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

REPLY BRIEF OF PLAINTIFF-APPELLANT, BUCHWALD CAPITAL ADVISORS LLC

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INTRODUCTION

On June 9, 2015, this Court remanded this case to the Bankruptcy Court for further proceedings on the previously bifurcated issue of whether the Tribe Defendants had waived their sovereign immunity by their conduct, which conduct included their control and dominance of the Debtors in these bankruptcy cases. Doc. # 5, pg ID 198. Because Plaintiff and the Tribe Defendants stipulated to entry of an order bifurcating the legal and factual issues at the inception of this adversary proceeding, Doc. # 5, pg ID 189, the waiver issue was never the subject of discovery, however limited, nor was the waiver issue ever litigated in the Bankruptcy Court. While the Tribe Defendants subsequently provided documents in connection with the parties' efforts to settle this adversary proceeding, those documents related to the Tribe Defendants' limited guaranty of the Debtors' obligations to and the underlying claims against the Papas and Gatzaros Defendants; they had nothing whatsoever to do with the waiver issue currently before this Court. Similarly, because the parties agreed to focus exclusively upon the legal issue under Section 106 of the Bankruptcy Code, the sufficiency of the factual allegations in the complaint have never been in issue and the Bankruptcy Court never had an opportunity to address their adequacy or whether an amended complaint was necessary or appropriate. Had it been given the opportunity, the Bankruptcy Court would have been guided by Fed. R. Civ. P. 15(a)(2),

incorporated into bankruptcy adversary proceedings by Fed. R. Bank. P. 7017, which requires that leave to amend be freely given when justice so requires.

After this Court remanded the waiver issue to the Bankruptcy Court, and after several status conferences with Bankruptcy Judge Shapero, the Tribe Defendants suggested that the issue of waiver could be decided without the need for Plaintiff to amend its complaint and without the need for limited discovery on *any* factual issues. Relying on *Memphis Biofuels, LLC v. Chickasaw Nation Industries, Inc.*, 585 F.3d 917 (6th Cir. 2009), the Tribe Defendants contended that, as a matter of law, the only way they could 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. The Tribe Defendants produced board minutes in support of their representation that no such resolution was ever adopted. Because they contended that the waiver issue could now be decided as a matter of law, the Tribe Defendants agreed that they would accept as true Plaintiff's factual recitations and inferences because, in light of *Memphis Biofuels*, no conceivable set of facts could ever result in a waiver of sovereign immunity in the absence of a duly-authorized board resolution. The Bankruptcy Court and Plaintiff accepted the Tribe Defendants' invitation to proceed in this manner, and the parties and the Bankruptcy Court proceeded

accordingly under these so-called rules of engagement. Doc. # 5, pg ID 249-250. Bankruptcy Judge Shapero ultimately agreed with the Tribe Defendants that no waiver could occur in the absence of a duly authorized board resolution and this appeal followed.

Contrary to these rules of engagement, the Tribe Defendants imply in their Brief on Appeal that Plaintiff is limited to the factual allegations alleged in its complaint, despite the fact that the parties bifurcated the legal and factual issues over 6 years ago precisely to avoid the time and expense of amending pleadings, conducting limited discovery, or litigating factual issues that might never become relevant, and despite the rules of engagement agreed to in connection with the Tribe Defendants' third motion to dismiss. However, the Tribe Defendants represented to the Bankruptcy Court that they were prepared to roll the dice entirely on *Memphis Biofuels* and their contention that, as a matter of law, there cannot be a valid waiver of sovereign immunity in the absence of a duly-authorized board resolution. Having made that commitment to the Bankruptcy Court and Plaintiff, they cannot now be heard to argue otherwise on appeal.

As explained in Appellant's Brief on Appeal, the Tribe Defendants' reliance on *Memphis Biofuels* is misplaced. *Memphis Biofuels* addresses only contractual waivers of sovereign immunity. 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 Tribe Defendants' protestations to the contrary, the waiver-by-conduct doctrine "equally applies to Indian tribes." *Jicarilla Apache Tribe v. Andrus*, 687 F.2d 1324, 1344 (10th Cir. 1982). Because there is *at least* one other method by which sovereign immunity may be waived, a board resolution is *not* the exclusive method of waiving immunity. The Tribe Defendants' third motion to dismiss should simply have been denied.

In their Brief on Appeal, the Tribe Defendants also mischaracterize Plaintiff's arguments, erroneously asserting that none of the waiver-by-conduct cases cited by Plaintiff involved Indian tribes and, even assuming the waiver-by-conduct doctrine applies to Indian tribes, Plaintiff points only to limited activities by the Tribe Defendants in support of its argument, such as the filing of various proofs of claim and plan objections. In fact, Plaintiff cited several cases applying the waiver-by-conduct doctrine to Indian tribes, in addition to those cases applying this doctrine to various States under the Eleventh Amendment. Moreover, in ***every*** response brief and in ***every*** argument that Plaintiff filed or made in connection with the issue of waiver, Plaintiff has pointed to the Tribe Defendants' pervasive involvement in the events leading up to and after the bankruptcy filing and their domination and control over the Debtors; conduct which goes well-beyond the

simple act of filing proofs of claim.[3] When Plaintiff's actual arguments are considered, the Court should conclude that a Board resolution is *not* the exclusive method of waiving one's sovereign immunity, and the Bankruptcy Court's order granting the Tribe Defendants third motion to dismiss should be reversed. Since there are other recognized means of waiver, Plaintiff is entitled to explore them through discovery. *See Gould, Inc. v. Pechiney Ugine, et al.*, 853 F.2d 445, 451 (6th Cir. 1988) (reversing and remanding to require the district court to allow discovery into the issue of sovereign immunity); *see also, J.S. Haren Co. 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).

[3] *See e.g.*, Plaintiff's initial Response to the Tribe Defendants' first Motion to Dismiss, Doc. # 5, pg ID 131, 132 n.3, and 144-148; Stipulated Order Establishing Procedures and Briefing Schedule to Address the Issue of Waiver Following Remand, Doc. # 5, pg ID 249-250; Plaintiff's Response to third Motion to Dismiss, Doc. # 5, pg ID 357. In addition, Plaintiff filed a motion to permit discovery at the inception of the adversary proceeding and has asked for limited discovery in every responsive brief thereafter.

I. THE WAIVER-BY-CONDUCT DOCTRINE APPLIES TO INDIAN TRIBES.

In their Brief on Appeal, the Tribe Defendants contend that "The Litigation Trust cites three cases which refer to the 'doctrine' variously as 'waiver by conduct' . . . 'waiver by litigation conduct' . . . or 'waiver by participation.' But none of those cases involved Indian tribes. Rather, they involved States and issues relating to Eleventh Amendment immunity." *Appellees' Brief on Appeal*, Doc. # 9, pg ID 659 (citations omitted). While it is true that Plaintiff cited waiver-by-conduct cases involving States, including the seminal decision of the United States Supreme Court,[4] Plaintiff also cited numerous cases where this doctrine was applied to Indian tribes. *See e.g., In re White*, 139 F.3d 1268 (9th Cir. 1998) (Tribe's participation as creditor waived immunity regarding adjudication of claim); *Jicarilla Apache Tribe v. Andrus*, 687 F.2d 1324 (10th Cir. 1982) (suit by Indian tribe waived immunity as to recoupment claims by defendant); *U.S. v. Confederated Tribes and Bands of the Warm Spring Reservation of Oregon*, 657 F.2d 1009 (9th Cir. 1981) (Tribe waived immunity by intervening); *In re National Cattle Congress*, 247 B.R. 259 (Bankr. N.D. Iowa 2000) (unless withdrawn, filing proof of claim waives sovereign immunity); *In re Vianese*, 195 B.R. 572 (Bankr. N.D.N.Y. 1995) (waiver resulting from initiation of adversary proceeding).

[4] *Gardner v. New Jersey*, 329 U.S. 565 (1947).

While one can certainly argue about the *scope and extent* of the waiver resulting from the conduct of the Indian tribe in question, in each of these cases the court *explicitly* recognized that the waiver-by-conduct doctrine applies equally to Indian tribes, and for good reason. If the waiver by conduct doctrine does not apply to Indian tribes, as the Tribe Defendants contend, then even the filing of a proof of claim would not waive sovereign immunity *with respect to that claim*; a position that conflicts with the Supreme Court's holding in *Gardner v. New Jersey* and a position that, to Plaintiff's knowledge, has never been adopted by any court.

In this case, Plaintiff alleges and, for the purposes of a motion to dismiss, such allegations must be accepted as true,[5] that the Tribe Defendants waived sovereign immunity with respect to this adversary proceeding by their conduct which included, among other things, (i) their domination and control of the Debtors, and use of the Debtors as their agents, in connection with the events leading up to the Debtor's issuance of approximately $185 million in unsecured notes, and the subsequent fraudulent transfer of those note proceeds to the Tribe and to the Papas and Gatzaros Defendants, among others, (ii) directing the Debtors to initiate these bankruptcy cases to forestall action by the Michigan Gaming

[5] Recent statements in their Brief on Appeal notwithstanding, the Tribe Defendants agreed that, given the absence of discovery and their reliance on the legal argument that a corporate resolution is required to waive immunity, they would accept all of Plaintiff's factual recitations and inferences as true for the purposes of the Tribe Defendants' Third Motion to Dismiss.

Control Board, among others, which threatened the Tribe Defendants' continued ownership and control of Greektown Casino and its highly valuable casino license, (iii) dominating and controlling each of the Debtors and, through them, initiating these bankruptcy cases and directing the strategy thereafter, utilizing the Debtors and their professionals (who were also the Tribe Defendants' professionals) as the Tribe Defendants' agents, and (iv) through their pervasive participation in these bankruptcy cases in their own name and through the use of the Debtors and their professionals as the Tribe Defendants' agents. In short, the Debtors were the alter ego of the Tribe Defendants and the respective corporate veils of the Tribe Defendants and Debtors should be pierced. In these circumstances, as discussed more fully below, the Debtors and the Tribe Defendants are "functionally the same entity in the eyes of the law . . . ." *Patin v. Thoroughbred Power Boats Inc*., 294 F.3d 640, 654 (5th Cir. 2002). As such, *by operation of law* and not by implication, the Tribe Defendants are the same entity as the non-sovereign Debtors, and the Tribe Defendants cannot hide behind the cloak of sovereign immunity where their alter egos, the Debtors in these bankruptcy cases, are not also cloaked with that same immunity.

Therefore, in light of the waiver-by-conduct doctrine and Plaintiff's allegations concerning alter ego and veil piercing -- allegations which have yet to be subject to the requisite discovery -- the Bankruptcy Court's order granting the

Tribe Defendants' Third Motion to Dismiss should be reversed and this case remanded to the Bankruptcy Court.

II. THE BANKRUPTCY COURT SHOULD HAVE CONSIDERED ALTER EGO, VEIL PIERCING AND AGENCY THEORIES IN DETERMINING WHETHER THE TRIBE DEFENDANTS WAIVED SOVEREIGN IMMUNITY BY THEIR CONDUCT.

The conduct of the Tribe Defendants renders them the alter egos of the Debtors, and warrants piercing corporate veils, as well as treating the non-sovereign Debtors as the Tribe Defendants' agents. The Bankruptcy Court should have considered these well-established principles, as did the several state and federal court decisions discussed in Appellant's Brief on Appeal, rather than simply rejecting the application of these principles out of hand. *See Warburton/Buttner v. the Superior Court of San Diego*, 103 Cal. App. 4th 1170 (Cal. Ct. App. 2002); *Private Solutions, Inc. v. SCMC, LLC*, 2016 U.S. Dist. LEXIS 88190 (D.N.J. July 6, 2016); *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).

The Tribe Defendants' efforts to distinguish the above-cited cases are unpersuasive. With respect to *Warburton*, the Tribe Defendants simply ignore the court's determination that "further discovery was necessary to determine if the tribe could be held liable under California's limited liability statute, which provides that a member of a limited liability company (e.g. the tribe) shall be

subject to liability under the common law governing alter ego liability." *Tribe Defendants' Brief on Appeal*, Doc. # 11, Pg ID 669. But that determination is *precisely* the issue in this case. The *Warburton* court recognized that, *notwithstanding* the tribe's sovereign immunity assertion, plaintiff was entitled to discovery to determine whether the tribe was the alter ego of the company and, again *notwithstanding* the tribe's assertion of sovereign immunity, liable as a result. 103 Cal. App. 4th at 1189-1190.

Similarly, in *Private Solutions*, the court recognized that, had plaintiff been able to satisfy the requisite elements of veil piercing, it would have been permitted to engage in limited discovery to test the tribe defendant's assertion of sovereign immunity. 2016 U.S. Dist. LEXIS 88190 at *8-*10. That is the very relief which Appellant in this case requested in the Bankruptcy Court.

Finally, in *Morgan*, the court recognized, but ultimately rejected plaintiff's alter ego claim because it found that the BKJ was a "subordinate economic entity." There are no issues regarding subordinate economic entities in this adversary proceeding. 2011 U.S. Dist. LEXIS 7840 at *6-*7.

Each of these courts acknowledged the applicability of alter ego and veil piercing principles, a result which should not be surprising because, in similar contexts "federal courts have consistently acknowledged that it is compatible with due process for a court to exercise personal jurisdiction over an individual or a

corporation that would not ordinarily be subject to personal jurisdiction in that court when the individual or corporation is an alter ego or successor of a corporation that would be subject to personal jurisdiction in that court." *Estate of Dorothy Thomson v. Toyota Motor Corporation Worldwide*, 545 F.3d 357, 362 (6th Cir. 2008), *quoting Patin v. Thoroughbred Power Boats, Inc*., 294 F.3d at 653. "When a corporation is deemed the "alter ego" of an individual, then those entities are considered to be one and the same under the law: 'the corporation's acts must be deemed to be [the individual's] own.'" *Patin*, 294 F.3d at 654 (internal citation omitted). *Indusource, Inc. Sandvik Tooling France SAS*, 2016 U.S. Dist. LEXIS 147334, *10 (E.D. Mich. October 25, 2016) ("The Sixth Circuit has adopted the alter-ego theory of jurisdiction, which "provides that a non-resident parent corporation is amenable to suit in the forum state if the parent company exerts so much control over the subsidiary that the two do not exist as separate entities but are one and the same for purposes of jurisdiction.'") (internal citation omitted).

The Tribe Defendants cannot argue that subject matter jurisdiction, unlike personal jurisdiction, cannot be waived and, therefore, the "alter ego theory of jurisdiction" is inapplicable in analyzing whether, by virtue of sovereign immunity, the Court lacks subject matter jurisdiction over them. Until it is established that the Tribe Defendants have sovereign immunity, the Court has subject matter jurisdiction and, therefore, the waiver issue must be decided first. In making this

preliminary determination, the "alter ego theory of jurisdiction" is both relevant and applicable. Moreover, the use of alter ego principles has also been used in analyzing the existence of subject matter jurisdiction. *Brown v. Astro Holdings, Inc.*, 385 F. Supp. 2d 519, 521 (E.D. Pa. 2005) (court has subject matter jurisdiction because the plaintiffs' alter ego claim states a federal question under ERISA and court has supplemental jurisdiction over the plaintiffs' veil piercing claim).

Taking Plaintiff's allegations as true, which the Bankruptcy Court was required to do on a motion to dismiss, the Tribe Defendants' conduct rendered the Debtors their alter ego and required that the Tribe Defendants' corporate veils be pierced. The Debtors and the Tribe Defendants are "functionally the same entity in the eyes of the law . . . ." *Patin v. Thoroughbred Power Boats Inc*., 294 F.3d at 654. As a result, the Tribe Defendants should not be permitted to hide behind a cloak of sovereign immunity where their alter egos, the Debtors in these bankruptcy cases, are not also cloaked with that same immunity.

In addition to the above cases where courts have acknowledged that alter ego and veil piercing principles apply in considering waivers of sovereign immunity by Indian tribes and questions of consent to jurisdiction generally, courts have routinely applied alter ego and veil piercing principles in analyzing whether foreign sovereigns have waived their immunity. *Appellant's Brief on Appeal*, Doc.

9, pg ID 625-628. *See Transamerica Leasing, Inc. v. La Republica De Venezuela*, 200 F.3d 843 (D.C. Cir. 2000); *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).

The Tribe Defendants seek to avoid the application of these principles by arguing that waivers of sovereign immunity under the Foreign Sovereign Immunities Act cannot be analogized to waivers of tribal sovereign immunity. *Appellees' Brief on Appeal*, Doc. # 9, pg ID 672. In support of this assertion, the Tribe Defendants rely upon the case *Allen v. Gold Country Casino*, 464 F.3d 1044 (9th Cir. 2006).[6] In *Allen*, however, the court 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 Foreign Sovereign Immunities Act to the Tribe Defendants. Rather, the Litigation Trust is arguing the common law doctrines of alter ego, veil piercing and agency apply equally when analyzing whether the Tribe

[6] Contrary to *Allen*, however, the Supreme Court has held that the law governing waivers of immunity by foreign sovereigns is instructive in addressing waivers by Indian tribes. *C&L Enterprises, Inc. v. Citizen Band of Potawatomi Indian Tribe of Okla.*, 532 U.S. 411, 421, n.3 (2001); *Kiowa Tribe of Oklahoma v. Manufacturing Technologies, Inc.*, 523 U.S. 751, 759 (1998).

Defendants waived their sovereign immunity in this case, just as they are commonly applied by courts to analyze whether a foreign sovereign waived its sovereign immunity by conduct. These common law doctrines are not specific or exclusive to the Foreign Sovereign Immunities Act, and the Litigation Trust is not seeking to have them applied by analogy. As the cases discussed above make clear, they are an entirely appropriate analytical tool for determining the scope and extent of the Tribe Defendant's waiver and should have been applied in this case instead of being rejected out of hand.

CONCLUSION

As discussed above and in its Brief on Appeal, Plaintiff presented ample evidence to demonstrate that the Debtors were the alter ego of the Tribe Defendants, that the applicable corporate veils should be pierced, and that the Debtors were the Tribe Defendants' agents. As these issues are directly relevant to determining the scope and extent of the Tribe Defendants' sovereign immunity waiver, Plaintiff should have been afforded the opportunity for limited discovery; an opportunity Plaintiff has requested since the inception of this adversary proceeding and which was improperly denied. If, by virtue of the Tribe Defendants' conduct, the Debtors are the alter egos and/or agents of the Tribe Defendants, then the Debtors and the Tribe Defendants are one and the same by operation of law. The Tribe Defendants cannot be permitted to hide behind a cloak

of sovereign immunity where their alter egos, the Debtors in these bankruptcy cases, are not also cloaked with that same immunity. The Bankruptcy Court's order granting the Tribe Defendants' Third Motion to Dismiss, therefore, should be reversed, and this case remanded to the Bankruptcy Court with instructions to allow Plaintiff limited discovery into the waiver issues discussed above.

Date: February 7, 2017

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE WITH RULE 32(a)

Certificate of Compliance with Type-Volume Limitation,
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1. This Reply Brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B)(ii) because this Reply Brief contains 3865 words, excluding those parts of the Reply Brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii), which word count is no more than half of the type volume specified in Fed. R. App. P. 32(a)(7)(B)(i).

2. This Reply 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 Reply Brief has been prepared in a proportionally spaced typeface using Microsoft Word in 14 point Times New Roman style.

Date: February 7, 2017

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CERTIFICATE OF SERVICE

I hereby certify that on this 7th day of February, 2017, 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.

/s/ Joel D. Applebaum
Joel D. Applebaum

Dated: February 7, 2017