No. 10-2069

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

Wells Fargo, National Association, as Trustee,

Appellant,

v.

Lake of the Torches Economic Development Corporation,

Appellee.

Appeal from the January 11, 2010 Judgment and April 22, 2010 Order of the
United States District Court for the Western District of Wisconsin,
District Court Case No. 09-CV-768
The Honorable Judge Rudolph T. Randa, Presiding by Designation

BRIEF OF THE DEFENDANT-APPELLEE, LAKE OF THE TORCHES ECONOMIC DEVELOPMENT CORPORATION

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Oral Argument Requested

Circuit Rule 26.1 Disclosure Statement

Appellate Court No: 10-2069

Short Caption: Wells Fargo Bank, N.A., as Trustee v. Lake of the Torches Economic Development Corporation.

(1) The full name of every party that the attorney represents in the case:

Lake of the Torches Economic Development Corporation.

(2) The names of all law firms whose partners or associates have appeared for the party in the case (including proceedings in the district court or before an administrative agency) or are expected to appear before the party in this court:

Michael Best & Friedrich, LLP and Jacobson Buffalo Magnuson Anderson & Hogen, P.C.

(3) If the party or amicus is a corporation:

(i) Identify all its parent corporations, if any; and

None.

(ii) list any publicly held company that owns 10% or more of the party's or amicus' stock:

None.

Attorney's Signature: s/Monica M. Riederer Date: 9/10/2010

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Jurisdictional Statement

Appellant's jurisdictional statement is not complete or correct.

Appellant, Wells Fargo Bank, N.A. ("Wells"), is a citizen of South Dakota, not, as it contends, a citizen of California. Br. at 1[1] (citing *Hertz v. Friend*, 130 S.Ct. 1181 (2010) (refining the principal-place-of-business test)). Citizenship of national banks is evaluated under the National Bank Act, *not* the principal-place-of-business test, *Wachovia Bank, N.A. v. Schmidt,* 546 U.S. 303, 306 (2006), so for diversity purposes, Wells is *only* a citizen of the state of its incorporation, South Dakota. A-001;[2] *In re Arbitration Between Wells Fargo Bank, N.A. v. WMR e-PIN, LLC,* Civil No. 08-cv-05472, 2008 WL 5429134, at *1 (D. Minn. Dec. 29, 2008).

Appellee, Lake of the Torches Economic Development Corporation (the "Corporation") is a single-purpose, wholly owned entity of the Lac du Flambeau Band of Lake Superior Chippewa Indians (the "Tribe"), established under tribal law to own and operate the Lake of the Torches Resort Casino (the "Casino"). The Corporation's principal place of business is in Wisconsin. While the Seventh Circuit has not addressed the citizenship of a tribal corporation, it should find, as the Ninth Circuit has, that a tribal corporation, such as the Corporation, is a citizen of the state of its principal place of business. *Cook v. AVI Casino Enters., Inc.,* 548 F.3d 718, 724 (9th Cir. 2008). Under that analysis, there is complete diversity of citizenship and the amount in

[1] Citations to Plaintiff-Appellant's Principal Brief are "Br. at __."
[2] Citations to the Appendix are "A-__." Citations to the Supplemental Appendix are "SA-___." Citations to documents in the Record on Appeal as "Doc. __," referencing the CM/ECF System Document Number, and the CM/ECF-assigned page number.

controversy exceeds $75,000, so the District Court had jurisdiction under 28 U.S.C. § 1332.

This case was dismissed on January 6, 2010, judgment was entered on January 11, 2010, and a corrected judgment was entered on January 19, 2010. SA003, SA004, SA002. Wells timely filed motions to vacate the judgment and for leave to amend its complaint on February 8, 2010, Doc. 50, both of which were denied on April 23, 2010. SA016-31. Wells timely filed a notice of appeal from a final order and judgment on April 30, 2010. Doc. 66. This Court has appellate jurisdiction. 28 U.S.C. § 1291; Fed. R. App. P. 3(a)(1), 4(a)(1)(A), 4(a)(4)(A)(iv).

Statement of Issues Presented For Review

1. Under the Indian Gaming Regulatory Act ("IGRA"), a "management contract" provides for management of all or part of a gaming operation. The Indenture gives Wells the ability to dictate hiring and firing of casino executives, to approve capital expenditures, to have a receiver appointed to control casino finances, and to force the Corporation to hire an outside gaming consultant. Did the District Court correctly conclude that the Indenture constitutes a management contract?

2. The Corporation is immune from suit absent a valid waiver of its tribal sovereign immunity. Although the Indenture contains a waiver, under IGRA, unapproved management contracts are void *ab initio*, so the waiver is ineffective. Did the District Court correctly hold that absent an effective waiver the court lacked jurisdiction to hear Wells's complaint?

3. To vacate a judgment and obtain leave to amend a complaint, a party must show new evidence or a manifest error of law *and* prove that its amended claims are not futile. Wells introduced only facts and claims that were available to it from the outset, and could show no error of law or valid new claim. Should the District Court have vacated its judgment and allowed Wells to try pleading anew?

4. On appeal, parties can only rely on facts and documents that are in the record. Wells relies on facts and documents it unsuccessfully sought to introduce *after* judgment was entered against it. Should this Court rely on Wells's new facts and documents?

Statement of the Case

Wells appeals the District Court's dismissal of its complaint for lack of jurisdiction and subsequent denial of its post-judgment motions to vacate the judgment and for leave to amend its complaint.

On December 21, 2009, Wells commenced this suit for breach of a trust indenture (the "Indenture") and brought an expedited motion to appoint a receiver over the Casino's gross revenues. A-001; Doc. 4. Seven days later, the Corporation responded to the motion, asserting that the Indenture (and the purported waiver of sovereign immunity contained therein) was void under IGRA, and therefore the District Court lacked jurisdiction over the Corporation. Doc. 12. Judge Crabb set a December 29 telephone hearing on the motion, SA-032, and Wells filed a reply brief before that hearing. Docs. 15, 16. At the hearing, Judge Crabb set a second hearing on the motion, and ordered the parties to submit any additional briefing by noon on January 5, 2010. SA-034.

Both parties timely filed supplemental briefing, Docs. 28 and 31, but the same morning, Judge Crabb recused herself and the case was reassigned. Doc. 26. Judge Randa cancelled the scheduled hearing, SA-036, and issued an Order dismissing the case. SA-003. Days later, he issued a Decision and Order further explaining the dismissal. SA-004.

Wells filed motions to vacate the judgment under Rule 59(e) and for leave to file an amended complaint under Rule 15. Docs. 49, 50, 52. Following thorough briefing by the parties, Judge Randa denied Wells's motions, finding no error in dismissing the

case, and holding that because the Indenture and all collateral documents were void, the Corporation had not waived its sovereign immunity, the Court lacked jurisdiction over the Corporation, and any amendment would be futile. SA-016. Wells timely appealed. Doc. 66.

STATEMENT OF FACTS

A. Overview

Wells, an experienced lender, bargained for onerous management terms in the Indenture but did not take the routine step—for its own protection—of asking the NIGC to decide at the outset whether the terms rendered the Indenture a management contract under IGRA. Instead, through these proceedings, Wells seeks to have courts rewrite the law to relieve it of the consequences of its "surprising" and "completely unreasonable" conduct. *See* SA-015.

B. The Record

Wells's Statement of Facts is riddled with citations to documents that are not in the record below. The District Court dismissed this case on January 6. SA-003. Wells repeatedly cites documents that it submitted after that date in support of its rejected Motion to Vacate and Amend. For example, Wells cites as "facts" the Amended Complaint (A-120-149), the Declaration of Michael D. Cox (Doc. 51; A155-63), the Declaration of William N. Newby (Doc. 53; A164-168), the Offering Memorandum (Doc. 50-5) and the Bonds (A-169-74). Each of these was rejected by the District Court when it denied Wells's post-judgment motions. While none of this post-judgment supplementation is appropriately considered on appeal, *see, e.g., Del. Valley Floral Group, Inc. v. Shaw Rose Nets,* 597 F.3d 1374, 1380 n.1 (Fed. Cir. 2010) (citing cases), for the sake of completeness, the Corporation will respond to Wells's arguments regarding these documents.

C. The Indian Gaming Regulatory Act

In 1988, Congress passed IGRA to pervasively regulate Indian gaming and to ensure that Indian tribes are the primary beneficiaries of Indian gaming. *See* 25 U.S.C. §§ 2701, *et seq.*[3] As part of IGRA, Congress created the NIGC "to meet congressional concerns regarding gaming and to protect such gaming as a means of generating tribal revenue." *Id.* § 2702(3). One of the NIGC's responsibilities under IGRA is to approve "management contracts" between tribes and their outside partners, and ensure that the contracts comply with IGRA. *Id.* § 2711. IGRA's regulatory scheme is significant here because management contracts that are not approved by the NIGC are "void" *ab initio*. *Id.* § 2711(a)(1); 25 C.F.R. § 533.7.

D. Gaming Revenue and the Bond Transaction

The Tribe is a federally recognized Indian 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, the Tribe established bingo and casino operations, including the Casino. Doc. 31 at 2.

The Casino is located on trust land, and the Tribe formed the Corporation, a not-for-profit corporation organized under tribal law and wholly owned by the Tribe, to operate the Casino. Doc. 31 at 2. As a matter of tribal constitutional law, the Lac du Flambeau Tribal Council "manage[s] all economic affairs and enterprises of the Tribe" —including operation of the Casino—in its governmental capacity. *Id.* Federal law also

[3] Each of the statutes cited herein was included in Wells's Supplemental Appendix and therefore will not be re-submitted here.

requires that the Tribe's Casino activities, including management of Casino operations and regulation and use of Casino revenues, are governmental activity. *Id.* at 2-3.

The Tribe's gaming revenues, including its Casino revenue, directly benefit the economic and social development of the community. Doc. 31 at 2. The Tribal government depends almost entirely on distributions from the Casino revenue to operate. Doc. 31 at 5. Historically, the vast majority of the Tribe's annual budget has been funded by distributions from the Casino and the Tribe's related amenities. *Id.*

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"). Doc. 31 at 3.

1. The Bond Offering

To fund its minority share in the Grand Soleil Project and to consolidate existing debt, the Corporation issued taxable gaming revenue bonds (the "Bonds") in the principal amount of $50,000,000, bearing an interest rate of 12 percent per year. A-012-096. The security for the Bonds was a pledge of the gross revenues from, and certain assets of, the Casino. *Id*.

In connection with the Bonds, the Corporation executed the following documents:

- Trust Indenture ("Indenture") (A-012-096);
- Security Agreement (Doc. 29-2);
- Tribal Agreement (Doc. 29-3);
- Closing Certificate of President and Secretary of Corporation (A-097-104);
- Corporate Bond Resolution (A-101-104);
- Closing Certificate of President and Secretary of Tribe (Doc. 29-5); and
- Tribal Bond Resolution (Doc. 29-5 at 5) (collectively, the "Bond Documents").

As part of the transaction, the bondholder required the Corporation to hire outside counsel ("Bond Counsel") to provide a bond opinion ("Bond Opinion"). The Bond Opinion stated that the parties had obtained all necessary approvals, and that none of the Bond Documents constitute a management contract. A-110, A-112-113. Nevertheless, the parties knew that neither the Indenture nor any of the other Bond Documents had been submitted to the NIGC for review. SA-008-009.

2. The Terms of the Indenture

The District Court considered several terms of the Indenture and found that,"[t]aken collectively and individually, . . . [they] give unapproved third parties the authority to set up working policy for the Casino Facility's gaming operation." SA-011. In particular, these terms (collectively, the "Management Provisions"):

- Pledged the Casino's gross revenues and all rights to the Corporation's equipment and accounts, without limitation, as collateral, A-018, Granting Clause I and II;
- Permitted the bondholders to limit Casino capital expenditures, A-053;
- Gave the bondholders authority over the hiring, retention, and firing of primary management officials of the Casino, A-054; A-057; A-059;
- Allowed the bondholders to engage a management consultant whose advice the Corporation would be obliged to promptly follow, A-053; and
- Permitted the court to appoint a receiver to take over the Casino's finances—including all gross revenues and all Casino equipment and accounts—and to have "such powers as the court making such appointment shall confer." A-021-28; A-060.

E. Impact of the Bond Transaction

Although the Tribe pledged the Casino revenue as the security for the Bonds, it (and Wells) always expected that revenue from the Grand Soleil Project would fund the Bond repayment. Doc. 31 at 3. Unfortunately, the Grand Soleil Project has been plagued by problems since its inception and is not yet operational. *Id.* Therefore the Tribe was forced to fund Bond repayment solely with Casino revenue. The Casino generates sufficient revenue to cover the Bond payments on an annualized basis, but during the winter months, the Casino only generated enough revenue to meet the debt service on the Bonds, leaving no revenue available to fund tribal government operations and programs. Doc. 35 at ¶¶ 4, 5, 8.

The stress of the Bond payments on the Tribe was severe, forcing the reduction of its governmental budget from approximately $18 million in 2007 to $8.2 million in 2008 and $4.0 million in 2009. Doc. 34 at ¶¶ 6-8. The Tribe was forced to lay off employees and reduce or eliminate numerous government programs important to the health and welfare of Tribal members. Doc. 33 at ¶ 7. For example, among other government programs, the Tribe was forced to suspend its Building Inspection Program, which regulated the safety of construction on trust land that cannot be regulated by State inspectors. Doc. 34 at ¶ 19; *see also id.* at ¶¶ 10-31. Similarly, the Casino had to delay required capital expenditures until summer months when funding was available, but also when business peaked and the opportunity cost of disrupting Casino operations was greatest. Doc. 34 at ¶ 10.

In response to the financial distress caused by the Bonds, the Tribe retained new legal counsel in mid-2009 to attempt to renegotiate the Bond payments. The new counsel informed the bondholder of the Tribe's current financial crisis and was the first to identify and raise the concern with Wells and the bondholder that the Indenture might be a management contract requiring NIGC approval to be valid and enforceable, but Wells refused to restructure the Bonds. Doc. 33 at ¶¶ 8-9; Doc. 31 at 7.

When a new Tribal Council was elected in October 2009, it asked the new law firm to request an advisory opinion from the NIGC regarding whether the Indenture and other Bond Documents constituted a management contract.[4] Doc. 33 at ¶ 12. But when Wells commenced this litigation, that counsel withdrew because of a perceived conflict of interest, and the Corporation hired counsel of record to defend this suit. *Id.*

On November 31, 2009, the Corporation requested that Wells transfer $4,750,000 from the operating reserve account "to pay the operating expenses of the [Corporation]." Doc. 6-3. Wells did so, *id.*, but later requested certain financial reporting from the Corporation. Docs. 13-2, 13-4. The Corporation's Controller quickly responded via email that "the books for November are not yet closed, and the information you are requesting is currently not available," Doc. 13 at ¶ 4; Doc. 13-4, and reiterated in subsequent emails that the information sought was not normally maintained by the Corporation in the format Wells requested. Doc. 13-2 – 13-4. The

[4] Wells's assertion that the members of the new Tribal Council "campaigned to repudiate the Bonds to divert the funds to the Tribe" lacks any factual support in the record and is in fact false. The *only* mention of such a charge below appeared as an allegation in Wells's proposed Amended Complaint, which was rejected by the District Court. Br. at 12, citing A131-132.

Corporation received a Notice of Default on December 18, and Wells commenced this litigation on December 21.

F. Wells's Emergency Motion to Appoint a Receiver

Despite having notice that the Corporation believed that the Indenture was an unenforceable management contract, Wells pursued an aggressive litigation strategy built only on the Indenture claims. Wells's Complaint alleged that the Corporation breached the Indenture, but it did not assert any claims under any other Bond Documents or raise any claims for equitable relief. A-001-11.

Wells set this case on the fast track by filing an expedited motion to appoint a receiver the day it brought suit, Doc. 4, and in doing so brought the management-contract and sovereign-immunity issues "squarely and immediately before the Court[.]" Doc. 65 at 8-9. Wells recognized that this issue could void not only the Indenture, but the entire transaction: "[The Corporation] offers only one substantive defense . . . that 'the [Trust] Indenture *and related agreements* are void and unenforceable as unapproved management contracts under the IGRA.'" Doc. 15 at 2 (emphasis added). Nevertheless, in its 21-page reply addressing the management-contract issue, Wells did not actually counter the Corporation's arguments regarding these related agreements and did not give any indication that it wanted the Court to consider any document other than the Indenture to determine whether the Corporation waived its sovereign immunity.

At the Court's request, both parties filed supplemental briefing on the management-contract and sovereign-immunity issues. Doc. 31; Doc. 28. Wells's ten-page brief and accompanying declarations continued to argue that the Indenture was

not a management contract. Docs. 28, 29. But even in this third-round supplemental briefing, Wells did not indicate any desire to amend its complaint to include additional equitable causes of action or ask the Court to consider other Bond Documents. Nor did Wells disclose the existence of or make any kind of proffer with regard to any additional witnesses, experts, or evidence that it intended to raise at the hearing–then scheduled for 9:00 a.m. the next day. Docs. 28, 29.

On January 6, following Judge Crabb's recusal, Judge Randa ordered the case dismissed without oral argument because, "[u]pon consideration of the briefs, affidavits, declaration and exhibits submitted in this matter, the Court finds that the Trust Indenture is a management contract that was executed without prior approval from the [NIGC and] . . . without prior approval, the entire contract is void *ab initio*." SA-003 (internal citations omitted). Judge Randa's January 11 Decision and Order further detailed that the Indenture and its purported waiver of sovereign immunity were void under IGRA, SA-009-011, "destroy[ing] the Court's jurisdiction over the defendant." SA-012.

G. Wells's Post-Judgment Conduct

Relying on the District Court's Order voiding the Indenture, the Corporation immediately asked Wells to return the funds it held under the void Indenture, including revenue generated by the Casino. Doc. 61-2, 61-3. Wells did not respond. Instead, on or around January 14, it withdrew nearly *all* of the funds from the Corporation's accounts. Doc. 60-2. Wells, purportedly acting as Trustee under the void Indenture, then distributed $5 million of Bond proceeds from the Corporation's bond

reserve account and approximately $1.2 million of Casino revenue from the Corporation's operating reserve account to the bondholder. *Id.* Adding this to the nearly $13,500,000 in Bond payments that the Corporation had already made, the Corporation has paid nearly $20,000,000 on the Bonds. Wells also withdrew approximately $15,484 in trustee and "extraordinary administrative fees," from the funds remaining in the Corporation's accounts, Doc. 60-3, and has continued to withdraw funds totaling over $500,000 to pay its monthly "expenses," including legal fees for this litigation.

H. Wells's Motions To Vacate the Judgment and Amend its Complaint

Wells next filed motions to vacate the judgment and for leave to amend the complaint, tacking on the affidavits of two previously undisclosed "expert" witnesses and an amended complaint containing numerous new factual allegations and causes of action. But none of the information alleged in the amended complaint was "new," nor were any of the "new" causes of action based on any newly discovered facts or conduct. Rather, the claims primarily relate to purported waivers of sovereign immunity in other Bond Documents and causes of action for breach of the Bonds. Of course, Wells had copies of all the Bond Documents when it drafted and filed its initial Complaint.

Likewise, Wells's new "experts," offered opinions that could have been provided before dismissal. For example, Michael Cox was asked to opine regarding whether the Indenture was a management contract. A-157. William Newby was asked to provide "testimony regarding the customs and practices in the Indian gaming finance industry, to opine on the bond transaction at issue, [and] the Trust Indenture at issue." A-165.

Aside from Wells's proposed supplemental pleadings and the District Court's dismissal order, *all of the documents* relied upon by the declarants were available to Wells long before this lawsuit. A-157; A-165.

Standard of Review

The District Court's dismissal of this case for lack of jurisdiction should be reviewed *de novo*. *E.g., Wisconsin v. Ho-Chunk Nation,* 512 F.3d 921, 929 (7th Cir. 2008); *Iddir v. Immigration & Naturalization Serv.,* 301 F.3d 492, 496 (7th Cir. 2002). This District Court dismissed this case *sua sponte*—not on a motion to dismiss or for summary judgment.

This Court should review denial of Wells's motions to vacate the judgment and amend its complaint for abuse of discretion. *E.g., Fannon v. Guidant Corp.,* 583 F.3d 995, 1002 (7th Cir. 2009). Wells cites no authority to support its preference that this Court review the motion to vacate and amend under the *de novo* standard.

Summary of Argument

This appeal marks the latest of Wells's attempts to have a court relieve it from the legal impact of its careless heavy-handedness. In negotiating the Bond deal, Wells pushed for—and obtained—harsh provisions designed to protect the security for the loan and ensure repayment by the Corporation. But despite bargaining for these provisions that implicate management of the Casino on their face, Wells "surprising[ly]" opted not to take the routine step, *for its own protection*, of submitting the financing documents to the NIGC for review. SA-015.[5]

Then, despite being on notice that the Corporation believed the Indenture to be a void management contract, Wells chose to limit its claims to breach of contract relating to the Indenture, opting not to include any equitable causes of action, any other Bond Documents, or any expert opinions. Instead, it sought the expedited appointment of a receiver over the Corporation's gross revenues. When its initial complaint was dismissed in a matter of days, Wells asked the Court for a mulligan, attempting to bolster the scanty record it had created with an amended complaint and after-the-fact affidavits that were properly rejected by the District Court. Now that the court has invalidated the Indenture, Wells wants another do-over, asking this Court to ignore the

[5] There is no support in the record for Wells's incendiary claim that the Corporation sought to "manipulate" IGRA to avoid its obligations under the Bonds. Instead, the record demonstrates the Corporation's good-faith reliance on advice of counsel, a litany of budget cuts and other financial hardships caused by the Bonds, and the Corporation's unsuccessful attempt to renegotiate the onerous and illegal terms of the Bonds. Doc. 31 at 5-8, 25; Docs. 33, 34. In contrast, it is Wells that seeks to perform a judicial end-run around IGRA by asking this Court to effectively usurp the NIGC's role in the review and approval of management contracts.

clear mandates of IGRA and directives of the NIGC and blue-pencil the Indenture. But this Court cannot rewrite the void Indenture any more than it can rewrite IGRA.

First, the District Court correctly found that the Indenture was a management contract because the Indenture, through the Management Provisions, gave the bondholder the ability to manage the Casino operation. The District Court's decision follows federal precedent and is fully supported by NIGC opinions issued before and after the decision.

Second, Wells's argument that the Indenture should still be enforced even if it is an unapproved management contract ignores the clear language of controlling NIGC regulations that unapproved management contracts are "void." As the District Court correctly held, Wells may not use contract-severance principles to end-run around IGRA and the NIGC.

Third, the District Court correctly held that because the Indenture was void, the other Bond Documents were also void. Wells's proposed parsing of the transaction is nonsensical and unsupported by IGRA.

And at each step, Wells had its chance to protect its interests, build its record, and make its case. The District Court afforded Wells three opportunities to be heard before dismissing the case *sua sponte* for lack of jurisdiction, as that Court was fully entitled—and in fact required—to do.

Argument

I. The District Court Had Subject-Matter Jurisdiction Under 28 U.S.C. § 1332.

As a general rule, an Indian tribe is not a citizen of any state for the purposes of diversity jurisdiction, meaning that it is not subject to suit in federal court where jurisdiction is based solely on diversity. *Romanella v. Hayward*, 114 F.3d 15, 16 (2d Cir. 1997). But there is an "absolute dearth of case law" regarding the citizenship of tribal corporations. *Cook v. AVI Casino Enterprises, Inc.*, 548 F.3d 718, 723 (9th Cir. 2008). Indeed, the Seventh Circuit has yet to definitively rule on this issue, [6] which must be resolved before reaching the merits of this appeal.[7]

This Court should follow the Ninth Circuit and hold that "a corporation organized under tribal law should be analyzed for diversity jurisdiction purposes as if it were a state or federal corporation," while still enjoying the same sovereign immunity as the tribe. *Cook*, 548 F.3d at 723, 726. This approach follows the plain language of the diversity statute, which provides that a corporation is a citizen of "the State where it has its principal place of business." 28 U.S.C. § 1332(c)(2). For the Corporation, that is Wisconsin. The Eighth Circuit's test, which looks to whether a tribal entity operates as "an arm of the tribe and not as a mere business," ignores the language of the statute and focuses on the function of a tribal entity, finding that where it is governmental, as is the Corporation's, Doc. 31 at 2-3, the entity is treated like a tribe and is not considered a

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[6] This Court appears to have assumed the existence of diversity jurisdiction in *Altheimer & Gray v. Sioux Manuf. Corp.*, 983 F.2d 803, (7th Cir. 1993), which involved a tribal corporation.
[7] The Corporation questioned the existence of diversity jurisdiction in its first pleading below, but the District Court did not address the issue. Doc. 12.

citizen of any state. *Auto-Owners Ins. Co. v. Tribal Court of the Spirit Lake Indian Reservation*, 495 F.3d 1017, 1021 (8th Cir. 2007). Under the more practical Ninth Circuit test, which this Court appears to have used, *see supra* at n.6, the parties are diverse and subject-matter jurisdiction exists.

II. Because The Indenture Is An Unapproved Management Contract, The District Court Correctly Held It And The Related Bond Documents Void *Ab Initio.*

Applying the language of IGRA and its implementing regulations to the facts of this case, the District Court correctly held that it had "no choice but to conclude that the Indenture is a 'management contract.'" SA-012. Since then, the NIGC—the federal agency with specialized expertise applying IGRA and charged by Congress to determine whether agreements are management contracts—has expressly agreed with the District Court's decision and cited it with approval at least *nine* times. AD013-81.[8]

A. Unapproved Management Contracts Are Void Under IGRA.

Congress passed IGRA in 1988 to pervasively regulate Indian gaming and to ensure that Indian tribes are the primary beneficiaries of Indian gaming. 25 U.S.C. §§ 2701 *et seq.* "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 Operations., LLC v. Multimedia Games, Inc.*, 412 F.3d 1166,

[8] Citations to publicly available documents, such as NIGC Bulletins and declination letters, which are provided for the Court's convenience in Defendant-Appellee's Addendum, are "AD___." The Court may take judicial notice of these agency decisions. *See, e.g.*, Fed. R. Evid. 201; *Golden Hill Paugussett Tribe of Indians v. Rell*, 463 F. Supp. 2d 192, 197 (D. Conn. 2006). Historically, the Seventh Circuit has reviewed and given deference to agency interpretations such as opinion letters, holding that "given the specialized experience and broader information available to such an agency [as the NIGC], these informal interpretations are 'entitled to respect' to the extent that they have the 'power to persuade.'" *Am. Fed. Of Gov't Employees v. Rumsfeld*, 262 F.3d 649, 656 (7th Cir. 2001) (citations omitted).

1167-68 (10th Cir. 2005). Specifically, IGRA requires that all management contracts be approved by the Chairman of the NIGC, and that all management contractors submit detailed background information to the NIGC before approval. 25 U.S.C. § 2711; 25 C.F.R. § 531.3.

The management-contract-approval process is rigorous, but critical to tribes and their commercial partners because without the NIGC's approval, management contracts are void *ab initio* and entirely unenforceable. 25 C.F.R. § 533.7; *Catskill Dev., LLC v. Park Place Enter. Corp.*, 547 F.3d 115, 128 (2d Cir. 2008) ("no part" of contract that is void under IGRA may be enforced or relied on) (quoting *A.K. Mgmt. Co. v. San Manuel Band of Mission Indians*, 789 F.2d 785, 789 (9th Cir. 1986)); *see also* Kevin K. Washburn, *The Mechanics of Indian Gaming Management Contract Approval,* 8 Gaming L. Rev. 333, 334 (2004) ("Washburn Article");

B. The NIGC Applies a Flexible Test to Determine Whether An Agreement is a Management Contract.

Congress did not define "management contract" in IGRA, but the NIGC has defined it 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 C.F.R. § 502.15. Under *Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, this Court "may not substitute its own construction" for the NIGC's definition of the term. 467 U.S. 837,

844 (1984). [9] The NIGC has further explained 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." AD002. Under *Skidmore v. Swift & Co.*, this NIGC guidance has "the power to persuade, if lacking power to control." 323 U.S. 134, 140 (1944).

Given IGRA's strict prohibition against unapproved management contracts, and the commercial reality that some parties want to enter into management contracts, but others want to avoid them, the NIGC has created two separate regulatory processes. First, where parties *intend* to enter into management contacts, the NIGC subjects the agreements to the formal contract-approval process to ensure they meet all of IGRA's requirements for management contracts. Second, where the parties *do not intend* enter into management contracts, the parties can ask the NIGC to review their agreements to advise whether it believes the agreements have inadvertently strayed into management-contract territory. AD001.

The *contract-approval* process is rigorous and requires the NIGC to review the substantive provisions of the proposed contract and the proposed management company's background. Washburn Article, *supra,* at 334, 337-45. Parties seeking approval must submit the management contract and any related contracts (*i.e.*

[9] Wells did not argue below that the NIGC's definition is unreasonable, arbitrary, capricious, or contrary to IGRA, and therefore may not do so here. *County of McHenry v. Ins. Co. of the West*, 438 F.3d 813, 819 -820 (7th Cir. 2006).

"collateral agreements") to the NIGC for review so that the NIGC can confirm that the parties have not sought to avoid IGRA's restrictions on management contracts (*e.g.* capping the amount of management fees) by hiding prohibited terms in collateral agreements. *Id.* at 334-36. Although the NIGC reviews the management agreement and all collateral agreements, its Chairman approves only the management contract itself, ensuring that it conforms with IGRA and includes all statutorily required provisions. *See* 25 C.F.R. § 531.1.[10]

In contrast, the *contract-review* process is the converse of contract approval, and is used by parties who seek a "declination letter" confirming that the NIGC agrees that contracts are not management contracts. *See, e.g.*, AD013-81. Under the contract-review process, the NIGC considers the entire set of interrelated agreements together to ensure that none conveys management authority, judging the agreements as a group. *See* AD002 (urging parties to send in all related and referenced agreements); AD004-10. After the NIGC "review[s] each submission and determine[s] whether the agreement requires the approval of the NIGC[,]" it advises the parties of its decision by letter. AD001. Though these letters are not binding, they provide guidance regarding the NIGC's interpretation of the agreements and are persuasive evidence of the NIGC's "body of experience and informed judgment to which courts and litigants may properly

[10] While Wells is correct that Dean Washburn agrees that collateral agreements do not need to be approved as part of the contract-approval process, Doc. 52 at 19, he also noted that the contract-review process is separate from the management-contract-approval process. Doc. 32 at ¶ 3; Washburn Article, *supra*, at 345 ("Upon request, the NIGC will review a contract and issue a letter indicating that the contract is not subject to the management contract review and approval process."). His affidavit was primarily directed to the process applicable to this case—the contract-review process, not the contract-approval process.

resort for guidance." *Skidmore*, 323 U.S. at 140. If the NIGC finds that the agreements do not constitute a management contract and declines jurisdiction over them as such, the parties can take comfort that its agreements are valid without NIGC approval. If the NIGC opines that the agreements collectively constitute a management contract, the parties must decide whether to work with the agency to remove the management provisions from the agreements (so that they do not need NIGC approval) or to affirmatively seek management-contract approval by reforming the agreements to meet all management-contract criteria. Parties who seek to avoid creating a management contract yet decline to engage in the contract-review process assume the risk of creating an unapproved management contract that is void *ab initio*. That is precisely the risk Wells assumed here.

1. An Agreement Need Not Be For The Purpose Of "Managing And Operating" a Casino or Be Labeled a "Management Contract" To Be Considered One Under IGRA.

In response to parties' attempts to get around the contract-approval requirements by entering into "consulting agreements" rather than "management contracts," the NIGC has advised that it is *effect*, not nomenclature, that drives the management-contract analysis. *See* AD002. The NIGC has made clear that, regardless of the title or intended purpose of an agreement, whether a particular agreement is a management contract must be determined by reference to "the facts and circumstances of the individual situation[.]" AD003

Wells's formalistic statutory-interpretation argument that the Indenture cannot be a management contract because its primary purpose was not "for the operation" of

the Casino, Br. at 25-29, is unpersuasive because it completely ignores the NIGC's guidance. *E.g.*, *Seneca-Cayuga Tribe of Okla. v. Nat'l Indian Gaming Comm'n*, 327 F.3d 1019, 1035 (10th Cir. 2003) (finding arguments grounded in the history of IGRA more persuasive in interpreting the statute than a "rather bald" statutory-construction argument) (citing cases). This Court is bound by the agency's regulatory definition that "*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" is a management contract. 25 C.F.R. § 502.15 (emphasis added); *Chevron*, 467 U.S. at 844. Regardless of Wells's statutory-construction semantics, the NIGC's application of this standard "encompasses many activities (e.g. planning, organizing, directing, coordinating, and c*ontrolling*)," 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." AD002 (emphasis added).

Though not controlling, NIGC Bulletin 94-5, AD002, and the NIGC's subsequent application of the Bulletin to dozens of agreements in the decade since, is persuasive. *Skidmore*, 323 U.S. at 140. Indeed, courts following the NIGC's lead have invalidated agreements as unapproved management contracts under IGRA regardless of the subject, purpose, form, or title of the agreement. *See, e.g., Catskill Dev.*, 547 F.3d 115 (concluding that agreements for the purchase, development and construction of land were void as unapproved management contracts); *First Am. Kickapoo*, 412 F.3d 1166

(concluding that gaming machine operating lease was void as an unapproved management contract); *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 as unapproved management contracts).

And in fact, the Eighth Circuit has invalidated a loan agreement as part of a series of agreements that, taken together, constituted a management contract. *U.S. ex rel. Bernard v. Casino Magic Corp.*, 293 F.3d 419, 424 (8th Cir. 2002) ("*Casino Magic I*"). Although in later proceedings the Eighth Circuit refused to disgorge borrowing fees—as opposed to management fees—that the tribe paid Casino Magic under the contracts, *U.S. ex rel. Bernard v. Casino Magic Corp.*, 384 F.3d 510, 514-15 (8th Cir. 2002) ("*Casino Magic II*"), it was not because, as Wells states, "there is a difference between lending and management" under IGRA. Br. at 41. Rather, *Casino Magic II* determined the proper damage award in light of *Casino Magic I*, and in particular whether, under the *qui tam* provisions of 25 U.S.C. § 81, the relator could recover borrowing fees (as opposed to management fees) that Casino Magic had collected under an invalidated bridge loan and the bank loan. *Casino Magic II*, 384 F.3d at 514. Before doing so, the Eighth Circuit was clear: "[t]he issue of damages [under 25 U.S.C. § 81]. . . requires a slightly different analysis" than the *Casino Magic I* IGRA analysis. *Id.* Because recovery under 25 U.S.C. § 81 is not at issue in this appeal, *Casino Magic II*'s damage analysis is inapposite. Rather, the "different" analysis required by IGRA applies, and under that analysis, the *Casino Magic I* Court invalidated a term loan agreement to which the "manager," Casino Magic, was not even a party. *Casino Magic I*, 293 F.3d at 422 (describing the term loan

agreement between the tribe and a bank) and 427 (concluding the term loan agreement was a management contract).

Perhaps unsurprisingly, following the District Court's decision, several tribes and lenders asked the NIGC to review various bond and financing documents. In response, the NIGC has cited the District Court's invalidation of the Indenture with approval at least *nine* times. AD013-81. In fact, the NIGC has since expressly rejected Wells's argument that "lending" cannot be "management":

> A financing agreement is a management contract if it requires a third party to approve or accept a tribe's management decisions about its gaming activity. This is so because the management decision is ultimately left to the discretion of, and is therefore under the control of, the third party. For example, an agreement that requires a tribe to obtain the consent of its lenders before making capital expenditures for the casino is a management contract. Such was the case in *Lake of the Torches*, and I agree with the court's finding there.

AD056-57.

2. The Potential for Management Makes an Agreement a "Management Contract" Under IGRA.

Even the *opportunity* to manage a tribe's casino can invalidate an agreement because contingent management is still management. For example, in *First Am. Kickapoo,* the Court rejected the argument "that a contract is only a management contract if it confers rights rather than opportunities to manage" as a misstatement of the law. 412 F.3d at 1175. Wells cites no authority for the proposition that "management" under IGRA must be absolute. Indeed, there is none. Similarly, Wells's argument that the Indenture is not a management contract because neither it nor the bondholders invoked any of the Management Provisions in the year that preceded this

suit falls flat. A requirements contract to deliver widgets is still a requirements contract even if the buyer never needs any widgets. At all times, the Indenture provided the potential for Wells or the bondholders to exercise the Management Provisions and, under IGRA, that is management. *Id.*

3. An Agreement Can Be an Unapproved Management Contract Under IGRA Regardless of Whether the Parties Intend To Enter a Management Contract, and Regardless of Whether the Agreement Includes IGRA's Mandated Management-Contract Provisions.

Wells's repeated protests that neither party intended for the Indenture to be a management contract may be true, but this is irrelevant under IGRA. Courts have repeatedly invalidated unapproved management contracts without regard for whether the parties thought the agreements were management contracts when they entered into them. *E.g. Catskill Dev.*, 547 F.3d 115; *Casino Magic I*, 293 F.3d 419; *First Am. Kickapoo*, 412 F.3d 1166; *Machal*, 387 F. Supp. 2d 659.

But party intent *is* important to determine whether the *contract-approval* or *contract-review* analysis applies. If the parties *intend* to enter into a management contract, they follow the NIGC's *contract-approval* process, where the NIGC is unconcerned by indicia of management, but ensures that the contract *includes* various statutory requirements. *See* 25 U.S.C. § 2711. If the parties *do not intend* to enter into a management contract, they follow the *contract-review* process, in which case the NIGC is unconcerned whether the contract meets the statutory requirements, but requires *exclusion* of management indicia. *See* AD001.

Here, because the parties *did not intend* to enter into a management contract, it is unsurprising that the Indenture did not contain all the statutory prerequisites for a management contract. Rather, the District Court properly framed the question as one of whether Indenture's terms gave Wells or the bondholders management authority over all or part of the Casino.[11]

C. The Indenture Is a Management Contract.

The District Court correctly found that because the Management Provisions, taken collectively and individually, allowed Wells to perform various management activities with respect to the Casino, the Indenture is a management contract under IGRA. Wells's weak protests that the Corporation "has been and continues to be the operator and manager of the Casino," Br. at 26, is *only* true because the District Court *denied* Wells's expedited motion for appointment of a receiver. If it had not, the receiver—who has not been approved by the NIGC—would now control the Casino's gross revenues, and would have a financial stranglehold on the Tribe. IGRA does not allow this result.

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[11] And where, as here, a contract is an unapproved management agreement, the *related* and referenced agreements also fail. *See* AD002 (urging parties to send in all related and referenced agreements). To determine whether an agreement *not intended* to be a management contract has crossed the line and become one, both the NIGC and courts review the entire set of interrelated agreements as a whole to determine whether they collectively constitute a management agreement. *E.g. Casino Magic I*, 293 F.3d at 425 ("The issue is whether Casino Magic, in fact, had managerial control. The NIGC found that it had, given the *combined effect of the series of agreements*. We defer to that finding.") (emphasis added); AD004-10 (opining that series of loan and other agreements considered together could constitute a management contract). These interrelated agreements stand or fall as a group, which is why Wells's belated attempts to reference transaction documents other than the Indenture must fail. *See infra* at 47.

Regardless of whether the Management Provisions are "typical" outside of the Indian-gaming context, Br. at 24, or are "routinely found in commercial loan agreements to protect a lender's security interest in the pledged security[,]" *id.* at 29, because they provide for the management of all or part of the Casino, they and the contract they are part of are void if not approved by the NIGC. Contrary to Wells's mischaracterization that the "[D]istrict [C]ourt did not analyze the contested provisions, other than to rely on Kevin Washburn's affidavit[,]" *id.*, the Court's analysis of the Management Provisions spanned four pages and compared, point by point, the language of the provisions to IGRA case law, NIGC regulations, *and* the Washburn Affidavit. SA-009-012. While Wells does not rely on a *single* IGRA case or regulation to support its claimed error,[12] the District Court's decision that the unapproved Management Provisions impermissibly allowed for the management of the Casino and therefore rendered the Indenture void, SA-012-013, is well supported by the law.

1. The Capital-Expenditure Provision

Under § 6.18 of the Indenture, 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 be withheld." A-053. On its face, this allows the bondholders to

[12] Because Wells cannot rely on the NIGC's interpretation of its own regulations and cannot point to a single court that has parsed IGRA as it would have this Court do, it is forced to resort to lender-liability laws. Br. at 29-33. Wells gives no authority for its unpersuasive supposition that lender-liability laws should inform this Court's analysis of whether a contract is a "management contract" under IGRA—a statute that pervasively regulates the field of Indian Gaming. *See id.* at 32.

direct and control how much the Corporation can spend on capital expenditures related to the Casino, and gives them "the opportunity to exert significant control over the management operations of the Casino Facility." SA-010 (citing 25 C.F.R. § 531.1(b)(1)). The NIGC agrees, stating in a declination letter issued after the decision in this case that "an agreement that requires a tribe to obtain the consent of its lenders before making capital expenditures for the casino is a management contract. Such was the case in *Lake of the Torches,* and I agree with the court's finding there." AD056-57. The District Court correctly held that, under IGRA, this is management. SA-012.

2. The Consultant Provision

Section 6.19 of the Indenture provides that if the debt-service-coverage ratio (which compares available revenues to the amount due) "falls below 2.00 to 1," the bondholders can require the Corporation to "promptly retain an Independent management consultant with sufficient experience in and knowledge of the gaming industry *approved by the Bondholder Representative*" to conduct a review of Casino operations and submit a report making "recommendations as to improving the operations and cash flow" of the Casino. A-053 (emphasis added). This provision further requires the Corporation to "use its best efforts to implement the recommendations of the management consultant within ninety (90) days from the date that the final management report is delivered to the Corporation." *Id.*

Requiring a tribe to follow an "approved" outside consultant's operational advice constitutes management, and renders the indenture a management contract. Doc. 45 at 7 (citing *First Am. Kickapoo,* 412 F.3d at 1173; 25 C.F.R. § 531.1(b)(4)); *accord,*

Casino Magic I, 293 F.3d at 425 (finding that loan agreement that mandated a tribe to follow an outside consultant's advice was a management contract); AD057 (agreeing with the District Court that Section 6.19 of the Indenture allowed the bondholders to "exert significant control over the management operations of the Casino Facility"). *Contra* AD046-47 (opining that agreement was not a management contract where, "[u]nlike the *Lake of the Torches*, the Loan Agreement does not require the Tribe to obtain the Lenders' approval of the independent consultant.").

3. The Replacement Provision

In § 6.20 of the Indenture, "[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]." [13] A-054. Regardless of a lender's "interest" in who manages the Casino, Br. at 31, by potentially requiring the Corporation to retain key employees *and* regulators even if the Corporation wanted their removal, this Section affords the bondholders extraordinary authority over primary management officials of the Casino.

In fact, it appears to prevent the Tribe from removing such officials even if they had taken some action that would require the Tribe, under IGRA or its Tribal Gaming Control Ordinance, to revoke the officials' gaming licenses (which all primary management officials must have). Doc. 36-3; *see also* 25 U.S.C. § 2710(b)(2)(F). Yet

[13] The Tribal Gaming Commission is the tribal regulatory body that enforces the Tribe's Gaming Ordinance. Doc. 36-3.

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 Indenture. A-057. The District Court correctly held that this provision impermissibly affords the Bondholders control over management of the Casino. Doc. 45 at 7 (citing *First Am. Kickapoo,* 412 F.3d at 1173; 25 C.F.R. § 531.1(b)(4)).

4. The Default-Replacement Provision

Upon an event of default, the Indenture gives bondholders *even more* authority over the Tribal gaming operation. For example, upon certain events of default, a 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." A-059. By affording the bondholders the right to require new management—whether the Corporation wants it or not—this section vests the bondholders with management authority, and the District Court correctly held that this provision renders the Indenture a management contract. SA-011; *accord Machal*, 387 F. Supp. 2d at 669 (contract that "excludes Jena Band from operating a gaming operation on its own [ ]" a management contract). And, indeed, the Corporation cannot even "select" a replacement manager, Br. at 31, it can only "recommend" one for approval by the bondholders. A-059. This, too, is management. *See* 25 C.F.R. § 502.15; *accord* 25 C.F.R. § 531(b)(4) (listing hiring of employees as a "management" function).

5. The Receivership Provision

Wells's assertion that it and the bondholders "have never . . . exercised any of the contested 'management' provisions[,]" is patently false. Br. at 6. Through this lawsuit, Wells affirmatively exercised § 8.04 of the Indenture—perhaps the most problematic of the Management Provisions. That section 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." A-060. The "Trust Estate" includes all assets pledged by the Corporation to secure the Bonds, *i.e.*, the gross revenues, equipment and accounts of the Casino, without limitation. A-021-28. If enforced, this provision would permit the Court to give a non-tribal entity complete control over the Casino's finances, and by extension, over the day-to-day operation of the Casino.

Control over casino finances is a primary function of casino management, as evidenced by many of IGRA's statutory requirements for management contracts. *See* 25 C.F.R. §§ 531.1(b) and (c). The NIGC and courts have made clear that the "authority to decide how and when operating expenses at the gaming facility are paid . . . is itself a management function. Furthermore, a party that controls gross revenue potentially can control everything about the gaming facility by allocating or putting conditions on the payment of operating expenses." Doc. 36-13 at 1; *see also* Doc. 36-12 at 3 (same); *Gaming World Int'l, Ltd. v. White Earth Band of Chippewa Indians,* 317 F.3d 840, 842-43 (8th Cir. 2003) (finding that a contract with provisions that dictate how gaming revenues are allocated is a management contract); *Machal,* 387 F. Supp. 2d at 665 (finding

"responsibility for financing procedures such as financial reporting and the paying of taxes, employees and other costs" an indicia of management).

Indeed, while opining on a very similar Wells trust indenture, the NIGC expressly agreed with the District Court's determination that *this* receivership provision is a management provision:

> The court in *Lake of the Torches* found [the receivership provision] to be management. The court noted that the receiver would have control over the trust estate, which was defined to include all of the gross gaming revenues of the gaming operation without limitation. *I agree* . . . .
>
> . . . . Appointing a receiver over the *Lake of the Torches* trust estate would give the receiver control over operating expenses and management authority over the casino.

AD060 (emphasis added) (internal citations omitted); *see also* AD013-52, AD065-81 ("I am aware of the recent decision in *Wells Fargo v. Lake of the Torches* and the court's holding that any agreement in which receivership is a possible remedy upon default is a management contract…I generally agree with the court's analysis").

The NIGC's concerns apply with equal force whether Wells had sought a receiver under Section 8.04 or Fed. R. Civ. P. 66. Br. at 32. The NIGC and IGRA case law make clear that the appointment of a receiver over the gross gaming revenues of a tribal gaming operation without limitation violates IGRA—regardless of the purported basis for the receiver's authority. The District Court was correct that "[b]y forcing the Corporation to deposit its revenues and pay its liabilities, the receiver would in fact be exerting a form of managerial control[.]" SA-011.

"Taken collectively and individually, [the Management Provisions] give unapproved third parties the authority to set up working policy for the Casino Facility's gaming operation." *Id.* Thus, IGRA gave the District Court "no choice but to conclude that the Trust Indenture is a 'management contract.'" SA-012.

D. The Indenture Cannot Be Severed Or Reformed.

IGRA also dictates the fate of unapproved management contracts: they are void.[14] 25 U.S.C. § 2711; 25 C.F.R. § 533.7. They are not voidable. They are not reformable. They are *void*. *See, e.g.,* AD002; 25 C.F.R. § 533.7; *see also First Am. Kickapoo,* 412 F.3d at 1176 ("Lacking the formality of NIGC approval, an agreement to manage *does not become a contract: it is void.*") (emphasis added); *Catskill Dev.,* 547 F.3d at 128 (same). The NIGC's regulation on this point is controlling. *Chevron,* 467 U.S. at 844. Having correctly held that the Indenture was void *ab initio*, there was nothing left for the District Court to sever or reform. Wells may find that result draconian, but its complaint is with Congress and the NIGC—not the Court.

[14] The single exception to IGRA's rule of automatic voiding 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); *Sokaogon Gaming Ent. Corp. v. Tushie-Montgomery Assoc., Inc.*, 86 F.3d 656, 659 (7th Cir. 1996); *Match-E-Be-Nash-She-Wish Band of Potowatomi 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 compelled 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-E-Be-Nash-She-Wish Band*, 383 F.3d at 518.

1. Contract-Law-Severance Principles Do Not Apply To Voided Unapproved Management Contracts.

In an attempt to escape the inescapable, Wells relies solely on non-IGRA cases in to convince this Court that the NIGC's unambiguous implementation of IGRA is not "automatic." Br. at 34 (citing cases). Because IGRA occupies the field of Indian-gaming contracts, those cases are inapplicable. *See Gaming World*, 317 F.3d at 848 ("IGRA completely preempts state law with respect to Indian gaming."). Thus, the *Olson* case, which reformed an arbitration provision in a customer-broker agreement that violated Commodity Futures Trading Commission regulations by adding certain required notice terms, is neither controlling nor persuasive here. *See Olson v. Paine, Webber, Jackson & Curtis, Inc.*, 806 F.2d 731, 742-743 (7th Cir. 1986). The *Olson* regulations governed "voluntary" arbitration clauses and had no voiding provision similar to IGRA's. *Id.*; 17 C.F.R. § 180.3. Indeed, Wells's selective excerpting of *Olson* for its proposed "flexible" rule, Br. at 34, conveniently omits *Olson*'s reliance on *Northern Indiana Public Serv. Co. v. Carbon Cty. Coal Co.*, which applied a flexible standard because "this is *not a case where the contract is illegal*[.]" 799 F.2d 265, 272 (7th Cir. 1986) (emphasis added).

Even if IGRA did not preempt inconsistent contract law, this Court *cannot* do what Wells asks because, unlike the *Olson* and *Northern Indiana* contracts, this *is* a case where the contract itself is illegal. Unlike *Olson*, there are no terms that the Court can add here to avoid a "formalistic" violation. Neither IGRA nor the NIGC could be more clear that unapproved management contracts are void. Wells does not—and indeed

cannot—cite to a single IGRA case or NIGC opinion that even hints at the availability of other "less extreme" sanctions.

Similarly, Wells's argument that the Indenture's Section 14.04 severability clause trumps IGRA must fail. Because the Indenture was void *ab initio* under IGRA, it is as if it never existed. *First Am. Kickapoo*, 412 F.3d at 1176 (an unapproved management contract "does not become a contract"). There are no clauses to enforce, including Section 14.04. Here, too, Wells's reliance on non-IGRA case law is unpersuasive. Because IGRA occupies the field with regard to Indian gaming, *Gaming World,* 317 F.3d at 848, it trumps both Wisconsin law and the Restatement of Contracts. Unapproved management contracts are void. Period. 25 C.F.R. § 533.7.

2. Enforcing IGRA By Voiding the Indenture Supports The Congressionally Mandated Role of the NIGC.

Wells asserts that "enforcing the Indenture without the Management Provisions is exactly what the NIGC would have done had it concluded the Provisions were improper 'indicia' of management." Br. at 36. But this is demonstrably false. Following the District Court's decision in this case, Wells asked the NIGC to review gaming-financing documents that Wells had executed with the Sokaogon Chippewa Community to confirm that the bond documents were not, like the Indenture, unintended management contracts. AD053-64. In response, the NIGC specifically compared the Management Provisions—and the District Court's review of those Provisions—to the Sokaogon provisions. *Id.* Time and again, the NIGC agreed with the District Court. *Id.* But it never made *any* suggestion that the management provisions

could or should have been severed from the Indenture. *Id.* Nor did the NIGC suggest Wells or Sokaogon "sever" the potentially offending provisions of the Sokaogon bond documents—even though the NIGC could not offer a "definitive opinion" regarding whether a particular provision made the unapproved bond documents management contracts. AD053.

Certainly, *if* parties seek contract review *before* they execute Indian-gaming contracts, and the NIGC opines that certain provisions are management provisions, *then* the parties have a choice: they can seek NIGC approval of the contract as a management contract or they can remove the management provisions so that the contract does not require NIGC approval. But Wells's reliance on this contract-review process, Br. 36, is misplaced where it did not seek NIGC review *before* it entered into the Indenture. If Wells wanted the opportunity to delete provisions that constituted management, it could have—and should have—sought a declination letter *before* it executed the Indenture. But it did not, and can find no support now for its argument that this Court should revise the Indenture after the fact. To the contrary, under IGRA, once the parties enter an unapproved management contract, it is void; there is no do-over. 25 C.F.R. § 533.7.

Indeed, under the scenario Wells advocates, Indian tribes and their gaming partners could intentionally or unintentionally enter into management contracts without any regard for the NIGC approval process. If no dispute arose between the parties, the contract would never be subject to review. If a dispute did arise, a court—not the executive agency with Congressionally delegated powers—would decide what

did or did not constitute "management," and "reform" the contract without any need for the NIGC. While this would be a handy end-run around IGRA for Wells, it would eviscerate the balance struck by Congress and entirely undermine the purpose and authority of the NIGC. 25 U.S.C. § 2702(3) (establishing "independent Federal regulatory authority for gaming on Indian lands, . . . Federal standards for gaming on Indian lands, and the . . . National Indian Gaming Commission . . . to meet congressional concerns regarding gaming and to protect such gaming as a means of generating tribal revenue[.]").

This Court must enforce IGRA, not rewrite it. "To give piecemeal effect to a contract as urged by appellant, would hobble the statute." *Catskill Dev.*, 547 F.3d at 128 (quoting *A.K. Mgm't Co.*, 789 F.2d at 789). Like the *First American Kickapoo* defendant, Wells's "proposed severed version of the contract does not account for a provision that was almost certainly part of the package for which the Tribe bargained, and is therefore unconvincing." *First Am. Kickapoo*, 412 F.3d at 1178. The District Court correctly followed federal precedent, rejected Wells's severance argument, and found the entire Indenture void. SA-013; SA-020-21.

Despite Wells—and its *amicus curiae's*—alarmism, the sky has not fallen. Lenders continue to lend to tribes, taking steps to protect their own interests by seeking declination letters from the NIGC where appropriate—just as they did before the decision. AD013-81. And now, the *NIGC favorably cites the District Court's opinion in this case* in its declination letters as entirely consistent with IGRA. *Id.* The NIGC has provided substantial guidance over the years as to what does or does not constitute a

management contract, including providing sample language parties can use to ensure that provisions that collateralize the gross proceeds of a gaming operation do not amount to management provisions. *See, e.g.,* Doc. 36-13. The system has—and continues to—work when parties follow the rules and take the appropriate steps to protect their own interests—a step Wells "suprising[ly]" failed to take in this case. SA-015.

E. Because the Indenture Is Void, the District Court Correctly Held That It Lacks Jurisdiction Over the Corporation.

Sovereign immunity protects the Tribe from unconsented suit. *See, e.g., Kiowa Tribe of Okla. v. Manuf. Techs., Inc.,* 523 U.S. 751 (1998). 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) (citation omitted). It preserves the autonomous political existence of Indian tribes, protects tribal treasuries, and promotes the federal policy of tribal self-determination. *Am. Indian Agric. Cred. Consortium v. Standing Rock Sioux Tribe*, 780 F.2d 1374, 1378 (8th Cir. 1985); *Chemehuevi Indian Tribe v. Cal. State Bd. of Equalization*, 757 F.2d 1047, 1050-51 (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 760 ("Tribes enjoy immunity from suit on contracts, whether those contracts involve governmental or commercial activities"); *see also Altheimer & Gray v. Sioux Mfg. Corp.*, 983 F.2d 803, 812 (7th Cir. 1993) (holding sovereign immunity extends to "wholly-

owned governmental subdivision of the Tribe"); *Barker v. Menominee Nation Casino*, 897 F. Supp. 389, 393 (E.D. Wis. 1995) (dismissing complaint against tribal casino on sovereign-immunity grounds because "an action against a tribal enterprise is, in essence, an action against the tribe itself[.]") (quotation omitted). Further, tribal sovereign immunity is jurisdictional and precludes a court considering the merits of a barred claim. *Puyallup Tribe Inc. v. Dept. of Game of the State of Wash.*, 433 U.S. 165, 172-73 (1977).

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). But just as the Indenture's severance clause cannot be enforced because the Indenture was void, its purported waiver could not be enforced. *See A.K. Mgm't Co.*, 789 F.2d at 789 ("[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.").

Because "sovereign immunity is an immunity from trial and the attendant burdens of litigation, and not just a defense to liability on the merits[,]" *Enahoro v. Abubakar*, 408 F.3d 877, 880 (7th Cir. 2005) (quotation omitted), the invalidity of the waivers left the Court without jurisdiction over the Corporation. Thus, as the District Court correctly held, "[w]hether sovereign immunity is more akin to subject matter jurisdiction or personal jurisdiction. . . [w]hat matters here is that the Corporation did

not waive its sovereign immunity, so summary dismissal was appropriate." SA-023. The District Court correctly held that "[t]he Court's finding that the Trust Indenture is an unapproved management contract destroys the Court's jurisdiction over the defendant." SA-012.

III. The District Court Correctly Denied Wells's Motions To Vacate And Amend Its Complaint.

Wells argues that the District Court should have allowed amendment of its complaint *post-judgment* to assert new equitable and tort causes of action and rely on Bond Documents not included in its initial complaint. Br. at 43 *et seq*. To support its argument, Wells mischaracterizes the District Court's ruling and completely ignores the Federal Rules of Civil Procedure. The District Court did not abuse its discretion in denying Wells's motion to vacate. *Figgie Int'l, Inc. v. Miller*, 966 F.2d 1178, 1179 (7th Cir. 1992) (citations omitted).

A. The District Court Correctly Denied Wells's Rule 59(e) Motion to Vacate.

This Court has made clear that motions to vacate are properly limited to cases of manifest error of law or fact or newly discovered evidence. *Bordelon v. Chicago School Reform Bd. of Trustees*, 233 F.3d 524, 529 (7th Cir. 2000). A Rule 59(e) motion "does not provide a vehicle for a party to undo its own procedural failures, and it certainly does not allow a party to introduce new evidence or advance arguments that could and should have been presented to the district court prior to the judgment." *Id.* (quotation omitted); *see also Moro v. Shell Oil Co.*, 91 F.3d 872, 876 (7th Cir. 1996) (same).

1. The District Court did not commit manifest error.

"'[M]anifest error' is not demonstrated by the disappointment of the losing party. It is the 'wholesale disregard, misapplication, or failure to recognize controlling precedent.'" *Oto v. Metro. Life Ins. Co.*, 224 F.3d 601, 606 (7th Cir. 2000). But "Wells point[ed] to no controlling precedent which demonstrate[d] that the Court committed manifest legal error." SA-0020. Instead, Wells's post-judgment motion was a naked request for reconsideration of arguments already made, and an improper vehicle to supplement the post-judgment docket with an eye to this appeal.

Conspicuously lacking any authority in support of its claimed "error," Wells instead relies on pernicious mischaracterization of the Court's opinion. The District Court, however, did not "acknowledge" *any* error in the procedures below, let alone manifest error. Rather, it carefully considered and rejected *each* of Wells's arguments. The District Court correctly stated the standard a Rule 59(e) motion must meet, SA-012-020, and found that there was no legal error in the District Court's management-contract analysis, SA-020, its refusal to sever the illegal management provisions, SA-020-21, the speed of its ruling, SA-021-022, its citation to the Washburn Affidavit, SA-022, or its *sua sponte* dismissal for lack of jurisdiction. SA-022-24.

For the sake of completeness, despite properly rejecting each "error" raised by Wells, the District Court assumed *arguendo* that it *had* erred in order to reach the secondary motion for leave to amend. SA-024 ("In light of the unique procedural history of this case, the Court will *presume* that dismissal without leave to amend was in error and proceed to analyze the proposed amended complaint.") (emphasis added).

Though its concluding statement incorporating this *arguendo* assumption is perhaps inartful, SA-030, the Court did not "acknowledge" any error, and certainly not error sufficient to set aside its well-reasoned decision.

2. Wells did not introduce any newly discovered evidence.

This Court has recognized that a party seeking relief from a judgment "has a hard row to hoe, because normally Rule 59(e) motions may not be used to cure defects that could have been addressed earlier." *Fannon,* 583 F.3d at 1002 (citation omitted). Though a party may not file a motion to vacate "to complete presenting his case after the court has ruled against him[,]" *Alloc, Inc. v. Pergo, Inc.*, 572 F. Supp. 2d 1024, 1027 (E.D. Wis. 2008) (quotation omitted), this is precisely what Wells did.

To support its motion to vacate the judgment, Wells restyled its complaint, adding "new" causes of action, raising "new" legal arguments, and attaching "new" affidavits of two "experts" that it never even hinted at before the case was dismissed. But *all* of these claims, arguments, and facts were available *before* the Court entered judgment. Wells has never argued otherwise. "[O]ne would think that the plaintiff would have attempted to set the record straight *before* the court ruled[.]" *LB Credit Corp. v. Resolution Trust Corp.*, 49 F.3d 1263, 1268 (7th Cir. 1995) (emphasis added). But Well Fargo's silence as to why it could not have raised these claims, arguments, or facts while the case was pending is deafening.

As the District Court noted, "the management contract issue was brought squarely and immediately before the Court in the context of Wells's emergency request to appoint a receiver." Doc. 65 at 8-9. "Where a party is made aware that a particular

issue will be relevant to its case but fails to produce readily available evidence pertaining to that issue, the party may not introduce the evidence to support a Rule 59(e) motion." *Matter of Prince,* 85 F.3d 314, 324 (7th Cir. 1996). Time and again, this Court has made clear that "[m]otions to alter or amend judgment are no place to start giving evidence that could have been presented earlier . . . Unlike the Emperor Nero, litigants cannot fiddle as Rome burns." *Dal Pozzo v. Basic Mach. Co., Inc.,* 463 F.3d 609, 615 (7th Cir. 2006) (internal citation and quotation omitted); *see also Olbriecht v. Raemisch,* 517 F.3d 489, 494 (7th Cir. 2008) (upholding refusal to consider "new" affidavit and evidence to support motion to vacate when the movant "could have—and should have—presented them to the district court before it rendered judgment."); *LB Credit Corp.,* 49 F.3d at 1267-68 (upholding refusal to consider "new" arguments to support a motion to vacate). And this Court has repeatedly affirmed lower courts' refusal to vacate a judgment and grant leave to amend where plaintiffs offered "no explanation for the delay in raising the new issue prior to the entry of judgment." *See, e.g., Twohy v. First Nat'l Bank of Chi.,* 758 F.2d 1185, 1197 (7th Cir. 1985) (quoting *U.S. Labor Party v. Oremus,* 619 F.2d 683, 692 (7th Cir. 1980)). It should not depart from that course here.

B. The District Court Correctly Denied Leave to Amend the Complaint.

"It is well-settled that after a final judgment, a plaintiff may amend a complaint under 15(a) only with leave of court after a motion under Rule 59(e) or 60(b) has been made and the judgment has been set aside or vacated." *Figgie Int'l,* 966 F.2d at 1179 (citations omitted). Because the District Court denied Wells's motion to vacate the judgment, there was no post-judgment complaint to amend. Contrary to Wells's

intentional misstatement, the Court did not find "that Wells should have been given leave to amend[,]" Br. at 43 n.10, but only assumed *arguendo* that amendment was *possible* in order to reach the question of whether the proposed amendment was *proper*, SA-024, and then correctly held that the proposed amendment was futile. SA-024-030.

Before dismissal, the only purported waiver of sovereign immunity that Wells argued would allow this case to proceed was the one in the void Indenture. Doc. 15 at 4. *After* the Court entered judgment, Wells also argued in its "statement of additional facts" that various other purported waivers in the related Bond Documents gave the Court jurisdiction over this case. Doc. 52 at 8-10.[15] This could-have-should-have post-judgment argument is "too little too late." *Moro,* 91 F.3d at 876; *see also LB Credit,* 49 F.3d at 1267-68. But for the record, it is also unavailing.

The Court correctly held that the other Bond Documents cannot confer jurisdiction, and here again, Wells's blatant mischaracterization of the Court's Order is unhelpful:

- The Court did not "acknowledge" that if the waivers of sovereign immunity contained in the other Bond Documents were "valid," the amended complaint could proceed. Br. at 43. Instead, it correctly found that "[t]he waiver provisions in these documents were generated in connection with the bond transaction, and they presuppose the validity of the same." SA-030.

- The Court did not simply hold that "once there has been a determination that an agreement is a management contract, all related documents are void unless

[15] Notably, Wells now attempts to rely on the Offering Memorandum and the Bond Opinion as providing enforceable waivers of the Corporation's sovereign immunity. Br. at 43. The Offering Memorandum merely *describes* other waivers, Doc. 50-4 at 4, it does not contain a waiver. The same is true of the Bond Opinion, Doc. 50-7, which also *could not* be a waiver of the Corporation's sovereign immunity because it was authored by the Corporation's former outside Bond Counsel, and not the Corporation itself.

submitted to the NIGC." Br. at 46. Instead, it looked at "the entire transaction[,]" found that "[c]onstrued together, the Bonds and the Trust Indenture reflect the parties' intention to allow the Trustee to exert managerial control[,]" and refused to "artificially divid[e]" the transaction. SA-027-028.

- Contrary to Wells's suggestion, Br. at 46, the Court *did* evaluate the Bond Resolution, Offering Memo, and opinion of Bond Counsel and held that "waiver provisions in these documents were generated in connection with the bond transaction, and they presuppose the validity of the same. To the extent that these waivers can be considered enforceable against the Corporation, they are collateral agreements to the bond transaction and are void[.]" SA-030.

Neither the Indenture nor the other Bond Documents were reviewed by the NIGC. If the Indenture had been approved as a management contract, the other Bond Documents would have been submitted to and reviewed by the NIGC as collateral agreements as part of the management-contract-approval process. *See supra at* 24-26. In that process, the NIGC would not have been concerned with how interdependent the transaction documents were because one, the Indenture, would have obtained NIGC approval, and the management contractor would have undergone a thorough background investigation. 25 C.F.R. Part 533.

But because the Indenture and the other Bond Documents were not submitted to the NIGC for approval, in determining whether they constitute a management, the District Court correctly reviewed them collectively to determine whether they were a management contract—as the NIGC would have in the contract-*review* process—collectively. Doc. 65 at 13; *see also, e.g.,* Doc. 36-5 at 1; AD004-10; *Casino Magic I*, 293 F.3d at 424-25. Under this analysis, even if one agreement, standing alone, is not a management contract, it becomes one if it is intertwined with and dependent upon other agreements that do provide for management. Thus, in *Casino Magic I*, even

though the NIGC had initially determined that a consulting agreement, standing alone, was *not* a management contract, 293 F.3d at 421, "[w]hen the NIGC had the opportunity to review the Consulting Agreement and the Construction and Term Loan Agreement together, it determined that the documents created a management agreement, requiring approval under 25 U.S.C. § 2711." *Id.* at 424. The court therefore found all three agreements at issue—the consulting agreement, term loan agreement, and participation agreement—invalid. *Id.* at 427.

That is precisely the case here. The Bond Documents to which Wells belatedly turned to find a valid waiver are inextricably linked to the Indenture. For example, virtually every paragraph of the Bonds refers to the Indenture, *see* A-169-174. And the Bond Resolution makes clear that the entire transaction is governed by, and dependent upon the Indenture. A-101 (noting that the purpose of the Resolution is "to provide financing . . . all pursuant to a Trust Indenture . . . ."). Because the Indenture was, as it is in any bond transaction, the centerpiece of the Corporation's debt issuance, the District Court could not "imagine the Bonds existing without the Trust Indenture." SA-028. So it correctly refused to "artificially divid[e] the transaction in the manner suggested by Wells Fargo[.]" *Id.* This result is particularly compelling because the Bonds *expressly* incorporate the terms of the Indenture, and so "essentially provide for the 'management of all or part of a gaming operation'" by reference. SA-029. Just as the *Casino Magic I* Court considered the loan agreement, consulting agreement, and participation agreement together to determine whether they "served as a management contract implicitly, if not explicity[,]" 293 F.3d at 425, the District Court correctly

evaluated the interrelated Indenture and bond documents as a group. Since "[t]he waiver provisions in these documents were generated in connection with the bond transaction," SA-030, either all of the provisions were valid or none of them were. And because, "[c]onstrued together," the unapproved Bond Documents "reflect the parties' intention to allow the Trustee to exert managerial control[,]" all of the documents, including their purported sovereign-immunity waivers, were void. SA-028.

Given this, any amendment that Wells could think of—before or after dismissal, in tort, equitable restitution, or otherwise—was futile because "[w]ithout a valid waiver immunity, there was no jurisdiction over the Corporation, and the case could not proceed." SA-024. Regardless of how contracts are "ordinarily" treated under federal and state contract law, Br. at 48, Congress and the agency to which it delegated authority have spoken here: unapproved management contracts are automatically void *ab initio*. 25 U.S.C. § 2711(a)(1); 25 C.F.R. § 533.7. No restitution, no reformation: void. The Court was not "fundamentally wrong" to enforce the law. *Contra* Br. at 48. Rather, the District Court properly denied the motion to amend because "the proposed amendment fail[ed] to cure the deficiencies in the original pleading[.]" *Foster v. DeLuca,* 545 F.3d 582, 584 (7th Cir. 2008) (quotation omitted); *see also George v. Islamic Repub. Of Iran,* 63 Fed. Appx. 917, 918 (7th Cir. 2003) (holding that notice and hearing or the opportunity to amend are not necessary if the jurisdictional defect is incurable); *Frey v. EPA,* 270 F.3d 1129, 1131-32 (7th Cir. 2001) (same).

Moreover, without the Indenture, which forms the sole basis for Wells's authority and duties as Trustee, Wells lacks standing to pursue *any* claims on the

bondholders' behalf pursuant to the other Bond Documents. A-021-027; A-064-065. Indeed, Wells is not even a party to any of the other Bond Documents.

IV. The Parties Had Ample Opportunity To Develop A Complete Record Within The Limitations Of Wells's Request For Expedited Relief.

Despite its after-the-fact protestations, it was Wells who set the District Court up for its "unconventional" ruling by seeking to enforce the Indenture on an expedited basis, which Wells knew would put the management-contract issue squarely before the Court. Nevertheless, Wells had three separate chances to make a record on this issue before the District Court gave Wells what it demanded—an expedited determination.

The record reflects that the Corporation raised the management-contract issue several months before this litigation was even filed. Doc. 31 at 7. It was Wells that decided not to address the issue when it drafted its complaint and sought the expedited appointment of a receiver. Even so, as the District Court noted, the Corporation raised the management-contract issue in its "very first set of motion papers[.]" SA-022. In its reply, Wells *did* address the management-contract issue, but still gave no indication that it sought anything other than an expedited decision on the complaint and supporting materials that it had already proffered. Doc. 15. And even after a full round of briefing, when the District Court paused and requested supplemental briefing, Wells still did not blink. Judge Crabb's order was very clear—file all supplemental materials with the court by noon on January 5. Doc. 48 at 10. In its supplemental briefing, Wells *chose* not to proffer any other Bond Documents, any arguments regarding purported waivers of

sovereign immunity in the Bond Documents, any experts, or any indication that it desired other equitable relief. Doc. 28.

In a hurry-up game of its own making, Wells took three swings at the management-contract ball. It had every "reasonable opportunity" under the expedited circumstances that it created to offer *all* of the facts, evidence and arguments at its disposal *before* the Court ruled. Wells's failure to do so was its own error – not the Court's—and now Wells is stuck with the record it created.

Wells's post-hoc attempt to recast the Court's dismissal as the grant of summary judgment cannot change this. The Corporation never sought summary judgment, the Court did not enter summary judgment, and Wells's repeated recitation of summary-judgment case law has no place here.

Similarly, Wells's persistent complaints about the Washburn Affidavit are unfounded. The Washburn Affidavit was not susceptible to a motion to strike,[16] and Wells's reliance on cases regarding "undisclosed" experts is nonsensical. Just 16 days into the case, the Corporation submitted Dean Washburn's testimony in accordance with Judge Crabb's order that the parties file *all* supplemental materials with the Court by January 5. *See* Doc. 48 at 10. Wells (who had the benefit of knowing it was

[16] Even now, Wells does not challenge Dean Washburn's qualifications as an expert or the reliability of his testimony, nor does it challenge whether expert testimony was warranted. Instead, it appears to argue that because Dean Washburn's testimony: (1) is inconsistent with the opinion of Bond Counsel for the transaction; and (2) conflicts with the testimony of its own undisclosed expert witness—whose testimony was rejected by the District Court when it denied Wells's motion to vacate and amend, but who the District Court nevertheless found "unpersuasive" (SA-022) —that it should have been afforded the chance to move to strike the Washburn Affidavit. Br. at 51 n.14. Neither of those bases provides grounds for a motion to strike. *See, e.g., Buscaglia v. U.S.*, 25 F.3d 530, 533 (7th Cir. 1994).

commencing a lawsuit that would raise these issues) could have filed its "expert" reports that day. It cannot now blame the Court for its failure to do so.

Wells was not deprived of due process. There is nothing that could have been or that could now be developed before the District Court that would change the result in this case. The Indenture is an unapproved management contract and is therefore void *ab initio* along with all of the other Bond Documents, which are inextricably intertwined with the Indenture. There is no valid waiver of sovereign immunity and therefore there is no jurisdiction over the Corporation for any claims, contractual, equitable, or otherwise. The District Court correctly dismissed this case and denied Wells leave to amend.

Conclusion

Congress passes laws that courts must enforce. Wells, however, would have this Court ignore federal law to save it from itself. But IGRA, controlling NIGC regulations, and persuasive NIGC opinions make clear that the heavy-handed Management Provisions render the Indenture a management contract that, without prior approval, was void *ab initio*. Wells could have—and indeed should have—protected itself, but it did not, and this Court cannot rewrite the Indenture or IGRA after the fact to avoid a statutorily mandated result. Nor can it overhaul the regulatory scheme created by the NIGC, the agency charged by Congress with administering IGRA, to somehow save the other Bond Documents, which the NIGC and courts agree must fall with the Indenture. The District Court correctly applied the law to the facts before it to hold that the Indenture is a management contract, and the entire Indenture and dependent Bond

Documents are void under IGRA. If Wells dislikes this result, its complaint is with Congress and the NIGC, not the Court.

Dated this 10th day of September, 2010.

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Certificate of Compliance With F.R.A.P. Rule 32(a)(7)

I, Monica M. Riederer, one of the attorneys for Defendant-Appellee, hereby certify that the Principal Brief of Defendant-Appellee, the Lake of the Torches Economic Development Corporation, complies with the type-volume limitations set out for principal briefs in Federal Rule of Appellate Procedure Rule 32(a)(7). The brief, including headings, footnotes and quotations, contains 13,971 words, as calculated by the Microsoft Word Tools word count function.

s/ Monica M. Riederer
Monica M. Riederer

September 10, 2010

Circuit Rule 31(e)(1) Certification

I, Monica M. Riederer, certify that an electronic version of the Principal Brief of Defendant-Appellee, the Lake of the Torches Economic Development Corporation, has been uploaded via the internet on this 10th day of September, 2010, pursuant to Circuit Rule 31(e), and that the file uploaded is virus free.

s/ Monica M. Riederer
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September 10, 2010

Certificate of Service

The undersigned, an attorney, hereby certifies that she caused hard and electronic copies of the Principal Brief of Defendant-Appellee to be served on the persons listed below via e-mail and via U.S. Mail on this 10th day of September 2010:

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