UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WISCONSIN

WELLS FARGO BANK, NATIONAL ASSOCIATION, AS TRUSTEE,

Plaintiff,

vs.

LAKE OF THE TORCHES ECONOMIC DEVELOPMENT CORPORATION,

Defendant.

Case No. 09-CV-768-bbc

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

Defendant, Lake of the Torches Economic Development Corporation (the "Corporation"), by and through its attorneys, Michael Best & Friedrich, LLP, submits the following supplemental 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 accordance with the Court's order of December 29, 2009, allowing additional briefing on this matter in advance of the hearing set for 9:00 a.m. on January 6, 2010.

BACKGROUND

The Lac du Flambeau Band of Lake Superior Chippewa Indians (the "Tribe") has inhabited the Lac du Flambeau area since 1745, when Chief Keeshkemun led the Tribe to the area. *See* Declaration of Monica M. Riederer ("Riederer Dec."), Ex. A. The Tribe acquired the name Lac du Flambeau from its gathering practice of harvesting fish at night by torchlight. *Id.* The name Lac du Flambeau or "lake of the torches" refers to this practice and was given to the

band by the French traders and trappers who visited the area. *Id.* The Lac du Flambeau Reservation was officially established by treaties in 1837 and 1842. *Id.* The area was continually logged in the following years and became a tourist destination for families from southern Wisconsin and Illinois around the turn of the century. *Id.* The Tribe is a federally-recognized tribe organized under Section 16 of the Indian Reorganization Act of 1934 (25 U.S.C. §§ 461, *et seq.*).

To increase economic activity and foster self-reliance among the various Native American communities, the Tribe began bingo and casino operations. Revenues generated by the casino operations go to the Tribe and directly benefit the economic and social development of the community. The Lake of the Torches Resort Casino (the "Casino") has enhanced the economy of the Lakeland area and provided valuable public services to residents in Lac du Flambeau. Indeed, according to the Wisconsin State Tribal Relations Initiative, as of January 1, 2009, the Lac du Flambeau government, including its enterprises, was the largest employer in Vilas County, employing approximately 800 people. Riederer Dec., Ex. B.

In order to manage the Casino operations, the Tribe formed the Lake of the Torches Economic Development Corporation (the "Corporation"). The Corporation is a not-for-profit corporation organized under tribal law and is wholly owned by the Tribe. *See* Supplemental Declaration of Karen Maki ("Maki Supp. Dec."), Ex. A. As a matter of tribal constitutional law, the Lac du Flambeau Tribal Council "manage[s] all economic affairs and enterprises of the Tribe" in its governmental capacity. Declaration of William Beson ("Beson Dec."), Ex. B at Art. VI, Sec. 1(f). Operation of the Casino, located on trust land, is one of these delegated powers. All of the Tribe's activities through the Casino, including management of its operations and regulation and use of the funds generated therefrom, are required by federal and tribal law to be

governmental activity, and are integral to the Tribe's rights of self-governance and self-determination.

Several years ago, the Tribe sought to expand its revenue base by participating in a project to build a riverboat casino, hotel and bed-and-breakfast in Natchez, Mississippi (the "Grand Soleil Project"). Beson Dec. ¶ 3. In part to fund its share in the project, the Tribe issued a $50 million bond offering (the "Bonds") in January 2008. Trust Indenture at 1. While the Casino revenue, among other things, was pledged as the security for the Bonds, the expected revenue from the Grand Soleil Project was always intended to fund the repayment of the Bonds. Beson Dec. ¶ 4. Unfortunately, the Grand Soleil Project has been plagued by problems since its inception and is still not yet operational. *Id.* ¶ 5. The Tribe's auditors recently conducted an audit of the project and found numerous issues, including lack of experience by the construction management company, Big River Enterprises (which is also one of the investors in the project along with the Tribe) in managing large or complex construction projects. *Id.* at ¶ 5, Ex. A. As a result, Big River Enterprises failed to obtain competitive bids for much of the work, which ultimately resulted in the project costing much more than it should have. *Id.*, Ex. A at 3. The auditors also found a lack of internal controls and ability to capture construction costs. *Id.* The auditors further found net apparent overcharges for the project to be in excess of $1 million. *Id.* at 4-5. The failure of the Grand Soleil Project to materialize has further exacerbated the economic stress caused by the Bond terms on the Tribe, as set forth below. *Id.* at ¶ 6.

The Bond covenants and terms require that the daily gross revenue from the Casino be deposited in the Restricted Depository Account at Chippewa Valley Bank, from which the amounts required for debt service on the Bonds are swept out of the account at the end of every month. Maki Supp. Dec. ¶ 3. Casino revenue, however, especially in northern Wisconsin, is

cyclical and varies dramatically from month to month. *Id.* ¶ 4. While the revenue during the spring and summer months exceeds what is required to make the monthly Bond payments and submit funds to the Tribe for its general fund, and the Tribe could potentially meet the Bond and governmental needs on an annualized basis, during the winter months, the Casino revenue is not sufficient to meet both the debt service on the Bonds and submit any funds to the Tribe. *Id.* ¶ 5, Exs. B and C. Indeed, some months, there is literally no cash left over for the Corporation or the Tribe once the Bond payment is made.[1] *Id.* ¶ 8.

This has a direct negative impact on Casino operations. *Id.* ¶ 9. The Casino has certain capital expenditures that are required in order to keep the business operational. *Id.* The Bond terms, which essentially require the first nearly $782,000 generated by Casino operations every month to be paid to the bondholder, strains the Corporation's ability to fund these projects. *Id.* For example, each year the Casino updates a certain portion of its slot machines, which requires those being replaced to be offline for a week. *Id.* ¶ 10. Other projects slated for completion in 2010 include the replacement of the carpet on the gaming floor and the installation of new IT equipment. *Id.* Each of these projects is disruptive to business on the gaming floor and, ideally, should be done when business is slow. *Id.* However, given the cash-flow restrictions caused by the Bond terms, there is not sufficient cash flow to undertake these projects until the summer months, when business peaks and the opportunity cost of stopping Casino operations is greatest. *Id.*

The Bond terms and covenants also have a direct negative impact on the Tribal government's ability to operate. *Id.* ¶ 11. Each year since the Bond offering, repayment of the

[1] The Trustee may argue that this is the very purpose of the Operating Reserve Account, which allows the Corporation to withdraw funds to pay for approved operating expenses of the Casino. But, the Bond terms require that any funds withdrawn be *immediately* replenished, even in the same month, which does nothing to alleviate the financial hardship or allow the Tribal government to be funded at an acceptable level.

Bonds has created a budget shortfall for the Tribe during the winter months. *Id.* at ¶ 11, Ex. C. This shortfall typically takes up to five months for the revenue generated from the Casino (beyond that required for the Bonds) to make up, but during these months, the Tribe still has governmental expenses that it needs income from the Casino to cover. *Id.* Indeed, the Tribe has struggled financially for two years as a result of efforts by the Corporation to make payments under the Bonds, reducing or eliminating many programs that are important to the health and welfare of Tribal members. Beson Dec. at ¶ 7.

The Tribal government depends almost entirely on distributions from the Casino revenue in order to operate. Declaration of Janice Philemon ("Philemon Dec.") at ¶ 3. Indeed, historically, nearly all of the Tribe's annual budget has been funded by distributions from the Casino and related amenities, of which the Tribe is the owner. *Id.* The Bond terms and covenant have caused extreme financial stress on the Tribal government and, consequently, the Tribal members. *Id.* at ¶ 4. Indeed, the current economic conditions have made it extremely difficult for the Tribal government to continue to operate at an acceptable level under the Bond obligations. *Id.* at ¶ 5.

As a consequence of the Bond terms and covenants, the Corporation's transfers to the Tribe for the fiscal year ended September 30, 2008 were $8.2 million, a reduction of $9.5 million from the Tribe's 2008 budget expectations. *Id.* at ¶ 6. This past fiscal year ending September 30, 2009, the Bond-related terms allowed only about $4.0 million in transfers from the Corporation to the Tribe. *Id.* at ¶ 7. Historically, the Tribe has depended on transfers from the Corporation in the range of $17 to $18 million annually. *Id.* at ¶ 8.

This reduction in transfers and funding has placed the Tribal government and members under severe duress. *Id.* at ¶ 9. In addition to the complete elimination of any per capita

distributions to the members, the Tribe has been forced to sustain distressing cuts in governmental and social programs of the Tribe. *Id.* at ¶ 10. For example, between 2007 and 2009, the Tribe was forced to make a 15% cut in the wages of Tribal employees and in 2009, the Tribe was forced to make an additional 19.5% cut. *Id*. at ¶ 11. Approximately 100 full-time positions have been eliminated, and substantial reductions in hours worked have also occurred. *Id.* As outlined in the declaration of the Tribe's Accounting Supervisor, the Tribe has been forced to eliminate numerous programs that support the Tribe's children, elderly and adult members. For example, the Tribe has cut the following programs from its budget:

- Tribal newspaper;
- Land Purchase Program, aimed at restoring former Tribal lands;
- Census and Demographics Program, key to planning and developing Tribal programs;
- WIA Comprehensive Services, workforce development program;
- Cultural Prevention Program, used traditional ceremonies and events to reduce alcohol/drug abuse;
- Transportation Program, provided educational transportation for higher education students;
- Building Inspection Program, provided inspection services for buildings on trust lands not subject to State inspection;
- Housing Rehabilitation Program, provided assistance to low income members;
- Tribal Youth Work Program, provided youth members with summer employment opportunities;
- GIS Mapping and Inventory Project, designed to catalogue reservation lands;
- Fish and Game Program, provided monitoring, management and protection of fish and game on reservation;
- Licensed Social Worker Program, provided a paid professional to Tribal members and families; and
- Tribal road funding cut by $250,000 over last two years.

Id. ¶¶ 13-30. Other vital programs have been substantially reduced, including:

- Education scholarship funding cut by 23% (approximately $140,000/year);
- Youth Sport and Fitness Program funding cut by 76% (approximately $330,000/year);
- Elderly Care Chore Worker Program funding cut by 87.5% ($245,000/year);
- Museum funding cut by 38% ($73,000/year);
- Health care clinic funds for members without health insurance cut by over $1,400,000.

Id. at ¶¶ 26-31.

In the middle of 2009, the Tribe retained legal counsel initially to attempt to renegotiate the Bond payments to something that would be manageable for the Tribe. Beson Dec. at ¶ 8. Indeed, the Trustee and bondholder were made aware of the Tribe's current financial crisis, as the parties engaged in extensive – though unsuccessful – negotiations over the past few months in an attempt to restructure the Bond terms. The Tribe's new legal counsel, for the first time, raised the issue with the Tribe as to whether the Bond Indenture and other documents amounted to a management contract that required approval of the NIGC in order to be valid and enforceable against the Tribe. *Id.* at ¶ 9.

On October 6, 2009, the Lac du Flambeau Tribe voted on and approved a new Tribal Council, which did not take office for another approximately 30 days. *Id.* at ¶ 10. Shortly thereafter, the Tribal Council President, Carl Edwards, chose to resign based on allegations of misconduct specifically relating to the Bond deal at issue in this case, among other things. *Id.* at ¶ 11. Also shortly after the new Tribal Council was elected, the law firm that was initially hired to renegotiate the Bond payments was engaged to pursue an advisory opinion from the NIGC regarding whether the Bond Indenture and other documents amounted to a management contract. *Id.* at ¶ 12. When this litigation was commenced, however, that law firm withdrew because of a perceived conflict of interest. *Id.* The new Tribal Council has since hired replacement counsel and has already begun pursuing this matter with the NIGC. *Id.* at ¶ 14. The Corporation and Tribe has also sought the advice of other Indian law experts, including Kevin Washburn, a Dean of the University of New Mexico Law School and former General Counsel of the NIGC, who has submitted an opinion as an expert witness that the Trust Indenture is a management contract that required NIGC approval. *See* Affidavit of Kevin Washburn ("Washburn Aff.").

It is now clear to the Tribal Council that the Bond deal went forward without the proper approvals, including but not limited to a lack of approval from the NIGC, the Secretary of the Interior, and the full Tribe pursuant to a referendum vote, which is required under the Tribal Constitution. Beson Dec. ¶ 13, Ex. B.

The Trustee and bondholder were also aware, through the failed restructuring negotiations, of the new Tribal Council's discovery that none of the appropriate approvals had been obtained. Notably, however, neither the Trustee nor the bondholder has sought review of the Trust Indenture or related documents, before or after the transaction.

ARGUMENT

I. THIS COURT LACKS JURISDICTION TO HEAR THIS MATTER.

A. The Trust Indenture is Void Because it Constitutes a Management Contract Under IGRA, and Unapproved Management Contracts are Void.

Under the Indian Gaming Regulatory Act, a contract that gives a non-tribal entity control over a tribal gaming operation is a "management contract" that must be submitted to and approved by the Chairman of the NIGC to become enforceable. Although not labeled as such, the Trust Indenture gives the Trustee and the bondholder substantial control over the Lake of the Torches Resort Casino, particularly after an "event of default" has occurred, and thus constitutes a management contract under the Act. Because the Trust Indenture has not been approved by the Chairman of the NIGC, it is void and unenforceable.

1. Management contracts must be approved by the Chairman of the NIGC to be enforceable.

Congress passed the Indian Gaming Regulatory Act in 1988 to pervasively regulate Indian gaming, and to ensure that Indian tribes are the primary beneficiaries of Indian gaming. *See* 25 U.S.C. § 2702.

> The purpose of the Act is to provide a statutory basis for operating Indian gaming, to promote economic development, to shield tribes from organized crime, to assure fairness to operators and players, and to establish a Federal regulatory authority for Indian gaming to meet congressional concerns.

S. Rep. No. 446, 100th Cong. 2d Sess. 15-16 (1988), *reprinted in* 1988 U.S.C.C.A.N. 3071, 3085-65.[2] "The IGRA effects these goals in part by providing for federal oversight of contracts between tribes and non-tribal entities for the management of tribal gaming operations." *First Am. Kickapoo Ops., LLC v. Multimedia Games, Inc.*, 412 F.3d 1166, 1167-68 (10th Cir. 2005). Specifically, IGRA requires that all management contracts be approved by the Chairman of the NIGC, 25 U.S.C. § 2711, and that all management contractors submit detailed background information to the NIGC prior to approval. *Id. See also* 25 CFR § 533.1.[3]

The NIGC defines a "management contract" as "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 CFR § 502.15. To be approved, a management contract must contain numerous terms that are specified in the NIGC's regulations, including:

- a representation that all gaming will be carried out in accordance with IGRA and the tribe's gaming ordinance;[4]
- an assignment of responsibilities for such things as maintaining and improving the gaming facility, maintaining books and records, hiring security personnel, providing operating capital, paying bills and expenses, and establishing and administering employment practices;
- a statement of who will be responsible for establishing and maintaining accounting systems;
- a requirement that the management contractor report the gaming facility's finances to the tribe;

[2] The NIGC is the federal agency established by the Act to regulate Indian Gaming. *See* 25 U.S.C. §§ 2704, 2706.
[3] Management contractors must also submit detailed background information to the State of Wisconsin under the terms of the Tribe's amended Gaming Compact with the State. *See* Riederer Dec., Ex. P.
[4] IGRA also requires that before any tribe may conduct class II (bingo, pull-tabs, and related games defined in 25 U.S.C. § 2703(7)) or class III (defined at 25 U.S.C. § 2703 (8) and including slot machines and house-banked card games like poker and black jack) gaming, a tribe must enact a gaming ordinance approved by the Chairman of the NIGC. 25 U.S.C. § 2710. Riederer Dec., Exs. C and D.

- a requirement that the management contractor give the tribe access to the gaming operation and its books and records;
- a guaranteed minimum payment to the tribe from gaming revenues that has preference over management fees;
- a maximum figure for development and construction costs;
- a term limit (the maximum of which is five years absent special circumstances);
- compensation calculations (the maximum of which is 30% of the facilities net revenues absent special circumstances);
- termination provisions;
- mechanisms to resolve disputes between the tribe and the management contractor, and between the management contractor and employees;
- limits on assignment of the contractor's rights;
- limits on the extent to which ownership interests in the management contractor can change without advance tribal approval; and
- a statement that the agreement is not effective absent the Chairman's approval.

25 CFR § 531.1.

The management contract approval process is rigorous, and can take from six months to three years. Kevin K. Washburn, *The Mechanics of Indian Gaming Management Contract Approval*, 8 Gaming L. Rev. 333, 334 (2004). This is because the NIGC must review the substantive provisions of a proposed contract and the proposed management company's background to determine "whether a person or entity involved in gaming poses a threat to the integrity of the gaming industry," and, because approval of a management contract usually constitutes a "major federal action" subject to review under the National Environmental Policy Act ("NEPA"), the NIGC must complete NEPA review. *Id.* at 337-45.

The approval process is critical to tribes and management contractors, however, because without the NIGC Chairman's approval, management contracts are void. 25 CFR § 533.7. Because such contracts are void *ab initio,* they are entirely unenforceable. *See Catskill Dev., LLC v. Park Place Enter. Corp.*, 547 F.2d 115, 128 (2d Cir. 2008) (finding entirety of unapproved management contracts void and unenforceable) (citing *A.K. Mgmt. Co. v. San Manuel Band of Mission Indians*, 789 F.2d 785, 789 (9th Cir. 1986)). The NIGC has noted that

> [a] management contract that has not been approved by the Chairman is void. Furthermore, the management of a gaming operating under a "management" contract or agreement that has not been approved could result in the gaming operation being closed. The consequences to the parties are:
>
> - The tribe would have to close down the operation or operate it on its own, and
> - The management contractor would have to vacate the operation and could be subjected to legal action to return to the tribe any funds it received under the contract.

NIGC Bulletin 94-5 (Oct. 14, 1994).[5] And the NIGC has closed tribal casinos operated by outside managers without an approved management contract.[6] The NIGC can also impose substantial fines for managing an Indian casino without an approved management contract, and has done so. *See, e.g.*, *NIGC Proposed Civil Fine Assessment*, CFA-07-02 (Jun. 15, 2007) (imposing $5,150,000 fine on management contractor who did not have approved management contract with tribe); [7] *NIGC Settlement Agreement*, SA 06-08 (Jun. 27, 2007) (management contractor agreed to pay $10,000,000 fine for managing Quapaw Tribe's casino without an approved management contract).[8] IGRA's management-contract regulatory scheme is significant here because if the Trust Indenture is a management contract, its lack of approval by the NIGC Chairman would render it void in its entirety, and subject the Trustee, the Corporation, the bondholders—and any receiver exercising management authority over the Tribe's casino—to enforcement action by the NIGC.

2. An agreement need not be labeled a "management contract" to be considered one under IGRA.

The NIGC recognized early on that it would be important for tribes and contractors to know whether the contracts they entered were management contracts requiring the Chairman's approval, or some other type of contract that did not require approval. In 1993, the Commission

[5] Riederer Dec., Ex. E.
[6] Riederer Dec., Ex. F.
[7] Riederer Dec., Ex. G.
[8] Riederer Dec., Ex. H.

issued a bulletin advising that certain gaming-related agreements "should be submitted to the NIGC for review," and that "[t]he NIGC will review each submission and determine whether the agreement requires the approval of the NIGC. If it does, the NIGC will notify the tribe to formally submit the agreement." NIGC Bulletin 93-3 (Jul. 1, 1993).[9]

In 1994, the NIGC expanded its advice about what constitutes a management contract by issuing another bulletin. *See* NIGC Bulletin 94-5 (Oct. 14, 1994), *supra.* At the time the bulletin was issued, many tribes and contractors had attempted to get around the management-contract-submission-and-approval requirements by entering into "consulting agreements" rather than "management contracts," prompting the NIGC's issuance of Bulletin 94-5 (titled Approved Management Contracts v. Consulting Agreements (Unapproved Management Contracts are Void). In that bulletin, the NIGC noted that "[m]anagement encompasses many activities (e.g. planning, organizing, directing, coordinating, and controlling)," and that the "performance of any one of such activities with respect to all or part of a gaming operation constitutes management for the purpose of determining whether any contract or agreement for the performance of such activities is a management contract that requires approval." *Id.*

Many parties have submitted their gaming-related agreements to the NIGC over the years, and the Commission has issued dozens of advisory opinions. Riederer Dec., Ex. J.[10] *See also* Washburn Aff. at ¶¶ 5-6. These opinions have concluded that many agreements not labeled "management contracts" nonetheless constitute "management contracts" under IGRA and are void without the Chairman's consent. *See, e.g.*, Riederer Dec., Ex. L (letter from NIGC Acting

[9] Riederer Dec., Ex. I.

[10] A sampling is available at http://nigc.gov/ReadingRoom/SoleProprietaryInterestLetters/tabid/879/Default.aspx (last visited Jan. 10, 2010). While these letters are kept on the NIGC's web site's "Reading Room" under the heading "Sole Proprietary Interest Letters," many of the letters analyze not only whether the contracts violate IGRA's requirement that a tribe maintain the "sole proprietary interest" in its gaming activity, 25 U.S.C. § 2710(b)(2)(A), but also whether the contracts constitute management contracts.

General Counsel concluding that lease, loan, and security agreements constituted unapproved management contracts). And not surprisingly, given the high stakes of a determination that one's contract is void, the courts have weighed in on what constitutes an unapproved management. *See, e.g., Catskill Dev., LLC*, 547 F.3d at 115 (concluding that land-purchase and development-and-construction agreements were void as unapproved management contracts); *First Am. Kickapoo Ops.*, 412 F.3d at 1166 (concluding that gaming-machine operating lease was void because it constituted an unapproved management contract); and *Machal, Inc. v. Jena Band of Choctaw Indians*, 387 F. Supp. 2d 659 (W.D. La. 2005) (finding various agreements between Jena Band and outside contractors void because they constituted unapproved management contracts).

3. The Trust Indenture is an unapproved management contract.

As noted above, the Corporation issued the Bonds, in part, to pursue a gaming complex in Natchez, Mississippi that was to include a riverboat casino, a hotel, and a bed-and-breakfast. Trust Indenture at 1. But the security for the Bonds was the existing Casino, which is a tribal casino regulated under IGRA and the Tribe's Gaming Control Ordinance. Under the Trust Indenture, the Corporation pledged and assigned, among other things, "[a]ll right, title and interest in and to the Gross Revenues of the Corporation, and investment earnings on the Gross Revenues of the Corporation (the 'Pledged Revenues')." Trust Indenture at 2, Granting Clause I. The "Gross Revenues of the Corporation" include all receipts from the operation of the Casino Facility, *i.e.* all revenues from the Lake of the Torches Resort Casino in Lac du Flambeau, Wisconsin. *Id.* § 1.01. The Corporation also pledged the Casino's equipment, and "[a]ll right, title, and interest in and to the Corporation's accounts, deposit accounts, general intangibles, chattel paper, instruments and investment property and the proceedings of each of the foregoing

and all books, records and files relating to all or any portion of the Pledged Revenues . . . ." *Id.* at 2, Granting Clause II. Thus, although the proceeds of the Bonds were not used to construct or operate a tribal casino, the Lake of the Torches Resort Casino and its operation and finances were integral to the issuance of the Bonds.

Because the Bonds were secured by Casino revenues, the Trust Indenture contains several provisions designed to ensure that those revenues are sufficient for the Corporation to make requisite payments on the bond debt. For example, the Corporation cannot "incur capital expenditures that exceed 25% of the prior fiscal year's capital expenditures without receiving the written consent of [at least 51% of the bondholders], which consent will not be unreasonably withheld." Trust Indenture, § 6.18. In other words, in a very real sense, the bondholders direct and *control* how much the Corporation can spend on capital expenditures. Such control is an indicium of management. *See* NIGC Bulletin 94-5 ("Management encompasses many activities (e.g. planning, organizing, directing, coordinating, and controlling)," and the "performance of any one of such activities with respect to all or part of a gaming operation constitutes management for the purpose of determining whether any contract or agreement for the performance of such activities is a management contract that requires approval."). *See also* Washburn Aff. at ¶ 8.

The Tenth Circuit has suggested that it is helpful to look at the NIGC's definition of "primary management official" for further clarification about what constitutes "management." *First Am. Kickapoo Ops.*, 412 F.3d at 1172. "While neither [IGRA] nor the regulations define management, the regulations do define a primary management official as any person 'who has authority . . . [t]o set up working policy for the gaming operation.'" *Id.* (citing 25 CFR § 502.19). As a later court noted, "[w]hile this is too vague to supply the court with a definition of

management, it does indicate that a necessary condition for a management contract is that it grant to a party other than the tribe some authority with regard to a gaming operation." *Machal*, 387 F. Supp. 2d at 665. By giving the bondholders veto power over certain capital expenditures, Section 6.18 gives the bondholders great authority over operation of the Casino.

However, Section 6.18 is not the only section of the Trust Indenture granting operational authority to the bondholders. Sections 6.20 and 8.02 of the Trust Indenture give the bondholders significant authority over the Corporation's ability to hire, retain, or fire top Casino personnel. In Section 6.20, "[t]he Corporation agrees that it will not replace or remove and will not permit the replacement or removal of the [Casino's] General Manager, Controller, or Chairman or Executive Director of the Gaming Commission for any reason without first obtaining the prior written consent of 51% of the [bondholders]." Not only does this Section purport to give the bondholders extraordinary authority over "primary management officials" of the Casino, but it would appear to prevent the Tribe from removing such officials even if they had taken some action that would require the Tribe, under IGRA and its Tribal Gaming Control Ordinance, to revoke the officials' gaming licenses (which all primary management officials must have.)[11] Yet failing to obtain the prior written consent of the bondholders before replacing "certain key employees as provided in Section 6.20" constitutes an event of default under the Trust Indenture. Trust Indenture, § 8.01(f).

Upon an event of default, the Trust Indenture purports to give the bondholders *even more* authority over the Tribal gaming operation.[12] For example, upon certain events of default, a

[11] Riederer Dec., Ex. C; *see also* 25 U.S.C. § 2710(b)(2)(F). Section 6.20 is particularly problematic because it not only gives the bondholders authority over *Casino* management personnel, but also purports to give them authority over tribal *regulatory* staff because the Tribal Gaming Commission is the entity that enforces the Tribe's Gaming Ordinance. Amendments to Lac du Flambeau Gaming Control Ordinance, Chapter VIII (1). Riederer Dec. Ex. D.

[12] The inclusion of these opportunities for non-tribal entities to direct and control the Casino rendered the Trust Indenture a management contract requiring NIGC approval at the outset regardless of whether the Tribe were to

majority of the bondholders "shall have the right to require, in writing, the Corporation to hire new management and shall have the right to consent, in writing to the management personnel and/or company that the Corporation recommends as replacement management." Trust Indenture, § 8.02. Quite literally, this provision gives the bondholders the ability to dictate management of the casino. As such it "provides for the management of all or part of a gaming operation," 25 CFR § 502.15, and renders the Trust Indenture a management contract.[13]

The Trust Indenture also gives the bondholders the right to force the Corporation to engage a consultant regarding casino operations and to follow the consultant's advice. Under Section 6.19, if the debt-service-coverage ratio falls below 2.00 to 1, the bondholders can require the Corporation to "promptly retain an Independent management consultant with sufficient experience in an knowledge of the gaming industry" to conduct a review of Casino operations and submit a report making "recommendations as to improving the operations and cash flow" of the Casino. Trust Indenture, § 6.19. The Corporation is to "use its best efforts to implement the recommendations of the management consultant within ninety (90) days from the date that the final management consultant report is delivered to the Corporation." *Id.* But requiring a tribe to follow an outside consultant's operational advice constitutes management, and renders the Trust Indenture a management contract. *United States v. Casino Magic*, 293 F.3d 419, 425 (8th Cir. 2002) (finding that loan agreement that mandated a tribe to follow an outside consultant's advice constituted a management contract). *See also* Washburn Aff. at ¶ 8 ("This provision has the

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actually default on the agreement. *First Am. Kickapoo Ops.*, 412 F.3d at 1175 (rejecting argument that "a contract is only a management contract if it confers rights rather than opportunities to manage" as a misstatement of the law).

[13] *See also Machal*, 387 F. Supp. 2d at 669 (reviewing a contract that gave two companies an exclusive right to enter into a management contract with the Jena Band of Choctaw, and finding that the "arrangement is not only exclusive of other potential management contractors, but also excludes Jena Band from operating a gaming operation on its own. It is an alienation by Jena Band of its right to manage gaming operations located on tribal lands in Louisiana. The [agreement], therefore 'provides for the management of a gaming operation.'").

effect of limiting the tribal manger's discretion and also grants significant management power to an outsider.").

Perhaps the most problematic provision of the Trust Indenture is the one the Trustee seeks to implement here. Section 8.04 purports to allow a court to appoint a receiver "of the Trust Estate and of the revenues, issues, payments and profits thereof, pending such proceedings, with such powers as the court making such appointment shall confer." The "Trust Estate" includes the assets pledged by the Corporation to secure the bonds — *i.e.*, all the revenues, equipment, and accounts of the Casino. Trust Indenture at § 1.01. This provision, if enforced, would permit the Court to give a non-tribal entity (one who has not been subjected to the mandatory gaming-licensing process required by Tribal and federal law)[14] complete control over the Casino's finances (and possibly the day-to-day operation of the Casino).[15] But control over casino finances is a primary function of casino management, as evidenced by the many requirements regarding casino finances that must be contained in a management contract. *See* 25 CFR §§ 531.1(b) and (c) and pages 9-10, *infra*. *See also Machal*, 387 F. Supp. 2d at 665 (including among a list of terms that indicate a transfer of management authority those that transfer "responsibility for financing procedures such as financial reporting and the paying of

[14] As noted above, IGRA and the Tribe's Gaming Control Ordinance require that certain casino officials be licensed by the Tribe's Gaming Commission before they may exercise authority at the Casino. Specifically, IGRA requires tribes to license "primary management officials," 25 U.S.C. § 2710(b)(F), which includes the "chief financial officer *or other person who has financial management responsibility"* at a tribal casino. 25 CFR § 502.19(c) (emphasis added). A tribe's failure to conduct background investigations on or to license such an official and report the investigation and licensing results to the NIGC subjects the tribe—or in this case the Corporation—to enforcement action by the NIGC. 25 U.S.C. § 2713. Riederer Dec., Ex. K (Stipulated Notice of Violation and Civil Fine Assessment to Eastern Shawnee Tribe of Oklahoma, NOV-07-01 (Feb. 27, 2007) (assessing $20,000 fine on Eastern Shawnee Tribe for failure to conduct background investigations and issue gaming licenses to primary management officials). The Tribe's Gaming Compact with the State of Wisconsin also requires the Tribe to conduct background investigations on all persons "employed in the operation or conduct of gaming." Riederer Dec., Ex. P at Section IX.

[15] In her letter reviewing the Sac & Fox Nation's lease, loan and security agreements, the NIGC Acting General Counsel noted that the security agreement permitted the contractor "to collect and handle all pledged revenues in default. The result is that in the event of default, [the contractor] would have the authority to decide which operating expense to pay at any given time. The power to decide operational expenditures is a function that constitutes management." *See* Riederer Dec., Ex. L at 3.

taxes, employees and other costs"); Riederer Dec., Ex. M (letter from NIGC Acting General Counsel stating "[A]n agreement containing a security interest in a gaming facility's future gross revenues, without further limitation, authorizes management of the gaming facility. We take this position because in the event of default, a party with a security interest in a gaming facility's gross revenues has the authority to decide how and when operating expenses at the gaming facility are paid, which is itself a management function.").[16]

As is evident, the Trust Indenture contains many indicia of management. Or, as the former NIGC General Counsel opines "[t]he provisions in the Trust Indenture that would give the NIGC significant regulatory concern are numerous." Washburn Aff. at ¶ 8. If the Trust Indenture were enforceable, it would:

- permit the bondholders to limit Casino capital expenditures;
- give the bondholders authority over the hiring, retention, and firing of primary management officials of the Casino;
- allow the bondholders to engage a management consultant whose advice the Corporation would be obliged to promptly follow; and
- permit the court to appoint an unlicensed receiver to take over the Casino's finances and have "such powers as the court making such appointment shall confer."

Under IGRA, these functions simply cannot be transferred to an entity other than a tribe unless they are prescribed by an approved management contract and the entity has undergone a thorough background examination by the NIGC. Because the Trust Indenture was not approved by the Chairman of the NIGC, it is void in its entirety as a matter of law, 25 CFR § 533.7, and cannot be enforced. Washburn Aff. ¶ 10. "Lacking the formality of NIGC approval, an agreement to manage *does not become a contract; it is void*." *First Am. Kickapoo Ops.*, 412 F.3d at 1176 (emphasis added); s*ee also Catskill Dev., LLC*, 547 F.3d at 128. Because the Trust

[16] Granting a receiver control over casino finances could also violate IGRA's requirement that a tribe maintain the "sole proprietary interest" in its gaming activity, 25 U.S.C. § 2710(b)(2)(A), and the Tribe's revenue allocation plan, which was approved by the Secretary of the Interior and specifies how the Tribe's gaming revenues may be used. . *See* Tribe's Per Capita Distribution Plan (as amended), Riederer Dec., Ex. N, and BIA Letter Approving Per Capita Distribution Ordinance (as amended), Riederer Dec., Ex. O.

Indenture is void, the Court cannot appoint a receiver as the Trustee requests. Indeed, it is without jurisdiction to do so.

B Because Sovereign Immunity Bars Consideration of the Trustee's Claims, This Court Lacks Jurisdiction to Appoint a Receiver.

1. The Tribe and the Casino are protected from suit by sovereign immunity.

Repeatedly and consistently, the Supreme Court has reaffirmed the existence and importance of tribal sovereign immunity from unconsented suit. *See, e.g., Kiowa Tribe of Oklahoma v. Manufacturing Technologies, Inc.*, 523 U.S. 751 (1998); *Oklahoma Tax Comm'n v. Citizen Band Potawatomi Indian Tribe of Okla.*, 498 U.S. 505 (1991); *Santa Clara Pueblo v. Martinez*, 436 U.S. 49 (1978); *United States v. United States Fidelity & Guaranty Co.*, 309 U.S. 506 (1940). This immunity is a "necessary corollary to Indian sovereignty and self-governance." *Three Affiliated Tribes v. Wold Eng'g*, 476 U.S. 877, 890 (1986) (citing *Santa Clara Pueblo*, 436 U.S. 49). It preserves the autonomous political existence of Indian tribes, protects tribal treasuries, and promotes the federal policy of tribal self-determination. *American Indian Agricultural Credit Consortium v. Standing Rock Sioux Tribe*, 780 F.2d 1374 (8th Cir. 1985); *Chemehuevi Indian Tribe v. California State Board of Equalization*, 757 F.2d 1047 (9th Cir. 1985), *rev'd on other grounds*, 474 U.S. 9 (1986).

Sovereign immunity protects a tribe from all unconsented claims— including claims arising from a tribe's "commercial" activities. *Kiowa Tribe*, 523 U.S. at 758-60 ("declin[ing] to draw th[e] distinction" between a tribe's commercial and noncommercial activities, and holding that "[t]ribes enjoy immunity from suit on contracts, whether those contracts involve governmental or commercial activities. . . ."). Tribal sovereign immunity is jurisdictional and precludes a court considering the merits of a barred claim. *Puyallup Tribe v. Dept. of Game of State of Washington*, 433 U.S. 165, 172-73 (1974); *Rupp v. Omaha Indian Tribe*, 45 F.3d 1241,

1244 (8th Cir. 1995) ("Sovereign immunity is a jurisdictional question: if the Tribe possessed sovereign immunity, then the district court had no jurisdiction to hear the counterclaims."). Because it is jurisdictional, the Tribe's immunity from the Trustee's suit must be addressed before a receiver can be appointed.

2. The Tribe has not waived its immunity from this suit.

The only purported waiver the Trustee has pointed to that would allow this case to proceed is the one found in the void Trust Indenture. (Pl.'s Reply, Doc. 15 at 4.) But to be effective, a contractual waiver must be part of an enforceable, valid agreement. *See Mo. River Serv., Inc. v. Omaha Tribe of Neb.*, 267 F.3d 848, 854 (8th Cir. 2001) (limiting waiver to language of approved management contracts). The unavoidable consequence of the failure to secure NIGC approval of the Trust Indenture is that the entire agreement—including the purported waiver of sovereign immunity—is void.[17] *See* 25 C.F.R. § 533.7.

The Trustee assumes (without *any* citation to legal authority) that the purported wavier is separable from the rest of the Trust Indenture because the Trust Indenture "specifically provides" that unenforceable provisions can be severed from the Indenture. Pl.'s Reply, Doc. 15 at 4. Courts disagree. "Lacking the formality of NIGC approval, an agreement to manage *does not become a contract*: it is void." *First Am. Kickapoo Ops.*, 412 F.3d at 1176. And it is void *ab initio*. The severability clause cannot save the waiver because *neither it nor the waiver provision* was *ever* enforceable.

[17] The single exception to this rule is that, where they exist, arbitration clauses are separable from an unapproved management contract because in those cases, under the Federal Arbitration Act, arguments that a contract is void must be directed to the arbitrator. *Prima Paint Corp. v. Flood & Conklin Mfg., Co.*, 388 U.S. 395, 403 (1967); *Sokagon Gaming Ent. Corp. v. Tushie-Montgomery Assoc., Inc.*, 86 F.3d 656, 659 (1996); *Match-Be-Nash-She-Wish Band of Pottawatomi Indians v. Kean-Argovitz Resorts*, 383 F.3d 512, 516 (6th Cir. 2004). It was Congress's passage of the Federal Arbitration Act, not any severability clause, that compels this result. *See Prima Paint Corp.*, 388 U.S. at 403. Because the Trust Indenture does not contain an arbitration clause, this exception to severability is inapplicable to this case. *Match-Be-Nash-She-Wish Band*, 383 F.3d at 518.

The Ninth Circuit faced this precise question in *A.K. Mgm't Co. v. San Manuel Band of Mission Indians*. 789 F.2d 785 (9th Cir. 1986). In that case, 25 U.S.C. § 81 required the parties to gain approval of the Bureau of Indian Affairs ("BIA") of the contract at issue.[18] The plaintiff there argued that it could bring suit on contractual theories notwithstanding this failure. The Court disagreed:

> [W]ithout BIA approval[, the contract] must be null and void in its entirely. No part of it may be enforced or relied upon unless and until BIA approval is given. BIA approval is an absolute prerequisite to the enforceability of the contract. . . . Since it is void, it cannot be relied upon to give rise to *any* obligation by the Band[.]"

Id. at 789 (footnotes omitted, emphasis in original). It concluded that the plaintiff could not sue the Tribe based on the contract at all: "[t]he 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." *Id.*

Because it is an unapproved management contract, the Trust Indenture—the *entire* Trust Indenture—fails. "To give piecemeal effect to a contract as urged by appellant, would hobble the statute." *Catskill Dev., LLC*, 547 F.3d at 128 (quoting *A.K. Mgm't Co.*, 789 F.2d at 789, internal alterations omitted, in a case holding contracts void and unenforceable unapproved management contracts under 25 C.F.R. § 533.7); a*ccord First Am. Kickapoo Ops.*, 412 F.3d at 1178 (refusing to apply a severability clause to a void and unenforceable unapproved management contract because "[a] contract is entire when its various provisions are a 'package deal.' . . . . First American's proposed severed version of the contract does not account for a

[18] Before it was amended in 2000, Section 81 required that all contracts with tribes "relative to their lands" be approved by the Secretary of the Interior, and provided that all such contracts failing to comply with the Section were "null and void." 25 U.S.C. § 81 (1999). When IGRA was passed in 1988, it transferred authority to approve gaming management contracts (which fell within Section 81's ambit) to the Chairman of the NIGC. 25 U.S.C. § 2711(h).

provision that was almost certainly part of the package for which the Tribe bargained, and is therefore unconvincing."). The Trustee's unsupported assertions simply cannot revive clauses of a contract that was void *ab initio*. Because no valid and enforceable waiver of the Tribe's sovereign immunity allows this Court to hear the Trustee's claims, the Court lacks jurisdiction to appoint a receiver. *See Mo. River Serv., Inc.*, 267 F.3d at 854.

C. In The Alternative, This Court Should Stay This Case Until The NIGC Has Opined On Whether The Trust Indenture And Related Documents Constitute A "Management Contract."

The Trustee submits that this Court does not have authority to rule on the validity of the Trust Indenture and related documents, and that only the NIGC Chairman has that authority. Pl.'s Reply Br. at 5. The Trustee's assertion is patently false. While the NIGC has the sole authority to approve management contracts, once such contracts have been entered into, the NIGC's role is to provide an advisory opinion, which this (or any) Court can take into consideration when determining whether the contract in question is a management contract that should have received NIGC approval. *See, e.g., First Am. Kickapoo Ops.*, 412 F.3d at 1175 ("While the Bulletin and the opinion letter do not compel our deference, they do offer confirmation of our conclusion that the Operating Lease is indeed a management contract."). But the law does not *require* such an advisory opinion before a court action may proceed. *See, e.g., A.K. Mgm't Co.*, 789 F.2d 785 (determining whether agreements repudiated three days after they were signed were management contracts). Under 25 C.F.R. §§ 2711 and 533.7, the failure to obtain NIGC approval renders a management contract void and unenforceable. If this Court determines that the Trust Indenture is a management contract, then it must find the contract null and void. Consequently, the Trustee's argument that the Corporation was required to exhaust its administrative remedies by seeking NIGC approval at the outset is simply wrong. Similarly,

there is no requirement that either party obtain an NIGC advisory opinion before this Court may rule on the validity of a purportedly unenforceable management contract. If NIGC approval was not obtained, a management contract is void *ab initio*.

This Court acknowledged the effect of similar statutory language in *Gulbronson v. D&J Enters.*, holding that:

> My preference would be to stay judgment in this case and have the agreement submitted to the Secretary of the Interior for approval. Only if the Secretary declined to approve the agreement, indicating that it was not beneficial to the tribe, would I declare the contract void. In that way, the statute would fulfill its intended purpose of protecting the tribes rather than its actual effect of bestowing windfalls. However, neither the statute nor the case law affords this discretion.

1993 U.S. Dist. LEXIS 19843, at *35-36.

Similarly, neither 25 C.F.R. § 2711 nor § 533.7 afford discretion to a court where a contract is an unapproved management contract. However, if the Court believes that an advisory opinion from the NIGC would assist it in determining whether the Trust Indenture and related documents constitute a management contract, and that the Court has the discretion to do so, the Corporation respectfully requests that this Court stay the present action until such an opinion may be obtained. Indeed, other courts have agreed with this approach in the analogous tribal-court-abstention context. As the Eighth Circuit held, "[o]ur examination leads us to the conclusion that the underlying issues regarding the contract's validity must be resolved before any other matter can be productively addressed. We believe the District Court should have stayed its proceedings pending a resolution in the first instance in the Tribal Court of these matters." *See Bruce H. Lien Co. v. Three Affiliated Tribes,* 93 F.3d 1412 (8th Cir. 1996).

The Corporation agrees – the issue of the validity of the Trust Indenture must be determined before any other matter, including the appointment of a receiver, can be addressed. The evidence, including the opinion of a well-respected Indian law expert, strongly suggests that

the NIGC would, in fact, find the Trust Indenture and related documents to be a management contract, as outlined above. *See* Washburn Aff. at §§ 8-10.

As an aside, the Trustee's estoppel argument cuts both ways. The Trustee contends that both it and the bondholder relied on the opinion of the Tribe's bond counsel. Though it faults the Tribe for failing to seek review by the NIGC at the outset of the deal, the Trustee and bondholders did not require the Tribe to do so, and did not themselves seek an NIGC opinion—though they certainly could have done so. The NIGC allows *either* party to request review of an agreement that may be a management contract. *See* NIGC Bulletin No. 94-5 ("…if a tribe *or contractor* is uncertain whether a gaming-related agreement requires the approval of either the NIGC or the BIA, they should submit those agreements to the NIGC.") (emphasis added).

In fact, given the size of this transaction and the Trustee's experience in Indian-gaming financing, it is curious that the Trustee and bondholders relied entirely on the Tribe's counsel and did not seek any independent legal opinion as to whether all proper approvals were obtained. In such cases, with considerable value at stake, "it is common for parties to obtain NIGC review of transactional documents for the finance of Indian gaming operations, even when the parties assert that the financing arrangement does not constitute a management contract." Washburn Aff. at ¶ 6. While the requirement that the NIGC approve all management contracts was enacted, in part, to protect tribes from "improvident and unconscionable contracts," it is customary, particularly in a transaction of this magnitude, for the lender (here, the Trustee and bondholders) to require NIGC approval as a condition of closing. Such caution at the outset protects a lender from the risk that a contract may in fact be a management contract that must be found to be void if it has not been approved. The Trustee and bondholders did not take this precaution.

But if the Trustee and bondholders relied on the advice of the Tribe's bond counsel, so did the Corporation and the Tribe. The Corporation did not knowingly "sit on its rights," nor is it attempting to circumvent remedies set forth in the IGRA. The Corporation did not file a declaratory judgment action against the Trustee or bondholders attempting to declare the Trust Indenture unenforceable. Accordingly, *United States ex re. Saint Regis Mohawk Tribe v. President R.C.-St. Regis Mgmt Co.*, relied on by the Trustee, is inapposite. 451 F.3d 44 (2d Cir. 2006). The Corporation has not "proceed[ed] directly to the district court in an action nowhere authorized under IGRA[.]"). *Id.* at 51. To the contrary, the Tribe *did* engage counsel and start the NIGC review process several months before this lawsuit was filed, but the commencement of litigation caused a conflict with the Tribe's Indian law counsel, further delaying the process while the Tribe engaged new counsel.[19] Beson Dec. at ¶¶ 12. The Tribe is now actively pursuing an NIGC opinion regarding whether the Trust Indenture and related documents require NIGC approval with new counsel. *Id.* at ¶ 13.

While this Court has the authority to determine, in accordance with the case law outlined above, whether the Trust Indenture and related agreements are a management contract, if it believes that an NIGC opinion is necessary or would assist the Court in making the determination, then this case should be stayed until the NIGC has been given the opportunity to opine on this issue.

II. THE TRUSTEE IS NOT ENTITLED TO THE APPOINTMENT OF A RECEIVER.

A. The Law Does Not Allow Appointment of a Receiver.

[19] In fact, the Trustee was put on notice of the Corporation's belief that the Trust Indenture was a management contract and that the Tribe intended to seek NIGC involvement well before this lawsuit, when the parties attempted to negotiate a restructuring of the deal in the fall of 2009.

As argued above, The Trustee seeks to appoint a receiver to "oversee" a gaming operation that only a tribe can operate. Under the IGRA, a tribe is required to have the sole proprietary interest in and responsibility for the conduct of any gaming operation. 25 U.S.C. § 2710(b)(2)(A). Moreover, casino gambling in the State of Wisconsin must be conducted by tribes in accordance with gaming compacts with the State. Appointing a receiver outside of the Tribe that has *any* ability to control or conduct the operations (including the finances) of the Casino Facility runs afoul of IGRA, the NIGC rules, and state and Tribal law. *See* Section I(A)(3), *infra*, particularly n.14.

Even if this Court did have jurisdiction, the Trustee is not entitled to the extraordinary remedy of the appointment of a receiver under these circumstances. In fact, because it would place control of the Casino's finances outside the Tribe, the remedy the Trustee seeks itself violates tribal, state, and federal law.

The Trustee makes much of the Corporation's failure to dispute that it is in breach of the terms of the Trust Indenture. The Court should reject this argument for three reasons. First, the Corporation believes the Trust Indenture and related documents are void and unenforceable and therefore, compliance with such terms is unnecessary. Nevertheless, as stated by the Corporation's Controller, the funds withdrawn from the Operating Reserve Account were placed in an account and are being held there during the pendency of this litigation.

Second, it is important to note that compliance with the terms of the Trust Indenture, has had the practical effect of financially crippling the Tribal government and causing severe financial distress to many members of the Tribe. *See generally* Philemon Dec., Beson Dec. As outlined in the declaration of the Accounting Supervisor for the Tribe, the Tribal government budget has been slashed and numerous critical services for the children, elderly and adult Tribal

members have been suspended or terminated as vital Casino revenue that is necessary to support the Tribal government has gone toward making the Bond payments rather than supporting the Tribe. Philemon Dec. at ¶¶ 6-32; Beson Dec. at ¶ 7.

As a practical matter, if the Tribal government is prevented from receiving the amounts needed to meet its already dramatically reduced budget, it cannot operate. This puts the Corporation, the Tribe, the Trustee and the bondholder in a Catch-22. The Casino cannot legally operate unless it is under the management of a viable tribal government or an approved management contractor. And the Tribal government cannot be viable and continue to operate without the funds it must receive from the Casino operations. Under the current terms of the Trust Indenture, the Tribal government effectively receives no operating revenue during the winter months. Maki Supp. Dec. at ¶ 5.

Third, well aware of the legal issues surrounding the appointment of a receiver with control over the financial operations of a sovereign nation raises, the Trustee repeatedly attempts to diminish the effect of its motion, arguing that it simply seeks a receiver to "oversee" the Corporation's finances. But, the fact is that any receiver that has the ability to exercise *any* control over the funds generated by the Casino Operations has the potential not only to violate federal law, *see* n.14, *infra*, but also to cut off the lifeblood of the Tribal government and the Tribe itself. The Tribal government gets the vast majority of its operating budget from the Casino operations. Philemon Dec. at ¶ 3. This budget, much of which has been cut, included expenditures for care for the elderly, education, healthcare and other critical benefits. *Id.* at ¶ 14-32. Stopping, delaying or diverting monies that the Tribal government needs to fund these activities will be catastrophic for the Tribe's members who depend on these funds. The

appointment of a receiver could also severely impact the ability of the Tribal government, which has already been dramatically reduced as a direct result of the Bond payments, to operate.

B. Even if Appointment of a Receiver Were Permitted, The Trustee Has Not Shown That The Federal Receivership Factors Weigh In Its Favor.

In its initial motion, and even in its reply brief, the Trustee failed to address many of the receivership factors or to adequately allege how these factors weigh in favor of the appointment of a receiver. It is well-settled that the moving party is not automatically entitled to this extraordinary remedy, but rather has the burden to prove that it is warranted. *See, e.g.*, *JPMorgan Chase Bank, N.A. v. Heritage Nursing Care, Inc.*, 2007 WL 2608827, at *8 (N.D. Ill.).

To reiterate, among the non-exclusive factors considered in the decision to appoint a receiver are:

> (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 probable 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).

The Trustee further suggests that two additional factors, "whether the defendant was of doubtful financial standing" and "whether the property was of insufficient value to insure payment," should be given considerable weight here given the type of receiver requested. *Id.*

First, however, contrary to the Trustee's assertions, this is not a simple case of a receiver collecting rent from a rental property, which is the context in which these factors may be given greater weight. *Id.* Rather, the Trustee is seeking a receiver to "exercise simple oversight" (Pl.'s Reply Br. at 2) over the Corporation's finances, including the funds generated from the Casino Operations.

According to Webster's Dictionary, however, "oversight" is defined as "watchful care: general supervision: MANAGEMENT." Webster's 3d New Int'l Dictionary (1986) at 1610 (capitalization in original). Thus, despite the Trustee's attempt to minimize the scope of its request, it is seeking the appointment of a receiver with management and supervisory powers. Courts have held that where a receiver is vested with managerial powers there must be "something more," like "the risk of economic waste, foreclosure delays, or other any other factor that compels appointment of a receiver." *See Sterling Svgs. Bank v. Citadel Devel. Co.*, 2009 WL 2952041, at *9 (D. Ore.).

Indeed, the language of the Trust Indenture, upon which the Trustee relies, purports to entitle the Trustee to obtain a receiver "of the Trust Estate and of the revenues, issues, payments and profits thereof…*with such powers as the court making such appointment shall confer*." Trust Indenture § 8.04. The Trust Indenture's broad language strongly reinforces the fact that the agreements constitute a management contract and that any such receiver would ultimately be in a position to manage a part of the Casino operations, in violation of federal law.

Moreover, the fact that the Trust Indenture provides for the right to a receiver is hardly determinative. *See Sterling Svgs. Bank*, 2009 WL 2952041, at *1 ("consent to a receiver is not dispositive of the issue"); *D.B. Swirn Spec. Opp. Fund, L.P. v. Tama Broadcasting, Inc.*, 550 F. Supp. 2d 481, (S.D.N.Y. 2008) (noting that courts retain discretion to deny appointment of a

receiver under appropriate circumstances even where contract provides specific right to appointment) (citation omitted). The Trustee must produce sufficient evidence of the federal receivership factors in order to succeed. *Id.* The Trustee has failed to do that here.

Second, the Trustee has failed to allege facts sufficient to support its contention that the Corporation is in "doubtful financial standing" or that there is "insufficient" property to insure payment on the Bonds. As supported by the facts alleged by the Trustee, the Corporation is financially healthy and has sufficient revenue to meet its Bond and operating expense obligations. The issue here is the fact that the Bond terms and covenants, in combination with the downturn in the economy and the cyclical nature of gaming in northern Wisconsin, have forced the Tribal government to make a Hobson's choice – continue setting aside Casino revenue at the rate required and making the Bond payments to the severe financial detriment of the Tribal government and the many members of the Tribe who depend on the government and governmental programs to subsist, or stop setting aside amounts in accordance with those terms and continue to provide essential services to the Tribe and its members during the winter months. The Tribe made a decision that favored the future health and stability of the Tribe.

1. The Trustee's Claim is Based Solely on a Contract that is Void and Unenforceable.

The Trustee apparently believes that because the Tribe's former counsel issued a legal opinion that the Trust Indenture and related agreements were not management contracts, that makes it so. The Trustee also apparently believes that it was the Corporation and Tribe that "issued such an opinion," rather than the Tribe's counsel, and therefore the Corporation should be forever estopped from questioning the validity of the Trust Indenture. Pl.'s Reply Br. at 4. In fact, however, the Corporation relied upon its counsel's opinion to the same extent at the Trustee and bondholder and thus had a legitimate and reasonable basis for failing request or obtain an

opinion from the NIGC that the Bond documents did not require NIGC approval. The Court should not punish the Tribe for its reliance on advice of counsel.

Moreover, it is customary for lenders to obtain their own, independent opinion, particularly for transactions of this magnitude, as well as to make obtaining an NIGC opinion advising that the loan documents do not constitute management contracts a condition of closing. The Trustee and bondholders took neither precaution.

As outlined in detail above, the Trust Indenture and related agreements have numerous provisions characteristic of a management contract, including management and control over financial matters, personnel, and other aspects of the gaming operation, including but not limited to the receivership provision at issue here. *See* Section I(3), *infra.* Because the NIGC has not approved the Trust Indenture, it is void, and the Trustee's claims must fail.

2. The Trustee has Failed to Allege Fraud by the Corporation.

The Trustee's carefully hedged fraud allegations recognize that, aside from bald, conclusory allegations, it has no evidence of fraud on the part of the Corporation. Indeed, the facts reveal that Corporation has done nothing to defraud the Trustee or the bondholder. Funds were withdrawn from the Operating Reserve Account pursuant to a certification that the funds were necessary. Given the current dispute, the Corporation has delayed the use of any of those funds and has maintained the amount withdrawn in a separate account, where those funds remain. Maki Dec. ¶ 6. While not necessarily consistent with the accelerated timeline arbitrarily set by the Trustee, the Corporation did respond to the Trustee's requests for documentation (Maki Dec. at para. 4, Ex. D), and were it not for this litigation, would have submitted the requested information when it became available.

3. The Trustee has Not Alleged That the Property is in Imminent 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." No evidence exists to support this bald assertion. However, the Trustee has not – and indeed cannot – claim that these funds are in any real danger. The Trustee has pled no allegations of corporate mismanagement or waste. The Trustee has not claimed that the Corporation keeps inadequate records, suffers from cash flow problems, or is in poor financial condition. *See, e.g., JPMorgan Chase*, 2007 WL 2608821, at *9.

The mere fact that the funds in question are no longer under the Trustee's control does not prove that the property is in danger of being squandered. Moreover, the Corporation has informed the Trustee, and the Court, where the funds withdrawn are being held and has consented to maintain those funds in their current account. Maki Dec. at ¶ 6.

4. Legal Remedies Would Adequately Protect the Trustee.

The Trustee has failed to show how legal remedies, such as a money judgment, would be inadequate here. There has been no suggestion that the Corporation is insolvent, that the assets of the Corporation are being wasted or mismanaged, or that there would not be sufficient assets to satisfy a money judgment should the Trustee prevail in this lawsuit. Indeed, as stated by the Corporation's Controller, the funds withdrawn from the Operating Reserve Account are being maintained in a separate account during the pendency of this litigation. Maki Dec. at ¶ 6.

Courts have held that where the underlying claim "involves the payment of certain sums of money subject to ready calculation," if the party seeking a receiver prevails on the merits, his claim "is compensable as money damages." *Waag v. Hamm*, 10 F. Supp. 2d 1191, 1194 (D.

Colo. 1998); *see also Meyer Jewelry Co. v. Meyer Holdings, Inc.*, 906 F. Supp. 428, (E.D. Mich. 1995) (the availability of money damages demonstrates adequacy of legal remedies and lack of irreparable harm). The same is true here, especially where there is no assertion that the assets securing the Bonds will be depleted before judgment could be obtained. *See, e.g., JPMorgan Chase*, 2007 WL 2609927, at *10. Therefore, this factor weighs in favor of the Corporation.

5. The Balance of Harms Weighs Strongly in Favor of the Corporation.

The Trustee is tellingly silent with regard to the balance of harms. However, as set forth in the Corporation's response brief, the harm to the Corporation and, consequently, the Tribe could be catastrophic. Indeed, the remedy sough here could severely impair the ability of a sovereign nation to govern itself.

The Trustee did not request a receiver to "monitor" the financial activities of the Corporation – it seeks a receiver with the ability to "exercise oversight," which includes supervision and management, over the Corporation's finances. *Cf. JPMorgan Chase*, 2007 WL 2609927, *10. 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, in addition to creating huge regulatory concerns for all involved, as a practical matter cutting off funds to the Tribal government would effectively shut it down. And, without a functioning Tribal government, there can be no governmental programs and no Casino operations.

Moreover, the Corporation and the Tribe are also required to follow certain federal and state regulations, as outlined above. The Corporation and the Tribe are liable if those regulations are not followed – presumably even if a receiver were in place making determinations as to the allocation of gaming revenue. 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.

As one court noted, "receivership may do more harm than good. The cost and expense of the suggested receiver…is likely significant. Further, appointment of a receiver would unnecessarily complicate this action." *Waag*, 10 F. Supp. 2d at 1195; *see also Meyer Jewelry*, 906 F. Supp at 434 (finding appointment of a receiver unjustified where defendant was not insolvent, there was no imminent threat to the plaintiff's investment and that "the deleterious effects of a receiver on the day to day operation" showed that a receivership would result in more harm than good). That is certainly the case here, as irreversible damage may be done to the health and stability of the Tribe if a receiver is appointed. Thus, this factor weighs heavily against the appointment of a receiver.

6. 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 Trust Indenture, 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 Trust Indenture. But without any allegations of waste or mismanagement, 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.

7. 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 would do more harm than good.

8. 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. The Trustee argues that its definition of "oversight" does not include any "managerial" function or the ability to direct the Casino operations. If that is the case, however, then it is difficult to see how increased transparency and additional financial reporting pursuant to this Court's order would be insufficient to address the Trustee's concerns during the pendency of the litigation.

CONCLUSION

Ultimately, the Trust Indenture is void because it gives the bondholders so much control over the Casino that it constitutes an unapproved management contract under IGRA. And because the only waiver of sovereign immunity that would give this Court jurisdiction to take

any action against the Corporation is embedded in the void Trust Indenture, the Court lacks jurisdiction to consider appointing a receiver. But even if that were not the case, appointing a receiver to "oversee" the Casino's finances is unworkable and unjustified.

In the heavily regulated arena of Indian gaming, all primary management officials—whether they work for outside management companies or are directly employed by the Tribe—must undergo thorough background checks by the Tribe that are reported to the NIGC and receive tribal gaming licenses. And outside management companies, i.e. managers who are not *employed* by a tribal casino but rather operate the casino under a management contract, must also be vetted by the NIGC and the State of Wisconsin before their management contracts can be approved. So placing a receiver in charge of tribal finances, which is indisputably a management function, would violate IGRA, the Tribe's NIGC-approved gaming ordinance, and the Tribe's Compact with the State of Wisconsin. On top of all that, the Trustee has utterly failed to show that a receiver is necessary in this instance. The Trustee's motion must be denied.

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