UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN

BAYLAKE BANK,

Plaintiff,

Case No. 08-C-608

v.

TCGC, LLC,

Defendant.

BRIEF IN SUPPORT OF PLAINTIFF'S
MOTION FOR SUMMARY JUDGMENT

Plaintiff, Baylake Bank, a Wisconsin banking corporation ("Baylake"), by its attorneys, Godfrey & Kahn, S.C., submits this Brief in Support of its Motion for Summary Judgment.

INTRODUCTION

This case focuses on what are nominally described as a "Right of First Refusal" and a "Restrictive Covenant." Call them what you will, William Shakespeare said it best; "What's in a name? That which we call a rose by any other name would smell as sweet." Shakespeare, *The Tragedy of Romeo and Juliet,* Act II, Scene II, 43:44, cited with approval, In re Grivas, 105 B.R. 954 (Bankr. S.D. Cal. 1989).[1]

[1] As noted previously to the court, Shakespeare has often been cited as a leading bankruptcy authority. See, e.g., Matter of Erickson, 815 F.2d 1090, 1092 (7th Cir. 1987). Moreover, Shakespeare has been cited with approval by no less than ten Wisconsin Courts. See e.g., Woznicki v. Erickson, 202 Wis. 2d 178, 549 N.W.2d 699 (1996); (Bablich, J. concurring); Management Computer Services, Inc. v. Hawkins, Ash, Baptie & Co., 196 Wis. 2d 578, 539 N.W. 2d 111 (Ct. App. 1995) (Sundby, J. concurring).

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This axiom is followed by both Wisconsin courts and bankruptcy courts when they look not at the name of an agreement, but rather, at its substance.[2]

Here whatever they are called, they serve one purpose: to attempt to use the past to eternally bind the future – not permitted by state law. As part of these "dead hand" documents, they attempt to circumvent clear and unambiguous federal policy and substitute a municipal policy in its place – not permitted by federal law. Lastly, even if one can get by these two fatal flaws, they nominally encumber and devalue TCGC's real estate harming its creditors, including Baylake Bank – removable via the Bankruptcy Code. Whatever called, and whatever public interest Hobart asserts is served, the chosen mechanism is unlawful under Wisconsin and Federal law or removable in the interest of creditors under the Bankruptcy Code.

FACTUAL BACKGROUND

Plaintiff, TCGC, LLC ("TCGC") is a Wisconsin limited liability company. (Schweiner Affidavit ¶ 1). TCGC's principal business is owning and operating Thornberry Creek Golf Course (the "Golf Course"). (*ibid*.). TCGC and the Schweiners (as defined below) are the owners of real property located entirely within the Village of Hobart, Brown County, Wisconsin ("Hobart"). The legal description is in the Complaint, a copy of which has been filed with this Court, Exhibit A (the "Property"). (*id*.¶ 2).

On July 16, 2007, TCGC filed for relief under Chapter 11 of Title 11 of the United States Code (the "Bankruptcy Code"). (*id*.¶ 3).

John and Carol Schweiner (the "Schweiners") operate the Golf Course. (*id*.¶ 4). Prior to 1992, the Schweiners purchased and developed a subdivision (*ibid*.¶ 4). In 1992, the Schweiners embarked on a reclamation project to develop the first 9 holes of what was to become the Golf

[2] See e.g. Ott v. All-Star Insurance Corp., 99 Wis. 2d 635, 299 N.W.2d 839 (1981); State Department of Public Welfare v. Central Standard Life Insurance Co., 19 Wis. 2d 426, 434, 120 N.W.2d 687 (1963). Federal law on this topic is cited in the body of this brief.

Course. (*ibid.*¶ 4). Around 1993, Sally Burrows invested approximately $600,000.00 in the project and obtained a 49% ownership interest in the project. (*id.*¶ 5).

In 1995-96, the Schweiners acquired an additional 532 acres adjacent to the existing nine hole Golf Course. (*id.*¶ 6). In 1996-97, the Schweiners cleared and developed an additional 18 holes. (*ibid.*¶ 6). From 1998 through 1999, the remaining nine holes were under construction as well as a planned development of 124 residential lots. (*ibid.*¶ 6).

In 1998, Sally Burrows died and her husband, Robert Burrows, commenced suit against the Schweiners to recoup the investment. (*id.*¶ 7). The suit became intractable. Robert T. Burrows v. John D. and Carol Schweiner, Brown County Circuit Court Case No. 06-CV-1121. In 2000 the Circuit Court for Brown County, the Hon. Atkinson, appointed Michael Grezca as receiver, (the "Receiver"), based on the parties' stipulated dissolution of Thornberry Creek. (Schweiner Affidavit ¶ 8). The Receiver ultimately sold the Golf Course to Hobart in 2003. (*id.*¶ 9). The clubhouse, maintenance facility and the Schweiners homestead were not sold by the Receiver because they were located on land owned by the Schweiners individually. (*ibid.*¶ 9). The Schweiners had made improvements on these parcels with separate borrowings from Baylake together with funds provided by the Schweiners. (*ibid.*¶ 9).

As a result of the sale to Hobart, an underlying mortgage to Baylake on the course was satisfied (*id.*¶ 10). After all of the expenses associated with the receivership and the litigation were paid, the excess proceeds were split between the Schweiners and Mr. Burrows. (*id.*¶10)

Baylake, however, still retained a mortgage with an approximate balance of $6 million on the clubhouse, maintenance building, the Schweiners' residence and the surrounding land, all of which remained titled in the Schweiners' name. (*id.*¶ 11).

Contemporaneously with Hobart's purchase, Hobart entered into a lease with the newly formed TCGC for the Golf Course. (*id.*¶ 12). The lease included an option for TCGC to

repurchase the Golf Course from Hobart upon the lease's expiration, which was anticipated to be approximately two years later in March of 2005. (*ibid.*¶ 12). Also, in March of 2003, the Schweiners attempted to transfer ownership of the clubhouse and the maintenance building to TCGC, but because of a legal description error, the property remained titled with the Schweiners. (*ibid.*¶ 12).

On March 22, 2005, the lease with Hobart expired, and TCGC exercised its option to re-purchase the Golf Course from Hobart. (*id.* ¶ 13). Baylake financed the TCGC purchase of the Golf Course from Hobart in March of 2005. (*ibid.*¶ 13). As stated above, prior to March of 2005, Baylake had financed the construction of the clubhouse and the maintenance building that operated in conjunction with the Golf Course. (*ibid.* ¶ 13). Baylake continues to hold a mortgage on the Property, (Malecki Affidavit ¶¶10-12), and has an interest in the proceeds of the Property's sale.

As a part of the March 2005 transaction, TCGC and Hobart entered into an agreement titled "Thornberry Creek Golf Course, Clubhouse and Maintenance Facility Option Amendment and Right of First Refusal Agreement" dated March 16, 2005 and recorded on March 22, 2005 with the Brown County Register of Deeds as Document No. 2179288 (the "Right of First Refusal"). (Schweiner Affidavit ¶ 14; Malecki Affidavit ¶ 3). A copy of the Right of First Refusal is attached to the Complaint as Exhibit C. The Right of First Refusal grants Hobart an option and right of first refusal to purchase the golf course. (Complaint, Ex.C, ¶ 1.1).

At the same time, in connection with the sale to TCGC, Hobart encumbered the Impacted Parcels (as defined below) with a document identified as a restrictive covenant dated March 15, 2005 and recorded with the Brown County Register of Deeds on March 22, 2005 as Document No. 2179285. (Schweiner Affidavit ¶ 15). A copy of the Document is attached to the Complaint as Exhibit B (the "Document"). (Schweiner Affidavit ¶ 15). The Document was

recorded against the following parcels: Tax Parcel Numbers 552, 567, 569, 570, 571, 572, 576, 580-10, 582, 716, 720, 736, 737-1, 739, 740 and 2382 (the "Impacted Parcels"), but they were not recorded against the clubhouse. (Malecki Affidavit ¶¶ 4 -5; Schweiner Affidavit ¶ 16). The Right of First Refusal was recorded against the Impacted Parcels, and possibly the maintenance building properties. (Malecki Affidavit ¶¶ 4, 7).

The Document attempts to place the following restrictions on the use or transfer of a portion of the Impacted Parcels:

a. No owner of any interest in the Impacted Parcels shall transfer any interest in the Impacted Parcels to any entity *or sovereign nation* without the written consent of Hobart; (Complaint, Ex. B, ¶ 1) (emphasis added);

b. No owner of any interest in the Impacted Parcels may take any action to remove the Impacted Parcels from the Hobart tax rolls to diminish or eliminate property taxes levied against the Impacted Parcels (*ibid.*); and

c. No owner of any interest in the Impacted Parcels may take any action to remove any portion of the Impacted Parcels from the zoning authority or jurisdiction of Hobart (*ibid.*).

d. Prior to any transfer of any interest in any Impacted Parcels, written notice must be provided to Hobart advising of the transfer, and the transferee, and confirming that both the transferor and transferee acknowledge the Document and agree to be bound by it. (*id.*, at ¶ 2(a)).

In addition, the Document provides that the Impacted Parcels may only be used as a golf course, and such other uses as are normally incidental thereto, and residential development or commercial development consistent with Hobart's zoning regulations. (Complaint, Ex. B, ¶ 4.)

In March 2005, to secure Baylake's cooperation to finance the Schweiners' exercise of the option and the Golf Course's purchase, Hobart agreed to subordinate its Right of First Refusal to Baylake's mortgage on the Property. (Schweiner Affidavit ¶ 17). A subordination agreement was executed between Hobart and Baylake to do so. (*ibid.*). The subordination agreement provided that if Baylake foreclosed on the mortgaged property, the foreclosure would extinguish Hobart's rights under the Right of First Refusal, unless Hobart exercised the right to purchase an assignment of Baylake's debt and security by paying the outstanding Baylake balance. (Complaint, Ex. D, E). The Right of First Refusal is subordinate to any of Baylake's liens pursuant to:

a. The subordination agreement dated March 15, 2005, a copy of which is attached to the Complaint as Exhibit D;

b. An additional subordination agreement, also dated March 15, 2005, a copy of which is attached to the Complaint as Exhibit E.

(Exhibits D and E to the Complaint are referred to collectively as the "Subordination Agreement").

The Subordination Agreement requires Baylake to provide notice to Hobart prior to its acceleration of any debt or foreclosure on its interests in the Impacted Parcels. Baylake has provided the required notice, and Hobart has failed to exercise any rights it may have under the Subordination Agreement or the Right of First Refusal. (Nixon Affidavit ¶¶ 2 - 4, Ex. A – C).

On March 23, 2006, based on default by the Schweiners (who still personally owned the clubhouse, maintenance building, their home and the surrounding land), Baylake filed a foreclosure action. (Schweiner Affidavit ¶ 18). Hobart was not joined as a defendant, because it had no recorded interest in the clubhouse, maintenance building, Schweiner home and surrounding property as evidenced by the title commitment. (*id.*¶ 19). Baylake obtained

foreclosure judgment on April 4, 2006. (Baylake Bank v. John D. Schweiner, Case No. 06-CV-576; Schweiner Affidavit ¶ 19). A sheriff's sale of the clubhouse, maintenance building, Schweiner home and surrounding property was scheduled for June 14, 2006. (Schweiner Affidavit ¶ 19).

On May 26, 2006, Hobart filed a Motion to Intervene in the foreclosure suit and for a temporary injunction asserting an unrecorded interest in the clubhouse, maintenance building, Schweiner home or surrounding land. (Schweiner Affidavit ¶ 20). Thereafter, until the filing of this bankruptcy, litigation ensued. (*id.* ¶ 23). Additionally, Mr. Burrows commenced litigation claiming an equitable right to a share of the remaining property developed by the Schweiners consisting of the clubhouse and maintenance facility. (*id.*¶¶ 20, 23). Mr. Burrows filed a *lis pendens* against the Property which further hindered TCGC's ability to sell the golf course and clubhouse. (*id.* ¶¶ 20, 23).

Around May, 2006, negotiations were nearly complete for TCGC's sale to a third party. (*id.*¶ 21). The sale was never consummated due to the pending litigation and encumbrances on the Property related to the Document. (*ibid.* ¶ 21). Thereafter, the Golf Course languished and Baylake advanced significant sums of money to cover operating losses and maintenance costs. (*id.*¶ 22). Baylake also provided Hobart notice of its right to repurchase the property pursuant to the Right of First Refusal. (Nixon Affidavit, ¶ 2. Ex. A.) Hobart did not exercise its rights, instead arguing that Baylake failed to give timely notice, which could not be cured. (*id.* at ¶¶ 3, 4, Ex. B, C.)

As of the filing of the bankruptcy petition, all actions pending in Brown County Circuit Court were stayed. The following litigation was pending:

Robert T. Burrows v. John D. Schweiner, Case No. 06-CV-1121[3];

Bay Bank v. TCGC, LLC, Case No. 07-CV-280[4];

Baylake Bank v. John D. Schweiner, Case No. 06-CV-576[5];

Baylake Bank v. TCGC, LLC, John D. Schweiner, Carol J. Schweiner, Village of Hobart and Julie Weizenicker, Case No. 06-CV-1752[6]; and

Village of Hobart v. Baylake Bank, John D. Schweiner, Carol J. Schweiner and TCGC, LLC, Case No. 07-CV-711[7].

(Schweiner Affidavit ¶ 23).

On June 30, 2008, TCGC filed its Plan of Reorganization (the "Plan"), which includes a provision for TCGC to sell all of its assets, including the Property, to the Oneida Indian Tribe of Wisconsin, a sovereign Indian nation (the "Oneida") pursuant to an Asset Purchase Agreement between TCGC and Oneida dated June 30, 2008, as amended (the "Purchase Agreement"). The Plan itemized TCGC's intended challenges to the Document. (Plan of Reorganization) (Schweiner Affidavit ¶ 24)). The Oneida are a federally recognized Indian tribe, and the Property is located entirely with the exterior boundaries of the Oneida Reservation. (Hill Affidavit ¶¶ 2, 3).

As a sovereign Indian nation, the Oneida have a legal right to apply to have land acquired by them placed in to a federal land trust. (25 C.F.R. Part 151 *et. seq.*, Hill Affidavit ¶ 5).

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[3] This is an action by Burrows in which he claims to have an equitable interest by virtue of an alleged lost business opportunity. A Lis Pendens has been filed against the Debtor's property. This action postdates the filing of the first and paramount Baylake mortgage.

[4] This is an action by Bay Bank to foreclose on its mortgage on a parcel of the real estate owned by TCGC. TCGC admits that there is a valid mortgage on the premises, but disputes the amount due. It is anticipated that Bay Bank will be paid out of the proceeds from the sale of Debtor's assets as contemplated by the Plan of Liquidation. Note Bay Bank is *not* Baylake Bank.

3 This is a foreclosure action brought by Baylake on the clubhouse, maintenance facility and surrounding property in which Hobart, the Schweiners and Mr. Burrows are parties. Procedurally, the Order of Foreclosure was vacated and the parties put back at "square one" with regard to the case.

[6] This is an action to foreclose Baylake's mortgage on the balance of the property. In June of 2007, the Court consolidated this case into 06-CV-576 on the motion of Baylake.

[7] This is an action by Hobart in yet another branch of the Circuit Court for Brown County for declaratory relief.

The Oneida intend to apply to have the Property taken into trust status upon successful closing of the Purchase Agreement. (*id.* ¶6).

The Purchase Agreement is conditioned upon TCGC's ability to convey the Property free and clear of liens, encumbrances, claims and security interests, including the Right of First Refusal, the Subordination Agreement, and the Document provisions. (Schweiner Affidavit ¶ 25).

Hobart has asserted immunity in its August 13, 2008 Answer to the Complaint to Determine the Extent of Hobart's Interest. (Answer, Affirmative Defenses). However, more than a year before it answered the Complaint, Hobart appeared without reservation of any claimed immunity, *see* August 14, 2007 Notice of Appearance and Request for Service of Papers, objected to the Debtor's cash-collateral financing, *see* August 14. 2007 Village of Hobart Objection), and participated in a hearing on that and other matters. (Nixon Affidavit ¶ 5).

On May 28, 2008, a full six weeks before this declaratory judgment action was filed, counsel for TCGC and Baylake sent a letter to corporate counsel for Hobart, informing Hobart of Baylake's intent to execute a letter of intent with the Oneida for its role in the Oneida's purchase of the assets of TCGC, including real estate in Hobart. (Nixon Affidavit Ex. D). The May 28 letter advises Hobart that the parties intend to challenge the Document. (Nixon Affidavit Ex. D). The May 28, 2008 letter followed a series of telephone calls with the Village regarding the restrictive covenant document and Right of First Refusal, and Baylake's intention to challenge the restrictive covenant document and Right of First Refusal, which David Cisar, attorney for the Village, acknowledged at a hearing in the underlying bankruptcy case held on December 14, 2007 in the United States Bankruptcy Court for the Eastern District of Wisconsin before the Honorable Susan V. Kelley. (Nixon Affidavit ¶7).

ARGUMENT

I. SUMMARY JUDGMENT STANDARD.

Summary judgment is proper only when the record demonstrates that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. Fed. R. Civ. Procedure 56(c). A genuine issue for trial exists only when "the evidence is such that a reasonable jury could return a verdict for the nonmoving party." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248, (1986). When ruling on a motion for summary judgment, the Court must view the record and draw all inferences from it in the light most favorable to the non-moving party. Schultz v. Gen. Elec. Capital Corp., 37 F.3d 329, at 333 (7th Cir. 1994). However, if the evidence is not sufficiently probative, or it is merely colorable, summary judgment may be granted. Liberty Lobby, Inc., 477 U.S. at 249-50. In determining whether a genuine issue of material fact exists, the Court should "view the evidence presented through the prism of the substantive evidentiary burden." *Id.* 477 U.S. at 254. If the "record taken as a whole could not lead a rational trier of fact to find for the nonmoving party, there is no genuine issue for trial." Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 587 (1986).

II. THE LANGUAGE OF THE DOCUMENT REQUIRING HOBART'S CONSENT TO ANY TRANSFER IS AN ILLEGAL RESTRAINT ON ALIENATION AND THEREFORE IS VOID AND UNENFOREABLE.

The Document requires TCGC first to obtain the written consent of Hobart prior to transferring an interest in its property to "any individual, entity . . . organization, or s*overeign nation*." (emphasis added). Relying both on case law and additional factors enumerated in the Restatement (Second) on Property, this restriction should be deemed invalid as an unreasonable restraint on alienability.

Wisconsin courts have long recognized the common law principal that certain restrictions may be placed on privately-owned property, provided such restrictions do not restrain a property

owner's right to alienate his property. Pepin Co. v. Prindle, 61 Wis. 301, 21 N.W. 254, 256 (1884); s*ee also, generally,* Becker v. Chester, 115 Wis. 90, 91 N.W. 87 (1902). "All restraints on alienation run counter to the policy of freedom of alienation, so that to be upheld they must in some way be justified." Restatement (Second) on Property (Donative Transfers) § 4.1, cmt. (1981)

Wisconsin has codified its rule against restraints on alienation in terms of the suspension of the power of alienation. Wis. Stat. § 700.16(2) (2008). Specifically, "the power of alienation is suspended when there are no persons in being who, alone or in combination with others, can convey an absolute fee in possession of land . . . ."

The Restatement (Third) of Property (Servitudes) § 3.4 (2000) refers to the Restatement (Second) of Property § 4.3, which lists factors to be considered in determining whether a restraint on alienability is reasonable: (a) the duration of the restraint; (b) whether the restraint is limited to allow a substantial variety of types of transfers to be employed; (c) whether the restraint is limited as to the number of persons to whom transfer is prohibited; (d) whether the restraint tends to increase the value of the property; (e) whether the restraint is imposed upon an interest that is not otherwise readily marketable; and (f) whether the restraint is imposed upon property that is not readily marketable.

Further, the Restatement (Third) of Property (Servitudes) § 3.4, cmt. d (2000) specifically addresses restraints on transfer without consent, noting that "a prohibition on transfer of property without the consent of another is an unreasonable restraint on alienation unless there is strong justification for the prohibition, and, unless the consent can be withheld only for reasons directly related to the justification for the restraint." Certain reasonable justifications listed include financial interdependence, shared governance responsibilities, and close living quarters involved in cooperative residential properties. *Id.* The Restatement goes so far as to conclude that if

consent to a transfer may be withheld arbitrarily, the restraint on alienation is reasonable only if the person withholding consent is obligated to supply a substitute purchaser for the property (such as in the case of a right of first refusal). *Id.*

When considering whether a particular restraint on alienation of property is valid, Wisconsin courts have generally considered the reasonableness of the restraint and relied upon the Restatement (Second) of Property (Donative Transfers). Badger State Agri-Credit & Realty, Inc. v. Lubahn, 122 Wis. 2d 718, 726-27, 365 N.W.2d 616 (Ct. App. 1985); Schneider v. Schneider, 132 Wis 2d 171, 389 N.W.2d 835 (Ct. App. 1986).

The restriction in this case is not limited in duration, and any possible limitation on duration is subject wholly to Hobart's sole discretion. Here, the restrictive covenants are binding for a period of one hundred years, subject to automatic extensions for successive periods of fifty years, running with the land, unless and until *Hobart* executes an instrument terminating the covenants in the agreement. Thus, Hobart essentially has an unbridled right to determine in perpetuity, who it does and does not want to own property within its jurisdiction. Such a result is contrary to public policy. Rather than a private property owner desiring approval rights over who its new neighbor will be, or a co-tenant concerned with whether its new co-tenant will undertake its obligations, here, we have a municipal body exercising rights that allow it to "cherry-pick" who its property owners will be. This is particularly egregious, as it completely negates the free and unrestricted transfer of property between a willing seller and willing buyer, and it begs the question as to whether Hobart specifically intended to use the restriction to create its own "utopia" of sorts by selectively choosing its inhabitants.

Additionally, Wisconsin courts have, in numerous cases, analyzed the validity of restrictive covenants as to the use of property, offering further insight as to factors to be considered when evaluating restrictive covenants. In Dodge v. Carauna, citing to McKinnon v.

Benedict, 38 Wis. 2d 607, 619157 N.W.2d 665, 670 (1968), the court confirmed that "the fundamental inquiry regarding a deed restriction is: 'Is [it] a reasonable one under all the facts and circumstances of the transaction in light of "the situation, business, and objects of the parties," and [is] the restriction "for a just and honest purpose, for the protection of the legitimate interests of the party in whose favor it is imposed . . . ."'" Dodge, 127 Wis.2d 62, 65 377 N.W.2d 208 (Wis. Ct. App. 1985).

Further, there is no reasonable purpose served by the restriction which is not already served in some other area of the Document. If Hobart is asserting approval rights in order to ensure certain use of the Impacted Parcels, the restriction in the Document limiting use of the property to a golf course or other approved uses (a restriction which is not contested in this case) is already present in the Document. In addition, Hobart has recorded the Right of First Refusal for itself, rendering the currently disputed consent restriction unnecessary for Hobart to retain the right to purchase the Impacted Parcels. The unbridled right to approve new property owners and to require their consent to restrictions, zoning, and jurisdiction is above and beyond the other reasonable restrictions placed on the property.

Analyzing the factors in Section 3.4 of the Restatement (Third) of Property (Servitudes), also leads to the conclusion that the restriction upon transfer without the consent of Hobart in its sole discretion is unreasonable. As discussed above, the duration of the restraint is potentially in perpetuity. Further, the restraint has no limit to allow a variety of types of transfers to be employed. Here, we have a limitless restraint which applies to all transfers. It just so happens that the case at hand deals with a sale of the Impacted Parcels, but the restrictions in the Document apply, to a lease, grant of easement, license agreement, or any other transfer of an interest in the subject property. The restraint is also unlimited as to the number of persons to whom transfer is prohibited. The restraint not only fails to increase the value, it decreases the

value and attractability of the Impacted Parcels, as subsequent land owners will always have to make transfers contingent on a discretionary approval by Hobart. Finally, the restraint is imposed upon an interest that is otherwise readily marketable, evidenced by the willing buyer currently interested in the property, but for the restriction.

Relying on factors in Comment d of Section 3.4 of the Restatement (Third) of Property (Servitudes), the Document, does not expressly, nor through implication, contain a strong justification for the prohibition on the transfer without consent. Additionally, while Hobart can exercise its consent arbitrarily, it has no obligation to provide a substitute purchaser. Instead, the Right of First Refusal was set forth in a separate agreement which was subordinate to Baylake's interest.

As a restrictive covenant in general, the consent restriction is not reasonable, applying the test cited in Dodge, supra. Under all the facts and circumstances of the transaction, in light of the situation, business, and objectives of the parties, the restriction does not protect a legitimate interest of Hobart, which is not already protected through other means in the agreement. The restriction on transfer without the approval of Hobart serves to arbitrarily restrict the free alienability of a private property owner's right to transfer an interest in his property, and further, allows for arbitrary prohibition of certain members of society from owning property within the Village of Hobart.

Finally, we look to other jurisdictions who have contemplated the validity of a restriction prohibiting transfer of property without prior consent of another party. In Kenney v. Morgan, 325 A.2d 419, 422 (Md. Ct. Spec. App. 1974), The Maryland Court of Special Appeals affirmed the trial court decision declaring a covenant applying to a residential development to be invalid. The covenant stated: "None of the property subject to this Declaration shall be occupied, leased, demised, rented, conveyed or otherwise alienated, except by way of a Mortgage or Deed of Trust

and sale for default thereunder, nor shall the title or possession thereof be transferred, without the consent in writing had and obtained from The Turnbull Company." Even though the covenant provided an exception if consent was obtained from majority of surrounding lot owners the Court found the consent restriction to be invalid, citing Northwest Real Estate Co. v. Serio, 144 A. 245, 246-47 (Md. 1929) for its holding, that, in practicality, the reservation gave the grantor unqualified control for a term of years over the disposition of the property by sale or lease, and that "such a discretionary control would be plainly incompatible with the freedom of alienation, which is one of the characteristic incidents of a fee-simple title." Kenney, 325 A.2d at 423. In its discussion, the Kenney Court also cited Murray v. Green, 28 P.118, 120 (Cal. 1883) for the proposition that, "It is difficult to conceive of a condition more clearly repugnant to the interest created by the grant of an estate in fee simple than the condition that the grantees shall not alienate the same without the consent of the grantor."

Furthermore, in Riste v. Eastern Wash. Bible Camp, Inc., 605 P.2d 1294, 1294 (Wash. Ct. App. 1980) the court held that a deed restriction stating, "The property described herein shall not be resold to any person without written approval by the SELLER or its agent" was invalid. The Court cited to the general rule in the state of Washington that a clause in a deed prohibiting a grantee from conveying land to another without the approval of the grantor when grantor transferred a fee simple estate to grantee, is void as repugnant to the nature of an estate in fee. The Court further stated that this type of restraint is a disabling restraint upon which there is a presumption of invalidity, and the restriction is invalidated on public policy grounds. The Court held that the outright grant of an estate in fee was fatal to the restrictions that Seller wanted to impose.

The logic of the Kenney and Riste Courts is applicable here, as the Impacted Parcels were purportedly transferred in fee, but they cannot be freely transferred by the current owner as a

result of the "Restrictions on Transfer" set forth in the Document. These restrictions must be recognized as an unreasonable restraint on alienation and be declared void.

III. HOBART'S ABILITY TO RESTRICT THE ONEIDA FROM APPLYING TO PLACE REAL ESTATE INTO A LAND TRUST IS PRE-EMPTED.

TCGC and the Oneida executed the Purchase Agreement for the sale of TCGC's assets, including the Impacted Parcels. The Oneida have expressed an intention to apply to have the Impacted Parcels, part of the original Oneida Reservation, placed into a trust status with the U.S. Department of the Interior.

The Document, however, prohibits the "owner of any interest in the Subject Real Estate" from transferring "any interest in the Subject Real Estate to any individual . . . organization, or *sovereign nation*, . . . if, as a result of the transfer any of the items (1) – (3) would occur." Referenced sections (1) and (2) prohibit action to remove the real estate from the tax rolls or to diminish or eliminate the payment of real estate taxes; section (3) prohibits removal of any of the Impacted Parcels from the zoning authority or jurisdiction of Hobart.[8]

The Document further requires a potential purchaser of the land to give "notice" to Hobart of the proposed transfer; the notice compels the purchaser to agree that the Impacted Parcels will remain subject to the terms and conditions of the Document subsequent to a transfer in ownership. As a result, these provisions of the Document -- if enforced -- preclude the Oneida from applying to place the property into a land trust.

Baylake Bank brought this motion for summary judgment, asking this Court to rule that, with respect to the Oneida Tribe, the "Restrictions on Transfer" contained in the Document are preempted by federal law and, therefore, are void and unenforceable.

[8] It appears that fee ownership of the property by the Tribe may remove the parcel from the Village's zoning authority and jurisdiction. See Gobin v. Snohomish, 304 F.3d 909 (9th Cir. 2002). This issue is not before the Court, and the Court need not consider this issue given the Tribe's stated intentions to place the land into trust.

The state's power to regulate in Indian country is generally treated as an issue of preemption. New Mexico v. Mescalero Apache Tribe, 462 U.S. 324, 334 (1983). It is well-recognized law that state and local authority over Indian Tribes is prohibited if it is preempted by federal law. White Mountain Apache Tribe v. Bracker, 448 U.S. 136, 142 (1980). Federal preemption preserves the tradition of Indian sovereignty, which "is reflected and encouraged in a number of congressional enactments demonstrating a firm federal policy of promoting tribal self-sufficiency and economic development." *Id.* at 143. Federal preemption of state law occurs in three situations: (1) where Congress explicitly preempts state law; (2) where preemption is implied because Congress has occupied the entire field; and (3) where preemption is implied because there is an actual conflict between federal and state law. Schneidewind v. ANR Pipeline Co., 485 U.S. 293, 300 (1988). In this analysis, any ambiguity is construed generously in favor of promoting sovereignty and encouraging tribal independence. Dykema v. Volkswagenwerk AG, 189 Wis. 2d 206, 210, 525 N.W.2d 754 (Ct. App. 1994).

A. Congress Has Explicitly Preempted State Action With Regard to Placing Land in Trust for Indian Tribes

Congress has recognized and supported the policy of protecting *and increasing* Indian trust land since the Indian Reorganization Act of 1934 ("IRA"). See Cohen's Handbook of Federal Indian Law § 15.07[1][a] (at 1009 (2005)) (emphasis added). The IRA, in relevant part, specifically authorizes the Secretary of the Interior to acquire, *without the consent of the state*, "any interest in lands, water rights, or surface rights to lands within or without existing Indian reservations" through purchase, gift or exchange "for the purpose of providing land for Indians." Id. at 1010; 25 U.S.C. § 465. The legislative history of this statute recognizes that two goals of the IRA are "'rehabilitating the Indians economic life' and 'developing the initiative destroyed by ... oppression and paternalism,' of the prior allotment policy." United States v. Roberts, 185 F.3d 1125, 1137 (10th Cir. 1999).

Under the IRA, the Secretary can convert fee land to trust status by accepting legal title to the land in the name of the United States government in trust for the benefit of a tribe. 25 U.S.C. § 465. In general, the regulations authorize the Secretary to place the land in trust for a tribe provided the land is (1) within the exterior borders of the reservation or adjacent to it; (2) the tribe already owns an interest in the land; or (3) the acquisition is necessary to facilitate tribal self-determination, economic development, or housing needs. Cohen's Handbook. at 1011; 25 C.F.R. § 151.3(a).

For on-reservation land, such as the land at issue in this case,[9] the Secretary is required to consider (1) the tribe's need for the land; (2) the purposes for which the land will be used; (3) the impact on the state of removing the land from the tax rolls; (4) jurisdictional issues and conflicts of land use that may arise; and (5) whether the Bureau of Indian Affairs is equipped to discharge the responsibilities associated with placing the land in trust status. *Id.*; 25 C.F.R. § 151.10. The statute does not direct the Secretary to consider zoning regulations or other local restrictions on the use of the land.

This regulatory scheme set forth by Congress is comprehensive in nature and provides the exclusive process for placing the land into the federal trust. Put simply, Congress has occupied the entire field: Indian land claims are "exclusively a matter of federal law." County of Oneida v. Oneida Indian Nation, 470 U.S. 226, 241 (1985). Accordingly, state property laws are preempted.

[9] Although the property at issue in this case is privately owned, it is located entirely within the exterior borders of the Oneida Tribe reservation. The land is, therefore, considered on-reservation or within Indian country. *See* 18 U.S.C. § 1151 (defining "Indian country" to include "all land within the limits of any Indian reservation under the jurisdiction of the United States Government…"); Oklahoma Tax Comm'n v. Sac & Fox Nation, 508 U.S. 114, 123 (1993) (making use of 28 U.S.C. § 1151 in a civil context).

B. The Document Unlawfully Interferes with Federal Law and is Thereby Unenforceable.

The IRA clearly authorizes the Oneida to apply to have land placed into a trust for the benefit of the Tribe. When land is taken into trust, Hobart is precluded from directly taxing the land and from exercising its zoning authority over the land. *See* Kansas Indians, 72 U.S. 737 (1867) (establishing the well-settled, though not universal, principle that states have no power to tax Indian trust lands); City of Sault Ste. Marie, Mich. v. Andrus, 532 F. Supp. 157, 165 (D.C. Cir. 1980) ("It has long been the position of the Department of Interior that municipal land use laws may not be enforced on tribal trust lands except as permitted by the Secretary"). Hobart will also be precluded from exercising its jurisdiction under certain circumstances. *See* Williams v. Lee, 358 U.S. 217, 223 (1959) (concluding that state courts have no jurisdiction over a claim by a non-Indian against an Indian for a civil claim arising in Indian Country).[10] Indeed, in establishing the legal structure for acquiring land in trust for Indians, Congress "doubtless intended and understood that *the Indians for whom the land was acquired would be able to use the land free from state or local regulation or interference*…." Chase v. McMasters, 573 F.2d 1011, 1018 (8th Cir. 1978) (emphasis added).

The Document's prohibition on removing the land from the tax rolls or Hobart's zoning authority or jurisdiction precludes the Oneida Tribe – and any Indian Tribe – from purchasing the land. If enforced, this Document would unlawfully impair the Oneida Tribe's right, granted under federal law, to purchase the land and to *apply* to enjoy beneficial use of land held in trust. This would interfere with the federal government's ability to meet its trust obligations to Indian tribes. *See Id.* at 1019. Enforcement of these provisions of the Document is, therefore, pre-

[10] Notably, the Document does not establish what "jurisdiction" Hobart is attempting to preserve. For purposes of court proceedings, whether a state has jurisdiction on Indian land depends on the individuals involved and the conduct at issue. *See Williams*, 358 U.S. at 223. Regardless of the intent of the Document, it is clear that some scope of Hobart's jurisdiction will be removed if the land is placed in trust for the Oneida Tribe.

empted by federal law as set forth in the IRA. Accordingly, this Court should rule that the "Restrictions on Transfer" language prohibiting "any action, the result of which would . . . (1) remove or eliminate the Subject Real Estate (or any part thereof) from the tax rolls . . . (2) diminish or eliminate the payment of real estate taxes levied or assessed against the Subject Real Estate (or any part thereof), and/or 3) remove the Subject Real Estate (or any part thereof) from the zoning authority and/or jurisdiction of the Village of Hobart " is pre-empted by federal law, void and unenforceable.

IV. THE DOCUMENT IS A LIEN FOR THE PAYMENT OF FUTURE REAL ESTATE TAXES.

Pursuant to 11 U.S.C. § 363(f), the assets of the bankruptcy estate can be transferred free and clear of any liens and encumbrances. Those portions of the Document restricting the transfer of ownership of the Impacted Parcels or removal of the real estate from the tax rolls constitute a lien, and accordingly the Property can be transferred without it.[11]

It is well settled that the form or title chosen by the parties is not determinative. In re Integrated Health Servs., Inc., 260 B.R. 71, 77 (Del. 2001) citing, Liona Corp. v. PCH Assoc. (In re: PCH Assoc.), 804 F.2d 193, 200 (2d Cir. 1986). Instead, courts "look to the economic realities of the [document] and not to the labels supplied by the parties." In re MCorp Fin., Inc., 122 B.R. 49, 52-53 (Bankr. S.D. Tex. 1990). That test includes examining all relevant circumstances and the economic substance of the agreement to discern the true nature of the instrument. See, e.g., In re PCH Assoc., 804 F.2d at 199.

Bankruptcy Courts commonly analyze whether a document constitutes a security agreement. Powers v. Royce, Inc., (In re Powers, 983 F.2d 88, 90 (7th Cir. 1993) (quoting S. Re.

[11] The remaining feature of the Document, requiring that the property be used as a golf course, or for other purposes consistent with the zoning, in perpetuity, are not affected by the Bankruptcy Code but are addressed elsewhere in this brief.

No. 989, 95th Cong., 2d Sess. 26 (1978)." In re QDS Components, Inc., 292 B.R. 313, 321. These cases provide an in-depth analysis of the factors as determinative of whether agreements are, however, "financing agreements."

Security Interest law has been continuously moving toward examining the economics rather than the document title. For instance, Article 9 of the U.C.C. no longer looks to the intent of the drafting parties to determine whether a transfer is a security agreement. The Official Comment confirms the importance of the revised language:

> Prior to this amendment, §1-201(37) provided that whether a lease was intended as security (i.e., a security interest disguised as a lease) was to be determined from the facts of each case . . . reference to the intent of the parties to create a lease or security agreement has led to unfortunate results. Accordingly, amended §1-201(37) deletes all references to the parties' intent. In Re: Pilotex, Inc., et al. v. Pilotex Corp., 349 F.3d 711, 721-722 (3d Cir. 2003) citing U.C.C. § 1-201(37), Official Cmt; a*ccord* In Re: Murray, 191 B.R. at 314 (stating that "judicial opinions construing U.C.C. § 1-201(37) and the Official Uniform Commercial Code Comments . . . clearly place the focus of the inquiry under the revised statute on the economics of the transaction rather than on the intent of the parties as had been the emphasis previously." *Id.*

U.C.C. § 1-201(37), Official Comment.

The Right of First Refusal and the Document are instruments documenting a disguised security interest in the Impacted Parcels securing TCGC's (or its successors') obligation to pay real estate taxes to Hobart. The notice to be provided to Hobart pursuant to the Document, in the event a transfer is contemplated, contains language that is functionally an assignment and assumption of a security agreement. Specifically, the transferee and transferor must acknowledge in writing that the real estate will be subject to the conditions of the Document following the transfer.

In addition, the current owner of the Impacted Parcels is prohibited from taking any action to remove all or any portion of the real estate from the tax rolls or to diminish or eliminate

the payment of real estate taxes. The Document further provides that in the event any steps are taken to remove the property from the tax rolls, Hobart will waive the covenants relating to tax rolls and tax payments, if the owner of the real estate commits to make payment in lieu of taxes ("PILOT payments"), insuring that a monetary equivalent to taxes will be paid to Hobart. The owner or proposed transferee must agree to the imposition of a lien on the real estate if the PILOT payments are not made. This language in the Document is not a restriction on the use of the Impacted Parcels, it is an agreement that taxes will be paid on the real estate now and in the future and that any attempted transfer of the Impacted Parcels will be "held up" for the payment of taxes and will require the transferee to acknowledge the validity and enforceability of the security interest.

The economic realities are that the Document, while entitled "Restrictive Covenant" is an avoidable security interest, lumped in with a land use restriction, that is intended to secure future payment of real estate taxes. As a result, TCGC may sell the Impacted Parcels to the Oneida free and clear of Hobart's lien and security interest pursuant to 11 U.S.C. §§ 363 (f)(3) and 1123(a)(5)(D) and (E).

VI. HOBART CAN BE COMPELLED TO ACCEPT MONETARY DAMAGES IN LIEU OF EQUITABLE RELIEF, PERMITTING THE SALE OF THE PROPERTY FREE AND CLEAR OF ENCUMBRANCES UNDER 11 U.S.C. § 363(f)(5)

11 U.S.C. § 363(f)(5) provides for asset sales free and clear of interests for which the creditor can be compelled to accept monetary damages in lieu of equitable relief. Any rights or entitlements that Hobart may have under the Document outside of the use restriction can be reduced to monetary damages, and can be avoided.

As discussed above, the Document is contractual in nature. Accordingly, Hobart's interest can be reduced to its contractual damage rights and thereafter be avoided. The

transaction that produced the Document lends itself to this proposition. Rather than enter into a reciprocal covenant under which Hobart would share a burden similar to that of TCGC, or any covenant in which Hobart's property interests were affected Hobart negotiated with TCGC to execute the Document to contract for and secure zoning rights and future payment of real estate taxes. Consequently, Hobart's damages can be reduced to the value of the negotiated benefit. See, e.g., In re Webb, 932 F.2d 155, 157-158 (2d Cir. 1991) (approving sale of a negative easement within a debtor's Chapter 12 Plan of Reorganization when the easement had previously been created through a purchase).

Hobart's interest under the Document can further be reduced to a compulsory monetary claim and thereafter avoided. Impacted Parcels interests, including interests in easements and restrictive covenants, are subject to condemnation and eminent domain proceedings, the result of which is the elimination of such interests in exchange for monetary compensation. *See, e.g.,* United States v. Welch, 217 U.S. 333 (1910) (setting the value of an easement after the related land was taken in an eminent domain action); United States v. 4.105 Acres of Land, etc., 68 F. Supp. 279 (N.D. Cal. 1946) (valuing the interest of a city's easement after its property was taken by the federal government in an eminent domain action). Because Hobart could be compelled in such proceedings to accept monetary compensation for its loss, Hobart's interest is further avoidable under Section 363(f)(5).

The Seventh Circuit briefly addressed the issue of Section 363(f)(5) application to land interests in the decision of In re Gouveia, 37 F.3d 295 (7th Cir. 1994). Gouveia involved a reciprocal land covenant between owners of subdivision lots. The land covenant contained a use restriction that prohibited non-residential use of the land at issue. The bankruptcy trustee attempted to use Section 363(f)(5) to sell a subdivision lot free and clear of the covenant. The court found that Section 363(f)(5) could not be used to strip the covenant because the other

subdivision lots' owners could not be compelled to accept monetary damages in exchange for the loss of the covenant.

The present matter is readily distinguishable from Gouveia for a variety of reasons. First, Gouveia involved a reciprocal land covenant between subdivision lot owners. The present matter involves a unilateral restriction that was purchased by Hobart. Accordingly, Hobart's interest is more akin to an executory contract than a land restriction. The Gouveia covenant involved a use restriction. The present matter involves a sale restriction, which is also more indicative of an executory contract.

Consequently, Hobart can be compelled to accept monetary damages in exchange for its interest, thus rendering that interest, as set forth in the Document, avoidable pursuant to § 363(f)(5).

VII. THE PROPERTY MAY BE SOLD FREE AND CLEAR OF THE DOCUMENT UNDER 11 U.S.C. § 363(e) IF HOBART IS PAID ADEQUATE PROTECTION

11 U.S.C. § 363(e) provides that, notwithstanding any other provision of Section 363, on the request of a party with an interest in property being sold, the court shall prohibit or condition the sale as necessary to provide that party with adequate protection of the interest. This section sets forth an independent implied power of sale. Accordingly, even if this Court finds that the provisions set forth above in Section 363(f) are not applicable, it may, notwithstanding those provisions, approve the sale and condition it as necessary to provide Hobart with adequate protection of any interest it claims to have pursuant to the Document.

VIII. TCGC MAY SELL THE PROPERTY FREE OF ENCUMBRANCES PURSUANT TO 11 U.S.C. § 1123(a)(5)(D)

Alternatively, TCGC may sell the Impacted Parcels to the Oneida free and clear of Hobart's interest pursuant to 11 U.S.C. § 1123(a)(5)(D), which states as follows:

> Notwithstanding any otherwise applicable nonbankruptcy law, a plan may provide for the sale of all or any part of the property of the estate, either subject to, or free of any

lien, or the distribution of all or any part of the property of the estate among those having an interest in such property of the estate.

The Restrictions on Transfer constitute an avoidable lien and interest in property under this section.

The Document constitutes an interest in property, and such interest is avoidable by the plain language of Section 1123(a)(5). Section 1123(a)(5) is described as an "empowering statute" under which the plan may propose certain actions notwithstanding nonbankrutpcy law or agreements. In re FCX, Inc., 853 F.2d 1149 (4th Cir. 1988). "Accordingly, Section 1123(a)(5)(D) then does not simply provide a means to exercise the debtor's pre-bankruptcy rights; it enlarges the scope of those rights, thus enhancing the ability of a trustee or debtor in possession to deal with property of the estate." *See Id.* at 1155 Consequently, TCGC can invoke the powers of Section 1123(a)(5) to sell the Impacted Parcels free and clear of Hobart's interest as set forth in the Document.

Further, the Document constitutes a hidden security interest in the form of a tax lien. As addressed above, though the Document may not be labeled as such, it is well settled that the form or title chosen by the parties is not determinative. (In Re: PCH Assoc.), 804 F.2d 193, 200 (2d Cir. 1986).

The function of the Document is to secure future payment of taxes in that the Impacted Parcels owner is prohibited from taking any action to remove all or any portion of the real estate from the tax rolls or to diminish or eliminate the payment of real estate taxes. The Document further provides that in the event any steps are taken to remove the property from the tax rolls, Hobart will waive the covenants relating to tax rolls and tax payments, if the owner of the real estate commits to make payment in lieu of taxes ("PILOT payments"), insuring that a monetary equivalent to taxes will be paid to Hobart. The owner or proposed transferee must agree to the imposition of a lien on the real estate if the PILOT payments are not made. This language in the

Document is not a restriction on the use of the Impacted Parcels, it is an agreement that taxes will be paid on the real estate now and in the future and that any attempted transfer of the Impacted Parcels will be "held up" for the payment of taxes and will require the transferee to acknowledge the validity and enforceability of the security interest.

To the extent Hobart has a lien based on yet unpaid future taxes, the Impacted Parcels can be sold free and clear of such lien. See In re A. Cardi Constr Co., 154 B.R. 403 (Bankr. D.R.I. 1993). Accordingly, the Plan appropriately provides for a sale free and clear of such lien.

IX. THE AFFIRMATIVE DEFENSES RAISED BY HOBART DO NOT PREVENT ENTRY OF SUMMARY JUDGMENT IN FAVOR OF PLAINTIFF.

Hobart asserts that the Plaintiffs' claims fail because: a) Hobart is immune from judgment under the Eleventh Amendment's immunity provision; and b) the Plaintiffs failed to comply with Wisconsin's municipal immunity statute, Wis. Stat. §893.80. *See* Answer, Affirmative Defenses ¶¶ 48-49. This Court can dispose of both affirmative defenses as a matter of law. *See* Lodl v. Progressive N. Ins. Co., 2002 WI 71, ¶ 17, 253 Wis. 2d 323, 646 N.W.2d 314 (statutory immunity under Wis. Stat. § 893.80 is a question of law); Ind. Dep't of Revenue v. Williams, 301 B.R. 871, 875 (S.D. Ind. 2003) (immunity of a government entity under the U.S. Constitution is a question of law).

A. Eleventh Amendment Immunity

The doctrine of sovereign immunity generally provides that a government may not be sued without its consent. *See* United States v. Mitchell, 463 U.S.206, 212 (1983). The Eleventh Amendment to the U.S. Constitution eliminates federal jurisdiction over "any suit in law or equity, commenced or prosecuted against one of the United States by citizens of another state, or by citizens or subjects of any foreign state." U.S. Const. Amend. XI.

> The Eleventh Amendment does not exist solely in order to prevent federal-court judgments that must be paid out of a State's treasury; it also serves to avoid the indignity of subjecting a State to the

> coercive process of judicial tribunals at the instance of private parties.

Seminole Tribe v. Florida, 517 U.S. 44, 58 (1996) (internal citation omitted). These protections do not extend to suits prosecuted against a municipal corporation or other governmental entity which is not an arm of the state. Alden v. Maine, 527 U.S. 706, 756 (1999). Hobart, therefore, is not entitled to Eleventh Amendment or sovereign immunity.

Even if Hobart were entitled to immunity under the Eleventh Amendment, Congress can and has abrogated that immunity when it comes to this Court's jurisdiction over the property of a bankruptcy estate. *See* Seminole Tribe, 517 U.S. at 57-58 (Congress may abrogate immunity by a valid exercise of power); Tenn. Student Assistance Corp. v. Hood, 541 U.S. 440 (2004) (because bankruptcy is an *in rem* proceeding involving the debtor's property and debts, the discharge of debts owed to a state does not implicate the Eleventh Amendment). Even state entities (not to mention municipalities like Hobart) have no authority to interfere with transfers of property under bankruptcy court jurisdiction. Regions Bank v. Rivet, 224 F.3d 483, 492 and n.14 (5th Cir. 2000), *citing* Int'l Shoe Co. v. Pinkus, 278 U.S. 261, 264 (1929) ("The power of Congress to establish uniform laws on the subject of bankruptcies throughout the United States is unrestricted and paramount. . . . The national purpose to establish uniformity necessarily excludes state regulation…. States may not pass or enforce laws to interfere with or complement the Bankruptcy Act or to provide additional or auxiliary regulations").

Finally, more than a year before it answered the Complaint, Hobart appeared without reservation of any claimed immunity, *see* August 14, 2007 Notice of Appearance and Request for Service of Papers, objected to the Debtor's cash-collateral financing, *see* August 14, 2007 Village of Hobart Objection), and participated in a hearing on that and other matters. Hobart's only assertion of immunity, however, appears in its August 13, 2008 Answer to the Complaint to determine the extent of Hobart's interest. Under those circumstances, Hobart has consented to

the plenary jurisdiction of this Court over the property at issue and has waived any immunity that it might otherwise have enjoyed. *See, e.g.,* 11 U.S.C. § 106(b) (waiver of sovereign immunity by filing a proof of claim); In re Bliemeister, 296 F.3d 858 (9th Cir. 2002) (participation in bankruptcy court proceedings prior to assertion of immunity constitutes waiver).

B. Statutory Immunity

Hobart's claim of statutory immunity also fails. Section 893.80 of the Wisconsin statutes provides limited immunity to Wisconsin municipalities and imposes specific notice requirements for parties wishing to pursue a claim against a municipality. Again, by appearing without reservation and consenting to the jurisdiction of this Court, Hobart has waived any state immunity rights it might otherwise have had. Furthermore, in giving the bankruptcy courts unrestricted authority over the disposition of a debtor's assets, Congress has pre-empted state laws that might otherwise interfere with a debtor's reorganization efforts. *See, e.g.,* Pacific Gas & Elec. Co. v. California, 350 F.3d 932, 937 (9th Cir. 2003) (sections 1123(a)(5)(b) and 1142(a) expressly pre-empt nonbankruptcy laws that "relate[] to financial condition"). And while Congress cannot pre-empt state laws designed to protect public health or safety, *see* Midlantic Nat'l Bank v. New Jersey Dep't of Environmental Protection, 474 U.S. 494 (1986); *see also* 11 U.S.C. 362(b)(4) (providing an exception to the automatic stay for actions or proceedings to enforce a governmental unit's police and regulatory power), those police powers are not at issue here. Certainly Hobart cannot contend that restriction on the transfer of land designed to ensure future tax payments by the land owner has anything to do with health or safety. In the absence of an overriding and legitimate regulatory interest in the property, a municipal entity like Hobart cannot use state procedural statutes to avoid this Court's power to supervise the orderly administration and disposition of the Debtor's property.

Even if Wis. Stat. § 893.80 were not pre-empted, the Wisconsin Supreme Court has carved out an exception to that statute for actions for declaratory relief. Willow Creek Ranch, L.L.C. v. Town of Shelby, 2000 WI 56, 235 Wis. 2d 409, 611 N.W.2d 693. "Although immunity serves as a bar to both money damages and injunctive relief based in tort, municipalities do not benefit from the shield of immunity in actions seeking declaratory relief." *Id.* ¶ 36 (*citing* Schmeling v. Phelps, 212 Wis. 2d 898, 915, 569 N.W.2d 784 (Ct. App. 1997)). Clearly, the court made a policy judgment to treat declaratory actions different than "any suit" for money damages or injunctive relief based in tort, reasoning that "public policy [] requires that citizens be afforded the opportunity for a court to declare their rights." *Id.* ¶¶ 31, 33, 36 *(citing* Schmeling, 212 Wis. 2d at 915).[12]

Furthermore, although Wis. Stat. § 893.80 requires that written notice of the circumstances of a claim be given to the governmental body before an action against it may be brought, subsection(1)(a) contains a "savings clause" which provides:

> Failure to give the requisite notice shall not bar action on the claim if the . . . subdivision or agency had actual notice of the claim and the claimant shows to the satisfaction of the court that the delay or failure to give the requisite notice has not been prejudicial to the defendant . . . subdivision or agency.

In other words, "[s]ubstantial, not strict, compliance with the notice statue is required." Fritsch v. St. Croix Cent. Sch. Dist., 183 Wis. 2d 336, 344, 515 N.W.2d 328 (Ct. App. 1994). Thus, if plaintiffs can show that Hobart had actual notice of the claim, and the delay in giving notice did not prejudice it, then the notice requirements of § 893.80 "shall not bar action on the claim."

[12] Furthermore, eleven years earlier, the court held that "Wis. Stat. § 893.80(4) does not grant immunity to actions based in contract." Willow Creek Ranch v. Town of Shelby, 2000 WI 56, ¶ 35, 235 Wis. 2d 409, 611 N.W.2d 693 (*citing* Energy Complexes, Inc. v. Eau Claire County, 152 Wis. 2d 453, 466, 449 N.W.2d 35 (1989)).

Wisconsin courts have held that "'[a]ctual notice' under § 893.80(1)(a), Stats., is the equivalent of actual knowledge." Elkhorn Area Sch. Dist. v. East Troy Comty. Sch. Dist., 110 Wis. 2d 1, 5, 327 N.W.2d 206 (Ct. App. 1982) (citation omitted). There can be no dispute that Hobart had actual knowledge of the circumstances giving rise to this claim. To begin with, Hobart intentionally encumbered the Impacted Parcels with the Document by drafting and recording the instrument. In the months leading up to the filing of this declaratory judgment action, corporate counsel for Hobart participated in numerous discussions concerning the validity of the covenant. If that weren't enough to provide "actual notice," on May 28, 2008, a full six weeks before this declaratory judgment action was filed, counsel for TCGC and Baylake sent a letter to corporate counsel for Hobart, informing Hobart of Baylake's intent to execute a letter of intent with the Oneida for its role in the Oneida's purchase of the assets of TCGC, including real estate in Hobart. The letter advises Hobart that the parties intend to challenge the Document. On June 30, 2008, Hobart was again notified of the challenge to the Document, when TCGC filed its Plan of Reorganization, which included a provision in which TCGC proposes to sell all of its assets, including the encumbered property, to the Oneida and itemized the Debtor's intended challenges to the Document.

Hobart can not credibly argue that it lacked actual knowledge of Baylake's intent to challenge the validity of the Document. In fact, Hobart's counsel stated in open court early in the case that this entire bankruptcy proceeding was an attempt by Debtor to remove Hobart's alleged covenants. That the validity and enforceability of the Document were at issue and would be challenged in an adversary proceeding was a mystery to no one.

The purpose of a notice of injury statute, in general, "is to allow governmental authorities to make a prompt investigation of the circumstances giving rise to a claim." Elkhorn, 110 Wis. 2d at 5. Hobart was well aware of the circumstances giving rise to this claim, as it had placed the

restrictive covenant on the land before transferring it to TCGC, had engage in discussion over the validity of the covenant, and appeared in the bankruptcy as an interested party, apparently, for the sole purpose of trying to enforce its alleged rights under the Document. Wisconsin courts have explained that the specific "purpose of § 893.80, Stats., is to afford the government an opportunity to compromise and settle the claim without litigation." Fritsch, 183 Wis. 2d at 343 (citation omitted). Hobart had every opportunity to settle this claim without litigation, and the bank's counsel opened the door to those settlement discussions in writing on May 28, 2008. Rather than choosing to settle or even engage in meaningful negotiations, Hobart instead appeared in the bankruptcy, objected to the cash collateral order, answered the Debtor's Adversary Complaint, and a year later--almost as an afterthought--asserted statutory immunity. Hobart has not been prejudiced, nor has its ability to settle the matter been hampered, by any "failure" to provide statutory notice.

CONCLUSION

For the foregoing reasons, summary judgment should be granted and the relief requested be awarded because there is no issue of material fact and the Plaintiff is entitled to judgment as a matter of law.

Dated: September 10, 2008.

GODFREY & KAHN, S.C.

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