

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

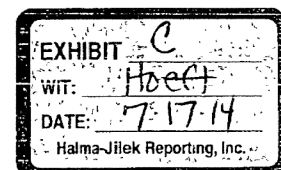
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DOROTHY BROWN
CLERK OF CIRCUIT COURT
LAW DIVISION

**AFFIDAVIT OF PATRICIA NINHAM HOEFT
IN SUPPORT OF MOTION TO DISMISS**

STATE OF WISCONSIN)
) ss.
COUNTY OF OUTAGAMIE)

Patricia Ninham Hoeft states under oath and on personal knowledge:

1. I am the Secretary of the Business Committee of the Oneida Tribe of Indians of Wisconsin ("Tribe"). I have held this position since July 2005.
2. The Tribe is the political successor in interest to the Oneida Tribe, first recognized by the United States in the 1794 Treaty of Canandaigua, 7 Stat. 44. The Tribe's Reservation was established by the Treaty with the Oneida, dated February 3, 1838, 7 Stat. 566. The Tribe's reservation and principal governmental offices are located in Brown and Outagamie Counties, Wisconsin. The Tribe is listed in the Federal Register, 79 Fed. Reg. 19, 4751 (Jan. 29, 2014), as a federally recognized Indian tribe.



3. In 1934, Congress enacted the Indian Reorganization Act, U.S.C. § 461 *et seq.*, 48 Stat. 984 ("IRA"), which provided Indian tribes the ability to organize under federal law for the tribe's common welfare and adopt a constitution and by-laws subject to approval by the Secretary of the Interior. Pursuant to the IRA, the Tribe adopted its Constitution and By-Laws "to reestablish our tribal organization, to conserve and develop our common resources and to promote the welfare of ourselves and our descendants...." The Secretary of the Interior approved the Tribe's Constitution and By-Laws on December 21, 1936. Attached hereto as Exhibit 1 is a true and correct copy of the Tribe's Constitution and By-Laws.

4. Pursuant to Article III, Sec. 1 of the Constitution, the governing body of the Tribe is the General Tribal Council, which is comprised of all qualified voters of the Tribe. *See* Exh. 1.

5. Article IV, Sec. 1(e) of the Oneida Constitution provides that the General Tribal Council has the power "[t]o manage all economic affairs and enterprises of the Oneida Nation of Wisconsin" *See* Exh. 1.

6. Article IV, Sec. 1(h) of the Constitution provides that the General Tribal Council has the power "[t]o *charter subordinate organizations for economic purposes* and to delegate to such organizations, or to any subordinate boards or officials of the tribe, any of the foregoing powers, reserving the right to review any action taken by virtue of such delegated power." *See* Exh. 1 (emphasis added).

7. Pursuant to Article III, Sec. 3 of the Constitution, the General Tribal Council shall elect a Business Committee, comprised of the following elected officials from the General Tribal Council: (1) a chair; (2) a vice-chair; (3) a secretary; (4) a treasurer; and (5) five council members. *See* Exh. 1.

8. The Business Committee has been delegated the Article IV, Sec. 1 powers of the General Tribal Council, including the power to create subordinate organizations for economic purposes described in paragraph no. 6, *supra*.

9. The Tribe provides healthcare, wellness, education, elder services, child services, energy assistance, food assistance and a variety of other services to its members. Recognizing that relying on one or two sources of income to support the governmental services of the Tribe is potentially problematic, over the last 25 years the Tribe has been diversifying its investments to create additional sources of income.

10. Consistent with the Tribe's goal of investment diversification, the Oneida Seven Generations Corporation ("OSGC") was created and chartered in accordance with Article IV, Sec. 1(h) of the Constitution as a subordinate organization of the Oneida Tribe by Resolution # 12-4-96-B, a true and correct copy of which is attached hereto as Exhibit 2. OSGC was created to "enhance the business and economic development of the Oneida Tribe." Exh. 2.

11. Attached hereto as Exhibit 3 is a true and correct copy of the Corporate Charter of the OSGC ("Charter"). The Tribe "confer[red] on [OSGC] all rights, privileges *and immunities* existing under federal and Oneida tribal laws." Exh. 3, Charter, Art. I (emphasis added).

12. OSGC was "created under, and is subject to the laws, ordinances and jurisdiction of the Oneida Nation The General Tribal Council expressly reserve[d] to the Oneida Nation all its inherent rights as an Indian nation with regard to the activities of [OSGC]." Exh. 3, Charter, Article V.

13. OSGC is expressly precluded from waiving any "rights, privileges or immunities of the Oneida Nation." Exh. 3, Charter, Art. XVII(F).

14. Article VI of the Charter, entitled Purpose and Powers, provides in part:

The purpose of this Corporation is to engage in any lawful activity within the purposes for which the corporation may be organized under the Oneida Constitution and Oneida tribal laws, ordinances and jurisdiction. The powers of the Corporation are;

(A) To promote and enhance the business and economic diversification directly or as a holding company for real estate and other business ventures of the Nation.

* * *

(C) To buy, sell, mortgage, pledge, lease, hold, transfer and assign all or any part of the Corporation's property and assets, PROVIDED, that title to all trust or restricted real or personal property of the Oneida Nation must be and remain in its trust or restricted status for the Oneida Nation which includes the necessary approval of the Oneida Land Commission or its successor.

* * *

(E) To waive only the sovereign immunity the Corporation 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.

* * *

(J) To sue and be sued in its Corporate name as herein specifically provided to the extent allowed by Oneida tribal, state or federal law upon any contract, claim or obligation of the Corporation arising out of the accomplishment of its purposes. Recovery against the Corporation is limited to the assets of the Corporation. The Oneida Nation will not be liable and its property or assets will not be expended for the debts or obligations of the Corporation.

* * *

(O) To set up separate corporate business systems and processes; i.e. LLC's and LLP's, etc.

Exh. 3, Charter, Art. VI.

15. The principal place of business of OSGC “must be on the Oneida Indian reservation.” Exh. 3, Charter, Art. IV. In accordance with its Charter, OSGC’s business offices are located on the Tribe’s Reservation.

16. All profits of OSGC must be used to carry out the purposes of OSGC and all profits not so utilized “will revert to and be designated for use by” the Tribe. Exh. 3, Charter, Article X. Profits of OSGC reverted to the Tribe in 2004 and 2006, and the Tribe receives approximately \$400,000 - \$500,000 annually in lease revenues from OSGC and its subsidiaries. *See* paragraph 21, *infra*. The lease payments are used to fund the Tribe’s 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. On occasion, profits of OSGC were not sufficient for it to meet its purpose of enhancing the business and economic development of the Tribe, and the Tribe appropriated funds to assist OSGC. Additionally, in 2004-2005 the Tribe invested \$4,000,000 in the OSGC business venture referred to as Nature’s Way Tissue Paper.

17. OSGC’s board members are appointed by the Business Committee. Exh. 3, Charter, Article VII(D)b. and e., p. 4. The OSGC board consists of seven members, and board members “shall be members of the Oneida Tribe ... age 21 or older,” although two board members may be non-members of the Oneida Tribe. Charter, Art. VII(D).

18. The OSGC board members and officers in 2012 and 2013 were as follows:

William Cornelius—Board President and member of the
Tribe

Mike Metoxen—Board Treasurer, Board Secretary and
member of the Tribe

Nathan King—Board Member and member of the Tribe

Tsyosha aht C Delgado—Board Member and member of
the Tribe

Shannon Hill—Board Member and member of the Tribe

Paul Linzmeyer—Board Member and only Board Member
not a member of the Tribe

Todd VanDen Heuvel—Board Member (term beginning
June 2013) and member of the Tribe

Owen Summers—Board Member (term beginning June
2013) and member of the Tribe

Kevin Cornelius—Chief Executive Officer (resigned in
August 2013) and member of the Tribe

Bruce King—Chief Financial Officer and member of the
Tribe

19. Attached hereto as Exhibit 4 is a true and correct copy of the Bylaws of OSGC.
Pursuant to the Bylaws of OSGC, the Business Committee acts on behalf of the Oneida Nation in
the role similar to shareholders of a corporation. Exh. 4, Bylaws, Art. 2.

20. OSGC must file detailed reports annually with the Business Committee and the
General Tribal Council describing the development activities and financial condition of OSGC
and disclosing relationships between OSGC, board members and key management to other
business entities. Exh. 3, Charter, Art. XIII. While the report *must* be filed annually, OSGC
does so quarterly.

21. As a result of OSGC's reporting to the Business Committee, I know that OSGC
manages thirteen commercial properties located in Brown and Outagamie Counties, Wisconsin.

Of those thirteen properties, 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 properties are held in fee title by the Tribe. One of the properties managed by OSGC is owned by North Packerland, LLC. OSGC is the owner of only one of the thirteen commercial properties that it manages.

22. The Business Committee has the authority to dissolve OSGC. Exh. 3, Charter Art. XV(B). On December 15, 2013, the General Tribal Council voted to dissolve OSGC. On December 24, 2013, the Business Committee adopted a resolution dissolving OSGC in accordance with OSGC Charter, Art. XV(B).

23. In 2004, the Tribe, by the Business Committee, adopted a Sovereign Immunity Ordinance. The Ordinance prescribes who has the authority to waive immunity and the process for waiver:

14.6 Waiver of Sovereign Immunity

14.6-1. All waivers of sovereign immunity shall be made in accordance with this law.

14.6-2. *Waiver by Resolution.* The sovereign immunity of the Tribe or a Tribal Entity may be waived:

- (a) by resolution of the General Tribal Council;
- (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.

Ordinance § 14.6. "Tribal Entity" is defined as "a corporation or other organization which is wholly owned by the Oneida Tribe of Indians of Wisconsin, is operated for governmental or

commercial purposes, and may through its charter or other document by which it is organized be delegated the authority to waive sovereign immunity.” Ordinance § 14.3-1(d). Attached hereto as Exhibit 5 is a true and correct copy of the Sovereign Immunity Ordinance § 14.

24. The Tribe’s Constitution and Bylaws, OSGC’s Charter, the Sovereign Immunity Ordinance § 14.6 and the Tribe’s other ordinances and resolutions are publicly available online and have been publicly available online for several years.

25. I am aware that Green Bay Renewable Energy, LLC (“GBRE”) and ACF Leasing, LLC executed: a) a Master Lease Agreement, dated May 24, 2013, (“Lease”) 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) a First Amendment to Schedule 1 of the Lease, dated June 10, 2013.

26. I am also aware that GBRE and ACF Services, LLC executed: a) an Operation and Maintenance Agreement, dated May 24, 2013, (“O&M Agreement”) for the operation and maintenance of the Project; and b) a First Amendment to the O&M Agreement, dated June 10, 2013.

27. Neither the Tribe nor OSGC are parties to the Lease or the O&M Agreement. In fact, the Business Committee had no knowledge regarding, and had never seen, the Lease or the O&M Agreement until after the Business Committee passed a resolution dissolving OSGC on December 24, 2013.

28. Neither the General Tribal Council nor the Business Committee passed a resolution authorizing waiver of the Tribe’s or OSGC’s sovereign immunity in connection with

the Lease or O&M Agreement, nor did the Business Committee pass such a motion, as is required by the Sovereign Immunity Ordinance § 14.6 for a valid waiver of sovereign immunity.

29. The Tribe and OSGC do not own, use or possess real property or any asset in Illinois, have no business offices, address, post office box or telephone listing in Illinois, and have no employees conducting tribal business in Illinois. To the extent that the Tribe or OSGC may have contracted with an entity located in Illinois, the contract was for the performance of services or delivery of goods in Wisconsin. No member of the Business Committee nor anyone authorized to act on behalf of the Tribe visited Illinois in connection with an ACF entity, the Project, Lease or the O&M Agreement.

Dated this 30th day of April, 2014.

Patricia Ninham Hoeft
Patricia Ninham Hoeft

Sworn to and subscribed before me
this 30th day of April, 2014

Jeri L. Bauman
Notary Public, State of 8-27-2017

