UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN

In re:	:	
	:	Case No. 2:16-cv-13643-PDB-RSW
GREEKTOWN HOLDINGS, LLC,	:	
Debtor,	:	
	:	Honorable Paul D. Borman

BRIEF ON APPEAL OF APPELLEES SAULT STE. MARIE TRIBE OF CHIPPEWA INDIANS AND KEWADIN CASINOS GAMING AUTHORITY IN SUPPORT OF THE BANKRUPTCY COURT'S ORDER GRANDING THE TRIBE'S MOTION TO DISMISS (WAIVER ISSUE)

Appellees Sault Ste. Marie Tribe of Chippewa Indians ("the Tribe") and Kewadin Casinos Gaming Authority ("Kewadin Authority") (collectively "the Tribe Defendants") submit this Brief on Appeal from the Opinion on Remanded Sovereign Immunity Waiver Issue (DKT. 649) (Adv. Pro. No. 10-05712, Doc. 728, filed 9/29/16) (hereinafter "Bk. Ct. Opinion").

Dated: January 3, 2017

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TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

INTRODUCTION 1

STANDARD OF REVIEW 3

SUMMARY OF ARGUMENT 3

FACTS 5

ARGUMENT 7

Under Memphis Biofuels, the Tribe Defendants Did Not Waive Their Immunity from Suit 7

A. Sanderlin v. Seminole Tribe of Florida, 243 F.3d 1282 (11th Cir. 2001). 10

B. Native American Distributing v. Seneca-Cayuga Tobacco Company, 546 F.3d 1288 (10th Cir. 2008). 10

C. World Touch Gaming, Inc. v. Massena Management, LLC, 117 F.Supp.2d 271 (N.D.N.Y. 2009). 11

D. Danka Funding Company, LLC v. Sky City Casino, 329 N.J. Super. 357, 747 A.2d 837 (1999). 12

The "Waiver by Conduct" Doctrine Does Not Apply to the Tribe Defendants 14

A. State Sovereign Immunity Cases Do Not Apply to Indian Tribes 14

B. Even When an Indian Tribe Files Suit, It Does Not Waive Its Immunity from Being Sued 17

C. The Tribe Defendants Did Not Waive Their Tribal Immunity Under Alter Ego or Agency or Piercing the Corporate Veil Theories 22

D. Cases Involving Foreign Sovereigns are Inapplicable to Indian Tribes 25

Discovery Is Not Necessary to Resolve the Tribal Immunity Issue 29

CONCLUSION 31

CERTIFICATE OF COMPLIANCE WITH RULE 32(A) 31

TABLE OF AUTHORITIES

28 U.S.C. § 158(a)(1); *In re Allen-Morris*, 2014 WL 5480825 (E.D. Mich. October 29, 2014) ... 3

3D Systems, Inc. v. Envisiontec, Inc., 575 F.Supp. 2d 799, 803 (E.D. Mich. 2008) 4

Allen v. Gold Country Casino, 464 F.3d 1044, 1047-48 (9th Cir. 2006) 27

Amerind Risk Management Corporation v. Malaterre, 633 F.3d. 680 (8th Cir. 2011)..... 28

Bodi v. Shingle Springs Band of Miwok Indians, 832 F.3d 1011 (9th Cir. 2016) 16

C & L Enterprises, Inc. v. Citizen Band Potawatomi Indian Tribe of Oklahoma, 532 U.S. 411, 418, 121 S.Ct. 1589, 1594, 149 L.Ed. 623 (2001)..... 5

Cartwright v. Garner, 751 F.3d 752, 759–60 (6th Cir. 2014) 4

Contour Spa at the Hard Rock, Inc. v. Seminole Tribe of Florida, 692 F.3d 1200, 1206, 1208 (11th Cir. 2012)..... 16

Danka Funding Company, LLC v. Sky City Casino, 329 N.J. Super. 357, 747 A.2d 837 (1999) 12

First National City Bank v. Banco Para El Comercio Exterior De Cuba, 462 U.S. 611, 103 S.Ct. 2891 (1983)..... 26

Foremost-McKesson v. Republic of Iran, 905 F.2d 438, 448 (D.C. Cir. 1990)..... 26

Gardner v. New Jersey, 329 U.S. 565, 574, 67 S.Ct. 467 (1947)..... 15

Gardner v. State of New Jersey, 329 U.S. 565, 67 S.Ct.467 (1947)..... 20

Hankins v. Missouri, 964 F.2d 853 (8th Cir. 1992) 14

In re 995 Fifth Avenue Assoc., L.P., 963 F.2d 503, 508 (2nd Cir. 1992)..... 14

In re Diaz, 667 F.3d 1073, 1087 (11th Cir. 2011) 21

In re Grenier, 430 B.R. 446, 449 (E.D. Mich. 2010), aff'd, 458 F. App'x 436 (6th Cir. 2012) 3

In re Paques, Inc., 277 B.R. 615, 634 (Bkrtcy E.D.Pa. 2000)..... 26

In re Rogers, Inc., 212 B.R. 265, 274 (E.D. Mich. 1997)..... 20

In re Seay, 244 B.R. 112, 119 (E.D. Tenn. 2000)..... 20

Jicarilla Apache Tribe v. Andrus, 687 F.2d 1324, 1344 (10th Cir. 1982)..... 17

Kiowa Tribe of Oklahoma v. Manufacturing Technologies, Inc., 523 U.S. 751, 754, 118 S.Ct. 1700 (1998) 1

Lapides v. Board of Regents of University System of Georgia, 535 U.S. 613, 122 S.Ct. 1640 (2002) 14

McMillan v. LTV Steel, Inc., 555 F.3d 218, 225 (6th Cir. 2009) 3

Memphis Biofuels, LLC v. Chickasaw Nation Industries, Inc., 585 F.3d 917, 920-921 (6th Cir. 2009) 2, 3, 8-11, 15, 26-27

Native American Distributing v. Seneca-Cayuga Tobacco Company, 546 F.3d 1288 (10th Cir. 2008) 10

Oklahoma Tax Commission v. Citizen Band of Potawatomi Indian Tribe of Oklahoma, 498 U.S. 505, 111 S.Ct. 905, 909, 112 L.Ed.2d 1112, (1991) 1, 6, 18, 20-21, 25

Piro-Harabedian v. Saginaw Chippewa Indian Tribe, 2005 WL 3163395 (E.D. Mich. Nov. 23, 2005) 28

Private Solutions, Inc. v. SCMC, LLC, 2016 U.S. Dist. LEXIS 88190 (D.N.J. July 6, 2016) 27-28

Sanderlin v. Seminole Tribe of Florida, 243 F.3d 1282 (11th Cir. 2001). 10

Santa Clara Pueblo v. Martinez, 436 U.S. 49, 58, 98 S. Ct. 1670, 1677, 56 L. Ed. 2d 106 (1978)5

Transamerica Leasing, Inc. v. La Republica De Venezuela, 200 F.3d 843 (D.C. Cir. 2000) 26

United States ex rel. Morgan Bldgs & Spas, Inc. v. Iowa Tribe of Okla., 2011 WL 308889 (W.D. Ok. Jan. 26, 2011) 25

United States v. Testan, 424 U.S. 392, 399, 96 S.Ct. 948, 953, 47 L.Ed.2d 114 (1976) 5

United States v. United States Fidelity & Guaranty Co., 309 U.S. 506, 511-12, 60 S.Ct. 658 (1940) 18

Warburton/Buttner v. The Superior Court of San Diego County, 103 Cal.App.4th 1170 (Cal. Ct. App. 2002) 23

Welsh v. Gibbs, 631 F.2d 436, 438 (6th Cir.1980) 3

White v. University of California, 765 F.3d 1010, 1026 (9th Cir. 2014) 18

Whittle v. United States, 7 F.3d 1259, 1262 (6th Cir. 1993) 3

World Touch Gaming, Inc. v. Massena Management, LLC, 117 F.Supp.2d 271 (NDNY 2009). 11

INTRODUCTION

This appeal arises out of the *In re Greektown Holdings, LLC* adversary proceeding, Adv. Pro. No.10-05712. In the Adversary Proceeding, Plaintiff-Appellant, as Litigation Trustee ("Litigation Trust"), seeks to avoid transfers made by Debtor Greektown Holdings, LLC ("Holdings") to several parties, including the Tribe Defendants, arguing that the transfers were fraudulent transfers under the Michigan Uniform Fraudulent Transfer Act.

The Tribe Defendants contend that they are immune from suit, on the grounds of tribal immunity. Suits against Indian tribes are barred by sovereign immunity absent a clear waiver by the tribe or congressional abrogation. *Oklahoma Tax Commission v. Citizen Band of Potawatomi Indian Tribe of Oklahoma*, 498 U.S. 505, 111 S.Ct. 905, 909, 112 L.Ed.2d 1112, (1991); *Kiowa Tribe of Oklahoma v. Manufacturing Technologies, Inc.*, 523 U.S. 751, 754, 118 S.Ct. 1700 (1998) (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); *Memphis Biofuels, LLC v. Chickasaw Nation Industries, Inc.*, 585 F.3d 917, 920-921 (6th Cir. 2009) (unless Congress abrogates a tribe's immunity, or the tribe waives its immunity, the tribe's immunity remains intact).

The congressional abrogation issue has been resolved in the Tribe Defendants' favor, with this Court's June 9, 2015 Opinion and Order (Case No.

14-14103; Dkt. No. 15) which reversed the Bankruptcy Court's Order denying the Tribe's Motion to Dismiss (Section 106(a) Issue). That decision remanded the matter to the Bankruptcy Court for further proceedings on the issue of whether the Tribe Defendants waived their sovereign immunity from suit.

On August 26, 2015, the Bankruptcy Court entered a Stipulated Order Establishing Procedures and Briefing Schedule to Address Issue of Waiver of Sovereign Immunity Following Remand from District Court ("Stipulated Procedures") (Adv. Pro. No. 10-05712; Dkt. No. 648; 8/26/15). In pertinent part, the Stipulated Procedures state:

> This Court has held a number of status conferences to consider the nature and conduct of further proceedings regarding the waiver issue on remand. The Tribe Defendants, based *inter alia* on the cases *Gardner v. State of New Jersey*, 329 U.S. 565 (1947) and *Memphis Biofuels, LLC v. Chickasaw Nation Industries, Inc.*, 585 F.3d 917 (6th Cir. 2009) and the Tribe Defendants' governing documents (e.g. Constitution, Tribal Code, and Charter), contend that they have not waived their sovereign immunity as a matter of law, and no factual discovery or evidentiary hearing is required. Buchwald [Litigation Trust], based *inter alia* on the cases *C&L Enterprises, Inc. v. Citizen Bank Potawatomi Indian Tribe of Oklahoma*, 532 U.S. 411 (2001) and *Transamerica Leasing Inc. v. La Republica De Venezuela*, 200 F.3d 843 (D.C. Cir. 2000), disagrees with the Tribe Defendants' position, and contends that discovery and an evidentiary hearing likely will be necessary in order to decide the waiver issue on remand. ***Both the Tribe Defendants and Buchwald agree, however, that the Court should rule on the Tribe Defendants' motion to dismiss*** (to be filed on the

> schedule set forth below), ***which ruling may allow the parties to avoid the considerable time and expense associated [with] discovery and an evidentiary hearing and which would promote judicial economy. This Court agrees.***" (emphasis added).

After briefing and oral argument by the parties, the Bankruptcy Court granted the Tribe Defendants' Motion to Dismiss (Waiver Issue), finding that the Tribe Defendants had not waived their immunity from suit. Bk. Ct. Opinion. The Litigation Trust appeals that decision.

STANDARD OF REVIEW

This Court has jurisdiction to hear appeals from final judgments, orders, and decrees of the bankruptcy court. 28 U.S.C. § 158(a)(1); *In re Allen-Morris*, 2014 WL 5480825 (E.D. Mich. October 29, 2014). On appeal, a bankruptcy court's findings of fact are reviewed for clear error, while its legal conclusions are reviewed *de novo*. *McMillan v. LTV Steel, Inc.*, 555 F.3d 218, 225 (6th Cir. 2009). A ruling on a motion to dismiss a bankruptcy court adversary proceeding is reviewed *de novo*. *In re Grenier*, 430 B.R. 446, 449 (E.D. Mich. 2010), aff'd, 458 F. App'x 436 (6th Cir. 2012).

SUMMARY OF ARGUMENT

The Litigation Trust bears the burden of establishing subject matter jurisdiction of the court over its claim. *Whittle v. United States*, 7 F.3d 1259, 1262 (6th Cir. 1993), citing *Welsh v. Gibbs*, 631 F.2d 436, 438 (6th Cir.1980), *cert.*

denied 450 U.S. 981, 101 S.Ct. 1517, 67 L.Ed.2d 816 (1981); *3D Systems, Inc. v. Envisiontec, Inc.*, 575 F.Supp. 2d 799, 803 (E.D. Mich. 2008) ("Where jurisdiction is challenged under *Fed. R. Civ. P. 12(b)(1)*, a plaintiff bears the burden of proving jurisdiction in order to survive the motion."). The Tribe Defendants moved to dismiss the Complaint pursuant to Rule 12(b)(1) for lack of subject matter jurisdiction. A 12(b)(1) motion for lack of subject matter jurisdiction can challenge the sufficiency of the pleading itself (facial attack) or the factual existence of subject matter jurisdiction (factual attack). *Cartwright v. Garner*, 751 F.3d 752, 759–60 (6th Cir. 2014). A facial attack goes to the question of whether the plaintiff has alleged a basis for subject matter jurisdiction, and the court takes the allegations of the complaint as true for purposes of Rule 12(b)(1) analysis. *Id.* A factual attack challenges the factual existence of subject matter jurisdiction. In the case of a factual attack, the court has broad discretion with respect to what evidence to consider in deciding whether subject matter jurisdiction exists, including evidence outside of the pleadings, and has the power to weigh the evidence and determine the effect of that evidence on the court's authority to hear the case. *Id.*

The central issue in this appeal is whether the Tribe Defendants waived their sovereign immunity. "It is settled that a waiver of sovereign immunity 'cannot be implied but must be unequivocally expressed.'" *Santa Clara Pueblo v. Martinez*,

436 U.S. 49, 58, 98 S. Ct. 1670, 1677, 56 L. Ed. 2d 106 (1978), quoting *United States v. Testan*, 424 U.S. 392, 399, 96 S.Ct. 948, 953, 47 L.Ed.2d 114 (1976); *see, also, C & L Enterprises, Inc. v. Citizen Band Potawatomi Indian Tribe of Oklahoma*, 532 U.S. 411, 418, 121 S.Ct. 1589, 1594, 149 L.Ed. 623 (2001) (a tribe's waiver of sovereign immunity must be "clear."). There is no dispute in this case that the Tribe Defendants did not approve a Board Resolution waiving the Tribe Defendants' tribal immunity, nor did the Tribe Defendants explicitly waive their tribal immunity in a written contract or agreement. Thus, the Litigation Trust is forced to argue that the Tribe Defendants waived their tribal immunity by **conduct**. But waiver by conduct is nothing more than waiver by implication, and the Litigation Trust agrees that tribal immunity cannot be waived by implication. Accordingly, the Bankruptcy Court correctly concluded that the Tribe Defendants did not waive their immunity from suit—expressly or otherwise—and no discovery and no evidentiary hearing was necessary to make that determination.[1]

FACTS

The Litigation Trust's Complaint asserts in conclusory fashion that the Tribe Defendants waived any defense of sovereign immunity. (Complaint, Doc 2442,

[1] The parties to this Adversary Proceeding have obtained a large volume of documents from the Debtors (pursuant to subpoena and otherwise). More importantly, pursuant to the settlement agreement previously reached between the Litigation Trust and the Tribe Defendants (later overturned by the Sixth Circuit), the Tribe Defendants produced and made available to the parties in this Adversary Proceeding approximately 20 boxes of documents relating to Greektown. The Tribe Defendants have also produced to the Litigation Trust copies of Board Minutes and Board Resolutions. Thus, the Litigation Trust's assertion that "[t]o date, Plaintiff has been unable to take *any* discovery from the Tribe Defendants on the subject of waiver of sovereign immunity" is not accurate. (Litigation Trust Appeal Brief, pg. 9) (emphasis in original).

filed 5/28/10, at ¶¶ 7 and 8). The Complaint notes that (a) on May 7, 2010, the Tribe filed an administrative priority proof of claim against Holdings in the amount of $263,217.67; (b) in 2008 and 2009, the Tribe Defendants filed several notices of appearance and requests for notices and service of papers in "the Debtors' bankruptcy proceedings;" and (c) the Tribe Defendants have participated throughout the Debtors' bankruptcy proceedings, including but not limited to filing numerous plan objections and joining in the objection and reservation of rights filed by Defendant Papas with respect to the request of the Official Committee of Unsecured Creditors and Deutsche Bank Trust Company Americas' for authorization to bring the underlying Adversary Proceeding. (Complaint, Doc 2442, filed 5/28/10, at ¶¶ 30 and 31). These facts are the only facts alleged in the Complaint regarding the Tribe Defendants' purported waiver of tribal immunity.

Chapter 44 of the Tribe's Tribal Code expressly reaffirms the Tribe's sovereign immunity from suit, unless waived under specific provisions of that Chapter, to wit: (a) by resolution of the Tribe's Board of Directors expressly waiving the Tribe's sovereign immunity and consenting to suit; (b) by a Tribal entity exercising authority expressly delegated to such entity in its charter or specifically by resolution of the Tribe's Board of Directors; or (c) for any claim "sounding in contract" arising from an express, written, and signed contract

involving the performance of a proprietary function of the Tribe.[2] It is undisputed that no such resolutions (expressly waiving the Tribe Defendants' tribal immunity) were ever adopted, and it further undisputed that the Tribe Defendants never entered into any contract containing provisions purporting to waive their tribal immunity as to the claims asserted in the Adversary Proceeding.

ARGUMENT

Under *Memphis Biofuels*, the Tribe Defendants Did Not Waive Their Immunity from Suit

The Sixth Circuit has held that an Indian tribe "may choose to expressly waive its tribal-sovereign immunity either in its charter or by agreement." *Memphis Biofuels, LLC v. Chickasaw Nation Industries, Inc.*, 585 F.3d 917, 921 (6th Cir. 2009). The Litigation Trust conceded that the Tribe Defendants' respective Boards did not adopt a resolution waiving sovereign immunity to permit the Litigation Trust to prosecute this Adversary Proceeding. (Litigation Trust Appeal Brief, pg. 21); *see also* Bk. Ct. Opinion, pg. 3-4 ("It is undisputed that no such resolutions were ever adopted."). Further, "it is also an undisputed fact that the Tribe Defendants never entered into any contract containing provisions purporting to waive sovereign immunity." Bk. Ct. Opinion, pg. 3-4. According to *Memphis Biofuels*, without a properly adopted Resolution waiving the Tribe Defendants' tribal immunity, the Tribe Defendants are immune from suit.

[2] The Bankruptcy Court noted that no party alleges that the (b) or (c) criteria are factually or legally pertinent. Bk. Ct. Opinion, pg. 3, fn. 3.

Memphis Biofuels involved the issue of whether a tribe official was authorized to waive a tribe's sovereign immunity. *Memphis Biofuels* involved a contract between Memphis Biofuels and the Chickasaw tribe which contained a "waiver provision" by which both parties waived all immunities. *Memphis Biofuels*, 585 F.3d at 922. However, the Chickasaw tribe's charter required board approval by written resolution of any waiver of tribal immunities. No such resolution was adopted by the tribe. Despite the explicit tribal immunity waiver provision in the contract between the parties, the Sixth Circuit concluded that there was no waiver of tribal immunity because "board approval was not obtained and [the tribe's] charter controls." *Id*.

The same reasoning applies in this case, but with more force, because not only are there no Board resolutions waiving tribal immunity, there is no contract by which the Tribe Defendants purported to expressly waive their sovereign immunity.

The Litigation Trust contends that *Memphis Biofuels* should be limited to situations where a tribe expressly waives its tribal immunity in a contract, and since no such contract exists in this case, *Memphis Biofuels* is inapplicable. But, the Litigation Trust misses the point. *Memphis Biofuels* stands for the proposition that if a tribe's charter or laws requires that waivers of tribal immunity be by duly adopted board resolutions, then that is the only way a tribe can properly waive its

tribal immunity, even where a tribal officer executes a contract on behalf of the tribe that contains an explicit provision waiving the tribe's tribal immunity.

The Bankruptcy Court correctly rejected the Litigation Trust's reading of *Memphis Biofuels*, noting that "if a specific contractual waiver cannot carry the day, one would be hard put to conclude as a matter of logic or law that *conduct*, which necessarily and by its very nature is or can be ambiguous, and in any event, less directed, specific, or clear as a writing (and thus usually considered to be of somewhat lesser legal force and effect), might nevertheless carry the day." Bk. Ct. Opinion, pg. 6 (emphasis in original). The Bankruptcy Court properly concluded that the Chickasaw tribe's contractual waiver of tribal immunity "was in essence the clearest, and most explicit form of 'conduct' imaginable," yet "the Sixth Circuit still found that to be insufficient to waive sovereign immunity, given the tribal charter's specific requirement that such waiver be by board resolution." Bk. Ct. Opinion, pg. 7. Thus, the Bankruptcy Court properly concluded that *Memphis Biofuels* is "binding" and "highly persuasive" and serves as "an independent basis for granting the Tribe Defendants' Motion to Dismiss." *Id*.

In reaching its decision, the *Memphis Biofuels* court noted: "Courts have held that unauthorized acts of tribal officials are insufficient to waive tribal-sovereign immunity." *Memphis Biofuels*, 565 F.3d at 922. In essence, the Litigation Trust is arguing that the unauthorized acts of tribal officials (in allegedly

directing the activities of the Debtors and in participating in the various bankruptcy cases) serve as a waiver of tribal immunity by conduct. Thus, the cases relied upon by the Sixth Circuit in reaching its conclusion are informative on the issue of whether a tribe can, by the conduct of its tribal officials, waive tribal immunity.

A. *Sanderlin v. Seminole Tribe of Florida*, 243 F.3d 1282 (11th Cir. 2001).

Sanderlin involved a claim by a former employee of the tribe that the tribe discriminated against him in violation of the federal Rehabilitation Act. Sanderlin argued that the tribe implicitly waived its sovereign immunity when its officers accepted federal funds on the tribe's behalf and agreed as a condition of their receipt to comply with the Rehabilitation Act. The Eleventh Circuit rejected this argument, noting that "***waivers of tribal sovereign immunity cannot be implied on the basis of a tribe's actions, but must be unequivocally expressed***." *Sanderlin*, 243 F.3d at 1286 (quoting *State of Florida v. Seminole Tribe*, 181 F.3d 1237, 1243 (11th Cir. 1999) (emphasis added). In particular, the court concluded that a Seminole Tribe ordinance prescribed when and how the tribe could waive sovereign immunity (i.e., pursuant to a resolution duly enacted by the Tribal Council) and, since Sanderlin was unable to point to any duly-enacted tribal resolution purporting to effect a waiver "in these circumstances," there was no waiver of the tribe's sovereign immunity. *Sanderlin*, 243 F.3d at 1287.

B. *Native American Distributing v. Seneca-Cayuga Tobacco Company*, 546 F.3d 1288 (10th Cir. 2008).

Native American Distributing involved a contract between Native American Distributing ("NAD") and the Seneca-Cayuga Tobacco Company ("SCTC"), an enterprise of the Seneca-Cayuga Tobacco Company ("the tribe"). When NAD and SCTC entered into the contract, an officer of NAD (who was also a member of the tribe) asked tribe officials if it was necessary to secure a tribal waiver of sovereign immunity and was told by those officials such a waiver was not necessary because SCTC was subject to a "sue and be sued" clause in a corporate charter. In fact, SCTC was not subject to the "sue and be sued" clause. NAD argued that SCTC should be equitably estopped from claiming sovereign immunity because its managers told NAD that SCTC was subject to the sue and be sued clause in the corporate charter. The district court and the Tenth Circuit rejected this argument, concluding that ***tribal officers possess no power through their actions to waive tribal immunity***. *Native American Distributing*, 546 F.3d at 1295 (emphasis added).

C. ***World Touch Gaming, Inc. v. Massena Management, LLC*, 117 F.Supp.2d 271 (N.D.N.Y. 2009).**

Massena involved a contract between World Touch and a casino owned and operated by an Indian tribe. The tribe entered into a management contract with Massena Management ("Massena") to manage the casino. Massena, on behalf of the casino, entered into two contracts with World Touch relating to the purchase and lease of gaming equipment. The two contracts contained language purporting

to waive the sovereign immunity of the tribe and the casino. When a dispute arose under the contracts, World Touch filed suit against Massena, the tribe, and the casino.

The tribe's civil judicial code provided that tribal sovereign immunity could only be waived by the tribe's council, in a clear and explicit writing. Although the contracts, signed by an officer of Massena (the casino's management company), contained clear language waiving the tribe's and the casino's sovereign immunity, the court concluded that the tribe's immunity was not waived, because the tribe's council did not authorize Massena to waive sovereign immunity nor did the tribe council waive its sovereign immunity. *Massena*, 117 F.Supp.2d at 275. The court held: "However, ***regardless of any apparent or implicit, or even express authority of the Management Company [Massena] 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***." *Massena*, 117 F.2d at 276 (emphasis added). The court further concluded that "any argument that subsequent acts, or acquiescence in carrying out the contract entered into with apparent authority, estop the Tribe from claiming sovereign immunity, must fail." *Id*.

D. *Danka Funding Company, LLC v. Sky City Casino*, 329 N.J. Super. 357, 747 A.2d 837 (1999).

Danka involved a casino owned and operated by an Indian tribe. The casino's comptroller entered into two leases with Danka for eight copying

machines. A dispute arose under the leases and Danka claimed that the tribe had waived its sovereign immunity based on the lease agreements with the casino, which contained a forum selection clause by which the parties consented to personal jurisdiction in the state where the lease processing center was located. The court was thus presented with the question of whether the forum selection clause in the casino's lease agreements waived the tribe's sovereign immunity. The court concluded that it did not.

The court started with the proposition that the "requirement that the waiver be 'clear' and 'unequivocally expressed' is not something that may be flexibly applied or even disregarded based on the parties or the specific facts involved." *Danka*, 747 A. 2d at 841. The court then noted that ***the "tribe, through its laws, describes how one may obtain a legally enforceable waiver" of its sovereign immunity***, but Danka failed to take advantage of those provisions. *Id.* at 842 (emphasis added). The court concluded: "By failing to avail themselves of the procedures for obtaining a waiver of immunity under tribal law, [Danka] 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 843.

All four of the cases relied upon by the Sixth Circuit in *Memphis Biofuels* provide strong support for the Tribe Defendants' contention that they have not waived their tribal immunity in this case.

The "Waiver by Conduct" Doctrine Does Not Apply to the Tribe Defendants

A. State Sovereign Immunity Cases Do Not Apply to Indian Tribes

Relying upon several cases that address the sovereign immunity of States under the Eleventh Amendment, the Litigation Trust asserts that it is "well established that sovereign entities may waive sovereign immunity by their conduct." (Litigation Trust Appeal Brief, pg. 21-22). But the problem with the Litigation Trust's contention is its failure to recognize and appreciate the distinction between a State's sovereign immunity under the Eleventh Amendment and an Indian tribe's tribal immunity.

The Litigation Trust cites three cases which refer to the "doctrine" variously as waiver by conduct, *Hankins v. Missouri*, 964 F.2d 853 (8th Cir. 1992), waiver by litigation conduct, *Lapides v. Board of Regents of University System of Georgia*, 535 U.S. 613, 122 S.Ct. 1640 (2002), or waiver by participation, *In re 995 Fifth Avenue Assoc., L.P.*, 963 F.2d 503, 508 (2nd Cir. 1992). (Litigation Appeal Brief, pg. 21-22, fn. 7). But none of those cases involved Indian tribes. Rather, they involved States and issues relating to Eleventh Amendment immunity. The issue in those cases was whether, and to what extent, a State waives its Eleventh Amendment immunity by its conduct in litigation. *See, Lapides* (whether the

State's act of removing a lawsuit from state court to federal court waives immunity); *Hankins* (whether the State's act of paying a judgment against a state employee and seeking to recoup the amount paid from an inmate waives immunity); *Fifth Ave.* (whether the Eleventh Amendment bars a debtor's suit to recover taxes paid to the State). Those cases are inapplicable to Indian tribes.

Lapides and the cases applying it demonstrate that a State's sovereign immunity cannot be analogized to the tribal immunity enjoyed by an Indian tribe. In *Lapides*, the Supreme court determined that a State that removes a case from state court to federal court voluntarily invokes the federal court's jurisdiction. The actual holding in *Lapides* is quite narrow, as the court specifically limited its ruling to cases involving "state law claims, in respect to which the State has explicitly waived immunity from state-court proceedings." *Lapides*, 535 U.S. at 617. *Lapides* followed the long-recognized principle set forth in *Gardner v. New Jersey*, 329 U.S. 565, 574, 67 S.Ct. 467 (1947) that "a State 'waives any immunity… respecting the adjudication of' a 'claim' that it voluntarily files in federal court." *Lapides*, 535 U.S. at 619. Of significance to this case is the *Lapides* court's recognition of the distinction between the protections afforded an Indian tribe and those afforded a State under the Eleventh Amendment. In *Lapides*, the State cited *Oklahoma Tax Comm'n v. Citizen Band Potawatomi Tribe of Okla.*, 498 U.S. 505, 111 S.Ct. 905 (1991), as support for its argument that participation in litigation

does not waive a sovereign's immunity. The *Lapides* court rejected this assertion, as it applied to the State, saying:

> Those cases, however, do not involve the Eleventh Amendment—a specific text with a history that focuses upon the State's sovereignty vis-á-vis the Federal Government. And each case involves special circumstances not at issue here, for example, an effort by a sovereign (*i.e.*, the United States) to seek the protection of its own courts (*i.e.*, the federal courts), or an effort to protect an Indian tribe.

Lapides, 535 U.S. at 623.

Two Circuit Courts following *Lapides* have concluded that, unlike a State, an Indian tribe does not waive its tribal immunity by removing a case to federal court. *Contour Spa at the Hard Rock, Inc. v. Seminole Tribe of Florida*, 692 F.3d 1200, 1206, 1208 (11th Cir. 2012) (quoting the same statement from *Lapides* and stating: "The Supreme Court squarely recognized that waiver rules applicable to states may not apply in the same way to Indian tribes" and noting that "there are powerful reasons to treat an Indian tribe's sovereign immunity differently from a state's Eleventh Amendment immunity."); *Bodi v. Shingle Springs Band of Miwok Indians*, 832 F.3d 1011 (9th Cir. 2016). In *Bodi*, the Ninth Circuit said: "Tribal immunity is not synonymous with a State's Eleventh Amendment immunity, and parallels between the two are of limited utility." *Bodi*, 832 F.3d at 1020. The *Bodi* court noted that a State's filing of a claim may waive its Eleventh Amendment immunity to counterclaims that arise from the same transaction or occurrence, at

least in the bankruptcy context, but the same is not true for Indian tribes. *Id*. ("A tribe, in contrast, does not waive its immunity to a compulsory counterclaim by voluntarily filing suit."). More importantly, the *Bodi* court noted that waiver can be implied under certain circumstances with respect to a State's Eleventh Amendment immunity, but waiver of immunity cannot be implied as to Indian tribes. *Id*.

B. Even When an Indian Tribe Files Suit, It Does Not Waive Its Immunity from Being Sued

The Litigation Trust notes that courts have applied waiver by conduct or waiver by litigation conduct where a State voluntarily invokes a federal court's jurisdiction or else makes a clear declaration that it intends to submit itself to a federal court's jurisdiction, citing four cases all involving a State's Eleventh Amendment immunity. The Litigation Trust then makes a leap, saying "the doctrine of waiver by conduct 'equally applies to Indian tribes,'" quoting *Jicarilla Apache Tribe v. Andrus*, 687 F.2d 1324, 1344 (10th Cir. 1982). (Litigation Trust Appeal Brief, pg. 28-29). But that case does not support the Litigation Trust's argument. In *Jicarilla*, an Indian tribe filed suit against the Secretary of the Interior and several oil and gas lessees, seeking an order cancelling the leases. The lessees filed counterclaims against the Indian tribe. The *Jicarilla* court upheld the trial court's determination that the counterclaims filed against the Indian tribe were barred by sovereign immunity because they did not sound in equitable recoupment

and they did not arise out of the same transaction as the Indian tribe's amended complaint. Id. at 1345.

Moreover, *Jicarilla* was decided nearly a decade before the Supreme Court's decision in *Oklahoma Tax Commission v. Citizen Band of Potawatomi Indian Tribe of Oklahoma*, 498 U.S. 505, 111 S.Ct. 905, 909, 112 L.Ed.2d 1112 (1991), where the Supreme Court removed any doubt that an Indian tribe does not waive its sovereign immunity from counterclaims filed against it in suits brought by the Indian tribe. The Supreme Court, relying upon *United States v. United States Fidelity & Guaranty Co.*, 309 U.S. 506, 511-12, 60 S.Ct. 658 (1940), held that the tribe did not waive its immunity merely by filing an action for injunctive relief. In *U.S. Fid. & Guaranty*, a surety bondholder claimed that a federal court had jurisdiction to hear its state-law counterclaim against an Indian tribe because the tribe's initial action to enforce the bond constituted a waiver of sovereign immunity. The court rejected this argument, holding that a tribe does not waive its sovereign immunity from actions that could not otherwise be brought against it merely because those actions are pleaded in a counterclaim to an action filed by the tribe. *Id.*, at 513, 60 S.Ct. at 656; *Oklahoma Tax Comm'n*, 498 U.S. at 509; *White v. University of California*, 765 F.3d 1010, 1026 (9th Cir. 2014) ("Waiving immunity as to one particular issue does not operate as a general waiver. Thus,

when a tribe files suit, it submits to jurisdiction only for purposes of adjudicating its claims, but not other matters, even if related.").

There is no dispute in this case that the Tribe Defendants did not initiate legal proceedings against Holdings or the Litigation Trust or anyone else for that matter. Nevertheless, the Litigation Trust contends that the Tribe Defendants have participated in the Greektown bankruptcy cases and thus must be found to have waived their sovereign immunity as to the fraudulent transfer claims brought by the Litigation Trust in this Adversary Proceeding. The Litigation Trust points to the following activity of the Tribe in the Greektown bankruptcy cases:

- Appearing at the omnibus hearings held in these cases;
- Filing objections with respect to several important issues in these cases, including objecting to Plan confirmation;
- Filing a proof of claim (Claim No. 282) against Greektown Casino in the amount of $1,357,612;
- Filing a proof of claim (Claim No. 280) against Kewadin Greektown Casino in the amount of $191,590;
- Filing an administrative priority proof of claim against Greektown Holdings (Claim No. 325) in the amount of $263,217;

- The Gaming Authority filing a proof of claim (Claim No. 263) against Greektown Casino in the amount of $550,000.[3]

The Bankruptcy Court correctly held that "[t]he Tribe Defendants' participation in the claims allowance and confirmation processes has not, as a matter of law, constituted a waiver of sovereign immunity that is broad enough to encompass this entire adversary proceeding against them, which seeks to recover alleged fraudulent transfers." Bk. Ct. Opinion, pg. 10-11.[4]

To the extent that *Gardner v. State of New Jersey*, 329 U.S. 565, 67 S.Ct.467 (1947), is applicable to an Indian tribe, the holding there makes clear the extremely limited nature of a sovereign's waiver associated with the filing of a proof of claim: "When the State becomes the actor and files a claim against the fund it waives any immunity which it otherwise might have had respecting the adjudication of the claim." Id. (emphasis added); *In re Rogers, Inc.*, 212 B.R. 265, 274 (E.D. Mich. 1997) (Under the plain language of *Gardner*, when a State files a proof of claim in a bankruptcy proceeding, the State only waives its sovereign immunity with respect to the adjudication of that particular claim); *In re Seay*, 244 B.R. 112, 119 (E.D. Tenn. 2000) ("The [*Gardner*] court's language makes it clear

[3] (Litigation Trust Appeal Brief, pg. 19).

[4] The Tribe Defendants' Motion to Dismiss noted that the Notices of Appearance filed by the Tribe Defendants specifically state that that the Tribe Defendants did not consent to jurisdiction over them and they reserved all defenses available to them; the Court granted a motion in limine permitting the Tribe Defendants to assert any defenses available to them in any potential avoidance claim or other claim filed against them; and the Plan Confirmation Order specifically provides that the Tribe Defendants are not deemed or construed to have waived or released their right to defend and attack any claim on all possible procedural and/or substantive grounds. (Tribe Defendants' Motion to Dismiss, pg. 13).

that it considered the filing of a proof of claim to waive sovereign immunity only as to the claims allowance process."). Thus, the filing of a proof of claim by a State does not waive sovereign immunity as to an adversary proceeding brought against the state. *In re Diaz*, 667 F.3d 1073, 1087 (11th Cir. 2011) ("A state that files a proof of claim in a bankruptcy case does not thereby subject itself to any and all lawsuits that in any way might relate to the bankruptcy. Instead, an adversary proceeding against the state must bear a direct relationship to the bankruptcy court's adjudication of the state's claim.").

The Litigation Trust has cited no case that has held that an Indian tribe waives its tribal immunity as to claims which could not otherwise be brought against it (due to the tribe's sovereign immunity) based on the filing of a proof of claim by the tribe in a bankruptcy case or the tribe's participation in a bankruptcy case (e.g. where the tribe files objections during the plan confirmation process). The Tribe Defendants are aware of no such case. Moreover, the Bankruptcy Court determined that the Litigation Trust failed to cite any legal authority in support of its proposition that by filing a bankruptcy petition (or causing or directing such filing for another entity), an entity waives its tribal sovereign immunity as to an adversary proceeding subsequently filed against it. Accordingly, the Bankruptcy Court correctly concluded that the Litigation Trust's arguments must be denied as legally insufficient. Bk. Ct. Opinion, pg. 13. The reason the Litigation Trust is

unable to cite to any such case is because the cases from courts around the country, including the Supreme Court, make clear that an Indian tribe's waiver of tribal immunity must be clear, express, and unequivocal. Participation in litigation—even the filing of litigation—does not constitute the clear, express and unequivocal waiver of tribal immunity required by the courts.

C. The Tribe Defendants Did Not Waive Their Tribal Immunity Under Alter Ego or Agency or Piercing the Corporate Veil Theories

The Litigation Trust contends that it presented credible evidence to the Bankruptcy Court that the Debtors were the alter ego of the Tribe Defendants and/or the Debtors were the agents of the Tribe Defendants, such that the acts of the Debtors leading up to and through the act of initiating the bankruptcy cases, constitute acts of the Tribe Defendants for waiver by conduct purposes. (Litigation Trust Appeal Brief, pg. 39).[5] The Litigation Trust's contention is without merit for several reasons.

First, *Oklahoma Tax Commission*, *Gardner*, *In re Rogers, Inc.*, and *In re Diaz* make clear that even if the Tribe Defendants themselves had initiated the bankruptcy cases, doing so would **not** have waived their tribal immunity as to a fraudulent conveyance adversary proceeding or counterclaim. Thus, there is no basis for the Litigation Trust's contention that the Tribe Defendants exposed

[5] The Litigation Trust also asserts that the Tribe Defendants' waived their tribal immunity under a piercing the corporate veil theory, but notes that the same standard is used for both alter ego liability and corporate veil piercing liability, such that the terms are functionally equivalent. (Litigation Trust Appeal Brief, pg. 309, fn. 12).

themselves to a multi-million dollar fraudulent conveyance claim based on the initiation of the bankruptcy cases by the Debtors, and the Litigation Trust cites no case that stands for that proposition.

Second, the cases cited by the Litigation Trust do not support the contention that the Tribe Defendants waived their tribal immunity under alter ego or agency principles. *Warburton/Buttner v. The Superior Court of San Diego County*, 103 Cal.App.4th 1170 (Cal. Ct. App. 2002), involved a contractual waiver issue. Indeed, the Litigation Trust notes that the issue considered by the *Warburton* court was "substantially identical to the issue presented in *Memphis Biofuels v. Chickasaw Nation Industries, Inc., supra*; namely, the effectiveness of a contractual waiver of sovereign immunity in the absence of a formal tribe resolution." (Litigation Trust Brief, pg. 31-32). *Warburton* involved an agreement between the plaintiff and an Indian tribe and a limited liability company owned by the Indian tribe. The agreement contained a provision whereby the Indian tribe expressly waived its tribal immunity. The agreement was signed on behalf of the tribe by the tribe's chairman, in the presence of four of the six other tribal council members. But, the tribe did not adopt a formal resolution approving the tribal immunity waiver. **Unlike the Sixth Circuit**, the California Court of Appeals held that the trial court "could not justifiably assume that the language of the Tribal Constitution must always be literally enforced, so that only a written tribal

resolution could satisfy the requirement that only an express waiver occur." *Id*. at 1190. Thus, the *Warburton* court simply reached the exact opposite conclusion from that of the Sixth Circuit in *Memphis Biofuels*. The Bankruptcy Court and this Court are bound by decisions of the Sixth Circuit, not decisions from California state courts.[6] Finally, as to the alter ego issue in *Warburton*, the California court simply determined that further discovery was necessary to determine if the tribe could be held liable under California's limited liability statute, which provides that a member of a limited liability company (e.g. the tribe) shall be subject to liability under the common law governing alter ego liability. *Id*. at 1188.

Similarly, *Private Solutions, Inc. v. SCMC, LLC*, 2016 U.S. Dist. LEXIS 88190 (D.N.J. July 6, 2016), offers the Litigation Trust no support. In that case, the plaintiff sought to amend its complaint to add as a party defendant the owner of the defendant limited liability company. The tribal immunity issue was limited to the question of whether the entity sought to be added as a defendant (Seneca Holdings) was an arm of the Seneca Nation of Indians (in which case, it would share the Nation's tribal sovereign immunity). The Magistrate Judge determined that "whether an economic entity such as Seneca Holdings benefits from tribal sovereign immunity requires a fact-intensive inquiry." *Private Solutions, Inc. v. SCMC, LLC*, 2016 WL 2946149, *5 (D.N.J. May 20, 2016). The District Court

[6] And, it of course bears reminding that the Tribe Defendants **did not** enter into a contract or agreement containing an express waiver of tribal immunity and, therefore, *Warburton* wouldn't apply in any event to the Tribe Defendants.

affirmed. The issue decided in *Private Solutions* is not present in this case and thus that decision has no bearing on the issues before the Court.

Finally, *United States ex rel. Morgan Bldgs & Spas, Inc. v. Iowa Tribe of Okla.*, 2011 WL 308889 (W.D. Ok. Jan. 26, 2011), also offers no support to the Litigation Trust. That case involved a suit against an Indian tribe ("ITO") and another entity ("BKJ"). BKJ waived its sovereign immunity in the contract at issue in the case. Plaintiff argued that BKJ was the alter-ego of ITO, and thus BKJ's waiver of sovereign immunity contained in the contract waived ITO's sovereign immunity. The court rejected plaintiff's argument, finding that BKJ was a subordinate economic entity of ITO and BKJ's waiver of sovereign immunity did not waive ITO's sovereign immunity, noting that plaintiff had presented "no authority for the proposition that a waiver of tribal sovereign immunity by a subordinate economic entity operates as a waiver of the sovereign immunity of the tribe." *Id.* at *4. The issue decided in *Morgan Buildings* is not present in this case and thus that decision has no bearing on the issues before the Court.

D. <u>Cases Involving Foreign Sovereigns are Inapplicable to Indian Tribes</u>

The Litigation Trust contends that alter ego and corporate veil piercing principles "have been applied in analogous circumstances to foreign sovereigns." (Litigation Trust Brief, pg. 34). But, the cases cited by the Litigation Trust are not analogous to the situation involving the Tribe Defendants.

In re Paques, Inc., 277 B.R. 615, 634 (Bkrtcy E.D.Pa. 2000), did not involve a sovereign immunity question. The issue there was whether a non-United States parent company could be subject to personal jurisdiction based on the activities of its United States subsidiary (under a piercing the corporate veil theory). That issue is not present in this case.

The other cases cited by the Litigation Trust[7] all involved the Foreign Sovereign Immunities Act, or FSIA, an act by which Congress abrogated the sovereign immunity of "foreign states" that participate in commercial activity in the United States. 28 U.S.C. § 1602. The FSIA provides the sole basis for obtaining jurisdiction over a foreign state in federal court. *Reiss v. Societe Centrale du Groupe des Assurances Nationales*, 235 F.3d 738, 746 (2nd Cir. 2000). Under the FSIA, foreign states are deemed to have waived their sovereign immunity (a) in any case in which the foreign state has waived its immunity "either explicitly ***or by implication***," and (b) in any case in which the action is based upon a commercial activity carried on in the United States by the foreign state. 28 U.S.C. § 1605(a) (emphasis added); *General Star National Ins. Co. v. Administratia Asigurarilor de Stat*, 289 F.3d 434, 437-438 (6th Cir. 2002) (FSIA provides that a foreign state is not entitled to sovereign immunity if it either expressly or implicitly waives immunity or as to any suit that is based on

[7] *Foremost-McKesson v. Republic of Iran*, 905 F.2d 438, 448 (D.C. Cir. 1990); *First National City Bank v. Banco Para El Comercio Exterior De Cuba*, 462 U.S. 611, 103 S.Ct. 2891 (1983) and *Transamerica Leasing, Inc. v. La Republica De Venezuela*, 200 F.3d 843 (D.C. Cir. 2000).

commercial activity carried on in the United States by the foreign state). Also, the definition of "foreign state" under the FSIA includes an "agency or instrumentality of a foreign state." 28 U.S.C. § 1603(a).

Thus, under the FSIA, a foreign state or its agent may waive their sovereign immunity ***by implication***, and also when they are involved in commercial activity in the United States. Neither of those conditions applies to Indian tribes, who cannot waive their sovereign immunity by implication, even when involved in commercial activity conducted off Indian lands. *Santa Clara Pueblo*, 436 U.S. at 58; *C & L Enterprises, Inc.*, 532 U.S. at 418. In fact, courts have made clear that waivers of sovereign immunity under the FSIA should not be analogized to waivers of tribal sovereign immunity. *Allen v. Gold Country Casino*, 464 F.3d 1044, 1047-48 (9th Cir. 2006). In *Allen*, the court stated:

> There is simply no room to apply the FSIA by analogy, as [plaintiff] would have us do. The FSIA precludes immunity of a foreign state when that state engages in commercial activities in the United States. 28 U.S.C. § 1605(a)(2). To apply that provision to the Tribe would contravene the Supreme Court's decision in *Kiowa*, holding that tribal immunity extended to commercial activities of the tribe. *Kiowa*, 523 U.S. at 760, 118 S.Ct. 1700. FSIA also permits a waiver of immunity to be implied, *see* 28 U.S.C. § 1605(a)(1), while the Supreme Court permits no such implied waiver in the case of Indian tribes. *See, e.g.*, *Santa Clara Pueblo*, 436 U.S. at 58, 98 S.Ct. 1670. We accordingly decline Allen's invitation to apply FSIA by analogy to tribal sovereign immunity.

Allen, 464 F.3d at 1048; *see also Piro-Harabedian v. Saginaw Chippewa Indian Tribe*, 2005 WL 3163395 (E.D. Mich. Nov. 23, 2005) (noting that it is well-established that an Indian tribe is not a foreign state and that the FSIA does not impair the immunity of Indian tribes).[8]

Finally, *Amerind Risk Management Corporation v. Malaterre*, 633 F.3d. 680 (8th Cir. 2011), cited by the Litigation Trust, strongly supports the absence of a waiver of sovereign immunity by the Tribe Defendants. (Litigation Trust Appeal Brief, pg. 29). In that case, Amerind, a federally-chartered tribal corporation which enjoyed sovereign immunity, assumed the rights and obligations of its tribally-chartered predecessor, ARMC, which was alleged to have waived its sovereign immunity as to the claims asserted by the plaintiffs. The court determined that Amerind's general assumption of ARMC's obligations and liabilities "was, at most, an implied waiver of sovereign immunity." Id. at 687. The court concluded that plaintiffs had failed to prove a waiver of sovereign immunity, because they "provided no evidence that Amerind's Board of Directors ever adopted a resolution waiving Amerind's immunity to the plaintiff's pending suit, and absent such a resolution, we cannot say that Amerind unequivocally

[8] It is perhaps worth mentioning that in *Transamerica*, on the control issue, the district court found that Venezuela controlled its instrumentality, CAVN, based on the following facts: Venezuela (1) owned a majority of CAVN's stock; (2) appointed the Board of Directors and the Chairman of the Board and President; (3) was involved in CAVN's "day-to-day" operations by overseeing the restructuring of CAVN's intermodal operations and approving the sale of three of CAVN's vessels; and (4) aided CAVN financially; while (5) the President of CAVN, with apparent authority to bind Venezuela, assured one of the plaintiffs that the Government would support CAVN. The Circuit Court concluded, however, that those facts "establish neither that Venezuela dominated CAVN nor that CAVN was Venezuela's actual or apparent agent." Id. at 850-851.

waived its sovereign immunity when it generally assumed ARMC's 'obligations and liabilities.'" Id. at 688.[9]

Thus, while theories of agency/alter ego/piercing the corporate veil may have applicability to issues involving a foreign country's waiver of sovereign immunity under the FSIA, they simply have no application to this case, nor do they apply even generally to the issue of tribal sovereign immunity. Accordingly, the Litigation Trust's arguments fail, and the Bankruptcy Court correctly concluded that Litigation Trust should not be permitted to undertake discovery on these issues, as they are simply irrelevant to the question of whether the Tribe Defendants clearly and expressly waived their immunity as to the fraudulent transfer claims brought by the Litigation Trust against the Tribe Defendants in this Adversary Proceeding.

Discovery Is Not Necessary to Resolve the Tribal Immunity Issue

The Bankruptcy Court determined that there was no need for further discovery of the Tribe Defendants because the court accepted as true all of the Litigation Trust's allegations that "the Tribe Defendants' pre-petition and post-petition conduct as relates to the Debtors amounts to pervasive dominion and control and went well beyond filing proofs of claim or other litigation conduct." Bk. Ct. Opinion, pg. 14. The Tribe Defendants disagree that the Bankruptcy Court

[9] The Amerind court concluded that a predecessor corporation's amenability to a pending suit is irrelevant unless the sovereign's successor's immunity has been expressly and unequivocally waived. Id. at 685, fn. 7.

was obligated to accept as true any factual allegations outside the Complaint, and most of the Litigation Trust's factual allegations were made outside the Complaint. Nevertheless, the Bankruptcy Court properly concluded that, even taking all of the Litigation Trust's allegations as true, those allegations are legally insufficient to amount to a waiver of the Tribe Defendants' sovereign immunity. *Id*. The Bankruptcy Court noted that none of the parties were able to locate any case in which theories of alter ego, piercing the corporate veil, and/or agency had been employed to find a waiver of tribal immunity. Bk. Ct. Opinion, pg. 16. The Bankruptcy Court found "the FSIA statute, and thus the cases analyzing it, to be so distinguishable as to have no material bearing on the present situation relating to Indian tribes." Bk. Ct. Opinion, pg. 17. The Bankruptcy Court said: "The Tribe Defendants correctly argue that the FSIA waives the sovereign immunity of a foreign state if it either explicitly *or by implication* waives that immunity" and the FSIA further provides that a foreign state lacks sovereign immunity in any suit that is based upon a commercial activity carried on in the United States by a foreign state, including an agency or instrumentality of the foreign state. *Id.* (emphasis in original). The Bankruptcy Court aptly held:

> [F]or the sake of argument and accepting that Plaintiff could persuade the Court of its every allegation, that is still not enough. As a matter of law, Plaintiff cannot but fail to meet the high burden of proving the required express, unequivocal, unmistakable, and unambiguous waiver. At the very least, any such waiver, even if those

> allegations are shown by the asserted facts and theories, must by its nature be considered to be 'implied' and that would be legally insufficient, *Santa Clara Pueblo, supra* 436 U.S. at 58 (waiver of sovereign immunity cannot be implied but must be unequivocally expressed).

Bk. Ct. Opinion, pg. 20-21.

CONCLUSION

For the reasons set forth above, the decision of the Bankruptcy Court granting the Tribe Defendants' Motion to Dismiss (on the waiver issue) should be affirmed.

CERTIFICATE OF COMPLIANCE WITH RULE 32(A)

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 8,951 words.
2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type of style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word in 14 point Times New Roman style.

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Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 3rd day of January, 2017, a copy of the foregoing was electronically filed with the Clerk of the Court using the CM/ECF system which will send notification of such filing to all attorneys of record.

/s/ David A. Lerner

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