UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN, GREEN BAY DIVISION

WELLS FARGO BANK, N.A.,
as Trustee,

Plaintiff,

v.

SOKAOGON CHIPPEWA COMMUNITY
(MOLE LAKE BAND OF LAKE SUPERIOR CHIPPEWA INDIANS)

Case No. 10CV1039

and

SOKAOGON GAMING ENTERPRISE CORPORATION,

Defendants.

DEFENDANTS' BRIEF IN SUPPORT OF MOTION TO DISMISS COMPLAINT

INTRODUCTION

More than one year after Plaintiff, Wells Fargo Bank, N.A., brought suit in state court for its contracts claims in Case No. 2009CV0079 (Forest County, Wisconsin), Plaintiff now seeks to envelop this Court in the same issues, involving a Trust Indenture and Guarantee signed by the Sokaogon Chippewa Community and its business arm, the Sokaogon Gaming Enterprise Corporation. Given that there is a pending parallel state matter, and that the Plaintiff's claims and the Court's jurisdiction depend on documents that are invalid for numerous reasons outlined below, this case must be dismissed for lack of subject matter jurisdiction, lack of personal jurisdiction and failure to state a claim upon which relief can be granted.

ARGUMENT

I. THE COURT LACKS SUBJECT MATTER JURISDICTION.

A. The Court Should Abstain From Hearing This Case Because There Is a Pending Parallel State Action.

Plaintiff has already sought comprehensive relief for its contracts claims in the Forest County Circuit Court, where litigation parallel to this federal suit has been pending since August 2009. Now Plaintiff has attempted to involve this Court by pleading three declaratory judgment actions and relying on supplemental jurisdiction to attach the state contract claims. (Compl. ¶ 6.) In the interests of judicial economy and wise judicial administration, and to avoid piecemeal litigation, the federal suit should be dismissed.

1. *Wilton/Brillhart* Applies, Giving the Court Substantial Discretion To Abstain From Hearing This Case.

This Court should apply the *Wilton/Brillhart* doctrine and use its considerable discretion to abstain from hearing the entire action because the Complaint contains only declaratory actions and non-declaratory actions dependent upon the success of the declaratory actions. *See Brillhart v. Excess Insurance Co. of America*, 316 U.S. 491, 494 (1942) (finding district courts have considerable discretion in deciding whether to entertain declaratory judgment actions); *see also Wilton v. Seven Falls Co.*, 515 U.S. 277, 286 (1995) (confirming continued vitality of *Brillhart* and rejecting use of *Colorado River* exceptional circumstances doctrine for declaratory judgment actions).

The *Wilton/Brillhart* doctrine provides a district court with significant discretion to dismiss claims seeking declaratory relief even if the court has subject matter jurisdiction over the claims. *R.R. Street & Co., Inc. v. Vulcan Materials Co.*, 569 F.3d 711 (7th Cir. 2009). This discretion stems from the language of the Declaratory Judgment Act which states that "[i]n a case of actual controversy within its jurisdiction … any court of the United States … *may* declare

the rights and other legal relations of any interested party seeking such declaration." *Id.* (citing 28 U.S.C. § 2201(a) (emphasis added)). As the Supreme Court explained in *Wilton v. Seven Falls Co.*, in enacting the Declaratory Judgment Act "Congress sought to place a remedial arrow in the district court's quiver; it created an opportunity, rather than a duty to grant a new form of relief to qualifying litigants." 515 U.S. 277, 286 (1995). Accordingly, "district courts possess considerable leeway in deciding whether to entertain declaratory judgment actions even though subject matter jurisdiction is established." *R.R. Street & Co., Inc.*, 569 F.3d at 714.

This doctrine should apply despite the Plaintiff having pled both declaratory and non-declaratory actions in its complaint. The Seventh Circuit recently determined that a district court can still exercise its discretion under *Wilton/Brillhart* and abstain from hearing the entire action even if both declaratory and non-declaratory actions are pled when (1) state and federal proceedings are parallel and (2) the claims seeking non-declaratory relief are not independent of the declaratory claims. *Id*. at *716*-17.

The suits in this case are "parallel" because "substantially the same parties are contemporaneously litigating substantially the same issues in another forum." *See LaDuke v. Burlington N. R. R. Co.*, 879 F.2d 1556 (7th Cir. 1989). The parties are actually identical. Meanwhile, nine out of fourteen counts in the Federal Complaint are identical to the counts found in the State Complaint.

These minor adjustments do not defeat the parallel nature of the suit. "Suits need not be identical to be parallel … and the mere presence of additional parties or issues in one of the cases will not necessarily preclude a finding that they are parallel. *AAR Intern., Inc. v. Nimelias Enterprises S.A.*, 250 F.3d 510, 518 (7th. Cir. 2001) (citations omitted). The relevant question is whether the state litigation "will dispose of all claims presented in the federal case." *Id*. (citation

omitted). The overarching issues raised in both the state and federal case are the same: (1) Was the contract valid? (2) Did Defendants breach the contract? and (3) What remedies are available if there was a breach or if the contract was invalid? Therefore, the state litigation will indeed dispose of all claims.

The second factor giving this Court discretion to abstain is also met here, because the non-declaratory claims cannot exist independent of the declaratory claims. The Seventh Circuit explained that "A claim for non-declaratory relief is 'independent' of the declaratory claim if: 1) it has its own federal subject-matter-jurisdictional basis; *and* 2) its viability is not wholly dependent upon the success of the declaratory claim." *R.R. Street & Co., Inc.*, 569 F.3d at 717 fn. 6 (emphasis added). Plaintiff relied solely on supplemental jurisdiction pursuant to 28 U.S.C. § 1367(a) to assert jurisdiction for its non-declaratory actions. (Plaintiff's Compl. ¶ 6). Therefore, removing the declaratory claims would remove the basis for jurisdiction for the state law contracts claims. Diversity jurisdiction could not save the state law claims because unincorporated federally recognized Indian tribes are not citizens of any state for the purposes of diversity jurisdiction. *CTGW, LLC v. GSBS, PC*, No. 09-CV667-bbc, 2010 WL 2739963, at *2 (W.D.Wis., July 12, 2010) (attached to brief).

In addition, the viability of the non-declaratory claims is dependent upon the success of the declaratory claims. The relief sought by Plaintiff in each non-declaratory action depends on its success on Count II, which asks this Court to declare the Indenture is not a management contract. If the Court does not side with Plaintiff on this issue, and declares the Indenture a management contract, then it is void for lack of NIGC approval. 25 U.S.C. § 2711; 25 C.R.F. § 533.7. If the Indenture is void, the state contracts claims cannot succeed.

Where the basis for abstaining is the pendency of a state-court proceeding, the Supreme Court has said it is often preferable to stay the federal court proceeding. *Wilton*, 515 U.S. at 288 n.2. Defendant therefore requests either a stay or a dismissal depending on what this Court finds to be appropriate.

2. Exceptional Circumstances Also Warrant Abstention In This Case.

Even if the non-declaratory claims could stand independently, this Court should dismiss the federal action pursuant to the exceptional circumstances test under the *Colorado River* doctrine, in the interest of wise judicial administration, conservation of judicial resources and comprehensive disposition of litigation. *See Lumen Construction Inc. v. Brant Construction Company*, 780 F.2d 691 (7th Cir. 1986).

The Supreme Court initially directed district courts deciding whether to defer to the concurrent jurisdiction of a state court to consider four factors: 1) which court first assumed jurisdiction over property; 2) the inconvenience of the federal forum; 3) the desirability of avoiding piecemeal litigation; and 4) the order in which jurisdiction was obtained by the concurrent forums. *Colorado River Water Conservation Dist. v. U.S.*, 424 U.S. 800, 818-19 (1976).

No single factor is necessarily dispositive, *id.*, yet all four factors favor a decision to abstain by this Court. Jurisdiction was first sought by Plaintiff in state court – more than a year before Plaintiff chose to take the same case to Federal Court. On November 29, 2010, the Forest County Circuit Court denied Plaintiff's Motion to Stay, thus revealing its intention to move forward with the case despite the pending federal action. If both actions were allowed to proceed concurrently, piecemeal litigation would certainly ensue, complete with the potential for conflicting interlocutory decisions or conflicting decisions on the merits of the claims. Lastly,

the Forest County Circuit Court is more convenient for Defendants, as it is about 100 miles closer to Defendants' home than Green Bay, Wisconsin.

The Supreme Court added four additional factors to be weighed in subsequent cases: (1) the source of governing law, state or federal; (2) the adequacy of the state court action to protect the federal plaintiff's rights; (3) the relative progress of the state and federal proceedings; and (4) the presence or absence of concurrent jurisdiction. *Lumen Construction Inc.*, 780 F.2d at 694 (citations omitted).

Again, the factors favor a decision to abstain. The Plaintiff has brought a breach of contract claim, which is governed exclusively by state law. The state court can adequately protect the federal plaintiff's rights given that it regularly handles comparable contracts claims using its own state law. If it needs assistance on the particular issues raised by this case, it can turn to a recent decision based on a very similar case coming out of the United States District Court for the Western District of Wisconsin, *Wells Fargo Bank, N.A. v. Lake of the Torches Economic Development Corp.*, 677 F.Supp.2d 1056 (W.D. Wis. 2010); (attached to brief along with the court's unpublished decision denying Wells Fargo's Motion to Alter or Amend, *Wells Fargo, N.A. v. Lake of the Torches Econ. Dev. Corp.*, No. 09-CV-768, 2010 WL 1687877 (W.D.Wis. April 23, 2010)).

Moreover, the parties and the state court have already put substantial effort into litigating the state case, including drafting and filing a Complaint, a Motion to Dismiss, Motion to Appoint a Receiver, an Amended Complaint, a Motion to Dismiss Amended Complaint and Brief in Support, a Motion to Stay and Memorandum in Support, a Response to the Motion to Stay, and attending a Motion Hearing in which Plaintiff's Motion to Stay was denied. The case has been moving along since August 2009.

The Seventh Circuit also considers "the vexatious or contrived nature of the federal claim." *Lumen Construction Inc.*, 780 F.2d at 694 (citations omitted). Plaintiff, a multi-billion dollar corporation, has already employed numerous strategies presumably contrived to diminish wear the down the Tribe's already depleted legal funds. The bond indenture that was allegedly breached contained a clause in which the Plaintiff agreed that any litigation would commence in federal court. Yet, Plaintiff first went to state court. Not until the state court case had been going on for over one year, which forced the Tribe to incur substantial sums to defend, did Plaintiff elect to bring a parallel case in federal court. The simultaneous defense of two lawsuits is rapidly wearing down the Tribe's ability to defend either suit, wasting judicial resources, and creating duplicative efforts on all fronts.

Given these exceptional circumstances, this Court should exercise its discretion to dismiss this federal action, or in the alternative, stay the case until the State Court litigation is finalized. When a State Court has already spent over one year grappling with the issues posed, and the issues revolve around state law contracts claims, this Court need not employ its own scarce judicial resources by taking over the dispute at this point.

II. THE COURT LACKS JURISDICTION OVER THE "PERSON" BECAUSE THE DEFENDANTS' WAIVER OF SOVEREIGN IMMUNITY IS VOID.

The tribal sovereignty of Indians was first recognized in *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515, 557, 8 L. Ed. 483 (1832), in which Chief Justice Marshall stated that Indian nations are "distinct political communities, having territorial boundaries, within which their authority is exclusive, and having a right to all the lands within those boundaries, which is not only acknowledged, but guaranteed by the United States." As such, "Indian tribes have long been recognized as possessing the common-law immunity from suit traditionally enjoyed by sovereign powers." *Turner v. United States*, 248 U.S. 354, 358 (1919). "Absent an effective waiver of

consent it is settled that a state court may not exercise jurisdiction over a recognized Indian tribe" *Puyallup Tribe, Inc. v. Dept. of Game*, 433 U.S. 165 (1977). Because "an action against a tribal enterprise is, in essence, an action against the tribe itself" the sovereign immunity of the tribe also applies to the Sokaogon Gaming Enterprise Corporation. *See Local IV-302 Int'l. Woodworkers Union of Am. v. Menominee Tribal Enter.*, 595 F.Supp. 859, 862 (E.D.Wis. 1984).

The Defendants' alleged waiver of sovereign immunity in this case is invalid because the documents which contain the waiver constitute an unapproved management contract and an unapproved encumbrance of Indian lands. With no valid waiver of sovereign immunity, the case must be dismissed for lack of personal jurisdiction. *Lake of the Torches Econ. Dev. Corp.*, 677 F.Supp.2d at 1061 (stating "The Court's finding that the Trust Indenture is an unapproved management contract destroys the Court's jurisdiction over the defendant" because if the contract is void *ab initio*, the waiver of sovereign immunity found in the contract is also invalid.).

A. The Indenture Is Invalid As An Unapproved Management Contract.

The Trust Indenture the Tribe signed with Plaintiff constitutes a "management contract" and is therefore void for lack of National Indian Gaming Commission ("NIGC") approval. *Lake of the Torches Econ. Dev. Corp.*, 677 F.Supp.2d at 1061. Indian Gaming Regulatory Act ("IGRA") regulations define "management contract" as "any contract, subcontract or collateral agreement between an Indian tribe and a contractor or between a contractor and subcontractor if such contract or agreement provides for the management of *all or part of a gaming operation*." 25 C.F.R. § 502.15 (emphasis added). Under 25 U.S.C. § 2711 management contracts must be approved by the NIGC; absent such approval, they are void *ab initio*. *See* 25 C.R.F. § 533.7; *Lake of the Torches Econ. Dev. Corp.*, 677 F.Supp.2d at 1061.

The United States District Court for the Western District of Wisconsin recently analyzed a Trust Indenture similar to indenture at issue in this case, and determined it to an unapproved management contract, and therefore void. *Lake of the Torches Econ. Dev. Corp.*, 677 F.Supp.2d at 1061. In that case, the indenture contained several provisions that together gave the bondholders sufficient management control such that the Court had "no choice but to conclude that the Trust Indenture is a 'management contract.'" *Id*. at 1061. Three of the particularly relevant provisions which led the court to deem the contract a management contract were: (1) a provision that put constraints on the tribe's capital expenditures; (2) a provision providing for the appointment of a "Management Consultant" if the "Debt Service Ratio" falls below a certain level; and (3) a provision authorizing the appointment of a receivership in the case of default. *Id.* at 1059-60.

All three of these provisions are also present in the indenture at issue in this case. Therefore, the Indenture is a "management contract" and void.

1. Outsider Control Over Capital Expenditures

First, the Indenture removed the Tribe's discretion over how much it must deposit into the Capital Expenditure Fund each month, and what these funds can be used for. Section 5.04 of the Bond Indenture (and Paragraph 7 of the Casino's Guaranty) creates a Capital Expenditures Fund, managed by the Trustee, and directs that:

> …on the same day each month … deposits shall be made [by the Tribe] to the credit of the Capital Expenditures Fund in the amount of $41,667 each.
>
> Amounts in the Capital Expenditures Fund shall be applied to capital expenditures with respect to the Casino Facility, including but not limited to acquisition of new slot machines, and related software. Disbursements shall be made by the Trustee upon the request of the Tribe or the Casino Enterprise, through submission of a Draw Request.

Further, Section 6.15 of the Bond Indenture requires that the Casino must spend at least $1,000,000 of the Capital Expenditure Fund monies every two years.

Not only does the Indenture dictate how much the Casino must spend in capital expenditures, and when it must do so, but it also limits the Tribe's discretion over what it spends the money on. The Casino may only withdraw money from this fund "through submission of a Draw Request" to the trustee. (Bond Indenture 5.04). In other words, if the Tribe wishes to purchase new casino equipment using the tribal funds it was required to place into the Capital Expenditures Fund, it must ask for permission from the Plaintiff, the Trustee. The Plaintiff then gets to decide whether to release funds. This constitutes control by the Plaintiff over the Tribal Casino's ability to buy new equipment, which is part of the gaming operation. Agreements that remove control of part of the tribe's gaming operation constitute management contracts. *Machal, Inc. v. Jena Band of Choctaw Indians*, 387 F. Supp. 2d 659, 665 (W.D. La. 2005) (citing 25 C.F.R. § 502.15).

In *Lake of the Torches*, Wells Fargo had the same kind of control over the capital expenditures by the Lac du Flambeau Tribe, in the form of a cap on allowable capital expenditures. The court analyzed the capital expenditure provisions at Section 6.18 of the Lake of Torches Trust Indenture, which provides that the Corporation cannot:

> incur capital expenditures that exceed 25% of the prior fiscal year's capital expenditures without receiving the written consent of [at least 51% of the bondholders], which consent will not be unreasonably withheld.

Lake of the Torches Econ. Dev. Corp., 677 F.Supp.2d at 1060-61 (citing the Indenture at § 6.18). This provision was found to be a management contract provision pursuant to 25 C.F.R. § 531.1(b)(1) (maintenance and improvement of gaming facility). *Id.*

The Sokaogon Indenture takes even more discretion away from the Tribe than that in the Lake of the Torches Indenture. The Sokaogon Indenture requires a *minimum* of expenditures, where the Lake of the Torches Indenture provides only a maximum. The Tribe has no discretion about whether to spend $1,000,000 every two years on new gaming assets. It must do so. This provision renders the Indenture an illegal and void management contract because it has not been approved by the NIGC.

2. Receivership Control Over Gaming Operations

Furthermore, as in the *Lake of the Torches* case, the Sokaogon Indenture contains a section providing for the appointment of a receiver upon an Event of Default. The provision does not limit or restrict the powers of the receiver with respect to the Casino assets (*See* Section 8.04 of the Sokaogon Indenture.)

In *Lake of the Torches*, the Court stated:

> An Event of Default also triggers the Trustee's right to the appointment of a receiver "of the Trust Estate and of the revenues, issues payments and profits thereof … with such powers as the court making such appointment shall confer."

Lake of the Torches Econ. Dev. Corp., 677 F.Supp.2d at 1060 (citing the Indenture, § 8.04).

The unlimited and unrestricted receivership provision of the Lake of the Torches Indenture and the Sokaogon Indenture, (including § 8.04) are identical. Both read as follows:

> Section 8.04 Appointment of Receivers. Upon the occurrence of an Event of Default, and upon the filing of a suit or other commencement of judicial proceedings to enforce the rights of the Trustee and the Holders of Bonds under this Indenture, the Trustee shall be entitled, as a matter of right, to the appointment of a receiver or receivers 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.

See Sokaogon indenture, Section 8.04 and Lake of the Torches Indenture, Section 8.04.

The Sokaogon Indenture, like the Lake of the Torches Indenture, specifically provides a third party with financial control over Casino management upon the event of a default. As held in *Lake of the Torches*, a receiver with powers over the Trust Estate, including "revenue, issues payments, and profits thereof" would wield managerial control over the Casino. In particular, "[b]y forcing the Tribal Corporation] to deposit its revenues and pay its liabilities, the receiver would, in fact, be exerting a form of managerial control since those monies could not be used for other purposes related to the operation of the Casino facility." *Lake of the Torches Econ. Dev. Corp.*, 677 F.Supp.2d at 1060. The Court also held that "[t]he decisions made by the receiver would be among the most important decisions in managing a gaming operation, and because they involve large sums of money, are among the management decisions of greatest interest to NIGC regulators. *Id*. (citation and internal quotations omitted).

The receivership provision, both in the Sokaogon Indenture and in Lake of the Torches Indenture at Sections 8.04 does not limit the receiver's authority at all with respect to management of casino operations and financial decision making. The receiver can exercise unlimited management control over Casino revenues after payment of operating expenses, including, for example, decisions regarding capital expenditures and payments on the Tribe's loan for its hotel.

Wells Fargo has filed a motion for an appointment of a receiver in the pending state court action and has not only nominated its own receiver, it has requested that the receiver be appointed with substantial powers to direct and redirect casino funds. Wells Fargo is not interested in limiting receivership powers. It is interested in expanding control over the gaming operations, as further evidenced by its efforts to renegotiate an Amended Indenture, which

includes terms of control even more favorable to Wells Fargo. (See Motion for Receiver attached to the Declaration of Glenn C. Reynolds.)

The Indenture entitles the Trustee and bondholder to the appointment of a receiver who will have total control over whether and how Tribal funds are spent for Tribal purposes or diverted to someone else. With Casino gross revenues in the hands of a third party, the Tribe is no longer able to exercise any discretionary control over its funds. The Tribe's managerial control over its revenues, profits, and assets is defeated by these offending terms in the Indenture. Accordingly, since these terms give partial managerial control over Casino assets and profits to someone other than the Tribe, the receivership provisions in the Indenture render it a management contract requiring NIGC review and approval to be valid. *See* 25 C.F.R. § 502.15. Because the Indenture has not been approved by NIGC, it is illegal and void.

3. Outsider Control Over Choice of Management Consultant and Changes to Operations

In *Lake of the Torches*, the court held that "[t]he [Indenture] provides for the appointment of a "Management Consultant" at the direction of a majority of the bondholders if the "Debt Service Ratio" falls below a certain level. *Lake of the Torches Econ. Dev. Corp.*, 677 F.Supp.2d at 1060 (quoting the Lake of Torches Indenture at § 6.19, which also provided that "Such independent management consultant shall conduct a review and provide a report . . . which make recommendations as to improving the operations and cash flow of the Casino Facility. The Corporation agrees to use its best efforts to implement the recommendations of the management consultant within ninety (90) days . . .")

The Sokaogon Bond Indenture also has such an offending provision. Section 6.13 of the Indenture requires the Casino to maintain revenues greater than 150% of debt service payments for each twelve month period. If it does not do so, then the Casino is required by the Indenture

to, "at its expense," hire a management consultant "acceptable to the Trustee." This gives the Plaintiff Trustee discretion over who will be the Tribe's management consultant.

Once a consultant acceptable to Wells Fargo has been hired, the Tribe *will, to the extent permitted by law, follow the consultant's recommendations* unless the Tribe is able to meet and resolve in a writing delivered to the Trustee on or before 45 days that the Independent Consultant's recommendations are not in the best interest of the Tribe and that a proposed alternative set of recommendations are likely to achieve the 150% debt service coverage ratio set forth in this Section. (*See* Indenture, Section 6.13) (emphasis added).

The management consultant, acceptable to the Plaintiff, is required "to make recommendations with respect to fees, charges, operating expenses and other matters relating to or affecting revenue." These are clearly management functions because they provide an opportunity to direct operations of the casino. Because Wells Fargo has control over the choice of the management consultant, Wells Fargo has the opportunity to control the management of the casino.

Since the discretion to hire a management consultant to implement changes in Casino operations is taken away from the Tribe by this provision in the Indenture, it is a management contract. The requirement that the Casino hire an expensive outside consultant, combined with the opportunity for the Trustee to choose the consultant whose recommendations would be the only realistic option, takes fundamental and day-to-day management control away.

Because the Indenture contains three provisions nearly identical to those provisions which were dispositive in *Lake of the Torches*, this Court should similarly find that this indenture is a management contract. Since the NIGC did not approve the Indenture, it – along with the sovereign immunity contained within – is void.

B. The Indenture Is Also Invalid Because It Constitutes An Unapproved Encumbrance of Indian Lands.

The waiver of immunity is also invalid because the Indenture contains an unapproved encumbrance on Indian Lands. The Indenture in Section 6.14 contains a "negative pledge of lands," which states:

> [t]he Tribe may not grant any mortgage lien or other lien against, or pledge or grant any security interest with respect to, any of the land the acquisition of which was financed or refinanced with proceeds of the Series 2006 Bonds, nor shall the Tribe take any action to place such land into trust or to sell, transfer or convey any interest therein to any third party. This covenant shall terminate if, for two consecutive fiscal years, the Pledged Casino Revenues, based on the audited financial statements of the Casino Enterprise, shall equal not less than 300% of Total Principal and Interest Requirements for all then outstanding indebtedness secured by the Pledged Casino Revenues, including all outstanding Bonds.

Because this provision directly interferes with the Tribe's proprietary control over the use of its lands for an indefinite period it constitutes an encumbrance of Indian Lands under 25 U.S.C. §81(b) and requires approval of the Secretary of Interior. Under Section 81, any agreement with Indian tribes that "encumbers Indian lands for a period of 7 or more years" must be approved by the Secretary of Interior. Otherwise, such an agreement is invalid. 25 U.S.C. § 81(b). "Encumbrances covered by this part may include leasehold mortgages, easements, and other contracts or agreements that by their terms could give to a third party exclusive or nearly exclusive proprietary control over tribal land." 25 C.F.R. § 84.002. Pursuant to Section 6.14 of the Sokaogon Indenture, the Plaintiff has asserted proprietary control over tribal land, and therefore has "encumbered" the land according to 25 U.S.C. § 81.

Despite Congress having narrowed the scope of Section 81 in the law's 2000 amendments, the Sokaogon Indenture remains squarely within its reach. Before Congress amended Section 81 in 2000, Secretary approval was required for all contracts "relative to Indian

lands." 25 U.S.C. § 81 (1994). Agreements which prohibited tribes from mortgaging their land, such as the Sokaogon Indenture, consistently qualified as agreements that required Secretary approval. *See e.g. Wisconsin Winnebago Business Committee v. Koberstein*, 762 F.2d 613, 619 (7th Cir. Wis. 1985); *see also Altheimer & Gray v. Sioux Mfg. Corp.*, 983 F.2d 803, 811 (7th Cir. Ill. 1993); see also *A.K. Management Co. v. San Manual Bank of Mission Indians*, 789 F.2d 785, 787 (9th Cir. 1986). Due to the ambiguity of "relative to Indian lands," many agreements that did not create encumbrances were also routinely presented to the Secretary for review and approval, including even contracts for the purchase of office supplies. S. Rep. 106-150 at 9. Accordingly, Congress chose to replace the phrase "relative to Indian lands," with "encumbering Indian lands" to "ensure that Indian tribes [would] be able to engage in a wide array of commercial transactions without having to submit those agreements to the BIA as a precaution." *Id*. Still, Congress intended for the amended Section 81, "to address a limited number of transactions that could place tribal lands beyond the tribe's ability to control the lands in its role as proprietor." *Id*. Therefore, Section 6.14 of the Sokaogon Indenture, which strips the Tribe of its role as proprietor, falls within 25 U.S.C. § 81(b).

The DC District Court's recent interpretation of amended Section 81 in *GasPlus v. United States Department of the Interior*, 510 F. Supp. 2d 18, 28-29 (D.D.C. 2007) further supports this analysis. In *GasPlus*, the court determined that an encumbrance under Section 81 is "a contract that, by its terms, provides a third party with a legal interest in the land itself; that is, a right or claim attached to the real property that would interfere with the tribe's exclusive proprietary control over the land." *Id.* at 30. Because the contract at issue in *GasPlus* only governed the management of a gasoline distribution business located on Indian land, it did not "encumber" the land. *Id.* Nor did it preclude the tribe from placing an encumbrance on the land.

Id. at 32. Chief among the court's considerations was the fact that "[h]ad the Tribe wished to mortgage the land (or facilities) during the term of the contract, the Management Agreement would have given GasPlus no power to stop the transaction or place a cloud on the title." *Id*.

However, Section 6.14 of the Sokaogon Indenture imposes just such a restriction on the Sokaogon and their lands. Unless the Tribe proves revenues greater than 300% of the total outstanding principal and interest requirements for two consecutive years, the Tribe may *not* mortgage its land; nor may it place its land into a trust, or sell, transfer or convey any interest in its land to any third party. This covenant is an indefinite encumbrance on some of its most valuable fee simple lands. Whereas, in *GasPlus*, "[t]he Nambe Pueblo retained all the rights of ownership over both the gasoline distribution business and the land, *id*., the Sokaogon has lost an essential right of exclusive ownership over its land: the power to sell, transfer, or convey any interest in the property.

The Sokaogon Indenture implicates the precise policy behind Section 81. "Section 81 … is a safeguard that protects Indian lands from being alienated or encumbered by legal claims that could interfere with Indian tribes' ability to use the land to their benefit." *Id*. at 34. Because the Sokaogon Indenture stripped the Tribe of any ability to sell, transfer, or convey any interest in the, the Tribe should have been afforded the safeguard required by Section 81: review and approval of the Indenture by the BIA.

Since the Indenture falls within Section 81, and it was not submitted to the Interior Secretary for approval, the entire Indenture is invalid. 25 U.S.C. § 81(b); *Wisconsin Winnebago Business Committee v. Koberstein*, 762 F.2d 613, 619 (7th Cir. Wis. 1985); *Guidiville Band of Pomo Indians v. NGV Gaming, LTD.*, 531 F.3d 767, 787 (9th Cir. Cal. 2008) (contracts that did not receive required Secretary approval deemed "invalid and unenforceable"); *United States v.*

Hattum Family Farms, 102 F. Supp. 2d 1154, 1164 (D.S.D. 2000), *aff'd* 237 F.3d 919 (8th Cir. 2000) (per curiam); *GasPlus,* 510 F. Supp. 2d at 22.

Because the entire Indenture is invalid, the waiver of sovereign immunity contained in the documents is also invalid. Therefore, this Court may not exercise jurisdiction over Defendants. *Puyallup Tribe, Inc.*, 433 U.S. at 172.

III. THE COMPLAINT FAILS TO STATE A CLAIM UPON WHICH RELIEF CAN BE GRANTED.

Plaintiff's requests for relief rely on the validity of the Bond Indenture. For the reasons stated above in Sections II.A and II.B, the Indenture is invalid. Therefore, the case must be dismissed for failure to state a claim upon which relief can be granted. *See* Fed. R. Civ. P. 12(b)(6).

In reviewing a motion to dismiss under Rule 12(b)(6) of the Federal Rules of Civil Procedure, the Court must accept all facts in the Complaint as true, view them in the light most favorable to the Plaintiff, and draw all reasonable inferences in the Plaintiff's favor. *Bonte v. U.S. Bank, N.A.*, 624 F.3d 461, 463 (7th Cir. 2010). The Court should dismiss a complaint if it does not "contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face." *Id*. (citation and internal quotations omitted).

In this case, the invalidity of the Bond Indenture is dispositive. Even if all facts alleged by the Plaintiff are true, i.e. even if the Tribe defaulted on the bond, the bond is void *ab initio*, *see Lake of the Torches Econ. Dev. Corp.*, 677 F.Supp.2d at 1061, jurisdiction does not attach, and relief cannot be granted in favor of the Plaintiff.

CONCLUSION

For the forgoing reasons, the court has no jurisdiction over the Defendants, and this case must be dismissed.

Dated this 30th day of December, 2010.

REYNOLDS & ASSOCIATES

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