

**Case No. 12-2434**

---

**UNITED STATES COURT OF APPEALS  
FOR THE SIXTH CIRCUIT**

---

IN RE: GREEKTOWN HOLDINGS, LLC  
*Debtor,*

---

DIMITRIOS PAPAS, a/k/a JIM PAPAS; VIOLA PAPAS;  
TED GATZAROS, MARIA GATZAROS,  
*Appellants,*

v.

BUCHWALD CAPITAL ADVISORS, LLC,  
Litigation Trustee for the Greektown Litigation Trust;  
SAULT STE. MARIE TRIBE OF CHIPPEWA INDIANS;  
KEWADIN CASINOS GAMING AUTHORITY,  
*Appellees.*

---

**On Appeal From the United States District Court  
For the Eastern District of Michigan, Southern Division  
Honorable Paul D. Borman  
Civil Action No. 12-cv-12340  
2:08-bk-53104**

---

**REPLY BRIEF OF  
DEFENDANTS-APPELLANTS**

---

**ORAL ARGUMENT REQUESTED**

---

Nancy K. Stone (P48515)  
Patrick M. McCarthy (P49100)  
Mary C. Dirkes (P42723)  
Michael O. Fawaz (P68793)  
Howard & Howard Attorneys PLLC  
450 West Fourth Street  
Royal Oak, MI 48067-2557  
248-645-1483 / 248-645-1568 (fax)  
*Attorneys for Defendants/Appellants*  
*Dimitrios ("Jim") Papas, Viola*  
*Papas, Ted Gatzaros and Maria*  
*Gatzaros*

---

## TABLE OF CONTENTS

	PAGE
TABLE OF AUTHORITIES.....	ii
INTRODUCTION .....	1
APPELLANTS' REQUEST FOR RELIEF .....	4
APPELLEES' MISSTATEMENT OF FACTS .....	5
1. The Tribe Orchestrated an Underhanded "Gotcha" Scenario .....	5
2. Appellees Would Like This Court To Believe That Because Papas and Gatazaros Were "In Possession" Of The Guaranty Agreement, That A Potential Claim Under This Agreement And All Of The Inter-Related Agreements Should Have Somehow Been Fully Analyzed And Raised Earlier.....	8
ARGUMENT .....	14
I. THE DISTRICT COURT ABUSED ITS DISCRETION BY ERRONEOUSLY APPROVING AN OVERREACHING CLAIMS BAR ORDER, EVEN BARRING INDEPENDENT CONTRACT CLAIMS, WHEN NOT ONE CASE WAS CITED TO SUPPORT SUCH AN UNPRECEDENTED USE .....	14
A. The Litigation Trustee Fails to Rely on Any Claims Bar Cases Involving Contract Claims.....	14
B. The Tribe Fails To Identify Any Cases That Support Their Arguments That The Claims Bar Order Was Proper And Fair In This Circumstance .....	18
C. The Tribe Also Misconstrues The Due Process Argument .....	21
D. The District Court's Ruling That Appellants' Future Contract Claim Should Be Forever Barred Because It Was Not Raised Earlier Is Not Supported By Any of the Cases Cited In the Court's Opinion .....	24
CONCLUSION .....	27

## TABLE OF AUTHORITIES

## PAGE

## Cases

<i>Allen v. Henry Ford Health Sys.</i> , No. 08-14106, 2010 WL 653252 (E.D. Mich. Feb. 19, 2010) .....	25
<i>Basinger v. CSX Transportation</i> , 1996 WL 400182 at *2 (6 <sup>th</sup> Cir. July 16, 1966).....	25
<i>Fisher v. Roberts</i> , 125 F.3d 974 (6 <sup>th</sup> Cir. 1997).....	22
<i>In re Gunnallen Financial, Inc.</i> , 443 B.R. 908 (M.D. Fla. 2011).....	20
<i>In re MQVP, Inc.</i> , 477 F. Appx. 310 (6 <sup>th</sup> Cir. 2012).....	18, 19
<i>In re Tribune Co.</i> , 464 B.R. 126 (Bankr. D. Del. 2011).....	14, 15, 16
<i>Matter of Munford, Inc.</i> , 97 F.3d 449 (11 <sup>th</sup> Cir. 1996).....	19, 20
<i>McDannold v. Star Bank, N.A.</i> , 261 F.3d 478 (6 <sup>th</sup> Cir. 2001).....	14, 17
<i>McGlone v. Bell</i> , 681 F.3d 718 (6 <sup>th</sup> Cir. 2012) .....	22
<i>McKay v. Headley</i> , 76 F.R.D. 113 (E.D. Tenn. 1977) .....	23
<i>Parr v. Cent. Soya Co., Inc.</i> , 732 F. Supp. 738 (E.D. Mich. 1990).....	23
<i>Terry Barr Sales Agency, Inc. v. All-Lock Co., Inc.</i> , 96 F.3d 174 (6 <sup>th</sup> Cir. 1996).....	22
<i>U.S. Oil and Gas Litigation</i> , 967 F.2d 489 (11 <sup>th</sup> Cir. 1992) .....	21

**Rules**

Fed. R. Civ. P. 12(b)(6) .....	22
Fed. R. Civ. P. 15(a)(2) .....	22
Fed. R. Civ. P. 56 .....	22
Fed. R. Civ. P. 59(e) .....	26

**Other Authority**

U.S. Const. Amend. VII .....	22
------------------------------	----

## INTRODUCTION

This appeal arises from the District Court's abuse of discretion in refusing to clarify or amend an overbroad and improper Claims Bar Order when presented with evidence in the record below that merited it. Specifically, the District Court improperly "declined to consider" the Guaranty Agreement and incorrectly declared that "no evidence of any excuse was offered" by Appellants for purportedly not raising it sooner, even though they plainly did so with explanation prior to the District Court's final order being entered. The District Court and Appellees do not cite any authority to suggest that a court can summarily "decline to consider" the merits of a breach of contract claim and thereby potentially dispose of one commercial party's private contract rights by "declining to consider" them. That result is fundamentally unjust and an abuse of discretion.

No legal authority exists to support the District Court's decision. None of the Claims Bar cases cited by Appellees or the District Court involve an adversary proceeding alleging a fraudulent transfer under state law where a Court-ordered release extends to contingent rights under contracts between two non-debtor commercial parties (who are parties to various contracts and transactions, the vast majority of which are not being litigated and could not be litigated because claims under them are not ripe) and a settlement where only one of those two commercial parties is a party to the settlement with the Debtor in which the court is issuing a

Claims Bar Order. None of the cases cited by Appellees support the District Court providing one commercial party a release from another commercial party that might erase the private commercial contract rights of the non-settling party for no consideration. None of the cases take a claims bar order that far.

Appellees want this Court to believe that the approval of the Claims Bar in favor of the Tribe in this context and on these facts is a “common” and “customary” occurrence. In reality, a claims bar may be “common” or “customary” in settlements of mass tort cases or complex bankruptcies as part of plan confirmations where finality is crucial when dealing with hundreds or even thousands of injured parties or creditors, but they are certainly not common or extended in their reach to the specific circumstances presented here. Indeed, Appellees fail to identify even one case where a court approved a claims bar in a commercial matter that bars a non-settling defendant’s separate, independent and unrelated contract claims against the settling party (as distinguished from any contribution or indemnity claims).

In this case, the District Court capriciously ordered the release of contract claims in favor of the Tribe without the consent of Papas and Gatzaros and with no consideration to either Papas or Gatzaros, essentially altering the agreed-upon, negotiated and long-standing contract terms between the parties thereto. This was

an abuse of discretion that resulted in fundamental prejudice to Papas and Gatzaros.

Even more troubling is that when Appellants presented a potential claim to the District Court under the Guaranty Agreement that was not barred by the Tribe's sovereign immunity or the statute of limitations, the District Court arbitrarily deemed it too late. Nothing about the contract claim itself under the Guaranty Agreement is "too late" - in fact, it is too early. As explained in Appellants' opening brief, the statute of limitations has not begun to run because a claim for breach of the Guaranty Agreement under this circumstance cannot factually arise until, and only if, Papas and Gatzaros are required to disgorge any redemption payments previously received. The underlying litigation is in the discovery phase with no trial date, thereby making the breach of contract claim not ripe for another year or more in the future. Yet the District Court decided that Papas and Gatzaros raised this potential claim too late for it to even "consider" whether or not it would be covered by the Court's Claims Bar Order in the context of the settlement motion. No statute or other legal basis exists for the District Court to bar a potential contract claim at this stage of the case.

The District Court's failure to "consider" the contract claim on its merits or otherwise does not eviscerate the claim itself but leaves open the possibility of future protracted and expensive litigation between the Tribe and Papas and



Gatzaros as to whether or not the Guaranty Agreement is covered by the Claims Bar Order should Papas and Gatzaros be found liable in the underlying case. Papas and Gatzaros will argue that it is not covered by the Claims Bar because the Guaranty Agreement is unrelated to the underlying MUFTA claims, among other reasons, and the Tribe will argue (and already has argued) that it is. As opposed to creating finality for the Tribe (or Papas and Gatzaros), the District Court actually created further doubt and uncertainty. The question for this Court is whether the District Court abused its discretion by “declin[ing] to consider” a valid, potential and independent contract claim presented in the underlying record. The answer is resoundingly “yes,” especially when the District Court could have clarified the issue by simply ordering further proceedings.

#### **APPELLANTS’ REQUEST FOR RELIEF**

Appellants are seeking an order of remand from this Court requiring the District Court to amend the Claims Bar Order to carve-out independent contract claims under the Guaranty Agreement and to preserve any future unknown claims against the Tribe. This Court must overturn the fundamentally unfair action taken by the District Court in this case.

In the alternative, the Court should remand this case for further clarification, because the District Court failed to consider the facts, legal arguments, and the merits of Papas and Gatzaros’ potential future claim under the Guaranty

Agreement. The District Court erred by “declining to consider” the issue at all and thereafter refusing to clarify or reconsider the breadth of the Claims Bar Order. Without clarification, the Claims Bar Order provides no finality on the issue because the District Court “declined to consider” it at all.

### **APPELLEES’ MISSTATEMENT OF FACTS**

The Litigation Trustee and the Tribe present a misleading and skewed version of the events leading up to the Settlement Agreement.

#### **1. The Tribe Orchestrated an Underhanded “Gotcha” Scenario.**

The Tribe, while at the same time it was working with Papas and Gatzaros under a joint defense agreement and sharing defense strategies, was secretly involved in what the Litigation Trustee described as a “protracted” series of private negotiations with the Litigation Trustee regarding the Tribe’s liability and a claims bar against Papas and Gatzaros.

According to Mr. Lee Buchwald’s testimony at the settlement hearing, the Tribe shared documents with the Litigation Trustee and permitted the Litigation Trustee to conduct witness interviews of top Tribe officials over the course of a year, focusing on whether the Tribe was indirectly liable for the Papas and Gatzaros transfers, while not providing Papas and Gatzaros with any of this information or the same access, let alone notice, that this was even happening.

Mr. Buchwald testified that the “Tribe Defendants requested a meeting to initiate settlement discussions” and that following this meeting, he “instructed his professionals to analyze the Tribe Defendants’ claims, particularly regarding whether their obligations under the Guaranty Agreement were triggered and whether they received an indirect benefit from the transfers to the other defendants.” (Tribe’s Brief, p. 14.) According to the Litigation Trustee, “[t]his analysis included reviewing numerous documents received from the Tribe Defendants...” . (*Id.* at p. 15.) Further, he “analyzed legal memoranda prepared by his counsel, as well as exchanges between his professionals and professionals for the Tribe Defendants.” (*Id.*) He described these negotiations as “protracted” and that he was in a position of having to be “extremely careful evaluating the merits and deficiencies in [his] case because there was quite a lot of money involved.” (*Id.*)

The Tribe intentionally “sand bagged” Papas and Gatzaros and put them at a severe disadvantage when it foisted a proposed Claims Bar on them via a settlement motion on April 13, 2012 (“Settlement Motion”) - with no notice whatsoever. The Tribe made sure that this Settlement Motion would be Papas’ and Gatzaros’ very first notice of the proposed Claims Bar, so that Papas and Gatzaros would have no adequate time to analyze the complex claims that had not yet been at issue in the case.

The Tribe orchestrated a “gotcha” scenario and now brazenly claims that Papas and Gatzaros should have analyzed in a matter of weeks the same issues that the Litigation Trustee analyzed for more than a year – without the advantage of “numerous documents” and Tribe interviews and meetings that the Litigation Trustee had. If the Tribe had been acting in good faith with Papas and Gatzaros as they had been portraying, the Tribe surely would have advised Papas and Gatzaros that they were intending to seek a Claims Bar that would forever alter the rights of Papas and Gatzaros *vis a vis* the Tribe. Yet, the Tribe purposely kept Papas and Gatzaros in the dark as to the impending Claims Bar request.

Once Papas and Gatzaros became aware of the Tribe’s effort to impose a Claims Bar on Papas and Gatzaros in the Tribe’s settlement with the Litigation Trustee, Papas and Gatzaros immediately objected to the Tribe obtaining *any* claims bar relief against the future claims of Papas and Gatzaros against the Tribe. After all, the Tribe secretly settled with the Litigation Trustee—not Papas and Gatzaros—and Papas and Gatzaros were rightfully shocked that any of Papas’ and Gatzaros’ future claims would be erased in a settlement to which they were not even parties. Nor were Papas and Gatzaros receiving any consideration whatsoever in exchange for the claims bar that the Tribe requested from the District Court. In just three short months after Papas’ and Gatzaros’ first notice of the Tribe’s secretive settlement and proposed Claims Bar, the District Court

rejected Papas and Gatzaros' objections and ruled that the Claims Bar Order would also extend to Papas and Gatzaros—even though Papas and Gatzaros were not part of the settlement—and the Claim Bar Order would also affect Papas' and Gatzaros' rights concerning certain future claims that belonged to Papas and Gatzaros. At that point, Papas and Gatzaros asked the District Court to, at a minimum, clarify whether a potential claim under a certain Guaranty Agreement was excluded from the Claims Bar Order, but the Court “declined to consider” the issue because it capriciously deemed it untimely.

**2. Appellees Would Like This Court To Believe That Because Papas and Gatazaros Were “In Possession” Of The Guaranty Agreement, That A Potential Claim Under This Agreement And All Of The Inter-Related Agreements Should Have Somehow Been Fully Analyzed And Raised Earlier.**

As explained in Papas' and Gatzaros' motion for reconsideration, in the short time-frame in which Papas and Gatzaros had to file an objection to the Settlement Motion and Claims Bar, the objections were logically focused on potential claims that could exist by virtue of the Tribe's dismissal, including indemnity or contribution, and described broad categories of potential claims. (Motion for Reconsideration, RE 17, Page ID# 433-434.) However, once the District Court issued its Opinion and Order accepting, approving and ordering the over-broad Claims Bar Order and its bar of future claims, it became apparent that the Tribe had orchestrated this so that the Tribe could argue in the future that

potential claims under the Guaranty Agreement by Papas and Gatzaros could be covered by the over-broad Claims Bar. Papas and Gatzaros filed their Motion for Reconsideration and/or Clarification to make certain these potential claims were *not* covered by the Claims Bar Order. Papas and Gatzaros' Motion for Reconsideration states:

As explained more fully below, on July 28, 2000, the Sault Ste. Marie Tribe (the "Tribe"), Kewadin Casinos Gaming Authority (the "Authority"), and the Papas and Gatzaros Defendants entered into several agreements relevant to the MUFTA Adversary Proceeding. In short, the parties entered into Redemption Agreements, wherein the Papas and Gatzaros Defendants sold their interest in Greektown to Monroe Partners, LLC ("Monroe"); in turn, Monroe entered into a Subscription Agreement wherein it agreed to sell to Kewadin Greektown Casino, LLC ("Kewadin") interests it redeemed from the Papas and Gatzaros Defendants; finally, these transactions were then guaranteed by the Tribe and the Authority, and in the Guaranty Agreement, the Tribe and the Authority explicitly waived their sovereign immunity. Significantly, the Papas and Gatzaros Defendants were explicitly referenced as intended third-party beneficiaries of the Guaranty Agreement, and the waiver of sovereign immunity expressly extended to them.

In light of the fact that the Papas and Gatzaros Defendants are intended third-party beneficiaries of the Guaranty Agreement, they may have legitimate claims against the Tribe and the Authority there under. Specifically, the Tribe and the Authority guaranteed payments to Papas and Gatzaros. However, the Gatzaros Defendants were never fully paid for their interest, only receiving about half the sum they were owed. Thus, the Gatzaros Defendants have legitimate claims for the monies they are still owed under the Guaranty Agreement. ***In light of the breadth of the Claims Bar Order, it could arguably capture this claim for damages that is not actually part of the MUFTA Adversary Proceeding. Thus, this Court should clarify that the Claims Bar Order does not apply to Gatzaros' claim for this non-transfer.***

Further, the Papas and Gatzaros Defendants, to the extent forced to disgorge any money in the MUFTA Adversary Proceeding, will have been damaged, triggering the Guaranty Agreement which entitles the Papas and Gatzaros Defendants to sue the Tribe and the Authority if certain conditions are satisfied, and as stated above and discussed in detail below, the Tribe has explicitly agreed to such a suit, having waived its sovereign immunity. ***However, the terms of the Guaranty Agreement, the amount the Tribe and the Authority must pay etc. are all legitimate fact questions that should not be barred now before the MUFTA Adversary Proceeding has been concluded. Only full litigation and proper discovery can reveal the full extent of the Tribe's liability.*** (Emphasis added.)

(*Id.* at Page ID #440-441.) As the foregoing describes, the Guaranty Agreement is not some simple agreement that is easily analyzed—a fact that the Litigation Trustee freely admitted when he testified that, as an “experienced trustee,” it took him a protracted amount of time, significant meetings with the Tribe, and professional legal analysis to determine the likelihood of success on the “indirect liability” theory. The Guaranty Agreement is not a stand-alone document. There are a number of controlling agreements that are integral to analyzing the rights and obligations of the parties under the guaranty obligation—documents that span over a decade and include numerous amendments and assignments.

As was explained in detail in the Motion for Reconsideration, on July 28, 2000, Papas and Gatzaros each entered into an Amended and Restated Limited Liability Company Redemption Agreement with Monroe whereby Monroe redeemed all of the membership interests of Papas and Gatzaros in exchange for



specified installment payments (*Id.*, Ex. B, excerpts of “the Redemption Agreements” filed under seal). Simultaneously, Monroe entered into a Subscription Agreement with Kewadin, agreeing to sell Kewadin the interests it redeemed from Papas and Gatzaros. (*Id.*, Ex. C, excerpts of the “Subscription Agreement” filed under seal).

On the same date the parties signed the Redemption Agreements and the Subscription Agreement, the Tribe and the Authority entered into a Guaranty Agreement to Fund Subscription Amount on behalf of Monroe and the Papas and Gatzaros Defendants. (*Id.*, Ex. D, the “Guaranty Agreement” filed under seal). This guaranty, which ran in favor of Monroe, was assigned by Monroe to Papas and Gatzaros pursuant to an Assignment of Guaranty Agreement. The key provision in the Guaranty Agreement is the “Funding Obligation” provision of Section 2, which provides that subject to certain limitations, the Tribe and the Authority guaranty to fund the Subscription Amount owed by the Kewadin Casino to Monroe upon default of payment obligations *and* upon notice and demand of Monroe. However, according to the Guaranty Agreement, the Tribe’s and Authority’s payment obligations were limited to a fund comprised of those Greektown Distributions that the Tribe and/or Authority received from Greektown Casino, LLC, Kewadin Greektown Casino and/or Monroe Partners by virtue of the Tribe and/or Authority’s ownership interest, affiliation with, or lending



arrangements with those entities. Many fact questions remain as to what the Tribe and the Authority are obligated to pay under the Guaranty Agreement, and there are conditions that must be met as defined in the Guaranty Agreement.

It is uncontested that Monroe defaulted on its obligation to pay. Thus, under the Guaranty Agreement, the Tribe and Authority are liable to the Papas and Gatzaros Defendants. However, this is precisely why the Motion for Reconsideration was filed; the Claims Bar Order may preclude potential, viable claims which may not accrue until certain conditions occur in the MUFTA Adversary Proceeding or which have to be determined by litigating certain agreements. Barring these claims now via a one-sided Claims Bar Order favoring the Tribe is unjust.<sup>1</sup>

Importantly, and as relevant to this appeal, Section 7 of the Guaranty Agreement provides that the Guaranty “shall automatically continue or be reinstated” if at some future point any payments are disgorged. Thus, under this section, should the Papas or Gatzaros Defendants ultimately be ordered to disgorge any payments it received from Monroe, and those payments were received by Monroe from either the Tribe or the Authority as a result of the Funding

---

<sup>1</sup> Appellees claim that the Tribe’s funding obligations were never triggered yet there has been no discovery on this issue and it is a fact in dispute. There is also a potential recovery for Papas and Gatzaros under the Guaranty Agreement because, as third party beneficiaries of Monroe, they can exercise their contractual rights under Section 8 of the Guaranty Agreement to modify, extend, increase and accelerate the Funding Obligations. This claim must be preserved as well.

Obligation, then the Papas and Gatzaros Defendants would have a claim against either the Tribe or the Authority related to such payments. Again, when the District Court was presented with the opportunity to clarify the Claims Bar Order to make certain that any claims under the Guaranty Agreement would be excluded, the District Court simply “declined to consider it.”

While the District Court’s September 27, 2012 Order claims that Papas and Gatzaros “offered no excuse” for failing to raise a contract claim under the Guaranty Agreement earlier, Papas and Gatzaros explained in detail why the Guaranty Agreement was not raised in isolation earlier in their Motion for Reconsideration as well as their Reply. (Motion for Reconsideration, RE 17, Page ID #440-442, 433-435; Reply, RE 32, Page ID #684-692.) All of this was presented below, but the District Court capriciously “declined to consider” any of it. In fact, the District Court incorrectly determined that no explanation for the timing was presented at all. Plainly, the District Court’s failure to even consider the issue was an abuse of discretion.

## ARGUMENT

### **I. THE DISTRICT COURT ABUSED ITS DISCRETION BY ERRONEOUSLY APPROVING AN OVERREACHING CLAIMS BAR ORDER, EVEN BARRING INDEPENDENT CONTRACT CLAIMS, WHEN NOT ONE CASE WAS CITED TO SUPPORT SUCH AN UNPRECEDENTED USE.**

When one cuts away the superciliousness and chastising prose utilized by Appellees in their respective briefs and actually reviews the case law (or lack thereof) upon which they rely, one immediately finds that Appellees are unable to cite to a single case in support of a claims bar in a commercial context among non-debtors, let alone a claim arising from a completely separate commercial transaction having little to do with the underlying litigation (and nothing to do with the long resolved bankruptcy). Appellees fail to cite *any* such case in combined 78-pages of briefing.

#### **A. The Litigation Trustee Fails to Rely on Any Claims Bar Cases Involving Contract Claims.**

The Litigation Trustee cites to only two cases in support of his repetitive and misplaced argument that the Claims Bar Order approved in this case is “commonplace” and “customary”: *In re Tribune Co.*, 464 B.R. 126, 176 (Bankr. D. Del. 2011) and *McDannold v. Star Bank, N.A.*, 261 F.3d 478, 484-486 (6<sup>th</sup> Cir. 2001).

*In re Tribune Co.* involved a claims bar that arose in the context of a complex Chapter 11 plan confirmation. The Delaware bankruptcy court was

considering two competing plans of reorganization. The main source of contention arose from the “Debtor/Committee/Lender Plan” or “DCL Plan,” which proposed a settlement of certain “LBO-Related Causes of Action” with the Senior Lenders and the Bridge Lenders, who loaned more than \$10 billion to Tribune in connection with the 2007 leveraged buy-out of Tribune. *Id.* at 135-36. The competing plan proposed to create two trusts to prosecute those claims post-confirmation. *Id.* at 136.

In analyzing the DCL Plan Settlement, the court discussed the reasonableness of a bar order, which would bar potential defendants in LBO-related future actions from pursuing litigation against the settling parties for contribution and indemnification. *Id.* at 176. The bar order included a proportionate judgment reduction provision, which would require a reduction of any judgment against the barred defendants “in an amount equal to (a) the amount of the Judgment against any such Barred Person times (b) the aggregate proportionate share of fault (expressed as a percentage). . . .” *Id.* at 177. In finding that the bar order was fair to the non-settling defendants, it was crucial to the court that they were protected by the proportionate judgment reduction, which the court held was equivalent to a contribution claim. *Id.* at 179.

The context of the Claims Bar Order in the case at hand is not remotely similar to *In re Tribune*. The Claims Bar Order in the instant case did not arise as

part of the plan confirmation, but rather arose years later as part of an adversary proceeding under a state law claim. The settlement here was not of a potential future claim, but rather of an actual pending fraudulent transfer claim. The Claims Bar Order here did not bar claims against the debtor, but rather served only to protect and benefit the Tribe, a non-debtor. The Claims Bar Order here did not just bar contribution or indemnity type claims like *In re Tribune*, but instead went much further by barring “any and all claims arising from the MUFTA Adversary Proceeding,” which could include the contract claims of Papas and Gatzaros thereby eradicating long-standing, negotiated and agreed-upon contract terms between those parties.

Papas and Gatzaros neither negotiated nor consented to the Claims Bar Order and the District Court’s action was akin to a non-consensual release for no consideration of these contract claims, an important distinction that the court in *In re Tribune* recognized when finding that the claims bar in that matter was “fair.” *In re Tribune* distinguished its case from those involving “improper nonconsensual release[s] of third-party claims” by a non-debtor of other non-debtor third parties where claim bars should be granted in “extraordinary circumstances.” *Id.* at 178 (emphasis added). Thus no aspect of the *In re Tribune* decision supports the District Court’s approval of this Claims Bar in this circumstance.

The Litigation Trustee also relied on this Court's decision in *McDonnold v. Star Bank, N.A.*, 261 F.3d 478, 484-486 (6<sup>th</sup> Cir. 2001), arguing that because the non-settling defendants in that case could not show that they had a contribution claim under ERISA, that the claims bar was fair—although the Court remanded for a determination of possible nonfiduciary liability as affecting the appellants' claimed right of contribution and a possible evidentiary hearing. (Litigation Trustee's Brief, p. 24.) The *McDonnold* Court did not address the situation where a claims bar prevented not only contribution and indemnity claims but also any contract claims between parties based on numerous complex contracts that were amended over the course of a decade and were not at issue in the underlying lawsuit.

The Litigation Trustee further attempts to justify the District Court's actions by arguing that there are mechanisms in place to protect third-parties affected by claims bars, *e.g.*, “defendants paying their fair share of liability” or “by apportioning fault among multiple tortfeasors under state statute or other applicable law” (*see* Litigation Trustee's Brief, p. 35). The Litigation Trustee fails to point out, however, that those protections are not present when the claim that is being barred is a contract claim, as is the case here. Papas and Gatzaros' contract claims against the Tribe should be protected and preserved.

**B. The Tribe Fails To Identify Any Cases That Support Its Argument That The Claims Bar Order Was Proper And Fair In This Circumstance.**

Public policy does not support a Claims Bar Order in this case and the Tribe's cases actually support the arguments of Papas and Gatzaros.

The Tribe relies on this Court's decision in *In re MQVP, Inc.*, 477 F. Appx. 310, 312-13 (6<sup>th</sup> Cir. 2012). (Tribe's Brief, p. 21.) Interestingly, the *MQVP* case did not even involve a claims bar. That case involved a debtor, MQVP, who had been actively involved in two lawsuits prior to the conversion of its bankruptcy case to Chapter 7. During the pendency of the bankruptcy, MQVP reached a settlement on the two lawsuits and sought approval from the bankruptcy court on the settlement. The court recognized that "[t]he very purpose of such a compromise agreement 'is to allow the trustee and the creditors to avoid the expenses and burdens associated with litigating sharply contested and dubious claims.'" *Id.* at 312. In analyzing the factors courts look at to determine whether a settlement is fair and equitable, the court found that the bankruptcy court did not abuse its discretion in approving the settlement. Here, the District Court not only approved a settlement agreement, but also approved a Claims Bar providing one commercial party a release from another commercial party that might erase the private commercial contract rights of the non-settling party for no consideration. Papas and Gatzaros did not dispute the underlying settlement or the amount of the

settlement and therefore the rationale used to encourage settlements in a bankruptcy context by the court in *In re MQVP* is completely misplaced in the context of this Claims Bar Order.

The Tribe also relies on the decision of *Matter of Munford, Inc.*, 97 F.3d 449, 455 (11<sup>th</sup> Cir. 1996). (Tribe's Brief, p. 22.) In *Munford*, the non-settling defendants argued that the bankruptcy court erred in entering an order barring them from asserting state law contribution and indemnity claims against a nondebtor as part of a settlement. In determining whether the claims bar was fair and equitable, the court held that it must consider "the interrelatedness of the claims that the bar order precludes, the likelihood of nonsettling defendants to prevail on the barred claim, the complexity of the litigation, and the likelihood of depletion of the resources of the settling defendants." *Id.* at 455 (citation omitted). The court affirmed the claims bar because the bankruptcy court granted the non-settling defendants a dollar-for-dollar reduction against any judgment ultimately rendered against the nonsettling defendants." *Id.* at 456.

The case at hand is not remotely similar to *Munford*. In *Munford*, the claims subject to the bar order, namely contribution and indemnity, flowed directly from the plaintiff's claims. Further, the court protected the settling defendant from a double recovery in any subsequent litigation while giving the nonsettling defendants the benefit of a dollar-for-dollar credit. The *Munford* court also



determined that it was unlikely that the nonsettling defendants would prevail. Here, the Claims Bar Order is substantially more harmful to Papas and Gatzaros than the one in *Munford*. The bar order here potentially extinguishes independent contract claims against the Tribe without any consideration or dollar-for-dollar reduction.

In distinguishing the *Munford* decision in a much more recent case, the court in *In re Gunnallen Financial, Inc.*, 443 B.R. 908, 916 (M.D. Fla. 2011) held that a claims bar that “extinguishes independent causes of action against nondebtors...,” is not fair, adequate or reasonable. The court held that the bar order in that case was “substantially more harmful to the barred parties than the one in *Munford*.” The court, in denying the claims bar, held that “[t]he absence of the payment of any meaningful consideration by the released parties has been a key consideration by courts in considering whether to approve bar orders.” *Id.* at 916-17.

Similar to *Gunnallen Financial, Inc.*, the Claims Bar Order in the case at hand bars independent causes of action by Papas and Gatzaros against nondebtors for no consideration. This is different than *Munford* where the non-settling defendants were protected by a dollar-for-dollar reduction against any judgment. The District Court not only failed to preserve or protect the independent contract claims of Papas and Gatzaros by way of a carve-out or reduction on liability, it “declined to consider” those claims at all.

The Tribe relies on *U.S. Oil and Gas Litigation*, 967 F.2d 489, 496 (11<sup>th</sup> Cir. 1992) when the decision supports the position of Papas and Gatzaros. In that class action case, the court held that the “propriety of the settlement bar orders should turn on the interrelatedness of the claims that it precludes” and the claims bar in that case barred fraud and negligence claims that were “integrally related” to plaintiff’s claims. Here, Papas’ and Gatzaros’ independent contract claims against the Tribe under the Guaranty Agreement are not related to the state fraudulent transfer claim at all. If Papas and Gatzaros are required to disgorge any of their redemption payments in the underlying lawsuit, the Tribe will be liable under the Guaranty Agreement.

**C. The Tribe Also Misconstrues The Due Process Argument.**

The Tribe claims that because “Papas and Gatzaros were given notice of the Settlement Approval Hearing, they submitted written briefs outlining their objections to the claims bar order, and they participated in the evidentiary hearing,” that their “due process rights were fully protected.” (Tribe’s Brief, p. 23.) The due process violation occurred when the District Court effectively dismissed independent contract claims before they were even ripe to be raised. The prejudice occasioned by the District Court’s decision to cavalierly “decline to consider” Appellants’ contractual rights is extraordinary.

Our entire justice system is designed to provide litigants with due process and the ability to “have their day in court.” Appellants have a constitutional right to a jury trial in cases involving private contracts. *See* U.S. Const. Amend. VII (“In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law.”). Further, the law is replete with myriad protections designed to ensure that factual disputes and claims are determined on their merits. For example, all the non-movant’s facts are accepted as true for dispositive motions under Federal Rules of Civil Procedure 12(b)(6) and 56. *McGlone v. Bell*, 681 F.3d 718, 731 (6th Cir. 2012) (“In determining whether a party has failed to state a claim, we construe the complaint in the light most favorable to the non-moving party and accept all factual allegations as true.”); *Terry Barr Sales Agency, Inc. v. All-Lock Co., Inc.*, 96 F.3d 174, 178 (6<sup>th</sup> Cir. 1996) (stating that when confronted with a motion for summary judgment “[a]ll evidence presented by the non-moving party is to be taken as true.”).

Leave to amend pleadings is freely given. Fed. R. Civ. P. 15(a)(2) (“The court should freely give leave when justice so requires.”). *See, e.g., Fisher v. Roberts*, 125 F.3d 974, 978-79 (6<sup>th</sup> Cir. 1997) (holding that “it is necessary to permit the liberal amendment of complaints in order to adhere to ‘the principle that

cases should be tried on their merits rather than on the technicalities of pleading”). Parties are frequently granted leave to amend their pleadings to state new or additional claims up through the time of trial. *See e.g., Parr v. Cent. Soya Co., Inc.*, 732 F. Supp. 738, 740-41 (E.D. Mich. 1990) (holding that allowing plaintiff to amend products liability complaint *on day of trial* to allege “emotional distress” as basis for request of exemplary damages under Michigan law was not unduly prejudicial); *McKay v. Headley*, 76 F.R.D. 113 (E.D. Tenn. 1977) (holding that permitting amendment of plaintiff’s damages claim *on the eve of trial* did not prejudice defendant).

By contrast, the District Court’s Claims Bar Order here afforded no such protection to the Appellants. By “declining to consider” the potential contract claims, the District Court effectively dismissed Appellants’ independent contract claims, with prejudice, before they were even ripe to be filed. This flies in the face of protections afforded to litigants to have claims determined on their merit as well as the liberal amendment policies. The District Court’s arbitrary inaction in “declining” to even consider the contract claim unjustly disposed of Appellants’ fundamental rights. At a minimum, the District Court’s refusal to at least clarify

the issue leaves Appellants and Appellees both without an answer as to whether the Claims Bar Order bars a future claim based on the Guaranty Agreement.<sup>2</sup>

Ironically, the District Court arbitrarily decided that it was “too late” for Appellants to raise their contractual rights - when in reality, it is still too soon. The contingent claims under the Guaranty Agreement will not ripen until the pending adversary proceeding is adjudicated on the merits. It is certainly “too soon” to dispose of Appellants’ contract rights when a case could not even be filed yet to protect them.

**D. The District Court’s Ruling That Appellants’ Future Contract Claim Should Be Forever Barred Because It Was Not Raised Earlier Is Not Supported By Any of the Cases Cited In the Court’s Opinion.**

In the District Court’s September 27, 2012 Opinion and Order, the court capriciously decided that because the Guaranty Agreement was “available” but not presented to the court earlier in the settlement motion process, the court could simply “decline to consider it.” (Order, RE 31, Page ID #681-682.) The court relied on two inapposite unpublished summary judgment decisions as alleged legal

---

<sup>2</sup> The evidentiary hearing was on the proposed settlement agreement and not a “fairness” hearing on the Claims Bar Order. The District Court stated that only if the court concluded that Papas and Gatzaros had potential viable claims that are barred by the Claims Bar Order is the court obligated to conduct a “fairness” hearing, and therefore refused to hold one despite Appellants’ request. (Order, RE 11, Page ID #312, 325-327.) When Appellants did present a viable future claim under the Guaranty Agreement, the District Court declined to hold a “fairness” hearing and declined to consider the claim at all.

support: *Basinger v. CSX Transportation*, 1996 WL 400182 at \*2 (6<sup>th</sup> Cir. July 16, 1996) and *Allen v. Henry Ford Health Sys.*, No. 08-14106, 2010 WL 653252 (E.D. Mich. Feb. 19, 2010). Those summary judgment decisions, however, are not at all relevant as to whether a court can “decline to consider” a potential contract claim between two commercial parties (one that is not yet ripe and for which the statute of limitations has not run) when those contract rights are raised in the context of a Settlement Motion and contested Claims Bar Order in an adversary proceeding.

In *Basinger, supra*, this Court affirmed the lower court’s decision granting a motion for summary judgment and denying a motion for reconsideration. In opposing a motion for summary judgment, the appellant had submitted only his own affidavit and, then on reconsideration, tried to submit additional evidence in support of his case. The court declined to consider the additional evidence after summary judgment was granted because such evidence was available before he responded to the summary judgment motion, and he provided “no explanation for his failure to submit the evidence earlier.” *Id.* at \*3. Similarly, *Allen, supra*, involved a plaintiff’s attempt to submit certain exhibits (that the plaintiff had previously stipulated at her deposition had no bearing on the claims asserted in the lawsuit) on a motion for reconsideration after the court had already granted defendant’s motion for summary judgment

The court's role in deciding motions for summary judgment is to determine, after a case is actually filed and discovery is completed, whether there are genuine issues of material fact for trial and, therefore, when evidence is submitted on a motion to alter or amend a judgment under Fed. R. Civ. P. 59(e) that was previously available, with no excuse offered, or that was previously deemed irrelevant, it makes sense that a court might rightfully decline to consider such evidence. Those decisions involve cases where a complaint had been filed, discovery was completed, and summary judgment proceedings had transpired, and the court granted summary judgment before the evidence was submitted.

In stark contrast, the District Court's decision in the matter at hand disposed of a potential contract claim under the Guaranty Agreement in the course of *one settlement motion* before any claim had even been filed, and before it could be filed, let alone after discovery and summary judgment proceedings. The District Court did this despite the fact that the law is replete with protections designed to ensure that factual disputes and claims are determined on their merits and not disposed of on procedural technicalities. The cases relied upon by the District Court arising in the summary judgment context do not support the District Court's decision to simply "decline to consider" the merits of an unripe and unfiled breach of contract claim on an unrelated Guaranty Agreement and thereby potentially

dispose of one commercial party's contract rights in the context of a Claims Bar Order between nondebtors.

In addition, the District Court completely ignored the explanations provided by Papas and Gatzaros in a lengthy Motion for Reconsideration and Reply Brief for why they did not raise the theory in earlier briefing. The District Court's statement that they "offered no excuse" is just plain wrong. Further, the District Court grossly oversimplified the claim and completely ignored the complex set of contractual documents spanning years between the parties related to the Guaranty Agreement.

Finally, the District Court's decision to "decline to consider" the Guaranty Agreement actually has compounded the issue and created more confusion for the parties. The District Court should have at least provided clarity to the parties on the issue of whether Appellants' contract claim against the Tribe was covered by the Claims Bar Order. The District Court abused its discretion by not considering it at all.

### **CONCLUSION**

For the foregoing reasons, Appellants/Defendants Papas and Gatzaros request that this Honorable Court find that the District Court abused its discretion in approving a one-sided, prejudicial and over-reaching Claims Bar Order and in denying Papas and Gatzaros' motion for reconsideration to clarify and/or amend



such order. A reversal of the District Court's order is required to provide a sensible, reasonable result that is fair to all the parties.

Respectfully Submitted,

HOWARD & HOWARD ATTORNEYS PLLC

Dated: April 15, 2013

By: s/Nancy K. Stone

Nancy K. Stone (P48515)

Patrick M. McCarthy (P49100)

Mary C. Dirkes (P42723)

Michael O. Fawaz (P68793)

450 West Fourth Street

Royal Oak, MI 48067-2557

248-645-1483 / 248-645-1568 (fax)

*Attorneys for Defendants/Appellants*

**CERTIFICATE OF COMPLIANCE WITH RULE 32(a)**

Certificate of Compliance with Type-Volume Limitation,  
Typeface Requirements, and Type Style Requirements

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 6,506 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii)
2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word in 14 point Times New Roman style.

Respectfully submitted,

HOWARD & HOWARD ATTORNEYS PLLC

By: s/Nancy K. Stone

Nancy K. Stone (P48515)

Patrick M. McCarthy (P49100)

Mary C. Dirkes (P42723)

Michael O. Fawaz (P68793)

450 West Fourth Street

Royal Oak, MI 48067-2557

248-645-1483

248-645-1568 (fax)

*Attorneys for Defendants/Appellants*

Dated: April 15, 2013

### **CERTIFICATE OF SERVICE**

Nancy K. Stone, undersigned attorney for Appellants Dimitrios Papas, aka Jim Papas, Viola Papas, Ted Gatzaros, and Maria Gatzaros, certifies that a copy of

#### **Reply Brief of Defendants-Appellants**

was filed with the Sixth Circuit Court of Appeals on April 15, 2013, using the ECF system which will send notification of such filing to all attorneys of record.

HOWARD & HOWARD ATTORNEYS PLLC

By: s/Nancy K. Stone

Nancy K. Stone (P48515)

Patrick M. McCarthy (P49100)

Mary C. Dirkes (P42723)

Michael O. Fawaz (P68793)

450 West Fourth Street

Royal Oak, MI 48067-2557

248-645-1483 / 248-645-1568 (fax)

*Attorneys for Defendants/Appellants*

Dated: April 15, 2013