

UNITED STATES BANKRUPTCY COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

-----X)	
In re:)	
GREEKTOWN HOLDINGS, LLC, <i>et al.</i> ,)	Case No. 08-53104
)	Chapter 11
Debtors.)	Jointly Administered
)	
)	Honorable Walter Shapero
-----X)	
BUCHWALD CAPITAL ADVISORS LLC, solely)	
in its capacity as Litigation Trustee for the)	
Greektown Litigation Trust,)	
)	
Plaintiff,)	
)	
v.)	
)	Adv. Pro. No. 10-05712
DIMITRIOS ("JIM") PAPAS, VIOLA PAPAS,)	
TED GATZAROS, MARIA GATZAROS,)	Honorable Walter Shapero
SAULT STE. MARIE TRIBE OF CHIPPEWA)	
INDIANS, AND KEWADIN CASINOS)	
GAMING AUTHORITY,)	
)	
Defendants.)	
)	
-----X)	

**RESPONSE AND BRIEF IN OPPOSITION TO MOTION TO DISMISS OF
DEFENDANTS SAULT STE. MARIE TRIBE OF CHIPPEWA INDIANS
AND KEWADIN CASINOS GAMING AUTHORITY ON GROUNDS OF
SOVEREIGN IMMUNITY (NO WAIVER)**

For its Response and Brief in Opposition to the Motion to Dismiss of Defendants Sault Ste. Marie Tribe of Chippewa Indians and Kewadin Casinos Gaming Authority On Grounds of Sovereign Immunity (No Waiver), Buchwald Capital Advisors LLC ("**Plaintiff**"), solely in its capacity as the Litigation Trustee for the Greektown Litigation Trust, states:

STATEMENT OF THE CASE

On June 28, 2010, Defendants Sault Ste. Marie Tribe of Chippewa Indians (the “**Tribe**”) and the Kewadin Casinos Gaming Authority (“**Kewadin Gaming Authority**”) (collectively, the “**Tribe Defendants**”) filed their Motion to Dismiss the Litigation Trust’s Complaint [Docket No. 8] under Fed. R. Civ. P. 12(b)(1), Fed. R. Civ. P. 12(b)(5), and Rule 7012 of the Federal Rules of Bankruptcy Procedure, on the grounds that sovereign immunity bars the claims asserted against them in the Complaint. On August 9, 2010, Plaintiff filed its Response and Brief in Opposition to the Motion to Dismiss [Docket No. 56] and, on August 23, 2010, the Tribe Defendants filed their Reply in Response [Docket No. 69]. Plaintiff and the Tribe Defendants subsequently stipulated to bifurcate consideration of the Motion to Dismiss to first address the purely legal issue of whether Congress, by enacting Section 106(a) of the Bankruptcy Code, abrogated the Tribe Defendants’ sovereign immunity, and reserving the factual issue of whether the Tribe Defendants waived their sovereign immunity by, among other things, causing the Greentown bankruptcy cases to be initiated and, thereafter, participating in the bankruptcy proceedings. [Docket No. 85] The Court heard oral argument on the Motion to Dismiss on December 29, 2010 and, following argument, took the matter under advisement.

Subsequently, the Tribe Defendants and Plaintiff filed a motion under Bankruptcy Rule 9019 to approve a settlement (the “**Settlement Motion**”), and requested the Court to hold any ruling on the Tribe Defendants’ Motion to Dismiss in abeyance pending a decision on the Settlement Motion. The reference was withdrawn on the Settlement Motion to the United States District Court, and the settlement was approved by United States District Court Judge Borman. Thereafter, the United States Court of Appeals for the Sixth Circuit reversed and remanded for further consideration of the claims bar order which was an integral aspect of the settlement.

Papas v. Buchwald Capital Advisors Inc. (In re Greentown Holdings, LLC), 728 F.3d 567 (6th Cir. 2013). The parties' subsequent attempts to achieve a global settlement of all claims against all remaining defendants through facilitation were unsuccessful [Docket No. 449], and the Tribe Defendants renewed their Motion to Dismiss [Docket No. 453], again bifurcating the legal issue from any factual issues surrounding waiver. On August 13, 2014, this Court denied the Motion, holding that Congress, by enacting Section 106(a) of the Bankruptcy Code, abrogated the Tribe Defendants' sovereign immunity. On June 9, 2015, the District Court reversed and remanded for further proceedings on the previously bifurcated factual issue of waiver.

The Tribe Defendants now contend that, as a matter of law, they cannot have waived their sovereign immunity and, therefore, no factual discovery or evidentiary hearings on the issue of waiver are required. Plaintiff obviously disagrees. Because they contend that no discovery or evidentiary hearings are required, the Tribe Defendants agreed that they would accept Plaintiff's factual recitation and inferences as true for the purposes of this Motion to Dismiss. The Tribe Defendants retain their rights with respect to waiver if their Motion to Dismiss is denied.

Pursuant to a Stipulated Order dated August 26, 2015 [Dkt. No. 648], this Court authorized the Tribe Defendants to file its further Motion to Dismiss addressing the waiver issue on remand. The Tribe Defendants' Motion to Dismiss On Grounds of Sovereign Immunity (No Waiver) was filed on September 4, 2015 [Dkt. No. 649], to which this Brief is in response.

SUMMARY OF ARGUMENT

Relying on *Memphis Biofuels, LLC v. Chickasaw Nation Industries, Inc.*, 585 F.3d 917 (6th Cir. 2009), the Tribe Defendants argue that the *only* way they can be subject to suit is if they expressly waived their sovereign immunity pursuant to a duly-adopted resolution by the Tribe's Board of Directors or, in the case of the Kewadin Gaming Authority, by a duly-adopted

resolution by the Authority's Management Board.¹ *Brief in Support of Motion to Dismiss (No Waiver)*, p. 6 [Dkt. No. 649-1]. According to the Tribe Defendants, no such resolutions were ever adopted and, therefore, the Tribe Defendants cannot have waived their sovereign immunity from suit in this case. *Id.*

The Tribe Defendants' reliance on *Memphis Biofuels* is misplaced. *Memphis Biofuels* addresses only **contractual** waivers of sovereign immunity and, as even the Tribe Defendants grudgingly acknowledge, contractually waiving one's sovereign immunity is not the only recognized method of waiver. *Id.* at pp. 11-14 [Dkt. No. 649-1]. It is well-established that sovereign entities may waive sovereign immunity by their conduct.² *Gardner v. New Jersey*, 329 U.S. 565, 573-574 (1947). The waiver by conduct doctrine, however denominated, "equally applies to Indian tribes." *Jicarilla Apache Tribe v. Andrus*, 687 F.2d 1324, 1344 (10th Cir. 1982).

Because a Board resolution is *not* the exclusive method of waiving one's sovereign immunity, the Tribe Defendants' instant Motion to Dismiss (No Waiver) must be denied. There are other recognized means of waiver and Plaintiff is entitled to explore them through discovery. "Since entitlement of a party to immunity from suit is such a critical preliminary determination, the parties have the responsibility, and must be afforded a fair opportunity, to define issues of fact and law, and to submit evidence necessary to the resolution of the issues." *Gould, Inc. v. Pechiney Ugine, et al.*, 853 F.2d 445, 451 (6th Cir. 1988) (reversing and remanding to require the district court to allow discovery into the issue of sovereign immunity). *See also, J.S. Haren Co.*

¹ At all times relevant herein, the members of the Tribe's Board of Directors, the members of Kewadin Gaming Authority's Management Board, and the members of the Debtors' Management Boards were identical or nearly identical. As discussed *infra*, the overlapping boards supports Plaintiff's contention that the Tribe Defendants waived their sovereign immunity by conduct under principals of agency, alter-ego/piercing the corporate veil.

² This doctrine is typically referred to as waiver by conduct, *Hankins v. Missouri*, 964 F.2d 853, 856 (8th Cir. 1992); waiver by litigation conduct, *Lapides v. Board of Regents of University System of Georgia*, 535 U.S. 613 (2002); or waiver by participation, *In re 995 Fifth Avenue Assoc., L.P.*, 963 F.2d 503, 508 (2d Cir. 1992).

v. Macon Water Authority, 145 Fed. Appx. 997, 998 (6th Cir. 2005) (remanding to permit parties to proceed with discovery on issue of alleged waiver of sovereign immunity and abrogation of sovereign immunity); *Sault Ste. Marie Tribe of Chippewa Indians v. Hamilton*, 2010 U.S. Dist. LEXIS 3992 (W.D. Mich., January 20, 2010) (permitting discovery into Tribe's assertion of sovereign immunity before ruling on Tribe's motion to dismiss).

In this case, Plaintiff alleges and, for the purposes of a motion to dismiss, such allegations must be accepted as true,³ that the Tribe Defendants waived sovereign immunity with respect to this adversary proceeding by their conduct which included, among other things, (i) their domination and control of the Debtors, and use of the Debtors as their agents, in connection with the events leading up to the Debtor's issuance of approximately \$185 million in unsecured notes, and the subsequent fraudulent transfer of those note proceeds to the Tribe and to the Papas and Gatzaros Defendants, among others, (ii) directing the Debtors to initiate these bankruptcy cases to forestall action by the Michigan Gaming Control Board (the "MGCB"), among others, which threatened the Tribe Defendants' continued ownership and control of Greektown Casino and its highly valuable casino license, (iii) dominating and controlling each of the Debtors and, through them, initiating these bankruptcy cases and directing the strategy thereafter, utilizing the Debtors and their professionals (who were also the Tribe Defendants' professionals) as the Tribe Defendants' agents, and (iv) through their pervasive participation in these bankruptcy cases in their own name and through the use of the Debtors and their professionals as the Tribe Defendants' agents.

In short, the Tribe Defendants' conduct, which includes the conduct of the Debtors and their professionals under well-established principals of agency and alter ego/piercing the

³ The Tribe Defendants agreed that, given the absence of discovery, they would accept Plaintiff's factual recitation and inferences as true for the purposes of this Motion to Dismiss. The Tribe Defendants retain their rights with respect to waiver if their Motion to Dismiss is denied.

corporate veil, constitute a clear waiver of the Tribe Defendants' sovereign immunity with respect to the claims that are the subject of this adversary proceeding. The Tribe Defendants' Motion to Dismiss (No Waiver) should, therefore, be denied.

RELEVANT FACTUAL BACKGROUND

The following recitation of factual background is based upon information obtained through limited discovery, primarily document discovery from Reorganized Greektown and Bankruptcy Court filings. In further support, Plaintiff incorporates by reference herein its original Response and Brief in Opposition to Motion to Dismiss of Tribe Defendants [Dkt. No. 56], and exhibits attached and/or referenced therein. To date, Plaintiff has been unable to take *any* formal discovery from the Tribe Defendants on the subject of waiver or, for that matter, deposition discovery of the Papas and Gatzaros Defendants (as defined below). With a fair opportunity to conduct reasonable discovery, as discussed *infra*, Plaintiff will be able to establish that the Tribe Defendants waived their sovereign immunity with respect to the fraudulent transfer claims at issue in this adversary proceeding because the Debtors herein were dominated and controlled by, and were the alter ego of, the Tribe Defendants, such that their corporate veils should be pierced. Moreover, the Debtors were simply the agents of the Tribe Defendants. Under these circumstances, the conduct of the Debtors and the conduct of the Tribe Defendants, taken as a whole, will clearly evidence a waiver by conduct of the Tribe Defendants' sovereign immunity.

1. The Tribe Defendants Obtain a Casino License to Develop the Greektown Casino

In 2000, Greektown Casino, LLC ("**Greektown Casino**") was licensed by MGCB to own and operate the Greektown Casino, a gaming facility which opened in November 2000, and which holds one of only three hugely valuable gaming licenses in the City of Detroit.

During the time that the Tribe Defendants sought to obtain a casino license, the Tribe Defendants, through their wholly-owned subsidiary Kewadin Greektown Casino, LLC, owned 50% of the membership interests in Greektown Casino. The remaining 50% of Greektown Casino's membership interests was owned by Monroe Partners, LLC ("**Monroe**"), a limited liability company owned by the Dimitrios and Viola Papas and Ted and Maria Gatzaros, defendants in this adversary proceeding (the "**Papas and Gatzaros Defendants**").⁴ The Papas and Gatzaros Defendants obtained their interests in Greektown Casino for nominal consideration.

In order to obtain and hold a casino license, MGCB approval is required. While the Tribe Defendants sought license approvals, the MGCB notified them that, if the Papas and Gatzaros Defendants were direct or indirect owners of Greektown Casino, a license would not be approved and, therefore, the casino would not open. As a result, the Tribe Defendants were forced to purchase the Papas and Gatzaros Defendants interests in Monroe. In June 2000, the Sault Ste. Marie Tribe agreed to pay the Papas and Gatzaros Defendants the aggregate sum of \$265 Million for their membership interests in Monroe, whose sole asset was its 50% of the ownership interests in Greektown Casino. The purchase price for the Papas and Gatzaros Defendants' Monroe membership interests was significantly higher than the membership interests' actual market value, rendering Greektown Casino financially vulnerable, as is discussed *infra*.

The Tribe Defendants controlled Greektown Casino's efforts to obtain a casino license, including the acquisition of the Monroe membership interests and the MGCB licensure proceedings. The Tribe Defendants and Greektown Casino were represented by the same counsel and other professional advisors; Greektown Casino did not have independent

⁴ The Papas and Gatzaros Defendants owned approximately 97% of the membership interests of Monroe Partners, with the remaining 3% owned by a handful of minority partners.

professional advisors. In effect, Greektown Casino was the agent and/or alter ego of the Tribe Defendants. From June 2000 through March 2005, the Sault Ste. Marie Tribe paid Papas and the Gatzaros over \$66 Million in connection with the purchase of their membership interests in June 2000; the remaining balance was partially paid out of Note proceeds in connection with the 2005 Debt Refinancing described below.

2. The Tribe Defendants Control Over Greektown Casino Through Equity Ownership, Control of All Management Boards and Through Management Services Agreement

From the Tribe Defendants' buyout of the Papas and Gatzaros Defendants in June 2000 through the bankruptcy filings in May 2008, the membership interests of Greektown Casino were wholly-owned, directly or indirectly, by the Tribe Defendants. Equally important, the members of the Tribe's Board of Directors, the members of Kewadin Gaming Authority's Management Board, and the members of each of the Debtors' Management Boards were identical or substantially identical. Therefore, a decision of the Tribe's Board of Directors was, for all practical and legal purposes, a decision of each of the subsidiaries' Management Boards as well. In addition to its complete control through interlocking boards, the Tribe was party to a Management Services Agreement entered into with Greektown Casino in January 2001, whereby the Tribe provided substantially all "Key Personnel" (as defined in the Management Services Agreement) to Greektown Casino to perform all or substantially all management functions of the casino including, but not limited to, its chief executive officer, accounting and financial management, risk and compliance management, and other management and administrative functions [See *Management Services Agreement*, Dkt. No. 492, pp. 1-3]. The Management Services Agreement was signed by Bernard Bouschor both in his capacity as Greektown Casino's manager and in his capacity as Chairman of the Tribe. *Id.* at p.8. Moreover, the

Management Services Agreement was prepared by counsel for the Tribe; Greektown Casino did not have independent counsel. The Tribe's Management Services Agreement continued in effect even though the Debtors were also party to a separate management services agreement with Millennium Management Group, LLC, a truly independent consulting company, until it was finally rejected by the Debtors in October 2008 [Dkt. No. 553].

In addition to the services provided by Tribe members under the Management Services Agreement, the Debtors' employees also reported to, and took day-to-day operational direction from, various Tribe officers including, without limitation, Victor Matson, the Tribe's Chief Financial Officer and, in connection with the construction of the Expanded Complex (defined below), Gregory Collins, the Tribe's Budget Director.

3. Tribe Defendants Acquire the Bates Garage as part of the Expanded Complex

In September of 2000, Greektown Casino desperately required additional parking as a last step to obtaining its license; the Casino's parking structure, to be completed as part of the Expanded Complex, was still years away. The Tribe approached the Sterling Group, which had acquired the rights to purchase the Bates Garage, which was located sufficiently close to the casino to satisfy the MGCB's requirements. An arrangement was structured whereby an affiliate of the Tribe Defendants – 132 Associates, LLC – agreed to purchase the Bates Garage and then lease the garage to Greektown Casino for a period of seven years. At the end of seven years, the Sterling Group had the right to reacquire the Bates Garage for one dollar. The officers of 132 Associates, LLC included Bernard Bouschor, the Tribe's then-Chairman, Michael Atkins, counsel to all three entities - 132 Associates, the Tribe and Greektown Casino - and two senior officers of Greektown Casino. Again, the Tribe Defendants dominated and controlled the acquisition of the Bates Garage, and the Tribe Defendants and Greektown Casino were

represented by the same counsel in connection with this purchase and lease transaction, and in connection with obtaining MGCB and City of Detroit approvals. Greektown Casino did not have independent counsel or other advisors. The method of acquisition and ownership structure of the Bates Garage evidences that Greektown Casino and the Tribe Defendants were understood by the Tribe Defendants to be one and the same.

4. Tribe Defendants Control the Construction of the Expanded Complex

On August 2, 2002, Greektown Casino, the City of Detroit and the Economic Development Corporation of the City of Detroit entered into a Revised Development Agreement (the “**Development Agreement**”). Pursuant to the Development Agreement, Greektown Casino obligated itself, *inter alia*, to expand the casino and to build a 400 room hotel, theater, ballroom, convention area and a parking facility for a minimum of 4,000 vehicles (the “**Expanded Complex**”). The cost to complete construction of the Expanded Complex, which Greektown Casino committed to do, was estimated at that time to be at least \$200,000,000. In the event Greektown Casino was unable to satisfy its obligations under the Development Agreement, it would be unable to maintain its gaming license, effectively eviscerating the value of the Tribe Defendants’ equity. Construction on the Expanded Complex began in earnest in 2006. By April 2006, Gregory Collins, the Tribe’s Budget Director, was placed in charge of *all* facets of this construction project, including the budget for the project, the capital raise discussed below, and interactions with the MGCB. All officers and employees of Greektown Casino were ordered to report directly to him. Mr. Collins, in turn, reported directly to the Tribe through Mr. Matson, the Tribe’s CFO, among other Tribe officers. The Expanded Complex was not completed until well after the bankruptcy cases were filed.

5. Tribe Defendants Transfer the Note Proceeds From the 2005 Debt Refinancing to Pay Their Debt Obligations

Greektown Holdings, LLC (“**Holdings**”) was formed in September 2005 to be the intermediate subsidiary between Greektown Casino and its direct parent entities, Kewadin Greektown Casino and Monroe, to hold the membership interests of Greektown Casino in connection with the refinancing of the senior secured debt of Greektown Casino, and the raising of additional capital through the Notes offering, discussed below. On December 2, 2005, Holdings entered into a new senior secured credit facility providing for aggregate maximum borrowings of \$290,000,000. The new senior facility provided for a term loan of \$190,000,000 and a \$100,000,000 revolving credit facility, including letters of credit of up to \$49 million to support the payment of EDC bonds. Also on December 2, 2005, Holdings, and its subsidiary, Greektown Holdings II, LLC, issued their 10 ³/₄% senior notes in the principal amount of \$185,000,000 (the “**Notes**”).

This 2005 refinancing was approved by the MGCB with strict financial covenants and other conditions which, if breached, gave the MGCB the right to require the Tribe to sell its interests in Greektown Casino and, if the Tribe failed to timely consummate a sale transaction, the conservatorship provisions of the Michigan Gaming Control and Revenue Act would allow the MGCB to take control of, operate, and sell or transfer the casino.

On or about December 2, 2005, the Tribe Defendants caused Holdings to transfer Note proceeds totaling \$6 million to Kewadin Greektown Casino, which then transferred the money to Tribe Defendant Kewadin Gaming Authority. Also on December 2, 2005, the Tribe Defendants caused Holdings to directly transfer Note proceeds totaling approximately \$164 million to the Papas and Gatzaros Defendants to partially satisfy the Tribe Defendants’ financial obligations to them.

6. Events Leading Up To The Tribe Defendants Initiating These Bankruptcy Filings

By November, 2006, it was apparent that Holdings would not be able to comply with the various financial covenants established by the MGCB. [See *Declaration of Clifford J. Vallier in Support of Debtors' Chapter 11 Petitions and First Day Pleadings* (the “**Vallier Declaration**”) (Bankruptcy Dkt. No. 10) at ¶¶19 and 21). The Tribe infused additional capital in 2007, but that was insufficient to fully stabilize and bring Holdings back into compliance. Ultimately, Holdings had until April 30, 2008 to cure the covenant violations or obtain a waiver from the MGCB. *Id.* at ¶21. As a result of the covenant violations, the MGCB had the right to require Holdings to sell its interest in Greektown Casino within 180 days of notice being provided by the MGCB. *Id.* If Holdings failed to consummate a sale transaction within the applicable 180-day period, the conservatorship provisions of the Michigan Gaming Act would become applicable, thereby allowing the MGCB to take control of, operate, and dispose of the Greektown Casino. *Id.* In addition to being out of compliance with the MGCB-mandated financial covenants, the casino was also in default of its obligations under the Development Agreement with the City of Detroit.

Holdings was unable to cure the covenant violations or obtain a waiver from the MGCB by May 29, 2008, *id.*, or meet its obligations under the Development Agreement. Therefore, to prevent the MGCB from requiring divestiture of the casino gaming license or the City from terminating the Development Agreement, either of which would result in a loss of the casino license, Holdings, Greektown Casino, Kewadin Greektown Casino, Monroe, and the remaining debtors (collectively, the “**Debtors**”), each filed voluntary petitions for relief under chapter 11 the Bankruptcy Code in this Court on May 29, 2008. The bankruptcy cases of the Debtors were jointly administered.

7. The Tribe Defendants' Domination and Control over the Bankruptcy

The Tribe Defendants continued to direct and control the strategy of the Debtors' post-petition operations, including the ongoing construction of the Expanded Complex, and by fully participating in the Debtors' bankruptcy proceeding as the Debtors' equity holder, through their domination of Debtors' various Management Boards, through the Management Services Agreement, and in their own name; by appearing at the omnibus hearings held in these cases, and by filing objections with respect to several important issues in the cases, including objecting to Plan confirmation [Dkt. Nos. 1654, 1655 and 1990], among others. In addition on November 26, 2008, the Tribe filed a proof of claim (Claim No. 282) against Greentown Casino in the amount of \$1,357,612.25, and a proof of claim against Kewadin (Claim No. 280) in the amount of \$191,590.91. On May 7, 2010, the Tribe filed an administrative priority proof of claim against Holdings (Claim No. 325) in the amount of \$263,217.67. On November 26, 2008, Defendant Kewadin Gaming Authority filed a proof of claim (Claim No. 263) against Greentown Casino in the amount of \$550,000.

ARGUMENT

The Litigation Trust acknowledges that, “[a]s a matter of federal law, an Indian tribe is subject to suit only where Congress has authorized the suit or the tribe has waived its immunity.” *Kiowa Tribe of Oklahoma v. Manufacturing Technologies, Inc.*, 523 U.S. 751, 754; 118 S. Ct. 1700, 1702 (1998). “To relinquish its immunity, a tribe’s waiver must be ‘clear.’” *C&L Enterprises, Inc. v. Citizen Bank Potawatomi Indian Tribe of Okla.*, 532 U.S. 411, 418 (2001), quoting *Oklahoma Tax Comm’n v. Citizen Band of Potawatomi Tribe of Okla.*, 498 U.S. 505, 509 (1991). While a tribe’s waiver of immunity must be clear, the use of the term “sovereign immunity” is not necessary for a waiver to be effective. See *C&L Enterprises, Inc.*, *supra* at 418

(“The [tribal immunity] waiver . . . is implicit rather than explicit only if a waiver of sovereign immunity, to be deemed explicit, must use the words ‘sovereign immunity.’ No case has ever held that.”); *Sungold Gaming USA, Inc. v. United Nation of Chippewa, Ottawa & Pottawatomi Indians of Michigan, Inc.*, 2002 Mich. App. Lexis at *5.

I. THE TRIBE DEFENDANTS WAIVED BY CONDUCT THEIR SOVEREIGN IMMUNITY IN THESE BANKRUPTCY CASES.

Relying on *Memphis Biofuels, LLC v. Chickasaw Nation Industries, Inc.*, 585 F.3d 917 (6th Cir. 2009), the Tribe Defendants argue that the *only* way they can be subject to suit is if they expressly waived their sovereign immunity pursuant to a duly-adopted resolution by the Tribe’s Board of Directors or, in the case of the Kewadin Gaming Authority, by a duly-adopted resolution by the Authority’s Management Board. *Brief in Support of Motion to Dismiss (No Waiver)*, p. 6 [Dkt. No. 649-1]. According to the Tribe Defendants, no such resolutions were ever adopted and, therefore, the Tribe Defendants cannot have waived their sovereign immunity from suit in this case. *Id.*

The Litigation Trust concedes for the purposes of this Motion that neither the Tribe’s Board of Directors nor Kewadin Gaming’s Management Board adopted a resolution waiving sovereign immunity to permit the Litigation Trust to prosecute this adversary proceeding. Nevertheless, the Tribe’s reliance on *Memphis Biofuels* is misplaced. *Memphis Biofuels* addresses only *contractual* waivers of sovereign immunity. Contractually waiving one’s sovereign immunity is not the only recognized method of waiver. In addition to contractual waivers, it is well-established that sovereign entities, including Indian tribes, may waive sovereign immunity by their conduct. *See, e.g., In re White*, 139 F.3d 1268, 1271 (9th Cir. 1998) (“Tribe’s initiation of a lawsuit is an action that ‘necessarily establishes consent to the court’s adjudication of the merits of that particular controversy’ . . . including the risk of being bound by

an adverse determination.”) (internal citations omitted); *Lapides v. Board of Regents*, 535 U.S. 613, 619 (2002) (“[W]here a state *voluntarily* becomes a party to a cause and submits its rights for judicial determination, it will be bound thereby and cannot escape the results of its own voluntary act by invoking the prohibitions of the Eleventh Amendment.”) (emphasis in original).

A. *Memphis Biofuels* Applies Only to Contractual Waivers of Immunity.

In *Memphis Biofuels*, Chickasaw Nation Industries, Inc. (“CNI”), a chartered tribal corporation, entered into a contract whereby CNI would deliver diesel fuel and soybean oil to Memphis Biofuels, LLC (“MBF”) for refinement and later resale as biodiesel. As described in the opinion, “MBF recognized that, should a dispute arise, CNI might try to claim sovereign immunity. Thus, MBF insisted on a contractual provision expressly waiving any sovereign immunity and a ‘representation and warranty’ that CNI’s waiver was valid, enforceable, and effective.” *Memphis Biofuels*, *supra* at 918. Although the contract contained the requested language, MBF was informed that CNI board approval was necessary to waive tribal sovereign immunity. Ultimately, the parties executed the contract, but CNI’s board did not waive immunity. *Id.* at 919.

CNI thereafter repudiated the contract and MBF initiated mediation procedures. CNI participated in those procedures, but the parties were unable to reach an accord. MBF then filed a demand for arbitration which CNI refused. MBF filed suit in the United States District Court for the Western District of Tennessee seeking a declaratory judgment that (i) the immunity waiver contained in the CNI contract was effective, (ii) an order compelling arbitration, and (iii) a temporary restraining order restraining CNI from proceeding with its case against MBF in the Chickasaw Nation District Court. *Id.* at 919. CNI moved to dismiss the suit for lack of subject matter jurisdiction, which the district court granted. *Id.*

On appeal, MBF first argued that CNI's charter contained a broad 'sue and be sued' clause which expressly waived sovereign immunity with respect to commercial contracts. *Id.* at 921. The Sixth Circuit rejected this argument on the grounds that the "sue and be sued" clause was insufficiently broad; the ability to take legal action was still limited to action approved by the board of directors. Thus, the Court concluded that "even if we were to conclude that a broad sue-and-be-sued clause waives tribal-sovereign immunity, this clause is insufficient to do the job." *Id.* at 921-922. As for the fact that the contract indicated that an express waiver of immunity had been obtained, the Court held:

MBF believed that CNI obtained the required approval for this waiver provision – but regardless of what MBF may have thought, board approval was not obtained, and CNI's charter controls. In short, without board approval, CNI's sovereign immunity remains intact.

Id. at 922.

Of relevance to the instant Motion, MBF also argued that CNI waived sovereign immunity based upon equitable doctrines because the agreement represented that sovereign immunity had been waived. The Sixth Circuit rejected this argument because "unauthorized acts of tribal officials are insufficient to waive tribal-sovereign immunity," and the signer of the document was not authorized to contractually waive immunity. *Id.* at 922. In short, the Sixth Circuit held that, *where a contract purports to waive sovereign immunity and the parties fail to obtain that waiver in accordance with the explicit terms of the applicable constitution or charter*, the non-sovereign party will not be able to use equitable or quasi-contractual remedies to override explicit waiver provisions contained in a tribal constitution or charter.

Memphis Biofuels and, indeed, each of the cases relied upon by the Tribe in its Motion to Dismiss (No Waiver) involved *contractual* waivers – contracts containing express written waivers of sovereign immunity or contracts that obligated the sovereign entity to obtain an

express waiver – where the parties failed to perfect such waivers in accordance with the operative constitution or charter. *See Brief in Support of Motion to Dismiss (No Waiver)*, pp. 8-10 [Dkt. No. 649-1]. In *Sanderlin v. Seminole Tribe of Fla.*, 243 F.3d 1282, 1288 (11th Cir. 2001), for example, the Eleventh Circuit rejected an argument that the tribal representative had *apparent authority* to waive immunity because “such a finding would be directly contrary to the explicit provisions of the Tribal Constitution.” Similarly, in *Native American Distributing v. Seneca-Cayuga Tobacco Co.*, 546 F.3d 1288 (10th Cir. 2008), the Tenth Circuit rejected an equitable estoppel argument based upon an oral representation involving the breadth of a sue-and-be-sued clause contained in the corporate charter. The remaining cases relied upon by the Tribe Defendants are substantially similar.

In each of these cases, however, the non-sovereign party could have obtained the agreed-upon immunity waiver by simply insuring that the tribe complied with the applicable constitutional or charter provisions; for example, by requiring a certified copy of the duly-adopted board resolution. *Memphis Biofuels, supra* at 922. That courts are unwilling to apply equitable or quasi-contractual remedies to rewrite tribal constitutions because of the non-sovereign party’s negligence is hardly surprising. A tribal constitution or charter is entitled to *at least* as much deference as is given to ordinary commercial contracts, and courts are equally unwilling to apply equitable remedies to rewrite express contracts. *See, e.g., Cloverdale Equipment Co. v. Simon Aerials, Inc.*, 869 F.2d 934, 939 (6th Cir. 1989) (“[a] quasi-contractual theory of recovery is inapplicable when the parties are bound by an express contract.”); *Advanced Plastics Corporation v. White Consolidated Industries, Inc.*, 828 F. Supp. 484, 491 (E.D. Mich. 1993) (“promissory estoppel is an alternative theory of recovery where no contract exists”); *Shurlock Tile and Carpet Co. v. Farhat*, 60 Mich. App. 486; 231 N.W.2d 384 (1975) (If

the parties acknowledge the existence of an express contract, but dispute its terms or effect, an action will not also lie for quantum meruit or implied contract.)

Memphis Biofuels thus stands for the unremarkable proposition that, if quasi-contractual remedies are inadequate to override express contractual provisions, they are equally inadequate to override the express terms of a tribal constitution. The case does *not* stand for the proposition advanced by the Tribe; namely, that the only way the Tribe can be subject to suit is if it expressly waived its sovereign immunity pursuant to a duly-adopted resolution by the Tribe's Board of Directors. In this case, Plaintiff did not request (and then fail to perfect) a commercial contract immunity waiver in order to sue the Tribe Defendants for a fraudulent transfer and, therefore, *Memphis Biofuels* is simply inapplicable. Moreover, in order to adopt the Tribe's position, this Court would have to ignore applicable Supreme Court precedent, or read *Memphis Biofuels* as having ignored applicable Supreme Court precedent, something this Court cannot and should not do.

B. *Memphis Biofuels* Does Not Abrogate The "Waiver By Conduct" Doctrine

In addition to contractual waivers addressed in *Memphis Biofuels*, it has long been held that a sovereign may waive its immunity by conduct. In *Gardner v. New Jersey*, 329 U.S. 565 (1947), the Supreme Court held that the State of New Jersey waived its sovereign immunity in a bankruptcy case by filing a proof of claim, at least with respect to that claim. *In re Charter Oak Associates*, *supra* (same). *Accord*, *In re White*, 139 F.3d 1268 (9th Cir. 1998) (Indian tribe waived immunity by initiating lawsuit).⁵ The *Gardner* court noted that "[W]hen the State

⁵ In footnote 2 to their *Brief in Support of Motion to Dismiss (No Waiver)*, the Tribe Defendants argue that, in light of their governing documents, "there can be no waiver of tribal immunity based on the filing of a proof of claim." No court has adopted this argument as it runs counter to *Gardner*, *supra*. In fact, a similar argument was rejected by the case principally relied upon by the Tribe Defendants in connection with their Section 106(a) arguments in this case. In *In re National Cattle Congress*, 247 B.R. 259, 269 (Bankr. N.D. Iowa 2000), the court held that, unless the

becomes the actor and files a claim against the fund, it waives any immunity which it otherwise might have had respecting the adjudication of the claim.” 329 U.S. at 573.

Since *Gardner*, the Supreme Court has applied waiver by conduct or waiver by litigation conduct where a state “voluntarily invokes [a federal court’s] jurisdiction, or else makes a ‘clear declaration’ that it intends to submit itself to a [federal court’s] jurisdiction.” *In re Charter Oak Associates*, 361 F.3d 760, 767 (2nd Cir. 2004); *cert. den.*, 125 S.Ct. 408 (2004), quoting *College Sav. Bank v. Florida Prepaid Postsecondary Educ. Expense. Bd.*, 527 U.S. 666, 675-676 (1999). *See also*, *Lapides v. Board of Regents*, *supra* at 619 (A state is deemed to have invoked the court’s jurisdiction when it has made a “voluntary appearance in federal court.”); *Bergemann v. Rhode Island Department of Environmental Management*, 665 F.3d 336 (1st Cir. 2011) (by removing an action to federal court, the Rhode Island Department of Environmental Management held to have waived its sovereign immunity). As noted, the doctrine of waiver by conduct “equally applies to Indian tribes.” *Jicarilla Apache Tribe v. Andrus*, *supra* at 1344; *U.S. v. Confederated Tribes and Bands of the Warm Springs Reservation of Oregon*, 657 F.3d 1009 (9th Cir. 1981) (waiver of immunity by intervening in litigation); *Amerind Risk Management Corp. v. Malaterre*, 633 F.3d 680, 685 (8th Cir. 2011) (tribal corporation “concedes it voluntarily waived its tribal immunity in federal court by filing this declaratory judgment action”); *In re Vianese*, 195 B.R. 572, 575 (Bankr. N.D.N.Y. 1995) (“In commencing the adversary proceeding, Plaintiff [tribal-owned casino] necessarily consented to the Court’s jurisdiction to determine any related claims brought adversely against it.”)

tribe withdrew its claim, the filing of the proof of claim constituted a waiver of sovereign immunity despite the tribe’s purported reservation of immunity and the absence of any board resolution.

C. Determining Scope of Tribe Defendants' Waiver Requires the Court to Examine All of the Tribe Defendants' Conduct at Issue

While it is clear that a tribe waives sovereign immunity by conduct through its participation in or initiation of litigation or through its participation in a bankruptcy case, what is less clear is the scope or extent of that waiver. *In re Charter Oak Associates*, *supra* at 768. Generally, the filing of a proof of claim in a bankruptcy case waives immunity only with respect to estate claims that arise from the same transaction or occurrence as the sovereign's claim. *Gardner*, *supra* at 573; *In re Lazar*, 237 F.3d 967, 978 (9th Cir. 2001). But despite the Tribe Defendants' repeated protestations to the contrary, this case is not simply about the Tribe Defendants' filed proofs of claim or their application for allowance of administrative expense claim [Dkt. No. 2314]. As discussed below, the Tribe Defendants' pervasive involvement in the events leading up to and after the bankruptcy filing go well beyond the simple act of filing proofs of claim. As this is before the Court upon the Tribe Defendants' Motion to Dismiss, the evidence of Plaintiff, as the non-moving party, is to be believed, and all justifiable inferences are to be drawn in the non-movant's favor. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986), quoting *Anderson v. Liberty Lobby*, 477 U.S. 242, 255 (1986). The factual record presented must be interpreted in a light most favorable to the non-moving party. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986). In this case, therefore, interpreting the limited factual record prior to *any* discovery on the issue waiver in a light most favorable to Plaintiff, the Court must conclude that the Tribe Defendants' waiver extends further than the simple filing of a proof of claim. *See e.g., U.S. v. Confederate Tribes*, *supra* at 1015; *In re Vianese*, *supra* at 575. *But c.f., In re Pegasus Gold Corp.*, 394 F.3d 1189, 119701198 (9th Cir. 2005) ("If aggressively pursuing a claim in bankruptcy could expand the scope of a waiver, then states would be chilled from advocating their rights within the bankruptcy proceeding.")

In *U.S. v. Confederate Tribes*, the Ninth Circuit refused to limit a tribe's waiver to the original equitable decree in force at the time that the tribe intervened in the underlying litigation. "By seeking equity, this Tribe assumed the risk that any equitable judgment secured could be modified if warranted by changed circumstances. By intervening, the Tribe assumed the risk that its position would not be accepted, and that the Tribe itself would be bound by an order it deemed adverse." *U.S. v. Confederate Tribes*, *supra* at 1015. Similarly, in *In re Vianese*, a tribe-owned casino initiated an adversary proceeding against a husband and wife, and then sought to use tribal immunity as a shield against the wife's subsequent claim for attorney's fees and costs pursuant to Bankruptcy Code Section 523(d). The Court refused to limit the counterclaim to recoupment, holding:

In commencing the adversary proceeding, Plaintiff necessarily consented to the Court's jurisdiction to determine any related claims brought adversely against it While such counterclaims generally take the form of recoupment . . . it would be inequitable under the present circumstances to permit Plaintiff to pursue its cause of action pursuant to Code §523(a)(2) without allowing C. Vianese to seek to recover attorney's fees and costs as permitted under Code §523(d). **This also comports with the view that '[a] creditor cannot reasonably expect to invoke those portions or [sic] the bankruptcy code that allow it to recover on its claims and yet avoid the legal effect of other sections that do not work in its favor.'**

In re Vianese, 195 B.R. at 575 (emphasis added, internal citations omitted).

Because the Tribe Defendants' conduct at issue in this case extends well beyond the simple filing of proofs of claim or application for allowance of administrative expense claim, all of the Tribe Defendants' conduct must be examined and considered in analyzing the scope and extent of the Tribe Defendants' waiver, and Plaintiff must be given the opportunity to conduct discovery to explore these issues more fully. As discussed below, this analysis includes the conduct of the Debtors under agency and alter ego principles which, if established, constitutes conduct of the Tribe Defendants. Such conduct includes the events leading up to and the

initiation of these bankruptcy cases, thereby invoking all sections of the Bankruptcy Code, including those relevant to this adversary proceeding.

D. Agency, Alter Ego, and Piercing the Corporate Veil Principles Apply to Tribe's Conduct

In addressing the Tribe Defendants' argument that this Court lacks jurisdiction over them by virtue of their sovereign status, the Court must decide whether the Tribe Defendants, by their conduct, waived sovereign immunity with respect to the claims in this adversary proceeding. In making this jurisdictional determination, however, the Court must also consider the Debtors' conduct under well-established principles of agency, alter ego and piercing the corporate veil. *See In re Paques, Inc.*, 277 B.R. 615, 633-637 (Bankr. E.D. Pa. 2000) (applying piercing corporate veil/alter ego analysis to determine personal jurisdiction over foreign entity). If the Court determines that the Debtors were agents of the Tribe Defendants, or that the Debtors' corporate forms should be pierced, the conduct of the Debtors constitutes conduct of the Tribe Defendants for sovereign immunity waiver purposes. *Foremost-McKesson*, 905 F.2d 438, 448 (D.C. Cir. 1990) (Under the Foreign Sovereign Immunities Act, "[A]ctivities of an agent may be attributed to the principal for jurisdictional purposes").⁶

In *First National City Bank v. Banco Paraq El Comercio Exterior De Cuba*, 462 U.S. 611, 628-634 (1983), the Supreme Court noted that the presumption that a sovereign is independent from its subsidiary can be overcome in two situations: First, 'where the corporate entity is so extensively controlled by its owner that a relationship of principal and agent is

⁶ The law governing waivers of immunity by foreign sovereigns is instructive in addressing waivers by Indian tribes. *C&L Enterprises, Inc. v. Citizen Band of Potawatomi Indian Tribe of Okla.*, 532 U.S. 411, 421, n.3; *Kiowa Tribe of Okla.*, *supra* at 759. However, application of agency and alter ego/piercing the corporate veil principles, although well-accepted in connection with foreign sovereigns, is an issue of first impression with respect to Indian tribes.

created . . . and second, where recognition of the instrumentality as an entity apart from the state ‘would work a fraud or injustice.’” (internal citations omitted).

Applying *Banco in Transamerica Leasing, Inc. v. La Republica De Venezuela*, 200 F.3d 843, 847-853 (D.C. Cir. 2000), now-Justice Ginsburg explained that control by the sovereign entity is relevant in two distinct contexts. “First, control is relevant when it significantly exceeds the normal supervisory control exercised by any corporate parent over its subsidiary and, indeed, amounts to complete domination of the subsidiary. *A sovereign is amenable to suit based upon the actions of an instrumentality it dominates because the sovereign and the instrumentality are in those circumstances not meaningfully distinct entities; they act as one.*” *Id.* at 848 (emphasis added). This is a straightforward alter ego/piercing the corporate veil analysis under applicable state law. *See United States Fidelity & Guaranty Co. v. American Home Assurance Co.*, 1999 U.S. Dist. LEXIS 7236, *24 (S.D.N.Y. May 17, 1999).

Second, control is also relevant when the sovereign exercises control in such a way as to make the instrumentality its agent; in that case control renders the sovereign amenable to suit under ordinary agency principles. *Transamerica Leasing, supra* at 849. As now-Justice Ginsburg noted, “[A] sovereign does not create an agency relationship merely by owning a majority of a corporation’s stock or by appointing its Board of Directors At the same time, a sovereign need not exercise complete dominion over an instrumentality – to the point of stripping it of any meaningful separate identity – in order to establish a relationship of principal and agent. If such domination were required, then agency principles would be superfluous because, as discussed above, the sovereign would be subject to suit on the ground that instrumentality and sovereign were in fact a single entity.” *Id.*

The question of how much control is required before parent and subsidiary may be deemed principal and agent “defies resolution by ‘mechanical formulae,’ for the inquiry is inherently fact-specific.” *Id.*, quoting *Banco*, 462 U.S. at 633. At a minimum, “the relationship of principal and agent does not obtain unless the parent has manifested its desire for the subsidiary to act upon the parent’s behalf, the subsidiary has consented so to act, the parent has the right to exercise control over the subsidiary with respect to matters entrusted to the subsidiary, and the parent exercises its control in a manner more direct than by voting a majority of the stock in the subsidiary or making appointments to the subsidiary’s Board of Directors.” *Id.* at 849.

As discussed throughout this Response, Plaintiff has limited evidence that the Debtors were the alter ego of the Tribe Defendants and/or the Debtors were the Tribe Defendants’ agents. To date, Plaintiff has been unable to take *any* discovery on these issues and, as discussed more fully below, Plaintiff is entitled to fully explore these issues through appropriate discovery as they are directly relevant to determining the scope and extent of the Tribe Defendants’ waiver.⁷ If the Debtors are, in fact, the agents of and/or alter egos of the Tribe Defendants, the acts of the Debtors *leading up to, including and after the act of initiating these bankruptcy cases*, constitute acts of the Tribe Defendants for waiver by conduct purposes.

E. The Tribe’s Conduct Expresses a Clear Waiver of Sovereign Immunity

The Tribe Defendants’ complete control over all aspects of Greentown Casino’s operations, well-exceeded the “normal supervisory control” exercised by a corporate parent over its subsidiary. *See Transamerica Leasing, supra* at 847-853. The Tribe Defendants were able to dominate and control in a variety of ways. First, the membership of the Tribe’s Board of

⁷ See footnote 3, *supra*.

Directors was substantially identical to the membership of each subsidiary's Management Board and, therefore, a decision of the Tribe's Board of Directors was effectively a decision of each of the operating subsidiaries. Second, through its Management Services Agreement, the Tribe Defendants handpicked Tribe members to serve as the Casino's "Key Personnel." Third, Victor Matson, the Tribe's Chief Financial Officer, acted as the Chief Executive and Chief Financial Officer of Greektown Casino and the other operating subsidiaries, and the senior officers and employees of Greektown Casino reported to him. Similarly, the Tribe's Budget Director, Gregory Collins, had direct responsibility over the 2005 Debt Restructuring, as well as complete control and day-to-day supervision over the entire Expanded Complex construction project, a process which continued well-after the bankruptcy petitions were filed in these cases. Fourth, the Tribe Defendants and Greektown Casino shared accounting and legal professionals who reported directly to, and took direction from, the Tribe Defendants, including the Tribe's Chairman, the Tribe's CFO, the Tribe's Budget Director, and the Tribe-selected Key Personnel. The Tribe Defendants' domination and control continued after the initiation of these bankruptcy cases, as did the Debtors' reliance on the Tribe Defendants' professional advisors.

By December 31, 2007, the Tribe Defendants' indirect subsidiary was out of compliance with the various financial covenants established by the MGCB. As a result of these defaults, the MGCB had the right to require the Tribe to sell its interests in Greektown Casino and, if the Tribe failed to consummate a sale transaction required by the MGCB, the conservatorship provisions of the Michigan Gaming Control and Revenue Act would allow the MGCB to take control of, operate, and sell or transfer the Greektown Casino. Similarly, the Tribe Defendants' indirect subsidiary was in default of various covenants in its secured credit facility, and in default or imminent default of its obligations under its Development Agreement with the City of Detroit,

and the Debtors' secured creditor could take action to foreclose on its collateral and the City could essentially cause the casino to lose its gaming license. In any of these events, the Tribe Defendants' continued ownership of the casino was in serious jeopardy. Unable to cure the defaults and dependent entirely upon the now-depleted cash position of the casino, the Tribe Defendants caused the Debtors to file their bankruptcy petitions in order to preserve the Tribe's equity investment and ownership of the casino license.

A few weeks before the bankruptcy filings, Monroe, Kewadin Greektown Casino and Greektown Holdings each signed a letter of intent with a potential equity investor in an effort to stave off bankruptcy. In a letter dated April 8, 2008, the lawyer for the Tribe Defendants, *who also represented each of the Tribe Defendants' subsidiaries*, wrote to the individual members of the Tribe's Board of Directors, warning them that "as a matter of general limited liability company law, to avoid 'piercing the corporate veil' and breaking the Tribe's limited liability protection for its indirect ownership in Greektown, we strongly advise that all discussions and actions regarding the current and future management, operations and construction of Greektown be made by the Board of Managers of Greektown and not by the Board of Directors of the Tribe." *See Letter from Tribe's/Casino's Attorney to Members of the Tribe's Board of Directors* dated April 8, 2008 (attached to *Motion to Request Examination of Debtors, et al.*, Dkt. No. 619, pp. 23-24). Counsel's letter was apparently borne out of a growing frustration and the knowledge that the Board members' conduct was not the only instance of the Board's interference in, and domination and control of, the activities of its direct and indirect subsidiaries; interference and control which continued even after the Debtors filed their bankruptcy petitions. Equally important, the Tribe Defendants' legal counsel implicitly

recognized that their conduct could jeopardize their sovereign immunity. This contradicts the narrow position taken by Tribe Defendants in their current Motion.

By concentrating entirely upon *Memphis Biofuels*, and the legal argument that no waiver can occur without a Tribal Board resolution, the Tribe Defendants would have this Court ignore *warnings by the Tribe's own counsel*. The Tribe Defendants would also have this Court ignore that, since beginning their efforts to obtain a casino license in the City of Detroit, the Tribe Defendants utilized the casino as its agent and alter ego and, even after these bankruptcy cases were filed, the Tribe Defendants continued to dominate and control each of the Debtors through their control of the Debtors' Management Boards, through the Management Services Agreement, and through the Debtors' reliance on the Tribe Defendants' professional advisors. The Tribe Defendants would also have the court ignore that, in addition to filing discrete proofs of claim, they regularly appeared at omnibus hearings in these cases, and objected to, among other significant issues, confirmation of the Plan and the entry of the Authorization Order. Indeed, the Tribe Defendants were the principal objectors to the Plan's third party release provisions which, after lengthy negotiations, resulted in modifications to the Confirmation Order and supplemental stipulated orders.

F. Plaintiff is Entitled to Discovery Regarding the Tribe's Waiver By Conduct, Including Alter Ego/Piercing the Corporate Veil Principles

The Sixth Circuit has long recognized that "since entitlement of a party to immunity from suit is such a critical preliminary determination, the parties have the responsibility, *and must be afforded a fair opportunity*, to define issues of fact and law, and to submit evidence necessary to the resolution of the issues. *Gould, Inc. v. Pechiney Ugine Kuhlmann & Trefimetaux*, 853 F.2d 445, 451 (6th Cir. 1988) (emphasis added). *Accord United States Fidelity and Guaranty Co. v. Braspetro Oil Services Co.*, 1999 U.S. Dist. LEXIS 7236, *25 (S.D.N.Y. May 17, 1999), quoting

Foremost-Mckesson, Inc. v. Republic of Iran, 905 F.2d at 449 (“Where a determination of the existence or absence of a principal/agent or alter ego relations also determines immunity from suit, the parties ‘must be afforded a fair opportunity, to define issues of fact and law, and to submit evidence necessary to the resolution of the issues.’”) This admonition is especially true in this case because the Tribe Defendants’ assertion of sovereign immunity, and Plaintiff’s contention that such sovereign immunity has been waived, remains unexamined. No discovery has thus far been permitted of the Tribe Defendants on the inherently factual issue of waiver by conduct and, other than discovery from the Tribe Defendants and their agents and professionals, no other sources of information are readily available to Plaintiff on this issue. Therefore, discovery and fact-finding “limited to the essentials necessary to determining the preliminary question of jurisdiction” is required, and this Court is explicitly authorized to define the procedures to enable Plaintiff to adequately explore the Tribe Defendants’ assertion of immunity from suit. *Gould, supra* at 451.

CONCLUSION

Waiver of sovereign immunity by conduct is well-established and, therefore, the Tribe Defendants argument -- that the only way the Tribe Defendants could waive their sovereign immunity is by adoption of a resolution of the Tribe Defendants' Board of Directors or Management Board -- must be rejected. Rather, Plaintiff must be given a "fair opportunity" to conduct appropriate discovery to explore the scope and extent of the Tribe Defendants' waiver by conduct in this case.

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Respectfully submitted,

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