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

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,)	Honorable Margaret Ann Brennan,
ONEIDA SEVEN GENERATIONS)	Judge Presiding
CORPORATION and THE ONEIDA TRIBE)	
OF INDIANS OF WISCONSIN,)	
)	
Defendants-Appellees.)	

REPLY BRIEF OF PLAINTIFFS-APPELLANTS

ORAL ARGUMENT REQUESTED

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ACF SERVICES, LLC and
GENERATION CLEAN FUELS, LLC**

ARGUMENT

The dismissal of the Tribe and OSGC for lack of subject matter jurisdiction should be reversed because: (1) the Tribe and OSGC were not entitled to sovereign immunity; and (2) to the extent that the Tribe and OSGC were entitled to sovereign immunity, they waived it based on: (a) the forum selection clause, (b) the unity and close relationship of Tribe and OSGC, (c) GBRE serving as a shell and alter ego of the Tribe and OSGC, and (d) Kevin Cornelius' authority as an agent of the Tribe and OSGC to negotiate the forum clause. Alternatively, the dismissal of OSGC should be reversed because OSGC was not truly an arm of the Tribe entitled to sovereign immunity.

I. THE TRIBE AND OSGC ARE NOT ENTITLED TO IMMUNITY.

There is no authority to invoke the application of sovereign immunity to the Tribe and OSGC in this case. Defendants summarily conclude that the Tribe and OSGC are entitled to sovereign immunity as to Plaintiffs' tort and equitable claims. Defendants recognize that the "doctrine of sovereign immunity is rooted in *federal common law*." (Def. Br. at p. 7, emphasis added.) Yet, there is a lack of "federal common law" to support the Defendants' conclusion that immunity applies here. Defendants only cite to gambling or strictly contract cases and fail to cite any federal common law which applied immunity to facts similar to those in this case. The *Kiowa Tribe* case on which the Defendants rely dealt only with immunity in a breach of contract matter involving a promissory note, while the facts of *Bay Mills* dealt with issues of gambling. See *Michigan v. Bay Mills Indian Community*, 134 S.Ct. 2024 (2014); see also *Kiowa Tribe v. Manufacturing Tech., Inc.*, 523 U.S. 751 (1998). In fact, 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. Therefore, federal common law as to this question remains unsettled. *Id.*

Strengthening Plaintiffs' position that immunity does not apply to the tort and equitable claims here, the 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). Defendants unconvincingly attempt to distinguish these cases based on their claim that Plaintiffs, unlike the plaintiffs in *Hamaatsa* and *Hollynn*, voluntarily chose to deal with the Tribe in entering into the agreements for this energy project. However, it must be noted that the Defendants assert two diametrically opposed factual situations in this case: (1) OSGC and the Tribe had nothing to do with the deal/dispute (Def. Br. p. 21-24, 29, 31-33) and (2) that Plaintiffs were dealing with the Tribe and OSGC (Def. Br. p. 16, 17, 34.). According to the Defendants, it appears that whether the Tribe and OSGC were involved in this deal depends on whether it suits their argument, i.e. the Tribe and OSGC were involved in this deal for purposes of application of sovereign immunity to their tortious conduct but not for purposes of being bound by the forum selection clause of the agreements at issue.

In any event, based on the contention by the Defendants that the Plaintiffs were not dealing with the Tribe and OSGC (Def. Br. pp. 22-24, 26, 28, 29, 31-33), Plaintiffs absolutely were similar to the plaintiffs in in *Hamaatsa* and *Hollynn* in that Plaintiffs did not voluntarily choose to deal with the Tribe and OSGC but rather were victims of the Tribe and OSGC's tortious conduct in interfering with the multi-million dollar energy project. (R. C00014-17.) Even if the Defendants' conflicting contention that the Plaintiffs did voluntarily deal with the Tribe and OSGC (Def. Br. p. 17) is entertained, Plaintiffs certainly did not have a choice in, and could not have expected, becoming tort victims as a result of the Tribe's actions in sabotaging the deal. (R. C0008-9, C00014-17.)

Unlike the gambling and contract cases in which the plaintiffs had other remedies against the tribe, Plaintiffs are left with no way to obtain relief for the Tribe's and OSGC's tortious conduct in interfering with and destroying the Plaintiff's \$400,000,000 energy project. (Supp. R. C27, ¶¶40-42; Supp. R. C28, ¶43; Supp. R. C34 ¶¶80-81; Supp. R. C35, ¶¶82-87; Supp. R. C36, ¶¶87-91.) As the federal common law in which tribal sovereign immunity is rooted has never held that immunity would apply to the facts and tort/equitable claims here and based on the notions of fundamental fairness, this Court should find that tribal immunity does not apply in this case to the Tribe's off-reservation activity which amounted to tortious conduct directed against the Plaintiffs. Thus, the trial court did, in fact, have subject matter jurisdiction over all of Plaintiffs' claims against OSGC and the Tribe. Therefore, dismissal was improper and should be reversed.

II. THERE ARE QUESTIONS OF FACT AS TO WHETHER THE TRIBE AND OSGC WAIVED IMMUNITY AND SUBJECT TO JURISDICTION.

Here, there are conflicting affidavits as to OSGC and the Tribe's roles and conduct in waiving immunity and conferring subject matter jurisdiction, which ultimately goes directly to the merits of this case, namely whether the agreements at issue, 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 Plaintiffs' claims should be reversed on the basis that there is a genuine issue of material fact. Defendants' reliance on *Cortright v. Doyle*, 386 Ill. App. 3d 895 (2008) that no question of fact exists is misplaced. *Cortright* involved an employment case which was dismissed based on the plaintiff's failure to plead allegations to support causes of action against state employees independent of the state.

III. THE TRIBE AND OSGC CLEARLY WAIVED SOVEREIGN IMMUNITY.

A. The Forum Selection Clauses Explicitly Waive Sovereign Immunity.

The Master Lease Agreement in this case provides, "..... 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) (emphasis added).) 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 (emphasis added).) These forum selection

clauses undeniably constitute express waivers of sovereign immunity. See *C&L Enterprises, Inc. v. Citizen Band Potawatomi Indian Tribe of Oklahoma*, 532 U.S. 411, 418 (2001); *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); *Alzheimer & Gray v. Sioux Mfg. Corp.*, 983 F.2d 803 (7th Cir. 1993).

Defendants argue that “none of those cases [above] involved a *simple* forum selection clause such as the one at issue here with no express waiver of sovereign immunity.” (Def. Br. p. 36 (emphasis added).) However, Defendants ignore that no case has ever held that a waiver must use the words “sovereign immunity” to be deemed an express waiver. See *Sokaogon*, 86 F.3d at 659-660; *C&L*, 532 U.S. at 418. Furthermore, Defendants’ distinction between arbitration and forum selection clauses to elude a waiver of immunity in this case is unavailing.

In *C&L Enterprises, Inc.*, the U.S. Supreme Court found waiver when the contract provided for resolution of all contract-related disputes between C&L and the tribe by binding arbitrations, and a court having jurisdiction to enforce the arbitral award is the Oklahoma state court under the contract’s choice-of-law clause. *C&L Enterprises, Inc.*, 532 U.S. at 418. In *Sokaogon*, the contract clause stated that “... disputes ... arising out of or related to the contract ‘shall be subject to and decided by arbitration,’ and that ‘judgment may be entered upon [the arbitration award] in accordance with applicable law in any court having jurisdiction thereof.” *Sokaogon*, 86 F.3d at 659-660.

As in *C&L* and *Sokaogon*, there is nothing ambiguous about the language of the forum selection clauses in this case. As the tribes in *C&L* and *Sokaogon* agreed that all disputes would be decided by arbitration and enforced in a state or federal court of law, the parties in this case agreed that all disputes would be determined exclusively by the courts situated in Cook County, Illinois. (Supp. R. C52, ¶14(h), C78, ¶15.) Thus, as the clauses in *C&L* and *Sokaogon* constituted waiver of immunity, likewise here the forum selection clauses waived the Tribe and OSGC's sovereign immunity. To agree to be sued is to waive any immunity one might have from being sued. *Sokaogon*, 86 F.3d at 659-660. Contrary to the Defendants' contention, the forum selection clauses were agreements to be sued and hence waived any immunity from being sued. *Id.*

The *Breakthrough* case relied upon by the Defendants to support their contention that there was no express waiver is completely inapposite. *Breakthrough* involved a simple clause only designating *where* the tribe can be sued, namely that "the sole and exclusive venue for any and all disputes ... shall be the state and federal courts located within the State of Colorado. *Breakthrough Mgmt. Grp., Inc. v. Chukchansi Gold Casino & Resort*, 629 F.3d 1173, 1178 n. 4 (10th Cir. 2010). Unlike the strictly venue provision designating only where the tribe can be sued in *Breakthrough*, the language of the forum selection clauses in this case provides that all disputes shall take place in and be determined exclusively by the courts in Cook County, Illinois. This language is more similar to the language in *Sokaogon* in which disputes were to be subject to and decided by arbitration. *Sokaogon*, 86 F.3d at 659-660. The clauses at issue here are more than mere venue clauses that only dictate where the tribe may be sued, but also provide that the Tribe can be sued and are bound by the determinations of the courts in Cook County,

Illinois for all disputes. (Supp. R. C52, ¶14(h), C78, ¶15.) As such, the forum clause and choice of law clause in this case clearly waived sovereign immunity.

B. The Unity And Close Relationship of OSGC And The Tribe Bind Them To The Forum Clause.

The evidence in this case demonstrates such a unity between the Tribe and OSGC that any distinction between OSGC and the Tribe must be disregarded. In fact, the Defendants do not argue or present any facts that OSGC should be treated as a separate entity from the Tribe. Nor does the Defendants' brief address the principles of unity and close relationship which bind OSGC and the Tribe to the express waiver of immunity. Rather, the Defendants focus on contract principles of integration and on inconsequential distinctions in the *Alzheimer* and *Solargenix* cases.

First, Defendants' argument as to the exclusion of certain evidence due to the merger and integration clauses of the agreements is misplaced. Defendants argue that since the agreements contained a merger and integration clause that parol evidence as to OSGC and the Tribe's involvement in the deal prior to signing the agreements cannot be admitted to add another term to the agreements. While Plaintiffs agree that this is certainly a correct statement of the law, it has no import on this case as Plaintiffs are not trying to "add" any terms to the agreements, but to enforce the agreements as written with the existing waiver of immunity. While a complete written contract cannot use parol evidence to supply a missing essential term, extrinsic evidence may be considered to interpret an essential term contained in the written agreement. *Gassner v. Raynor Mfg. Co.*, 409 Ill. App. 3d 995, 948 N.E.2d 315 (2nd Dist. 2011).

The court in *Gassner* found that parol evidence was not necessary to establish the *existence* of an essential term; rather, the purposes of parol evidence in that case would be to interpret what a particular term meant. *Gassner*, 409 Ill. App. 3d at 1004. Similarly here, the facts as to the Tribe and OSGC's involvement in the deal are not necessary to establish the existence of an essential term. The forum selection clauses were already clearly terms of the agreements. Instead, the purpose of the alleged "parol evidence" is to establish the meaning of the forum selection clause and whether it waived OSGC and the Tribe's purported immunity. As such, this Court is well within its authority, even under contract principles, to consider the actions and involvement of OSGC and the Tribe to find unity and a close relationship to the dispute.

Second, despite Defendants' denunciation, *Alzheimer* is directly on point. Defendants claim that *Alzheimer* is distinguishable because the vice-president and general manager of the tribal entity in that case signed the contract with the forum selection clause, and neither the Tribe nor OSGC signed the agreements in this case. Defendants' claim ignores very crucial facts: (1) Kevin Cornelius, an officer of both OSGC and GBRE, signed the Agreements (Supp. R. C127), (2) OSGC and the Tribe were referred to interchangeably (Supp. R. C90, ¶20; C160, ¶17), (3) the Plaintiffs regarded the signature of Kevin Cornelius, as an officer of OSGC, binding on OSGC and the Tribe (Supp. R. C160, ¶¶17-19) and (4) the unity between OSGC and the Tribe when OSGC is completely controlled by the Tribe and all decisions of OSGC ultimately rest with the Tribe (Supp. R. C261, p. 23 L. 11-19, C286, C292). All of these facts demonstrate a clear unity between OSGC and the Tribe similar to the facts in *Alzheimer* which led the 7th Circuit to disregard any distinction between the tribe and the tribal entity. *Alzheimer*,

983 F.2d at 806, 812. Accordingly, any claimed distinction between OSGC and the Tribe should be disregarded as a fiction.

Nonetheless, OSGC and the Tribe are bound by the forum selection clauses by reason of their “close relationship” to the dispute. Rather than refute that OSGC and the Tribe had a close relationship to this dispute, Defendants simply attempt to discount the *Solargenix* case by virtue of the ultimate holding being the existence of personal jurisdiction, not subject matter jurisdiction. The *Solargenix* court’s ultimate holding does not diminish the relevant import in this case of the court’s findings as to when a non-signatory parent corporation will be bound by an agreement signed by its subsidiary.

The key applicable rule of law from the *Solargenix* case is that a parent corporation with a “close relationship” to the dispute should be bound by a forum selection clause in an agreement executed by its subsidiaries. *Solargenix Energy, LLC v. Acciona, S.A. et al.*, 2014 IL App (1st) 123403, ¶¶49-52 (Ill. App. 1st Dist. 2014). Indeed, 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); *see also American Patriot Ins. Agency, Inc. v. Mutual Risk Management, Ltd.*, 364 F.3d 884, 888–89 (7th Cir. 2004); *Adams v. Raintree Vacation Exch., LLC*, 702 F.3d 436, 439-40 (7th Cir. 2012).

The facts of this case are very similar to the facts in *Solargenix* which led the court to find that the parent corporations were so “closely related” to the dispute that it became foreseeable that they would be bound by the forum selection clause. *Solargenix*, 2014 IL App (1st) 123403 at ¶42. Defendants attempt to distinguish *Solargenix* by

claiming that both of the Spanish parent corporations signed a letter of adhesion accepting and consenting to be bound by the contract. Defendants' factual premises for this distinction are untrue. In fact, only one of the parent corporations in *Solargenix* signed the letter of adhesion, and that letter of adhesion did not specifically incorporate the forum selection clause. *Id.* at ¶14-20. Yet, the court in *Solargenix* found that both parent corporations were bound by the forum selection clause since both of them were closely related to the joint venture contracts, the dispute and the subsidiary. *Solargenix* at ¶49-51. Contrary to the Defendants' statement on page 26 of its brief, Plaintiffs did point out these facts from *Solargenix* in its initial brief. (Pltf. Br. pp. 24-25.)

Here, 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*, 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*, 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 pursuing the joint venture agreements, the Tribe and OSGC were the only entities capable of pursuing the objectives of the Master Lease and Operation and Maintenance Agreements and implementation of Plaintiffs' 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* 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*, 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 which was the subject of the agreements, 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.) While Defendants claim that OSGC and the Tribe simply wanted to have some knowledge of the project (Def. Br. p. 29), the evidence shows otherwise, in that 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*, Kevin Cornelius and Bruce King held executive positions in both OSGC and its subsidiary GBRE; further, the Tribe financially supported OSGC, which 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*, it is because of the Tribe and OSGC's close involvement with the project and the agreements that Plaintiffs allege the Tribe and OSGC were allowed to control GBRE and stifle Plaintiffs' rights under the agreements. (R. C00003-18.) *Solargenix* 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*, 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 direct benefits 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*, 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. *Alzheimer*, 983 F.2d at 806; *Solargenix* 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. While it is true that there is no United States Supreme Court precedent applying alter ego principles to tribal affiliated entities, there is no Supreme Court precedent or other precedent in Illinois

holding that alter ego does not apply in the context of an entity affiliated with a tribal corporation. Defendants contend that the U.S. Supreme Court case of *Three Affiliated Tribes* somehow establishes a rule of law that alter ego theories are inapplicable. *Three Affiliated Tribes* makes no such holding. *Three Affiliated Tribes* involved a North Dakota statute which provided that, in order for tribes to gain access to its courts, they must consent to suit in *all* civil causes of action. 106 S. Ct. at 890. The Supreme Court found that the extent of the statutory waiver was unduly intrusive on the tribe's common law sovereign immunity, and thus on its ability to govern itself according to its own laws. *Id.* at 891. The Supreme Court, however, recognized that not all conditions imposed by state law which potentially affect tribal immunity are objectionable. *Id.*

Moreover, the *Morgan Buildings & Spas, Inc.* case cited by Defendants is not binding precedent on this Court. Regardless, the *Morgan Buildings & Spas, Inc.* did not hold that alter ego is inapplicable to a tribal entity. Rather, the court found that the subordinate economic entity analysis was more appropriate. 2011 WL 308889, *2-3. The court never truly dealt with the issue of alter ego. 2011 WL 308889, *2-3. Instead, the court determined that the tribal corporation was a subordinate economic entity, which by that virtue would have enjoyed sovereign immunity if it had not waived it by agreement. The court's analysis as to whether the tribal entity was a subordinate economic entity is inapplicable to this case as the Tribe has never claimed GBRE is entitled to sovereign immunity as a subordinate economic entity. As such, the facts and holdings in *Morgan Buildings & Spas, Inc.* are not helpful in determining whether GBRE should be considered an alter ego of OSGC and the Tribe.

As additional support for their argument that alter ego does not apply, Defendants state that “if piercing the corporate veil of a state chartered corporation to get to a nation’s assets were allowed, the United States would be liable for the debts of virtually every bankrupt state corporation.” Defendants’ statement is nothing more than hyperbole. Analogizing state chartered corporations to the tribal economic entities in this case is absurd and inapplicable since the entities at issue in this case are wholly owned by the Tribe and the agreements were approved by the board of OSGC and executed by officers of OSGC. Obviously, state chartered corporations are generally not wholly owned by the United States and their contracts are not approved by the United States or signed by officers of the United States.

Nonetheless, GBRE, a Delaware limited liability company, is merely an instrumentality or alter ego of OSGC and of the Tribe under Delaware law. *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). *Old Orchard Urban Limited Partnership v. Harry Rosen, Inc.*, 389 Ill. App. 3d 58, 69 (1st 2009). *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”).

The factors for an alter ego analysis weigh in favor of finding that GBRE was the alter ego of OSGC and of the Tribe. *A.G. Cullen Const., Inc. v. Burnham Partners, LLC*, 2015 IL App (1st) 122538, ¶¶ 42-43 (March 11, 2015). Defendants argue that Plaintiffs have failed to make out a *prima facie* case of alter ego. However, Defendants are

improperly relying on unpublished, non-precedential opinions to support their argument. *See Mason v. Network of Wilmington, Inc.*, 2005 WL 1653954 (Del. Ch. July 1, 2005) and *eCommerce Industries, Inc. v. MWA Intelligence, Inc.*, 2013 WL 5621678 (Del. Ch. October 4, 2013); Illinois Supreme Court Rule 23(e).

In any event, the Defendants are incorrect. Here, the Tribe/OSGC clearly controlled the day-to-day operations of GBRE. (Supp. R. C158, ¶10; Supp. R. C200; Supp. R. C89, ¶13, C90, ¶21, C131, ¶11, C156, ¶5, C157, ¶7, C160, ¶17, C226, p. 46 L. 1-5, 20-23, 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, C267, p. 47 L. 9-20.) Indeed, in pleadings it has filed with other courts, OSGC and GBRE have represented that OSGC and GBRE are one and the same. *See* A22-37; *see also Oneida Seven Generations Corporation and Green Bay Renewable Energy, LLC*, 2014 WI App 45, ¶ 6, 353 Wis. 2d 553. Nonetheless, Defendants erroneously argue that Plaintiffs must establish that GBRE existed for no other purpose than a vehicle for fraud in order to pierce the corporate veil. “[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*, 621 A.2d at 793 [emphasis added]. In any event, Defendants ignore the well-settled rule of law that the corporate veil may be pierced in the interest of justice. *A.G. Cullen Const., Inc.*, 2015 IL App (1st) 122538, ¶¶ 42. Certainly, the facts establish an injustice in this case by the Defendants creating a shell company specifically for the \$400,000,000 energy project, completely sabotaging the deal and leaving the Plaintiffs holding the bag. (C. 0004-18; C165, ¶5; Supp. R. C135, ¶27; Supp. R. C150, ¶27.) Therefore, as GBRE is the alter ego and merely an

instrumentality of OSGC/the Tribe, the corporate veil should be pierced in the interest of justice.

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 whether GBRE was in effect the alter ego of the Tribe, 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.

Regardless of whether this court pierces the corporate veil, the Tribe and OSGC were “direct participants” in the wrongs alleged in the Complaint and, therefore, should be directly liable. *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). Defendants claim that this argument has been waived; however, Plaintiffs have consistently pled and argued that OSGC and the Tribe have been involved and directly participated in this energy project and its ultimate demise. (R. C00014-15; Supp. R. C6-10, 15.) Further, the rule of waiver is an admonition to the parties and not a limitation on the jurisdiction of the reviewing court that would prevent this court from considering the Plaintiffs’ direct participation argument. *Hamilton v. Conley*, 356 Ill. App. 3d 1048, 1053-54, 827 N.E.2d 949, 955 (2005); Illinois Supreme Court Rule 366(a)(5).

As to the direct participation theory, Defendants miss the point when they argue that "ACF was aware ... GBRE was the entity responsible for the Project." (Def. Br. at p. 33.) First, GBRE was not the only entity responsible for the project. While GBRE may have been listed as the borrower, OSGC/the Tribe wired money, guaranteed loans and extended credit for the project. (Supp. R. C156, ¶5; Supp. R. C157, ¶7; Supp. R. C267, p. 47 L. 9-20.) Second, OSGC and the Tribe should be liable based on their direct participation. Here, 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. (See Supp. R. C226, p. 46 L. 1-5, 20-23, C158, ¶10; C200; C89, ¶13, C156, ¶5; C157, ¶7; C267, p. 47 L. 9-20, C227, p. 52 L. 4-8; C223 p. 37 L. 5-11; C261, p. 23 L. 21-24; C264, p. 34 L. 17-20; R. C00008; and A22-37.) As such, the dismissal of the Tribe, and at least OSGC, should be reversed.

D. A Tribal Resolution Is Not Required To Waive Immunity.

The Defendants rely on *Danka* to argue that a tribal resolution is required to waive immunity regardless of a contractual waiver. The court in that case merely discussed the split in decisions on whether a contract clause can waive immunity without a resolution, but it did not come forth with an overall rule that such clauses cannot waive immunity on their own, and ultimately found that the forum selection clause was not clear enough in that case to waive immunity. *Danka v. Sky City Casino*, 329 N. J. Super. 357, 368 (1999). There is no precedent necessitating a tribal resolution in addition to a contractual waiver of immunity in order to for the waiver to be binding. The U.S. Supreme Court has not required anything other than clear unequivocal language for a valid waiver of sovereign immunity. *C&L*, 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). Courts have held that when an authorized agent of the tribe enters into a contract, that authority extends to a waiver of immunity contained in the contract. *C&L*, 532 U.S. at 421, n. 3 (2001); *see also Smith v. Hopland Band of Pomo Indians*, 95 Cal. App. 4th 1, 10 (2002). Here, the contract was signed by Kevin Cornelius the CEO of OSGC/President of GBRE who had the approval of the OSGC Board to enter into the subject agreements. (Supp. R. C89, ¶13; Supp. R. C158, ¶10; Supp. R. C200; Supp. R. C226, p. 46 L. 1-5, 6-11, 20-23.) As such, the lack of a tribal resolution does not invalidate the waiver of sovereign immunity. *Id.*

E. Cornelius Had Authority To Bind The Tribe/OSGC To The Agreements, Including Waiver Of Immunity.

There are no U.S. Supreme Court or Illinois precedential decisions which prohibit the application of agency principles to tribal sovereign immunity. The more recent trend would support the application of agency principles for purposes of sovereign immunity. *Richman v. Sheahan*, 270 F.3d 430, 442 (7th Cir. 2001); 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); *see C&L Enterprises, Inc.*, 532 U.S. at 421 and *Sokaogon*, 86 F.3d at 660; *see also Storevisions, Inc. v. Omaha Tribe of Nebraska*, 281 Neb. 238 (Neb. S.Ct. 2011); *Rush Creek Solutions, Inc. v. Ute Mountain Ute Tribe*, 107 P.3d 402 (Colo. Ct. of App. 2004).

Here, OSGC's board approval demonstrated the "principal's manifestations" that Kevin Cornelius, as CEO of OSGC, was an agent of the Tribe/OSGC with authority to

bind OSGC and the Tribe. (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; Supp. R. C158, ¶¶10, 11; Supp. R. C200; Supp. R. C90, ¶20-23; Supp. R. C158, ¶13; Supp. R. C160, ¶¶17, 19.) *Petrovich*, 188 Ill. 2d at 42. Clearly, the facts establish that GBRE/Cornelius was an agent of the Tribe and OSGC when negotiating the agreements for the project with Plaintiffs. 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.

Defendants claim that this argument has been waived. However, as discussed, the rule of waiver is an admonition to the parties and not a limitation on the jurisdiction of the reviewing court such that the court may consider the Plaintiffs' direct participation argument. *Hamilton v. Conley*, 356 Ill. App. 3d 1048, 1053-54, 827 N.E.2d 949, 955 (2005); Illinois Supreme Court Rule 366(a)(5). Plaintiffs make this argument in the alternative and it is based on a recent case from New York's highest court which was decided after the ruling in this case and holds that sovereign immunity is not automatic for tribal corporate entities. *Sue/Perior Concrete & Paving, Inc. v. Lewiston Golf Course Corp.*, 24 N.Y.3d 538, 548 (November 25, 2014).

The facts demonstrate that OSGC lacks sovereign immunity under the arm-of-the-tribe analysis. The Defendants argue two non-precedential cases that the economic factors should not be elevated over the other factors (Def. Br. at p. 12-13). However, the

court's emphasis on the financial relationship factor is rooted in the Eleventh Amendment immunity of States where the vulnerability of the State's purse is considered the most salient factor in determinations of a State's immunity. *Sue/Prior*, 24 N.Y.3d at 550. This makes sense because if the tribe's coffers are vulnerable in defending the suit against the subordinate entity, that would indicate that the real party in interest is the tribe. *See e.g. Altheimer*, 983 F.2d at 809.

As to the financial relationship, Defendants' arguments as to the indirect effects of OSGC on the Tribe's income (Def. Br. at p. 12-13) cannot establish that the liabilities of OSGC would directly affect the purse of the Tribe. In fact, quite the opposite is true. Under OSGC's Charter, the Tribe cannot be liable for, and its property or assets cannot be expended on, OSGC's debts or obligations. (Supp. R. C244-45, ¶14.) *Sue/Prior*, 24 N.Y.3d at 549. 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.

In conclusion, the Order of October 8, 2014 dismissing the Tribe and OSGC with prejudice for lack of subject matter jurisdiction should be reversed as to the Tribe and OSGC, and alternatively, should be reversed at least as to OSGC.

Respectfully submitted,

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