UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WISCONSIN

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WELLS FARGO BANK, NATIONAL ASSOCIATION, AS TRUSTEE,

Plaintiff,

vs.

LAKE OF THE TORCHES ECONOMIC DEVELOPMENT CORPORATION,

Defendant.

Case No. 09-CV-768-bbc

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**DEFENDANT'S RESPONSE IN OPPOSITION TO PLAINTIFF'S MOTION FOR APPOINTMENT OF A RECEIVER**

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Defendant, Lake of the Torches Economic Development Corporation (the "Corporation"), by and through its attorneys, Michael Best & Friedrich, LLP, submits the following response in opposition to Plaintiff, Wells Fargo Bank, National Association, as Trustee's ("Trustee") motion for the appointment of a receiver in the above-captioned matter. The following is being submitted in advance of the expedited hearing, set for 3:30 p.m. on Tuesday, December 29, 2009, on the Plaintiff's Motion for Appointment of a Receiver.

Without considering any response from the defendant in this matter, the Court has prematurely determined that the appointment of a receiver is warranted. Dkt. #8. However, the contracts upon which the Trustee's request is based are void and unenforceable as unapproved management contracts, rendering the purported waiver of sovereign immunity contained in those contracts also void. Thus, the Court lacks jurisdiction over this case. Even if the Court had jurisdiction, however, the factors weigh against the appointment of a receiver under the circumstances alleged.

**BACKGROUND**

The Corporation is a for-profit corporation organized under tribal law and is wholly-owned by the Lac du Flambeau Band of Lake Superior Chippewa Indians (the "Tribe"), a federally-recognized tribe organized under Section 16 of the Indian Reorganization Act of 1934 (25 U.S.C. § 461, *et seq.*). The Corporation owns and operates the Lake of the Torches Resort Casino ("Casino"). The Casino provides the vast majority of income for the Tribal government, which is used to provide basic services to Tribe's members, including services for the elderly; utilities, such as propane for heat and electricity; and healthcare benefits. Without the income generated by the Casino, the Tribal government cannot operate and such services would cease. The Casino, as a gaming facility, and the Corporation, are governed by federal gaming regulations.

On or around January 1, 2008, the Corporation issued bonds (the "Bonds") and entered into a Trust Indenture with Wells Fargo (the "Bond Indenture"). The Bond Indenture was executed by Victoria Doud, the President of the Corporation and the Tribal Council. Neither the Trust Indenture nor any of the Bond documents were submitted to the National Indian Gaming Commission ("NIGC") for approval prior to their execution. The Bonds were issued, in part, to fund an unrelated gaming facility in Natchez, Mississippi, which was intended ultimately to cover the Bond payments, but which has not materialized.

On November 30, 2009, Tribe Treasurer, Barry LeSieur, and Tribe Vice President, Dee Mayo, transferred $4,750,000 from the Operating Reserve Account, submitting a certification that the funds were being transferred to pay operating expenses of the Corporation. On December 1, 2009, the Trustee transferred the funds. All funds transferred out of the Operating

Reserve Fund on December 1, 2009, were deposited in a separate account at the same bank, Chippewa Valley Bank. Declaration of Karen Maki ("Maki Dec.") at ¶ 6.

On or around December 8, 2009, the Trustee requested by letter certain documents from the Corporation. Maki Dec. at ¶ 2, Exs. A, B. The Trustee reiterated its request via email two days later. *Id.*, Ex. C. The information requested by the Trustee was not normally maintained by the Corporation in the format requested by the Trustee. *Id.* at ¶ 5. Corporation's Controller responded via email shortly thereafter that "the books for November are not yet closed, and the information you are requesting is currently not available." *Id.* at ¶ 4, Ex. D.

The Corporation received a Notice of Default on December 18, 2009. In light of the Notice and impending litigation, the Corporation delayed making any payments using the funds transferred from the Operating Reserve Fund and has no intention of disposing these funds or using them for any improper purpose during the pendency of this action. *Id.* at ¶ 6.

## ARGUMENT

### I. This Court Lacks Jurisdiction To Hear This Matter

#### A. There is No Personal Jurisdiction Over The Tribe or the Corporation.

Tribal sovereign immunity protects Indian tribes from suit absent express authorization by Congress or clear waiver by the tribe. *See Kiowa Tribe of Oklahoma v. Manuf. Tech., Inc.*, 523 U.S. 751, 754, 118 S. Ct. 1700 (1998). This immunity applies to the Tribe's commercial as well as governmental activities, including tribal corporations that act as an arm of the Tribe. *Id.* at 754-55. Plaintiff relies wholly upon the language of the Bond Indenture and related documents in its claim that the Corporation and/or Tribe waived sovereign immunity. However, the Bond Indenture, Security Agreement and Tribal Agreement are void and unenforceable as unapproved "management contracts" under the Indian Gaming Regulatory Act ("IGRA").

Therefore, sovereign immunity was never waived and this Court does not have jurisdiction over the Corporation or the Tribe.

**1. The Bond Indenture and Related Agreements Were Not Approved by the NIGC and Are Therefore Void as Unapproved "Management Contracts"**

"A management contract means any contract, subcontract, or collateral agreement between an Indian tribe and a contractor or between a contractor and a subcontractor if such contract or agreement provides for the management of all or part of a gaming operation." 25 C.F.R. § 502.15. The National Indian Gaming Commission ("NIGC") has long and consistently taken the position that any agreement that provides for "planning, organizing, directing, coordinating, and controlling" all or any portion of a tribal gaming operation is a management contract. *See* NIGC Bulletin No. 94-5 (October 14, 1994). Under IGRA and regulations of the NIGC, a "management contract" with respect to any tribal gaming operations is void if it has not been approved by the Chairman of the NIGC. 25 U.S.C § 2711 and 25 U.S.C. § 533.7. Neither the Bond Indenture nor the Bonds were approved by the NIGC Chairman and are therefore void.

The Bond Indenture, Tribal Agreement and Security Agreement each contain provisions which, either alone or collectively, cause those agreements to be considered management contracts under positions that have been formally and informally taken by the Office of the General Counsel ("OGC") of the NIGC. Although the Bonds themselves do not expressly contain the "management" provisions found in the Bond Indenture, the Bonds incorporate the Bond Indenture by reference and are inextricably tied to the Bond Indenture.[1] Therefore, the Bonds are subject to the same fatal flaws contained in the Bond Indenture.

[1] The Bonds include the language "Reference is hereby made to the Indenture and the Bond Resolution, and any amendments or supplements thereto, for a description and limitation of the property, revenues and funds pledged and appropriated to the payment of the Bonds, the nature and extent of the security thereby created, the rights of the owners of the Bonds, the rights, duties and immunities of the Trustee, and the rights, immunities and obligations of

First and foremost, Section 8.04 of the Bond Indenture expressly provides for the appointment of a receiver upon the occurrence of an Event of Default. Such provision, like Section 6.19, which requires the retention of a management consultant under certain circumstances, and Section 6.20, which limits the replacement of key management personnel, are, on their face, "management" provisions. Each Section dictates how a portion of the gaming operation must be conducted.

Similarly, Sections 6.18 and 6.19 of the Bond Indenture dictate the amount of expenses the Corporation can incur, as well as dictating steps the Corporation must take if the debt falls below a certain ratio. These types of restrictions render the Bond Indenture a management contract because courts have held that when an agreement sets forth items that would be required under an intended management contract, such an agreements should be considered a management contract. *See First Am. Kickapoo Operations, L.L.C. v. Multimedia Games, Inc.*, 412 F.3d 1166, 1173 (10th Cir. 2005).

The Code of Federal Regulations, at 25 C.F.R. § 531.1(c), requires a contract to include accounting procedures for the gaming operation. The Bond Indenture's provision falls under this type of accounting procedure contemplated by IGRA and Section 531.1(c). Indeed, it is likely that a court would find that provisions of an agreement that would have been required in a management contract would make the Bond Indenture a management contract under IGRA. *See id.* at 1173 (holding that because an agreement "extrapolated from the regulations' definition [it] suggests the Operating Lease is a management contract.").

The Security Agreement also contains several provisions that render it a "management contract." The Security Agreement grants security interests in gaming revenue and also dictates

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the Corporation thereunder." In addition, the Bonds would likely be viewed as "collateral agreements" within the meaning of IGRA and NIGC Regulations that require approval of the Chairman of the NIGC if they "provide for the management of all or part of a gaming operation." *See* 25 C.F.R. § 502.15.

actions the Trustee can take upon the occurrence of an event of a default. *See* Security Agreement Sections 1, 4. Courts have found that provisions that dictate how gaming revenues are to be allocated are management contracts. *See, e.g, Gaming World Intern., Ltd. v. White Earth Band of Chippewa Indians*, 317 F.3d 840, 842-43 (8th Cir. 2003). Because IGRA requires that a management contract contain "an agreed ceiling for the repayment of development and construction costs," an agreement that purports to give a security interest in repayment of the bonds would certainly fall under a management contract because it contains provisions that are required under IGRA in an actual management contract.

This provision of the Security Agreement also violates other sections of IGRA. Section 290 of Chapter 25 of the Code of Federal Regulations, which discusses implementing proceedings for IGRA, governs Tribal Revenue Allocation Plans ("TRAP"). Any Indian tribe that intends to make per capita payments from net gaming revenues must submit a TRAP. *See* 25 C.F.R. § 290.6. The TRAP must be submitted for review and approved by the Bureau of Indian Affairs to ensure compliance with IGRA. 25 C.F.R. § 290.5. In the absence of an approved TRAP, a tribe would be unable to use tribal gaming revenues for any tribal programs, payouts to tribal members, or the like. 25 C.F.R. § 290.9. Any time a tribe makes gaming payouts in the absence of TRAP, or without a pre-approved TRAP, it is in violation of IGRA and is void. 25 C.F.R. § 290.10.

Section 4(b) of the Tribal Agreement controls management, controllers, and directors of the gaming commission. Courts have found that agreements with provisions that dictate control or operation of gaming facilities are considered "management contracts" under IGRA. *See First Am. Kickapoo,* 412 F.3d at 1173 (finding that an operating lease was a "management contract" as defined by IGRA where it controlled how a tribe was to supervise and manage personnel at a

gaming operation). Because Section 4(b) requires the Tribe to agree "that it will not replace the Casino's Facilities' General Manager, Controller, or Executive Director of the Gaming Commission without first obtaining the prior written consent of 51% of the Holders of the Bonds," the Tribal Agreement is a management contract.

As the Tenth Circuit noted, "[n]on-tribal parties who enter into contracts relating to tribal gaming undertake, in addition to ordinary business risks, certain regulatory risks as well. [The plaintiff] elected to execute a *de facto* management contract without the fuss and bother of NIGC approval and now wishes [the defendant] to assume the costs of [the plaintiff's] decision." *See First Am. Kickapoo*, 412 F.3d at 1178-79. Accordingly, the Tenth Circuit held the unapproved management contract void under 25 C.F.R. § 533.7. This is precisely what this Court should do.

Under the case law, the Bond documents are management contracts and, having not been approved by the NIGC, are therefore void and unenforceable.

**2. Thus, the Waiver Contained in the Bond Documents is also Void and Unenforceable.**

Courts have routinely held that when an unapproved management contract includes a waiver of sovereign immunity, that waiver is void and actions against the tribe are properly dismissed. *AK Mgmt Co. v. San Manuel Band of Mission Indians*, 789 F.2d 785, 789 (9th Cir.1986) (holding "the waiver of sovereign immunity is clearly part of the Agreement, and is not operable except as part of that Agreement. Since the entire contract is inoperable without BIA approval, the waiver is inoperable and, therefore, the tribe remains immune from suit."). Thus, if the Bond Indenture and related agreements are void, that voids any waiver of sovereign immunity.

**B. This Court Lacks Subject Matter Jurisdiction Over This Dispute.**

Even assuming the Tribe and/or Corporation waived its sovereign immunity, which they did not, such a waiver does not automatically confer jurisdiction on federal courts. *See Auto-Owners Ins. Co. v. Tribal Court of the Spirit Lake Indian Reservation,* 495 F.3d 1017, 1020 (8th Cir. 2007) (citing *Weeks Constr., Inc. v. Oglala Sioux Hous. Auth.,* 797 F.2d 668, 671-72 (8th Cir. 1986)). A federal court must make a separate determination as to whether it has subject matter jurisdiction over the lawsuit. *Id.*

**1. Citizenship of a Tribal Corporation is Not Settled in the Seventh Circuit.**

A federal court has original jurisdiction over an action if the parties are of diverse state citizenship and the courts of the state in which the federal court sits can entertain the suit. *See* 28 U.S.C. § 1332(a)(1). It is well-settled that Indian tribes, as sovereign entities, are not citizens of any state and cannot be sued in federal court under diversity jurisdiction. *Auto-Owners Ins.,* 495 F.3d at 1020 (citations omitted). As alleged in the Complaint, the Corporation is organized under the tribal laws of the Lac du Flambeau Tribe – not under federal or state law. Comp. ¶ 3.

The Trustee relies entirely on cases from other jurisdictions for the proposition that "a corporation organized under tribal law should be analyzed for diversity jurisdiction purposes as if it were a state or federal corporation." Pl. Br. at n.2 (citing *Cook v. Avi Casino Enters., Inc.,* 548 F.3d 718, 723 (9th Cir. 2008). However, the Seventh Circuit has made no such holding. Consistent with the law in other jurisdictions, the Corporation may be considered "an arm of the tribe and not as a mere business," meaning that no diversity jurisdiction exists as a basis for subject matter jurisdiction. *See, e.g., Auto-Owners Ins.,* 495 F.3d at 1021 (citations omitted). Indeed, the operations of the Casino Facility and Corporation are inextricably intertwined with the Tribal government and the Tribal members.

**2. Plaintiff Has Not Alleged Federal Question Jurisdiction.**

In addition to diversity subject matter jurisdiction, a federal court also has original jurisdiction over all civil actions arising under the Constitution, laws, or treaties of the United States. 28 U.S.C. § 1331. The Trustee has neither alleged federal question jurisdiction, nor does one exist.

**C. The Appointment of a Receiver is Not Warranted Here.**

As noted above, "[a]ppointment of a receiver is an extraordinary remedy and the court should exercise its discretion to appoint one with 'care and caution.'" *JPMorgan Chase Bank, N.A. v. Heritage Nursing Care, Inc.*, 2007 WL 2608827 (N.D. Ill.) (citing *Connolly v. Gishwiller*, 162 F.2d 428, 435 (7th Cir. 1947)); *Aviation Supply Corp. v. R.S.B.I Aerospace, Inc.*, 999 F.2d 314, 316 (8th Cir. 1993) (appointing a "receiver is an extraordinary equitable remedy that is only justified in extreme situations"). "Furthermore, the court should use caution when appointing a receiver and should make findings on the federal factors."[2] *Sterling Savgs. Bank v. Citadel Devel. Co.*, 2009 WL 2952041 (D. Or.) (citing *Solis v. Matheson*, 563 F.3d 425, 438 (9th Cir. 2009)). A thorough examination of each the factors makes clear that a receiver is not warranted here.

Where the validity of the contracts that form the basis for the Trustee's motion is at issue, the exercise of care and caution should lead to the denial of such motion.[3] *See, e.g., JPMorgan Chase*, 2007 WL 2608827 at *7 ("The party seeking a receiver must first 'show that he or she has some legally recognized right in that property that amounts to more than a mere claim against defendant.'").

[2] In light of time constraints, the Corporation assumes, without conceding, that federal law governs the issue of the appointment of a receiver here. However, the Corporation reiterates the fact that it appears to be an open question here as to whether diversity jurisdiction actually exists.

[3] Indeed, as outlined above, the very inclusion of a provision for the appointment of a receiver in the Bond Indenture renders the agreement a management contract.

Further, the proposed receiver under these circumstances is invalid under federal and state gaming regulations, which prohibit a non-Indian from operating or running a casino in the State of Wisconsin. Mr. Polsky, the proposed receiver, is not a Native American.

**1. The Factors Considered by Federal Courts Weigh Against the Appointment of a Receiver.**

While there is "no precise formula for determining when a receiver may be appointed," federal courts consider a variety of factors in making this determination, including, for example:

> (1) whether [the party] seeking the appointment has a valid claim;
> (2) whether there is fraudulent conduct or the probability of fraudulent conduct by the defendant;
> (3) whether the property is in imminent danger of being lost, concealed, injured, diminished in value, or squandered;
> (4) whether legal remedies are inadequate;
> (5) whether the harm to plaintiff by the denial of the appointment would outweigh injury to the party opposing the appointment;
> (6) the plaintiff's probably success in the action and the possibility of irreparable injury to the plaintiff's interest in the property; and
> (7) whether [the] plaintiff's interests sought to be protected will in fact be well-served by the receivership.

*See Canada Life Assur. Co. v. LaPeter*, 563 F.3d 837, 844 (9th Cir. 2009) (citations and internal quotations omitted).[4]

The Trustee suggests two additional factors that have been applied by the Ninth Circuit, which include "whether the defendant was of doubtful financial standing" and "whether the property was of insufficient value to insure payment." *Id.* Later courts have noted that these factors may be sufficient to appoint a receiver to collect rents or other revenue from a subject property, but they alone are not enough to vest the receiver with managerial powers. *Sterling Svgs. Bank*, 2009 WL 2952041, at *9. However, contrary to the Trustee's assertions, the weight of these factors should be substantially discounted where, as here, the movant is not merely

[4] Although the Trustee repeatedly cites to *Canada Life* and the factors enumerated therein, it neglects to mention, much less provide any support for, several of the factors. Nevertheless, the Corporation will deal with each of the factors below.

seeking the appointment of a receiver to essentially collect rent and pay bills relating to a rental property, but rather seeks a receiver to "exercise oversight over the Defendant's finances until the principal and interest on the bonds are repaid in full." Pl. Br. at 9. While the Trustee seeks to assure the Court that it is not seeking a receiver to manage or operate the Casino Facility – for good reason – the exercise of "oversight" necessarily includes making critical determinations as to the use of the Casino revenue, which affects not only the bondholder, but the Corporation, the Tribal government, and each and every member of the Tribe.

Moreover, the Trustee has alleged no facts to support its contention that the Corporation is in doubtful financial standing or that the property is of insufficient value to insure payment. In fact, the allegations in the Trustee's brief lead to exactly the opposite conclusion. For example, the Trustee alleges that the Casino Facility operations have never generated negative EBITDA during any month since October 2006 and that on October 31, 2009, the Corporation had approximately $9 million of unrestricted cash, without accounting for the Casino Facility's earnings or net income. Pl. Br. at 4, n.3. While the Corporation may not be in a position to immediately pay the entire $50 million, assuming *arguendo* that such amount were due, the revenue generated by the Casino Facility does have sufficient value to insure payment over time.

The Trustee also emphasizes the "great weight" federal courts have accorded to the existence of a contract that provides for the appointment of a receiver; however, the contracts in those cases were not subject to challenge as void and unenforceable. Moreover, as noted in authority cited by the Trustee, "consent to a receiver is not dispositive of the issue," the movant must still produce sufficient evidence of the federal receivership factors in order to succeed. *Id.* at *1.

**a. The Trustee's claims are based on contracts that are void and unenforceable.**

As set forth in detail above, the Bond Indenture and related agreements are void and unenforceable as unapproved management contracts under the IGRA. Consequently, not only does this Court lack jurisdiction over this matter, but the Trustee's claims, which depend entirely on these agreements, must fail. This Court should not impose the extraordinary burden on the Corporation – or the Tribe – of the appointment of a receiver under these circumstances. This factor weighs against the Trustee.

**b. The Trustee has failed to allege fraud by the Corporation.**

Notably, the Trustee has carefully couched its allegations with regard to fraud. According to the Trustee, there is a "danger" that fraud has been committed because the Corporation made a "potentially false" request for the withdrawal of funds from the account. The Trustee bases its bald allegations of fraud on the fact that the Corporation had, according to its records, "cash sufficient to cover operating expenses for several more months without requesting the transfer;" the Casino Facility had never generated negative EBITDA since October 2006; and because neither the Corporation or the Tribe responded to requests for certain documentation to support the transfer.

First, this is insufficient to adequately allege a fraud on the part of the Corporation. Second, the Trustee knowingly misstates events when it claims that neither the Corporation nor the Tribe responded to its repeated requests for documentation. The Controller for the Corporation did respond to the requests for documentation, which included financial information and reports not typically produced under the Bond Indenture, indicating that the November books had not yet closed and that such information was not yet available. Maki Dec. at ¶ 4, Ex. D. Contrary to the Trustee's overreaching allegations, the Corporation has not "fail[ed] to

document its finances," the documents requested were simply not yet available within the timeline requested and deviate from the Bond Indenture's monthly requirements.

The Corporation's conduct is not indicative of fraud, but rather belies the Corporation – and the Tribe's – belief that the Bond Indenture and related documents should have been approved by the NIGC and are therefore void and unenforceable.

**c. The Trustee has alleged no facts to support the allegation that the property is in danger of being lost, concealed, injured, diminished in value, or squandered.**

The Trustee claims that because the funds are "currently beyond the Trustee's control…there is a very real possibility that these assets will be squandered." However, the Trustee has not – and indeed cannot – claim that these funds are in any real danger. The mere fact that the property is no longer under the Trustee's control does not prove that the property is in danger of being wasted. In fact, according to the Corporation's Controller, once withdrawn, the funds were deposited in a separate account, where they remain. Maki Dec. at ¶ 6. Given the litigation, the Corporation has delayed the use of the funds. *Id.*

**d. There is no allegation that legal remedies would be inadequate.**

The Trustee, and ultimately the bondholder, is seeking a money judgment – not the return of particular property. Like the similar factor relating to the injunction standard, this factor seeks to provide relief where a "legal" remedy, such as a money judgment, will not be enough. However, in light of fact that the funds withdrawn are merely being held in a different account (Maki Dec. at ¶ 6) and the fact that neither the Casino Facility nor the Tribe are in danger of insolvency – as supported by the Trustee's own allegations – the Trustee has failed to show how legal remedies will be insufficient here.

**e. The harm to the Corporation and the Tribe would vastly outweigh the harm to the Trustee.**

The Trustee patently fails to address the harm it would suffer if a receiver were not appointed. In contrast, however, the harm to the Corporation and, consequently, the Tribe could be catastrophic. If a receiver is appointed and the use of income generated by the Casino is effectively locked up pending approval by a receiver "exercising oversight" over the funds, the Tribal government could effectively be shut down. As even the Bond documents recognize, the Tribal government uses a portion of those revenues to provide crucial services and benefits to the Tribe's children, elderly and adult members, including utilities and healthcare to those living and working on the reservation. The cutoff of funds to the Tribal government could literally mean the cutoff of utilities and other critical services to the Tribe in the middle of winter in northern Wisconsin.

Moreover, the Corporation and the Tribe are also required to follow certain regulations, including, as outlined above, Indian gaming and TRAP regulations. The Corporation and the Tribe are liable if those regulations are not followed – assumedly even if a receiver were in place making determinations as to the allocation of gaming revenue. In addition, the state regulations are very clear with regard to who can operate a casino. If the receiver were to be given the authority – or overstep its authority – and venture into the management and operation of the casino, that could jeopardize the Tribe's gaming rights, which provide the vast majority of the revenue used to support the Tribal members.[5]

[5] Notably, based on the Affidavit of Michael Polsky, received by the Corporation's counsel at 2:46 p.m. today, it does not appear that he has had experience as a receiver for an Indian tribe or tribal corporation.

**f. The Trustee does not have a high probability of success in this action, nor has it shown a risk of irreparable harm.**

Given the invalidity of the Bond Indenture and related agreements, it is not likely that the Trustee will prevail in this action. In addition, the Trustee has failed to show how it would be irreparably injured. The Trustee is effectively seeking a money judgment against the Corporation for defaulting on its obligations under the unenforceable Bond documents. However, the Trustee has not – and cannot – claim that a money judgment would be insufficient to protect its interest in the funds it claims it is owed.

**g. The Trustee has not shown how its interests will be well-protected by the relief it seeks.**

The Trustee, and invariably the bondholder, seeks to be paid what it believes it is owed under the Bond agreements. The Trustee has not – and indeed cannot – show that the appointment of a receiver is necessary to protect its interests. In addition, the potential appointment of a receiver to "exercise oversight" over the Corporation's finances, which are, in effect, the Tribe's finances, is fraught with potential problems, including violations of federal gaming regulations. While the Trustee is no longer in control of the Corporation's revenues, its interest in those funds (assuming it has a valid interest) is not unprotected such that a receiver is necessary. The Trustee has not presented any evidence that the Corporation is mismanaging the funds – only that the funds have been removed from its control. And, indeed, as evidenced by the declaration of the Corporation's Controller, any distribution of those funds is currently being held in light of this litigation. Maki Dec. at ¶ 6. A receiver is not necessary. Indeed, a receiver will do more harm than good.

**h. There are other, less drastic, equitable remedies available here.**

In addition to the factors outlined above, courts have considered whether there are other, less drastic remedies available rather than the extraordinary relief of the appointment of a receiver. *See Aviation Supply*, 999 F.2d at 317. The Corporation respectfully submits that there are various less drastic remedies available to the Trustee, particularly in light of the dispute with regard to the validity of the Bond documents, including, among other things, placing funds in an escrow account during the pendency of this litigation and/or providing additional financial reporting to the Trustee.

## CONCLUSION

For the reasons set forth above, this Court should deny Plaintiff's motion for appointment of a receiver.

Dated this 28th day of December, 2009.

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