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

ACF LEASING, LLC; ACF SERVICES, LLC; and GENERATION CLEAN FUELS, LLC,	)	
Plaintiffs,	)	
v.	)	**Case No. 14 L 2768**
GREEN BAY RENEWABLE ENERGY, LLC; ONEIDA SEVEN GENERATIONS CORPORATION; and THE ONEIDA TRIBE OF INDIANS OF WISCONSIN,	)	
Defendants.	)	

NOTICE OF FILING

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PLEASE TAKE NOTICE that on August 28, 2014, the undersigned caused to be filed with the Clerk of the Circuit Court of Cook County, Illinois, County Department, Law Division, the attached **The Oneida Tribe of Indians of Wisconsin's and Oneida Seven Generations Corporation's Reply Brief in Support of Motion to Dismiss for Lack of Personal Jurisdiction**, a copy of which is hereby served upon you.

ONEIDA SEVEN GENERATIONS
CORPORATION; and THE ONEIDA
TRIBE OF INDIANS OF WISCONSIN

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

Plaintiffs,

v.

Case No. 14 L 002768

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

Defendants.

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

I. ACF HAS NOT MADE A *PRIMA FACIE* CASE FOR PERSONAL JURISDICTION UNDER 735 ILCS 5/2–209.

In its Complaint, ACF[1] failed to plead facts demonstrating personal jurisdiction over the Tribe, a sovereign Indian nation, or its subordinate economic entity, OSGC, and identify the applicable sections of 735 ILCS 5/2–209 upon which ACF claimed personal jurisdiction. In response to a motion to dismiss, ACF submitted the affidavits of Messrs. Decator and Galich, which are disputed, *see* Affidavits of Messrs. Cornelius, King and Kavan submitted herewith. And for the first time, ACF asserts specific (not general) personal jurisdiction over the Tribe and OSGC under 735 ILCS 5/2–209(a)(1), transacting business, 2-209(a)(2), tortious act, and 2-209(a)(7), making or performing a contract. As set forth below, ACF's arguments fail as matter of law.

A. ACF Has Not Demonstrated That The Tribe And OSGC Transacted Business In Illinois.

ACF claims personal jurisdiction over the Tribe and OSGC based on the conduct of Messrs. Cornelius and King. ACF Br. p. 7. ACF claims that because Messrs. Cornelius and King were officers of both OSGC and GBRE, used OSGC email addresses and otherwise did not keep corporate formalities between GBRE and OSGC, personal jurisdiction extends to both OSGC and the Tribe. *Id.*; *see also* Part II.B., *infra*.

ACF's reliance on corporate parent/subsidiary case law is misplaced. The Tribe and OSGC are not corporations; they are governmental entities with sovereign immunity. *See* Reply Brief in Support of Motion to Dismiss for Lack of Subject Matter Jurisdiction ("Subject Matter

[1] The shorthand references used in 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 will be used herein.

Juris. Reply Br.").[2] None of the case law relied on by ACF involved governmental entities, and ACF has not established that a sovereign such as the Tribe or OSGC, are "persons" for purposes of 735 ILCS 5/2–209.

Even if a traditional corporate parent/subsidiary relationship existed, to conclude that the actions of a subsidiary, GBRE, are those of the parent, the Tribe and OSGC, for purposes of 735 ILCS 5/2–209(a)(1), ACF must demonstrate that "'a subsidiary corporation is acting as the parent corporation's Illinois agent in the sense of conducting the parent's business rather than its own.'" *Old Orchard Urban Ltd. P'ship v. Harry Rosen, Inc.*, 389 Ill. App. 3d 58, 66 (1st Dist 2009) (quoting *Alderson v. Southern Co.*, 321 Ill. App. 3d 832, 854, (1st Dist. 2001)). "[B]ecause parents of wholly owned subsidiary corporations necessarily control and direct the activities of the subsidiaries to some extent, Illinois courts will not permit the exercise of personal jurisdiction over a subsidiary's parent simply because it is the parent." *Id.* "[J]urisdiction does not turn on whether the distinction of separate corporate identities has been blurred," and "[t]he existence of common officers of both the parent and the subsidiary, without more, is also not sufficient to permit such an exercise of personal jurisdiction." *Id.* at 66-67 (citations omitted). "The determinative question is whether the parent corporation is simply attempting to shield itself from lawsuits by conducting its own business through the legal fiction of 'separate' subsidiaries and distribution networks." *Id.* at 68.

ACF has not alleged any facts supporting an inference that GBRE was created to conduct the business of the Tribe and/or OSGC rather than its own such that GBRE was a mere legal

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[2] The same sovereign immunity principles that deprive this Court of subject matter jurisdiction, also deprive this Court of personal jurisdiction. Sovereign Indian tribes are not "persons" subject to personal jurisdiction under 735 ILCS 5/2–209. The Tribe and OSGC enjoy immunity from suit and this immunity deprives the Court of all jurisdiction. *See Kiowa Tribe of Okla. v. Mfg. Techs., Inc.*, 523 U.S. 751, 754-760 (1998).

fiction. The Tribe is a sovereign Indian nation providing the full panoply of governmental services to its tribal members, including healthcare, wellness, education, elder services, child services, energy assistance, food assistance and a variety of other services. Hoeft Aff. ¶¶ 1-9. OSGC is a tribally-charted entity whose purpose is to diversify the income of the Tribe. OSGC created a variety of business entities and operates thirteen commercial properties. Hoeft Aff. ¶ 10-21. OSGC does not directly own GBRE. Instead, OSGC created, and is the sole owner of OEI, a Wisconsin corporation. Keluche Aff. ¶ 5. OEI created and is the 100% owner of OEB, a Delaware Corporation. *Id.* OEB created and is the sole member and 100% owner of GBRE, a Delaware limited liability company. *Id.* GBRE was set up as a single asset LLC for purposes of development of an energy project. *Id.*

The Tribe and OSGC are not in the energy development business. The Tribe is a governmental entity that must meet the needs of its tribal members, and OSGC is an economic development agency. The Tribe and OSGC operate much like the State of Illinois and the Illinois Department of Commerce and Economic Opportunity. GBRE, in contrast, is a Delaware limited liability company that was created for the sole purpose of the development of an energy project. The mere fact that GBRE and OSGC had overlapping officers in Messrs. Cornelius and King and may not have maintained rigid corporate formalities is not sufficient to exercise personal jurisdiction over the Tribe and OSGC under 735 ILCS 5/2–209(a)(1). *Old Orchard*, 389 Ill. App. 3d at 66-67. There is no evidence to suggest that GBRE existed solely to do the business of the Tribe and OSGC in Illinois. *Id.* As a result, personal jurisdiction under 735 ILCS 5/2–209(a)(1) is lacking as a matter of law.

B. The Tribe and OSGC Did Not Commit A Tortious Act In Illinois And Economic Injury, Without More, Is Insufficient to Establish Personal Jurisdiction Under 735 ILCS 5/2–209(a)(2).

ACF claims that the Tribe's decision to dissolve OSGC tortuously interfered with the Master Lease and O&M Agreement (collectively the "Agreements") between ACF and GBRE because financing for the Project fell through after the vote of dissolution. ACF Br. p. 8. Notably, ACF does not assert, nor could it, that any of the alleged tortious acts occurred in Illinois because the dissolution of OSGC occurred in Wisconsin, where the Tribe and OSGC are located. Instead, ACF asserts that the tortious conduct that occurred outside of Illinois caused injury in Illinois, citing to its Complaint, ¶¶ 80-91. Nowhere in the Complaint does ACF allege an injury in Illinois. While ACF has an office in Evanston, Illinois, ACF is a Delaware entity. Compl., Exs. A at p. 1 and B at p. 1. The Project was to be constructed and operated in Monona, Wisconsin and Cheboygan, Michigan. Compl., Ex. A at I-1. The Complaint and the affidavits do not allege where the alleged injury occurred.

Even if the Court were to assume that ACF had pled that it suffered an economic injury in Illinois where it has an office, "'injurious consequence' in Illinois [is] not the same as a tortious act in Illinois." *W. Va. Laborers Pension Trust Fund v. Caspersen*, 357 Ill. App. 3d 673, 678 (1st Dist. 2005) (citation omitted). "[W]here the injury is economic rather than physical or emotional, the plaintiff needs to show more than just that the 'harm [was] felt' in Illinois." *Id.* (citation omitted). "When there is an economic injury, the plaintiff must show 'an intent to affect an Illinois interest.'" *Id.* Nothing in the Complaint or the ACF affidavits supports an inference that OSGC or the Tribe intended to affect an Illinois interest when the Tribe's members directed the Business Committee to dissolve OSGC. Indeed, the Tribe's Business Committee was unaware of the existence of the Agreements until well after the vote to dissolve OSGC, and the OSGC board had no role in the dissolution, which is being carried out by the

Business Committee at the direction of the vote of the tribal members. Hoeft Aff. ¶ 27. Having failed to set forth any facts to support a finding the Tribe and OSGC intended to affect an Illinois interest, ACF has not made a *prima facie* case for personal jurisdiction under 735 ILCS 5/2–209(a)(2).

C. The Tribe And OSGC Did Not Make Or Perform Any Contract Or Promise In Illinois.

Finally, ACF claims personal jurisdiction over the Tribe and OSGC under 735 ILCS 5/2–209(a)(7). ACF argues that the wiring of $50,000 from an OSGC account to ACF "clearly confers" personal jurisdiction over both the Tribe and OSGC. ACF Br. pp. 8-9. According to ACF, the $50,000 wire transfer resulted from a Commitment Letter entered into between Equity Asset Finance, LLC and GBRE for financing for the Project. Decator Aff. ¶ 5 and Ex. B. The Commitment Letter and wire transfer from an OSGC account are the sole facts relied on by ACF to established jurisdiction under 735 ILCS 5/2–209(a)(7). *See* ACF Br. pp. 8-9.

Equity Asset Finance, LLC is not a party to this lawsuit and ultimately did not provide the financing for the Project. There is no claim that the Tribe, OSGC or GBRE breached the Commitment Letter. ACF cites to no case finding personal jurisdiction under 735 ILCS 5/2–209(a)(7) where the contract that forms the basis for jurisdiction is not the contract upon which the claims are based. All of ACF's claims derive from the Agreements, not the Commitment Letter. The Agreements contain integration clauses, making the prior Commitment Letter moot, and the Tribe and OSGC are not parties to the Agreements. While Mr. Cornelius held a position with OSGC, the Agreements are signed by Mr. Cornelius in his capacity as an officer of GBRE only. Compl., Exs. A and B. The fact that an upstream owner may have provided some initial funding for a down-steam subsidiary to start up a project is not sufficient to establish personal

jurisdiction. *See Old Orchard*, 389 Ill. App. 3d at 61, 65. ACF's attempt to obtain personal jurisdiction over the Tribe and OSG under 735 ILCS 5/2–209(a)(7) fails as a matter of law.

II. ACF HAS NOT MADE A *PRIME FACIE* CASE FOR PERSONAL JURISDICTION UNDER ILLINOIS OR FEDERAL DUE PROCESS CRITERIA.

ACF makes two primary arguments for the exercise of personal jurisdiction over the Tribe and OSGC under 735 ILCS 5/2–209(c), which allows for personal jurisdiction on any basis "'permitted by the Illinois Constitution and the Constitution of the United States.'" *Knaus v. Guidry*, 389 Ill. App. 3d 804, 813 (1st Dist. 2009). ACF asserts that personal jurisdiction may be found upon piercing the corporate veil or by imputing the conduct of Messrs. Cornelius and King to OSGC and the Tribe As set forth below, neither theory is applicable here.

A. Piercing The Corporate Veil Is Inapplicable to Sovereigns.

As set forth in the Tribe's and OSGC's Reply Brief in Support of Motion to Dismiss for Lack of Subject Matter Jurisdiction, application of traditional piercing the corporate veil/alter ego case law is inapplicable in the context of a sovereign, such as the Tribe and OSCG. *See* Subject Matter Juris. Reply Br. pp. 5-8. Even if ACF's alter ego or piercing the corporate theories were applicable, ACF has not made out a prima *facie case.*

Under Illinois law,[3] piercing the corporate veil for purposes of establishing personal jurisdiction requires a court to consider a "unity of interest factors," such as under capitalization, insolvency, whether the dominant shareholder siphoned corporate funds and whether corporate formalities were kept. *See Old Orchard,* 389 Ill. App. 3d at 70. "Importantly, the use of common officers and directors, or the sharing of office space, without more, does not render one

[3] Illinois law, rather than the law of the state of incorporation, applies for piercing the corporate veil to establish personal jurisdiction. *Old Orchard*, 389 Ill. App. 3d at 69. However, whether Delaware law or Illinois law applies for either subject matter jurisdiction or personal jurisdiction is irrelevant because both states require consideration of a list of factors and the additional requirement of fraud. *See* Subject Matter Juris. Reply Br. pp. 5-8 (Delaware law) and discussion in the text, *infra* (Illinois law).

corporation liable for the obligations of another." *Id.* (citing *Pederson v. Paragon Pool Enters.*, 214 Ill. App. 3d 815, 820 (1st Dist. 1991). Just like Delaware law, Illinois law also requires the plaintiff to establish fraud: "Illinois will disregard this legal separation and pierce the corporate veil only where the subsidiary is so controlled, and its affairs so conducted by a parent that observance of the fiction of separate identities would sanction a fraud or promote injustice." *Id.*

"[I]n breach of contract cases, courts should apply even more stringent standards to determine when to pierce the corporate veil than they would in tort cases. 'This is because the party seeking relief in a contract case is presumed to have voluntarily and knowingly entered into an agreement with a corporate entity, and is expected to suffer the consequences of the limited liability associated with the corporate business form.'" *Tower Investors, LLC v. 111 East Chestnut Consultants, Inc.*, 371 Ill. App. 3d 1019, 1034 (1st Dist. 2007) (quoting 1 W. Fletcher, Cyclopedia of Corporations § 41.85, at 692 (1999)).

ACF attempts to make much of the fact that Messrs. Cornelius and King were officers of both OSGC and GBRE, used the same address as OSGC and used their OSGC email to communicate with them. Even if failure to strictly adhere to corporate formalities in the LLC context were an appropriate alter ego factor to consider, which it is not,[4] that fact alone is insufficient to pierce the corporate veil. *Old Orchard,* 389 Ill. App. 3d at 70. ACF must also establish fraud. ACF presented no facts to support a finding that GBRE existed as a vehicle for fraud. *Id.*

Additionally, the facts demonstrate that ACF was fully aware of the ownership structure of GBRE. The Lease contemplates a future transaction if the Project became effective in which

[4] Piercing the corporate veil factors must be analyzed differently for LLCs, and, specifically, operational formalities should not be emphasized given the informal nature of LLCs. *Kaycee Land & Livestock v. Flahive*, 46 P.3d 323, 328 (Wyo. 2002); Stephen M. Bainbridge, *Abolishing LLC Veil Piercing,* 2005 U. Ill. L. Rev. 77, 88-89 (2005).

ACF would give a "Royalty Loan" to OEI. Compl., Ex. A at I-5. OEI is identified as the "indirect parent" of GBRE, OEB is identified as the parent of GBRE, and the loan is conditioned on ACF obtaining both an assignment from OSGC and a pledge of 49% of OEB's ownership interest in GBRE. *Id.* Thus, to obtain financial obligations from OSGC and OEB for repayment of the Royalty Loan, ACF knew that subsequent agreements involving those parties would have to be executed. ACF even agreed to take a 49% membership interest in GBRE as collateral for its loan, which is conclusive proof that ACF was aware that GBRE was responsible for the Project and existing for a purpose other than fraud. Had ACF wanted to hold OSGC and the Tribe financially responsible for the Project or for performance of the Agreements, it should have required that they be parties to the Agreements or provide guarantees. It did not and ACF should be precluded from using parol evidence to refute the unambiguous Agreements in an effort to extend personal jurisdiction to sovereign entities that are not parties to the Agreement. *K's Merch. Mart, Inc. v. Northgate Ltd. P'ship*, 359 Ill. App. 3d 1137, 1143 (4th Dist. 2005). ACF knew of the existence of the ownership structure of GBRE and knew or should have known it would have no recourse against the Tribe or OSGC for the Agreements or the Project. *Old Orchard,* 389 Ill. App. 3d at 71-72; *Tower Investors*, 371 Ill. App. 3d at 1034. Personal jurisdiction based on piercing the corporate veil has not been established by ACF.

B. Personal Jurisdiction Based On Apparent Agency Is Inapplicable.

As detailed in the Tribe's and OSGC's Reply Brief in Support of Motion to Dismiss for Lack of Subject Matter Jurisdiction, application of agency law is inapplicable in the context of a tribal sovereign, such as the Tribe and OSCG. *See* Subject Matter Juris. Reply Br. pp. 8-10. ACF has not cited any case law in which apparent agency has operated to extend personal jurisdiction over sovereign entities.

Even if state agency law were applicable, the apparent agency case law supporting imputing the actions of a subsidiary to a parent, ACF's primary argument,[5] demonstrates that personal jurisdiction does not exist.[6] In *Maunder,* the Illinois Supreme Court recognized the appropriateness of asserting personal jurisdiction over a foreign parent corporation when the parent corporation's subsidiary, which is subject to the jurisdiction of Illinois courts, is acting as the parent corporation's Illinois agent and the parent corporation is, in effect, doing business through its subsidiary due to the high amount of control exhibited over its subsidiary. *Maunder v. DeHavilland Aircraft of Canada, Ltd.*, 102 Ill. 2d 342 (1984). "Parents of wholly-owned subsidiaries necessarily control, direct, and supervise subsidiaries to some extent. If, however, the subsidiary is conducting its own business, then an Illinois court may not assert *in personam* jurisdiction over the parent simply because it is the parent." *Alderson v. S. Co.*, 321 Ill. App. 3d 832, 854 (1st Dist. 2001). "The critical question is whether the Illinois subsidiary exists for no purpose other than conducting the business of its parent." *Old Orchard*, 389 Ill. App. 3d at 66 (declining to assert personal jurisdiction under either an agency theory or through piercing the

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[5] ACF also asserts that Messrs. Cornelius and King made oral representations that should be imputed to the Tribe and OSGC. ACF Br. p. 14. As set forth fully in the Subject Matter Juris. Reply Br., pp. 8-10, agency law requires that the apparent agency arise not merely from the agent's acts, but also from specific conduct of the principal. *See also Schoenberger v. Chicago Transit Auth.*, 84 Ill. App. 3d 1132, 1136 (1st Dist. 1980). Thus, the disputed oral representations by Messrs. Cornelius, King and Kavan concerning their authority to bind the Tribe and OSGC are insufficient to establish apparent authority. *Id.* ACF has presented no facts demonstrating that the Tribe's Business Committee or OSGC's board made explicit statements that would lead ACF to believe that Mr. Cornelius was authorized to negotiate and execute the Agreements on *their* behalf and to waive *their* immunity.

[6] ACF also argues "implied authority" to establish agency and, in turn, personal jurisdiction; however, the cases relied on do not arise in the context of personal jurisdiction. *Petrovich v. Share Health Plan of Ill., Inc.*, 188 Ill. 2d 17 (1999) (regarding vicarious liability for HMO in medical malpractice case); *Letsos v. Century 21-New W. Realty*, 285 Ill. App. 3d 1056 (1st Dist. 1996) (regarding real estate agent's alleged breach of fiduciary duty). ACF has cited to no law applying the doctrine of "implied authority" in the context of establishing personal jurisdiction, which seems particularly inappropriate in the context of the Tribe and OSGC, which are entities whose sovereign immunity may not be waived by implication.

corporate veil). As with the corporate veil piercing approach, "standing alone, the existence of common officers or directors serving both corporations is not sufficient to confer jurisdiction over a nonresident parent corporation." *Alderson*, 321 Ill. App. 3d at 854.

As set forth fully in Part I.A., *supra,* ACF has not, and cannot, demonstrate GBRE existed for no other purpose than to do the business of the Tribe and OSGC given the varying responsibilities and businesses engaged in by the entities. At best, ACF's facts demonstrate that OSGC and the Tribe had some knowledge of ACF and the Project, and OSGC may have been willing to provide some financial security to the bank for the Project. However, regular reporting to a parent corporation's board on what a down-stream subsidiary is doing is neither unusual nor grounds for holding the parent financially responsible for the LLC's contractual obligations. *Alderson*, 321 Ill. App. 3d at 854. Furthermore, the loan guarantee was to be a commitment to the bank, not a commitment to ACF, and there is no basis to conclude that the bank guarantee had any connection to Illinois. GBRE's actions in Illinois may not be imputed to the Tribe and OSGC to establish personal jurisdiction.

ACF submitted a supplemental brief in which it spends seven pages analyzing *Solargenix Energy, LLC v. Acciona, S.A.*, 2014 IL App (1st) 123403, ¶ 42. In that case, the appellate court held that personal jurisdiction over a foreign corporation who did not sign the contract in dispute could be found "where it was closely related to the dispute such that it became foreseeable that the nonsignatory would be bound." *Id.* However, the foreign parent corporation had signed a letter of adhesion dated the same day as the amended cooperation agreement underlying plaintiffs' contract and tort claims. In the letter of adhesion, which was signed by the foreign parent's CEO, the foreign parent acknowledged that certain provisions of the amended cooperation agreement "refer to and affect" it and its subsidiaries, and the foreign parent

"accept[ed] and consent[ed] to be bound by and to comply with the contents and obligations set forth in the Applicable Sections" of the amended cooperation agreement. *Id.* ¶ 16. The amended cooperation agreement contained a forum selection clause. Based on the combination of the letter of adhesion entered into by the foreign parent, the forum selection clause and the fact that only the foreign corporations were capable of meeting the objective of the amended cooperation agreement (*i.e.*, ***worldwide*** development of thermosolar projects), the court held it had personal jurisdiction over the foreign entities. *Id.* ¶¶ 43-47. In distinct contrast here, the Tribe and OSGC are not foreign corporations, they are a sovereign Indian nation and a tribal subordinate economic entity. Neither the Tribe nor OSGC signed the Agreements or any other contract that is involved in this dispute. The Business Committee was unaware of the existence of the Agreements until months after the vote to dissolve OSGC. Neither the Tribe nor OSGC are in the business of energy project development. The Tribe and OSGC were never asked to sign the Agreements and they are not so "closely related to the dispute such that it became foreseeable that [they] would be bound" by the Agreements and their forum selection clauses. *Id.* ¶ 42. *Solargenix Energy* is inapposite.

CONCLUSION

For the reasons set forth herein and in the Tribe's and OSGC's initial brief, the Complaint against them should be dismissed with prejudice for lack of personal jurisdiction.

Dated this 28th day of August, 2014.

WHYTE HIRSCHBOECK DUDEK S.C.

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the foregoing **The Oneida Tribe of Indians of Wisconsin's and Oneida Seven Generations Corporation's Reply Brief in Support of Motion to Dismiss for Lack of Personal Jurisdiction** was served upon:

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U.S. Mail, proper postage prepaid, before the hour of 5:00 p.m., this 28th Day of August, 2014, from the law offices of Swanson, Martin & Bell, LLP, 330 North Wabash Avenue, Suite 3300, Chicago, Illinois 60611.

[✓] Under penalties as provided by law pursuant to Section 1-109 of the Code of Civil Procedure, the undersigned certifies that the statements set forth in this Certificate of Service are true and accurate.

Pamela Carrington