UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MICHIGAN

IN RE: GREEKTOWN HOLDINGS, LLC
Debtor,

BUCHWALD CAPITAL ADVISORS LLC,
Litigation Trustee for the Greektown Litigation Trust,
Appellant,

v.

SAULT STE. MARIE TRIBE OF CHIPPEWA INDIANS and
KEWADIN CASINOS GAMING AUTHORITY,
Appellees.

On Appeal From the United States Bankruptcy Court
for the Eastern District of Michigan

District Court No. 2:16-cv-13643

Bankruptcy Adversary Proceeding No. 10-05712

AMENDED BRIEF OF PLAINTIFF-APPELLANT, BUCHWALD CAPITAL ADVISORS LLC

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DISCLOSURE OF CORPORATE AFFILIATIONS AND FINANCIAL AFFAIRS

Appellant, Buchwald Capital Advisors LLC, makes the following disclosure:

1. Buchwald Capital Advisors LLC, is not a subsidiary or affiliate of a publicly owned corporation.

2. There is no publicly owned corporation not a party to the appeal, that has a financial interest in the outcome. However, Buchwald Capital Advisors LLC, is the Trustee of the Greektown Litigation Trust which was created pursuant to the confirmed plan of reorganization of Greektown Holdings, LLC, *et al*. As beneficiaries of the Greektown Litigation Trust, the entities identified below have a financial interest in the outcome of this appeal. These entities include or may include publicly owned corporations or affiliates thereof.

KNOWN BENEFICIARIES OF GREEKTOWN LITIGATION TRUST

JOHN HANCOCK BOND FUND
JOHN HANCOCK INCOME SECURITIES TRUST
JOHN HANCOCK INVESTORS TRUST
JOHN HANCOCK FUNDS III LEVERAGED COMPANIES FUND
JOHN HANCOCK FUNDS II ACTIVE BOND FUND
JOHN HANCOCK FUNDS TRUST ACTIVE BOND TRUST
MANULIFE GLOBAL FUND U.S. BOND FUND
MGF US SPECIAL OPPORTUNITIES BOND FUND
MANULIFE GLOBAL FUND STRATEGIC INCOME
JOHN HANCOCK TRUST STRATEGIC INCOME TRUST
JOHN HANCOCK TRUST HIGH INCOME TRUST
JOHN HANCOCK FUNDS II HIGH INCOME FUND
JOHN HANCOCK FUNDS II STRATEGIC INCOME FUND
JOHN HANCOCK HIGH YIELD FUND
JOHN HANCOCK STRATEGIC INCOME FUND
OPPENHEIMER CHAMPION INCOME FUND
OPPENHEIMER STRATEGIC INCOME FUND
OPPENHEIMER STRATEGIC BOND FUND V/A
OPPENHEIMER HIGH INCOME FUND V/A

ING OPPENHEIMER STRATEGIC INCOME PORT
BRIGADE LEVERAGED CAPITAL STRUCTURES FUND LTD
SOLA LTD
SOLUS CORE OPPORTUNITIES MASTER FUND LTD
BROOKVILLE HORIZONS FUND LP
FRONT PART BROOKVILLE CAPITAL MASTER FUND LP
HALBIS DISTRESSED OPPORTUNITIES MASTER FUND LTD
STANDARD GENERAL FOCUS FUND LP
STANDARD GENERAL MASTER FUND LP
STANDARD GENERAL OC MASTER FUND LP
MARINER TRICADIA CREDIT STRATEGIES MASTER FUND LTD
STRUCTURED CREDIT OPPORTUNITIES FUND II LP
TRICADIA DISTRESSED AND SPECIAL SITUATIONS MASTER FUND
BLACK ROCK HIGH INCOME VI FUND
BLACK ROCK HIGH INCOME PORTFOLIO
BLACK ROCK CORPORATE HIGH YIELD FUND INC
BLACK ROCK HIGH INCOME SHARES
BLACK ROCK HIGH INCOME FUND
BLACK ROCK CORPORATE HIGH YIELD FUND III
BLACK ROCK CORPORATE HIGH YIELD FUND VI
BLACK ROCK CORPORATE HIGH YIELD FUND V INC
BLACK ROCK INCOME OPPORTUNITY TRUST
BLACK ROCK HIGH YIELD TRUST
BLACK ROCK CORE BOND TRUST
BLACK ROCK STRATEGIC BOND TRUST
BLACK ROCK LIMITED DURATION INCOME TRUST
BLACK ROCK FLOATING RATE INCOME TRUST
BLACK ROCK HIGH YIELD BOND PORTFOLIO
BGF US DOLLAR HIGH YIELD BOND FUND
RB-U-FONDS-HYBO
BAV RBI RENTEN US HYI
MANAGED ACCOUNT SERIES HIGH INCOME PORTFOLIO
REGIMENT CAP

s/ Joel D. Applebaum
(Signature of Counsel)

December 2, 2016
(Date)

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STATEMENT IN SUPPORT OF ORAL ARGUMENT

In this appeal, the legal issues are complicated and novel. The opportunity to address the issues in this appeal in greater detail and to respond to inquiries from the Court will aid the Court in its decision-making process. Under the guidance set forth in Rule 8019 of the Federal Rules of Bankruptcy Procedure and E.D. Mich. L.R. 83.50, oral argument is necessary and appropriate.

APPELLANT'S STATEMENT OF SUBJECT MATTER JURISDICTION

On June 9, 2015, this Court issued its Opinion and Order Reversing the Bankruptcy Court's August 13, 2014 Order Denying the Tribe's Renewed Motion to Dismiss on the Grounds of Sovereign Immunity and Remanding for Further Proceedings. *In re Greektown Holdings, LLC*, 532 B.R. 680 (E.D. Mich. 2015). On September 29, 2016, the United States Bankruptcy Court for the Eastern District of Michigan (the "**Bankruptcy Court**") issued its Opinion and Order On Remand, granting Appellees' Motion to Dismiss on the ground that the Appellees had not waived their sovereign immunity. *In re Greektown Holdings, LLC*, 2016 Bankr. LEXIS 3605 (September 29, 2016). This appeal arises from the Bankruptcy Court's Opinion and Order on Remand. The Bankruptcy Court had subject matter jurisdiction to hear this adversary proceeding pursuant to 28 U.S.C.

§§157(b) and 1334 and E.D. Mich. L.R. 83.50(a). This Court has jurisdiction over this appeal pursuant to 28 U.S.C. §158(a)(1).[1]

STATEMENT OF ISSUES PRESENTED

1. Whether the Bankruptcy Court erred in determining that the Tribe Defendants' tribal sovereign immunity could only be waived by duly-adopted resolutions by the Tribe Defendants' governing boards?

2. Whether the Bankruptcy Court erred in determining that the Tribe Defendants did not waive their tribal sovereign immunity by conduct including, but not limited to: (i) the Tribe Defendants' participation in litigation; (ii) the Tribe Defendants' filing of proofs of claim and participation in the claims allowance process in a bankruptcy case; (iii) the Tribe Defendants' participation in the plan confirmation process; (iv) by actually or effectively filing the bankruptcy petitions of the Debtors; and, (v) where the Tribe Defendants are legally equated to the Debtors under theories of alter ego, piercing the corporate veil, and/or agency?

3. Whether the Bankruptcy Court erred in determining that, as a matter of law, theories of alter ego, piercing the corporate veil, and/or agency are

[1] Even if the Bankruptcy Court lacked the constitutional authority to enter a final judgment on Appellees' Motion to Dismiss under *Stern v. Marshall*, 131 S.Ct. 2594 (2011), the Supreme Court ruled that a district court's de novo review and entry of its own valid final judgment resolves any deficiency in jurisdiction and "cure[s] any error." *Exec. Benefits Ins. Agency v. Arkison*, 134 S.Ct. 2165, 2175 (2014).

inapplicable to the question of whether the Tribe Defendants waived their sovereign immunity by conduct?

4. Whether the Bankruptcy Court erred in determining that Plaintiff failed to meet its burden of proving that the Tribe Defendants' unequivocally waived by conduct their sovereign immunity?

5. Whether the Bankruptcy Court erred in granting the Tribe Defendants' Motion to Dismiss before allowing Plaintiff to conduct discovery on the Tribe Defendants' conduct?

STATEMENT OF THE CASE

The Official Committee of Unsecured Creditors sued to avoid and recover approximately $155 Million from a variety of defendants including Defendants Sault Ste. Marie Tribe of Chippewa Indians (the "**Tribe**") and the Kewadin Casinos Gaming Authority ("**Kewadin Gaming Authority**") (collectively, the "**Tribe Defendants**"). In connection with confirmation of the amended plan of reorganization for Greektown Holdings, Greektown Casino, Kewadin Greektown Casino, Monroe, and the remaining debtors (collectively, the "**Debtors**"), Buchwald Capital Advisors LLC, solely in its capacity as Litigation Trustee for the Greektown Litigation Trust (the "**Litigation Trust**") ("**Plaintiff**") was substituted as plaintiff into the adversary proceeding in the place and stead of the Official Committee of Unsecured Creditors (the "**Committee**"). On June 28, 2010, the

Tribe Defendants filed their initial Motion to Dismiss the Litigation Trust's Complaint on the ground that sovereign immunity bars the claims asserted against them in the Complaint. 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 Greektown bankruptcy cases to be initiated and, thereafter, participating in those proceedings. The Bankruptcy Court heard oral argument on the initial 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 Bankruptcy Court to hold any ruling on the Tribe Defendants' Motion to Dismiss in abeyance pending a decision on the Settlement Motion. The reference on the Settlement Motion was subsequently withdrawn to this Court, and the settlement was approved. 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 part of the settlement. *Papas v. Buchwald Capital Advisors LLC (In re Greektown 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, and the Tribe Defendants renewed their Motion to Dismiss in the Bankruptcy Court. Again, the parties bifurcated the legal issue from any factual issues surrounding waiver. On August 13, 2014, the Bankruptcy 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, this Court reversed the Bankruptcy Court, and remanded for further proceedings on the previously bifurcated fact-intensive issue of waiver. *In re Greektown Holdings, LLC*, 532 B.R. 680 (E.D. Mich. 2015).

Although the issue of waiver is an intensely factual one, the Tribe Defendants contended on remand that, *as a matter of law*, they cannot have waived their sovereign immunity and, therefore, no factual discovery or evidentiary hearing on the issue of waiver were required. Because they contended that no discovery or evidentiary hearing were 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.[2] Pursuant to a Stipulated Order dated

[2] Moreover, as this matter was before the Bankruptcy Court upon the Tribe Defendants' Motion to Dismiss, the evidence of Plaintiff, as the non-moving party, was to be believed, and all justifiable inferences were 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

August 26, 2015 [Dkt. 5, Pg Id 249-251, A.P. Dkt. No. 648], the Bankruptcy Court authorized the Tribe Defendants to file a 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. 5, Pg Id 252-343, A.P. Dkt. No. 649] and Plaintiff responded thereafter. Almost one year later, on September 29, 2016, the Bankruptcy Court issued its Opinion and Order On Remand granting Appellees' Motion to Dismiss. *In re Greektown Holdings, LLC*, 2016 Bankr. LEXIS 3605 (September 29, 2016). This appeal followed.

SUMMARY OF APPELLANT'S ARGUMENT

Relying on *Memphis Biofuels, LLC v. Chickasaw Nation Industries, Inc.*, 585 F.3d 917 (6th Cir. 2009), the Tribe Defendants argued that, as a matter of law, 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. 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. The Bankruptcy Court agreed, holding that, regardless of legal theory or factual development, no conduct

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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).

by the Tribe Defendants could ever override the absence of a duly-adopted board resolution.

The Bankruptcy Court's reliance on *Memphis Biofuels* was misplaced. *Memphis Biofuels* addresses only the validity of *contractual* waivers of sovereign immunity in the absence of a duly-authorized tribal board resolution. Waiving one's sovereign immunity through the adoption of a board resolution is not the only recognized method of waiver. It is well-established that sovereign entities may waive sovereign immunity by their conduct. *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 as a matter of law, the Bankruptcy Court should have simply denied the Tribe Defendants' Motion to Dismiss. There are other recognized means of waiver and Plaintiff was entitled to explore them through limited discovery. *Gould, Inc. v. Pechiney Ugine, et al.*, 853 F.2d 445, 451 (6th Cir. 1988) ("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.") *See also, J.S. Haren Co. 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); *Warburton/Buttner v. the Superior Court of San Diego*, 103 Cal. App. 4th 1170 (Cal. Ct. App. 2002) (permitting discovery into alter ego/veil piercing claims in connection with tribe's assertion of sovereign immunity).

In this case, Plaintiff alleged and, for the purposes of a motion to dismiss, such allegations must be accepted as true, that the Tribe Defendants waived sovereign immunity with respect to this adversary proceeding by their conduct which included, among other things, (i) their complete domination and control of the Debtors, and use of the Debtors as a mere instrumentality, 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 case 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, Plaintiff should have been given the opportunity to explore whether the Tribe Defendants' conduct, including the conduct of the Debtors and their professionals under well-established alter ego/veil piercing principals, constituted a waiver of the Tribe Defendants' sovereign immunity with respect to the claims that are the subject of this adversary proceeding. The Bankruptcy Court's Opinion and Order on Remand, therefore, should be reversed.

STANDARD OF REVIEW ON APPEAL

On appeal from a bankruptcy court, a district court reviews the bankruptcy court's findings of fact under the clearly erroneous standard, but reviews *de novo* the bankruptcy court's conclusions of law. *In re Isaacman*, 26 F.3d 629, 631 (6th Cir. 1994).

STATEMENT OF FACTS

To date, Plaintiff has been unable to take *any* discovery from the Tribe Defendants on the subject of waiver of sovereign immunity. While the Tribe Defendants provided Plaintiff with certain documents related to the their settlement

with Plaintiff and the Settlement Motion, those documents did not address subject matter jurisdiction or whether the Tribe Defendants' waived their claim of entitlement to sovereign immunity. As discussed *infra*, Plaintiff should have been given a fair opportunity to conduct limited reasonable discovery to explore whether the Tribe Defendants waived their sovereign immunity with respect to the fraudulent transfer claims at issue in this adversary proceeding because, among other things, the Tribe Defendants were the alter ego of the Debtors such that their respective corporate veils should be pierced. Nevertheless, the following statement of facts, which is based primarily upon information obtained from documents produced by the reorganized Debtors and Bankruptcy Court filings, supports Plaintiff's contentions that the Debtors were the alter ego of and/or agents of the Tribe Defendants and, therefore, the Debtors' conduct applies equally to the Tribe Defendants in determining whether the Tribe Defendants waived 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% was owned by Monroe Partners, LLC ("**Monroe**"), a limited liability company owned by the Dimitrios and Viola Papas and Ted and Maria Gatzaros, also defendants in this adversary proceeding (the "**Papas and Gatzaros Defendants**").[6] 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 approval, 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 the casino could 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

[6] 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.

the membership interests' actual market value, rendering Greektown Casino financially vulnerable.

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 Refinancing and Recapitalization described below.

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

The Tribe Defendants exclusively controlled Greektown Casino's efforts to obtain a casino license, including the acquisition of the Monroe membership interests and the MGCB licensure proceedings. 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. More importantly, 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*, Bank. 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 the Millennium agreement was finally rejected by the Debtors in October 2008 [Bank. 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 gaming 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, a parking structure located sufficiently close to the casino to satisfy 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. The Tribe Defendants 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. Once again, Greektown Casino was without independent counsel or other independent advisors. The method of acquisition and ownership structure of the Bates Garage further 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**") [Dkt. 5, Pg Id 55, Complaint ¶ 33]. 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 was estimated at the time to be at least $200,000,000. [Dkt. 5, Pg Id 55, Complaint ¶ 34]. 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 gutting the value of the Tribe Defendants' equity [Dkt. 5, Pg Id 56-57, Complaint ¶ 41]. 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 the Casino's interactions with the MGCB. All officers and employees of Greektown Casino were ordered to report directly to Mr. Collins who, in turn, reported directly to the Tribe through Mr. Matson, the Tribe's CFO, and other Tribe officers. As the Expanded Complex was not completed until well after the bankruptcy cases were filed, this chain of command continued as well.

5. Tribe Defendants Transfer the Note Proceeds From the 2005 Refinancing and Recapitalization to Pay The Tribe Defendants' 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. [Dkt 5, Pg Id 56, Complaint ¶ 36]. 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. *Id* Also on December 2, 2005, Holdings, and its affiliate, Greektown

Holdings II, LLC, issued their 10 ¾% senior notes in the principal amount of $185,000,000 (the "**Notes**") [Dkt. 5, Pg Id 56, Complaint ¶ 37].

This 2005 Refinancing and Recapitalization 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 equity 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. [Dkt. 5, Pg Id 59, Complaint ¶ 53]. 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. These transfers are the subject of this adversary proceeding. [Dkt. 5, Pg Id 57, Complaint ¶¶ 42-43].

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**") (Bank. Dkt. No. 10) at ¶¶19 and 21. The Tribe infused additional capital in 2007, but that infusion was insufficient to fully stabilize and bring Holdings back into financial compliance. Ultimately, Holdings had until April 30, 2008 to cure its 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 and the City from terminating the Development Agreement, either of which would result in a loss of the casino license, the Debtors filed their

voluntary petitions for relief under chapter 11 the Bankruptcy Code on May 29, 2008. The bankruptcy cases were thereafter jointly administered.

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

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 control 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] [Dkt. 5, Pg Id 55, Complaint ¶ 31], among others. In addition on November 26, 2008, the Tribe filed a proof of claim (Claim No. 282) against Greektown 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. [Dkt. 5, Pg Id 54, Complaint ¶ 27]. 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. [Dkt. 5, Pg Id 54, Complaint ¶ 28]. On November 26, 2008, Defendant Kewadin Gaming Authority filed a proof of claim (Claim No.

263) against Greektown Casino in the amount of $550,000 [Dkt. 5, Pg Id 54, Complaint ¶ 29].

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 (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.*, 532 U.S. 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 2376, *5 (April 5, 2002) ("A tribe's waiver of immunity must be clear and unequivocal . . . but the tribe need not use the words "sovereign immunity" for the waiver to be deemed explicit.") (internal citation omitted).

I. A DULY AUTHORIZED BOARD RESOLUTION IS NOT THE EXCLUSIVE METHOD WHEREBY SOVEREIGN IMMUNITY MAY BE WAIVED.

Relying on *Memphis Biofuels, LLC v. Chickasaw Nation Industries, Inc.*, 585 F.3d 917 (6th Cir. 2009), the Bankruptcy Court agreed with the Tribe Defendants that the *only* way the Tribe Defendants 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. 2016 Bankr. LEXIS 3605 at *11-*12. No such resolutions were ever adopted and, therefore, the Bankruptcy Court held, as a matter of law, that the Tribe Defendants cannot have waived their sovereign immunity from suit in this case. *Id*.

The Litigation Trust concedes 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 Bankruptcy Court's reliance on *Memphis Biofuels* was misplaced. *Memphis Biofuels* addressed only the validity of contractual waivers of sovereign immunity in the absence of a duly-authorized tribal board resolution. However, waiving one's sovereign immunity through a duly-authorized board resolution is not the only recognized method of waiver. It is well-established that

sovereign entities may waive sovereign immunity by their conduct.[7] *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). *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). As discussed below, because there are other effective methods of waiver in addition to the adoption of a tribal board resolution, the Tribe Defendants' Motion to Dismiss should have been denied.

A. *Memphis Biofuels* Applies Only to Purported 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

[7] 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).

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 this appeal, 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 Bankruptcy Court and the Tribe Defendants below 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 tribal constitution or charter. Id. at *12-13. 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 below 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 its 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"); *Shurlow 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 Defendants and adopted by the Bankruptcy Court; 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 holding that a board resolution was the exclusive method of waiver, the Bankruptcy Court improperly conflated two distinct concepts thereby reaching an

absurd result. The Bankruptcy Court first found that the contract at issue in *Memphis Biofuels* was the "clearest, and most explicit form of 'conduct' imaginable." *Id*. at *11. Because this newly-denominated "conduct" was held to be insufficient to waive sovereign immunity in light of the tribal charter at issue, the Bankruptcy Court erroneously concluded that "what Plaintiff alleges the Tribe Defendants did should also be seen as insufficient." *Id*. at *12. This adversary proceeding, however, sounds in tort, whereas *Memphis Biofuels* sounded in contract. 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, nor would such a request be imaginable. First, it was impossible to know that the Tribe Defendants would be committing a tort (the fraudulent transfers alleged in the complaint) in order to have requested a waiver and, second, it is equally inconceivable that the Tribe Defendants would have adopted a board resolution waiving sovereign immunity with respect to a tort claim that had not yet been asserted. Taking its reasoning to its logical conclusion, the Bankruptcy Court has effectively eliminated the possibility of waivers of sovereign immunity in the tort context; an absurd result. In the tort context, *Memphis Biofuels* is simply inapplicable.

B. *Memphis Biofuels* Did Not Abrogate the Doctrine of "Waiver By Conduct."

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).

Since *Gardner*, courts have 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) (immunity waived 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.")

The doctrine of waiver by conduct was neither addressed nor rejected by the *Memphis Biofuels* court which, as previously noted, focused exclusively on contractual waivers. In light of *Gardner*, *supra*, among other cases, it cannot be said that the adoption of a tribal board resolution is the sole and exclusive method by which tribal sovereign immunity may be waived. Again, as this matter was before the Bankruptcy Court upon on the Tribe Defendants' Motion to Dismiss, that motion should simply have been denied.

II. WELL-ESTABLISHED ALTER EGO, PIERCING THE CORPORATE VEIL AND AGENCY PRINCIPLES APPLY IN EVALUATING THE TRIBE DEFENDANTS' CONDUCT FOR PURPOSES OF DETERMINING WHETHER THE TRIBE DEFENDANTS WAIVED SOVEREIGN IMMUNITY

On remand, the Bankruptcy Court was required to determine whether the Tribe Defendants, by their conduct, waived sovereign immunity with respect to the claims in the adversary proceeding. In making this determination, however, the Bankruptcy Court should have considered the conduct of the Tribe Defendants and the Debtors under well-established alter ego, piercing the corporate veil and agency principals.

The Bankruptcy Court flatly rejected the application of these principals because, first, their application appeared to be an issue of first impression and, second, according to the Court, "[t]aking all of the Plaintiff's allegations as true, the Court finds that such are legally insufficient to amount to a waiver of the Tribe Defendants' sovereign immunity." 2016 Bankr. LEXIS 3605 at *25. The Bankruptcy Court continued:

> As a matter of law, Plaintiff cannot but fail to meet the high burden of proving the required express, unequivocal, unmistakable, and unambiguous waiver. At the very least, any such waiver, even if those allegations are shown by the asserted facts and theories, must by its nature be considered to be "implied" and that would be legally insufficient. *Id.* at *34 (internal citation omitted).

The Bankruptcy Court's legal conclusions were clearly erroneous for two primary reasons. First, application of alter ego and piercing the corporate veil in

determining whether sovereign immunity was waived is not an issue of first impression. Other state and federal courts have recognized the applicability of these principals in connection with the question of waiver, including waivers by Indian tribes. Moreover, precedent in an analogous context also supports the application of alter ego and piercing the corporate veil principals in this case. Second, and more importantly, the application of these principals is not a form of improper "implication," and does not violate the requirement that waivers of sovereign immunity cannot be implied but must be unequivocally expressed. *See Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 58 (1978). Determining whether application of alter ego/veil piercing principals is warranted is independent of the analysis of whether sovereign immunity was waived. If Plaintiff were successful in establishing that the Debtors were alter egos of the Tribe Defendants such that their respective corporate veils should be pierced, the Tribe Defendants' sovereign immunity is waived by operation of law, not by implication. Plaintiff should have been given this opportunity.

A. State and Federal Courts Have Recognized the Applicability of Alter Ego and Piercing the Corporate Veil Principals in Determining Whether an Indian Tribe Waived Sovereign Immunity.

In *Warburton/Buttner v. the Superior Court of San Diego*, 103 Cal. App. 4th 1170 (Cal. Ct. App. 2002), the California Court of Appeals considered an issue substantially identical to the issue presented in *Memphis Biofuels v. Chickasaw*

Nation Industries, Inc., supra; namely, the effectiveness of a contractual waiver of sovereign immunity in the absence of a formal tribe resolution. The *Warburton* court recognized that, independent of a formal tribal board resolution, alter ego theories "raise issues concerning whether the Tribe, as a member of the limited liability company First Nation, is protected from Liability to the same extent enjoyed by corporate shareholders, or whether it may be held subject to individual liability under the common law of alter ego liability." *Warburton/Buttner v. the Superior Court of San Diego* at 1189. Relying, in part, on *Gould, Inc. v. Pechiney Ugine Kuhlmann*, 853 F.2d 445 (6th Cir. 1988), the *Warburton/Buttner* court held that the plaintiff was "entitled to discovery to pursue the above alter ego allegations and its other theories of contractual liability and fraud, despite the admitted lack of a formal tribal resolution . . . ." because, among other reasons, "none of the cases cited and reviewed that have found contractual waivers of sovereign immunity, that were ultimately approved by official tribal results of some variety, also contained the type of alter ego allegations that we have here." *Id*. at 1189-1190. Thus, in allowing discovery into the issue of alter ego, the *Warburton/Buttner* court recognized that alter ego theories provided an independent basis for a finding of liability even in the absence of a formal tribal board resolution.

Similarly, in *Private Solutions, Inc. v. SCMC, LLC*, 2016 U.S. Dist. LEXIS 88190 (D.N.J. July 6, 2016), the United States District Court for the District of New Jersey considered an appeal from an order of its Magistrate Judge holding that plaintiff was entitled to amend its complaint to add a tribe defendant as a party defendant under a veil piercing claim. In response, the tribe defendant asserted, among other defenses, that it was immune from suit because it was "an arm of the Seneca Nation of Indians." *Id*. at *3. Ultimately, the District Court concluded that plaintiff was unable to satisfy the second prong of the veil piercing analysis such that amending the complaint would be futile. *Id*. at *8. Had plaintiff been able to satisfy the requisite elements of veil piercing, however, the plaintiff would have been permitted to engage in limited discovery with respect to the tribe defendant's assertion of sovereign immunity. *Id*. at *9. *See also, United States ex rel. Morgan Bldgs. & Spas, Inc. v. Iowa Tribe of Okla.*, 2011 U.S. Dist. LEXIS 7840 at *5 (W.D. Okla. January 26, 2011) (factual dispute as to whether defendant was "the alter ego of ITO [Iowa Tribe of Oklahoma] or a subordinate economic entity of ITO. If BKJ is the alter ego of ITO, BKJ's waiver of tribal sovereign immunity would also act as a waiver of ITO's triable sovereign immunity.")[9]

[9] In this adversary proceeding, there are no issues regarding subordinate economic entities.

As discussed in Section II. C. below, although Plaintiff has not been afforded any opportunity to conduct discovery on these issues, the limited factual record in this case evidences that the Debtors were a mere instrumentality of the Tribe Defendants, the Debtors were exploited to commit a fraud or other wrong, and the beneficiaries of the Litigation Trust suffered as a result. *Flagstar Bank, FSB v. Centerpoint Financial, Inc.*, 2011 U.S. Dist. LEXIS 56257, *14 (E.D. Mich. May 26, 2011); *Xerox Corp. v. N.W. Coughlin & Co.*, 2009 U.S. Dist. LEXIS 8453, *12-13 (E.D. Mich. February 4, 2009).

B. Federal Courts Recognize the Applicability of Alter Ego and Piercing the Corporate Veil Principals to Foreign Sovereigns in Analogous Circumstances.

In addition to the above-cited cases applying alter ego and veil piercing principals to sovereign immunity waivers involving Indian tribes, these same principals have been applied in analogous circumstances to foreign sovereigns. *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); *Foremost-McKesson v. Republic of Iran*, 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").[10]

[10] 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*

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 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. Braspetro Oil Services Co.*, 1999 U.S. Dist. LEXIS 7236, *24-*25 (S.D.N.Y. May 17, 1999).

Potawatomi Indian Tribe of Okla., 532 U.S. 411, 421, n.3; *Kiowa Tribe of Okla., supra* at 759.

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.

The Tribe Defendants below sought to avoid the application of these principles by arguing that waivers of sovereign immunity under the FSIA [Foreign Sovereign Immunities Act] cannot be analogized to waivers of tribal sovereign immunity. In support of this assertion, the Tribe Defendants principally relied upon the case *Allen v. Gold Country Casino*, 464 F.3d 1044 (9th Cir. 2006). The Bankruptcy Court agreed. In *Allen*, however, the court addressed and rejected the argument that a *specific* provision of the Foreign Sovereign Immunities Act precluding immunity for a foreign sovereign engaged in commercial activity in the United States should be applied *by analogy* to Indian tribes. The *Allen* case is not applicable here, as the Litigation Trust is not seeking to apply – whether by analogy or otherwise – the specific provisions of the FSIA to the Tribe Defendants. Rather, the Litigation Trust is arguing that common law doctrines of agency, alter ego and piercing the corporate veil apply equally when analyzing whether the Tribe Defendants waived their sovereign immunity in this case, just as they are commonly applied by courts analyzing whether a foreign sovereign waived its sovereign immunity by conduct. These common law doctrines are not specific to or exclusive to the FSIA. Rather, they are a useful and appropriate analytical tool

for determining the scope and extent of the Tribe Defendant's waiver and should be applied in this case.

C. The Tribe Defendants' Conduct Creates an Issue of Fact Regarding Whether the Tribe Defendants' Were the Alter Ego and/or Whether the Debtors Were Agents of the Tribe Defendants.

As this Court recognized in *Xerox Corp. v. N.W. Coughlin & Co.*, 2009 U.S. Dist. LEXIS 8453, *12-13 (E.D. Mich. February 4, 2009),

> In actions against shareholders of corporations, Michigan courts begin with the initial presumption that the corporate form will be respected. "This presumption, often called the 'corporate veil' may be pierced only where an otherwise separate corporate existence has been used to 'subvert justice or cause a result that [is] contrary to some overriding public policy.'" "The traditional basis for piercing the corporate veil has been to protect a corporation's creditors where there is a unity of interest of the stockholders and the corporation and where the stockholders have the corporate structure in an attempt to avoid legal obligations."
>
> Michigan courts pierce the corporate veil upon a finding of three elements: (1) that the corporate entity was a mere instrumentality of another entity or individual, (2) that the corporate entity was used to commit a fraud or wrong, and (3) that there was an unjust loss or injury to the plaintiff. In making this determination, courts consider several factors, including the sufficiency of the capitalization of the corporation, the maintenance of separate books, the degree of separation of the corporation's and shareholders' finances, any disregard of corporate formalities, the existence of the corporation as a sham. As a result, "[t]he propriety of piercing the corporate veil is highly dependent on the equities of the situation, and the inquiry tends to be intensively fact-driven." (internal citations omitted).

See also, Wild v. United States, 2015 U.S. Dist. LEXIS 163349 *9-10 (E.D. Mich. October 26, 2015) ("Likewise, the Court may pierce the veil when (a) the interests

of a corporation and its shareholders are identical; (b) the mere instrumentality test is met; (c) the corporation is being used to avoid a legal obligation; or (d) 'the corporation is used to defendant public convenience, justify a wrong, protect fraud or defend a crime.'") (internal citation omitted).

Notwithstanding that Plaintiff was prohibited from taking *any* discovery on these issues, as set forth above, Plaintiff presented credible evidence to the Bankruptcy Court that the Debtors were the alter ego of the Tribe Defendants and/or the Debtors were the Tribe Defendants' agents, such that veil piercing was appropriate.[12] As agents 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. Taken as a whole, the actions of the Debtor and the Tribe Defendants described above evidence a clear waiver of sovereign immunity and, therefore, the Tribe Defendants' Motion to Dismiss should have been denied.

The Debtors were mere instrumentalities of the Tribe Defendants, who were able to dominate and control the Debtors in a variety of ways. The membership of the Tribe's Board of Directors was identical or substantially identical to the membership of each Debtor's Management Board and, therefore, a decision of the

[12] While alter ego liability and piercing the corporate veil are distinct concepts, the same standard is used for both theories, and the terms are functionally equivalent. *Wild v. United States, supra* at * 8.

Tribe's Board of Directors was effectively a decision of each of the operating debtor subsidiaries. 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 all "Key Personnel" (as defined in the Management Services Agreement) to the Debtor 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 senior management and administrative functions. Similarly, Victor Matson, the Tribe's Chief Financial Officer, acted as the Chief Executive and Chief Financial Officer of Greektown Casino and the other Debtor operating subsidiaries, and the senior officers and employees of Greektown Casino reported directly to him. Moreover, the Tribe's Budget Director, Gregory Collins, had direct responsibility over the Casino's 2005 Refinancing and Recapitalization, as well as complete control and day-to-day supervision over all facets of the entire Expanded Complex construction project, a process which continued well-after the bankruptcy petitions were filed in these cases. Importantly, the operating Debtors had no independent professional advisors. Rather, the Tribe Defendants "shared" their accounting and legal professionals, each of whom 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.*, A.P. 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 recognized that their conduct could jeopardize their sovereign immunity. Counsel's recognition contradicts the narrow position taken by the

Tribe Defendants in their Motion to Dismiss as adopted by the Bankruptcy Court below, and would be an appropriate subject of discovery by Plaintiff.

As a result of their complete and total control of the Debtors, the Tribe Defendants engineered a transfer of over $150 million from the Casino, who desperately needed that money to complete construction of the Expanded Complex, to the Papas and Gatzaros Defendants for the Tribe Defendants' benefit, and to themselves. These transfers, benefitting only the Tribe Defendants and the Papas and Gatzaros Defendants, rendered the Debtors insolvent and without adequate capital. They were, in short, fraudulent transfers resulting in significant injury to the beneficiaries of the Litigation Trust who were creditors of the Debtors.

In the Bankruptcy Court, the Tribe Defendants concentrated entirely upon *Memphis Biofuels* and the argument that, as a matter of law, no waiver can occur without a Tribal Board resolution. The Bankruptcy Court agreed, ignoring, among other things, the warnings by the Tribe's own counsel. The Bankruptcy Court also ignored that, since beginning their efforts to obtain a casino license in the City of Detroit, the Debtors were mere instrumentalities of the Tribe Defendants, who utilized the Debtors as their agents and alter ego. 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.

On a Motion to Dismiss, the factual record presented to the Bankruptcy Court warranted denial of the Tribe Defendants' Motion. Plaintiff should have been allowed to engage in limited discovery to more fully develop the factual record on this seminal issue.

III. PLAINTIFF IS ENTITLED TO DISCOVERY REGARDING THE TRIBE'S WAIVER BY CONDUCT, INCLUDING ALTER EGO AND 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 Warburton/Buttner v. the Superior Court of San Diego*, 103 Cal. App. 4th 1170 (Cal. Ct. App. 2002) (applying *Gould* to discovery of alter ego and veil piercing claim in connection with sovereign immunity waivers by Indian tribe); *United States Fidelity & 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 largely, if not entirely, 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 and the application of alter ego, veil piercing and agency principals are well-established. The Bankruptcy Court's legal conclusion -- 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 -- was clearly erroneous. The Bankruptcy Court's Order Granting Motion to Dismiss should be reversed, and this case

remanded so that Plaintiff is afforded a "fair opportunity" to conduct appropriate, limited discovery on the scope and extent of the Tribe Defendants' waiver by conduct in this case.

Respectfully submitted,

Date: December 2, 2016

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CERTIFICATE OF COMPLIANCE WITH RULE 32(a)

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1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 10,134 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 of 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,

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CERTIFICATE OF SERVICE

I hereby certify that on this 2nd day of December, 2016, a copy of the foregoing was electronically filed with the Clerk of the Court using the CM/ECF system which will send notification of such filing to all attorneys of record.

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Dated: December 2, 2016