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

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

INTRODUCTION[1]

Defendant The Oneida Tribe of Indians of Wisconsin ("Tribe") is a federally recognized Indian tribe. Hoeft Aff., ¶ 2. Defendant Oneida Seven Generations Corporation ("OSGC") is a tribally charted subordinate entity created under the Tribe's Constitution to enhance the business and economic development of the Tribe. Hoeft Aff., ¶ 10 and Exh. 2. Plaintiffs (collectively referred to as "ACF" or "Plaintiffs") claim damages arising out of two contracts: 1) 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");[2] and 2) 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. Financing for the Project hinged on a 90% guarantee by the United States Department of Interior, Bureau of Indian Affairs ("BIA") of a $21,777,777 loan. Complaint, Exh. A (Schedule 1, I-3 providing that the Lease Commencement Date would be the date on which the loan proceeds were received by GBRE). Plaintiffs allege that the Lease and O&M Agreement have been breached and the Project cannot proceed because financing failed when the Tribe, through its General Tribal Council and the Business

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[1] Facts necessary to support the motion to dismiss are contained in the Affidavits of Patricia Ninham Hoeft and Gene Keluche, and the exhibits attached thereto, which have been submitted herewith, and which are incorporated herein fully by reference.

[2] OSGC is the sole owner of Oneida Energy, Inc. ("OEI"). OEI, a Wisconsin corporation, is the sole owner of Oneida Energy Blocker Corporation ("OEB"), a Delaware corporation. OEB is the sole member and owner of GBRE, a Delaware limited liability company. GBRE was set up as a single asset LLC for purposes of developing the Project. Keluche Aff., ¶5.

Committee—the governing bodies of the Tribe—voted to dissolve OSGC in December 2013. Complaint, ¶¶ 39-41; Hoeft Aff., ¶¶ 4-8 and 22.

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, that 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.

Disregarding the numerous, significant legal deficiencies with Plaintiffs' claims for purposes of this motion, this Court need not, and indeed cannot, consider the sufficiency or merits of Plaintiffs' claims against the Tribe and OSGC because it 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 barring Plaintiffs' suit as a matter of federal common law. *Kiowa Tribe of Okla. v. Mfg. Techs., Inc.*, 523 U.S. 751, 754-56 (1998); *Three Affiliated Tribes of the Fort Berthold Reservation v. Wold Eng'g*, 476 U.S. 877, 890 (1986).

Plaintiffs, who have the burden of proving that jurisdiction exists, cannot demonstrate that either the Tribe or OSGC waived their sovereign immunity. A waiver of sovereign immunity cannot be implied but must be unequivocally expressed. *Santa Clara Pueblo v. Martinez,* 436 U.S. 49, 58 (1978); *Altheimer & Gray v. Sioux Mfg. Corp.,* 983 F.2d 803, 812 (7th Cir. 1993); *Kiowa 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 Enters, Inc. v. Citizen Band of Potawatomi Indian Tribe of Okla.,* 532 U.S. 411, 418 (2001).

Here, the Tribe and OSGC did not sign the Lease or O&M Agreement and, further, there is no mention of waiver of their sovereign immunity in either agreement. Moreover, the Tribe has an ordinance prescribing that waiver of sovereign immunity by the Tribe or a Tribal entity such as OSGC must be by formal resolution or by a motion passed by the Tribe's Business Committee on behalf of the Tribe. 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. As a matter of federal common law, where tribal law prescribes who has the authority to waive sovereign immunity and how sovereign immunity is to be waived, absent compliance with such tribal law sovereign immunity may not be, and is not, waived irrespective of any written or oral promises to the contrary by persons lacking authority to waive sovereign immunity. *Native Am. Distrib. v. Seneca Cayuga Tobacco Co*, 546 F.3d 1288, 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., LLC 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.

ARGUMENT

I. STANDARD OF REVIEW.

A complaint must be dismissed pursuant to Section 2-619(a)(1) of the Illinois Code of Civil Procedure when, as is the case here, "the court does not have jurisdiction of the subject matter of the action...." 735 ILCS 5/2-619(a)(1). "When ruling on a section 2–619 motion, the trial court may consider the pleadings, depositions, and affidavits." *Cohen v. McDonald's Corp*, 347 Ill. App. 3d 627,632 (1st Dist. 2004) "[T]ribal sovereign immunity is a threshold jurisdictional question." *Amerind Risk Mgmt. Corp. v. Malaterre*, 633 F.3d 680, 684 (8th Cir.

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. As a matter of federal common law, where tribal law prescribes who has the authority to waive sovereign immunity and how sovereign immunity is to be waived, absent compliance with such tribal law sovereign immunity may not be, and is not, waived irrespective of any written or oral promises to the contrary by persons lacking authority to waive sovereign immunity. *Native Am. Distrib. v. Seneca Cayuga Tobacco Co*, 546 F.3d 1288, 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., LLC 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.

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2011). *See also Williams v. Davet,* 345 Ill. App. 3d 595, 600 (1st Dist. 2003) (sovereign immunity deprives the court of subject matter jurisdiction); *Cohen*, 347 Ill. App. 3d at 632. "On a motion invoking sovereign immunity to dismiss for lack of subject matter jurisdiction, the plaintiff bears the burden of proving by a preponderance of evidence that jurisdiction exists." *Garcia v. Akwesasne Hous Auth.*, 268 F.3d 76, 84 (2nd Cir. 2001); *see also Amerind Risk Mgmt.*, 633 F.3d at 685-86.

II. THE TRIBE AND OSGC HAVE SOVEREIGN IMMUNITY.

Indian tribes are immune from suit in both state and federal court unless "Congress has authorized the suit or the tribe has waived its immunity." *Kiowa*, 523 U.S. at 754. Absent congressional abrogation or a clear and unequivocally expressed waiver of sovereign immunity, Indian tribes are not subject to civil suit in any state, federal, or arbitral tribunal. *C & L Enters.*, 532 U.S. at 418. The doctrine of tribal sovereign immunity is rooted in federal common law and reflects the federal Constitution's treatment of Indian tribes as governments under the Indian commerce clause. *See* U.S. Const. Art. 1, § 8. As the Supreme Court has indicated, tribal sovereign immunity "is a necessary corollary to Indian sovereignty and self-governance." *Three Affiliated Tribes*, 476 U.S. at 890.

Sovereign immunity extends to a tribe's business activities. *Kiowa Tribe*, 523 U.S.at 760. "Tribes enjoy immunity from suits on contracts, whether those contracts involve governmental or commercial activities and whether they are made on or off reservation." *Id.* "The perceived inequity of permitting the Tribe to recover from a non-Indian for civil wrongs in instances where a non-Indian allegedly may not recover against the Tribe simply must be accepted in view of the overriding federal and tribal interests in these circumstances, much in the same way that the perceived inequity of permitting the United States or [a State] to sue in cases

where they could not be sued as defendants because of their sovereign immunity also must be accepted." *Three Affiliated Tribes,* 476 U.S. at 893.

Tribal sovereign immunity also extends to subordinate economic organizations of the tribe.[3] In *Breakthrough Mgmt. Grp., Inc. v. Chukchansi Gold Casino and Resort*, 629 F.3d 1173 (10th Cir. 2010), the plaintiff and an "agent" of Chukchansi Gold Casino and Resort ("Casino") executed a license agreement for online business management training and consulting service. *Id.* at 1176-77. The tribe allegedly paid for the license. *Id.* The Chukchansi Economic Development Authority ("Authority") owned and operated the Casino. *Id.* The plaintiff alleged that the terms of the license were violated and sued the tribe, Authority, Casino and individual Casino employees. *Id.* at 1177.

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

> Tribal sovereign immunity may extend to subdivisions of a tribe, including those engaged in economic activities, provided that the relationship between the tribe and the entity is sufficiently close to properly permit the entity to share in the tribe's immunity.... As the Ninth Circuit has noted, immunity for subordinate economic entities "directly protects the sovereign Tribe's treasury, which is one of the historic purposes of sovereign immunity in general."
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> * * *

[3] *See e.g., Allen v. Gold Country Casino,* 464 F.3d 1044, 1046-47 (9th Cir. 2006) (casino organized pursuant to tribal ordinance and interstate gaming compact entitled to tribal sovereign immunity as arm of the tribe); *Native Am. Distrib. v. Seneca-Cayuga Tobacco Co.*, 546 F.3d 1288, 1292-96 (10th Cir. 2008) (tobacco manufacturer had sovereign immunity as enterprise of tribe); *Pink v. Modoc Indian Health Project Inc.*, 157 F.3d 1185 (9th Cir. 1998) (nonprofit health corporation created and controlled by Indian tribes entitled to tribal immunity); *Dillon v. Yankton Sioux Tribe Hous. Auth.*, 144 F.3d 581, 583 (8th Cir. 1998) (tribal housing authority – established by tribal council pursuant to its powers of self-government– is a tribal agency entitled to sovereign immunity); *Barker v. Menominee Nation Casino,* 897 F. Supp. 389, 393 (E.D. Wis.1995) (tribal gaming commission and casino found to be immune from suit).

> A commentator has observed that "[t]ribal governments directly control or participate in commercial activities more frequently than other [types of] governments.... [T]he tribal organization may be part of the tribal government and protected by tribal immunity, even though it may have a separate corporate structure."

Id. at 1183-84 (citations omitted).

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

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

ACF has conceded that the Tribe is a federally recognized Indian tribe. Complaint, ¶ 14; *see also* Hoeft Aff., ¶ 2. Therefore, it is indisputable that the Tribe is immune from ACF's suit. *Kiowa*, 523 U.S. at 754; *Three Affiliated Tribes*, 476 U.S. at 890-91.

With respect to OSGC, much like the Authority in *Breakthrough,* OSGC was created under, and is subject to, the laws, ordinances and jurisdiction of the Tribe. Hoeft Aff., ¶¶ 3-8, 10-12 and Exhs. 1-3. *See Breakthrough,* 629 F.3d at 1187 (factor number one). OSGC's purpose is to "promote and enhance the business and economic diversification" of the Tribe. Hoeft Aff., Exh. 3 (Charter, Art. VI(A)). Like the Authority and Casino in *Breakthrough,* OSGC promotes and funds the Tribe's self-determination through revenue generation and the funding of diversified economic development. *See Breakthrough,* 629 F.3d at 1187 (factor number two).

The Tribe has significant control over OSGC. *Breakthrough,* 629 F.3d at 1187 (factor number three). Pursuant to the bylaws of OSGC, the Business Committee acts on behalf of the Tribe in the role similar to shareholders of a corporation. Hoeft Aff., ¶ 19 and Exh. 4. OSGC's board members are appointed by the Business Committee, and at least 5 of 7 board members must be members of the Tribe. Hoeft Aff., ¶ 17 and Exh. 3 (Charter, Art VII(D)b. and e.). At all relevant times in 2012-2013, there was only one board member that was not a member of the Tribe. Hoeft Aff., ¶ 18. OSGC provides detailed reports quarterly to the Business Committee and General Tribal Council describing the development activities and financial condition of OSGC. Hoeft Aff., ¶ 20 and Exh. 3 (Charter, Art. XIII). Finally, the Business Committee retained the authority to dissolve OSGC. Hoeft Aff., ¶ 22 and Exh. 3 (Charter Art. XV(B)).

Consistent with the fourth *Breakthrough* factor, it is plain that the Tribe intended its sovereign immunity to extend to OSGC. *Breakthrough,* 629 F.3d at 1187. The Tribe conferred on OSGC "all rights, ***privileges and immunities*** existing under federal and Oneida tribal laws." Hoeft Aff., ¶ 11 and Exh. 3 (Charter, Art. I) (emphasis added). The General Tribal Council expressly reserved to the "Oneida Nation all its inherent sovereign rights as an Indian nation with regard to activities of" OSGC. Hoeft Aff., ¶ 12 and Exh. 3 (Charter, Art. IV). OSGC was

expressly precluded from waiving any "rights, privileges or immunities of the Oneida Nation." Hoeft Aff., ¶ 13 and Exh. 3 (Charter, Art. XVII(F)). OSGC is authorized to waive **its** immunity, but not the Tribe's immunity, for purposes of entering into contracts. Hoeft Aff., ¶ 14 and Exh. 3 (Charter, Art. XVII(E)). However, OSGC must strictly follow the Tribe's Sovereign Immunity Ordinance § 14 for a waiver of sovereign immunity to be valid. Hoeft Aff., ¶ 23 and Exh. 5. *See* Argument, Part II.

The financial relationship between the Tribe and OSGC also supports the conclusion that it is immune from suit. *Breakthrough,* 629 F.3d at 1187. All profits of OSGC must be used to carry out the purposes and powers of OSGC (*i.e.*, to diversify the economic portfolio of the Tribe) and all profits not so utilized "will revert to and be designated for use by" the Tribe. Hoeft Aff., ¶ 16 and Exh. 3 (Charter Art. X). OSGC manages thirteen commercial properties located in Brown and Outagamie Counties, Wisconsin. Hoeft Aff., ¶ 21. The Tribe is the owner of eleven of those properties: six properties are held in trust by the federal government for the benefit of the Tribe, and five are properties held in fee title by the Tribe. *Id.* The profits of OSGC have reverted to the Tribe on at least two occasions, and the Tribe receives $400,000-$500,000 annually in lease payments from OSGC and its subsidiaries. Hoeft Aff., ¶ 16. The Tribe uses the lease payments received from OSGC and its subsidiaries to fund its Division of Land Management ("DLM"), which manages the Tribe's residential, commercial and agricultural leases, easements and land use in general. The DLM also uses the lease payments to pay for property maintenance and to make home loans to tribal members. Hoeft Aff., ¶¶ 9 and 16.

OSGC "plainly promote[s] and fund[s] the Tribe's self-determination through revenue generation and the funding of diversified economic development." *Breakthrough,* 629 F.3d at

1195. Therefore, "extending immunity to [OSGC] 'directly protects the sovereign Tribe's treasury, which is one of the historic purposes of sovereign immunity in general...." *Id.* As a subordinate economic enterprise of the Tribe, OSGC enjoys sovereign immunity, and ACF's Complaint must be dismissed.

III. THE TRIBE AND OSGC DID NOT WAIVE THEIR SOVEREIGN IMMUNITY.

A waiver of sovereign immunity cannot be implied but must be unequivocally expressed. *Santa Clara Pueblo,* 436 U.S. at 58. In the absence of a clear waiver, suits against tribes (and tribal entities) are barred by sovereign immunity. *Altheimer,* 983 F.2d at 812; *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 Enters.,* 532 U.S. at 418.

In *Native American Distributing,* 546 F.3d at 1289, plaintiffs sued the Seneca Cayuga Tobacco Company ("SCTC"), which was an enterprise of the tribe, and three of SCTC's officers. The tribe was governed by a business committee and the business committee created the SCTC as a tribal enterprise to manufacture, distribute and sell tobacco products. *Id.* at 1290-91. SCTC entered into a contract to distribute SCTC's product and, when asked about sovereign immunity, "SCTC officials told [plaintiffs] that no waiver was necessary...." *Id.* at 1291. Plaintiffs sued for breach of the agreement, and SCTC raised sovereign immunity as a defense to the suit. *Id* at 1292-93. The court rejected the plaintiffs' argument that the tribe should be estopped from asserting sovereign immunity because of the oral representations made by SCTC's officers:

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

Id. at 1295. (Internal cites omitted.)

In *World Touch Gaming,* 117 F. Supp. 2d at 271, the seller and lessor of gaming equipment sued a tribe, its casino, and its casino management company for breach of contract. The gaming equipment company and the casino entered into agreements for the lease and purchase of pull tab machines for use in the tribe's gaming enterprise. The Vice President of the casino's management company—a state incorporated LLC that had an agreement with the tribe to act as the managing agent of the casino—signed the relevant agreements. In deciding that neither the tribe nor the casino had waived sovereign immunity, the court relied on the "unequivocal language" of the tribe's Constitution and Civil Judicial Code whereby "only the Tribal Council can waive the Tribe's sovereign immunity, and such waiver must be express." *Id* at 275. The court also held that giving the management company authority to operate the casino was not the equivalent to authorizing the management company to waive the tribe's sovereign immunity. *Id.*

The court found that "as a sophisticated distributor of gaming equipment that frequently deals with Indian gaming enterprises, [plaintiff] should have been careful to assure that either the Management Company had the express authority of the Tribe to waive sovereign immunity, or that the Tribe itself expressly waived sovereign immunity with respect to the Sales and Lease Agreements." *Id.* at 275. The court also held that, "regardless of any apparent or implicit, or even express, authority of the Management Company to bind the Casino and the Tribe to contract terms and other commercial undertakings, such authority is insufficient to waive the Tribe's sovereign immunity." *Id.* at 276 (internal citations omitted).[4]

[4] *See also Sanderlin v. Seminole Tribe of Fla.,* 243 F.3d 1282, 1288 (11th Cir. 2001) (rejecting argument that tribal Chief had actual or apparent authority to waive immunity because "[s]uch a finding would be directly contrary to the explicit provisions of the Tribal Constitution").

In *Danka Funding,* 747 A.2d at 838-39, the controller of a casino owned by a Tribe signed equipment lease contracts containing forum selection clauses. The laws of the Tribe, however, described its immunity and prohibited waiver by anyone other than the Tribal Council. *Id.* at 841. The New Jersey court held that casino controller's execution of the contract did not waive the Tribe's sovereign immunity because the controller had no legal authority to waive immunity under the Tribe's laws. *Id.* at 842-44. In reaching this conclusion, the court held the plaintiff should have availed itself of the tribal procedure for obtaining a valid waiver:

> Danka Business Services knew it was dealing with an Indian tribe and is charged with knowledge that the tribe possessed sovereign immunity. The tribe, through its laws, describes how one may obtain a legally enforceable waiver of that immunity. Neither Danka Business Services nor Danka Funding took advantage of those provisions.
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> By failing to avail themselves of the procedures for obtaining a waiver of immunity under tribal law, Danka Business Systems and Danka Funding failed to satisfy the conditions necessary for an unequivocal waiver identified in *Santa Clara Pueblo v. Martinez*, 436 U.S. at 58, 98 S.Ct. 1670.

Id. at 842-43.

There can be no dispute that Congress did not waive the Tribe's or OSGC's immunity with respect to ACF's claims, all of which are state law contract and tort claims. *Santa Clara Pueblo,* 436 U.S. at 58. Therefore, the only way for ACF to prove that the Tribe or OSGC waived sovereign immunity is to demonstrate that there has been an express, clear and unequivocal waiver in conformity with Tribal law. *Id.*

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

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

Hoeft Aff., Exh. 5. The Sovereign Immunity Ordinance, as well as the Tribe's Constitution and Bylaws and OSGC's Charter, are publicly available online. Hoeft Aff., ¶ 24. Neither the Tribe nor OSGC passed a resolution authorizing a waiver of sovereign immunity in connection with the Lease or O&M Agreement, nor did the Business Committee pass such a motion. Hoeft Aff., ¶ 28; Keluche Aff., ¶¶ 8-9.

ACF knew it was dealing with an entity, GBRE, whose indirect owners are the Tribe and OSGC, a tribal corporation. Complaint, Exh. A (Lease, Schedule 1, p. I-3 providing that Lease Commencement Date would be the date GBRE received loan proceeds with a guarantee by the United States Department of Interior, Bureau of Indian Affairs). "By failing to avail themselves of the procedures for obtaining a waiver of immunity under tribal law, ... [ACF] ... failed to satisfy the conditions necessary for an unequivocal waiver identified in *Santa Clara Pueblo v. Martinez*, 436 U.S. at 58, 98 S.Ct. 1670." *Danka Funding,* 747 A.2d at 843.

Furthermore, neither the Tribe nor OSGC are parties to the Lease or O&M Agreement and neither agreement contains any reference to the waiver of sovereign immunity by the non-parties. Complaint, Exh. A at p. 14 and Exh. B at 15. Had ACF wanted to hold the Tribe and OSGC accountable for GBRE's contractual obligations, its path was clear—require the Tribe and OSGC to be parties to the Lease and O&M Agreement and include waiver of sovereign

immunity provisions in the agreements. Both agreements have merger and integration clauses and, therefore, constitute the entire agreements between GBRE and ACF. Complaint, Exh. A at ¶ 14(i), p. 13 and Exh. B at ¶ 21, p. 14. It is contrary to well-established principles of contract law for ACF to assert that the Tribe and OSGC are bound by contracts to which they are not parties. *Baird & Warner, Inc. v. Addison Indus. Park, Inc* , 70 Ill. App. 3d 59, 70 (1st Dist. 1979) (defendant "was not a party to the contract; indeed ... it did not even sign it. Therefore, ... it was not bound by the contract and could not have been guilty of a breach of contract.... [T]he mere fact a stockholder owns 100 percent of the stock is not enough to entitle a court to pierce the corporate veil and hold the stockholder liable on a contract made by the corporation.").

Tacitly acknowledging this fatal flaw, ACF asserts that the GBRE acted as an agent for the Tribe and OSGC, implying that GBRE could and did waive the Tribe's and OSGC's sovereign immunity by entering into the Lease and O&M Agreement. Complaint, ¶ 49. However, a waiver of sovereign immunity cannot be implied; it must be unequivocally expressed. *Santa Clara Pueblo,* 436 U.S. at 58. Therefore, the contractual language waiving immunity must contain the "requisite clarity." *C & L Enters.,* 532 U.S. at 418. In *Altheimer,* 983 F.2d at 805-07, the Seventh Circuit found that a tribal entity had waived its and the tribe's sovereign immunity when the vice-president and general manager of the tribal entity signed a contract containing provisions providing that the tribal entity and the tribe would "waive all sovereign immunity in regards to all contractual disputes," "all agreements contemplated hereunder will be executed and interpreted in accordance with the laws of the State of Illinois," and all parties "agree to submit to the venue and jurisdiction of the federal and state courts located in the State of Illinois." *Id.* at 807. The choice of law and venue provisions in the Lease and O&M Agreement make no reference to the Tribe or OSGC, sovereign immunity or waiver,

and neither the Tribe nor OSGC signed them. Complaint Exh. A at ¶ 14(h), p. 13 and Exh. B at ¶ 15, p. 13.

Additionally, OSGC was granted the authority to "waive only the sovereign immunity [OSGC] possesses for the purposes of dispute resolution or contract enforcement in contracts, agreements or other similar documents for the furtherance of the Corporation's business and/or purpose." Hoeft Aff., Exh. 3 (Charter, Art. VI(E)). The General Tribal Council expressly reserved to the "Oneida Nation all its inherent sovereign rights as an Indian nation with regard to the activities of [OSGC]." Hoeft Aff., Exh. 3 (Charter, Art. V). GBRE, not the Tribe or OSGC, signed the Lease and O&M Agreement, like the management company in *Danka Funding*. 747 A.2d at 841-44. Waiver of immunity by the Tribe and OSGC is prescribed by Tribal law, like the tribe and Authority in *Danka Funding*. *Id.* GBRE has no authority under Tribal law to waive immunity of the Tribe or OSGC, like the management company in *Danka Funding*. *Id.* ACF knew that the Tribe and OSGC are indirect owners of GBRE, and it failed to demand that the Tribe and OSGC sign the Agreement, nor did it obtain sovereign immunity waivers from them.

Even if GBRE's employees made misrepresentations to ACF and those employees were deemed by this Court to be "agents" of the Tribe or OSGC, "misrepresentations of the Tribe's officials or employees cannot affect its immunity from suit." *Native Am. Distrib.*, 546 F.3d at 1295. "[R]egardless of any apparent or implicit, or even express, authority of ... [GBRE] ... to bind ... [OSGC] ... and the Tribe to contract terms and other commercial undertakings, such authority is insufficient to waive the Tribe's sovereign immunity." *World Touch Gaming,* 117 F. Supp. 2d at 276. The facts simply do not support a finding that the Tribe or OSGC waived their sovereign immunity.

CONCLUSION

For the reasons set forth herein, and as supported by the Affidavits of Patricia Ninham Hoeft and Gene Keluche, the exhibits attached thereto and all matters of record, ACF's Complaint against the Tribe and OSGC must be dismissed. As a matter of law, the Tribe and OSGC have sovereign immunity, depriving this Court of subject matter jurisdiction.

Dated this 5th day of May, 2014.

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