ill. 2d 233, 247, 735 N.E.2d 582, 591 (2000) (reversing dismissal based on sovereign immunity when there was a question of fact as to defendants' immunity from suit). Once a defendant satisfies this initial burden of establishing the affirmative defense, the burden then shifts to the plaintiff, who must establish that the affirmative defense asserted either is 'unfounded or requires the resolution of an essential element of material fact before it is proven.' *Nichol*, 192 Ill. 2d at 247, *quoting Kedzie & 103rd Currency Exchange, Inc.,* 156 Ill. 2d 112, 116 (1993).

The trial court cannot weigh conflicting affidavits in deciding a motion to dismiss under section 2-619. *Etten v. Lane*, 138 Ill. App. 3d 439, 445-46, 485 N.E.2d 1177, 1181-82 (5th Dist. 1985). "Where conflicting affidavits are presented to the trial court, the court has a duty either to hear other proof bearing on the material facts, or to deny the motion without prejudice to the right of defendants to raise the subject matter thereof by answer." *Id.*

II. DISMISSAL OF THE TRIBE AND OSGC WAS IMPROPER WHEN THERE IS NO SOVEREIGN IMMUNITY.

The trial court summarily concluded that there is no dispute that sovereign immunity would apply to the Tribe and OSGC. However, neither the Tribe nor OSGC are entitled to sovereign immunity in this case. There is simply no basis to conclude the Tribe and OSGC have sovereign immunity as to Plaintiff's tort and equitable claims.

The United States Supreme Court has never decided the applicability of immunity for a tribe's non-contractual activity, such as pled in the Plaintiff's tort and equitable claims, and has continued to leave this question open. *Michigan v. Bay Mills Indian Community,* 134 S.Ct. 2024 (2014); *see also Kiowa Tribe v. Manufacturing Tech., Inc.*, 523 U.S. 751 (1998). The Supreme Court majority in *Kiowa* specifically stated:

> There are reasons to doubt the wisdom of perpetuating the doctrine. At one time, the doctrine of tribal immunity from suit might have been thought necessary to protect nascent tribal governments from encroachments by States. In our interdependent and mobile society, however, tribal immunity extends beyond what is needed to safeguard tribal self-governance. This is evident when tribes take part in the Nation's

> commerce. Tribal enterprises now include ski resorts, gambling, and sales of cigarettes to non-Indians. See *Mescalero Apache Tribe v. Jones,* 411 U.S. 145, 93 S.Ct. 1267, 36 L.Ed.2d 114 (1973); *Potawatomi, supra* [*Oklahoma Tax Comm'n v. Citizen Band Potawatomi Indian Tribe of Oklahoma* 498 U.S. 505, 510, 111 S.Ct. 905, 112 L. Ed. 2d 1112 (1991)]; *Seminole Tribe of Fla. v. Florida,* 517 U.S. 44, 116 S.Ct. 1114, 134 L.Ed.2d 252 (1996). In this economic context, immunity can harm those who are unaware that they are dealing with a tribe, who do not know of tribal immunity, or who have no choice in the matter, as in the case of tort victims.

Kiowa, 523 U.S. at 758.

Moreover, several federal and state courts post-*Kiowa* have held that the doctrine of tribal sovereign immunity does not extend to non-contractual off-reservation conduct. *See Hamaatsa, Inc. v. Pueblo of San Felipe*, 310 P.3d 631 (N.M. App. Ct. 2013), *cert. granted sub nom. Hamaatsa v. San Felipe*, 2013-NMCERT-009, 311 P.3d 452 (holding that sovereign immunity did not bar action by an adjoining landowner that road acquired by the tribe running outside of reservation was a public road); *Hollynn D'Lil v. Cher-Ae Heights Indian Cmty. of Trinidad Rancheria*, 2002 WL 33942761, at *8 (N.D. Cal. Mar. 11, 2002) (denying sovereign immunity to tribe in connection with a disability discrimination claim against a tribal-run, off-reservation hotel).

The *Bay Mills* case concerned tribal gaming activities where the State of Michigan sought to enjoin a tribe from operating an off-reservation casino. *Bay Mills Indian Community,* 134 S.Ct. 2024. The Court ultimately held that Michigan's suit was

barred by tribal sovereign immunity. *Id.* at 2039. First, the Court found that Congress did not abrogate immunity under the Indian Gaming Regulation Act for gaming activity located off of reservation lands. *Id.* Second, the Court found that the tribe was entitled to sovereign immunity for off-reservation commercial activity under its previous decision in *Kiowa Tribe of Oklahoma v. Manufacturing Technologies, Inc.*, 118 S.Ct. 1700 (1998). *Id.*

The Court, however, stated, that "[w]e have never, for example, specifically addressed (nor, so far as we are aware has Congress) whether immunity should apply in the ordinary way if a tort victim, or other plaintiff who has not chosen to deal with a tribe, has no alternative way to obtain relief for off-reservation commercial conduct. The argument that such cases would present a "special justification" for abandoning precedent is not before us. [citations omitted]." *Bay Mills,* 134 S.Ct. 2024 at n. 8.

In his dissenting opinion, Justice Thomas denounced the *Kiowa* decision's extension of the judicially created tribal immunity to off-reservation commercial activity. *Bay Mills,* 134 S.Ct. at 2045. Justice Thomas found no substantive basis for *Kiowa's* extension of tribal immunity to commercial acts outside of tribal lands, and specifically stated, "[s]uch an expansion of tribal immunity is unsupported by any rationale for that doctrine, inconsistent with the limits on tribal sovereignty, and an affront to state sovereignty." *Id.* Justice Thomas recognized that tribal commerce has proliferated since *Kiowa* was decided with tribes' commercial activities ever expanding into industries from online prescription drugs to banking and gasoline distribution and has engendered much conflict and unfairness. *Id.* at 2051.

Justice Thomas declared, "As the commercial activity of tribes has proliferated, the conflict and inequities brought on by blanket tribal immunity have also increased. Tribal immunity significantly limits, and often extinguishes, the States' ability to protect their citizens and enforce the law against tribal businesses. This case is but one example: No one can seriously dispute that Bay Mills' operation of a casino outside its reservation (and thus within Michigan territory) would violate both state law and the Tribe's compact with Michigan. Yet, immunity poses a substantial impediment to Michigan's efforts to halt the casino's operation permanently. The problem repeats itself every time a tribe fails to pay state taxes, harms a tort victim, breaches a contract, or otherwise violates state laws, and tribal immunity bars the only feasible legal remedy. Given the wide reach of tribal immunity, such scenarios are commonplace." *Bay Mills,* 134 S.Ct. at 2051.

Based on the foregoing and notions of fundamental fairness, this Court should decline to further extend tribal immunity in this case to the Tribe's off-reservation commercial activity which amounted to tortious conduct directed against the Plaintiffs. The tort claims in the present case, which are wholly unrelated to gaming and reservation lands, involve the Tribe's and OSGC's conduct directed toward Illinois plaintiffs and contracts. The Court has never addressed the application of sovereign immunity under these specific circumstances and has stated as such. *Id.* Unlike Michigan, which had other remedies against the tribe, ACF is left with no way to obtain relief for the Tribe's and OSGC's tortious conduct. The tortious conduct of the Tribe giving rise to ACF's tortious interference claims was the decision to dissolve OSGC, which in turn resulted in the breach of the Agreements and substantial injury to ACF. (Supp. R. C27, ¶¶40-42; Supp. R. C28, ¶43; Supp. R. C34 ¶¶80-81; Supp. R. C35, ¶¶82-87; Supp. R. C36, ¶¶87-

91.) Certainly, sovereign immunity should not, and the Court has never held, that immunity would apply here. As such, OSGC and the Tribe's argument that they have the benefit of sovereign immunity to begin with is entirely without merit. Thus, the trial court did, in fact, have subject matter jurisdiction over all of ACF's claims against OSGC and the Tribe. Therefore, dismissal was improper and should be reversed.

III. DISMISSAL OF THE TRIBE AND OSGC WAS IMPROPER WHEN THERE WAS A QUESTION OF FACT AS TO WHETHER THE TRIBE AND OSGC WAIVED IMMUNITY THEREBY CONFERRING SUBJECT MATTER JURISDICTION.

Rather than finding a question of material fact as to subject matter jurisdiction and denying the Defendants' motion without prejudice, the trial court erroneously weighed the conflicting evidence in favor of the Defendants. *Nichol*, 192 Ill. 2d at 247; *Etten*, 138 Ill. App. 3d at 445-46. Where jurisdictional issues are inextricably intertwined with the merits of the case, it is proper for the court to deny a motion to dismiss for want of subject matter jurisdiction on the basis that there are genuine issues of material fact. *See Stifel, Nicolaus & Co., Inc. v. Lac due Flambeau Band of Lake Superior Chippewa Indians et al.*, 980 F. Supp. 2d 1078, 1090 (W.D. Wisc. 2013) (holding that there existed a genuine issue of material fact when the determination of subject matter jurisdiction required a resolution of the merits as to whether the transaction documents were valid and enforceable); *see also Pratt Cent. Park Ltd. P'ship v. Dames & Moore, Inc.*, 60 F.3d. 350, 361, n. 8 (7th Cir. 1995).

Here, the Tribe and OSGC argue that this Court lacks subject matter jurisdiction based on their sovereign immunity. However, an Indian tribe is subject to suit where

Congress has authorized the suit or the tribe has waived its immunity. *Kiowa Tribe of Oklahoma*, 523 U.S. at 754. As in *Stifel*, this Court cannot decide the question of subject matter jurisdiction without going directly to the merits of this case, namely whether the Agreements, and consequently the forum and choice of law provisions, are enforceable against OSGC and the Tribe on theories of alter-ego and agency. *Stifel, Nicolaus & Co., Inc.*, 980 F. Supp. 2d at 1090. As such, the jurisdictional issues are intertwined and clearly united with the main elements of the Plaintiffs' claims. Therefore, the trial court erred in resolving the merits of this case under the guise of jurisdiction. Accordingly, the trial court's dismissal of ACF's claims should be reversed on the basis that there is a genuine issue of material fact.

IV. DISMISSAL OF THE TRIBE AND OSGC WAS IMPROPER WHEN THE TRIBE AND OSGC CLEARLY WAIVED SOVEREIGN IMMUNITY.

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

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

The majority rule recognized in Illinois and in most jurisdictions provides that parties should be free and unrestricted in making their own contracts. *Progressive*

Universal Insurance Co. of Illinois v. Liberty Mutual Fire Insurance Co., 215 Ill. 2d 121, 129, 828 N.E.2d 1175, 1180 (2005). More specifically, "Illinois's public policy 'strongly favors freedom to contract' [citation] and broadly allows parties to determine their contractual obligations. [citation.]" *Hussein v. L.A. Fitness International, L.L.C.*, 2013 IL App (1st) 121426, ¶ 11, 987 N.E.2d 460, 465 (March 22, 2013). As a result, "we exercise 'sparingly' the power to declare a private contract void as against public policy." *American Access Casualty Co. v. Reyes*, 2012 IL App (2d) 120296, ¶ 10, 982 N.E.2d 261, 264 (December 28, 2012), *quoting Progressive*, 215 Ill. 2d at 129; *Saba Software, Inc. v. Deere & Co.*, 2014 IL App (1st) 132381, ¶ 60 (September 30, 2014) (holding that as the parties waived venue in their contract by consenting to the exclusive jurisdiction of any court in Illinois, Cook County was a proper place to bring the action).

The First, Seventh and Eighth federal Circuits have taken a practical, commonsense approach in determining which words fairly can be construed as comprising a waiver of tribal sovereign immunity. *See Sokaogon Gaming Enterprise Corp. v. Tushie-Montgomery Associates, Inc.*, 86 F.3d 656, 660 (7th Cir. 1996); *Rosebud Sioux Tribe v. Val–U Const. Co.*, 50 F.3d 560, 563 (8th Cir. 1995); *Ninigret Dev. Corp. v. Narragansett Indian Wetuomuck Hous. Auth.*, 207 F.3d 21, 30-31 (1st Cir. 2000). "A forum selection clause in a given agreement has been held sufficient to constitute consent to personal jurisdiction in a foreign State." *GPS USA, Inc. v. Performance Powdercoating*, 2015 IL App (2d) 131190, ¶ 24 (January 28, 2015), *quoting ETA Trust v. Recht*, 214 Ill. App. 3d 827, 834 (1991).

Furthermore, "where venue is specified with mandatory or obligatory language, [a forum selection] clause will be enforced; where only jurisdiction is specified, the clause

will generally not be enforced unless there is some further language indicating the parties' intent to make venue exclusive." *Stifel, Nicolaus & Co., Inc. v. Lac du Flambeau Band of Lake Superior Chippewa Indians,* 980 F. Supp. 2d 1078, 1088, 2013 WL 5803778, at *7 (W.D. Wis. Oct.29, 2013), *quoting Muzumdar v. Wellness Int'l Network, Ltd.,* 438 F.3d 759, 762 (7th Cir. 2006). "Mandatory" forum selection clauses are those in which a particular forum is designated as *exclusive*—for example, those stating that venue "shall" lie in a particular court for "any dispute." *Stifel, Nicolaus & Co. v. Lac Courte Oreilles Band of Lake Superior Chippewa Indians of Wisconsin*, 2014 WL 2801236, at *13 (W.D. Wis. June 19, 2014).

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

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

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

In *Ninigret Dev. Corp.*, the First Circuit held that the forum selection clause in the contract when read against the background of a tribal ordinance that authorized the tribal housing authority to waive immunity by contract was a direct and clear waiver. *Ninigret Dev. Corp.*, 207 F.3d at 31. The forum selection clause specifically provided that, "[a]ll claims, disputes and other matters ... arising out of or relating to [the contract]" to arbitration, and further provides that the agreement to arbitrate "shall be specifically enforceable under prevailing law." *Id.*

As the clauses in the contracts at issue in *C&L Enterprises, Inc.*, *Altheimer & Gray*, *Sokaogon Gaming Enterprise Corp.* and *Ninigret Dev. Corp.* clearly waived sovereign immunity, the Agreements in this case clearly waived sovereign immunity when the parties agreed to be bound by Illinois law and to sue or be sued in connection with any disputes related to the Agreements in the federal or state courts in Cook County, Illinois. (Supp. R. C52, ¶14(h); Supp. R. C78, ¶15.) Here, the Defendants' agreement to be sued exclusively in Illinois in this case is to waive any immunity the Defendants might have from being sued. *Sokaogon Gaming Enterprise Corp.*, 86 F.3d at 659. As such, the forum clause and choice of law clause clearly waived sovereign immunity.

B. OSGC And The Tribe Are Bound By the Forum and Choice of Law Clause.

OSGC and the Tribe are subject to the forum and choice of law clause by reason of unity. The evidence in this case establishes a unity between the Tribe and the OSGC such that any distinction between OSGC and the Tribe should be disregarded. In *Altheimer & Gray,* the court ignored the tribal corporation's corporate status and found that the contract was between the tribe and the plaintiff, even though the agreement was signed by the tribal corporation's vice president. The facts leading to the court's disregard of the tribal corporation as a separate entity from the tribe included the tribe and tribal corporation being referred to interchangeably; the plaintiff regarding the signature of the tribal corporation as binding on the tribe itself regarding waiver of immunity; and a unity between the tribal corporation and the tribe. *Altheimer & Gray*, 983 F.2d at 806, 812.

Similarly here, OSGC and the Tribe were referred to interchangeably. (Supp. R. C90, ¶20; C160, ¶17.) In addition, just as the plaintiff in *Altheimer & Gray* regarded the tribal corporation's execution of the letter of intent binding on the tribe, ACF regarded the execution of the Agreements as binding on the Tribe itself regarding the choice of law and jurisdictional clauses. (Supp. R. C160, ¶¶17-19.) *Altheimer & Gray*, 983 F. 2d at 806. Further, OSGC has unequivocally demonstrated the unity between itself and the Tribe when it declared, "OSGC is controlled by the Oneida Business Committee, on behalf of the Tribe, its sole shareholder." (Supp. R. C286.) In addition, OSGC has declared, "...since the board of directors [of OSGC] is answerable to the Tribe, the decisions ... ultimately rest with the Tribe." (Supp. R. C286.) OSGC has further

admitted, "[t]he Tribe's involvement in OSGC, both from a control and operational standpoint, is so pervasive, ..." (Supp. R. C292.) These declarations regarding the control and unity between OSGC and the Tribe are further bolstered by the testimony in this case.

Patricia Hoeft, elected Secretary of the Tribe's Business Committee, testified that OSGC was essentially created to make money for the Tribe and was expected to share its profits with the Tribe. (Supp. R. C228, p. 56 L. 13-17; Supp. R. C231, p. 67 L.22-24 and p. 68 L. 1.) The Tribe provides funds to OSGC to be used for projects and has loaned money to OSGC due to OSGC's cash flow problem, and OSGC has not paid back those funds to the Tribe. (Supp. R. C128-29, ¶5; Supp. R. C143, ¶5; Supp. R. C235, p. 85 L. 15-23, Supp. R. C236, p. 86 L. 9-14; Supp. R. C266, p. 43 L. 9-16.) Further, the Tribe has the power to dissolve OSGC. (Supp. R. C261, p. 23 L. 11-19.) All of these facts demonstrate a clear unity between OSGC and the Tribe. Accordingly, any claimed distinction between OSGC and the Tribe should be disregarded as a fiction.

Furthermore, OSGC and the Tribe are bound by the forum selection clauses by reason of their "close relationship" to the dispute. A number of cases hold that the test for whether a nonparty to a contract containing such a clause can nonetheless enforce it (and whether the nonparty will be bound by the clause if, instead of suing, it is sued) is whether the nonparty is "closely related" to the suit. *Hugel v. Corporation of Lloyd's*, 999 F.2d 206, 209–10 (7th Cir. 1993); *Holland America Line Inc. v. Wärtsilä North America, Inc.*, 485 F.3d 450, 455–56 (9th Cir. 2007); *Marano Enterprises v. Z–Teca Restaurants, L.P.*, 254 F.3d 753, 757–58 (8th Cir. 2001); *Manetti–Farrow, Inc. v. Gucci America, Inc.*, 858 F.2d 509, 514 n. 5 (9th Cir. 1988); *Caperton v. A.T. Massey Coal Co.*, 225 W.Va.

128, 690 S.E.2d 322, 347–48 (W.Va. 2009); *Ex Parte Procom Services, Inc.*, 884 So.2d 827, 834 (Ala. 2003); *Weygandt v. Weco LLC,* C.A. No. 4056–VCS, 2009 WL 1351808 at *5–6 (Del.Ch. May 14, 2009). A forum selection clause is sometimes enforced by or against a company that is under common ownership (for example as parent and subsidiary) with, or an affiliate of, a party to a contract containing the clause, as in *American Patriot Ins. Agency, Inc. v. Mutual Risk Management, Ltd.*, 364 F.3d 884, 888–89 (7th Cir. 2004), and the *Holland America* and *Manetti–Farrow* cases cited above. *See Adams v. Raintree Vacation Exch., LLC*, 702 F.3d 436, 439-40 (7th Cir. 2012).

"On balance it seems better to let the parties decide in the contract whether to limit the forum selection clause to the named entities than for the law to impose such a limit as a default provision to govern in the absence of specification of other entities to be bound. The latter approach would greatly complicate the negotiation of such clauses because the parties would have to strain to close all the loopholes that would open if only entities named in the contract could *ever* invoke or be made subject to such a clause." *Adams*, 702 F.3d at 442.

Most recently in Illinois, the court in *Solargenix Energy, LLC* found that Spanish parent corporations had a "close relationship" to the dispute such that they would be bound by a forum selection clause in the agreement executed by their subsidiaries. *Solargenix Energy, LLC v. Acciona, S.A. et al.*, 2014 IL App (1st) 123403, ¶¶49-52 (Ill. App. 1st Dist. 2014). In *Solargenix Energy, LLC*, the plaintiff, a North Carolina limited liability company, formed a joint venture with subsidiaries of two Spanish corporations, Acciona and Acciona Energia, for the development of thermosolar power plants. *Solargenix Energy, LLC*, 2014 IL App (1st) 123403, ¶1-3. The plaintiff's principal

initially contacted the CEO of one of the Spanish parent corporations to propose a joint venture. *Id.* at ¶9.

Several days of negotiations took place in Chicago which resulted in an amended cooperation agreement and other joint venture agreements. *Id.* at ¶10. Representatives of the plaintiff and the Spanish corporations' subsidiaries signed the agreement. *Id.* The agreement contained a choice of law provision which designated Illinois law as the governing law and further a forum selection provision in which the parties consented to the exclusive jurisdiction of any state of federal court situated in the State of Illinois, City of Chicago. *Solargenix Energy, LLC*, 2014 IL App (1st) 123403, ¶ 15. In addition, one of the Spanish corporations, Acciona Energia, signed a letter addressed to the plaintiff in which it accepted and consented to be bound by and to comply with the contents and obligations set forth in the "applicable sections" of the agreement. . *Id.* at ¶16. The "applicable sections" contained in this adhesion letter, however, did not specifically incorporate the forum selection clause of the agreement. *Id.* at ¶14-20.

A forum selection provision is a legal arrangement by which a litigant may expressly or impliedly consent to the personal jurisdiction of the court. *Id.* at ¶34-35. In addition, forum selection clauses have been held to apply not merely to contract claims involving the terms of the contract in which the clause appears, but also to other claims that are otherwise connected to the contract, such as tort claims arising from the contract. *Id.*, *quoting*, *Hugel v. Corp. of Lloyd's*, 999 F.2d 206, 209 (7th Cir. 1993). "[W]here the relationship between the parties is contractual, the pleading of alternative non-contractual theories of liability should not prevent enforcement of such a bargain [as to the appropriate forum for litigation]." *Id.*, *quoting*, *Hugel v. Corp. of Lloyd's*, 999 F.2d at

209. In addition, in Illinois, forum selection clauses are presumed valid and enforceable, unless proven otherwise by the party contesting their application. *Solargenix Energy, LLC*, 2014 IL App (1st) 123403 at ¶42.

The *Solargenix Energy, LLC* court found that although the Spanish defendants were not signatories to the agreement, courts have determined that a nonparty to a contract containing a forum selection clause can nonetheless be bound by that clause where the nonsignatory is "'closely related' to the dispute such that it becomes 'foreseeable' that it will be bound." *Id. quoting, Hugel v. Corp. of Lloyd's*, 999 F.2d at 209. The court in *Solargenix Energy, LLC* found that a nonsignatory need not also be deemed a third-party beneficiary of the contract in order for a court to find that the forum selection clause applies to it, although third-party beneficiary status "would, by definition, satisfy the 'closely related' and 'foreseeability' requirements." *Id., quoting, Hugel v. Corp. of Lloyd's*, 999 F.2d at 210 n. 7. "Where there is a sufficiently close relationship between the non-signatory and the dispute and the parties, it does not defy the non-signatory's reasonable expectations that it would be bound by the clause, just as the signatory parties are. A nonsignatory impliedly consents to the forum selection clause via its connections with [the] dispute, the parties and the contract or contracts at issue." *Solargenix Energy, LLC*, 2014 IL App (1st) 123403, ¶42.

The *Solargenix Energy, LLC* court first found that the plaintiff's claims, including breach of contract, tortious interference and unjust enrichment, fell within the scope of the broad forum selection clause and arose out of and were related to the agreements at issue in the case. *Id.* at ¶47. The court then found that in addition to being a signatory to the adhesion letter, Acciona Energia as well as Acciona, who was not a signatory to the

adhesion letter, were closely related to the joint venture contracts, the dispute and the subsidiary. *Id.* at ¶48. Acciona and Acciona Energia were the only entities capable of pursuing the expansion and implementation of the plaintiff's thermosolar technology. *Id.* at ¶48-49. Acciona Energia's executive committee discussed and reviewed the investment, and the agreements were negotiated by senior officials of Acciona Energia, namely the head of international business and its lawyer. *Id.* Senior officials of Acciona determined the subsidiaries' strategy and which project to pursue, and the CEO of Acciona was personally involved in the decision to invest in the joint venture and approved the initial decision to enter the joint venture. *Id.*

In addition, Acciona Energia financially supported the subsidiaries. Further, several individuals held positions in Acciona Energia, as well as served on the boards of the subsidiaries. *Id.* Lastly, the court noted, "[i]ndeed, it is because of Acciona's close involvement with the joint venture that [the plaintiff] alleges Acciona was allowed to control [the subsidiary] and stifle potential opportunities for the joint venture...." *Id.* at ¶49-50.

Solargenix Energy, LLC, while technically a case deciding personal jurisdiction, is directly on point with the present case regarding when parent corporations will be bound by forum clauses in contracts signed by their subsidiaries. As in *Solargenix Energy, LLC,* the Tribe and OSGC were so "closely related" to the dispute such that it became foreseeable that they would be bound by the forum selection clause in the Master Lease and Operation and Maintenance Agreements. (Supp. R. C39-64; Supp. R. C65-84.) As in *Solargenix Energy, LLC*, the Agreements in this case contained a choice of law clause and a broad forum selection clause whereby all legal actions/any disputes

pertaining to this Agreement shall take place in the federal or state courts situated in Cook County, Illinois. (Supp. R. C52, ¶ 14(h); Supp. R. C78, ¶15.) As in *Solargenix Energy, LLC*, the plaintiffs' claims, including breach of contract, tortious interference and unjust enrichment, fall under the broad forum selection clause. Similarly to Acciona and Acciona Energia, who were found to be closely related to the dispute and the contracts when they were the only entities capable of pursing the joint venture agreements, the Tribe and OSGC were the only entities capable of pursuing the objective of the Master Lease and Operation and Maintenance Agreements and implementation of ACF's energy technology. (Supp. R. C39-64; Supp. R. C65-84; Supp. R. C86-87, ¶2; Supp. R. C88, ¶¶9, 11; Supp. R. C157, ¶¶ 7, 9; Supp. R. C267, p. 47 L9-20.) *Solargenix Energy* at ¶49-51.

Moreover, as Acciona Energia's executive committee and Acciona's CEO and lawyer were involved in the investment in and negotiation of the joint venture in *Solargenix Energy, LLC*, the Business Committee of the Tribe and the CEO, CFO, financial advisor and attorney of OSGC were involved in the due diligence of the Project, investment in the Project, and negotiations of the Agreements. (Supp. R. C86-87, ¶¶2, 4, 6-7; Supp. R. C88, ¶¶7-11; Supp. R. C89, ¶¶13-14; Supp. R. C156, ¶¶2-5; Supp. R. C157, ¶¶6-9, Supp. R. C158, ¶¶9-12; Supp. R. C225, p. 43 L1-8; Supp. R. C226, p. 46 L. 1-23; Supp. R. C267, p. 47 L. 9-20.) Here, OSGC's board of directors approved the Agreements, and any decision of OSGC's board of directors ultimately rests with the Tribe. (Supp. R. C158, ¶¶10-11; Supp. R. C286.) Furthermore, as in *Solargenix Energy, LLC,* Kevin Cornelius and Bruce King held executive positions in both OSGC and its subsidiary GBRE; further, the Tribe financially supported OSGC, who in turn financially

supported and controlled GBRE. (Supp. R. C88, ¶¶9, 11; Supp. R. C128-29, ¶5; Supp. R. C143, ¶5; Supp. R. C156, ¶5; Supp. R. C157-58, ¶¶7, 9; Supp. R. C235, p. 85 L. 15-23; Supp. R. C236, p. 86 L. 9-14; Supp. R. C266, p. 43 L. 9-16.) Lastly, as in *Solargenix Energy, LLC*, it is because of the Tribe and OSGC's close involvement with the Project and Agreements that ACF alleges the Tribe and OSGC were allowed to control GBRE and stifle ACF's rights under the Agreements. (R. C00003-18.) *Solargenix Energy, LLC* at ¶49-51.

All of the foregoing facts clearly establish that the Tribe and OSGC were "closely related" to the dispute and the Agreements at issue such that the Tribe and OSGC are bound by the forum selection clauses contained therein. *Solargenix Energy, LLC*, 2014 IL App (1st) 123403 at ¶31-34. In addition, OSGC and the Tribe are bound by the forum selection clauses as third-party beneficiaries of the Agreements. Specifically, OSGC was to receive royalty payments under the First Amendment to Schedule 1 to the Master Lease Agreement, and consequently share those royalty payments with the Tribe since its purpose was to make money for and share profits with the Tribe. (Supp. R. C39-64; Supp. R. C228, p. 56 L. 13-17, Supp. R. C231, p. 67 L.22-24, Supp. R. C231, p. 68 L. 1.) As such, OSGC and the Tribe were third-party beneficiaries of the Agreements as they were to receive a direct benefit under the Agreements. *See Advanced Concepts Chicago, Inc. v. CDW Corp.*, 405 Ill. App. 3d 289, 293, 938 N.E.2d 577, 581 (1st Dist. 2010).

Accordingly, OSGC and the Tribe's third-party beneficiary status "would, by definition, satisfy the 'closely related' and foreseeability' requirements" and bind OSGC and the Tribe to the forum selection clauses. *Solargenix Energy, LLC*, 2014 IL App (1st)

123403 at ¶36. As a result of unequivocally being bound by the forum selection clauses contained in the Agreements, the Tribe and OSGC have clearly waived their sovereign immunity and are subject to the jurisdiction of this Court. *Altheimer & Gray*, 983 F.2d at 806; *Solargenix Energy, LLC*, 2014 IL App (1st) 123403 at ¶36-37.

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

GBRE is merely the alter ego of its parent, the Tribe/OSGC. As GBRE is a Delaware limited liability company, Illinois courts would apply Delaware law in determining whether the entity's separate existence should be disregarded. *Old Orchard Urban Limited Partnership v. Harry Rosen, Inc.*, 389 Ill. App. 3d 58, 69 (1st 2009). Furthermore, the doctrine of piercing the corporate veil applies to Delaware limited liability companies. *Westmeyer v. Flynn*, 382 Ill. App. 3d 952, 958, 889 N.E.2d 671, 677 (1st Dist. 2008); *see also Wellman v. Dow Chemical Co.*, 2007 WL 842084, *2 (D. Del. March 20, 2007) ("Under Delaware law, a limited liability company formed under the Delaware Limited Liability Company Act is treated for liability purposes like a corporation"). Under Delaware law, a court can pierce the corporate veil of an entity where there is fraud or where a subsidiary is in fact a mere instrumentality or alter ego of its owner. *Geyer v. Ingersoll Publications Co.*, 621 A.2d 784, 793 (Del. Ch. 1992) (denying the defendant's motion to dismiss when plaintiff sufficiently stated an alter ego claim).

"[A]n alter ego analysis must start with an examination of factors which reveal how the corporation operates and the particular defendant's relationship to that operation. These factors include whether the corporation was adequately capitalized for the corporate undertaking; whether the corporation was solvent; whether dividends were

paid, corporate records kept, officers and directors functioned properly, and other corporate formalities were observed; whether the dominant shareholder siphoned corporate funds; and whether, in general, the corporation simply functioned as a facade for the dominant shareholder." *A.G. Cullen Const., Inc. v. Burnham Partners, LLC*, 2015 IL App (1st) 122538, ¶¶ 42-43 (March 11, 2015, *citing Harco National Insurance Co. v. Green Farms, Inc.,* 1989 WL 110537, at *4 (Del. Ch. Sept. 19, 1989), *quoting United States v. Golden Acres, Inc.,* 702 F. Supp. 1097, 1104 (D. Del. 1988).

The facts in this case demonstrate that GBRE was the alter ego and mere instrumentality of the Tribe/OSGC. First, the Tribe/OSGC controlled the day-to-day operations of GBRE. Testimony has established that while OSGC is ultimately the owner of GBRE; both the Tribe and OSGC have the power to dissolve GBRE. Supp. R. C227, p. 52 L. 4-8, Supp. R. C223, p. 37 L. 5-11; Supp. R. C261, p. 23 L. 21-24, Supp. R. C264, p. 34 L. 17-20.) Moreover, "OSGC would have to approve anything that its entities did," and had control over the approval process of any contract of GBRE. (Supp. R. C226, p. 46 L. 1-5, 20-23.) The negotiations of the Agreements in this case establish OSGC's pervasive control over GBRE in practice when Kevin Cornelius (OSGC CEO/GBRE President) repeatedly represented that he did not do anything without the approval of the OSGC Board. (Supp. R. C158, ¶10; Supp. R. C200; Supp. R. C89, ¶13.) Second, GBRE and the Tribe/OSGC operated as a single economic entity when OSGC, not GBRE, wired $50,000 to Equity Asset Finance LLC per the terms of GBRE's commitment letter. (Supp. R. C156, ¶5.) In addition, the Tribe/OSGC guaranteed loans and extensions of credit to GBRE for the Project. (Supp. R. C157, ¶7; Supp. R. C267, p. 47 L. 9-20.)

Lastly, an inference emerges that GBRE is operating as OSGC's instrumentality where the officers of GBRE and OSGC are wholly identical and where these officers only corresponded with ACF utilizing OSGC email addresses and letterhead and utilized OSGC's office. (Supp. R. C90, ¶21; 160, ¶17; Supp. R. C131, ¶11.) Furthermore, the officers of GBRE/OSGC repeatedly represented, and ACF always understood, that GBRE was merely a vehicle for tax purposes to facilitate the Project. (Supp. R. C160, ¶17.) The facts in this case unequivocally establish that GBRE is the alter ego and merely an instrumentality of OSGC/the Tribe. *Geyer*, 621 A.2d at 793. As such, the forum and choice of law clauses in the Agreements are enforceable against OSGC and the Tribe. Accordingly, OSGC and the Tribe have waived sovereign immunity and are subject to suit in Illinois and liability under the Agreements. Hence, the dismissal of the Tribe/OSGC should be reversed.

Notwithstanding that GBRE was in effect the alter ego of both the Tribe and OSGC, the evidence absolutely establishes that GBRE was the alter ego of OSGC. *A.G. Cullen Const., Inc., LLC*, 2015 IL App (1st) 122538, ¶¶ 42-43. Thus, OSGC is certainly bound by the forum and choice of law clauses, and therefore, has clearly waived sovereign immunity. Accordingly, at a minimum, the dismissal in favor of OSGC should be reversed.

Nonetheless, the Tribe and OSGC were "direct participants" in the wrong alleged in the Complaint, and therefore, should be directly liable. Where a corporation is the sole shareholder of another corporation (as defendant was here), the general rule is that the shareholder-corporation is not liable for the conduct of its subsidiary unless the corporate veil can be pierced. *Forsythe v. Clark USA, Inc.*, 361 Ill. App. 3d 642, 646, 836 N.E.2d

850, 854 (1st Dist. 2005) *aff'd,* 224 Ill. 2d 274, 864 N.E.2d 227 (2007). There is, however, a well-established though seldom employed exception to "the general rule that the corporate veil will not be pierced in the absence of large-scale disregard of the separate existence of a subsidiary corporation"; that exception being "direct participant" liability. *Id.*

"Although not often employed to hold parent corporations liable for the acts of subsidiaries in the absence of other hallmarks of overall integration of the two operations, it has long been acknowledged that parents may be 'directly' liable for their subsidiaries' actions when the 'alleged wrong can seemingly be traced to the parent through the conduit of its own personnel and management,' and the parent has interfered with the subsidiary's operations in a way that surpasses the control exercised by a parent as an incident of ownership." *Id., citing Pearson v. Component Technology Corp.,* 247 F.3d 471, 486–87 (3rd Cir. 2001), *quoting United States v. Bestfoods,* 524 U.S. 51, 64, 118 S.Ct. 1876, 1886 (1998), *quoting* W. Douglas & C. Shanks, *Insulation From Liability Through Subsidiary Corporations,* 39 Yale L.J. 193, 207 (1929). It is well settled that "where a holding company directly intervenes in the management of its subsidiaries so as to treat them as mere departments of its own enterprise, it is responsible for the obligations of those subsidiaries incurred or arising during its management. * * * A holding company which assumes to treat the properties of its subsidiaries as its own cannot take the benefits of direct management without the burdens." *Id, quoting Consolidated Rock Products Co. v. Du Bois,* 312 U.S. 510, 524, 61 S.Ct. 675, 684 (1941).

"Direct participation" liability has long been recognized by courts and commentators alike as a basis for holding corporations responsible for meddling in the

affairs of their subsidiaries even where the corporate veil remains impenetrable. *Forsythe*, 361 Ill. App. 3d at 651. This liability, however, is "transaction-specific" and thus limited to those instances where that meddling is directly tied to the resultant harmful or tortious conduct of the subsidiary. *Id.* The appellate court in *Forsythe* discussed four actions which would generally insure that a parent corporation would not be liable for its subsidiaries' wrongdoing: (1) Maintaining a separate financial unit that should be sufficiently financed so as to carry the normal strains upon it; (2) Separating the day-to-day business of the two units; (3) Maintaining formal barriers between the two management structures; and (4) Not representing the two units as being one unit. *Id.*

In *Forsythe*, the plaintiff asserted that the defendant, despite its legal status as a parent corporation, was directly responsible for the wrongful conduct alleged in the complaint. The evidence showed that the parent corporation's directors drew up and approved the subsidiary's budget, boards of both met often simultaneously, the parent mandated the subsidiary's overall business strategy; and the parent president who was also the CEO of the subsidiary instructed the subsidiary to reduce its budget by 25% which resulted in cutbacks on maintenance, training and infrastructure of the subsidiary which resulted in injury to the plaintiff. The court held that the plaintiff submitted sufficient evidence to survive summary judgment. *Forsythe*, 361 Ill. App. 3d at 651.

As the parent and subsidiary in *Forsythe* failed to maintain formal barriers between the two management structures and separate their day-to-day business, the evidence in this case sufficiently demonstrates the Tribe/OSGC's "direct participation" liability. The Tribe/OSGC controlled the day-to-day operations of GBRE as demonstrated by GBRE's inability to freely enter into contracts. Specifically, "OSGC

would have to approve anything that its entities did," and had control over the approval process of any contract of GBRE. (Supp. R. C226, p. 46 L. 1-5, 20-23.) The Agreements at issue in this case had to be approved by the OSGC Board, the CEO of which was also the GBRE President. (Supp. R. C158, ¶10; Supp. R. C200; Supp. R. C89, ¶13.) Further, the Tribe/OSGC wired $50,000 per the terms of GBRE's commitment letter and guaranteed loans and extensions of credit to GBRE for the Project. (Supp. R. C156, ¶5; Supp. R. C157, ¶7; Supp. R. C267, p. 47 L. 9-20.)

In addition, the Tribe had the authority to dissolve OSGC, as well as the Tribe/OSGC had the authority to dissolve GBRE. (Supp. R. C227, p. 52 L. 4-8; Supp. R. C223 p. 37 L. 5-11; Supp. R. C261, p. 23 L. 21-24; Supp. R. C264, p. 34 L. 17-20.) In fact, the Tribe did dissolve OSGC which caused GBRE to breach the Agreements. (R. C00008.) The dissolution of OSGC resulted in the guarantee application to the BIA being withdrawn and caused the BIA to abandon the Project. (R. C00008.) Clearly, the Tribe and OSGC have failed to maintain formal barriers between the Tribe's and OSGC's management and that of GBRE which lead to the Plaintiffs' damages alleged in the Complaint. (R. C00008.)

Moreover, the direct participation between the Tribe/OSGC and GBRE is even more pervasive than in *Forsythe* when OSGC and GBRE represent themselves as being one unit. *Forsythe*, 361 Ill. App. 3d at 651. In the matter of *Oneida Seven Generations Corporation and Green Bay Renewable Energy, LLC v. City of Green Bay*, 2014 WI App 45, 353 Wis. 2d 553, 846 N.W.2d 33 *review granted*, 2014 WI 122, ¶ 6, 855 N.W.2d 694 (March 25, 2014), currently pending before the Supreme Court of Wisconsin, OSGC and GBRE refer to themselves collectively as "OSGC." (A copy of the Brief of OSGC in the

Green Bay case is attached to the Appendix. *See* A22-37.) That case involved the City of Green Bay's revocation of a conditional use permit issued to OSGC (or GBRE) for the construction of a waste-to-energy facility. Interestingly, in that matter, as in the instant case, Kevin Cornelius, CEO of OSGC, was the individual who gave a presentation to the Plan Commission on behalf of OSGC and GBRE. *Oneida Seven Generations Corporation and Green Bay Renewable Energy, LLC*, 2014 WI App 45, ¶ 6, 353 Wis. 2d 553.

While there is ample evidence to pierce the corporate veil between the Tribe/OSGC and GBRE, and certainly as between OSGC and GBRE, the Tribe/OSGC is at the very least subject to "direct participant" liability for its role in dissolving OSGC, which led to the breach by and the tortious interference of the Agreements with GBRE.

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

The Tribe and OSGC claim that there could be no waiver of sovereign immunity without a resolution under the Tribe's Sovereign Immunity Ordinance. Neither the U.S. Supreme Court nor the Illinois courts have addressed this issue. The U.S. Supreme Court has not required anything other than clear unequivocal language for a valid waiver of sovereign immunity. *C&L Enterprises, Inc.*, 532 U.S. at 418; *see also Bates Associates, LLC v. 123 Associates, LLC*, 290 Mich. App. 52, 58-64, 799 N.W.2d 177, 181-184 (2010). The U.S. Supreme Court, however, observed that reference to uniform federal law governing immunities by foreign sovereigns is appropriate in deciding whether a particular act constitutes the wavier of tribal immunity. *C&L Enterprises, Inc.*, 532 U.S. at 421, n. 3 (2001); *see also Smith v. Hopland Band of Pomo Indians*, 95 Cal. App. 4th 1,

10 (2002). Under federal law, "[w]hen a person has authority to sign an agreement on behalf of a state, it is assumed that the authority extends to a waiver of immunity contained in the agreement. *Id.*

In *Smith*, the court disregarded tribal law requiring a resolution and held that the tribe entered into the contract, which was signed by an authorized agent, and clearly waived sovereign immunity. 95 Cal. App. 4th at 10. Likewise in *Bates*, the court held that a tribe and its limited liability company waived their sovereign immunity and tribal jurisdiction when the tribe's CFO had authority to enter into the sale and settlement agreements containing the waivers of immunity. 290 Mich. App. at 58-64. Similar to *Smith* and *Bates*, the lack of a tribal resolution does not invalidate the waiver of sovereign immunity when Kevin Cornelius, CEO of OSGC and President of GBRE, had authority to enter into the Agreements.

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

The U.S. Supreme Court has observed that reference to uniform federal law governing immunities by foreign sovereigns is appropriate in deciding whether a particular act constitutes the wavier of tribal immunity. *C&L Enterprises, Inc.*, 532 U.S. at 421, n. 3 (2001). The 7th Circuit also recognized that agency principles are applicable for purposes of sovereign immunity. *Richman v. Sheahan*, 270 F.3d 430, 442 (7th Cir. 2001). There is no Supreme Court or Illinois precedent regarding the enforceability of immunity waivers by tribal agents with apparent authority, and the law among the other states is unsettled. Substantial authority exists, however, to support the proposition that courts should give effect to such waivers. Adam Keith, *Who Should Pay for the Errors of*

the Tribal Agent?: Why Courts Should Enforce Contractual Waivers of Tribal Immunity When an Agent Exceeds Her Authority Under Tribal Law, 14 J. Bus. L. 843 (2014).

While the Tribe/OSGC will likely rely heavily on the rulings in *World Touch Gaming, Inc. v. Massena Mgmt.*, 117 F. Supp. 2d 271 (N.D.N.Y. 2000) and perhaps, *Danka Funding Co., LLC v. Sky City Casino*, 747 A. 2d 837 (N.J. S.Ct. 1999), these rulings asserting that the requisite clarity of immunity waivers forbids the enforcement of waivers made by tribal agents with apparent authority does not follow the more recent trend in narrower readings of what constitutes a clear waiver. *See C&L Enterprises, Inc.*, 532 U.S. at 421 and *Sokaogon,* 86 F.3d at 660 (ruling that a standard arbitration clause, which made no explicit mention of tribal immunity, was sufficiently clear to constitute an express waiver). Moreover, from a policy perspective, a specific waiver, such as here, is very limited in scope and only abrogates tribal immunity in the context of a single contractual relationship of suits related to "the revenue stream associated with a specified commercial project." Adam Keith, *Who Should Pay for the Errors of the Tribal Agent?: Why Courts Should Enforce Contractual Waivers of Tribal Immunity When an Agent Exceeds Her Authority Under Tribal Law*, 14 J. Bus. L. 843 (2014). Further, applying agency principals to interpret immunity waivers in specific factual circumstances does not fundamentally alter the nature of tribal immunity or go against cases such as *Kiowa*, which only addressed the question of whether the court should generally completely abrogate tribal immunity. *Id.*

In *Storevisions, Inc. v. Omaha Tribe of Nebraska*, 281 Neb. 238 (Neb. S.Ct. 2011), the Supreme Court of Nebraska applied agency principles to the waiver of tribal immunity and held that the chairman and vice chairman of a tribal council had apparent

authority to waive the tribe's immunity. Similarly in *Rush Creek Solutions, Inc. v. Ute Mountain Ute Tribe*, 107 P.3d 402 (Colo. Ct. of App. 2004), the court applied agency law and held that the tribe's CFO had apparent authority to enter into the contract and the waiver contained therein.

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

Kevin Cornelius was an implied agent of the Tribe/OSGC when the Tribe/OSGC exerted sufficient control over GBRE/Cornelius so as to negate GBRE/Cornelius' status as independent. *Petrovich*, 188 Ill. 2d at 42. Namely, GBRE/Cornelius could not act without approval of OSGC's Board, and the Tribe/OSGC guaranteed loans and extended funds and credit to GBRE for the Project. (Supp. R. C227, p. 52 L. 4-8; Supp. R. C223, p. 37 L. 5-11, Supp. R. C226, p. 46 L. 1-5, 20-23; Supp. R. C261, p. 23 L. 21-24; Supp. R. C264, p. 34 L. 17-20, Supp. R. C267, p. 47 L. 9-20; Supp. R. C156, ¶5; Supp. R. C 157, ¶7.) Nonetheless, Kevin Cornelius was an apparent agent of the Tribe/OSGC based on the Tribe/OSGC's acquiescence in Kevin Cornelius' exercise of authority in

negotiating and executing the Agreements. (Supp. R. C158, ¶¶10, 11; Supp. R. C200.) Furthermore, the Tribe/OSGC and Kevin Cornelius made representations from which ACF reasonably concluded that Kevin Cornelius had authority to negotiate the Project, execute the Agreements and waive sovereign immunity on behalf of the Tribe/OSGC. (Supp. R. C90, ¶20-23; Supp. R. C158, ¶13; Supp. R. C160, ¶¶17, 19.) Clearly, the facts establish that GBRE/Cornelius was an apparent agent of the Tribe and OSGC when negotiating the Agreements for the Project with ACF. Hence, jurisdiction over the Tribe/OSGC is proper based on the activities of their subsidiary, GBRE, and their implied and apparent agents, GBRE/Cornelius.

V. ALTERNATIVELY, OSGC IS NOT ENTITLED TO SOVEREIGN IMMUNITY WHEN IT IS NOT AN ARM OF THE TRIBE.

Notwithstanding, sovereign immunity would not be applicable to OSGC in any event. The United States Supreme Court has never held that corporations merely affiliated with an Indian tribe have sovereign immunity. *Sue/Perior Concrete & Paving, Inc. v. Lewiston Golf Course Corp.*, 24 N.Y.3d 538, 548 (November 25, 2014). Accordingly, the analysis of sovereign immunity of the Supreme Court in *Kiowa* and *Bay Mills*, which concerned lawsuits against the tribes and not their corporate affiliates, does not apply to OSGC. *Id.*

Although the U.S. Supreme Court has not addressed this issue, it has acknowledged that the United States has taken the position that corporate entities *may* be arms of the tribe entitled to the tribe's sovereign immunity. *See Inyo County v. Paiute–Shoshone Indians*, 538 U.S. 701, 705 n. 1, 123 S.Ct. 1887 (2003). According to the federal courts of appeals, the proper inquiry is "whether the entity acts as an arm of the

tribe so that its activities are properly deemed to be those of the tribe." *See Allen v. Gold Country Casino,* 464 F.3d 1044, 1046 (9th Cir. 2006); *Hagen v. Sisseton–Wahpeton Cmty. Coll.,* 205 F.3d 1040, 1043 (8th Cir. 2000); *Ninigret Dev. Corp. v. Narragansett Indian Wetuomuck Hous. Auth.,* 207 F.3d 21, 29 (1st Cir. 2000). To determine whether an entity acts as an arm of the tribe so that its activities are properly deemed to be those of the tribe, and consequently entitled to the tribe's immunity, the Colorado Supreme Court has identified the following three factors based on the federal courts of appeals: (1) whether the tribes created the entities pursuant to tribal law; (2) whether the tribes own and operate the entities; and (3) whether the entities' immunity protects the tribes' sovereignty. *Cash Advance & Preferred Cash Loans v. State*, 242 P.3d 1099, 1109-10 (Colo. 2010). The Colorado Supreme Court believed this arm-of-the-tribe analysis was consistent with governing federal law and was not likely to function as a state diminution of tribal sovereign immunity. *See Kiowa,* 523 U.S. at 756.

The Courts of Appeals of Wisconsin and New York's highest court have applied the following similar list of factors to determine whether tribal immunity is conferred on an affiliated corporation:

> (1) Whether the corporation is organized under the tribe's laws or constitution;
>
> (2) Whether the corporation's purposes are similar to or serve those of the tribal government;
>
> (3) Whether the corporation's governing body is comprised mainly or solely of tribal officials;

(4) Whether the tribe's governing body has the power to dismiss corporate officers;

(5) Whether the corporate entity generates its own revenue

(6) Whether a suit against the corporation will affect the tribe's fiscal resources;

(7) Whether the corporation has the power to bind or obligate the funds of the tribe;

(8) Whether the corporation was established to enhance the health, education, or welfare of tribe members, a function traditionally shouldered by tribal governments/ tribe has legal title or ownership of property used by organization; and

(9) Whether the corporation is analogous to a tribal governmental agency or instead more like a commercial enterprise instituted for the purpose of generating profits for its private owners/tribal officials exercise control over the administration or accounting activities of the organization.

McNally CPA's & Consultants, S.C. v. DJ Hosts, Inc., 2004 WI App 221, ¶¶ 12-13, 277 Wis. 2d 801, 809-11, 692 N.W.2d 247, 251-52 (Wis. App. Ct. 2004) (holding that the tribe's affiliated entity was not entitled to sovereign immunity); *Sue/Perior Concrete & Paving, Inc.*, 24 N.Y.3d at 546-47.

The court in *Sue/Perior Concrete & Paving, Inc.* found that the financial relationship considerations to be the most important factors based on the persuasive consideration of federal precedent on the Eleventh Amendment immunity of States. The court recognized that the sovereign immunity of an Indian tribe is not based on the

Federal Constitution; however, both types of immunity have an underlying common foundation. *Sue/Perior Concrete & Paving, Inc.*, 24 N.Y.3d at 550. Based on this common foundation, the court found the most significant factor in whether an entity is an "arm" of an Indian tribe was the effect on the tribal treasuries, just as "the vulnerability of the State's purse is considered 'the most salient' factor" in determinations of a State's Eleventh Amendment immunity. *Id.*, *quoting*, *Hess v. Port Authority Trans–Hudson Corporation,* 513 U.S. 30, 48, 115 S.Ct. 394 (1994). The exercise of complete control over the operations of the affiliated entity by the tribe is not enough to confer immunity. *McNally CPA's & Consultants, S.C.*, 277 Wis. 2d at 811, 692 N.W.2d at 252. A corporation is not an "arm" of the tribe if the corporation has no authority to bind or obligate the funds of the tribe. *Sue/Perior Concrete & Paving, Inc.*, 24 N.Y.3d at 550. In other words, protection of a tribal treasury against liability in a corporate charter is strong evidence against the retention of sovereign immunity by the corporation. *Id.* at 551.

In *Sue/Perior Concrete & Paving, Inc.*, the court found that the purposes of the affiliated entity were to act as a regional economic engine and serve the profit-making interests of the tribe rather than promote tribal welfare on the reservation directly, and such purpose was sufficiently different from the tribe. 24 N.Y.3d at 549. The court further found that some of the factors favored the conclusion that the affiliated entity was protected by sovereign immunity, *i.e.* organization under tribal law, governing body being composed of tribal officials, tribal control over entity's board of directors and over the administration and accounting activities of the entity. *Id.* However, the court determined that the most important factors, specifically those that consider the financial

relationship between the tribe and the entity, supported the conclusion that the entity could not benefit from sovereign immunity. *Sue/Perior Concrete & Paving, Inc.*, 24 N.Y.3d at 549.

In *Sue/Perior Concrete & Paving, Inc.*, the record was clear that a suit against the affiliated entity would not impact the tribe's fiscal resources when the entity lacked the power to bind or obligate the funds of the tribe. The entity's charter provided that no indebtedness incurred by it would in any way involve the assets of the tribe. The charter further stated the entity would have no power to allow "any right, lien, encumbrance or interest in or on any of the assets of the Nation." *Sue/Perior Concrete & Paving, Inc.*, 24 N.Y.3d at 549.

Likewise here, OSGC lacks sovereign immunity under the arm-of-the-tribe analysis. As in *Sue/Perior Concrete & Paving, Inc.*, the Charter for OSGC specifically provided that "Recovery against the Corporation is limited to the assets of the Corporation. The Oneida Nation will not be liable and its property or assets will not be expended or the debts or obligations of the Corporation." (Supp. R. C244-45, ¶14.) While some factors favor immunity, such as OSGC being organized under tribal law and governed by a board comprised mostly of tribal officials, the most important factors, specifically those that consider the financial relationship between the tribe and the entity, supported the conclusion that OSGC lacks sovereign immunity.

Whether OSGC's revenues will become part of the Tribe's resources is inconsequential. *Sue/Perior Concrete & Paving, Inc.*, 24 N.Y.3d at 549. The test, with respect to the financial relationship factors, is not the indirect effects of any liability on the Tribe's income, but rather whether the immediate obligations of OSGC are assumed

by the Tribe. *Id.* The record establishes that OSGC's obligations are clearly not assumed by the Tribe. (Supp. R. C244-45, ¶14.) As such, OSGC lacks sovereign immunity. Accordingly, dismissal of OSGC for lack of subject matter jurisdiction was improper and should be reversed.

CONCLUSION

Neither the Tribe nor OSGC were entitled to sovereign immunity over the tort and equitable claims alleged in Plaintiff's Complaint concerning off-reservation activities. Even if sovereign immunity were to apply, which it does not, the Tribe and OSGC were bound by the forum and choice of law clauses contained in the Agreements signed by its agent and subsidiary based on their unity and their close relationship to the dispute. Alternatively, OSGC was not entitled to sovereign immunity as it was not an arm of the Tribe. Accordingly, the Order of October 8, 2014 dismissing Defendants, the Tribe and OSGC with prejudice for lack of subject matter jurisdiction should be reversed.

Respectfully submitted,

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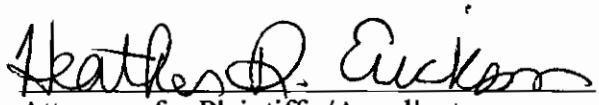
By: 

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