

IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT, LAW DIVISION

ACF LEASING, LLC, ACF SERVICES,
LLC, GENERATION CLEAN FUELS, LLC,

Plaintiffs,

v.

GREEN BAY RENEWABLE ENERGY,
LLC, ONEIDA SEVEN GENERATIONS
CORPORATION and THE ONEIDA TRIBE
OF INDIANS OF WISCONSIN,

Defendants.

Case No. 14 L 002768

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DOROTHY BROWN
CLERK OF CIRCUIT COURT
LAW DIVISION

**THE ONEIDA TRIBE OF INDIANS OF WISCONSIN'S
AND ONEIDA SEVEN GENERATIONS CORPORATION'S
MOTION TO DISMISS FOR LACK OF SUBJECT MATTER JURISDICTION**

Defendants The Oneida Tribe of Indians of Wisconsin ("Tribe") and Oneida Seven Generations Corporation ("OSGC"), by and through their attorneys, respectfully move this Court, pursuant to 735 ILCS 5/2-619(a)(1), to dismiss Plaintiffs' Complaint for lack of subject matter jurisdiction. The grounds for this motion are as follows:

1. The Tribe is a federally recognized Indian tribe. Hoeft Aff., ¶ 2. Defendant Oneida Seven Generations Corporation ("OSGC") is a tribally chartered subordinate entity created under the Tribe's Constitution to enhance the business and economic development of the Tribe. Hoeft Aff., ¶ 10 and Exh. 2.
2. Plaintiffs claim damages arising out of two contracts: a) a Master Lease Agreement, dated May 24, 2013, ("Lease") entered into between defendant Green Bay Renewable Energy, LLC ("GBRE") and ACF Leasing, LLC for the lease of three, forty-ton liquefaction machines and pretreatment equipment for purposes of processing waste plastic to

generate electricity and create oil-based fuel products at locations in Monona, Wisconsin and Cheboygan, Michigan (the “Project”); and b) an Operation and Maintenance Agreement, dated May 24, 2013, (“O&M Agreement”) entered into between GBRE and ACF Services, LLC for the operation and maintenance of the Project.

3. Neither the Tribe nor OSGC is a party to the Lease or the O&M Agreement, both of which contain integration clauses. Complaint, Exhs. A and B. Nonetheless, Plaintiffs assert that GBRE was acting as the “agent” of the Tribe and OSGC and, therefore, they are bound by the agreements and are liable (directly or vicariously) for alleged breaches. Complaint, ¶¶ 49-54 and 71-79. Likely in recognition that the lack of privity is fatal to their contract claims, Plaintiffs also pleaded various tort claims against the Tribe and OSGC. Complaint, ¶¶ 60-91.

4. This Court need not, and indeed cannot, consider the sufficiency or merits of Plaintiffs’ claims because this Court lacks subject matter jurisdiction to do so. The Tribe—a sovereign Indian Nation—and OSGC—a subordinate economic entity created by and for the benefit of the Tribe—enjoy sovereign immunity from Plaintiffs’ suit as a matter of federal common law. *Kiowa Tribe of Oklahoma v. Mfg. Technologies, Inc.*, 523 U.S. 751, 754-56 (1998); *Three Affiliated Tribes of the Ft. Berthold Reservation v. World Eng’g, P.C.*, 476 U.S. 877, 890 (1986).

5. A waiver of sovereign immunity cannot be implied but must be unequivocally expressed. *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 58 (1978); *Alzheimer & Gray v. Sioux Mfg. Corp.*, 983 F.2d 803, 812 (7th Cir. 1993) *cert. denied*, 510 U.S. 1019 (1993); *Kiowa Tribe*, 523 U.S. at 753. An Indian tribe or tribal entity may waive its sovereign immunity by contract but only if it does so with “requisite clarity.” *C & L Enterp., Inc. v Citizen Band of Potawatomi Indian Tribe of Okla.*, 532 U.S. 411, 418 (2001).

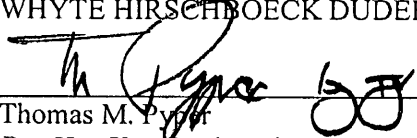
6. Here, the Tribe and OSGC did not sign the Lease or O&M Agreement and, further, there is no mention of waiver of their sovereign immunity in either agreement. Moreover, the Tribe has an ordinance prescribing that waiver of sovereign immunity by the Tribe or a Tribal entity such as OSGC must be by formal resolution or by a motion passed by the Tribe's Business Committee on behalf of the Tribe. Hoeft Aff., ¶ 23 and Exh. 5. It is indisputable that no such resolution was passed by the Tribe or OSGC, nor did the Business Committee pass such a motion. Hoeft Aff., ¶ 28; Keluche Aff., ¶ 9.

7. As a matter of federal common law, where tribal law prescribes who has the authority to waive sovereign immunity and how sovereign immunity is to be waived, absent compliance with tribal law sovereign immunity may not be, and is not, waived irrespective of any written or oral promises to the contrary by persons lacking authority to waive sovereign immunity. *Native American Distributing v. Seneca Cayuga Tobacco Co.*, 546 F.3d 1288, 1289 (10th Cir. 2008); *World Touch Gaming, Inc. v. Massena Mgmt., LLC*, 117 F. Supp. 2d 271 (N.D.N.Y. 2000); *Danka Funding Co. v. Sky City Casino*, 747 A.2d 837, 838-39 (N.J. Super. Ct. Law Div. 1999). As a matter of law, therefore, this Court lacks subject matter jurisdiction and the Tribe and OSGC must be dismissed.

For the reasons set forth herein, in the supporting memorandum filed herewith, and in the Affidavits of Patricia Ninham Hoeft and Gene Keluche, the exhibits attached thereto, and all matters of record, the Tribe and OSGC respectfully request the Court enter an order dismissing Plaintiffs' Complaint against the Tribe and OSGC for lack of subject matter jurisdiction.

Dated this 5th day of May, 2014.

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