IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN

BAYLAKE BANK

Plaintiff

v.

TCGC, LLC,

Debtor, Case No. 08-C-608

VILLAGE OF HOBART,

Movant.

VILLAGE OF HOBART'S MEMORANDUM OF LAW IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT

The Village of Hobart ("Village") hereby respectfully submits this memorandum of law in support of its Motion for Summary Judgment.

INTRODUCTION

In 2003, the Village owned that portion of TCGC, LLC's (the "Debtor") real estate which comprised all 27 holes of the Thornberry Creek Golf Course (the "Golf Course"). (Affidavit of Elaine Willman (hereinafter, "Willman Aff."), ¶ 2; Village of Hobart's Statement of Proposed Findings of Fact (hereinafter, "Findings of Fact"), ¶ 1.) At that time, the Debtor or Jack Schweiner owned the land upon which the clubhouse and maintenance facility are located (the "Clubhouse & Maintenance Facility" and, together with the Golf Course, the "Property"). (Willman Aff., ¶ 3; Findings of Fact, ¶ 2.)

On August 28, 2003, the Village and Mr. Schweiner entered into an agreement pursuant to which Mr. Schweiner obtained an option to purchase the Golf Course from the Village (the

"Original Option"). (Willman Aff., ¶ 4; Findings of Fact, ¶ 3.) The Original Option contained express language which indicated the option could be exercised only if certain deed restrictions were placed upon the Golf Course upon Schweiner's purchase. (Willman Aff., ¶ 5; Findings of Fact, ¶ 4.) Specifically, Section 3.12 of the Original Option read in pertinent part as follows:

> 3.12 Deed Restriction. Upon the sale of the Option Property to Schweiner hereunder, the Parties agree to impose a deed restriction with respect to the Leased Premises, which deed restriction shall be a covenant running with the land and be binding upon and inure [to] the benefit of Schweiner, his heirs, successors, and assigns. The deed restriction shall prohibit the sale of the golf course, or any part thereof, to any individual, entity (whether corporation, limited liability company, partnership or otherwise), organization, or nation, the result of which would remove the Leased Premises from the tax base in the Village of Hobart, eliminate the payment of real estate taxes associated therewith, and/or remove the Leased Premises from the zoning authority or jurisdiction of the Village....

(Willman Aff., ¶ 5, Exh. A, p. 11, § 3.12; Findings of Fact, ¶ 4.)

In conjunction with the sale of the Golf Course to the Debtor in accordance with the Original Option, certain Restrictive Covenants (Exhibit B to Willman Aff., hereinafter, the "Restrictive Covenants") as well as the "Thornberry Creek Golf Course Clubhouse and Maintenance Facility Option Amendment, and Right of First Refusal" (Exhibit C to Willman Aff., hereinafter, the "Option" and, together with the "Restrictive Covenants", the "Village's Interests") were recorded on the Golf Course as well as on the Clubhouse & Maintenance Facility. (Willman Aff., ¶ 6; Findings of Fact, ¶ 5.)

Both the Debtor and Baylake Bank (the "Bank" and, together with the Debtor, the "Plaintiffs"), each with the assistance of counsel (Godfrey & Kahn on behalf of the Debtor; Attorney Stephen Kase on behalf of the Bank), participated in the drafting, reviewing and final approval of the Village's Interests before they were signed and recorded. (Affidavit of William S. Woodward (hereinafter, "Woodward Aff."), ¶ 2; Findings of Fact, ¶ 13.)

The Bank required that it approve of the Restrictive Covenants because they were intended to enjoy priority over all of the Bank's mortgage liens. (Woodward Aff., ¶ 3; Findings of Fact, ¶ 14.) By agreement, the Restrictive Covenants were intentionally recorded before the Bank's mortgage. (Woodward Aff., ¶ 4; Findings of Fact, ¶ 15.) The Restrictive Covenants are superior to all mortgages of the Bank, and are not subject to any subordination agreement. (Woodward Aff., ¶ 5; Findings of Fact, ¶ 16.)

The Bank financed the Debtor's purchase of the Golf Course from the Village, being fully aware of the Village's Interests and the fact that the Village's Restrictive Covenants were superior to the Bank's interests. (Woodward Aff., ¶ 6; Findings of Fact, ¶ 17.)

The Village would not have sold the Golf Course to the Debtor in the absence of both the Debtor and the Bank agreeing to the Village's Interests and agreeing to the Restrictive Covenants being prior to the Bank's mortgages (Willman Aff., ¶ 7; Findings of Fact, ¶ 6.)

The Restrictive Covenants contain, without limitation, the following language:

> **Restriction on Transfer**. Without … consent of the village … no owner of any interest in the subject real estate … shall transfer any interest … the result of which would: (1) remove or eliminate the subject real estate … from the tax rolls of the village … ; (2) diminish or eliminate the payment of real estate taxes … , and/or (3) remove the subject real estate...from the zoning authority and/or jurisdiction of the village ….
>
> …
>
> **Waiver of Certain Restrictions**. Notwithstanding anything in these Restrictive Covenants to the contrary, the restrictions … which pertain to tax assessments … shall be deemed to have been waived by the village … provided that such owner or proposed transferee will confirm and agree … such owner or proposed transferee will make payments to the Village of Hobart in lieu of real estate taxes …
>
> **Restriction on Use**. With respect to the golf course property only, said real estate may only be used for the purpose of a golf course and such other uses that are normally incidental thereto than

> residential development or commercial development consisted with the village's zoning regulations…. Notwithstanding the foregoing, this restriction shall not prohibit an owner from petitioning the village to re-zone all or any portion of the golf course property.

(Restrictive Covenants, §§ 1, 3, 4.)

After agreeing to the Village's Interests and participating in their drafting, the Debtor and the Bank now seek to avoid the Village's Interests. On July 16, 2007, the Debtor filed for chapter 11 bankruptcy in the Eastern District of Wisconsin. As part of the bankruptcy, the Debtor and the Bank seek to eliminate the Village's Interests because they claim they can sell the Property for a higher price if the Village's Interests are eliminated. In its Plan of Liquidation dated June 30, 2008, the Debtor has stated that it intends to sell all the Property to the Oneida Tribe of Indians of Wisconsin (the "Oneida") and that to do so for the offered price of $12,000,000, it needs to extinguish the interests of the Village in the Property under the Restrictive Covenants and Option. (Exh. A to Cisar Aff. (hereinafter, the "Plan"), Article V, pp. 7-8; Findings of Fact, ¶ 18.) The Debtor's "Proposed Amended Disclosure Statement," filed August 11, 2008, provides that if the Village's Interests are not extinguished and the Oneida therefore withdraw their offer or reduce their purchase price below $10,000,000, the Property will instead be sold at an auction. (Exh. B. to Cisar Aff. (hereinafter, the "Disclosure Statement"), pp. 16, 22; Findings of Fact, ¶ 19.)

The Debtor is not reorganizing; it is liquidating all of its assets. (*See generally*, Plan and Disclosure Statement; Findings of Fact, ¶ 20.) The Bank is alleged to hold perfected liens on all of the Debtor's real and personal property, except for prior liens for about $140,000 to Greenleaf Wayside Bank on one parcel of real estate and a mortgage lien on one house to Bay Bank. (Plan, p. 20; Findings of Fact, 21.) The Disclosure Statement estimates unsecured claims (excluding undersecured creditors) at $150,000. (Disclosure Statement, pp. 20-21; Findings of Fact, ¶ 22.) Sections 4.2 and 4.5 of the Plan "carve out" of the Bank's collateral $100,000 for the unsecured

creditors. (Plan, pp. 6-7; Findings of Fact, ¶ 23.) Section 3.3 of the Plan "carves out" $150,000 for the priority tax claimants. (Plan, p. 6; Findings of Fact, ¶ 24.) Section 3.1(A) "carves out" the funds necessary to pay the administrative expenses of the chapter 11 case, including the Debtor's lawyers fees. (Plan, p. 5; Findings of Fact, ¶ 24.) The Debtor's lawyer is being paid by the Bank. If the gross auction price is less than $10,000,000, the carve outs for the unsecured creditors and for the priority tax creditors are to be proportionally reduced. (Disclosure Statement, pp. 22; Findings of Fact, ¶ 26.)

Substantially all of the increase in the value of the Property, if the Village's Interests are extinguished, will inure to the benefit of the Bank that initially agreed to the Village's Interests, but now finds itself undersecured, because it is owed in excess of $15,000,000. (Disclosure Statement, p. 20; Findings of Fact, ¶ 27.)

On July 11, 2008, the Debtor and the Bank filed their Complaint to Determine Extent of Interest and for Declaratory Judgment against the Village seeking, among other things, to extinguish the Village's Interests. (Exh. D to Cisar Aff. (hereinafter, the "Complaint"); Findings of Fact, ¶ 28.)

STANDARD FOR SUMMARY JUDGMENT

Federal Rule of Civil Procedure 56(c) provides that summary judgment "shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Only genuine issues of "material and outcome determinative fact" will defeat a proper motion for summary judgment. *Vasquez v. Hernandez*, 60 F.3d 325, 327 (7th Cir. 1995) (*citing Celotex Corp. v. Catrett*, 477 U.S. 317, 322, 106 S. Ct. 2548 (1986). "A genuine issue of material fact exists only where there

is sufficient evidence favoring the nonmoving party for a jury to return a verdict for that party." *Zimbauer v. Milwaukee Orthopaedic Group Ltd.*, 920 F. Supp. 959, 964 (E.D. Wis. 1996) (*quoting Santiago v. Lane*, 894 F.2d 218, 221 (7th Cir. 1990)).

The moving party has the burden of establishing that there exists no genuine issue of material fact and that it is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c); *Celotex*, 477 U.S. at 323. The moving party may meet its burden by showing "that there is an absence of evidence to support the nonmoving party's case." *Celotex*, 477 U.S. at 325. If the moving party meets its burden, the non-moving party "may not rest upon the mere allegations or denials of his pleading, but his response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial." *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586, 106 S. Ct. 1348 (1986).

SUMMARY OF CLAIMS AND THE VILLAGE'S ARGUMENTS

The Plaintiffs assert the following claims in their Complaint:

1. **Count I (Avoidance of Interest)**: This Count only seeks relief as to the Restrictive Covenants, which the Complaint (in paragraph 11) defines as the "Document". Plaintiffs assert that "all language in the [Restrictive Covenants] that does not constitute a use restriction should be recognized as a lien, and be avoided … pursuant to 11 U.S.C. §§ 363(f)(4), 363(f)(5) and 1123(a)(5)(D)." (Complaint, ¶ 28.)

2. **Count II (Pre-emption)**: Plaintiffs assert that "language prohibiting any action to remove any Impacted Parcel from the tax rolls is pre-empted by [the Indian Reorganization Act of 1934[1]] and, therefore, is void and unenforceable." (Complaint, ¶ 33.)

3. **Count III (Restraint on Alienation)**: Plaintiffs assert that the Restrictive Covenants "constitute[] a prohibited unlawful restraint on alienation." (Complaint, ¶ 35.)

4. **Count IV (Declaratory Judgment)**: Plaintiffs assert that:

    a. the Restrictive Covenants are "subject to a bona fide dispute and should be avoided pursuant to 11 U.S.C.§ 363(f)(4)" (Complaint, ¶ 42);

[1] Plaintiffs cite to "25 C.F.R. Part 151", and "25 U.S.C. part 151 et seq." in various paragraphs of Count II. (Complaint, ¶¶ 30-33.) Presumably they intend to refer to 25 U.S.C. §§ 461, et seq., and 25 C.F.R. §§ 151, et seq.

b. any "rights or entitlements that [the Village] may have under the [Restrictive Covenants] can be reduced to money damages" and, as such "the Property should be sold free and clear of the terms and conditions of the [Restrictive Covenants], pursuant to 11 U.S.C. § 363(f)(5)" (Complaint, ¶ 43);

c. "[p]ursuant to 11 U.S.C. § 363(e) this Court should condition the sale of the Property as necessary to provide [the Village] with adequate protection of any interest it claims to have pursuant to the [Option] or the [Restrictive Covenants]" (Complaint, ¶ 44); and

d. "[t]he Property should be sold pursuant to the Plan of Liquidation currently on file with the Court free of any lien or encumbrance created by the [Option] or the [Restrictive Covenants], pursuant to 11 U.S.C. § 1123(a)(5)(D)." (Complaint, ¶ 45.)

The Village is entitled to summary judgment as a matter of law on all claims of the Complaint because:

1. With respect to **Count I (Avoidance of Interest)**:

a. The Restrictive Covenants may not be avoided pursuant to 11 U.S.C. § 363(f)(4) because they are not themselves subject to a bona fide dispute. The Restrictive Covenants are enforceable under Wisconsin law, by injunction, and are not subject to the type of dispute contemplated by § 363(f)(4); such disputes must center around the validity of a debt, not rights as between third parties.

b. The Restrictive Covenants may not be avoided pursuant to 11 U.S.C. § 363(f)(5) because they are covenants that run with the land and are enforceable by injunction under Wisconsin law. As such, the Village cannot be compelled to accept money damages in satisfaction of its rights under the Restrictive Covenants.

c. The Restrictive Covenants may not be avoided pursuant to 11 U.S.C. § 1123(a)(5)(D) because that section only speaks to sales free of liens, and the Restrictive Covenants are not liens. They are negative promises not to do certain things which under Wisconsin law constitute covenants that run with the land.

2. With respect to **Count II (Preemption)**: The Restrictive Covenants are not voidable by the preemption doctrine or the Indian Reorganization Act of 1934 ("IRA"), because the IRA is inapplicable in this case. The IRA applies only to transfers to the federal government, not transfers to Indian tribes. Further, the Restrictive Covenants do not conflict with the IRA.

3. With respect to **Count III (Restraint on Alienation)**: The Restrictive Covenants do not constitute illegal restraints on alienation under Wisconsin law because they do not prohibit the Debtor from conveying title to the Property in absolute fee.

4. With respect to **Count IV (Declaratory Judgment)**: For the reasons set forth above, the Plaintiffs are not entitled to the requested declaration. In addition, pursuant to 11 U.S.C. § 363(e), the Court should *prohibit* any sale in violation of the Village's Interests because it is impossible to specify adequate protection for the unending loss of potential tax revenue and disruption to village planning that would occur if the Village's Interests are avoided, and only preservation of the Village's Interest will adequately protect the Village.

5. With respect to the Village's **Affirmative Defenses**: The Village is further entitled to dismissal of the Plaintiffs' claims because neither the Debtor nor the Bank have satisfied the requirements of Wis. Stat. § 893.80, which are a condition to seeking relief against the Village, and because the Plaintiffs are estopped from attacking the Village's Interests.

Because there is no material issue of fact with respect to any of Plaintiffs' claims, and because the theories espoused by Plaintiffs are not supported by the law, the Village is entitled to summary judgment on all counts.

ARGUMENT

I. SUMMARY JUDGMENT IS REQUIRED DISMISSING COUNT I OF THE COMPLAINT BECAUSE PLAINTIFFS ARE NOT ENTITLED TO AVOIDANCE OF THE VILLAGE'S INTERESTS PURSUANT TO § 363(f)(4), § 363(f)(5) OR 1123(a)(5)(D).

Pursuant to § 363(f) of the Bankruptcy Code, the trustee[2] may sell property of the estate free and clear of any interest in such property, only if one of the five subsections of § 363(f) are satisfied. The Plaintiffs have alleged that they are entitled to sell the Property free of the Village's Interests pursuant to §§ 363(f)(4) and 363(f)(5). Section 363(f)(4) provides that the trustee's sale may be approved free of an interest in the property if "such interest is in bona fide dispute." Section 363(f)(5) provides that the trustee's sale may be approved free of an interest in

[2] Notably, the statute specifically identifies the "trustee" as the party authorized to sell free of interests under § 363(f). While § 363(f) "refers to a 'trustee,' it also applies to a Chapter 11 debtor in possession, Chapter 12 farmer, and Chapter 13, debtor." GINSBERG AND MARTIN ON BANKRUPTCY, § 5.05[A] (2008). The Bank does not fall within any of these categories. Thus, the Bank is not a proper party to Claims I or IV of the Complaint, and should be dismissed as a party plaintiff with respect to those claims.

the property if the holder of the interest "could be compelled, in a legal or equitable proceeding, to accept a money satisfaction of such interest."

A. The Village's Interests May Not Be Avoided Pursuant To § 363(f)(4) Because They Are Not Themselves Subject To A Bona Fide Dispute And Because The Enforceability Of A Restrictive Covenant Is Not The Type Of Dispute Contemplated By § 363(f)(4); Such Disputes Must Center Around The Validity Of A Debt.

1. <u>The Village's Interests are not subject to a bona fide dispute</u>.

The Debtor has the burden of establishing the existence of a bona fide dispute pursuant to § 363(f)(4). *See In re Octagon Roofing*, 123 B.R. 583, 590 (Bankr. N.D. Ill. 1991). Not just any alleged dispute will satisfy the standard in the subsection; there must be some sort of "meritorious, existing conflict." *See Atlas Machine & Iron Works, Inc. v. Bethlehem Steel Corp.*, 986 F.2d 709, 715 (4th Cir. 1993). Merely alleging that a dispute exists is not sufficient to meet the Debtor's burden. *In re Octagon Roofing*, 123 B.R. 583, 590 (Bankr. N.D. Ill. 1991). Here, the Debtor cannot meet its burden, because there is no dispute about the validity of the Restrictive Covenants.

Further, in interpreting the term "bona fide dispute," courts have held that a bona fide dispute only exists when "there is an objective basis for either a factual or a legal dispute as *to the validity of a debt*." 3 COLLIER ON BANKRUPTCY, ¶ 363.06[5] (15th Ed. 2007) (*citing Octagon Roofing*, 123 B.R. at 590; *In re Collins*, 180 B.R. 447, 452 (Bankr. E.D. Va. 1995)); *see also Scherer v. Federal Nat'l. Mortgage Ass'n. (In re Terrace Chalet Apartments, Ltd.)*, 159 B.R. 821, 828 (N.D. Ill. 1993); *Restaurant Associates, L.L.C. v. The Meadowbrook Mall Co. Ltd. P'ship (In re Restaurant Assoc., L.L.C.)*, CIV.A.1:06CV53, 2007 WL 951849 (N.D.W. Va. Mar. 28, 2007). In *Restaurant Associates*, the issue before the court was the enforceability of certain restrictive covenants in connection with the debtor's sale of the property pursuant to § 363 of the bankruptcy code. The buyers of the property argued that the sale was free of the restrictive

covenants for a variety of reasons, including that the covenants were subject to a bona fide dispute. The court found that the restrictive covenants were not subject to a bona fide dispute under § 363(f)(4) because the alleged dispute did not specifically involve the validity of a debt. *In re Restaurant Assoc., L.L.C.*, 2007 WL 951849, *9.

In analyzing the allegation that the restrictive covenants were subject to a bona fide dispute under § 363(f)(4), the court found that § 363(f) contemplates the sale of property free of "interests" to which can be attached monetary relief. *Id*. The restrictive covenants were not akin to a debt or other interests to which the court could attach a dollar amount. The *Restaurant Associates* court concluded that the "dispute" contemplated by § 363(f)(4) must be a dispute as to the validity of debt, and not tangential disputes, such as the applicability of the covenants at issue. *Id*.

In the case at bar, no dispute as to any monetary obligation is alleged. The only arguable dispute raised concerning the validity of the Restrictive Covenants is the Plaintiffs' claim that they constitute an unlawful restraint on alienation. As set forth in Section III, below, Plaintiffs are plainly wrong because the Restrictive Covenants do not prevent transfer of the fee. Because no monetary obligation is disputed and the Restrictive Covenants are valid, no bona fide dispute exists, and § 363(f)(4) is inapplicable.

Finally, as set forth in Section V.A., below, the Plaintiffs should be estopped from asserting that the Restrictive Covenants are subject to a bona fide dispute, because they participated in the drafting of the Restrictive Covenants in the first place and agreed to them and benefitted from them in the transaction out of which they arose. (Woodward Aff., ¶ 2, Findings of Fact, ¶ 13.)

2. <u>The Court should not employ § 363(f)(4) to approve a sale of the Property free and clear of the Village's Interests because they are property rights of the Village and involve the rights of third parties</u>.

The Eighth Circuit Court of Appeals has cautioned against the use of § 363(f)(4) to eliminate the property interests of third parties, such as those of the Village in this case. *See State of Missouri v. U.S. Bankruptcy Court for E.D. of Arkansas*, 647 F.2d 768 (8th Cir. 1981). In the *State of Missouri* case, the Eighth Circuit Court of Appeals warned the bankruptcy court on remand to carefully consider the requirements of § 363(f) and the duty under the bankruptcy code to protect the property interests of third parties. *Id*. at 778. The Eighth Circuit specifically advised the bankruptcy court to "particularly examine its authority to order [a] sale if title documents indicate…that any bona fide dispute over the property exists ***only between third parties***." *Id*. (emphasis added). Similarly, in the *Restaurant Associates* case, the court cited the *State of Missouri* case in holding that when the alleged dispute concerns the rights of third parties, bankruptcy courts should use § 363(f)(4) with caution. *Restaurant Associates*, 2007 WL 951849 at *9.

The controversy in this case is analogous to that in both *State of Missouri* and *Restaurant Associates*: it is a tangential dispute involving the rights of third parties (the Oneida and the Village) being fought primarily for the benefit of the Bank. This case does not involve a situation in which the debtor and a lender are disputing the validity of a debt – the type of dispute properly contemplated by § 363(f)(4). Therefore, § 363(f)(4) is not applicable.

B. The Village's Interests May Not Be Avoided Pursuant To § 363(f)(5) Because They Run With The Land And Are Enforceable By Injunction Under Wisconsin Law. As Such, The Village Cannot Be Compelled To Accept Money Damages In Satisfaction Of Its Rights Under The Restrictive Covenants. Therefore, The Court May Not Avoid The Village's Interests Under § 363(f)(5).

Under § 363(f)(5), a sale may occur free of an interest if the holder of the interest "could be compelled, in a legal or equitable proceeding, to accept a money satisfaction of such interest." There are three elements to this section: "(1) a proceeding exists or could be brought, in which (2) the nondebtor could be compelled to accepted a money satisfaction of (3) its interest." *In re PW, LLC*, 391 B.R. 25 (B.A.P. 9th Cir. 2008). The Village ***cannot*** be compelled to accept money satisfaction of the Village's Interests. Therefore, the Plaintiffs cannot satisfy the elements of their claim under § 363(f)(5), and summary judgment should be granted dismissing this Count.

1. <u>The Restrictive Covenants run with the land and are enforceable by injunction under Wisconsin law</u>.

Under Wisconsin case law, "covenants are classified into real covenants and personal covenants. Real covenants are those which are annexed to the estate and which are incidents of its ownership and enjoyment irrespective of the fact that the original parties to the covenant are no longer in possession thereof. Such covenants are … therefore said to run with the land." *Lincoln Fireproof Warehouse Company v. Greusel*, 199 Wis. 428, 434, 224 N.W. 98 (1929). "A restrictive covenant … constitutes a valuable property right which a court of equity will enforce in the absence of facts and circumstances making such enforcement unjust or inequitable." *Ward v. Prospect Manor Corp.*, 188 Wis. 534, 537, 206 N.W. 856 (1926).

The introduction to the Restrictive Covenants states that:

> Each part of the Subject Real Estate shall be held, sold and conveyed only subject to the following covenants, conditions and restrictions which shall constitute covenants running with the land

> and shall be binding upon all parties acquiring or holding any right, title or interest in the Subject Real Estate (or any part thereof), their heirs, personal representatives, successors or assigns, and the covenants contained herein shall inure to the benefit of each owner thereof.

(Restrictive Covenants, p. 1.) Furthermore, section 5 states:

> The covenants, conditions, and restrictions contained in this instrument ***are to run with the land***… (emphasis added)

(*Id*.) Clearly, it was the parties' intent for these covenants to run with the land.

In Wisconsin, "[t]he remedy of injunction has been recognized as a proper device to specifically enforce negative promises by enjoining breach of them, and in the case of a contract consisting wholly of negative stipulations, complete specific performance may be granted by injunction. " *See Cobb v. Milwaukee County*, 60 Wis. 2d 99, 113, 208 N.W.2d 848 (1973) (*quoting E. L. Husting Co. v. Coca Cola Co.* 205 Wis. 356, 237 N. W. 85 (1931); *see also Ward*, 188 Wis. at 537. Because Wisconsin courts have determined that an injunction is the proper remedy for enforcing restrictive covenants, the Village has that remedy with which to enforce its rights.

2. <u>Because the Village cannot be compelled to accept money damages in lieu of injunctive relief and because the Restrictive Covenants run with the land, the Property may not be sold free from the Restrictive Covenants under § 363(f)(5)</u>.

The Seventh Circuit Court of Appeals Circuit has held that "[a]n entity must be able to be '*compelled*' to accept money damages in lieu of equitable enforcement [of its restrictive covenant] before [section 363(f)(5)] will apply." *Gouveia v. Tazbir*, 37 F.3d 295, 299 (7th Cir. 1994) (emphasis in original). In *Gouveia v. Tazbir*, the only Seventh Circuit case addressing whether property can be sold free and clear of a restrictive covenant under § 363(f)(5), the debtor purchased a piece of property in a subdivision. The property was encumbered by a covenant which restricted use of the property to a one-story, single-family building to be used only for

residential purposes. Despite the restrictive covenant, the debtor obtained permission from the city to build a commercial music store on her property. Her neighbors filed suit asking the court to enforce the covenant. While the trial court found the covenant to be unenforceable, the court of appeals disagreed and enjoined the debtor from building her music store. Unable to operate her business, the debtor filed for Chapter 11 bankruptcy. *Id*.

As part of her bankruptcy filing, the debtor in *Gouveia* asked the bankruptcy court to authorize the sale of her property free of the restrictive covenant. *Id*. at 297-98. Her neighbors objected, and the bankruptcy court agreed with the neighbors that (1) the restrictive covenant was an interest in real property running with the land; and (2) the interest was enforceable by equitable relief and, therefore, the neighbors could not be compelled to accept money damages. *Id*. at 298. On appeal, the Seventh Circuit agreed. *Id*. at 299. Thus, § 363(f)(5) did not apply.

Several other courts also have held that a restrictive covenant cannot be extinguished under § 363(f)(5) if it is a real covenant that runs with the land. *See, e.g., In re 523 East Fifth Street Housing Preservation Development Fund Corp.*, 79 B.R 568 (Bankr. S.D.N.Y. 1987); *In re Oyster Bay Cove, Ltd.*, 196 B.R. 251 (E.D.N.Y. 1996) (holding that "a sale 'free and clear of liens and other interests' has no impact on restrictions of record that run with the land"). *In re 523 East Fifth Street Housing Preservation Development Fund Corp.* is a case analogous to this case. In that case, the debtor was a non-profit organization created for the purpose of acquiring 523 East Fifth Street and renovating the premises. *In re 523 East Fifth Street*, 79 B.R. at 569. The debtor acquired the building through a purchase from the City of New York. *Id*. The deed from the City contained a restrictive covenant that stated that the property was to be operated solely as a housing project for low-income persons or families. *Id*. The debtor filed for Chapter

11 bankruptcy and decided to sell the property, and, after soliciting bids, petitioned the court for permission to sell the property free and clear of all interests. *Id*.

The City of New York objected to the sale free and clear of the covenant requiring the property to be used as low-income housing. The City of New York argued that the covenant was one that runs with the land and, thus, could not be extinguished. *Id*. at 574. The court agreed and denied the sale free and clear of all interests, stating that "the City ha[d] a continuing right to see the property used in a manner consistent with its objectives." *Id*.

As set forth above, in Wisconsin, "[t]he remedy of injunction has been recognized as a proper device to specifically enforce negative promises by enjoining breach of them, and in the case of a contract consisting wholly of negative stipulations, complete specific performance may be granted by injunction." *See Cobb*, 60 Wis. 2d at 113. Because the Village has an injunction as its enforcement remedy, it cannot be compelled to accept money damages in satisfaction of its rights under the Restrictive Covenants and the Property cannot be sold free of the Restrictive Covenants pursuant to § 363(f)(5).[3]

C. The Restrictive Covenants May Not Be Avoided Pursuant to § 1123(a)(5)(D) Because That Provision Only Speaks To Sales Free Of Liens, And The Restrictive Covenants Are Not Liens. They Are Interests In Real Estate That Run With The Land.

Section 1123(a)(5)(D) provides that

> … a plan shall – provide adequate means for the plan's implementation, such as – 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…

11 U.S.C. § 1123(a)(5)(D) (2006).

[3] One court in another circuit has held that the holder of a restrictive covenant can be compelled to accept money in satisfaction of the covenant at issue. *See In re Signature Developments, Inc.*, 348 B.R. 758 (Bankr. E.D. Mich. 2006). That case, however, is from a different circuit, and relied on a different state's law, in holding that the breach of a covenant to use a particular builder in a subdivision could be measured by money damages.

The Plaintiffs assert that, because of this section, the Debtor may sell the Property in accordance with the proposed Plan of Liquidation, free of the Village's Interests. However, as articulated in section I.B.1., above, the Village's Interests are not liens. The Debtor's primary obligations under the Restrictive Covenants are ***not*** to do certain things. Section 1 of the Restrictive Covenants states: "No owner of any interest in the Subject Real Estate (or any part thereof) shall transfer any interest in the Subject Real Estate … or take any action …" (Restrictive Covenants, ¶ 1.) This is a negative obligation. It is not a grant of a mortgage lien. This type of negative obligation is typical of restrictive covenants. *See* Section I.B.1, above; *Cobb*, 60 Wis. 2d at 113.

Thus, § 1123(a)(5)(D) does not apply, and the Plaintiffs are not entitled to the relief requested.

II. SUMMARY JUDGMENT IS REQUIRED DISMISSING COUNT II OF THE COMPLAINT BECAUSE THE RESTRICTIVE COVENANTS ARE NOT SUBJECT TO PREEMPTION BY THE INDIAN REORGANIZATION ACT OF 1934 AND BECAUSE THEY ARE PRIVATE AGREEMENTS THAT RUN WITH THE LAND.

The Plaintiffs allege that the Indian Reorganization Act of 1934 preempts "[l]anguage prohibiting any action to remove any Impacted Parcel from the tax rolls." (Complaint, ¶ 32.) "The doctrine of preemption emanates from the Supremacy Clause… Because federal law is the supreme law of the land, it preempts state laws that 'interfere with, or are contrary to, federal law.'" *Boomer v. AT&T Corp.*, 309 F.3d 404, 417 (7th Cir. 2002) (*quoting Hillsborough County v. Automated Medical Laboratories, Inc.*, 471 U.S. 707, 712, 105 S. Ct. 2371, 85 L. Ed. 2d 714 (1985)). The doctrine of preemption does not apply in this matter because the IRA only applies to transfers to the federal government, which this is not, because the IRA does not conflict with the Village's Interests.

A. The IRA Does Not Require Preemption Because It Does Not Apply To The Acquisition Of Land By An Indian Tribe.

The IRA does not apply to the acquisition of land ***by individual Indians and tribes***. It only applies to the acquisition of land ***by the United States*** in trust status from and for individual Indians and tribes. *See* 25 U.S.C. § 465 (2006); 25 C.F.R. § 151.1 (2008). The statute reads, in part:

> The Secretary of the Interior is hereby authorized, in his discretion, to acquire, through purchase, relinquishment, gift, exchange, or assignment, any interest in lands, water rights, or surface rights to lands, within or without existing reservations, including trust or otherwise restricted allotments, whether the allottee be living or deceased, for the purpose of providing land for Indians.

25 U.S.C. § 465. The Code of Federal Regulations, through which the IRA is implemented, provides, in part:

> These regulations set forth the authorities, policy, and procedures governing the acquisition of land by the United States in trust status for individual Indians and tribes. ***Acquisition of land by individual Indians and tribes in fee simple status is not covered by these regulations*** …

25 C.F.R. § 151.1 (2008) (emphasis added).[4] The Oneida's proposed acquisition of the Property from the Debtor is not governed by the IRA or the regulations implementing it and there can be no federal preemption.

The Bank has conceded that, under any circumstances, the Tribe cannot unilaterally obtain federal protection of property (or invoke the application of the IRA) by purchasing the land on the open market from current titleholders. ("Plaintiff's Memorandum of Law in

[4] "The regulations established by the Department [of the Interior] to implement the IRA are binding…" *South Dakota v. U.S. Dept. of Interior*, 423 F.3d 790, 800 (8th Cir. 2005). When applying an agency regulation, the Court should "accord substantial deference to an agency's interpretation of its own regulation, unless the regulation violates the constitution or a federal statute, or unless the interpretation is plainly erroneous or inconsistent with the regulation." *South Dakota v. U.S. Dept. of Interior*, 487 F.3d 548, 551 (8th Cir. 2007) (*citations omitted*); *see also* 5 U.S.C. § 706(2)(A) (2006).

Opposition to the Village of Hobart's Motion to Withdraw the Reference," p. 5; Findings of Fact, ¶ 30 ("no issue has been, or will be, raised concerning whether the Buyer would ultimately be successful in any future effort to place the land into trust with the Secretary of the Interior")); *see also City of Sherrill v. Oneida Indian Nation of N.Y.*, 544 U.S. 197, 125 S. Ct. 1478 (2005). If the Tribe ultimately does not buy the Property (there are several conditions to the offer to purchase[5]), or does not make the application to obtain trust status for the Property, or if the Tribe's future attempt to place it into trust were to be unsuccessful for other reasons, then the request to eliminate the Interests pursuant to the IRA is not warranted.

What the Plaintiffs are really asking of this Court is to render an advisory opinion as to the application of the IRA on behalf of the Oneida. Plaintiffs are not entitled to such relief, because "[f]ederal courts established pursuant to Article III of the Constitution do not render advisory opinions." *Wisconsin's Environmental Decade, Inc. v. State Bar of Wisconsin*, 747 F.2d 407, 410 (7th Cir. 1984) (*citing United Public Workers v. Mitchell*, 330 U.S. 75, 89, 67 S. Ct. 556, 564, 91 L. Ed. 754 (1947)). The Court is "obligated to consider [its] jurisdiction at any stage of the proceedings, and ripeness, when it implicates the possibility of this Court issuing an advisory opinion, is a question of subject matter jurisdiction under the case-or-controversy requirement." (citation omitted) *Wisconsin Central, Ltd. v. Shannon*, No. 07-3554, --- F.3d ----, 2008 WL 3905899, at *4 (7th Cir. Aug. 26, 2008) (*quoting Wisconsin v. Ho-Chunk Nation*, 512 F.3d 921, 935 (7th Cir. 2008)). "The requirements for a justiciable case or controversy are no less strict in a declaratory judgment proceeding than in any other type of suit." *Wisconsin's Environmental Decade*, 747 F.2d at 410.

[5] The Oneida's offer to purchase the Property requires Bankruptcy Court confirmation by September 1, 2008, which has not occurred. The Oneida may terminate for that reason, as well as based on environmental review, title review and a due diligence (records/financials) review. *See* (Cisar Aff., ¶ 4, Exh. C, Offer to Purchase, § 4.1(b), 4.1(e), and 6.1).

Because there is no justiciable controversy as it relates to federal preemption under the IRA, the Court does not have subject matter jurisdiction to render the advisory opinion Plaintiffs seek.

B. There Is No Conflict Between The IRA And The Village's Interests.

While the IRA does provide a mechanism for the federal government to take land into trust for the benefit of an Indian tribe, it requires the consideration of the interests of others who have a stake in the land's governance and well-being. *See City of Sherrill*, 544 U.S. at 220-21. As the Supreme Court found in the *City of Sherrill* case, the regulations implementing the IRA are:

> …sensitive to the complex interjurisdictional concerns that arise when a tribe seeks to regain sovereign control over territory. Before approving an acquisition, the Secretary [of the Interior] must consider, among over things, the tribe's need for additional land; "[t]he purposes for which the land will be used"; "the impact on the State and its political subdivisions resulting from the removal of the land from the tax rolls"; and "[j]urisdictional problems and potential conflicts of land use which may arise."

Id.; *see also Sokaogon Chippewa Community v. Babbitt*, 214 F.3d 941, 947 (7th Cir. 2000) (stating that the Secretary of the Department of the Interior has broad discretionary authority in deciding whether to place land in trust and noting that "it is anyone's guess what the Secretary's final decision will be"). Not only does the IRA ***not*** apply to the acquisition of the Property by the Oneida, it actually potentially accommodates restrictive covenants such as these by recognizing that the interests of others in property being considered for trust status are entitled to be recognized. There is no necessary conflict between the Village's Interests and the IRA.

Finally, the Restrictive Covenants at issue in this case were voluntarily placed upon the property by the Village and the Debtor, with the consent of the Bank. (Woodward Aff., ¶¶ 2-6; Willman Aff., ¶ 7; Findings of Fact, ¶¶ 13-17, 6.) Voluntary restrictions placed on land before it

is placed into trust ***will not*** be voided by federal law. *Friends of East Willits Valley v. County of Mendocino*, 101 Cal. App. 4th 191, 123 Cal. Rptr. 2d 708 (Cal. Ct. App. 2002) ("We hold that federal law does not void prior restrictions on land agreed to before the land passed into trust."). As the IRA does not void prior restrictions on land agreed to before the land passes into trust, the IRA cannot preempt such restrictions.

III. SUMMARY JUDGMENT IS REQUIRED DISMISSING COUNT III OF THE COMPLAINT BECAUSE THE RESTRICTIVE COVENANTS ARE NOT ILLEGAL RESTRAINTS ON ALIENATION; THEY DO NOT PROHIBIT THE DEBTOR FROM CONVEYING TITLE TO THE PROPERTY IN ABSOLUTE FEE.

Plaintiffs assert that the Restrictive Covenants "constitute[] a prohibited unlawful restraint on alienation" and that the Restrictive Covenants prohibit "transferring any property interest in any Impacted Parcel to anyone … without [the Village's] consent, in its sole discretion." (Complaint, ¶¶ 35-36.) Plaintiffs assert that the Restrictive Covenants constitute an unlawful restraint on alienation in violation of Wis. Stat. § 700.16(2), which states:

> (2) 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, or full ownership of personalty.

Wis. Stat. § 700.16 (2005-2006). Plaintiffs are wrong.

"Alienation is the conveyance of property to another." *Fohr v. Fohr*, 2007 WI App 149, ¶9, 302 Wis. 2d 510, 735 N.W.2d 570 (2007). "The power of alienation is suspended when it is not possible for one or more persons to convey title in absolute fee." *Le Febvre v. Osterndorf*, 87 Wis.2d 525, 531, 275 N.W.2d 154 (Ct. App. 1979).

The existence of covenants on property does not make that property inalienable.

> Many servitudes indirectly affect the alienability of property by limiting the numbers of potential buyers or by reducing the amount the owner might otherwise realize on a sale of the property. If the servitude is validly created … the fact that the servitude results in

> some diminution in return to the owner, or some reduction in the potential market for the property, is not sufficient justification for refusing to give effect to the intent of the parties to create the servitude.

RESTATEMENT THIRD, PROPERTY (SERVITUDES) § 3.5, cmt. a (2008). This Comment summarizes the case before the Court. The Village's Interests do not prohibit alienation of the property in fee. Pursuant to *Le Febvre* and the wording of § 700.16(2), Wis. Stat., the discussion should end there. The fact that the Oneida may decide not to buy it because of the Village's Interests, or that the Oneida will only buy it at a reduced price because of the Village's Interests is of no consequence. As long as the Debtor has the ability to convey title in absolute fee, the Restrictive Covenants are not an unlawful restraint on alienation.

The Plaintiffs claim the Restrictive Covenants prohibit the transfer of the real estate "to anyone, specifically including sovereign nations, without Hobart's consent, in its sole discretion." (Complaint, ¶ 36.) That statement is false. Nowhere in the Restrictive Covenants is the Village given the unfettered right to approve or disapprove of a sale of the Property. Paragraph 1 of the Restrictive Covenants prohibit a transfer of the real estate, without the consent of the Village, if and only if "the result of [the transfer] would: (1) remove or eliminate the subject real estate...from the tax rolls...; (2) diminish or eliminate the payment of real estate taxes...; and/or (3) remove the subject real estate...from the zoning authority and the jurisdiction of the village...." (Restrictive Covenants, ¶ 1.) In other words, if the proposed transfer does not result in one of those three things occurring, the Village has absolutely no authority to stop that transfer.

Moreover, even if the transfer would result in (1) or (2) occurring, the Village would still be powerless to interfere with or in anyway stop the sale if the buyer agrees to make payments in lieu of real estate taxes. Pursuant to Paragraph 3 of the Restrictive Covenants, if the transferee

agrees to make payments in lieu of real estate taxes, the Restrictive Covenants, as they pertain to tax assessments, "shall be deemed to have been waived by the village...." (Restrictive Covenants, ¶ 3.) This is an automatic waiver. It is simply not true, as alleged in the Complaint, that the Village can prevent a sale of the Property in fee to anyone.

Moreover, these types of covenants are not uncommon in other contexts. Municipalities frequently require "PILOT" ("payment in lieu of taxes") agreements from non-profit (for example, healthcare) institutions, which would otherwise be exempt from paying real estate taxes, as a condition to granting conditional use, rezoning, or similar land use requests. In tax incremental financing districts, the covenants placed on the property in the district invariably include prohibitions on removing the property from the tax rolls because the financing and approval of the TIF districts require the payment of taxes to accomplish the purpose of the district.

IV. FOR THE REASONS SET FORTH ABOVE, PLAINTIFFS ARE NOT ENTITLED TO A DECLARATION WITH RESPECT TO THEIR CLAIMS UNDER §§363(f)(4), 363(f)(5), OR 1123(a)(5)(D). IN ADDITION, THE COURT SHOULD PROHIBIT THE REQUESTED SALE PURSUANT TO § 363(e) IN ORDER TO PROVIDE ADEQUATE PROTECTION TO THE VILLAGE.

For all of the reasons set forth in Section I, II and III, above, the Plaintiffs are not entitled to the requested declaration. In addition, pursuant to § 363(e), the Court should *prohibit* any sale in violation of the Village's Interests.

Section 363(e) provides that:

> Notwithstanding any other provision of [section 363], at any time, on request of any entity that has an interest in property … proposed to be used, sold, or leased, … the court, with or without a hearing, ***shall prohibit*** or condition such use, sale, or lease as is necessary to provide adequate protection of such interest… (emphasis added)

The Plaintiffs cite this provision as authority for their request that the Court condition the sale of the Property free and clear of the Village's Interests as necessary to provide the Village

with adequate protection. (Complaint, ¶ 44.) Section 361 of the bankruptcy code generally identifies three methods of providing adequate protection of an entity's interest in property, as may be required by other sections of the bankruptcy code. 11 U.S.C. § 361(1)-(3) (2006). Adequate protection may be in the form of cash payments, replacement liens, or other methods that result in the realization of the "indubitable equivalent" of an entity's interest in the property. *Id*.

It is impossible to specify adequate protection for the unending loss of potential tax revenue, loss of use and jurisdictional controls, and the disruption to village planning that would occur if the Village's Interests are avoided. (Willman Aff., ¶¶ 8-13; Findings of Fact, ¶¶ 7-12.) As set forth in Section I.B., above, the Village cannot be compelled to accept monetary damages for its Interests. *See Gouveia*, 37 F.3d at 299. The Village is entitled to injunctive relief to enforce its Interests. *See Cobb*, 60 Wis. 2d at 113. Cash payments pursuant to § 361(1) are not adequate protection of the Village's Interests. The Village's Interests are not liens; thus, replacement liens pursuant to § 361(2) are not adequate protection of the Village's Interests. There is no indubitable equivalent to the Village's Interests in the Property; therefore, there is no means to provide adequate protection pursuant to § 361(3).

V. SUMMARY JUDGMENT IS REQUIRED DISMISSING THE PLAINTIFFS' CLAIMS BECAUSE (1) NEITHER THE DEBTOR NOR THE BANK HAVE SATISFIED THE REQUIREMENTS OF WIS. STATS. § 893.80, AND (2) BECAUSE THE PLAINTIFFS ARE ESTOPPED FROM ASSERTING THAT THERE IS ANY DISPUTE AS TO THE ENFORCEABILITY OF THE RESTRICTIVE COVENANTS.

A. Plaintiffs Failed To Comply With The Provisions Of Wis. Stat. § 893.80(1), Which Are A Condition To Seeking Relief Against The Village.

The Plaintiffs' claims are barred because they failed to provide the requisite notice to the Village of their claims, in accordance with the provisions of Wis. Stat. § 893.80(1), which provides as follows:

> **893.80 Claims against governmental bodies or officers, agents or employees; notice of injury; limitation of damages and suits.** (1) Except as provided in subs. (1g), (1m), (1p) and (8), no action may be brought or maintained against any volunteer fire company organized under ch. 213, political corporation, governmental subdivision or agency thereof nor against any officer, official, agent or employee of the corporation, subdivision or agency for acts done in their official capacity or in the course of their agency or employment upon a claim or cause of action unless:
>
> (a) Within 120 days after the happening of the event giving rise to the claim, written notice of the circumstances of the claim signed by the party, agent or attorney is served on the volunteer fire company, political corporation, governmental subdivision or agency and on the officer, official, agent or employee under s. 801.11. Failure to give the requisite notice shall not bar action on the claim if the fire company, corporation, 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 fire company, corporation, subdivision or agency or to the defendant officer, official, agent or employee; and
>
> (b) A claim containing the address of the claimant and an itemized statement of the relief sought is presented to the appropriate clerk or person who performs the duties of a clerk or secretary for the defendant fire company, corporation, subdivision or agency and the claim is disallowed.

Under Wis. Stat. § 893.80(1)(a), prior to commencing any action against a governmental entity, a claimant must serve a notice of the circumstances of its claim (sometimes referred to as a "notice of injury") within 120 days of the event giving rise to the claim on the proper person. *See Vanstone v. Town of Delafield*, 191 Wis. 2d 586, 592, 530 N.W.2d 16 (Ct. App. 1995). The statute applies to contractual claims as well as tort claims or claims for injunctive or other equitable relief. *See, e.g., DNR v. City of Waukesha*, 184 Wis. 2d 178, 515 N.W.2d 888 (1994).

In addition, under Wis. Stat. § 893.80(1)(b), the claim itself must be served on the clerk or secretary of the governmental entity prior to bringing or maintaining the action against that

governmental entity. *See* Wis. Stat. § 893.80(1)(b) (2005-2006); *see also Thorp v. Town of Lebanon*, 2000 WI 60, ¶ 22, 235 Wis. 2d 610, 612 N.W.2d 59 (2000) ("Section 893.80(1) contains two notice provisions. Each provision must be satisfied since each serves a different purpose.").

In this case, the Plaintiffs have not filed any notice of circumstances of claim under § 893.80(1)(a), or a claim under § 893.80(1)(b) with respect to the claims made in the Complaint. (Willman Aff. ¶ 14; Findings of Fact, ¶ 29.) As a result, they have not complied with the statutory prerequisites to filing a lawsuit against the Village, and their claims are barred by the provisions of Wis. Stat. § 893.80(1) and must be dismissed.

B. The Plaintiffs Are Estopped From Attacking The Restrictive Covenants.

The Debtor and the Bank also should not be permitted to proceed with the Complaint under principles of estoppel. Whether it is considered estoppel by deed or equitable estoppel, it is well established that grantees like the Debtor and the Bank cannot acquiesce in, and enjoy the benefits of, a transaction and then reject the accompanying burdens. 28 AM. JUR. 2D *Estoppel and Waiver*, § 14. Recitals in a deed will operate as an estoppel when they are of the essence of the contract. That is, where the facts establish that the contract would not have been made if the terms had been different. *Id*. at § 20. Here, there is no dispute that if the Debtor and Bank had not accepted the Restrictive Covenants and the effect those covenants had on the title and mortgages respectively, the Golf Course would not have been sold to the Debtor and the Bank would not have obtained its mortgage. (*See* Willman Aff., ¶ 7; Findings of Fact, ¶ 6.) Under these circumstances, both the Debtor and Bank should be estopped from pursuing their attack on the Restrictive Covenants.

In *Tri-Continental Fire Corp. v. Tropical Marine Enterprises*, 265 F.2d 619 (5th Cir. 1959), the Fifth Circuit considered whether restrictive covenants on the use of a marine vessel

would apply to the mortgagee of the vessel and any purchaser at the mortgagee's foreclosure sale. There was no dispute that the vessel would not have been sold without the restrictive covenants and the mortgagee had notice of them when it made the mortgage. One issue was whether the restrictive covenants "ran with the vessel" or were merely personal between the original seller and the original purchaser. The Fifth Circuit plainly believed that the restrictive covenants ran with the vessel, but rested its decision affirming the trial court on estoppel:

> It is rather to be determined by whether, under circumstances of the kind disclosed here, where the mortgagee, having itself furnished the money to make the trade with full knowledge of the covenant, is now undertaking to deprive the beneficiary of its benefits and at the same time to impose upon Owens, with whom it arranged to make the mortgage, the burden of the heavy loss which will follow with breach, equity will prevent appellant from taking this plainly inequitable, if not unconscionable course by holding it estopped or otherwise bound by it in equity.

Tri-Continental Fire Corp., 265 F.2d at 626; *see also Carter Oil Co. v. Delworth*, 120 F.2d 589 (7th Cir. 1941) ("Obviously, one purchasing land subject to an outstanding interest is estopped to deny its validity."); *North American Property Ltd. v. Pocino Farms Lot Owners Ass'n*, 489 F. Supp. 452, 461 (D. Pa. 1980) (where a mortgagor was unsuccessful in overcoming estoppel by deed in its effort to avoid the mortgage it had signed).

Whether it is estoppel by deed or equitable estoppel, the Debtor and the Bank cannot now be permitted to challenge the very Restrictive Covenants they participated in drafting and subject to which they took their respective interests in the Golf Course – interests they would not have obtained had they challenged the Restrictive Covenants at the time. As the Wisconsin Supreme Court noted in *Phillips Petroleum Co. v. Taggart*, 271 Wis. 261, 275, 73 N.W.2d 482 (1955):

> Generally speaking, a party will not be permitted to occupy inconsistent positions or to take a position in regard to a matter which is directly contrary to or inconsistent with, one previously assumed by him.

There being no genuine dispute concerning the relevant facts, the Village is entitled to summary judgment of dismissal based on estoppel.

CONCLUSION

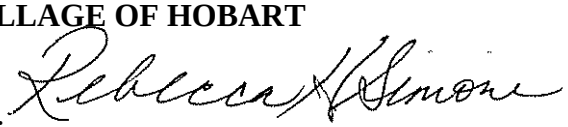
The Debtor is liquidating, not reorganizing. The Bank is paying the Debtor's attorneys fees and paying off other creditors (by carve-outs from collateral) to orchestrate an attack on the Village's Interests that the Bank and Debtor agreed to, the benefit of which will inure primarily to the Bank. That is not equitable, and the law does not permit it.

The Court should not avoid the Village's Interests under § 364(f)(4) because there is no debt in dispute as to the Village, and the Restrictive Covenants only involve the interests of the Village and the Oneida; the Village's Interests are not in bona fide dispute. They are enforceable by injunctive relief under Wisconsin law, which is also why they cannot be avoided under § 363(f)(5). Preemption does not apply because the IRA does not apply to the transfer contemplated (to the Oneida), and the Village's Interests do not necessarily conflict with the IRA. The Village's Interests do not prohibit transfers in fee, so they do not constitute an unlawful restraint on alienation. Neither the Debtor nor the Bank gave notice pursuant to Wis. Stat. § 893.80(1), and the knowledge and actions of the Debtor and the Bank estop them from now attacking the Village's Interests.

There are no material issues of fact that prevent judgment in favor of the Village dismissing the Complaint. The Court should do so.

Dated this 10th day of September, 2008.

Respectfully submitted,
VILLAGE OF HOBART

By: 

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