

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

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

COURT REPORTER
OF COOK COUNTY
LAW DIVISION

Plaintiffs,

v.

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

Case No. 14 L 002768

Defendants.

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

INTRODUCTION

Plaintiffs' claim that the Court has personal jurisdiction in this case turns on whether defendants Oneida Seven Generations Corporation ("OSGC") and The Oneida Tribe of Indians of Wisconsin ("Tribe") are bound by two fully-integrated contracts between one of their affiliates and Plaintiffs, to which OSGC and the Tribe are not parties or signatories and in which they are not even mentioned. Illinois law is clear that the Tribe and OSGC cannot be bound under such circumstances.

Tellingly, Plaintiffs' claims against OSGC and the Tribe are premised on the conclusory allegation that Defendant Green Bay Renewable Energy, LLC ("GBRE") was an agent of, and was acting on behalf of, the Tribe and OSGC when it executed the two agreements between Plaintiffs and GBRE that form the basis for this litigation: 1) a Master Lease Agreement, dated

May 24, 2013 ("Lease") entered into between GBRE and plaintiff 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");¹ 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. As detailed below, neither GBRE, nor the actual signatory to the contract, Kevin Cornelius, GBRE's president, acted as an agent for the Tribe and OSGC with respect to these agreements.² As these agreements are the sole bases for personal jurisdiction asserted by Plaintiffs (see Compl. ¶¶ 16-24, 49-50), Plaintiffs' claims against the Tribe and OSGC must be dismissed for lack of personal jurisdiction.³

ARGUMENT

I. STANDARD OF REVIEW.

"The plaintiff has the burden of proving a *prima facie* case for jurisdiction when seeking jurisdiction over a nonresident defendant." *Bolger v. Nautica Int'l, Inc.*, 369 Ill. App. 3d 947, 949 (2d Dist. 2007). "In determining whether a particular defendant is subject to the jurisdiction of this state, the court must first determine whether plaintiff[] has established a *prima facie* case

¹ 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.

² Facts necessary to support the motion to dismiss are contained in the Affidavits of Patricia Ninham Hoefft and Gene Keluche, and the exhibits attached thereto, which were filed on May 5, 2014 and are hereby incorporated fully by reference.

³ The Tribe and OSGC have filed a Motion to Dismiss for Lack of Subject Matter Jurisdiction. The Court need not, and indeed cannot, consider this personal jurisdiction motion if it lacks subject matter jurisdiction.

of jurisdiction through the untraversed pleadings, documents, and affidavits.” *Knaus v. Guidry*, 389 Ill. App. 3d 804, 813 (1st Dist. 2009). “Concomitantly, at this juncture the court must also accept as true any facts averred by the defendant which have not been contradicted by an affidavit submitted by plaintiff.” *Id.* “If jurisdictional facts remain in controversy, then the court must conduct a hearing to resolve those disputes.” *Id.* If, however, as is the case here, the documentary evidence defeats jurisdiction, then no *prima facie* case has been made and the complaint must be dismissed for lack of personal jurisdiction. *Bolger*, 369 Ill. App. 3d at 950.

II. THE COURT LACKS PERSONAL JURISDICTION OVER THE TRIBE AND OSGC.

A. General Legal Standards.

“The ability of the courts of our state to exercise jurisdiction over nonresidents is governed by the Illinois long-arm statute,” Section 2-209 of the Code of Civil Procedure, 735 ILCS 5/2-209. *Knaus*, 389 Ill. App. 3d at 813. The long-arm statute provides, in part, that “[a]ny person, whether or not a citizen or resident of this state, who in person or through an agent,” submits to personal jurisdiction in Illinois if he transacts any business in the state or makes or performs any contract or promise substantially connected with this state. 735 ILCS 5/2-209(a)(1), (a)(7). “The statute further provides that a court may ‘exercise jurisdiction on any other basis now or hereafter permitted by the Illinois Constitution and the Constitution of the United States.’” *Knaus*, 389 Ill. App. 3d at 813 (quoting 735 ILCS 5/2-209(c)). Accordingly, for an Illinois court to assert personal jurisdiction over a nonresident defendant like the Tribe and OSGC, Plaintiffs must establish that the assertion comports with the due process guarantees of both the Illinois and the United States Constitutions. *See MacNeil v. Trambert*, 401 Ill. App. 3d 1077, 1080 (2d Dist. 2010); *Knaus*, 389 Ill. App. 3d at 813.

“[T]he due process protections arising from the United States and Illinois Constitutions are not identical and must be analyzed separately.” *Knaus*, 389 Ill. App. 3d at 814. “In order for

personal jurisdiction to comport with federal due process requirements, the defendant must have certain minimum contacts with the forum state such that maintaining the suit there does not offend traditional notions of fair play and substantial justice.” *Bolger*, 369 Ill. App. 3d at 951

The minimum contacts required for personal jurisdiction must be based on 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. The purposeful availment requirement exists so that an alien defendant will not be forced to litigate in a distant or inconvenient forum solely as a result of random, fortuitous, or attenuated contacts or the unilateral act of a consumer or some other third person.

Id. (internal quotation marks omitted.) “The ‘minimum contacts’ required for personal jurisdiction differ depending on whether general jurisdiction or specific jurisdiction is being sought.” *Id.* (internal citation omitted). Neither standard is met here.

Moreover, “Illinois courts cannot assert personal jurisdiction over [a] nonresident parent corporation simply because they have personal jurisdiction over . . . [a] subsidiary.” *Morecambe Mar., Inc. v. Nat’l Bank of Greece, S.A.*, 354 Ill. App. 3d 707, 711 (1st Dist. 2004). Additionally, “the existence of common officers of both the parent and the subsidiary is not sufficient, by itself, to permit jurisdiction over the nonresident parent corporation.” *Id.* “Because a parent corporation necessarily controls, directs, and supervises its subsidiaries to a certain extent, courts must determine whether the subsidiary is conducting its own business or the parent corporation’s business.” *Id.* If the subsidiary is conducting its own business, jurisdiction over the parent company will not lie. *Id.* As detailed below, GBRE was acting on its own accord here and not as agent, or at the direction of, the Tribe or OSGC.

B. The Court Lacks General Jurisdiction Over The Tribe And OSGC.

“General jurisdiction can be found when the defendant has continuous and systematic general business contacts with the forum. Illinois limits general jurisdiction over nonresidents to

instances in which the nonresident was present and doing business in the forum.” *Bolger*, 369 Ill. App. 3d at 339 (internal citations omitted). “That standard requires a nonresident defendant to carry on business activity in Illinois, not occasionally or casually, but with a fair measure of permanence and continuity. The standard is quite high and means that in effect, the foreign corporation has taken up residence in Illinois and, therefore, may be sued on causes of action both related and unrelated to its activities in Illinois.” *Id.* (internal quotation marks omitted).

Tellingly, Plaintiffs do not claim general jurisdiction over the Tribe or OSGC and, therefore, have failed to prove a *prima facie* case for jurisdiction. *See Compl.*; *Bolger*, 369 Ill. App. 3d at 949. This is likely because they cannot. The Tribe is a federally recognized Indian tribe, which has its reservation and its principal governmental offices located in Brown and Outagamie Counties, Wisconsin. *Hoelt Aff.* ¶ 2. OSGC, a tribally-chartered corporation, which was created and chartered pursuant to the Oneida Constitution, has its principal place of business on the Tribe’s reservation. *Hoelt Aff.* ¶¶ 2 and 29; *Keluche Aff.*, ¶ 3.

The Tribe and OSGC do not own, use or possess real property or any assets in Illinois, have no business offices, addresses, post office boxes or telephone listings in Illinois, and have no employees conducting tribal business in Illinois. *Hoelt Aff.* ¶ 29. To the extent the Tribe or OSGC may have contracted with an entity located in Illinois, the contract was for the performance of services or the delivery of goods in Wisconsin. *Hoelt Aff.* ¶ 29. No basis for jurisdiction exists under 735 ILCS 5/2-209.

C. Plaintiffs Cannot Satisfy The Illinois Due Process Requirements Or The Federal Requirements For Specific Jurisdiction.

Under the federal constitution, a court may exercise “specific jurisdiction over a defendant if the suit arises out of or relates to the defendant’s contacts with the forum state.” *Bolger*, 369 Ill. App. 3d at 952. “In order to subject a particular defendant to specific personal

jurisdiction in a given forum, he must have certain minimum contacts with it such that the maintenance of the suit does not offend traditional notions of fair play and substantial justice.” *Knaus*, 389 Ill. App. 3d at 814 (internal citation omitted). “Such a defendant may be subject to jurisdiction only if his conduct and connection with the forum State with respect to the subject matter of the lawsuit, are such that ‘he should reasonably anticipate[] being haled into court there.’” *Id.* “This requirement ensures the orderly administration of the laws, and gives a degree of predictability to the legal system that allows potential defendants to structure their primary conduct with some minimum assurance as to whether that conduct will and will not render them liable to suit.” *Id.* at 815 (internal quotation marks and citation omitted). “The focus is on the defendant’s activities within the forum State, not on those of the plaintiff.” *Bolger*, 369 Ill. App. 3d at 952 (internal citation omitted).

Similarly, “[u]nder the due process guidelines of the Illinois Constitution, a court may exercise jurisdiction ‘only when it is fair, just, and reasonable to require a nonresident defendant to defend an action in Illinois, considering the quality and nature of the defendant’s acts which occur in Illinois or which affect interests located in Illinois.’” *Knaus*, 389 Ill. App. 3d at 815 (internal citation omitted). Neither the Illinois due process requirements nor the federal requirements for specific jurisdiction are met here.

There can be no question that the Tribe and OSGC’s alleged activities when viewed apart from GBRE—as they should be—do not give rise to jurisdiction. Indeed, Plaintiffs do not assert such conduct as the basis for jurisdiction. *See Compl. generally.* Their sole basis for jurisdiction against the Tribe and OSGC are the fully-integrated agreements executed by GBRE’s president

on behalf of GBRE alone, and not the Tribe and OSGC.⁴ See Compl. Exs. A-B. In fact, the Business Committee, the legislative body of the Tribe, had no knowledge of and had not seen the Lease or O&M Agreement until well after their execution. Hoeft Aff., ¶ 27. Creatively, Plaintiffs assert that jurisdiction is still proper because GBRE was acting as the “agent” for the Tribe and OSGC, and, therefore, the Tribe and OSGC are allegedly bound by the agreements and are liable (directly or vicariously) for GBRE’s alleged breaches. Compl. ¶¶ 49-54, 71-79. This claim should be rejected. See Part II.D., *infra*. There is simply no *factual* basis in the Complaint—or otherwise—for concluding that GBRE was acting as an agent for the Tribe and/or and/or OSGC when its president executed the agreements or that the Tribe and/or OSGC even authorized the agreements. They did not. Hoeft Aff., ¶¶ 27-29.

D. GBRE Did Not Act As The Tribe Or OSGC’s Agent With Respect To The Agreements.

The Tribe and OSGC are not corporate entities incorporated under any state law. The Tribe is a sovereign Indian nation, and the OSGC is a tribally chartered entity of the Tribe. Therefore, general principles of corporate law and agency law are generally inapplicable. Instead, federal common law generally governs. *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); *Native Am. Distrib. v. Seneca-Cayuga Tobacco Co.*, 546 F.3d 1288, 1295 (10th Cir. 2008) (“misrepresentations of the Tribe’s officials or employees cannot affect

⁴ Both agreements have merger and integration clauses and, therefore, constitute the entire agreements between GBRE and ACF. Compl., Ex. A at ¶ 14(i), p. 13 & Ex. 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.”).

its immunity from suit"); *World Touch Gaming, Inc. v. Massena Mgmt., LLC*, 117 F. Supp. 2d 271, 276 (N.D.N.Y. 2000) ("[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.") *See also* 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, pp. 4-14.

Even if state agency law were applicable, however, "[i]t is well settled that one dealing with an agent . . . has the burden of proving the agent's authority to bind the principal to the particular contract on which he rests his claim." *Sacks v. Helene Curtis Indus.*, 340 Ill. App. 76, 86 (1st Dist. 1950). "[A] corporate subsidiary may act as the agent of its parent corporation if the elements of agency are proved." *Well, Freiburg & Thomas, P.C. v. Sara Lee Corp.*, 218 Ill. App. 3d 383, 390 (1st Dist. 1991). "To state a cause of action based on an agency relationship, a plaintiff must allege facts showing that one person acted for another 'under circumstances that imply knowledge on the part of the alleged principal of such acts.' A principal is liable for those acts of its agent which the agent has actual or apparent authority to perform." *Bank of Waukegan v. Epilepsy Found. of Am.*, 163 Ill. App. 3d 901, 906 (2d Dist. 1987) (internal citation omitted).

"A complaint relying on agency must plead facts which, if proved, could establish the existence of an agency relationship. It is insufficient to merely plead the legal conclusion of agency." *Connick v. Suzuki Motor Co., Ltd.*, 174 Ill. 2d 482, 497-98 (1996). To state that an individual is an "agent", without more, is a mere legal conclusion that is insufficient to plead agency because there are no facts to support a finding that the individual had actual or apparent authority to act on behalf of the purported principal. *Id.* Here, Plaintiffs' *factual* allegations do not support the conclusion that GBRE was authorized to act on behalf of the Tribe or OSGC with

respect to the agreements. Plaintiffs have not asserted that the Tribe or OSGC expressly authorized GBRE to bind them to the agreements. They cannot with any degree of candor. As detailed in the Tribe and OSGC's Motion to Dismiss for Lack of Subject Matter Jurisdiction, the Tribe's Business Committee—which is delegated governing authority of the Tribe—had no knowledge of, and did not even see the agreements, until well after they were executed. Hoefft Aff. ¶ 27.

Plaintiffs have also failed to allege—and indeed cannot show—that GBRE's relationship with the Tribe and/or OSGC gave GBRE implied authority to bind the Tribe and/or OSGC to the agreements. It did not. While the three entities are affiliated, that relationship does not alone, as a matter of law, give rise to an agent-principal relationship; rather, "the elements of agency [must be] proved." *Weil, Freiburg & Thomas, P.C.*, 218 Ill. App. 3d at 390; *see supra* 3-4 (interplay between parent company and subsidiary jurisdiction). The Tribe and OSGC did not sign the agreement or authorize GBRE to act on their behalf. Hoefft Aff., ¶¶ 27-29; Keluche Aff., ¶ 9.

In light of the facts above, there is simply no basis for concluding that GBRE was an agent of the Tribe or OSGC when it executed the agreements. Absent such a conclusion, the Tribe and OSGC are not bound by the agreements. As that is the sole basis for personal jurisdiction asserted by Plaintiffs, and the Tribe and OSGC's activities when viewed apart from GBRE do not satisfy the Illinois and federal due process requirements for jurisdiction, Plaintiffs' claims must be dismissed as against the Tribe and OSGC for lack of personal jurisdiction.

CONCLUSION

For the reasons set forth herein, and as supported by the Affidavits of Patricia Ninham Hoefft and Gene Keluche, the exhibits attached thereto and all matters of record, Plaintiffs' 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. Moreover, the Court lacks personal jurisdiction over the Tribe and OSGC, who are not bound by the agreements at issue, the sole basis asserted for this Court's jurisdiction.

Dated this 11th day of July, 2014.



**James H. Vogts, Esq.
Thomas J. Verticchio, Esq.
Swanson, Martin & Bell, LLP
330 North Wabash Avenue, Suite 3300
Chicago, Illinois 60611
(312) 321-9100
(312) 321-0990 – Fax
Firm No. 29558**

**WHYTE HIRSCHBOECK DUDEK S.C.
Thomas M. Pyper
Pro Hac Vice Registration No. 6315077
Cynthia L. Buchko
Pro Hac Vice Registration No. 6315078
P.O. Box 1379
Madison, Wisconsin 53701-1379
Telephone: 608-255-4440
Fax: 608-258-7138
Email: tpyper@whdlaw.com
Email: cbuchko@whdlaw.com**

**Attorneys for Defendants The Oneida Tribe
of Indians of Wisconsin and Oneida Seven
Generations Corporation**

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