

**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 to the)	
GREEKTOWN LITIGATION TRUST,)	Adv. Pro. No. 10-05712
)	
Plaintiff,)	Honorable Walter Shapero
)	
v.)	
)	
DIMITRIOS ("JIM") PAPAS, VIOLA PAPAS, TED)	
GATZAROS, MARIA GATZAROS, BARDEN)	
DEVELOPMENT, INC., LAC VIEUX DESERT)	
BAND OF LAKE SUPERIOR INDIANS, SAULT)	
STE. MARIE TRIBE OF CHIPPEWA INDIANS,)	
KEWADIN CASINOS GAMING AUTHORITY, and)	
BARDEN NEVADA GAMING, LLC,)	
)	
Defendants.)	
)	
)	
-----	X	

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

Defendants the Sault Ste. Marie Tribe of Chippewa Indians (the "Tribe") and Kewadin Casinos Gaming Authority ("Gaming Authority") (collectively the "Tribe Defendants") submit this Reply Brief in Support of their Motion to Dismiss on the grounds of sovereign immunity (no waiver).

MEMORANDUM IN SUPPORT

I. INTRODUCTION

The Litigation Trust, in responding to the Tribe Defendants' Motion to Dismiss, acknowledges that there is no Tribal Resolution by which the Tribe Defendants agreed to waive their sovereign immunity for the claims asserted by the Litigation Trust. Nor is there any other written document that purportedly would constitute an express waiver of sovereign immunity by the Tribe Defendants, such as a contract executed by a Tribal Official purporting to waive the sovereign immunity of the Tribe Defendants. The absence of a Tribal Resolution waiving the Tribe Defendants' sovereign immunity is dispositive and should end the waiver discussion in favor of the Tribe Defendants. In an attempt to create an issue where one does not exist, the Litigation Trust relies on cases involving the purported waiver by a State of its Eleventh Amendment immunity and the waiver by a foreign state of its sovereign immunity under the Foreign Sovereign Immunity Act ("FSIA"). As will be demonstrated below, the cases relied upon by the Litigation Trust make clear that Eleventh Amendment immunity cases do not apply to Indian tribes and even in the cases involving Eleventh Amendment waivers by States, such waivers are quite limited and narrow in scope. Similarly, the FSIA specifically provides for implied waiver and waiver by agency principles for foreign states, but it has no application to Indian tribes, as they are not foreign states under the FSIA. The fact remains that an Indian tribe cannot waive its sovereign immunity unless it does so clearly and expressly—not by implication and not by conduct. For these reasons, the Tribe Defendant's Motion to Dismiss should be granted.

II. THE STANDARD OF REVIEW ON A 12(b)(1) MOTION TO DISMISS

The Tribe Defendants' Motion to Dismiss was brought as a facial attack on subject-matter jurisdiction. Rule 12(b)(1) motions to dismiss for lack of subject-matter jurisdiction generally come in two varieties: a facial attack or a factual attack. Gentek Bldg. Products, Inc. v. Sherwin-Williams Co., 491 F.3d 320, 330 (6th Cir. 2007); 3D Systems, Inc. v. Envisiontec, Inc., 575 F.Supp.2d 799, 803 (E.D. Mich. 2008). A facial attack on the subject-matter jurisdiction alleged in the complaint questions merely the sufficiency of the pleading. Id. When reviewing a facial attack, a district court takes the allegations in the complaint as true, which is a similar safeguard employed under 12(b)(6) motions to dismiss. Id. Where, on the other hand, there is a factual attack on the subject-matter jurisdiction alleged in the complaint, no presumptive truthfulness applies to the allegations. Id. When a factual attack, also known as a "speaking motion," raises a factual controversy, the district court must weigh the conflicting evidence to arrive at the factual predicate that subject-matter jurisdiction does or does not exist. Id. In its review, the district court has wide discretion to allow affidavits, documents, and even a limited evidentiary hearing to resolve jurisdictional facts. Id.

"[I]t is well established that the plaintiff has the burden of distinctly and affirmatively pleading the facts forming the basis of subject matter jurisdiction." Walls v. Waste Res. Corp., 761 F.2d 311, 317 (6th Cir. 1985). The Tribe Defendants contend that the Litigation Trust has failed to meet this pleading burden and therefore, the claims against the Tribe Defendants should be dismissed. Moreover, even if the Court considers the factual assertions set forth in the Litigation Trust's response, the result is the same: the

claims against the Tribe Defendants should be dismissed on the basis of sovereign immunity.

III. WAIVER OF TRIBAL SOVEREIGN IMMUNITY MUST BE CLEAR AND CANNOT BE IMPLIED AND THUS THE TRIBE DEFENDANTS DID NOT WAIVE THEIR SOVEREIGN IMMUNITY SIMPLY BY PARTICIPATING IN THESE BANKRUPTCY CASES

The Litigation Trust and the Tribe Defendants agree that suits against Indian tribes are barred by sovereign immunity absent a clear waiver by the tribe or by congressional abrogation. Oklahoma Tax Comm'n v. Citizen Band Potawatomi Indian Tribe of Oklahoma, 498 U.S. 505, 509, 111 S. Ct. 905, 909, 112 L. Ed. 2d 1112 (1991); (Response and Brief In Opposition to Motion to Dismiss, Doc. No. 668, filed 10/23/15, pg. 13) (hereinafter “Buchwald Brief, pg. __”). “It is settled that a waiver of sovereign immunity ‘cannot be implied but must be unequivocally expressed.’” Santa Clara Pueblo v. Martinez, 436 U.S. 49, 58, 98 S. Ct. 1670, 1677, 56 L. Ed. 2d 106 (1978), quoting United States v. Testan, 424 U.S. 392, 399, 96 S.Ct. 948, 953, 47 L.Ed.2d 114 (1976); see, also, C & L Enterprises, Inc. v. Citizen Band Potawatomi Indian Tribe of Oklahoma, 532 U.S. 411, 418, 121 S.Ct. 1589, 1594, 149 L.Ed. 623 (2001) (a tribe’s waiver of sovereign immunity must be “clear.”). In this case, there has been no clear and unequivocal waiver of sovereign immunity by the Tribe Defendants.

A. The Litigation Trust’s Attempt to Distinguish *Memphis Biofuels* Actually Demonstrates Why The Tribe Defendants Cannot Be Found To Have Waived Their Sovereign Immunity

The Litigation Trust argues that, because Memphis Biofuels, LLC v. Chickasaw Nation Industries, Inc., 585 F.3d 917 (6th Cir. 2009) involved a contract which contained a purported express waiver of sovereign immunity, and there is no such contract in this case, Memphis Biofuels, and the cases cited in it, have no application to this case. (Buchwald

Brief, pg. 15-17). To the contrary, the fact that Memphis Biofuels rejected a waiver of sovereign where there was an express statement of waiver by the tribe defendant only serves to demonstrate why there can be no waiver in this case—where there is nothing in writing evidencing an express statement of waiver.

As the Litigation Trust notes in its Brief, in Memphis Biofuels, the tribe defendant entered into a contract which contained (i) a provision waiving any sovereign immunity and (ii) a representation and warranty that the waiver was valid, enforceable and effective. Despite this clear and express contractual language purporting to waive the tribe's sovereign immunity, the Sixth Circuit concluded that the waiver was not effective, because the tribal charter required all waivers of sovereign immunity to be by duly adopted tribal resolution.

In this case, a conclusion that there has been no waiver is made much easier, because there is no contract or other document the Litigation Trust can point to where the Tribe Defendants purported to waive their sovereign immunity. In other words, the Litigation Trust—unlike the plaintiff in Memphis Biofuels—is not able to argue that the Tribe Defendants intended to waive their sovereign immunity, as evidenced by some clear and express contractual or other written language. Rather, the Litigation Trust is left to try to argue that certain conduct of the Tribe Defendants or the Debtors implies a waiver of sovereign immunity by the Tribe Defendants. Waiver by implication however is not permitted. Thus, the distinction the Litigation Trust attempts to draw between this case and Memphis Biofuels only serves to highlight how very weak their waiver argument is. Memphis Biofuels stands for the proposition that where a tribal charter or by-laws require sovereign immunity to be waived only by a tribal resolution, that is the only way a tribe can

waive its sovereign immunity, even where the tribe entered into a contract clearly and expressly purporting to waive the tribe's sovereign immunity. Memphis Biofuels, 585 F.3d at 922 (no waiver of tribal immunity because "board approval was not obtained and [the tribe's] charter controls.").

B. The Tribe Defendants Did Not Waive their Sovereign Immunity by Conduct In the Bankruptcy Proceedings

The Litigation Trust asserts that it is "well established that sovereign entities may waive sovereign immunity by their conduct." (Buchwald Brief, pg. 4). But, the cases cited by the Litigation Trust do not support an argument that an Indian tribe can waive its sovereign immunity by conduct in litigation.

The Litigation Trust cites three cases for its proposition concerning waiver by conduct: Lapides v. Board of Regents of University System of Georgia, 535 U.S. 613, 122 S.Ct. 1640 (2002); Hankins v. Missouri, 964 F.2d 853 (8th Cir. 1992); and In re 995 Fifth Avenue Assoc., L.P., 963 F.2d 503, 508 (2nd Cir. 1992). (Buchwald Brief,pg. 4, fn. 2). But, none of those cases involved Indian tribes; rather, those cases involved States and issues relating to Eleventh Amendment immunity. The issue in those cases was whether, and to what extent, a State waives its Eleventh Amendment immunity by its conduct in litigation. Lapides (whether the State's act of removing a lawsuit from state court to federal court waives immunity); Hankins (whether the State's act of paying a judgment against a state employee and seeking to recoup the amount paid from an inmate waives immunity); Fifth Ave. (whether the Eleventh Amendment bars a debtor's suit to recover taxes paid to the State).

Lapides determined that a State that removes a case from state court to federal court voluntarily invokes the federal court's jurisdiction. The actual holding in Lapides is

quite narrow, as the court specifically limited its ruling to cases involving “state law claims, in respect to which the State has explicitly waived immunity from state-court proceedings.” Lapides, 535 U.S. at 617. Lapides followed the long-recognized principle set forth in Gardner v. New Jersey, 329 U.S. 565, 574, 67 S.Ct. 467 (1947) that “a State ‘waives any immunity... respecting the adjudication of’ a ‘claim’ that it voluntarily files in federal court.” Lapides, 535 U.S. at 619. Of particular significance to this case is the Lapides court’s recognition of the distinction between the protections afforded an Indian tribe and those afforded a State under the Eleventh Amendment. In Lapides, the State cited Oklahoma Tax Comm’n v. Citizen Band Potawatomi Tribe of Okla., 498 U.S. 505, 111 S.Ct. 905 (1991), as support for its argument that participation in litigation does not waive a sovereign’s immunity. The Lapides court rejected this assertion, stating:

Those cases, however, do not involve the Eleventh Amendment—a specific text with a history that focuses upon the State’s sovereignty vis-à-vis the Federal Government. And each case involves special circumstances not at issue here, for example, an effort by a sovereign (*i.e.*, the United States) to seek the protection of its own courts (*i.e.*, the federal courts), or an effort to protect an Indian tribe.

Lapides, 535 U.S. at 623; see Contour Spa at the Hard Rock, Inc. v. Seminole Tribe of Florida, 692 F.3d 1200, 1206, 1208 (11th Cir. 2012) (quoting the same statement from Lapides and stating: “The Supreme Court squarely recognized that waiver rules applicable to states may not apply in the same way to Indian tribes” and noting that “there are powerful reasons to treat an Indian tribe’s sovereign immunity differently from a state’s Eleventh Amendment immunity.”).

In Oklahoma Tax Comm’n, the Potawatomi Indian tribe filed suit in federal court to enjoin the State’s assessment of a \$2.7 million cigarette tax. The State counterclaimed,

seeking to enforce its tax assessment. The Supreme Court, relying upon United States v. United States Fidelity & Guaranty Co., 309 U.S. 506, 511-12, 60 S.Ct. 658 (1940), held that the tribe did not waive its immunity merely by filing an action for injunctive relief. In U.S. Fid. & Guaranty, a surety bondholder claimed that a federal court had jurisdiction to hear its state-law counterclaim against an Indian tribe because the tribe's initial action to enforce the bond constituted a waiver of sovereign immunity. The court rejected this argument, holding that a tribe does not waive its sovereign immunity from actions that could not otherwise be brought against it merely because those actions are pleaded in a counterclaim to an action filed by the tribe. Id., at 513, 60 S.Ct. at 656; Oklahoma Tax Comm'n, 498 U.S. at 509.

Citing Jicarilla Apache Tribe v. Andrus, 687 F.2d 1324, 1344 (10th Cir. 1982), the Litigation Trust argues that the "waiver by conduct doctrine, however denominated, 'equally applies to Indian tribes.'" (Buchwald Brief, pg. 4). But that case does not support the Litigation Trust's argument. In Jicarilla, an Indian tribe filed suit against the Secretary of the Interior and several oil and gas lessees, seeking an order cancelling the leases. The lessees filed counterclaims against the Indian tribe. The Jicarilla court upheld the trial court's determination that the counterclaims filed against the Indian tribe were barred by sovereign immunity because they did not sound in equitable recoupment and they did not arise out of the same transaction as the Indian tribe's amended complaint. Id. at 1345. Moreover, Jicarilla was decided nearly a decade before the Supreme Court's decision in Oklahoma Tax Comm'n, where the Supreme Court removed any doubt that an Indian tribe does not waive its sovereign immunity to counterclaims filed against it in suits brought by the Indian tribe. See e.g. Contour Spa at the Hard Rock, Inc. v. Seminole Tribe of Florida,

692 F.3d 1200, 1206 (11th Cir. 2012) (“Our precedents make it abundantly clear that a waiver of tribal sovereign immunity cannot be implied on the basis of a tribe's actions; rather, it must be unequivocally expressed.”). The same rational applies even more forcefully in cases like the instant one, where an Indian tribe does not file suit but is subject to a direct suit by an adverse party.

There is no dispute in this case that the Tribe Defendants did initiate legal proceedings against Holdings or the Litigation Trust or anyone else for that matter. Nevertheless, the Litigation Trust contends that the Tribe Defendants have participated in the Greektown bankruptcy proceedings and thus must be found to have waived their sovereign immunity as to the fraudulent transfer claims brought by the Litigation Trust in this Adversary Proceeding. The Litigation Trust points to the following activity of the Tribe in the Greektown bankruptcy proceedings:

- Appearing at the omnibus hearings held in these cases;
- Filing objections with respect to several important issues in these cases, including objecting to Plan confirmation;
- Filing a proof of claim (Claim No. 282) against Greektown Casino in the amount of \$1,357,612;
- Filing a proof of claim (Claim No. 280) against Kewadin Greektown Casino in the amount of \$191,590;
- Filing an administrative priority proof of claim against Greektown Holdings (Claim No. 325) in the amount of \$263,217;
- The Gaming Authority filing a proof of claim (Claim No. 263) against Greektown Casino in the amount of \$550,000.¹

¹ (Buchwald Brief, pg. 13).

For the reasons set forth in the Tribe Defendants' Motion to Dismiss, none of these acts by the Tribe Defendants waive their sovereign immunity as to the entirely separate and distinct fraudulent transfer claims brought by the Litigation Trust in this Adversary Proceeding.²

To the extent that Gardner v. State of New Jersey, 329 U.S. 565, 67 S.Ct.467 (1947), is applicable to an Indian tribe, the holding there makes clear the extremely limited nature of a sovereign's waiver associated with the filing of a proof of claim: "When the State 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." Id. (emphasis added); In re Rogers, Inc., 212 B.R. 265, 274 (E.D. Mich. 1997) (Under the plain language of Gardner, when a State files a proof of claim in a bankruptcy proceeding, the State only waives its sovereign immunity with respect to the adjudication of that particular claim); In re Seay, 244 B.R. 112, 119 (E.D. Tenn. 2000) ("The [Gardner] court's language makes it clear that it considered the filing of a proof of claim to waive sovereign immunity only as to the claims allowance process."). In particular, the filing of a proof of claim by a state does not waive sovereign immunity as to an adversary proceeding brought against the state. In re Diaz, 667 F.3d 1073, 1087 (11th Cir. 2011) ("A state that files a proof of claim in a bankruptcy case does not thereby subject itself to any and all lawsuits that in any way might relate to the bankruptcy. Instead, an adversary proceeding against the state must bear a direct relationship to the bankruptcy court's adjudication of the state's claim.").

² The Tribe Defendants' Motion to Dismiss notes that the Notices of Appearance filed by the Tribe Defendants specifically state that the Tribe Defendants did not consent to jurisdiction over them and they reserved all defenses available to them; the Court granted a motion in limine permitting the Tribe Defendants to assert any defenses available to them in any potential avoidance claim or other claim filed against them; and the Plan Confirmation Order specifically provides that the Tribe Defendants are not deemed or construed to have waived or released their right to defend and attack any claim on all possible procedural and/or substantive grounds. (Tribe Defendants' Motion to Dismiss, pg. 13).

The cases cited by the Litigation Trust in its Brief support the position of the Tribe Defendants that they have not waived their sovereign immunity by “participating” in the Greektown bankruptcy proceedings. For example, in In re National Cattle Congress, 247 B.R. 259, 268 (Bkrtcy.N.D. Iowa 2000)³, the court noted the general proposition that “[n]othing short of a clear, express waiver satisfies the requirement that a tribe’s waiver cannot be implied but must be unequivocally expressed,” and held that the tribe’s application to modify the debtor’s Chapter 11 proceeding did not express a clear waiver of the tribe’s immunity. Similarly, in In re White, 139 F.3d 1268 (9th Cir. 1998)⁴, a tribal entity participated in the bankruptcy of a tribe member, by filing a proof of claim, objecting to the confirmation plan, and by filing an adversary proceeding contesting the dischargeability of its claim. The court held that in doing so, the tribe had “waived its immunity respecting the adjudication of its claim to recover [tribe member’s] debts,” but doing so did not extend the tribe’s waiver “beyond adjudication of the claim itself...” White, 139 F.3d at 1271, 1272.⁵

The Litigation Trust has cited no case that has held that an Indian tribe waives its sovereign immunity as to claims which could not otherwise be brought against it (due to the tribe’s sovereign immunity) based on the filing of a proof of claim by the tribe in a bankruptcy proceeding or the tribe’s participation in a bankruptcy proceeding (e.g. where the tribe files objections during the plan confirmation process). The Tribe Defendants are aware of no such case. The reason the parties can cite to no such a case is because the

³ Cited in the Buchwald Brief at footnote 5, page 18.

⁴ Cited in the Buchwald Brief at page 19.

⁵ The White court noted that the issue of whether the tribe entity was authorized to waive its sovereign immunity was not raised below and that there was “nothing in the record...that suggests what tribal approvals are necessary, or that indicates whether any approval in fact is required.” Id. at 1271. Unlike the tribe in White, the Tribe Defendants have demonstrated that formal approval by the Tribe Board is required for any waiver of tribal immunity and, therefore, even if the Gardner rule is applied to Indian tribes, the Tribe Defendants’ governing documents (Tribal Code and Charter) control and there can be no waiver of tribal immunity based on the filing of a proof of claim.

cases from courts around the country, including the Supreme Court, make clear that an Indian tribe's waiver of sovereign immunity must be clear, express, and unequivocal. Participation in litigation—even the filing of litigation—does not constitute the clear, express and unequivocal waiver of tribal sovereign immunity required by the courts.

IV. THE LITIGATION TRUST'S AGENCY, ALTER EGO, AND PIERCING THE CORPORATE VEIL THEORIES HAVE NO APPLICATION TO THIS CASE

The Litigation Trust argues that in determining whether the Tribe Defendants have waived their sovereign immunity, “the Court must also consider the Debtors’ conduct under well-established principles of agency, alter ego and piercing the corporate veil.” (Buchwald Brief, pg. 22). But, the case cited by the Litigation Trust for this proposition, In re Paques, Inc., 277 B.R. 615, 633-637 (Bkrtcy.E.D.Pa. 2000), does not involve an Indian tribe and does not even involve a subject-matter jurisdiction issue. Rather, it stands for the unremarkable proposition that a court may consider the relationship between a foreign corporation and its subsidiary in determining whether the foreign corporation may be subject to personal jurisdiction in the forum state based on the activities of the subsidiary in the forum state. That issue is not before the Court, and the Paques case in no way stands for the proposition that a court may waive an Indian tribe’s sovereign immunity based on the conduct of an entity in which the Indian tribe has an indirect interest. The Litigation Trust cites no case for such a proposition, and we are unaware of any such case. Indeed, the Litigation Trust acknowledges that its theory would be one of first impression for any court. (Buchwald Brief, pg. 22, footnote 6).

The cases involving the FSIA cited by the Litigation Trust⁶ are inapplicable to this case because they involved the issue of the sovereign immunity of foreign states under the FSIA, an act by which Congress abrogated the sovereign immunity of “foreign states” that participate in commercial activity in the United States. 28 U.S.C. § 1602.

The FSIA provides the sole basis for obtaining jurisdiction over a foreign state in federal court. Reiss v. Societe Centrale du Groupe des Assurances Nationales, 235 F.3d 738, 746 (2nd Cir. 2000). Under the FSIA, foreign states are deemed to have waived their sovereign immunity (a) in any case in which the foreign state has waived its immunity “either explicitly or by implication,” and (b) in any case in which the action is based upon a commercial activity carried on in the United States by the foreign state. 28 U.S.C. § 1605(a) (emphasis added); General Star National Ins. Co. v. Administratia Asigurarilor de Stat, 289 F.3d 434, 437-438 (6th Cir. 2002) (FSIA provides that a foreign state is not entitled to sovereign immunity if it either expressly or implicitly waives immunity or as to any suit that is based on commercial activity carried on in the United States by the foreign state). Also, the definition of “foreign state” under the FSIA includes an “agency or instrumentality of a foreign state.” 28 U.S.C. § 1603(a).

Thus, under the FSIA, a foreign state or its agent may waive their sovereign immunity by implication and also when they are involved in commercial activity in the United States. Neither of those conditions applies to Indian tribes, who cannot waive their sovereign immunity by implication, even when involved in commercial activity conducted off Indian lands. Santa Clara Pueblo, 436 U.S. at 58; C & L Enterprises, Inc., 532 U.S. at 418. In fact, courts have made clear that waivers of sovereign immunity under the FSIA should

⁶ First National City Bank v. Banco Para El Comercio Exterior De Cuba, 462 U.S. 611, 103 S.Ct. 2891 (1983) and Transamerica Leasing, Inc. v. La Republica De Venezuela, 200 F.3d 843 (D.C. Cir. 2000).

not be analogized to waivers of tribal sovereign immunity. Allen v. Gold Country Casino, 464 F.3d 1044, 1047-1048 (9th Cir. 2006). In Allen, the court stated:

There is simply no room to apply the FSIA by analogy, as [plaintiff] would have us do. The FSIA precludes immunity of a foreign state when that state engages in commercial activities in the United States. 28 U.S.C. § 1605(a)(2). To apply that provision to the Tribe would contravene the Supreme Court's decision in *Kiowa*, holding that tribal immunity extended to commercial activities of the tribe. *Kiowa*, 523 U.S. at 760, 118 S.Ct. 1700. FSIA also permits a waiver of immunity to be implied, *see* 28 U.S.C. § 1605(a)(1), while the Supreme Court permits no such implied waiver in the case of Indian tribes. *See, e.g., Santa Clara Pueblo*, 436 U.S. at 58, 98 S.Ct. 1670. We accordingly decline Allen's invitation to apply FSIA by analogy to tribal sovereign immunity.

Allen, 464 F.3d at 1048; *see also Piro-Harabedian v. Saginaw Chippewa Indian Tribe*, 2005 WL 3163395 (E.D. Mich. Nov. 23, 2005) (noting that it is well-established that an Indian tribe is not a foreign state and that the FSIA does not impair the immunity of Indian tribes).⁷

Finally, Amerind Risk Management Corporation v. Malaterre, 633 F.3d. 680 (8th Cir. 2011), cited by the Litigation Trust, strongly supports the absence of a waiver of sovereign immunity by the Tribe Defendants. (Buchwald Brief, pg. 19). In that case, Amerind, a federally-chartered tribal corporation which enjoyed sovereign immunity, assumed the rights and obligations of its tribally-chartered predecessor, ARMC, which was alleged to have waived its sovereign immunity as to the claims asserted by the plaintiffs. The court determined that Amerind's general assumption of ARMC's obligations and liabilities "was,

⁷ It is perhaps worth mentioning that in Transamerica, on the control issue, the district court found that Venezuela controlled its instrumentality, CAVN, based on the following facts: Venezuela (1) owned a majority of CAVN's stock; (2) appointed the Board of Directors and the Chairman of the Board and President; (3) was involved in CAVN's "day-to-day" operations by overseeing the restructuring of CAVN's intermodal operations and approving the sale of three of CAVN's vessels; and (4) aided CAVN financially; while (5) the President of CAVN, with apparent authority to bind Venezuela, assured one of the plaintiffs that the Government would support CAVN. The Circuit Court concluded, however, that those facts "establish neither that Venezuela dominated CAVN nor that CAVN was Venezuela's actual or apparent agent." Id. at 850-851.

at most, an implied waiver of sovereign immunity.” *Id.* at 687. The court concluded that plaintiffs had failed to prove a waiver of sovereign immunity, because they “provided no evidence that Amerind’s Board of Directors ever adopted a resolution waiving Amerind’s immunity to the plaintiff’s pending suit, and absent such a resolution, we cannot say that Amerind unequivocally waived its sovereign immunity when it generally assumed ARMC’s ‘obligations and liabilities.’” *Id.* at 688.⁸

Thus, while theories of agency/alter ego/piercing the corporate veil may have applicability to issues involving a foreign state’s waiver of sovereign immunity under the FSIA, they simply have no application to this case, nor do they apply even generally to the issue of tribal sovereign immunity. Accordingly, the Litigation Trust’s arguments fail, and the Litigation Trust should not be permitted to undertake discovery on these issues, as they are simply irrelevant to the question of whether the Tribe Defendants clearly and expressly waived their immunity as to the fraudulent transfer claims brought by the Litigation Trust against the Tribe Defendants in this Adversary Proceeding.

V. **CONCLUSION**

Memphis Biofuels and the cases cited therein make clear that if a tribe has established specific procedures for waiving sovereign immunity, either through the tribe’s constitution or charter or tribal code, then those procedures **must** be followed in order to find a clear and unambiguous waiver of tribal immunity. The Tribe Defendants governing documents provide that tribal sovereign immunity may only be waived by the Tribe Defendants pursuant to a duly authorized and approved resolution, adopted by the Tribe Board and the Authority Board, respectively. No such resolution exists by which the Tribe

⁸ The Amerind court concluded that a predecessor corporation’s amenability to a pending suit is irrelevant unless the sovereign’s successor’s immunity has been expressly and unequivocally waived. *Id.* at 685, fn. 7.

Defendants waived their sovereign immunity as to the claims asserted by the Litigation Trust. Accordingly, the Tribe Defendants are immune from suit and this case should be dismissed as against them.

Dated: November 9, 2015

Respectfully submitted,

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