

UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH CAROLINA
GREENVILLE DIVISION

The Michelin Retirement Plan and The
Investment Committee of the Michelin
Retirement Plan,

Plaintiffs,

v.

Chicago Transit Authority Retiree Health
Care Trust and Board of Trustees of the
Chicago Transit Authority Retiree Health
Care Trust,

Intervening Plaintiffs,

v.

Dilworth Paxson LLP, BFG Socially
Responsible Investments Ltd, Burnham
Financial Group Inc, Burnham Securities Inc,
COR Fund Advisors LC, GMT Duncan LLC,
Greenberg Traurig LLP, Thorsdale Fiduciary
and Guaranty Company Ltd, US Bank
National Association, Valor Group Ltd,
Wakpamni Lake Community Corp., Wealth
Assurance AG, Wealth Assurance Private
Client Corporation, Timothy B Anderson, Jon
Michael Burnham, Devon D Archer, Bevan T
Cooney, Hugh Dunkerly, Jason W Galanis,
John P Galanis, Gary T Hirst, Frankie D
Hughes, and Michelle A Morton,

Defendants.

Civil Action No. 6:16-cv-3604-DCC

**DEFENDANT WAKPAMNI LAKE
COMMUNITY CORP.'S MOTION TO
VACATE JUDGMENT PURSUANT TO
FED. R. CIV. P. 60(B) AND
SUPPORTING MEMORANDUM OF
LAW**

Defendant Wakpamni Lake Community Corp. (“WLCC”), by undersigned counsel, hereby makes a limited appearance to contest jurisdiction and moves, pursuant to Federal Rule of Civil Procedure 60 (“Rule 60”), for relief from this Court’s default judgment entered against WLCC on January 29, 2020, ECF No. 605 (the “Default Judgment”), pursuant to Rule 60(b)(1), (4) and (6).

I. RELEVANT BACKGROUND

A. Procedural Background

On November 10, 2016, Plaintiffs the Investment Committee of the Michelin Retirement Plan and the Michelin Retirement Plan (collectively “Michelin”) filed suit against WLCC and various other defendants. (Compl. 1, ECF No. 1.) The Complaint alleges that WLCC and the other defendants “carried out and enabled a fraudulent conspiracy to raid the retirement funds of Michelin and other similarly situated victims” (*Id.*) In relevant part, pursuant to the alleged fraudulent scheme, the defendants “convinced representatives of the Wakpamni Lake Community of the Oglala Sioux Tribe to issue bonds with promises of free community improvement projects for the Tribe.” (*Id.* at 2.)

As a basis for jurisdiction, the Complaint alleges federal question jurisdiction (28 U.S.C. § 1331) for the claims arising under the Employee Retirement Income Security Act (29 U.S.C. § 1132(e)(1)) and the Racketeer Influenced and Corrupt Organizations Act (18 U.S.C. § 1965) and supplemental jurisdiction over all other claims (28 U.S.C. § 1367). (*Id.*, ¶ 29.)

The Complaint asserts only the following claims against WLCC: tortious interference with a contract (the Complaint’s eighth cause of action (*id.*, ¶¶ 180-87)); breach of bond indenture and breach of fiduciary duty in failing to disclose bond indenture breach (ninth cause of action (*id.*, ¶¶ 188-205)); and breach of bond indenture (eleventh cause of action (*id.*, ¶¶ 216-19)). The Complaint does not allege that WLCC, the Wakpamni Lake Community, or the Tribe waived sovereign immunity or otherwise consented to suit in federal court in South Carolina or elsewhere.

On March 22, 2017, Michelin filed a Request for Entry of Default as to Defendant WLCC. (Req. Entry Default, ECF No. 172.) Filed with the request was an Affidavit of Service stating that a process server served an authorized agent for WLCC on February 28, 2017. (Aff. of Service, ECF No. 172-3). In the March 22, 2017 submissions, there is no mention of the Court's exercise of jurisdiction or that there has been any waiver of sovereign immunity or consent to suit by WLCC, the Wakpamni Lake Community, or the Tribe. The Clerk of Court made an Entry of Default for WLCC on March 22, 2017. (Entry of Default, ECF No. 173.)

On October 29, 2019, Michelin filed a Motion for Default Judgment against WLCC and various other defendants and supporting memorandum of law. (Mot. Default J., ECF No. 513; Mem. Supp. Mot. Default J., ECF No. 513-1; Aff. of Default, ECF No. 513-2; Clifton E. Moore Aff., ECF No. 513-3.) The October 29, 2019 submissions set forth no additional basis for the Court's exercise of jurisdiction or contain any allegations that WLCC, the Wakpamni Lake Community, or the Tribe waived sovereign immunity or otherwise consented to suit. (*Id.*) On January 29, 2020, the Court entered default judgment in Michelin's favor against WLCC, ordering that Michelin recover from WLCC the amount of \$11,732,307.45 plus post-judgment interest at the rate of 1.55%, along with costs. (Default J., ECF No. 605.)

B. The Oglala Sioux Tribe, the Wakpamni Lake Community, and WLCC

The Complaint correctly alleges that "Defendant [WLCC] is a tribally-chartered corporation, wholly-owned by the Wakpamni Lake Community, a subdivision of the Wakpamni Lake District, each a subordinate governmental unit of the Oglala Sioux Tribe of the Pine Ridge Reservation, South Dakota." (Compl., ¶ 5.) As the Complaint acknowledges, "[t]he Tribe is a federally recognized Indian tribe organized and operating in accordance with Section 16 of the Indian Reorganization Act of 1934 and under a federally-approved Constitution and By-laws." (*Id.*) Also correct is the Complaint's allegation that WLCC was falsely led to believe that the

proceeds of the bond sales at issue in this case would be invested into higher-yielding annuity contracts that would generate a revenue stream to pay for a tribal economic development project. (Compl. ¶ 46.)

1. The Oglala Sioux Tribe

“The Oglala Sioux Tribe is a federally recognized tribe, in accordance with Section 16 of the Indian Reorganization Act of 1934, and as adopted by a federally approved Constitution and By-Laws, approved on December 20, 1935.” (*See* Ex. A, Declaration of Geneva Lone Hill (hereinafter “Lone Hill Decl.”) ¶ 4; Ex. 1, Wakpamni Lake Community Government, <https://www.wakpamnilake-nsn.gov> (last visited Jan. 22, 2021); Ex. B, Declaration of Raycen American Horse Raynes (hereinafter “Raynes Decl.”) ¶ 4.) It is located on the Pine Ridge Indian Reservation, which was established in 1889 and covers three million acres (roughly the size of Connecticut). (*Id.*) The nation has more than 45,000 enrolled citizens. (Lone Hill Decl. ¶ 4, Ex. 1.)

As explained by the website for the Wakpamni Lake Community, the Oglala Sioux Tribe faces many challenges:

Due in part to our remote location, there are few opportunities to develop a local economy or job opportunities for our people. The lack of good roads, reliable communications systems, and other necessary infrastructure further impedes economic development, job creation, and a good quality of life on our Reservation. These circumstances also contribute to the many social challenges that our people currently face, which include extreme poverty, alcohol and substance abuse, inadequate health care, and high crime rates.

(*Id.*)

The Oglala Sioux Tribe’s inherent sovereignty long predates this country’s founding, and the United States government continues to affirm that sovereignty through federal recognition. *See* 84 Fed. Reg. 1200, 1202 (Feb. 1, 2019) (listing the “Oglala Sioux Tribe” on the list of “Indian Entities Recognized and Eligible to Receive Services from the United States Bureau of Indian Affairs”).

2. The Wakpamni Lake Community

At all relevant times to this action, Wakpamni Lake Community has been an unincorporated “local subsidiary municipal tribal government of the Oglala Sioux Tribe.” (Lone Hill Decl., Ex. 1; Wakpamni Lake Community Government, <https://www.wakpamnilake-nsn.gov> (last visited Jan. 22, 2021).)

The Oglala Sioux Tribal Council met on June 23, 1978 and passed Resolution 78-101 to confirm and recognize Wakpamni Community as a Community within the Wakpamni District, consisting of Wakpamni Lake, Batesland, and Crossroads. (*See* Lone Hill Decl. ¶ 5; Ex. 2, Resolution No. 78-101 of the Oglala Sioux Tribal Council, June 23, 1978.) On March 4, 2012, the same Wakpamni Lake Community (consisting of Wakpamni Lake, Batesland, and Crossroads) promulgated its Constitution and By-Laws. (*See* Lone Hill Decl. ¶ 6; Ex. 3, Constitution and By-Laws of Wakpamni Lake Community, Mar. 4, 2012.)

The Wakpamni Lake Community describes itself as “a modern governmental body woven together by many traditional tiospayes or traditional family groups.” (Lone Hill Decl., Ex. 1, Wakpamni Lake Community Government, <https://www.wakpamnilake-nsn.gov> (last visited Jan. 22, 2021).) It “prides itself on having one of the largest remaining concentrations of fluent Lakota speakers and traditional Lakota practitioners.” (*Id.*) Traditionally a matriarchal society, Wakpamni Lake Community “works hard to incorporate traditional Lakota values into all aspects of [its] work.” (*Id.*)

The Wakpamni Lake Community is located within the Oglala Lakota County, which is among the poorest counties in the United States. (Lone Hill Decl. ¶ 24, Ex. 4, WLCC Corporation, <https://www.ewakpamni.com/corporation> (last visited Jan. 22, 2021).) Just under 52% of its population is below the poverty line, and per capita income of its residents is around \$8,768. (*Id.*)

The unemployment rate in Oglala Lakota County is in the 80% range, and it has a high school dropout rate of over 60%. (*Id.*)

3. WLCC

“To address these dire economic statistics and better provide for the welfare of our residents, the leadership of the Wakpamni Lake Community established a wholly owned tribal economic development corporate arm, the Wakpamni Lake Community Corporation (WLC Resolution 12-04).” (*Id.*; Raynes Decl. ¶ 4.) The Wakpamni Lake Community passed that resolution on March 4, 2012, recognizing that “in order to provide for the welfare of its residents, Wakpamni Lake Community has determined that establishing a for-profit corporation with full protection of Oglala Sioux Tribe rights and privileges would be best to serve the needs of the community and bring development plans and projects to fruition in attaining self-sufficiency.” (*See* Lone Hill Decl. ¶ 13; Ex. 5, Resolution No. 12-04 of the Wakpamni Lake Community.)

Unlike federal, state, and local governments, tribal governments have no tax base from which it can generate governmental revenue. (*See* Lone Hill Decl. ¶ 14; Ex. 6, FAQs About WLCC and Tribal Corporations, <https://www.ewakpamni.com/faqs> (last visited Jan. 22, 2021).) Tribal land is non-taxable federal trust land that generates no property taxes. (*Id.*) Additionally, because the Oglala Sioux Tribe’s population base is so small and impoverished, any income tax would be futile and highly regressive. (*Id.*) While technically the Oglala Sioux Tribe could impose a sales tax, “state governments have litigated sales tax to the point of inaccessibility for most tribal nations.” (*Id.*) Accordingly, to generate revenue, tribal governments must compete in the private commercial marketplace. (*Id.*) WLCC is an example of one such effort by the Oglala Sioux Tribe and Wakpamni Lake Community to raise governmental revenue and create economic development opportunities for members of the Wakpamni Lake Community. (*Id.*; Raynes Decl. ¶ 15.)

Accordingly, Wakpamni Lake Community created WLCC as its economic development arm in 2012. On March 30, 2012, the incorporator and initial director for WLCC filed its Form 14 – Articles of Incorporation with the appropriate Oglala Sioux Tribe governmental offices to formally incorporate WLCC as “a close corporation formed pursuant to the Tribal Business Corporations Code, Part 4 of Chapter 44 of the Oglala Sioux Tribe Law and Order Code. (*See* Lone Hill Decl. ¶ 15; Ex. 7, Form 14 – Articles of Incorporation.) On April 1, 2012, WLCC’s incorporator and initial director signed WLCC’s Articles of Incorporation. (*See* Lone Hill Decl. ¶ 16; Ex. 8, Articles of Incorporation of WLCC.) The members of WLCC comprise the general membership of the Wakpamni Lake Community. (*Id.* art. 14.1.) It remains a wholly owned tribal corporation and economic development arm of the Wakpamni Lake Community. (*See* Lone Hill Decl., Ex. 4, WLCC Corporation, <https://www.ewakpamni.com/corporation> (last visited Jan. 22, 2021).)

As explained by the WLCC’s Articles of Incorporation, WLCC “is a legal entity of the WAKPAMNI LAKE COMMUNITY, which is part of the OGLALA SIOUX TRIBE, a federally recognized American Indian Tribe, with a distinct and separate existence from that of the Tribe and is created by and for the WAKPAMNI LAKE COMMUNITY.” (*See* Lone Hill Decl.; Ex. 8, art. 3.1.) WLCC “is vested with the sovereign immunity of the Tribe.” (*Id.* art. 3.2.) As further explained by the WLCC’s Articles of Incorporation, “[t]he WAKPAMNI LAKE COMMUNITY as a legally recognized subdivision of the OGLALA SIOUX TRIBE expressly reserves all its inherent sovereign rights, privileges, and immunities as a member of a federally recognized Indian Tribe with respect to the creation, existence, and activities of [WLCC], including the Tribe’s immunity from suit in any Court.” (*Id.*)

C. The WLCC Bond Issuance at Issue, the Galanis Fraud, and WLCC as Defendant in this Case

In order to create a revenue stream to fund the construction of the key part of the Wakpamni Lake Community Town Center, WLCC issued the bonds at issue in this case. (*See* Lone Hill Decl. ¶ 17; Ex. 9, at 6, WLCC Economic Development Projects, www.ewakpamni.com (last visited Jan. 22, 2021).) The proceeds from the bond issuance were supposed to be invested in a higher-yielding annuity contract. (Compl. ¶ 46.) The annuity contract was supposed to generate sufficient income to pay the principal and interest on all of the bonds and more. (*Id.*) Through the annuity contract investment, WLCC was supposed to have excess uninvested proceeds from the bond issuance as well as excess income from the annuity contract. (*Id.*) This excess was supposed to be used to construct commercial shipping and receiving facilities at the Wakpamni Lake Community Town Center; however, the investment in the annuity contract never occurred. (*See* Lone Hill Decl. ¶ 17; Ex. 9, at 6.) Instead, the alleged orchestrators of this purported investment scheme misappropriated the proceeds raised by the bond issuance, and WLCC received nothing. (Compl. ¶ 54.)

The WLCC Bond acknowledges that WLCC “is a wholly-owned subsidiary of the [Wakpamni Lake] Community, which in turn is a subordinate governmental unit of the [Oglala Sioux] Tribe, a federally-recognized Indian Tribe, and is vested with sovereign immunity of the Tribe unless and until [WLCC] has granted a waiver of sovereign immunity in accord with Community and Tribal law.” (Lone Hill Decl. ¶ 18; Ex. 10, at 4, WLCC Bond, Aug. 25, 2014; *see also id.* ¶ 19; Ex. 11, at 45, Trust Indenture, Aug. 25, 2014.) The WLCC Bond and Trust Indenture both contain a limited waiver of sovereign immunity, providing that WLCC “expressly and unequivocally grants . . . a limited waiver of [WLCC’s] sovereign immunity from suit as provided in the Resolution Regarding Limited Waiver of Sovereign Immunity adopted by [WLCC’s] Board of Directors on August 8, 2014 for the sole purpose of enforcement of this Indenture, to the extent

set forth in the Indenture and limited herein.” (*Id.*, Ex. 10, at 4; Ex. 11, at 45-46; *see also id.*, Ex. 13.) The referenced Indenture is the Trust Indenture dated as of August 25, 2014 between WLCC and the trustee (U.S. Bank National Association). (*Id.*, Ex. 10, at 2; Ex. 11, at 2.)

The WLCC Bond and the Indenture both contain the same limitations on where suit can be brought against WLCC, providing that WLCC “expressly waives its immunity from suit and consents to suit as provided and limited herein and/or to be sued in any of the following: the United States District Court for the District of South Dakota; South Dakota state district courts; and appellate courts therefrom for both jurisdictions.” (*Id.*, Ex. 10, at 4; Ex. 11, at 46; *see also id.*, Ex. 13.) Both documents also provide that “[t]he laws of South Dakota shall apply to any such suit. (*Id.*, Ex. 10, at 4; Ex. 11, at 46; *see also id.*, Ex. 13.)

As soon as officers of WLCC became suspicious of the investment process in late 2015, they notified and cooperated with law enforcement authorities, including the Securities and Exchange Commission and the United States Attorney’s Office for the Southern District of New York. (Raynes Decl. ¶ 5.) On May 11, 2016, the United States filed a federal criminal complaint (*United States v. Galanis, et al.*, Case No. S1 16 Cr. 371 (RA)) against Jason Galanis; his father, John “Yanni” Galanis; and five other defendants in the United States District Court for the Southern District of New York. (*Id.*) The criminal complaint charged the defendants with orchestrating a scheme to defraud WLCC and its numerous investors. (*Id.*)

On January 19, 2017, Jason Galanis pled guilty before U.S. District Court Judge Ronnie Abrams of defrauding WLCC and the investing public of tens of millions of dollars in connection with the issuance of bonds by WLCC. (*Id.* ¶ 7.) Specifically, Jason Galanis pled guilty to conspiracy to commit securities fraud, securities fraud, and conspiracy to commit investment adviser fraud. (*Id.*) Then-United States Attorney Preet Bharara stated as follows in

announcing Jason Galanis' plea: "As Jason Galanis admitted today in his guilty plea, he and his co-conspirators cheated their tribal clients by urging them to issue bonds, and then siphoning off the proceeds for their own personal use. (*Id.* ¶ 8.)

On August 11, 2017, United States District Court Judge Abrams sentenced Jason Galanis to 173 months in federal prison. (*Id.* ¶ 9.) Acting U.S. Attorney Joon H. Kim announced the sentencing, stating as follows:

In a brazen securities scheme designed to enrich themselves at the expense of everyone else, Jason Galanis and his co-conspirators cheated both their tribal clients as well as the investing public. After defrauding a Native American tribe into issuing bonds, Jason Galanis and his cohorts sold the illiquid bonds to unwitting pension funds, and then stole the proceeds for themselves. For his role in this campaign of theft and deception, Jason Galanis will now spend over 14 years in federal prison.

(*Id.*) In addition to the prison term, Jason Galanis was ordered to forfeit \$43,277,436 and to make restitution in the amount of \$43,785,176. (*Id.* ¶ 10.)

Like Plaintiffs, WLCC was a victim of the investment fraud perpetrated by Jason Galanis and his co-conspirators. The United States District Court for the Southern District of New York and the federal agencies investigating these crimes, the Federal Bureau of Investigation and the United States Securities and Exchange Commission, consider WLCC to be the victim of the Galanis conspiracy. (*Id.* ¶ 12; Lone Hill Decl. ¶ 22, Ex. 14, Victim Impact Statement, Aug. 10, 2017.) Since first becoming aware of the potential fraud by Galanis, WLCC has devoted significant attention to assisting in the prosecutions of the wrongdoers by the federal government, including testifying multiple times and hosting Assistant United States Attorneys who came to visit the Wakpamni Lake Community and assess WLCC's damages in 2017. (Lone Hill Decl. ¶ 23.)

Despite being a victim of the Galanis fraud, WLCC was named a defendant in this lawsuit and others. (Compl.; Lone Hill Decl. ¶ 26; Raynes Decl. ¶ 13.) Neither WLCC nor Wakpamni

Lake Community have had the resources to hire attorneys to defend WLCC in this action or others. (*Id.* ¶ 26; Raynes Decl. ¶ 13.)

In or about the fall of 2017, a man named Quattlebaum contacted WLCC and Wakpamni Lake Community President Lone Hill on three separate occasions. (Lone Hill Decl. ¶ 27; *see also* Raynes Decl. ¶ 16.) President Lone Hill understood that Mr. Quattlebaum was Judge Quattlebaum, then a United States District Judge for this Court.¹ (Lone Hill Decl. ¶ 27; *see also* Raynes Decl. ¶ 16.) Mr. Quattlebaum asked President Lone Hill about the financial state of WLCC and Wakpamni Lake Community and about the subject matter of the lawsuit. (Lone Hill Decl. ¶ 27.) Based on the information received, Mr. Quattlebaum deduced that WLCC and the Wakpamni Lake Community were destitute. (*Id.*) President Lone Hill understood from her conversations with Mr. Quattlebaum that he understood and appreciated their innocent and impoverished position. President Lone Hill further understood and believed that Mr. Quattlebaum—as a judge of this Court—indicated to her that no further action was needed with respect to this case.

II. ARGUMENT

Defendant WLCC moves for relief from judgment pursuant to Rule 60(b)(1), (4), and (6) of the Federal Rules of Civil Procedure. The Court should grant Defendant WLCC relief from default judgment under Rule 60(b)(4) because this Court lacks personal jurisdiction over WLCC and because the Court lacks subject matter jurisdiction over this dispute because WLCC has sovereign immunity as an arm of the Oglala Sioux Tribe and the Wakpamni Lake Community. WLCC also respectfully asserts that the Court should grant it relief from the default judgment because it was the product of mistake, inadvertence, surprise or excusable neglect, justifying

¹ Quattlebaum is also the name of counsel for Plaintiff Michelin. Upon consulting with Plaintiff's counsel Mr. Quattlebaum about the instant motion, counsel for WLCC learned that counsel for Plaintiff (Mr. Quattlebaum) spoke with President Lone Hill on multiple occasions.

application of Rule 60(b)(1). Additionally, Defendant WLCC respectfully asserts that it should be entitled to relief from default judgment under Rule 60(b)(6).

A. The Default Judgment Is Void Because the Court Lacks Jurisdiction.

Rule 60(b)(4) provides for relief from judgment where it is void. Fed. R. Civ. P. 60(b)(4). A judgment is void “only if the court that rendered it lacked jurisdiction of the subject matter, or of the parties, or if it acted in a manner inconsistent with due process of law.”¹¹ Charles Alan Wright & Arthur R. Miller, *Federal Practice and Procedure* § 2862 (3d ed. Apr. 2020 Update) (footnotes omitted); *see also Cromer v. Kraft Foods N. Am., Inc.*, 390 F.3d 812, 817 (4th Cir. 2004). “The Supreme Court has long instructed that judgments in excess of subject-matter jurisdiction are not voidable, but simply void.” *Bell Helicopter Textron, Inc. v. Islamic Republic of Iran*, 734 F.3d 1175, 1180 (D.C. Cir. 2013) (internal quotation marks omitted).

As further explained in Wright and Miller’s *Federal Practice and Procedure*, Rule 60(b)(4) is different from other bases for relief from a judgment under Rule 60(b):

There is no question of discretion on the part of the court when a motion is under Rule 60(b)(4). Nor is there any requirement, as there usually is when default judgments are attacked under Rule 60(b), that the moving party show a meritorious defense. Either a judgment is void or it is valid. Determining which it is may well present a difficult question, but when that question is resolved, the court must act accordingly.

¹¹ Charles Alan Wright & Arthur R. Miller, *Federal Practice and Procedure* § 2862 (footnotes omitted).

As explained by the Fourth Circuit, “when a defendant who is named in a default judgment challenges it as void for lack of subject matter jurisdiction, the standard of review often turns on whether the defendant participated in the proceedings leading up to the judgment.” *Hawkins v. i-TV Digitalis Tavkozlesi zrt.*, 935 F.3d 211, 221 (4th Cir. 2019). When the defendant does not appear at all, as is his right if the court lacks jurisdiction over the subject matter of the dispute,

“the defendant is usually free to challenge the existence of subject matter jurisdiction in a later proceeding.” *Id.* In such case, “the district court must review the jurisdictional question afresh as if it faced a motion to dismiss for lack of subject matter jurisdiction under Rule 12(b)(1) during the underlying litigation.” *Id.* That same principle applies when a defendant challenges a judgment as void because the court lacks personal jurisdiction over the defendant. *See Vinten v. Jeantot Marine Alls., S.A.*, 191 F. Supp. 2d 642, 650 (D.S.C. 2002) (“[W]hen a Rule 60(b) motion ‘is based on a void judgment under rule 60(b)(4), *the district court has no discretion*, the judgment is either void or it is not.’” (emphasis in original) (quoting *Carter v. Fenner*, 136 F.3d 1000, 1005 (5th Cir. 1998))).

1. The Default Judgment Is Void Because the Court Lacks Personal Jurisdiction over WLCC.

“In order for a court to validly exercise personal jurisdiction over a non-resident defendant, a statute must authorize the service of process, and the exercise of jurisdiction must comport with the Due Process Clause of the Fourteenth Amendment.” *Id.* at 645. “‘South Carolina has interpreted its long-arm statute to extend personal jurisdiction to the constitutional limits imposed by federal due process,’ and therefore this court’s ‘inquiry must focus on due process.’” *Id.* (quoting *Foster v. Arletty 3 Sarl*, 278 F.3d 409, 414 (4th Cir. 2002)). “In determining whether the exercise of personal jurisdiction comports with due process, ‘the constitutional touchstone remains whether the defendant purposefully established ‘minimum contacts’ in the forum State.’” *Id.* (quoting *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 474, 105 S. Ct. 2174, 85 L. Ed. 2d 528 (1985)). “Once minimum contacts have been established, ‘these contacts may be considered in light of other factors to determine whether the assertion of personal jurisdiction would comport with ‘fair play and substantial justice.’” *Id.* (quoting *Burger King*, 471 U.S. at 476).

As succinctly articulated by this Court in *Vinten*, the proper due process analysis considers the following:

The Supreme Court has found that “due process requires only that in order to subject a defendant to a judgment in personam, if he be not present within the territory of the forum, he have certain minimum contacts with it such that the maintenance of the suit does not offend traditional notions of fair play and substantial justice.” *International Shoe Co. v. Washington*, 326 U.S. 310, 316, 66 S. Ct. 154, 90 L. Ed. 95 (1945) (internal quotations omitted). The Court has noted that “‘it is essential in each case that there be some act by which the defendant purposefully avails itself of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws.’” *Burger King Corp.*, 471 U.S. at 475, 105 S. Ct. 2174 (quoting *Hanson v. Denckla*, 357 U.S. 235, 253, 78 S. Ct. 1228, 2 L.Ed.2d 1283 (1958)) (emphasis added). The “‘purposeful availment’ requirement ensures that a defendant will not be haled into a jurisdiction solely as a result of ‘random,’ ‘fortuitous,’ or ‘attenuated’ contacts, or of the ‘unilateral activity of another party or a third person.’” *Id.* (internal citations omitted). Due process is satisfied, however, “where the contacts proximately result from actions by the defendant *himself* that create a ‘substantial connection’ with the forum State.” *Id.* (emphasis in original).

Vinten, 191 F. Supp. 2d at 645.

Because WLCC has not participated in the proceeding leading to judgment, the Court should consider the Rule 60(b)(4) motion on these personal jurisdictional grounds afresh as if it faced a motion to dismiss for lack of personal jurisdiction under Rule 12(b)(2). *See Hawkins*, 935 F.3d at 221. Accordingly, Plaintiff should have “the burden of establishing a *prima facie* case of jurisdiction,” the analysis of which “resembles the plausibility inquiry governing motions to dismiss for failure to state a claim under Rule 12(b)(6).” *Id.* at 226. That means that “the district court must determine whether the facts proffered by the party asserting jurisdiction—assuming they are true—make out a case of personal jurisdiction over the party challenging jurisdiction.” *Id.* However, unlike under Rule 12(b)(6), “the court may also consider affidavits submitted by both parties, although it must resolve all factual disputes and draw all reasonable inferences in favor of the party asserting jurisdiction.” *Id.*

In the business context, potential factors for consideration in the minimum-contacts analysis include, but are not limited to, the following:

- whether the defendant maintains offices or agents in the forum state;
- whether the defendant owns property in the forum state;
- whether the defendant reached into the forum state to solicit or initiate business;
- whether the defendant deliberately engaged in significant or long-term business activities in the forum state;
- whether the parties contractually agreed that the law of the forum state would govern disputes;
- whether the defendant made in-person contact with the resident of the forum in the forum state regarding the business relationship;
- the nature, quality and extent of the parties' communications about the business being transacted; and
- whether the performance of contractual duties was to occur within the forum.

Consulting Engineers Corp. v. Geometric Ltd., 561 F.3d 273, 278 (4th Cir. 2009) (internal citations omitted).

Considering all facts before it in this respect, WLCC lacks sufficient contacts with South Carolina for the Court to exercise personal jurisdiction over WLCC. WLCC maintains no offices or agents in this state and owns no property here. (Lone Hill Decl. ¶ 8.) WLCC also did not reach into South Carolina to solicit or initiate business. (*Id.* ¶ 9.) WLCC did not engage in significant or long-term business activities in South Carolina. (*Id.* ¶ 10.) The parties to the WLCC Bond agreed that South Dakota, not South Carolina law would apply to any suit against WLCC. (*See id.*, Ex. 10 at 4-5; Ex. 11, at 46-47.) WLCC never made in-person contact with Plaintiff in South Carolina regarding the business relationship. (Lone Hill Decl. ¶ 11.) The communications about the business

being transacted were directed to Plaintiff's investment manager in Virginia, not to Plaintiff in South Carolina. (*Id.*)

As stated in the Complaint, Hughes Capital Management, LLC ("Hughes Capital") purchased the Wakpamni Lake Bonds at issue, not Plaintiff. (Compl. ¶¶ 25-26, 39-40, 159.) Hughes Capital was Plaintiff's investment manager located in Alexandria, Virginia, not South Carolina. (*Id.* ¶¶ 4, 36-37.) Furthermore, in purchasing the Wakpamni Lake Bonds, Hughes Capital allegedly "raided \$8,102,154 of employee retirement funds from the Plan to purchase a Wakpamni Lake Bond." (*Id.* ¶ 39.) Plaintiff only learned of the purchase after the fact and then immediately directed Hughes Capital to sell the bonds. (*Id.* ¶ 41.)

The sole allegation in the Complaint to support personal jurisdiction over WLCC simply lumps WLCC with the other Defendants. That allegation merely concludes that "this Court has personal jurisdiction over the Defendants since part of the contract was to be performed in South Carolina and the Defendants knew the identity of Plaintiff whose location is a matter of public record." (*Id.* ¶ 30.) This conclusory allegation is insufficient to bestow the Court's jurisdiction over WLCC. Accordingly, there are no facts in the record to suggest that WLCC purposefully availed itself of the privilege of conducting activities within the South Carolina.

2. The Default Judgment Is Void Because the Court Lacks Subject Matter Jurisdiction.

Tribal sovereign immunity is a threshold question of subject matter jurisdiction. *See Puyallup Tribe v. Dept. of Game of State of Wash.*, 433 U.S. 165, 172 (1977) (stating that "[a]bsent an effective waiver or consent," a court "may not exercise jurisdiction over a recognized Indian tribe"); *Williams v. Big Picture Loans, LLC*, 929 F.3d 170, 185 (4th Cir. 2019) (reversing and remanding the denial of a motion to dismiss for lack of subject matter jurisdiction based on tribal sovereign immunity); *Pan Am. Co. v. Sycuan Band of Mission Indians*, 884 F.2d 416, 418 (9th Cir.

1989) (explaining that “the issue of tribal sovereign immunity is jurisdictional in nature”); *Amerind Risk Mgmt. Corp. v. Malaterre*, 633 F.3d 680, 684-85 (8th Cir. 2011) (“We have held that tribal sovereign immunity is a threshold jurisdictional question.”); *see also F.D.I.C. v. Meyer*, 510 U.S. 471, 475 (1994) (explaining that “[s]overeign immunity is jurisdictional in nature”); *United States v. Jones*, 225 F.3d 468, 469 (4th Cir. 2000) (“Sovereign immunity deprives a court of jurisdiction.”).

Courts have granted relief under Rule 60(b)(4) because sovereign immunity deprived the court of jurisdiction. *See, e.g., Jordon v. Gilligan*, 500 F.2d 701, 710 (6th Cir. 1974) (holding that “once it is determined that a state is not subject to federal jurisdiction because of the operation of the Eleventh Amendment, a court must vacate any judgment entered in excess of its jurisdiction”); *Merit Mgmt. Grp. v. Ponca Tribe of Indians Oklahoma*, 778 F. Supp. 2d 916, 917-18 (N.D. Ill. 2011) (granting a Rule 60(b)(4) motion based on its finding that an Indian tribe is not a citizen of any state for diversity purposes but also noting that “[a]bsent congressional or tribal consent to suit, state and federal courts have no jurisdiction over Indian tribes; only consent gives the courts the jurisdictional authority to adjudicate claims raised by or against tribal defendants”); *World Bus. Lenders, LLC v. G7, Medicare & Medicate*, No. CV RDB-19-1655, 2020 WL 978696, at *2 (D. Md. Feb. 28, 2020) (“Relief is warranted under Rule 60(b)(4) because sovereign immunity barred the state court from ordering a judgment against federal funds.”). The Court should do so here, where the default judgment entered lacks jurisdiction over WLCC, an arm of the Oglala Sioux Tribe and its Wakpamni Lake Community.

a. The Oglala Sioux Tribe Has Sovereign Immunity from Suit as a Federally Recognized Indian Tribe.

“Indian tribes are ‘domestic dependent nations’ that exercise inherent sovereign authority over their members and territories.” *Oklahoma Tax Comm’n v. Citizen Band Potawatomi Indian*

Tribe of Oklahoma, 498 U.S. 505, 509 (1991) (quoting *Cherokee Nation v. Georgia*, 5 Pet. 1, 17, 8 L. Ed. 25 (1831)). “Suits against Indian tribes are thus barred by sovereign immunity absent a clear waiver by the tribe or congressional abrogation. *Id.* (citing *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 58 (1978)).

Through its federal recognition, the United States acknowledges the Tribe in a formal government-to-government context as a sovereign body politic with reserved rights that predate the United States Constitution. *See Martinez*, 436 U.S. at 55-59. As part of its inherent sovereignty, the Tribe is protected by sovereign immunity from unconsented suit. *See Michigan v. Bay Mills Indian Cmty.*, 134 S. Ct. 2024, 2030 (2014) (reaffirming that “[a]mong the core aspects of sovereignty that tribes possess—subject [only] to congressional action—is the ‘common-law immunity from suit traditionally enjoyed by sovereign powers’” (quoting *Martinez*, 436 U.S. at 58)).

Indeed, “[t]he rule that a tribe of Indians under the tutelage of the United States is not subject to suit without the consent of Congress is too well settled to admit of argument.” *Haile v. Saunooke*, 246 F.2d 293, 297 (4th Cir. 1957). Indian tribes “have a status higher than that of states.” *Native Am. Church of N. Am. v. Navajo Tribal Council*, 272 F.2d 131, 134 (10th Cir. 1959). “They are subordinate and dependent nations possessed of all powers as such only to the extent that they have expressly been required to surrender them by the superior sovereign, the United States.” *Id.*

Importantly, the Tribe retains its immunity even when it acts in a commercial capacity outside the boundaries of its territory. *See Bay Mills Indian Cmty.*, 134 S. Ct. at 2036 (stating that the “doctrine of tribal immunity—without any exceptions for commercial or off-reservation conduct—is settled law and controls”); *Kiowa Tribe of Okla.*, 523 U.S. at 760 (holding that tribal

sovereign immunity extends to a tribe's "governmental or commercial activities" regardless of "whether they were made on or off a reservation").

b. WLCC Is Immune from Suit as an Economic Arm of the Wakpamni Lake Community and the Oglala Sioux Tribe.

Tribal immunity extends to subdivisions of a tribe, and even bars suits arising from a tribe's commercial activities. *Native Am. Distrib. v. Seneca-Cayuga Tobacco Co.*, 546 F.3d 1288, 1292 (10th Cir. 2008); *see also Marceau v. Blackfeet Hous. Auth.*, 455 F.3d 974, 978 (9th Cir. 2006), *opinion adopted in part, modified in part on reh'g*, 519 F.3d 838 (9th Cir. 2008), *opinion amended and superseded on denial of reh'g*, 540 F.3d 916 (9th Cir. 2008), and *opinion reinstated in part, superseded in part*, 540 F.3d 916 (9th Cir. 2008) (holding that immunity "extends to agencies and subdivisions of the tribe, and has generally been held to apply to housing authorities formed by tribes.").

The Complaint correctly alleges that "Defendant [WLCC] is a tribally-chartered corporation, wholly-owned by the Wakpamni Lake Community, a subdivision of the Wakpamni Lake District, each a subordinate governmental unit of the Oglala Sioux Tribe of the Pine Ridge Reservation, South Dakota." As noted above, the Oglala Sioux Tribal Council confirmed and recognized the Wakpamni Lake Community as a community within the Wakpamni District on June 23, 1978 by Resolution 78-101. (*See Lone Hill Decl.* ¶ 5; Ex. 2, Resolution No. 78-101 of the Oglala Sioux Tribal Council, June 23, 1978.) As such, the Wakpamni Lake Community is a part of the Oglala Sioux Tribe and is entitled to sovereign immunity. (*See Lone Hill Decl.*, Ex. 8, Articles of Incorporation § 3.1 (explaining that Wakpamni Lake Community "is a part of the" Oglala Sioux Tribe).)

Created in 2014 as Wakpamni Lake Community's economic development arm, WLCC remains wholly owned by the Wakpamni Lake Community. (*See Lone Hill Decl.*, Ex. 1 at 2.;

Raynes Decl. ¶ 4.) Tribal sovereign immunity extends to businesses that operate as economic arms of the Tribe. *Kiowa Tribe of Okla.*, 523 U.S. at 757 (explaining that tribal sovereign immunity is retained even for those tribal businesses that had arguably “become far removed from tribal self-governance and internal affairs”); *see also Cook v. AVI Casino Enters.*, 548 F.3d 718, 725 (9th Cir. 2008) (stating that “tribal corporations acting as an arm of the tribe enjoy the same sovereign immunity granted to a tribe itself”); *United States v. Bly*, 510 F.3d 453, 465 (4th Cir. 2007) (recognizing arm of the tribe doctrine). Indeed, upholding tribal sovereign immunity for tribal commercial entities is consistent with a central purpose underlying immunity; that is, “to promote economic development and tribal self-sufficiency.” *Kiowa Tribe of Okla.*, 523 U.S. at 757; *see also Am. Indian Agr. Credit Consortium, Inc. v. Standing Rock Sioux Tribe*, 780 F.2d 1374, 1378 (8th Cir. 1985) (emphasizing that immunity is “necessary to promote the federal policies of tribal self-determination, economic development, and cultural autonomy”).

To determine whether a tribal entity is an arm of tribe and entitled to sovereign immunity, the Fourth Circuit Court of Appeals has adopted the modified arm-of-the-tribe immunity analysis from *Breakthrough Management Group, Inc. v. Chukchansi Gold Casino & Resort*, 629 F.3d 1173 (10th Cir. 2010). *See Big Picture Loans*, 929 F.3d at 177 (following *White v. Univ. of Cal.*, 765 F.3d 1010, 1026 (9th Cir. 2014) and adopting the first five *Breakthrough* factors). Under this modified *Breakthrough* approach, the Court assesses arm-of-the-tribe sovereign immunity by considering: (1) the method of the entity’s creation; (2) its purpose; (3) its structure, ownership, and management; (4) the tribe’s intent to share its sovereign immunity; and (5) the financial relationship between the tribe and the entity. *Big Picture Loans*, 929 F.3d at 177. Here, all five factors weigh in favor of sovereign immunity. “Put differently, the Court must determine whether a tribal entity is ‘analogous to a governmental agency, which should benefit from the defense of

sovereign immunity’ or whether it is more like ‘[a] commercial business enterprise, instituted solely for the purpose of generating profits for [its] private owners.’” *Solomon v. Am. Web Loan*, 375 F. Supp. 3d 638, 652 (E.D. Va. 2019).

i. Method of Creation

In considering “method of creation,” courts focus on the law under which the entity was formed. *Breakthrough*, 629 F.3d at 1191-92. Formation under tribal law weighs in favor of immunity. *Big Picture Loans*, 929 F.3d at 177; *see also Breakthrough*, 629 at 1191; *White*, 765 F.3d at 1025. In analyzing method of creation, courts also consider the “circumstances under which the entity’s formation occurred, including whether the tribe initiated or simply absorbed an operational commercial enterprise.” *Solomon v. Am. Web Loan*, 375 F. Supp. 3d 638, 653 (E.D. Va. 2019).

Here, WLCC was formed pursuant to the Tribal Business Corporations Code, Part 4 of Chapter 44 of the Oglala Sioux Tribe Law and Order Code. (*See Lone Hill Decl.*, Ex. 7, Form 14, WLCC Articles of Incorporation; Ex. 8, WLCC Articles of Incorporation.) Wakpamni Lake Community formed WLCC rather than simply absorbing it. Accordingly, this factor weighs in favor of tribal sovereign immunity for WLCC.

ii. Purpose

In considering the entity’s “purpose,” courts look to both the stated purpose for which the entity was created and evidence related to that purpose. *See Big Picture Loans*, 929 F.3d at 178; *Breakthrough*, 629 F.3d at 1192-93. “The stated purpose need not be purely governmental to weigh in favor of immunity as long as it relates to broader goals of tribal self-governance.” *Big Picture Loans*, 929 F.3d at 178.

A stated on its Facebook page, the mission of WLCC is “to create jobs, opportunities, and economic development for the community of Wakpamni Lake.” As shown by its Articles of Incorporation, the WLCC’s stated purposes include the following:

- To engage in general economic and financial businesses that promote the general economic development and welfare of the people of the WAKPAMNI LAKE COMMUNITY.
- To plan, develop, and implement comprehensive plans, proposals, and studies designed to secure or to increase financial resources available for business activity for the WAKPAMNI LAKE COMMUNITY and its members.
- To plan, develop, and implement financial development on behalf of the WAKPAMNI LAKE COMMUNITY-and its members in a manner consistent with the social and cultural interests of the WAKPAMNI LAKE COMMUNITY.
- To plan, develop, and promote job opportunities for members of the WAKPAMNI LAKE COMMUNITY that best utilize or enhance their talents and provide them adequate income on a long term basis.
- To plan, develop, and implement such activities and ventures as may compliment and further financial and related development enterprises in the WAKPAMNI LAKE COMMUNITY.
- To efficiently and effectively utilize financial and other resources for economic development within the WAKPAMNI LAKE COMMUNITY-which promotes the long term interests of the community and its tribal members.
- To promote and to secure availability of grants, loans, and other forms of development capital from governmental, private, and other sources to support plans, studies, projects and enterprises that serve the interests of the WAKPAMNI LAKE COMMUNITY and its members.
- To develop competent community based financial and economic development leadership in the WAKPAMNI LAKE COMMUNITY to plan, implement, and perform programs and activities of the Corporation.
- To actively and systematically make financial contributions to established non-profit local community groups and non-profit organizations that are involved in local community and social development projects within WAKPAMNI LAKE COMMUNITY areas.

(Lone Hill Decl., Ex. 8 at Article V, §§ 5.1, 5.2, 5.3, 5.4, 5.6, 5.7, 5.8, 5.9, 5.10.)

WLCC has fulfilled its purpose by, among other things, the following:

- promoting tribal tourism;
- developing a mixed-use development project in Batesland, South Dakota;
- promoting tribal e-commerce for the benefit of community members;
- exploring ways to expand opportunities for its members in government contracting;
- producing, acquiring, storing, and distributing locally grown, highly nutritious foods to community members;
- building a partially underground greenhouse to grow food for community members;
- supporting community and family gardens to create more community independence and self-sufficiency and to improve the health of community members through healthier food choices;
- designing the Wakpamni Lake Community Fire Department, a hybrid fire department model incorporating both wildland and structure firefighters, whereby the former is deployable to generate revenue to assist in subsidizing the provision of local governmental structural/residential fire protection; and
- undertaking the bond issuance at issue in this case in order to assist the Wakpamni Lake Community's construction of a Community Town Center to bring services to community members and provide a central gathering location with a commercial center that subsidized social retail space and included a tutoring learning center, coffee shop, health and exercise facility, and laundromat.

(Lone Hill Decl., Ex. 9, WLCC Economic Development Projects, <https://www.ewakpamni.com> (last visited Jan. 22, 2021); *see also id.*, Ex. 12, *Wakpamni Lake Community Corporation*, Facebook, <https://www.facebook.com/wakpamnilake/> (last visited Jan. 22, 2021).)

Based on its stated purposes, WLCC was clearly created to function as the economic development arm of Wakpamni Lake Community. All of these purposes relate to the broader goals of tribal self-governance. *See Big Picture Loans*, 929 F.3d at 178. Additionally, the evidence related to WLCC's stated purposes shows that WLCC has endeavored to fulfill them. Indeed, WLCC would not be a defendant in this case but for its efforts to generate funds needed by

Wakpamni Lake Community for the construction of its Community Town Center. Accordingly, this factor weighs in favor of WLCC's sovereign immunity as an arm of the Wakpamni Lake Community and the Oglala Sioux Tribe.

iii. Control

In considering "control," courts examine the structure, ownership, and management of the entity, including the amount of control the Tribe has over the entity. *Big Picture Loans*, 929 F.3d at 182; *see also Breakthrough*, 629 at 1191. "Relevant to this factor are the entities' formal governance structure, the extent to which the entities are owned by the tribe, and the day-to-day management of the entities." *Big Picture Loans*, 929 F.3d at 182.

As noted, WLCC is wholly owned by the Wakpamni Lake Community. (*See* Lone Hill Decl., Ex. 8, Articles of Incorporation, § 3.1 (stating that "[t]he Corporation is a legal entity of the WAKPAMNI LAKE COMMUNITY"); websites and declaration).) It is governed by a Board of Directors consisting of three members. (*Id.* at § 9.1.) The initial Board of Directors with initial terms of three years are specified in the Articles of Incorporation. These initial directors were determined by the Wakpamni Lake Community Executive Board. (*See id.* at § 9.3(E).) After these initial terms, subsequent directors must also be nominated by the Wakpamni Lake Community Executive Board. (*Id.* at § 9.3(c).) Nominated candidates for the Board of Directors are then voted on every three years at the annual meeting corporation. (*Id.*) The directors are selected by the General Membership of WLCC, which is comprised of the members of Wakpamni Lake Community who are 18 years of age or older. (*Id.* at § 14.1.)

Because the Wakpamni Lake Community owns WLCC, this factor weighs in favor of its sovereign immunity as an arm of the Wakpamni Lake Community and the Oglala Sioux Tribe. The fact that the Wakpamni Lake Community Executive Board effectively controls the nomination of WLCC directors further weighs in favor of WLCC's sovereign immunity.

iv. Intent

In considering “intent,” courts assess the tribe’s intent to extend its immunity to the entity. *See Big Picture Loans*, 929 F.3d at 184. Facts relevant to the Court’s consideration include tribal ordinances, tribal council resolutions, or organizational documents that state the tribe’s intent to share the tribe’s immunity. *Id.*

As already noted, the Articles of Incorporation of WLCC state that WLCC “is vested with the sovereign immunity of the Tribe.” (Lone Hill Decl., Ex. 8, Articles of Incorporation at § 3.2.) As explained by the Articles of Incorporation, WLCC is a legal entity of the Wakpamni Lake Community that was created by and for the Wakpamni Lake Community. (*Id.* at § 3.1.) As further explained by the WLCC’s Articles of Incorporation, the Wakpamni Lake Community expressly “expressly reserves all its inherent sovereign rights, privileges, and immunities as a member of a federally recognized Indian Tribe with respect to the creation, existence, and activities of [WLCC], including the Tribe’s immunity from suit in any Court.” (*Id.* at § 3.2.) The WLCC Bond likewise acknowledges that WLCC “is vested with the sovereign immunity of the [Oglala Sioux] Tribe.” (Lone Hill Decl., Ex. 10, WLCC Special Limited Revenue Bond 4.) The WLCC Bond also states that WLCC is “a wholly-owned subsidiary of [Wakpamni Lake] Community.” (*Id.*) The Trust Indenture contains identical statements. (*See* Lone Hill Decl., Ex. 11, Trust Indenture at 1, 45-46.)

Here, the Articles of Incorporation, the WLCC Bond, and the Trust Indenture all explicitly and unequivocally state that WLCC has the sovereign immunity of the Oglala Sioux Tribe and the Wakpamni Lake Community. As a result, this factor favors a finding of immunity.

v. Financial Responsibility

In considering the “financial relationship” factor, the Court considers the financial relationship between the tribe and the entity. *See Big Picture Loans*, 929 F.3d at 184; *see also Breakthrough*, 629 F.3d at 1194.

Here, Wakpamni Lake Community has been the sole owner of WLCC since its inception. Thus, all of WLCC's realized profits would inure to the benefit of the Wakpamni Lake Community. Future realized profits of WLCC help fund critical tribal programs and direct services to tribal members. In addition to shareholder dividends, WLCC provides value to Wakpamni Lake Community members through its activities described above.

An additional consideration in assessing the financial relationship factor is "whether a judgment against an entity would reach the tribe's assets." *Big Picture Loans*, 929 F.3d at 184. "However, direct tribal liability for an entity's actions 'is neither a threshold requirement for immunity nor a predominant factor in the overall analysis.'" *Id.* (citing *Miami Nation*, 386 P.3d at 373). "Instead, courts consider the extent to which a tribe 'depends . . . on the [entity] for revenue to fund its governmental functions, its support of tribal members, and its search for other economic development opportunities.'" *Id.* (citing *Breakthrough*, 629 F.3d at 1195).

Although the Wakpamni Lake Community would not be directly liable for a judgment against WLCC, any judgment against WLCC would impair the Wakpamni Lake Community's and the Oglala Sioux Tribe's future ability to fund critical tribal programs and direct services and promote business development in the Wakpamni Lake Community. In short, any profits eventually generated by WLCC directly and solely benefit the members of the Wakpamni Lake Community who are part of the Oglala Sioux Tribe. Consequently, the financial relationship between WLCC and the Wakpamni Lake Community weighs in favor of a finding of immunity.

Based on the application of the five *Breakthrough* factors, WLCC is an economic arm of the Navajo Nation entitled to immunity from Plaintiff's claims here.

c. WLCC Has Not Waived Its Immunity from Suit in this Court.

"Suits against Indian tribes are . . . barred by sovereign immunity absent a clear waiver by the tribe or congressional abrogation." *Oklahoma Tax Comm'n v. Citizen Band Potawatomi Indian*

Tribe of Oklahoma, 498 U.S. 505, 509, 111 S. Ct. 905, 909, 112 L. Ed. 2d 1112 (1991). “To relinquish its immunity, a tribe’s waiver must be ‘clear.’” *C & L Enterprises, Inc. v. Citizen Band Potawatomi Indian Tribe of Oklahoma*, 532 U.S. 411, 418, 121 S. Ct. 1589, 1594, 149 L. Ed. 2d 623 (2001). “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) (internal quotation marks omitted).

As noted above, WLCC granted to Plaintiff, as purchaser of the bond at issue, a limited waiver of WLCC’s immunity from suit:

The Corporation [WLCC] expressly waives its immunity from suit and consents to suit as provided herein and limited herein and/or to be sued in any of the following: the United States District Court for the District of South Dakota; South Dakota state district courts; and appellate courts therefrom for both jurisdictions.

(Lone Hill Decl., Ex. 10 at 4; *id.*, Ex. 11 at 46.) Pursuant to this limitation, WLCC did not expressly, unequivocally, or clearly consent to suit in South Carolina. Rather, the only interpretation of this clause in the WLCC Bond and Trust Indenture that gives meaning to all of its terms is that WLCC’s waiver of its sovereign immunity is limited to suits brought in South Dakota courts.

Accordingly, because WLCC has not clearly waived its sovereign immunity from suit in South Carolina and instead limited its consent to suit to cases brought in South Dakota, this Court lacks subject matter jurisdiction over this dispute. Therefore, the default judgment entered against WLCC is void pursuant to Rule 60(b)(4) of the Federal Rules of Civil Procedure.

B. WLCC Should Be Entitled to Relief from Judgment on Account of Its Mistake, Inadvertence, Surprise, or Excusable Neglect.

Pursuant to Rule 60(b)(1), a party can obtain relief from judgment by showing the “existence of mistake, inadvertence, surprise or excusable neglect as a ground for relief.” *Park*

Corp. v. Lexington Ins. Co., 812 F.2d 894, 896 (4th Cir. 1987). In this regard, “[a] party seeking relief from a default judgment under Rule 60(b)(1) must show . . . that he had an acceptable excuse for lapsing into default.” *Id.* (internal quotation marks omitted). In order to obtain relief from a judgment under Rule 60(b)(1), “a moving party must show that his motion is timely, that he has a meritorious defense to the action, and that the opposing party would not be unfairly prejudiced by having the judgment set aside.” *Id.* “[W]here default judgments are at issue, over the years [the Fourth Circuit] has taken an increasingly liberal view of Rule 60(b)” *See Augusta Fiberglass Coatings, Inc. v. Fodor Contracting Corp.*, 843 F.2d 808, 810 (4th Cir. 1988).

WLCC asserts that mistake, inadvertence, surprise or excusable neglect caused WLCC to fail to respond to Plaintiff’s complaint in this action. Specifically, WLCC was contacted on three occasions by a person named “Quattlebaum” that WLCC believed to be associated with the Court. (Lone Hill Decl. ¶ 27; Raynes Decl. ¶ 16.) Through these conversations, WLCC received the impression that WLCC need not do anything further to defend against the suit because WLCC was destitute. (Lone Hill Decl. ¶ 27; Raynes Decl. ¶ 16.) As a result, WLCC took no action to defend the action, believing that its participation in the three calls had satisfied the Court that WLCC was destitute and could not afford to defend the action, much less pay a judgment. (Lone Hill Decl. ¶ 27; Raynes Decl. ¶ 16.)

WLCC’s motion is timely. Pursuant to Rule 60(c)(1), a motion under Rule 60(b)(1) cannot be brought more than one year after entry of the judgment, and accordingly, the instant motion is timely. WLCC also has a meritorious defense. For the reasons stated in more detail below, the Court lacks personal and subject matter jurisdiction over WLCC. Finally, the opposing party will not be unfairly prejudiced by having the judgment set aside beyond that suffered by any party that loses a quick victory. *See Augusta Fiberglass Coatings, Inc.*, 843 F.2d at 812.

Accordingly, WLCC respectfully request that the Court grant it relief from judgment pursuant to Rule 60(b)(1).

C. The Default Judgment Should Be Set Aside Under Rule 60(b)(6).

Rule 60(b)(6) permits relief from judgment “for any other reason that justifies relief.” Fed. R. Civ. P. 60(b)(6). The Fourth Circuit has stated that “[w]hile this catchall reason includes few textual limitations, its context requires that it may be invoked in only ‘extraordinary circumstances’ when the reason for relief from judgment does not fall within the list of enumerated reasons given in Rule 60(b)(1)-(5).” *Aikens v. Ingram*, 652 F.3d 496, 500 (4th Cir. 2011). “‘However, where default judgments are at issue, over the years [the Fourth Circuit] has taken an increasingly liberal view of Rule 60(b)’” *Nat’l Credit Union Admin. Bd. v. Gray*, 1 F.3d 262, 265 (4th Cir. 1993) (quoting *Augusta Fiberglass Coatings, Inc.*, 843 F.2d at 810). “Rule 60(b)’s catch-all phrase—any other reason justifying relief—has been described as a “grand reservoir of equitable power to do justice in a particular case.” *Id.* (internal quotation marks omitted). The Fourth Circuit has required—“in addition to the explicitly stated requirements that the motion under Rule 60(b)(6) be filed on ‘just terms’ and within ‘a reasonable time’—that the party filing the motion have a meritorious claim or defense and that the opposing party not be unfairly prejudiced by having the judgment set aside.” *Aikens*, 652 F.2d at 501.

Here, relief under Rule 60(b)(6) is justified based on the following unique facts and circumstances of this default judgment against WLCC:

- the fact that WLCC was a victim of the fraud at issue in this case (Lone Hill Decl. ¶¶ 22-24, Ex. 14; Raynes Decl. ¶¶ 7-9, 11-13, 16);
- the nature and magnitude of the Galanis fraud (Lone Hill Decl. ¶¶ 22, 24, Ex. 14; Raynes Decl. ¶¶ 7-10);
- WLCC’s lack of resources to afford counsel (Lone Hill Decl. ¶ 26; Raynes Decl. ¶ 13, 15);

- the poverty faced by members of Wakpamni Lake Community (Lone Hill Decl. ¶¶ 24-26, Ex. 14; Raynes Decl. ¶¶ 13, 15);
- the important role that WLCC plays as economic development arm for the Wakpamni Lake Community (Lone Hill Decl. ¶¶ 16-17, Ex. 8 at Article V, §§ 5.1, 5.2, 5.3, 5.4, 5.6, 5.7, 5.8, 5.9, 5.10; Ex. 9; Raynes Decl. ¶ 15); and
- the impression that President Lone Hill received from Mr. Quattlebaum, who President Lone Hill believed to be Judge Quattlebaum, that WLCC need not take further action to defend this matter (Lone Hill Decl. ¶ 27; Raynes Decl. ¶ 16).

As already noted, the instant motion is timely, even under the one-year limitation imposed by Rule 60(c)(1), which by its terms does not apply to Rule 60(b)(6). Additionally, as explained in detail above, WLCC has a meritorious defense on the basis of the Court's lack of personal jurisdiction over WLCC and lack of subject matter jurisdiction over this action. Finally, as noted, the opposing party will not be unfairly prejudiced beyond that suffered by any party that loses a quick victory. *See Augusta Fiberglass Coatings, Inc.*, 843 F.2d at 812.

Therefore, WLCC respectfully requests that the Court grant it relief from judgment pursuant to Rule 60(b)(6).

III. CONCLUSION

WHEREFORE, for the foregoing reasons, Defendant Wakpamni Lake Community Corp. respectfully requests that this Court enter an order vacating the Default Judgment entered against it on January 29, 2020.

The undersigned certifies that he has consulted with opposing counsel as required by local rules prior to filing this motion in an effort to resolve this motion.

Respectfully submitted,

s/Clarence Davis

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