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IN THE APPELLATE COURT OF ILLINOIS
FIRST DISTRICT

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

BRIEF OF DEFENDANTS-APPELLEES ONEIDA SEVEN GENERATIONS CORPORATION AND THE ONEIDA TRIBE OF INDIANS OF WISCONSIN

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POINTS AND AUTHORITIES

NATURE OF THE CASE

An Indian tribe cannot, as a matter of law, be sued in state or federal court unless Congress has authorized the suit or the tribe has waived its sovereign immunity. This appeal challenges the trial court's proper application of this law and its dismissal with prejudice of all of Plaintiffs' claims against defendant The Oneida Tribe of Indians of Wisconsin ("Tribe"), a federally recognized Indian tribe, and its subordinate economic entity, defendant Oneida Seven Generations Corporation ("OSGC"). The trial court dismissed these claims pursuant to Section 2-619 of the Illinois Code of Civil Procedure ("Section 2-619") based on its conclusion that the Tribe and OSGC did not waive their sovereign immunity. No congressional authorization is claimed. Plaintiffs now appeal to this Court. This appeal is not from a jury verdict, and all questions are raised on the pleadings.

ISSUES PRESENTED FOR REVIEW

Did the trial court properly conclude that the Tribe and OSGC have sovereign immunity?

Do the choice–of-law and forum selection provisions in agreements to which neither the Tribe nor OSGC is a party waive their sovereign immunity?

Did the trial court properly dismiss the claims against the Tribe and OSGC pursuant to Section 2-619 based on sovereign immunity because there are no questions of material fact in dispute and the Tribe and OSGC are entitled to judgment as a matter of law?

STATUTE INVOLVED

The Tribe has a statute that describes the sovereign immunity of the Tribe, the entities and individuals entitled to its protection, and specifies the exclusive manner in

which sovereign immunity may be waived. (R. C161-163; *available at* https://oneida-nsn.gov/uploadedFiles/wwwroot/Government/Laws,_Policies,_Resolutions/Oneida_Register/Code_of_Laws/Sovereign%20Immunity.pdf?AspxAutoDetectCookieSupport=1) (the "Sovereign Immunity Ordinance").

STATEMENT OF FACTS

The Tribe is a federally recognized Indian tribe. (R. C125 ¶ 2.) Pursuant to the Oneida Constitution, the governing body of the Tribe is the General Tribal Council, which is comprised of all qualified voters of the Tribe. (R. C126 ¶ 4; C. 135 (Article III, Section 1).) The General Tribal Council has the power "[t]o manage all economic affairs and enterprises" of the Tribe. (R. C126 ¶ 5; C137 (Article IV, Section 1(e)).) The General Tribal Council also has the power "[t]o charter subordinate organizations for economic purposes." (R. C126 ¶ 6; C137 (Article IV, Section 1(h).)) The General Tribal Council shall elect a Business Committee, comprised of the following elected officials from the General Tribal Council: (1) a chair; (2) a vice-chair; (3) a secretary; (4) a treasurer; and (5) five council members. (R. C126 ¶ 7; C135 (Article III, Section 3).) The Business Committee has been delegated the Article IV, Section 1 powers of the General Tribal Council, including the power to charter subordinate organizations for economic purposes. (R. C127 ¶ 8.)

OSGC is a tribally chartered subordinate entity created under the Tribe's Constitution to enhance the business and economic development of the Tribe. (R. C127 ¶ 10; C142.) Plaintiffs (collectively referred to as "ACF" or "Plaintiffs") claim damages arising out of two contracts. The first is a Master Lease Agreement, dated May 24, 2013 ("Lease"), entered into between defendant Green Bay Renewable Energy, LLC ("GBRE") and ACF Leasing, LLC for the lease of three, forty-ton liquefaction machines

and pretreatment equipment to process waste plastic to generate electricity and create oil-based fuel products at locations in Monona, Wisconsin, and Cheboygan, Michigan (the "Project"). (R. C20-C44.) The second contract is an Operation and Maintenance Agreement, dated May 24, 2013 ("O&M Agreement"), entered into between GBRE and ACF Services, LLC for the operation and maintenance of the Project. (R. C45-C63.)

GBRE was set up as a single asset limited liability company ("LLC") to develop the Project. (R. C165 ¶ 5.) OSGC is an indirect owner of GBRE: OSGC is the sole owner of Oneida Energy, Inc. ("OEI"); OEI, a Wisconsin corporation, is the sole owner of Oneida Energy Blocker Corporation ("Oneida Energy"), a Delaware corporation (*Id.*); and Oneida Energy is the sole member and owner of GBRE, a Delaware LLC. (*Id.*) Financing for the Project hinged on a 90% guarantee by the United States Department of Interior, Bureau of Indian Affairs ("BIA") of a $21,777,777.00 loan. (R. C37 (Schedule 1 to the Lease, providing that the Lease Commencement Date would be the date on which the loan proceeds were received by GBRE).) GBRE was the borrower on the BIA-guaranteed loan for the Project. Indeed, federal regulations demonstrate GBRE's eligibility to serve as the borrower. 25 C.F.R. § 103.25(a)(2) (state incorporated entity majority owned by tribal entity could be borrower). Moreover, the bank commitment letter and GBRE Agreements also identify GBRE as the borrower.

In March 2014, Plaintiffs filed the instant lawsuit against GBRE, the Tribe, and OSGC claiming that they breached the Lease and O&M Agreement (together, "GBRE Agreements") and that the Project cannot proceed because financing failed when the Tribe, through its General Tribal Council and the Business Committee—the governing

bodies of the Tribe—voted to dissolve OSGC in December 2013. (R. C8 ¶¶ 39-41; C126-27 ¶¶ 4-8; C131 ¶ 22.)

Neither the Tribe nor OSGC signed, or is otherwise made a party to, the GBRE Agreements and both GBRE Agreements contain integration clauses, restricting their interpretation to the express language of the Agreements. (R. C20-C63.) Nonetheless, Plaintiffs assert GBRE acted as the "agent" of the Tribe and OSGC and, therefore, that the Tribe and OSGC are bound by the Agreements and are liable (directly or vicariously) for the alleged breaches. (R. C10 ¶¶ 49-54; C14-C15 ¶¶ 71-79.) Likely in recognition that the lack of privity is fatal to their contract claims, Plaintiffs also asserted various tort claims against the Tribe and OSGC. (R. C12-C17 ¶¶ 60-91.)[1]

On May 5, 2014, the Tribe and OSGC moved to dismiss all of Plaintiffs' claims against them pursuant to Section 2-619 for lack of subject matter jurisdiction. (R. C117-120; *see also* SA-1-16.)[2] The Tribe and OSGC also moved to dismiss Plaintiffs' claim for lack of personal jurisdiction. (R. C96-101.) After the parties conducted discovery and fully briefed the motions to dismiss, the Court held a hearing on the motions on October 8, 2014. (R. C368.) At the conclusion of the hearing, the Court granted the Tribe and OSGC's motion to dismiss for lack of subject matter jurisdiction and denied

[1] While Plaintiffs rely on factual assertions concerning conduct by Messrs. Kevin Cornelius and Bruce King, two of approximately 16,000 Tribal members, all such alleged conduct predates the execution of the GBRE Agreements and is barred from being considered by the integration clauses in the Agreements. Moreover, all AFC's factual assertions are denied and refuted by Messrs. Cornelius and King. (R. C359-363; C342-347.) To the extent necessary, additional facts are discussed in the Argument section, *infra*.

[2] Pursuant to Supreme Court Rule 342(a), the Tribe and OSGC have filed a Supplementary Appendix that is bound separately from this brief and labeled "Defendants-Appellees' Separate Supplementary Appendix". Citations to this appendix are referenced herein as "SA__".

the motion to dismiss for lack of personal jurisdiction as moot. (*Id.*) Since Plaintiffs' claims against GBRE remained, the Tribe and OSGC sought and were granted a Rule 304(a) finding. (R. C376-377.) This appeal followed. (R. C378-79.)

STANDARD OF REVIEW

A complaint must be dismissed pursuant to Section 2-619(a)(1) of the Illinois Code of Civil Procedure when, as here, the court lacks subject matter jurisdiction. 735 ILCS 5/2-619(a)(1); *see also Cortright v. Doyle*, 386 Ill. App. 3d 895, 905-06 (1st Dist. 2008) (affirming dismissal of complaint pursuant to Section 2-619 because "plaintiffs' intentional tort claims [were] barred by sovereign immunity and, thus, the circuit court lacked jurisdiction to hear th[e] case"). When, as here, "a cause of action is dismissed pursuant to a [S]ection 2–619 argument, the questions on appeal are whether a genuine issue of material fact exists and whether the defendants are entitled to judgment as a matter of law." *Gray v. Nat'l Restoration Sys., Inc.*, 354 Ill. App. 3d 345, 354-55 (1st Dist. 2004). If the material facts are not disputed and defendants are entitled to judgment as a matter of law, the trial court decision should be affirmed. "The dismissal of a complaint under [S]ection 2–619 is subject to *de novo* review." *Id.* at 355.

SUMMARY OF ARGUMENT

The trial court properly dismissed the underlying claims against the Tribe and OSGC for lack of subject matter jurisdiction. The Tribe – a sovereign Indian Nation – and OSGC – a subordinate tribally chartered economic entity created by and for the benefit of the Tribe – enjoy sovereign immunity barring Plaintiffs' suit as a matter of federal common law. *Kiowa Tribe of Okla. v. Mfg. Techs., Inc.*, 523 U.S. 751, 754-56 (1998); *Three Affiliated Tribes of the Fort Berthold Reservation v. Wold Eng'g*, 476 U.S. 877, 890 (1986).

Plaintiffs, who have the burden of proving that jurisdiction exists, cannot demonstrate that either the Tribe or OSGC waived its sovereign immunity. "[A] waiver of sovereign immunity 'cannot be implied; rather, it must be unequivocally expressed.'" *Santa Clara Pueblo v. Martinez,* 436 U.S. 49, 58 (1978); *Altheimer & Gray v. Sioux Mfg. Corp.,* 983 F.2d 803, 812 (7th Cir. 1993); *Kiowa,* 523 U.S. at 753-54. An Indian tribe or tribal entity may waive its sovereign immunity by contract but only if it does so with "requisite clarity." *C&L Enters., Inc. v. Citizen Band Potawatomi Indian Tribe of Okla.,* 532 U.S. 411, 418 (2001).

Here, the Tribe and OSGC did not sign the Lease or O&M Agreement and, further, there is no mention of waiver of their sovereign immunity in either agreement. Moreover, the Tribe has an ordinance prescribing that waiver of sovereign immunity by the Tribe or a Tribal entity such as OSGC must be by formal resolution or by a motion passed by the Tribe's Business Committee on behalf of the Tribe. (R. C131-132 ¶ 23; C161-163; SA-60-62.) It is undisputed that no such resolution was passed by the Tribe or OSGC, nor did the Business Committee pass such a motion. (R. C132-33 ¶ 28; C166 ¶ 9.) As a matter of federal common law, where tribal law prescribes who has the authority to waive sovereign immunity and how sovereign immunity is to be waived, absent compliance with such tribal law sovereign immunity may not be, and is not, waived irrespective of any written or oral promises to the contrary by persons lacking authority to waive sovereign immunity. *Native Am. Distrib. v. Seneca Cayuga Tobacco Co.,* 546 F.3d 1288, 1295 (10th Cir. 2008); *World Touch Gaming, Inc. v. Massena Mgmt., LLC,* 117 F. Supp. 2d 271 (N.D.N.Y. 2000); *Danka Funding Co. v. Sky City Casino,* 747 A.2d 837, 838-39 (N.J. Super. Ct. Law Div. 1999). For all of these reasons, and as detailed

below, the trial court lacked subject matter jurisdiction as a matter of law and properly dismissed the Tribe and OSGC from the underlying suit.

ARGUMENT

I. THE TRIAL COURT PROPERLY CONCLUDED THAT THE TRIBE AND OSGC HAVE SOVEREIGN IMMUNITY.

A. The Tribe, As A Federally Recognized Indian Tribe, Is Immune From Suit In State Or Federal Court Pursuant To The Broad Federal Doctrine Of Tribal Sovereign Immunity ("Sovereign Immunity").

"[T]ribal immunity is a matter of federal law and is not subject to diminution by the States." *Kiowa*, 523 U.S. at 756. The doctrine of sovereign immunity is rooted in federal common law and reflects the federal Constitution's treatment of Indian tribes as governments under the Indian commerce clause. *See* U.S. Const. art. 1, § 8. As the Supreme Court has indicated, sovereign immunity "is a necessary corollary to Indian sovereignty and self-governance." *Three Affiliated Tribes*, 476 U.S. at 890.

The Tribe is a federally recognized Indian tribe. (R. C125 ¶ 2; *see also* C5 ¶ 14.) "As a matter of federal law, an Indian tribe is subject to suit only where Congress has authorized the suit or the tribe has waived its immunity." *Kiowa*, 523 U.S. at 754. Absent congressional abrogation or a clear and unequivocally expressed waiver of sovereign immunity, Indian tribes are not subject to civil suit in any state, federal, or arbitral tribunal. *C&L Enters.*, 532 U.S. at 418. Absent waiver or congressional action or an unequivocal expressed waiver of sovereign immunity, the Tribe is immune from suit. *Kiowa*, 523 U.S. at 754; *Three Affiliated Tribes*, 476 U.S. at 890-91. As detailed below, this immunity applies to all of ACF's contractual claims and non-contractual claims against the Tribe *and* its subordinate tribally chartered economic entity, OSGC.

B. ACF Has Waived Its Claims That OSGC Does Not Have Sovereign Immunity, And Sovereign Immunity Extends To OSGC As A Subordinate Economic Entity Of The Tribe.

ACF raises for the first time on appeal that OSGC is not an "arm of the tribe" entitled to sovereign immunity. (Brief of Plaintiffs-Appellants ("ACF Br.") 38-43.) ACF, however, fails to acknowledge that the Tribe and OSGC argued before the trial court that tribal sovereign immunity extends to OSGC as a subordinate economic entity of the Tribe (R. C105-110; SA-5-10.), and ACF completely ignored the argument. Since ACF did not dispute – or even allude to – the issue in its opposition brief in the trial court, the Tribe and OSGC pointed out in their reply brief that "[s]ignificantly, ACF has not disputed that OSGC is a subordinate economic entity of the Tribe. ACF argues only waiver." (R. C329 n.4 (citation omitted).) ACF did not contest the point at the hearing on the motions to dismiss, even when the Tribe and OSGC reiterated their position (R. V3, 5; SA-48, 10:14-24) and the Court agreed (Id. at 13; SA-54, 36:7-9).

At this juncture, ACF cannot advance new arguments and positions. Issues "'not raised in the trial court are waived and may not be raised for the first time on appeal.'" *Jackson v. Hooker,* 397 Ill. App. 3d 614, 617 (1st Dist. 2010) (quoting *Shell Oil Co. v. Dep't of Revenue,* 95 Ill. 2d 541, 550 (1983)); *IPF Recovery Co. v. Ill. Ins. Guar. Fund,* 356 Ill. App. 3d 658, 666 (1st Dist. 2005) ("'[I]t has long been held that arguments not raised in the trial court are considered waived on appeal.'"). ACF had an opportunity below, both in its reply brief and at the hearing to raise the issue, but it strategically chose not to do so. *Cholipski v. Bovis Lend Lease, Inc.*, 2014 IL App (1st) 132842, ¶ 62 (finding waiver because "contrary to their argument on appeal, defendants had a realistic opportunity in both their reply brief and at the hearing to raise [an argument], and they failed to do so."). ACF has waived the issue on appeal.

Not only did ACF waive the argument by failing to raise it below, but the argument that OSGC is not an "arm of the tribe" fails on the merits. Tribal sovereign immunity extends to subordinate economic organizations of the tribe as "arms of the tribe." *See, e.g., Allen v. Gold Country Casino,* 464 F.3d 1044, 1046-47 (9th Cir. 2006) (casino organized under tribal ordinance and interstate gaming compact entitled to tribal sovereign immunity as arm of the tribe); *Native Am. Distrib.,* 546 F.3d at 1292-96 (tobacco manufacturer had sovereign immunity as enterprise of tribe); *Hagen v. Sisseton-Wahpeton Cmty. Coll.,* 205 F.3d 1040, 1043 (8th Cir. 2000) (college "chartered, funded, and controlled by the Tribe to provide education to tribal members on Indian land" was "arm of the tribe" and therefore covered by sovereign immunity); *Pink v. Modoc Indian Health Project Inc.*, 157 F.3d 1185 (9th Cir. 1998) (nonprofit health corporation created and controlled by Indian tribes entitled to sovereign immunity); *Dillon v. Yankton Sioux Tribe Hous. Auth.,* 144 F.3d 581, 583 (8th Cir. 1998) (tribal housing authority – established by tribal council under its powers of self-government–is a tribal agency entitled to sovereign immunity); *Barker v. Menominee Nation Casino,* 897 F. Supp. 389, 393 (E.D. Wis. 1995) (tribal gaming commission and casino found to be immune from suit).

In *Breakthrough Management Group, Inc. v. Chukchansi Gold Casino and Resort*, 629 F.3d 1173 (10th Cir. 2010), a case ACF fails to mention despite its direct applicability, the plaintiff and an "agent" of Chukchansi Gold Casino and Resort ("Casino") executed a license agreement for an online business management training and consulting service. *Id.* at 1176-77. The tribe allegedly paid for the license. *Id.* The Chukchansi Economic Development Authority ("Authority") owned and operated the

Casino. *Id.* The plaintiff alleged that the terms of the license were violated and sued the tribe, Authority, Casino, and individual Casino employees. *Id.* at 1177.

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

> Tribal sovereign immunity may extend to subdivisions of a tribe, including those engaged in economic activities, provided that the relationship between the tribe and the entity is sufficiently close to properly permit the entity to share in the tribe's immunity . . . . As the Ninth Circuit has noted, immunity for subordinate economic entities "directly protects the sovereign Tribe's treasury, which is one of the historic purposes of sovereign immunity in general."
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> A commentator has observed that "[t]ribal governments directly control or participate in commercial activities more frequently than other [types of] governments . . . . [T]he tribal organization may be part of the tribal government and protected by tribal immunity, even though it may have a separate corporate structure."

Id. at 1183-84 (citations omitted).

The *Breakthrough* Court articulated six factors for determining whether a subordinate economic entity is entitled to sovereign immunity: (1) "the method of creation of the economic entities"; (2) "their purpose"; (3) "their structure, ownership, and management, including the amount of control the tribe has over the entities"; (4) "the tribe's intent with respect to the sharing of its sovereign immunity"; (5) "the financial relationship between the tribe and the entities"; and (6) "the policies underlying tribal sovereign immunity and its connection to tribal economic development, and whether those policies are served by granting immunity to the economic entities." *Id.* at 1187; *see also White v. Univ. of Cal.*, 765 F.3d 1010, 1025 (9th Cir. 2014) (citing the *Breakthrough*

Management factors with approval and finding that the "Repatriation Committee was an 'arm of the tribe' for sovereign immunity purposes").

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

Like the Authority in *Breakthrough,* OSGC was created under, and is subject to, the laws, ordinances and jurisdiction of the Tribe. (R. C126-27 ¶¶ 3-8 and 10-12; C134-153.) *See Breakthrough,* 629 F.3d at 1187 (factor number one). OSGC's purpose is to "promote and enhance the business and economic diversification" of the Tribe. (R. C144 (Charter, Art. VI(A)).) Like the Authority and Casino in *Breakthrough,* OSGC promotes and funds the Tribe's self-determination through revenue generation and the funding of diversified economic development. *See Breakthrough,* 629 F.3d at 1187 (factor number two).

The Tribe has significant control over OSGC. *Breakthrough,* 629 F.3d at 1187 (factor number three). Under the bylaws of OSGC, the Business Committee acts on behalf of the Tribe in the role similar to shareholders of a corporation. (R. C130 ¶ 19;

C154-163.) OSGC's board members are appointed by the Business Committee, and at least 5 of 7 board members must be members of the Tribe. (R. C129 ¶ 17 and C145-46 (Charter, Art VII(D)b. and e.).) At all relevant times in 2012-2013, only one board member was not a member of the Tribe. (R. C129-130 ¶ 18.) OSGC provides detailed reports quarterly to the Business Committee and General Tribal Council describing the development activities and financial condition of OSGC. (R. C130 ¶ 20; C148-151 (Charter, Art. XIII).) Finally, the Business Committee retained the authority to dissolve OSGC. (R. C131 ¶ 22; C151 (Charter, Art. XV(B)).)

Consistent with the fourth *Breakthrough* factor, it is plain that the Tribe intended its sovereign immunity to extend to OSGC. *Breakthrough,* 629 F.3d at 1187. The Tribe conferred on OSGC "all rights, privileges *and immunities* existing under federal and Oneida tribal laws." (R. C127 ¶ 11; C143 (Charter, Art. I) (emphasis added).) The General Tribal Council reserved to the "Oneida Nation all its inherent sovereign rights as an Indian nation with regard to the activities of" OSGC. (R. C143 (Charter, Art. V., see also C127 ¶ 12).) OSGC was precluded from waiving any "rights, privileges or immunities of the Oneida Nation." (R. C127 ¶ 13; C152 (Charter, Art. XVII(F)).) OSGC may waive *its* immunity, but not the Tribe's immunity, to enter into contracts. (R. C127-128 ¶ 14; C152 (Charter, Art. VI(E)).) However, OSGC must strictly follow the Tribe's Sovereign Immunity Ordinance § 14 for a waiver of sovereign immunity to be valid. (R. C131-32 ¶ 23; C161-163.)

The financial relationship between the Tribe and OSGC also supports the conclusion that it is immune from suit. *Breakthrough,* 629 F.3d at 1187. All profits of OSGC must be used to carry out the purposes and powers of OSGC (*i.e.*, to diversify the

economic portfolio of the Tribe) and all profits not so utilized "will revert to and be designated for use by" the Tribe. (R. C129 ¶ 16; C147 (Charter Art. X).) OSGC manages thirteen commercial properties in Brown and Outagamie Counties, Wisconsin. (R. C130-31 ¶ 21.) The Tribe owns eleven of those properties: six are held in trust by the federal government for the benefit of the Tribe, and five are held in fee title by the Tribe. (*Id.*) The profits of OSGC have reverted to the Tribe on at least two occasions, and the Tribe receives $400,000-$500,000 annually in lease payments from OSGC and its subsidiaries. (R. C129 ¶ 16.) The Tribe uses the lease payments received from OSGC and its subsidiaries to fund its Division of Land Management ("DLM"), which manages the Tribe's residential, commercial and agricultural leases, easements, and land use in general. The DLM also uses the lease payments to pay for property maintenance and to make home loans to tribal members. (R. C129 ¶ 16.)

OSGC "plainly promote[s] and fund[s] the Tribe's self-determination through revenue generation and the funding of diversified economic development." *Breakthrough,* 629 F.3d at 1195. Therefore, "extending immunity to [OSGC] 'directly protects the sovereign Tribe's treasury, which is one of the historic purposes of sovereign immunity in general...." *Id.*

The cases on which ACF relies are distinguishable. For instance, *McNally CPA's & Consultants, S.C. v. DJ Hosts, Inc.*, 2004 WI App. 221, 692 N.W.2d 247, 250, held only that "when the sole facts are that an Indian tribe purchases all of the shares of an existing [non-tribal] for-profit corporation and takes control over the operations of the corporation, tribal immunity is not conferred on the corporation." This "narrow question" and its related narrow holding bear no relationship to the issues in this case. In

Sue/Perior Concrete & Paving, Inc. v. Lewiston Golf Course Corp., 25 N.E.3d 928, 933-37 (N.H. 2014), the Court emphasized the economic interconnectedness factors above all others. Yet, while the economic relationship between the Tribe and the entity is one of many factors used to determine whether sovereign immunity extends to the entity, courts have criticized elevating the economic relationship factors above all others. *See, e.g., Breakthrough*, 629 F.3d at 1185-89 (expressly overruling district court's holding that financial interconnectedness is a threshold factor); *J.L. Ward Assocs., Inc. v. Great Plains Tribal Chairmen's Health Bd.*, 842 F. Supp. 2d 1163, 1176 (D.S.D. 2012) (refusing to adopt economic threshold determination approach and instead analyzing a variety of factors articulated by other courts).

Thus, OSGC – a subordinate economic entity created by and for the benefit of the Tribe – is sufficiently related to the Tribe to enjoy Tribal sovereign immunity.

C. The Sovereign Immunity Doctrine Bars ACF's Contractual And Non-Contractual Claims.

Sovereign immunity applies to contractual claims: "Tribes enjoy immunity from suits on contracts, whether those contracts involve governmental or commercial activities and whether they are made on or off a reservation." *Kiowa*, 523 U.S. at 760. The United States Supreme Court has made clear that sovereign immunity is "a broad principle," from which it is "improper" to carve out exceptions, and that it is for Congress – not the courts – to determine when and how to abrogate sovereign immunity for off-reservation commercial conduct. *Mich. v. Bay Mills Indian Cmty.*, 134 S. Ct. 2024, 2031 (2014); *Kiowa*, 523 U.S. 758 (deferring to Congress the "important judgment" of whether to confine sovereign immunity to "reservations or to noncommercial activities").

Nonetheless, ACF cites *Michigan v. Bay Mills Indian Community, supra*, to argue this Court "should decline to further extend sovereign immunity in this case" to off-reservation conduct and that the "United States Supreme Court has never decided the applicability of immunity for a tribe's non-contractual activity, such as pled in Plaintiff's tort and equitable claims, and has continued to leave this questions open." (ACF Br. 11, 14.) ACF misses the point. This Court is not being asked to "extend" the sovereign immunity doctrine. Rather, as a matter of well settled federal law, sovereign immunity already immunizes the Tribe (and OSGC) from suit absent congressional action or waiver. *Bay Mills*, 134 S. Ct. at 2031. Immunity is the rule, rather than the exception. The United States Supreme Court has "time and again treated the 'doctrine of tribal immunity [as] settled law' and dismissed any suit against a tribe absent congressional authorization (or a waiver)." *Bay Mills*, 134 S. Ct. at 2030-31. So, contrary to ACF's suggestion, because neither Congress nor the Supreme Court has yet to recognize any exception to sovereign immunity for off-reservation conduct or for non-contractual conduct, the default position is – and should be – dismissal of all claims against the Tribe (and OSGC) absent a waiver. *See Bay Mills*, 134 S. Ct. at 2032 & n.4.

ACF cites to a footnote in *Michigan v. Bay Mills Indian Community*, 134 S. Ct. at 2036 n. 8, in which the Supreme Court indicates, *in dicta*, that it has never addressed whether there could be "special justification" that would allow the Court to depart from the rule of *stare decisis* in the tribal sovereign immunity context, such as a situation involving a tort victim "who has not chosen to deal with a tribe" and had no alternative relief. *Id.* ACF relies on two non-Supreme Court cases to support its claim that sovereign immunity does not extend to non-contractual off-reservation conduct, which

are readily distinguishable. (ACF Br. 12 (citing *Hamaatsa, Inc. v. Pueblo of San Felipe*, 310 P.3d 631 (N.M. App.), *cert. granted sub nom. Hamaatsa v. San Felipe*, 311 P.3d 452 (N.M. 2013) (still pending) and *Hollynn D'Lil v. Cher-Ae Heights Indian Cmty. of Trinidad Rancheria*, No. C 01-1638 TEH, 2002 WL 33942761 (N.D. Cal. Mar. 11, 2002).) In both cases, the plaintiffs – unlike ACF – did not voluntarily choose to deal with the tribe. In *Hollynn*, the plaintiffs sought to enforce several disability-related civil rights laws (such as the Americans with Disabilities Act of 1990), none of which are applicable here. In permitting those claims to go forward, the court distinguished that case from ACF's claims here by explaining that "[t]ort victims and civil rights plaintiffs (such as those in the case at bar) have no notice that they are on Indian property, nor any opportunity to negotiate the terms of their interaction with the tribe." *Hollynn*, 2002 WL 33942761, at *6. Similarly, in *Hamaatsa*, which involved a dispute over a state public road, the court made clear that the plaintiffs there (unlike ACF) did not voluntarily interact with the tribe:

> This is not a case in which a party suing a tribe has engaged in a contractual or commercial relationship with that tribe. No one is forced to enter into such relationships. Those entering into such relationships do so voluntarily, by choice, and they should know the legal risks. When a tribe acquires property in fee simple that envelops a state public road and subsequently denies access to existing property owners or other individuals, those excluded are innocent citizens who had no choice and cannot be held to have known or anticipated a legal risk of access denial and a dispositive facial assertion of sovereign immunity by an Indian tribe.

Hamaatsa, 310 P.3d at 636-37.

There is no special justification for departing from established sovereign immunity principles here. ACF chose to enter into the GBRE Agreements solely with

GBRE and interacted with the Tribe and OSGC voluntarily. Unlike an unwitting tort victim, ACF knew that the Tribe and OSGC were upstream owners of GBRE with sovereign immunity. Therefore, it should have known the legal risks and could have protected itself by obtaining a sovereign immunity waiver and requiring the Tribe and OSGC to sign the GBRE Agreements before proceeding with the Project. Absent that waiver (which, as detailed below, ACF failed to negotiate) the Tribe and OSGC are immune from suit on all of ACF's contractual and non-contractual claims. *Kiowa*, 523 U.S. at 754; *Three Affiliated Tribes*, 476 U.S. at 890-91; *Bay Mills*, 134 S. Ct. at 2031. The trial court properly dismissed these claims.

II. CHOICE–OF-LAW AND FORUM SELECTION PROVISIONS IN AGREEMENTS TO WHICH NEITHER THE TRIBE NOR OSGC IS A PARTY CANNOT, AS A MATTER OF LAW, WAIVE THEIR SOVEREIGN IMMUNITY.

A. A Waiver Of Sovereign Immunity Must Be Express.

"[A] waiver of sovereign immunity 'cannot be implied; rather, it must be unequivocally expressed.'" *Santa Clara Pueblo,* 436 U.S. at 58. Absent a clear waiver, suits against tribes (and tribal entities) are barred by sovereign immunity. *Altheimer,* 983 F.2d at 812; *Kiowa,* 523 U.S. at 753-54. An Indian tribe or tribal entity may waive its sovereign immunity by contract, but only if it does so with "requisite clarity." *C&L Enters.*, 532 U.S. at 418.

In *Native American Distributing,* 546 F.3d at 1290, the plaintiffs sued the Seneca Cayuga Tobacco Company ("SCTC"), which was an enterprise of the tribe, and three of SCTC's officers. The tribe was governed by a business committee and the business committee created the SCTC as a tribal entity to manufacture, distribute and sell tobacco products. *Id.* at 1290-91. SCTC contracted to distribute SCTC's

product and, when asked about sovereign immunity, "SCTC officials told [the plaintiffs] that no waiver was necessary...." *Id.* at 1291. The plaintiffs sued for breach of the agreement, and SCTC raised sovereign immunity as a defense to the suit. *Id.* at 1292-93. The court rejected the plaintiffs' argument that the tribe should be estopped from asserting sovereign immunity because of the oral representations made by SCTC's officers:

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

Id. at 1295 (citations omitted).

In *World Touch Gaming*, 117 F. Supp. 2d at 272, the seller and lessor of gaming equipment sued a tribe, its casino, and its casino management company for breach of contract. The gaming equipment company and the casino entered into agreements for the lease and purchase of pull tab machines for use in the tribe's gaming enterprise. The Vice President of the casino's management company—a state incorporated LLC that had an agreement with the tribe to act as the managing agent of the casino—signed the relevant agreements. In deciding that neither the tribe nor the casino had waived sovereign immunity, the court relied on the "unequivocal language" of the tribe's Constitution and Civil Judicial Code whereby "only the Tribal Council can waive the Tribe's sovereign immunity, and such waiver must be express." *Id.* at 275. The court also held that giving the management company authority to operate the casino was not

the equivalent to authorizing the management company to waive the tribe's sovereign immunity. *Id.*

The court found that

> as a sophisticated distributor of gaming equipment that frequently deals with Indian gaming enterprises, [plaintiff] should have been careful to assure that either the Management Company had the express authority of the Tribe to waive sovereign immunity, or that the Tribe itself expressly waived sovereign immunity with respect to the Sales and Lease Agreements.

Id. at 275. The court also held that, "regardless of any apparent or implicit, or even express, authority of the Management Company to bind the Casino and the Tribe to contract terms and other commercial undertakings, such authority is insufficient to waive the Tribe's sovereign immunity." *Id.* at 276; *see also Sanderlin v. Seminole Tribe of Fla.*, 243 F.3d 1282, 1288 (11th Cir. 2001) (rejecting argument that tribal Chief had actual or apparent authority to waive immunity because "[s]uch a finding would be directly contrary to the explicit provisions of the Tribal Constitution").

In *Danka Funding,* the controller of a casino owned by a Tribe signed equipment lease contracts containing forum selection clauses. 747 A.2d at 838-40. The laws of the Tribe, however, described its immunity and prohibited waiver by anyone other than the Tribal Council. *Id.* at 841. The New Jersey court held that the casino controller's execution of the contract did not waive the Tribe's sovereign immunity because the controller had no authority to waive immunity under the Tribe's laws. *Id.* at 842-44. In reaching this conclusion, the court held the plaintiff should have availed itself of the tribal procedure for obtaining a valid waiver:

> Danka Business Services knew it was dealing with an Indian tribe and is charged with knowledge that the tribe possessed sovereign immunity. The tribe, through its laws,

> describes how one may obtain a legally enforceable waiver of that immunity. Neither Danka Business Services nor Danka Funding took advantage of those provisions.
>
> ***
>
> By failing to avail themselves of the procedures for obtaining a waiver of immunity under tribal law, Danka Business Systems and Danka Funding failed to satisfy the conditions necessary for an unequivocal waiver identified in *Santa Clara Pueblo v. Martinez*, 436 U.S. at 58, 98 S.Ct. 1670.

Id. at 842-43.

Congress did not waive the Tribe's or OSGC's immunity regarding ACF's claims, all of which are state law contract and tort claims. *Santa Clara Pueblo,* 436 U.S. at 58. Therefore, the only way for ACF to prove that the Tribe or OSGC waived sovereign immunity is to demonstrate (which it cannot do on this record) that there has been an express, clear and unequivocal waiver in conformity with Tribal law. *Id.*

B. ACF Did Not Comply With Tribal Law To Obtain A Valid Waiver of Sovereign Immunity.

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

> 14.6-2. *Waiver by Resolution.* The sovereign immunity of the Tribe or a Tribal Entity may be waived:
>
> (a) by resolution of the General Tribal Council;
>
> (b) by resolution or motion of the Oneida Business Committee; or
>
> (c) by resolution of a Tribal Entity exercising authority expressly delegated to the Tribal Entity in its charter or by resolution of the General Tribal Council or the Oneida Business Committee, provided that such waiver shall be made in strict conformity with the provisions of the charter

> or the resolution governing the delegation, and shall be limited to the assets and property of the Tribal Entity.

(R. C162-163.) The Sovereign Immunity Ordinance, and the Tribe's Constitution and Bylaws and OSGC's Charter, are publicly available online. (R. C132 ¶ 24.) Neither the Tribe nor OSGC passed a resolution authorizing a waiver of sovereign immunity in connection with the Lease or O&M Agreement, nor did the Business Committee pass such a motion. (R. C132-33 ¶ 28; C166 ¶¶ 8-9.)

ACF knew it was dealing with an entity, GBRE, whose indirect owners are the Tribe and OSGC, a tribal corporation. (R. C37 (Schedule 1 to the Lease, providing that Lease Commencement Date would be the date GBRE received loan proceeds with a guarantee by the United States Department of Interior, Bureau of Indian Affairs).) Both its principals who negotiated the GBRE Agreements are attorneys. (R. Suppl. C86, ¶ 1; C155 ¶ 1.) "By failing to avail themselves of the procedures for obtaining a waiver of immunity under tribal law,... [ACF] ... failed to satisfy the conditions necessary for an unequivocal waiver identified in *Santa Clara Pueblo v. Martinez*, 436 U.S. at 58." *Danka Funding*, 747 A.2d at 843. In *Danka* (*see supra* Section II.A), the court reasoned that "Danka Funding and Danka Business Systems could have insured that they received a proper waiver of immunity by resort to tribal law." *Id.* at 844. The same is true here.

ACF does not dispute that the requirements of the Tribe's Sovereign Immunity Ordinance were not met. It argues instead that compliance with the Tribe's ordinance is not required, relying on *Bates Associates, LLC v. 132 Associates, LLC*, 799 N.W.2d 177 (Mich. Ct. App. 2010), and *Smith v. Hopland Band of Pomo Indians*, 115 Cal Rptr. 2d 455 (Ct. App. 2002). (ACF Br. 34-35.) First, as discussed above (see *supra* Section II.A.), the weight of authority requires adherence to the tribal law setting forth who has

the authority to waive sovereign immunity and in what manner. *See Memphis Biofuels, LLC v. Chickasaw Nation Indus. Inc.*, 585 F.3d 917 (6th Cir. 2009) (charter of a corporation wholly owned by Indian tribe but separate and distinct from the tribe controlled and that the entity retained immunity absent board approval waiving such immunity); *Sanderlin,* 243 F.3d at 1288 (tribal chief did not have actual or apparent authority to waive sovereign immunity, absent a resolution of the tribal council, where the ordinance provided that consent of tribe to waiver of its immunity may be made only by a resolution of the tribal council specifically acknowledging that the tribe is waiving its immunity, and specifying the limited purpose for which immunity is waived).

Second, the cases on which ACF relies are inapposite. In *Bates Associates*, the tribe was a party to the contract, the contracts were signed by the tribe's CFO and the contracts both contained provisions expressly waiving the tribe's immunity. *Bates Assocs.*, 799 N.W.2d at 179. In *Smith*, the tribe was a party to the contract, the tribal chairperson signed the contract and the tribal council had unanimously voted to authorize the tribal chairperson to negotiate and execute the contract. *Smith,* 115 Cal. Rptr. 2d at 457-58. In contrast here, the Tribe and OSGC did not sign, and are not parties to, the GBRE Agreements. There was no resolution or vote of the Tribe or OSGC authorizing Mr. Cornelius[3] to sign the Agreements on behalf of the Tribe or OSGC, much less resolutions authorizing a waiver of their tribal sovereign immunity. (R. C131-133 ¶¶ 23-28; C166 ¶ 9.) The Tribe's Sovereign Immunity Ordinance is publicly available on line,

[3] Kevin Cornelius was the former President of GBRE and former CEO of OSGC (R. C359 ¶ 1) and Bruce King was a former Vice-President and CEO of GBRE and former CFO of OSGC (R. C342 ¶ 1.). ACF argues that these individuals held themselves out as representatives of the Tribe, which both deny. (R. C359-362 ¶¶ 1, 3, and 6; C342 ¶¶ 1, 3, and 7.)

as are all Business Committee Agendas and Minutes. (R. C132 ¶ 24.) Messrs. Cornelius and King held no elected or other position with the Tribe. (R. C359 ¶ 1; R. C342 ¶ 1.) While Messrs. Cornelius and King held positions with OSGC, the Agreements are signed by Mr. Cornelius in his capacity as an officer of GBRE only. (R. C33-34; C59-60.)

C. The Tribe And OSGC Are Not Parties To The GBRE Agreements And Are Therefore Not Bound By Their Terms.

ACF tries several arguments to support its position that OSGC and the Tribe are bound by the GBRE Agreements. (ACF Br. 20-28.) ACF contends that (1) "OSGC and the Tribe are subject to the forum selection and choice of law clause by reason of unity" (ACF Br. 20), (2) "[t]he 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" (ACF Br. 27), and (3) "OSGC and the Tribe are bound by the forum selection clauses as third-party beneficiaries" (ACF Br. 27). Yet, all of ACF's arguments fail as a matter of law for the same reason: neither the Tribe nor OSGC are parties to the Lease or O&M Agreement and neither agreement refers to a waiver of sovereign immunity by the non-parties. (R. C33-34; C59-60.)

Had ACF wanted to hold the Tribe and OSGC accountable for GBRE's contractual obligations, its path was clear—require the Tribe and OSGC to sign the GBRE Agreements and become parties to the Lease and O&M Agreement and include waiver of sovereign immunity provisions in the agreements. Both agreements have merger and integration clauses and, therefore, constitute the entire agreements between GBRE and ACF. (R. C32 ¶ 14(i); C58 ¶ 21.) "In Illinois, a written contract is presumed to include all material terms agreed upon by the parties, and any prior negotiations or representations are merged into that agreement; extrinsic evidence, parol or otherwise, of

antecedent understandings and negotiations is generally inadmissible to alter, vary, or contradict the written instrument." *K's Merch. Mart, Inc. v. Northgate Ltd. P'ship*, 359 Ill. App. 3d 1137, 1143 (4th Dist. 2005). "'If [a contract] imports on its face to be a complete expression of the whole document,...it is to be presumed that the parties introduced into it every material item and term, and parol evidence cannot be admitted to add another term to the agreement....'" *Ringgold Capital IV, LLC v. Finley*, 2013 IL App (1st) 121702, ¶ 19.

Neither of the GBRE Agreements states that the Tribe or OSGC is a contracting party. It is contrary to well-established principles of contract law for ACF to assert that the Tribe and OSGC are bound by contracts they did not sign and to which they are not parties. *Baird & Warner, Inc. v. Addison Indus. Park, Inc.*, 70 Ill. App. 3d 59, 70 (1st Dist. 1979) (defendant "was not a party to the contract; indeed ... it did not even sign it. Therefore,... it was not bound by the contract and could not have been guilty of a breach of contract.... [T]he mere fact a stockholder owns 100 percent of the stock is not enough to entitle a court to pierce the corporate veil and hold the stockholder liable on a contract made by the corporation.").

Tacitly acknowledging this fatal flaw, ACF asserts that GBRE acted as an agent for the Tribe and OSGC, implying that GBRE could, and did, waive the Tribe's and OSGC's sovereign immunity by entering into the Lease and O&M Agreement. (R. C10 ¶ 49.) Yet, nothing in the GBRE Agreements indicates that GBRE entered into the Agreements as "agent" for the Tribe and OSGC. To the contrary, Mr. Cornelius signed the GBRE Agreements only in his capacity as the "Chairman" of GBRE, and any alleged

facts predating the Agreements relied on by ACF to support its agency assertion are barred by the integration clauses as a matter of law. (R. C32 ¶ 14(i); C58 ¶ 21.)

The litany of cases on which ACF relies to support its argument has nothing to do with sovereign immunity or subject matter jurisdiction. Most notably, ACF expends many pages on two cases, *Altheimer & Gray v. Sioux Manufacturing Corporation and Solargenix Energy, LLC v. Acciona S.A.*, 2014 IL App. (1st) 123403, both of which are inapplicable. (ACF Br. 20-28.)

In *Altheimer*, 983 F.2d at 805-07 – a case on which ACF strangely relies – the Seventh Circuit found that a tribal entity had waived its and the tribe's sovereign immunity when the vice-president and general manager of the tribal entity signed a contract providing that the tribal entity and the tribe "waive[d] all sovereign immunity in regards to all contractual disputes," "all agreements contemplated hereunder will be executed and interpreted in accordance with the laws of the State of Illinois," and all parties "agree to submit to the venue and jurisdiction of the federal and state courts located in the State of Illinois." *Id.* at 807. By contrast, neither the Tribe nor OSGC signed the GBRE Agreements, the Agreements do not reference the Tribe or OSGC and the Agreements contain no statement that the Tribe or OSGC waives its sovereign immunity. (R. C32 ¶ 14(h); C57 ¶ 15.)

As ACF admits, Solargenix was a personal jurisdiction case, not a sovereign immunity, subject matter jurisdiction case. (*Id.* 25.) The legal standards governing each are entirely different. Indeed, *Solargenix* – which is analyzed under a personal jurisdiction framework on the basis of personal jurisdiction precedent – says nothing of subject matter jurisdiction or even agency law. *Id.* ¶ 42 ("The touchstone illustrated by

these cases is that a court may exercise *personal jurisdiction* over a defendant by enforcing a forum selection clause against it, even though it was not a signatory to the contract containing the clause, where it was closely related to the dispute such that it became foreseeable that the nonsignatory would be bound.") (emphasis added).

Moreover, ACF's extensive discussion of *Solargenix* fails to point out that the court ruled that the Spanish parents had signed a letter of adhesion which provided that the Spanish parent corporation "accept[ed] and consent[ed] to be bound by and to comply with" the provisions of the contract at issue. *Id.* ¶ 16. Here, neither the Tribe nor OSGC consented to be bound by the GBRE Agreements, and nothing in the GBRE Agreements supports ACF's argument that GBRE entered into the Agreements as their agent.

D. Principles Of State Law Apparent/Implied Authority Are Inapplicable.

ACF asserts that Kevin Cornelius was the "apparent agent" of OSGC and the Tribe and, therefore, bound the Tribe and OSGC to the Agreements and waived their sovereign immunity. (ACF Br. 35-38.) The Supreme Court has never applied state law agency principles in the tribal sovereign immunity context. While ACF cites to two state court cases that applied agency law, the cases are the "minority view." *MM&A Prods., LLC v. Yavapai-Apache Nation*, 316 P.3d 1248, 1253 (Ariz. Ct. App. 2014). The majority view has refused to apply state agency law in the tribal sovereign immunity context because tribal sovereign immunity is a matter of federal law that may not be diminished by state law. *Id.* at 1252-53; *see also Memphis Biofuels, LLC,* 585 F.3d at 918–19; *Amerind Risk Mgmt. Corp. v. Malaterre*, 633 F.3d 680, 688 (8th Cir. 2011); *World Touch Gaming, Inc.*, 117 F. Supp. 2d at 276; *Dilliner v. Seneca–Cayuga Tribe*, 258 P.3d 516, 520 (Okla. 2011); *Chance v. Coquille Indian Tribe*, 963 P.2d 638, 640–42

(Or. 1998) (rejecting apparent authority argument and holding that, even if contract's language waiving immunity was express, contract not valid because the signing official lacked authority under tribal law to waive immunity); *Calvello v. Yankton Sioux Tribe*, 584 N.W.2d 108 (S.D. 1998) (without clear expression of waiver by tribal council, acquiescence of tribal officials cannot waive immunity). Under federal law, sovereign immunity "cannot be waived by officials" in a way that "subject[s] the [sovereign] to suit in any court in the discretion of its responsible officers." *United States v. U.S. Fid. & Guar. Co.*, 309 U.S. 506, 513 (1940). This is true even if the officials make affirmative misrepresentations. *See Native Am. Distrib.*, 546 F.3d at 1295 ("misrepresentations of the Tribe's officials or employees cannot affect its immunity from suit"). Thus, "[r]egardless of any apparent or implicit, or even express, authority of ... [GBRE] ... to bind ... [OSGC] ... and the Tribe to contract terms and other commercial undertakings, such authority is insufficient to waive the Tribe's sovereign immunity." *World Touch Gaming*, 117 F. Supp. 2d at 276.

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

Moreover, agency law requires that the apparent authority arise from the "principal's manifestation," and "cannot be established [solely] by the agent's acts, declarations, or conduct." *StoreVisions, Inc. v. Omaha Tribe of Neb.*, 795 N.W.2d 271, 279 (Neb. 2011). *See also Schoenberger v. Chicago Transit Auth.*, 84 Ill. App. 3d 1132,

1136 (1st Dist. 1980). The principal must make "explicit statements" and act in a way that induces a reasonable person to believe that the agent has authority to act on the principal's behalf. *StoreVisions,* 795 N.W.2d at 279. Thus, the disputed oral representations by Messrs. Cornelius, King and Kavan concerning their authority to bind the Tribe and OSGC and waive their immunity would not establish apparent authority. *Id.* The only other facts offered by ACF are: a) one presentation made to the Tribe's Business Committee concerning the Project technology in January 2013 before the Agreements were signed; b) OSGC's agreement to guarantee the bank loan for the Project; and c) one presentation made to the Business Committee concerning the Project and two demonstration plant site visits made ***after*** the Agreements were signed. (*See* R. Suppl. C158 ¶ 10; C88-90 ¶¶ 8, 12, 16, 19, 20.) Absent, however, is any evidence demonstrating that the Tribe's Business Committee or OSGC's board made "explicit statements" that would lead ACF to believe that Mr. Cornelius was authorized to negotiate and execute the Agreements on *their* behalf and to waive *their* immunity at any of these meetings. Indeed, ACF claims that it reasonably relied on oral representations of Messrs. Cornelius, King and Kavan, that they were waiving OSGC's and the Tribe's sovereign immunity. Both Messrs. Decator and Galich are attorneys. (R. Suppl. C86 ¶ 1; C155 ¶ 1.) They could not "reasonably" rely on any such alleged allegations, as a matter of law. None of the three held an elected position with the Tribe, a fact that could easily have been discovered by going online, *see https://oneida-nsn.gov/Templates/OneColumn.aspx?id=102.* Messrs. Cornelius and King were each one of 16,000 Tribal members. They could no more orally waive the Tribe's sovereign

immunity than a citizen of Illinois could waive the State's sovereign immunity. Any "reasonable" attorney would know that.

Instead, the evidence proves conclusively that the procedure for obtaining a valid waiver of the Tribe's or OSGC's sovereign immunity, *i.e.*, a motion passed or resolution adopted in accordance with the Sovereign Immunity Ordinance, was not followed. (*See* R. C131-33 ¶¶ 23-28; C166 ¶¶ 8-9; R. Suppl. C229-230 (59:1-64:9); C261 (24:21-25:23); C264-265 (35:2 – 41:24).) Simply because the Tribe and OSGC may have wanted to have some knowledge of the Project and the technology does not support an inference that they authorized Mr. Cornelius to negotiate and enter into the Agreements on their behalf or waive their sovereign immunity. Indeed, regular reporting to a parent corporation's board on what a down-stream subsidiary is doing is neither unusual nor grounds for holding the parent financially responsible for the subsidiary's contractual obligations. Furthermore, OSGC's loan guarantee was a commitment to the bank, not a commitment to ACF. If agreement by a parent corporation to guarantee a bank loan of one of its single asset subsidiaries would operate to bind the parent to all the subsidiary's contractual obligations, no parent would ever guarantee a subsidiary's bank loans, which is a customary practice in the corporate context.

E. Alter Ego, Piercing The Corporate Veil, And Participant Liability Theories Are Not Applicable.

ACF claims that GBRE is the "alter ego" of OSGC and the Tribe, such that it may "pierce the corporate veil" and bind OSGC and the Tribe to the forum selection clause. (ACF Br. 28-34.) Tellingly, none of the cases ACF relied on involve sovereign immunity. *See, e.g., Old Orchard Urban Ltd. P'ship v. Harry Rosen, Inc.*, 389 Ill. App. 3d 58, 69 (1st Dist. 2009); *Westmeyer v. Flynn*, 382 Ill. App. 3d 952, 958 (1st Dist.

2008); *Wellman v. Dow Chem. Co.*, No. 05-280-SLR, 2007 WL 842084, at *2 (D. Del. March 20, 2007); *Geyer v. Ingersoll Publ'ns Co.*, 621 A.2d 784, 793 (Del. Ch. 1992); *A.G. Cullen Constr., Inc. v. Burnham Partners, LLC*, 2015 IL App (1st) 122538, ¶ 43.

There is no United States Supreme Court precedent extending alter ego and piercing the corporate veil principles to the sovereign immunity context. As a matter of federal Indian law, state law alter ego and piercing the corporate veil theories are inapplicable. *Three Affiliated Tribes,* 476 U.S. at 890; *see also United States ex rel. Morgan Bldgs. & Spas, Inc. v. Iowa Tribe of Okla.*, No. CIV-09-730-M, 2011 WL 308889, at * 3 (W.D. Okla. Jan. 26, 2011) (alter ego analysis inapplicable to tribal sovereign immunity context). There is also no authority for piercing the corporate veil of a state created corporation, *i.e.*, GBRE, to reach the assets of a sovereign nation, *i.e.* the Tribe. The Tribe is not a corporation, it is a sovereign nation. If piercing the corporate veil of a state chartered corporation to get to a nation's assets were allowed, the United States would be liable for the debts of virtually every bankrupt state corporation.

Not only are ACF's alter ego or piercing the corporate veil theories inapplicable, but also ACF has not made out a prima *facie case.* In *Mason v. Network of Wilmington, Inc.*, No. CIV.A.19434 NC, 2005 WL 1653954, at *3 (Del. Ch. 2005), the Court listed the alter ego factors, such as under capitalization, insolvency, whether the dominant shareholder siphoned corporate funds, and whether corporate formalities were kept.[4] However, piercing the corporate veil based on alter ego in the LLC context is a developing area and courts and commentators have noted that the factors for proving alter ego, particularly the corporate formalities factor, must be analyzed differently for LLCs

[4] ACF relied on the Delaware piercing the corporate veil standards before the trial court (R. C14)

because many corporate formalities do not apply. *Kaycee Land & Livestock v. Flahive*, 46 P.3d 323, 328 (Wyo. 2002) ("The LLC's operation is intended to be much more flexible than a corporation's."). Furthermore, "'[p]iercing the corporate veil under the alter ego theory [also] requires that the corporate structure cause fraud or similar injustice. Effectively, the corporation must be a sham and exist for no other purpose than as a vehicle for fraud.'" *Mason*, 2005 WL 1653954, at * 3; *see also A.G. Cullen Constr.*, 2015 IL App (1st) 122538, ¶ 42 ("Delaware courts do not lightly disregard the corporate form. Absent sufficient cause the separate legal existence of a corporation will not be disturbed. Generally, the corporate veil may be pierced where there is fraud or where a subsidiary is in fact the mere alter ego of the parent.").

Here, ACF argues that Messrs. Cornelius and King were officers of both OSGC and GBRE, used the same address as OSGC and used their OSGC email to communicate with them. (ACF Br. 30.) Under similar circumstances, the *Mason* court refused to pierce the corporate veil concluding that, "[b]eing the sole shareholder of two different legal entities, housed in the same office building and possessing the same phone number at separate (and not sequential) times does not constitute a sham that 'exist[s] for no other purpose than as a vehicle for fraud.'" *Id.* at *4. *See also eCommerce Industries, Inc. v. MWA Intelligence, Inc.*, No. CV 7471-VCP, 2013 WL 5621678, at *28 (Del. Ch. Sept. 30, 2013). ACF has presented no facts to support a finding that GBRE existed "for no other purpose than as a vehicle for fraud." *Wallace ex rel. Cencom Cable Income Partners II, Inc. v. Wood*, 752 A.2d 1175, 1184 (Del Ch. 1999). ACF even agreed to take a 49% membership interest in GBRE as collateral for its loan, which is conclusive proof

that ACF knew that GBRE was responsible for the Project and existed for a purpose other than fraud. (R. C39.)

Moreover, OSGC is the sole owner of OEI, a Wisconsin corporation, which is the sole owner of Oneida Energy, a Delaware corporation. Oneida Energy is the sole member and owner of GBRE, a Delaware LLC. (R. C165 ¶ 5.) ACF would need to pierce through all of these entities, using the law of the state of incorporation for each, in order to reach the Tribe or OSGC. ACF has not attempted to do so. Additionally, ACF appears to argue that because OSGC is the economic development arm of the Tribe, if it pierces the corporate veil to OSGC, it also reaches the Tribe. (ACF Br. 28-30.) OSGC has a variety of assets, has created many state-incorporated entities, and exists to diversify the income of the Tribe. (R. C127-131 ¶ 14-21.) Were Delaware alter ego law applied to the Tribe and OSGC, which it is not as a matter of federal law, there is no evidence suggesting that OSGC is a sham entity that exists for no purpose other than fraud.

Tellingly, ACF now argues for the first time on appeal, that even if the general requirements for piercing the corporate veil are not present the Tribe and OSGC are nonetheless liable as the holding corporations for GBRE as "direct participants" of the alleged misconduct. (ACF Br. 30-34.) This argument has been waived. (*See supra* 11-12 (issues may not be raised for the first time on appeal).) Moreover, the argument fails on the merits.

The Tribe and OSGC were indisputably not direct participants in the project between GBRE and ACF. (R. C360 ¶ 3; C343 ¶ 3.) ACF was aware *before* it signed the Agreements that the borrower on the BIA-guaranteed loan for the Project was GBRE, not

the Tribe or OSGC, a fact ACF does not address. (R. C37; C360-61 ¶ 4; C364-366.) Instead, ACF claims that the Tribe would have been required to be the borrower on the loan, based on the testimony of Mr. Keluche. (ACF Br. 5-6.) However, Mr. Keluche acknowledged that he was not certain who could be the borrower on a BIA-guaranteed loan (Suppl. R. C267 (47:9 to 47:14)), and the relevant federal regulations prove that GBRE could be the borrower. 25 C.F.R. § 103.25(a)(2) (state incorporated entity majority owned by tribal entity could be borrower). The bank commitment letter and GBRE Agreements also identify GBRE as the borrower, not the Tribe.

To obtain financing, the bank required guarantees from ACF, OSGC, OEI, and Oneida Energy. (R. C360-61 ¶ 4; C364-366.) Had ACF wanted OSGC and the Tribe to be bound by the Agreements, like the bank it should have required that they be parties to the Agreements. However, in its August 13, 2013 letter to OSGC, ACF asks OSGC to "support [ ] the Waste to Energy Project [ ] on which *we are partnering with your subsidiary . . . GBRE.*" (R. Suppl. C122-23 (emphasis added).) The undisputed facts demonstrate that ACF was aware when it signed the Agreements that GBRE was the entity responsible for the Project. ACF's attempted reliance on inadmissible parol evidence to contradict the unambiguous language of the Agreements and pierce GBRE's corporate veil is legally impermissible.

Moreover, direct participant liability is a theory of liability separate and apart from the piercing the corporate veil theory. In *Forsythe v. Clark USA, Inc.*, 224 Ill. 2d 274 (2007), upon which ACF relies, the issue was whether a parent company could be held liable as a direct participant in the negligence alleged. Specifically, the Illinois Supreme Court concluded that a parent company may owe a duty to third parties for

purposes of a negligence claim "[w]here there is evidence sufficient to prove that a parent company mandated an overall business and budgetary strategy *and* carried that strategy out by its own specific direction or authorization, surpassing the control exercised as a normal incident of ownership in disregard for the interests of the subsidiary...." *Id.* at 290. Not only did ACF fail to argue this theory before the trial court, no such claim appears in its pleading and no evidence appears in the record that the Tribe or OSGC "carried that strategy out by [their] own specific direction or authorization, surpassing the control exercised as a normal incident of ownership in disregard for the interests of [GBRE]." *Id.* (*See generally* R. C3-63; R. Suppl. C5-20.) This claim has been waived. (*See supra* 11-12; *see Burys v. First Bank of Oak Park*, 187 Ill. App. 3d 384, 387 (1st Dist. 1989) (new theories not pleaded below cannot be presented on appeal).)

Even if the Tribe and OSGC had directly participated in the Project, that participation would serve only to reinforce that ACF, as a party knowingly and voluntarily dealing with a federal tribe and its subordinate tribal entity, should have protected itself by demanding a waiver of sovereign immunity. *See Bay Mills*, 134 S. Ct. at 2035 ("'a party [such as ACF] dealing with a tribe in contract negotiations has the power to protect itself by refusing to deal absent the tribe's waiver of sovereign immunity from suit.'"). Nowhere in *Forsythe* (or any other case cited by ACF) did the court state that the theory of participant liability somehow overcomes federal sovereign immunity principles. Because ACF has not shown, and cannot show, that its alter ego, piercing the corporate veil, and participant liability theories have any bearing on the Tribe and OSGC's sovereign immunity defenses, those theories are irrelevant and should not be applied by the Court.

F. Were The Tribe And OSGC Parties To The GBRE Agreements, The Choice-of-Law And Forum Section Clauses In The GBRE Agreements Do Not, As A Matter Of Law, Waive Sovereign Immunity.

ACF asserts that the forum selection clause in the Agreements waived sovereign immunity. There would be no reason for it to do so since GBRE is the only party to the Agreements, and it has no sovereign immunity. Moreover, even if the Tribe and OSGC were parties to the GBRE Agreements, the forum selection clause does not waive their sovereign immunity.

ACF relies on four cases that held only that an agreement's arbitration clause (and in some cases more than that) constituted a waiver of sovereign immunity. *See C&L Enters.*, 532 U.S. at 412 (arbitration clause that also provided that "arbitral awards may be reduced to judgment"); *Altheimer,* 983 F.2d at 812 (arbitration clause with an express provision that the tribe and tribal entity would '"waive all sovereign immunity in regards to all contractual disputes'"); *Sokaogon Gaming Enter. Corp. v. Tushie-Montgomery Assocs., Inc.,* 86 F.3d 656, 659 (7th Cir. 1996) (arbitration clause with a provision that "judgment may be entered upon [the arbitration award]"); *Ninigret Dev. Corp. v. Narragansett Indian Wetuomuck Hous. Auth.*, 207 F.3d 21, 31 (1st Cir. 2000) (tribal ordinance authorizing tribal entity to decree by contract to waive immunity from suit, coupled with an arbitration provision that committed "'[a]ll claims, disputes and other matters ... arising out of or relating to [the contract]' to arbitration, and further provide[d] that the agreement to arbitrate 'shall be specifically enforceable under prevailing law,'" deemed a waiver) *Rosebud Sioux Tribe v. Val-U Constr. Co. of S.D.*, 50 F.3d 560, 562 (8th Cir. 1995) (*tribe* signed a contract containing an arbitration clause that provided that "'[a]ll questions of dispute under this Agreement shall be decided by arbitration in

accordance with the Construction Industry Arbitration Rules of the American Arbitration Association'"). None of those cases involved a simple forum selection clause such as the one at issue here with no express waiver of sovereign immunity. That distinction is legally definitive.

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

> Here, the language of the parties' agreement is that "the sole and exclusive *venue* for any and all disputes involving...this Agreement shall be the state and federal courts located within the state of Colorado."
>
> Notably, the parties' agreement here speaks only to *where* a suit may be brought, but it does not expressly or impliedly address *whether* a suit may be brought. Unlike cases such as *C&L* [specifying arbitration], the Tribe here did not expressly agree to submit any dispute for adjudication; it merely agreed as to where such adjudication would take place, if an adjudication were to occur.

Breakthrough, 2007 WL 2701995, at *5 (emphasis in original). The forum selection clause in the Agreements merely specifies Illinois as the venue for a dispute. (R. C32 ¶ 14(h); C57 ¶ 15.) It says nothing about agreeing to be sued or to waive sovereign

immunity. Accordingly, even if the Tribe and OSGC were bound by the GBRE Agreements, those Agreements do not waive their sovereign immunity.

Just like ACF's mistaken reliance on the *Solargenix, supra,* personal jurisdiction case, it is irrelevant that forum selection clauses may be deemed consent to personal jurisdiction in a foreign state. (*See* ACF Br. 17 (citing *GPS USA, Inc. v. Performance Powdercoating*, 2015 IL App (2d) 131190, ¶ 24 and *ETA Trust v. Recht*, 214 Ill. App. 3d 827, 834 (1st Dist. 1991).) The issue here is one of sovereign immunity – subject matter jurisdiction – and not personal jurisdiction. The cases cited by ACF, none of which involved a tribe or even sovereign immunity, are immaterial.

III. THE TRIAL COURT PROPERLY DISMISSED THE CLAIMS AGAINST THE TRIBE AND OSGC PURSUANT TO SECTION 2-619 BASED ON SOVEREIGN IMMUNITY BECAUSE THERE ARE NO QUESTIONS OF MATERIAL FACT IN DISPUTE AND THE TRIBE AND OSGC ARE ENTITLED TO JUDGMENT AS A MATTER OF LAW.

"A [S]ection 2–619 motion for involuntary dismissal asserts affirmative matters – such as ... sovereign immunity ... in this case – that avoid or defeat the claim." *Cortright*, 386 Ill. App. 3d at 899. When, as here, "a cause of action is dismissed pursuant to a [S]ection 2–619 argument, the questions on appeal are whether a genuine issue of material fact exists and whether the defendants are entitled to judgment as a matter of law." *Gray*, 354 Ill. App. 3d at 354-55. As detailed above, the Tribe and OSGC are immune from suit based on their sovereign immunity. (*See supra* Section I.A.) Congressional waiver is not alleged and there is no legitimate dispute that the Tribe and OSGC are not parties to the GBRE Agreements on which ACF relies to claim a waiver of tribal sovereign immunity. (*See generally* R. C3-63; *supra* Section II.) Were the Court to conclude there is a question of fact regarding whether the Tribe and OSGC are bound by the GBRE Agreements, the forum and choice-of-law clauses in those agreements

(upon which ACF relies) do not, as a matter of law, constitute a waiver of sovereign immunity. (*See supra* Section II.) The trial court, therefore, properly concluded that the Tribe and OSGC are entitled to dismissal of the claims against them with prejudice pursuant to Section 2-619.

Tellingly, ACF cites two federal cases to argue that the motion to dismiss should have been denied because the "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 the theories of alter-ego and agency." (ACF Br. 16.) This procedural question is governed by state law, however, not federal law. Under the law applicable to Illinois civil procedure, a trial court can properly dismiss a claim based on a sovereign immunity defense pursuant to Section 2-619(a)(1) when, as in this case, there are no genuine issues of material fact and the defendant is entitled to judgment as a matter of law. *See, e.g., Cortright*, 386 Ill. App. 3d at 905-06 (affirming dismissal of complaint pursuant to Section 2-619 because "plaintiffs' intentional tort claims [were] barred by sovereign immunity and, thus, the circuit court lacked jurisdiction to hear th[e] case"). As detailed above, there are no disputed issues of material fact because, even if the Tribe and OSGC were bound to the GBRE Agreements under agency or any of the other state law theories alleged by ACF, the forum selection clause is not a sovereign immunity waiver, and the Tribe and OSGC are entitled to judgment as a matter of law. The trial court therefore properly dismissed the claims against the Tribe and OSGC pursuant to Section 2-619.

Contrary to ACF's suggestion, "when ruling on a section 2–619 argument, a trial court may consider pleadings, depositions and affidavits." *Id.* The trial court was not required to weigh the conflicting affidavit submitted below (which it was permitted to do under Section 2-619) in order to resolve the claims against the Tribe and OSGC, since, as detailed above, this matter turns only on well-settled federal law and the terms of the GBRE Agreements. (*See supra* Sections I and II.) Since ACF has not shown and cannot show that the Tribe and OSGC have waived tribal sovereign immunity, the dismissal of the Tribe and OSGC was proper.

CONCLUSION

For the foregoing reasons, Defendants Oneida Seven Generations Corporation and The Oneida Tribe of Indians of Wisconsin respectfully request that this Court affirm the order of the circuit court dismissing all of Plaintiffs' claims against them with prejudice for lack of subject matter jurisdiction.

Dated this 11th day of May, 2015.

Respectfully submitted,

ONEIDA SEVEN GENERATIONS CORPORATION; and THE ONEIDA TRIBE OF INDIANS OF WISCONSIN

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