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' REPLY BRIEF IN SUPPORT OF MOTION TO DISMISS COMPLAINT

INTRODUCTION

It is easy to understand why lenders such as the Plaintiff would want to imbed substantial control provisions over a borrower in a typical set of bond documents. Lenders want the power to direct scarce funds to themselves first in case of default. But contracts involved in Indian gaming are not typical. Such control provisions are illegal in the case of Indian gaming contracts unless they are first approved by the National Indian Gaming Commission (NIGC). When the Plaintiff and the lenders it represents insisted on including such control provisions in the Sokaogon Indenture without receiving NIGC approval, the lenders took a big gamble by skirting regulatory review. The history of this case shows the risk-return calculus the Plaintiffs took: (a) include substantial control provisions in the Indenture to make sure the Plaintiff can control the money if revenues runs short; (b) avoid the NIGC review process who require cutting out the offending control provisions from the Indenture; and (c) if trouble arises and the control provisions are found to be illegal, the backup plan was to ask the court to just sever them so they can still recover. However, for courts to allow this kind of end-run around would completely defeat the major purpose of NIGC oversight over Indian gaming contracts: to protect tribal interests from outside control.

ARGUMENT

I. Abstention Is Not Moot Because A Parallel State Action Is Still Pending.

Abstention remains an appropriate route for this Court to take. Despite the state claim's dismissal, that parallel action is still pending. Defendants have filed a motion for reconsideration and notice of appeal on the question of whether the court erred by dismissing the case based on a provision in the contract without first determining if the contract was valid. (*See* attached Motion and Notice.) Moreover, the state case was dismissed without prejudice so a dismissal in federal court would enable Plaintiff to return to state court to decide the claims. Though the contracts are

void *ab initio* for lack of NIGC approval, returning the Plaintiff's claims to state court would best represent the intent of the Plaintiff when it signed the Indenture. The Indenture calls for state court jurisdiction if federal court jurisdiction is declined. Indenture at § 13.02.

II. The Waiver Of Sovereign Immunity Is Invalid Because The Bond Documents Are Void *Ab Initio* As Unapproved Management Contracts.

If the Court does not abstain from hearing the case, then it must determine whether the bond documents - and the waivers of sovereign immunity found within - are valid. As discussed in Defendants' Motion to Dismiss, several sections in the bond documents give Plaintiff such influence and control over the casino operations as to make them "management contracts" and therefore void *ab initio* for lack of NIGC approval. *See* 25 C.F.R. § 533.7; *see also Wells Fargo Bank, N.A. v. Lake of the Torches Econ. Dev. Corp.*, 677 F.Supp.2d 1056, 1057 (W.D.Wis. 2010) (hereinafter, "*Lake of the Torches*"); *see also Catskill Dev. L.L.C. v. Park Place Entertainment Corp.*, 547 F.3d 115 (2nd Cir. 2008) (interpreting 25 C.F.R. § 533.7 to void *ab initio* contracts subject to Indian Gaming Regulatory Act that lack NIGC approval). Absent a valid waiver of sovereign immunity, the case must be dismissed for lack of personal jurisdiction. *Kiowa Tribe v. Mfg Techs., Inc.*, 523 U.S. 754 (1998); *Local IV-312 Int'l. Woodworkers Union of Am. v. Menominee Tribal Enter.*, 595 F.Supp. 859, 862 (E.D.Wis. 1984).

An agreement that removes control over *any part* of the Tribe's gaming operation constitutes a management contract and requires NIGC approval. *Machal, Inc.* v. *Jena Band of Choctaw Indians*, 387 F. Supp. 2d 659, 665 (citing 25 C.F.R. § 502.15). Defendants focused on three aspects of the bond documents that rendered the contract void *ab initio* based upon Judge Randa's recent decision on a very similar debt arrangement with the Lac du Flambeau Tribe. *See Lake of the Torches*, 677 F.Supp.2d at 1059-60. The Plaintiff has failed to meaningfully

distinguish the Sokaogon Indenture from the Lac du Flambeau Indenture, and the Court should embrace the sound reasoning of Judge Randa and dismiss Defendants' complaint.

A. *The Capital Expenditure Fund Provisions Render the Contract a Management Contract.*

The decision to direct scarce casino revenues toward capital expenditure investments in new gaming equipment is one of the most fundamental of all management functions. The Sokaogon Indenture takes away the Tribe's discretion over the amount of gaming revenues it must deposit into the Capital Expenditure Fund each month. It also restricts how these tribal funds can be used. Section 5.04 of the Bond Indenture (and Paragraph 7 of the Casino's Guaranty) creates a Capital Expenditures Fund to be 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 request of the Tribe or the Casino Enterprise, through submission of a Draw Request.

Further, Section 6.15 of the Bond Indenture requires the Casino spend at least $1,000,000 of the Capital Expenditure Fund monies every two years, regardless of need. This transfers a significant discretionary management decision from the Tribal Defendants to the Plaintiff.

Wells Fargo argued that because "the Tribe already has made the management decision to make these minimum capital expenditures" by signing the Indenture, the Capital Expenditure provision did not remove any control from the Tribe, and therefore did not require NIGC approval. (Pl.'s Brief at 14). However, a contract that limits future discretion does indeed implicate the federal oversight of contracts imposed by 25 U.S.C § 2711. A tribe may enter into a management contract only "[s]ubject to the approval of the [NIGC] Chairman." 25 U.S.C. § 2711(a)(1). The question is not whether the Tribe *agreed* to sign away control, but rather,

whether the Indenture itself "provides for the management of all or part of a gaming operation." *First Am. Kickapoo Operations, L.L.C. v. Multimedia Games, Inc.*, 412 F.3d 1166, 1175 (10th Cir. 2005). Otherwise, no agreement that gives away control over the casino in advance, i.e., at the time of the making of the contract, would require NIGC approval, thus eviscerating the purpose of the Indian Gaming Regulatory Act (IGRA). If the contract provides for such management, and is not reviewed by the NIGC, it is void. *See* 25 C.F.R. § 533.7; *First Am.*, 412 F.3d at 1176 ("Lacking the formality of NIGC approval, an agreement to manage does not become a contract: it is void.")

Plaintiff oversimplifies the capital expenditures requirement by likening it to an agreement to make payments over time. (Pl.'s Brief at 14). But Section 6.15 not only prevents the money from being spent on other uses, it usurps a vital management function of the casino by dictating the Tribe spend that money on gaming equipment purchases. By forcing the Tribe to spend a minimum of $1,000,000 on capital expenditures for its casino every two years, regardless of whether it is a sound management decision or not, the contract imposes substantially more control on the gaming operations than a debt repayment obligation.

In addition, the Indenture gives the Trustee control over the Casino's ability to buy new equipment, one of the most fundamental management decisions in the gaming operation. The Casino may only withdraw money from this fund "through submission of a Draw Request" to the Trustee. (§ 5.04). If the Tribe wishes to purchase new casino equipment using the funds it had to deposit into the Capital Expenditures Fund held by the Trustee, it must ask for permission. The Trustee then gets to decide whether to release funds based on its sole discretion. Nothing in the bond documents limits or guides the Trustee's discretion in deciding whether to grant the Tribe's request for capital expenditure funds for gaming equipment.

In *Lake of the Torches*, Wells Fargo had the same type of control over the capital expenditures of the Lac du Flambeau Tribe and its casino, in the form of a *cap* on allowable capital expenditures. 677 F.Supp.2d at1059-60. The capital expenditure provisions of the Lake of Torches Trust Indenture stated that the tribal casino was not allowed to:

> 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.

Id. (citing Indenture at § 6.18). Judge Randa found this provision to be a management contract provision pursuant to 25 C.F.R. §531.1(b)(1) (maintenance and improvement of gaming facility), which voided the Lac du Flambeau bond documents. *Id.*

The Sokaogon Indenture is identical, except instead of a *cap* on expenditures, it provides a *floor*. The Plaintiff never elaborates on its argument that this distinction makes the two indentures "materially different" (Pl.'s Brief at 21), probably because there is no material difference. Both provisions remove control over capital expenditures spending from the tribes and give it to the trustees. For the Sokaogon Indenture, the Tribe has no discretion about whether it would be prudent to spend $1,000,000 every two years on new gaming equipment. The Indenture requires it to do so. The Tribe's choice is taken away by the Indenture and given to the Trustee, who holds the money.

B. *The Receivership Provisions Also Remove Control From the Tribe.*

As in the *Lake of the Torches* case, the Sokaogon Indenture also provides a third party receiver with financial control over Casino management functions upon the event of a default. The receivership provisions in the Sokaogon and the Lake of the Torches indentures are identical; neither limits or restricts the powers of the receiver with respect to the casino revenues or assets. (*See* § 8.04.) 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.

(Sokaogon Indenture, § 8.04 and Lake of the Torches Indenture, § 8.04.) (emphasis added).

Wells Fargo has already filed a motion for the appointment of a receiver in the parallel case filed against Defendants pending in Forest County Circuit Court. In that motion, Wells Fargo nominated its own hand-selected receiver, who would have substantial powers to control Casino funds. With Casino revenues in the hands of a third party, the Tribe's managerial control over its revenues, profits, and assets is defeated.

As held in *Lake of the Torches*, a receiver with powers over the Trust Estate, including "revenues, issues, payments, and profits thereof" wields 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*, 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).

Under the Sokaogon bond documents a receiver is specifically entitled to exercise unlimited management control over Tribal Casino revenues after payment of operating expenses, including all of the Tribe's funds held in the Capital Expenditures Fund, the Bond Fund, the Sinking Fund, the Optional Redemption Fund, the Reserve Fund, and moneys and investments in the Project Fund not paid out to meet Project Expenses. (*See* § 1.01 at p. 27, Granting Clauses

I and II at p. 18, and § 8.05.) This includes the power to decide which expenses should be paid and which should not. This is a management function.

Presumably, the receiver would give every penny to the bondholders, regardless of whether the casino needed to buy equipment or pay other vendors. No language limits the powers of the receiver to decide what expenses are operating expenses. No language limits or guides the receiver as to how to manage the funds remaining after operating expenses are paid. To the extent that gross revenues after payment of operating expenses are profits, the power to direct profits is a substantial management function. *Lake of the Torches*, 677 F.Supp.2d at 1060.

Plaintiff incorrectly asserts that a receiver would not have control over management of the casino simply because it would not have control over operating expenses. (Pl.'s Brief at 16). Control over capital expenditures also constitutes managerial control. *See e.g. Hinshaw v. Ligon Industries, L.L.C.*, 551 F.Supp.2d 798, 801 (N.D.Iowa,2008) (control of large capital expenditures is a management decision); *see also PPG Industries, Inc. v. Dept. of Revenue*, 765 N.E.2d 34, 41 (Ill.App. 1 Dist.,2002) (control over capital expenditures is one aspect of management control). Under the Internal Revenue Code's definition, a receiver with control over capital expenditures would control "[a]ny amount paid out for new buildings or for permanent improvements or betterments made to increase the value of any property or estate …[including] amounts paid or incurred (1) to add to the value, or substantially prolong the useful life, of property owned by the taxpayer, such as plant or equipment, or (2) to adapt property to a new or different use." 26 C.F.R. § 1.263(a)-1. Decisions such as these are oftentimes even more significant than daily decisions, thereby enabling even more control over casino operations.

C. *The Debt Service Coverage Covenant Also Creates a Management Contract.*

The debt service coverage provision found at Section 6.13 of the Indenture, and repeated in Paragraph 6 of the Guaranty and Pledge Agreement, also encroaches on the Tribe's control

over management and renders the contract void *ab initio* as an unapproved management contract, thus invaliding the waiver of sovereign immunity found within. *Lake of the Torches*, 677 F.Supp.2d at 1061.

Both the Sokaogon and the Lake of the Torches Indenture provide "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." *Id*. at 1060 (quoting Lake of Torches Indenture at § 6.19). The Sokaogon Bond Indenture in particular requires the Casino to maintain revenues above 150% of the required debt service payments for each twelve month period. (§ 6.13). Otherwise the Gaming Enterprise must, "at its expense," hire a management consultant "acceptable to the Trustee." *Id*. With the power to approve a consultant, Wells Fargo has the power to select a consultant who will wield influence over the management of the Gaming Enterprise.

The Sokaogon Indenture provides that 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.

(§ 6.13) (emphasis added).

The Indenture requires the management consultant "to make recommendations with respect to fees, charges, operating expenses and other matters relating to or affecting revenue." *Id*. These are clearly management functions. *See* NIGC Letter, September 24, 2008 re Sac & Fox Casino Lease Agreement for Gaming Equipment, pg. 3 (determining that "[t]he power to decide operational expenditures is a function that constitutes management.").

In addition, if revenues fall below the 150% debt service ratio, the Tribe does not have any freedom to avoid the expense of a management consultant, whose fees can be substantial. Nor is the Tribe really free from having to implement the management consultant's directions as to operations and finances.

Penny Coleman, Acting General Counsel for the National Indian Gaming Commission (NIGC) agreed with the Tribe's position in her recent opinion letter to the parties:

> If the Casino falls below a certain debt service coverage ratio, the Tribe must pay for the services of an independent consultant, which is not an inexpensive proposition. Trust Indenture, § 6.13. If the Tribe chooses not to follow the consultant's recommendations, it must, pay for alternative recommendations, presumably from another consultant, and because the Casino is not making its debt service coverage ratio, it is already under some financial distress.

(Letter from Penny Coleman to Attorneys Larson, Reynolds and Williams, May 27, 2010, pg. 8, hereinafter "Coleman Letter, pg. 8").[1] The Tribe also must come up with any such alternative recommendations within a very short 45-day deadline, else waive any right to implement alternative recommendations to those of the consultant approved by Wells Fargo.

Plaintiff faults Attorney Coleman for misreading Section 6.13, and claims that "the alternative recommendations were anticipated to be recommendations made by the Tribal Council and not by a third party." (Pl.'s Brief at 18). The language of the Indenture does not support this claim. The Indenture states:

> The Tribe agrees that the Casino Enterprise will, to the extent permitted by law, follow the recommendations of the Independent consultant unless the Tribal Council in good faith resolves in a writing delivered to the Trustee on or before 45 days of receipt of the recommendations of the Independent consultant that such recommendations are not in the best interests of the Casino Enterprise and that a proposed alternate set of recommendations of management are likely to achieve the 150% debt service coverage ratio set forth in this Section.

[1] Coleman's letter can be found attached to Plaintiff's Brief in Opposition to Defendants' Motion to Dismiss as Exhibit M to the Affidavit of Michael Slade. It bears repeating that Attorney Coleman's letter represents only her opinion on the matters discussed. It does not represent a formal decision or opinion of the National Indian Gaming Commission.

(§ 6.13.) The Indenture later attributes the alternative recommendations to the Tribal Council (referring to them as "alternative recommendations of Tribal Council") only because the Tribal Council would have been responsible for finding the alternative consultant. The following sentence in Section 6.13 makes clear the Indenture's intent that outside management consultants are required:

> …[P]rovided that if the Casino Enterprise shall have employed an Independent consultant pursuant to this Section on a continuing basis, the Casino Enterprise shall not be required to employ a new Independent consultant or *obtain new recommendations.*

(emphasis added.) The phrase "obtain new recommendations" settles any ambiguity that other phrases may have created. The Tribe has two choices: (1) employ a new Independent consultant; or (2) obtain new recommendations, all within a 45-day deadline.

With nothing in the Indenture or Guaranty to limit the control delegated to a consultant (whether that consultant is chosen by the Plaintiff or the Tribe), these bond documents constitute management contracts. The NIGC has clarified that just because a tribal council has hired an individual "does not mean that an entity or individual reporting to such body is not 'managing' all or part of the operation." NIGC Bulletin 94-05. A contract requiring a tribe to hire a third party consultant is more likely to be construed as a management contract if: the agreement does not provide finite tasks or assignments to be performed, is open-ended as to the dates by which the work is to be completed, [and] provides for compensation that is not tied to specific work performed." *Id*. The Indenture lacks any limiting language, and provides the consultant with open-ended authority to make recommendations "with respect to fees, charges, operating expenses and other matters relating to or affecting said Income Available for Debt Service..." (§ 6.13.)

The Tribe *must* follow either the Independent consultant's recommendation or the recommendations of its hired consultant. (*See* § 6.13.) Federal case law has established, "[A]n employee can qualify as management if the employee actually has authority to take discretionary actions…or *recommends* discretionary actions that are implemented by others possessing actual authority to control employer policy – a *de facto manager*." *Waldo v. M.S.P.B.*, 19 F.3d 1395 (Fed.Cir. 1994). Therefore, as general counsel for NIGC noted, "although the Tribe retains the ultimate authority to decide whether to implement the independent consultant's recommendations, the provision also suggests management by a third party consultant." Coleman Letter, pg. 8.

Generally speaking, it is not surprising to find management and control provisions in a typical set of non-Indian bond documents. In consideration for lending large amounts of money, the lenders have a very strong incentive to implant mechanisms for ensuring control over the borrower and its funds if trouble arises. However, in contracts involving Indian Gaming, such management and control provisions are strictly regulated by NIGC to ensure that the tribe is the primary beneficiary of the casino enterprise, not the outside party. *See* 25 U.S.C. § 2702(2). In particular, contracts with management control provisions must be approval by the NIGC. 25 U.S.C. §2711. Absent such approval, the "entire contract is void ab initio." *See Lake of the Torches Econ. Dev. Corp.*, F.Supp.2d at 1057; *see also* 25 C.F.R. 533.7. Since the contract is void, the Tribe's waiver of immunity is invalid, and the Court lacks jurisdiction to hear the case. *See Kiowa Tribe*, 523 U.S. at 560.

III. The Invalidity Of The Indenture And Guaranty Render All Related Documents Invalid.

The waivers of immunity found in the collateral documents to the Indenture and Guaranty cannot save the Court's jurisdiction because those documents were drafted pursuant to

and dependent upon the void Indenture, and are all considered together for purposes of review under IGRA. 25 C.F.R. § 502.15. Plaintiff argued that even if the waiver in the Indenture is invalid, the Court has jurisdiction due to waivers of immunity existing in the Tribe's 2005 Initial Resolution, the 2006 Bond Resolution, and the Bonds.[2] (Pl.'s Brief at 21.) However, if the Indenture is void and unenforceable, then those documents intertwined with and dependent upon the Indenture are "collateral agreements" as defined in 25 C.F.R. § 502.5, and are therefore also void and unenforceable. 25 C.F.R. § 502.15; 25 C.F.R. § 533.7.

When the NIGC reviews documents to determine if they are management contracts requiring NIGC approval, they review all collateral documents related either directly or indirectly to the primary agreement. 25 C.F.R. § 502.15. In this case, Counsel for the NIGC considered not whether the *Indenture* is a management contract, but whether the Trust Indenture, the Guaranty and Pledge Agreement, and the Bonds are management contracts. Coleman Letter, pg. 2. The documents, referred to collectively by the NIGC's attorney as "the bond documents" would either stand or fall as a unit, based on their combined effect. *See* Coleman Letter, pg. 2; *see also United States v. Casino Magic Corp.*, 293 F.3d 419, 425 (8th Cir. 2002) (combined effect of series of agreements gave Casino Magic managerial control, making the unapproved management agreements invalid).

Given the interdependency of the bond documents, it would be impossible for one of the documents to remain valid if the Indenture were void for lack of NIGC approval. The documents repeatedly rely on the existence of a valid Indenture. The following statements of reliance were found within the Series 2006A bond documents:

[2] Plaintiff also relies on the waiver of sovereign immunity found in the Guaranty, but as explained above, the Guaranty has the same offensive debt-ratio coverage provision as the Indenture. Therefore, even if the Guaranty did not depend upon the Indenture, it also would be invalid as an unapproved management contract.

- "**The Indenture creates** the following funds and accounts into which the proceeds of the Series 2006A Bonds are to be deposited…" (§ 2.1)
- "A reasonably required reserve or replacement fund … is required to be maintained by the Trustee **pursuant to the Indenture**…" (§ 2.3)
- "The Trustee at the time acting hereunder may at any time resign from the trusts created by this Agreement by giving written notice to the Issuer and the Issuer **as provided in the Indenture**." (§ 8.2)
- "The Trustee shall accept the trusts imposed upon it by this Agreement and agree to perform said trusts, **but only upon and subject to the express terms and conditions stated in the Bond Indenture**." (§ 8.3)
- "The expectations of the Issuer described herein **are based upon the provisions of the Indenture** and upon the representations of the Initial Purchaser and the Issuer as to the matters contained in this Agreement and in their certificates attached hereto." (§ 9.13)

(emphasis added.) Similar reliance is found in the 2006 Bond Resolution:

- "In order to provide financing and refinancing for the Tribal Projects and Gaming Projects… the Tribe proposes to issue its General Obligation Tribal Purpose Bonds…and its General Obligation Taxable Gaming Bonds …**under a Trust Indenture**…. The Series 2006 Bonds shall be in the principal amounts, shall bear interest, shall mature, and shall bear such additional terms and provisions **as are set forth in the Indenture.** (§ 1.5)
- **In accordance with the Indenture**, it is proposed that the Series 2006 Bonds are further secured by a pledge of the full faith, credit and taxing power of the Tribe, and by a pledge of the Pledged Casino Revenues (**as defined in the Indenture), as more fully described in the Indenture.** (§ 1.7)

(emphasis added.) The bond documents and Resolutions would not exist but for the Indenture, and so if the Indenture fails, the waiver of immunity in the related documents must fail as well. *Lake of the Torches*, 677 F.Supp.2d at 1061.

IV. A Decision That The Indenture Is Invalid Precludes Plaintiff From Collecting Under Theories Of Equity.

Plaintiff argues its equitable claims should survive even if the contract is invalid, (Pl.'s Brief at 27). This ignores that an invalid Indenture destroys Wells Fargo's standing to be a Plaintiff and bring suit, as well as the Court's jurisdiction to hear the matter. It is pursuant to the Indenture that Wells Fargo can claim authority to bring a bond-related action. Wells Fargo, as a

Trustee, "undertakes to perform such duties and *only such duties* as are specifically set forth in this Indenture." (§ 9.01.) A finding that the Indenture is invalid defeats Wells Fargo standing to pursue any claims on behalf of investors.

Plaintiff would also have no standing even if the Court could find jurisdiction over the Tribe based on other bond documents. As explained above, the bond documents - along with all the enclosed waivers of sovereign immunity - must stand or fall together. Without a valid waiver of sovereign immunity, the Court does not have jurisdiction over the Tribe, and can order nothing but dismissal. *Kiowa Tribe*, 523 U.S. at 560; *Lake of the Torches*, 677 F.Supp.2d at 1061.

Moreover, due to the posture and nuances of this case, typical contract law principles regarding remedies for illegal contracts do not apply. *See A.K. Mgt. Co. v. San Manuel Band of Mission Indians*, 789 F.2d 785, 789 (finding it "doubtful that general contract principles apply to an agreement subject to IGRA). In typical contracts cases, a court might be able to sever illegal provisions to uphold the parties' intent behind the bargain, or apply equitable principles to resolve the dispute. But in this case, it is the "illegality" of the contract that voids *ab initio* the Court's jurisdiction over the case. If the contract provides for management over even part of a gaming enterprise, it is void *from the beginning*: there is nothing to sever, including a waiver of immunity. *Lake of the Torches*,677 F.Supp.2d at 1061.

If a party could recover under principles of equity despite the contract being void *ab initio*, it would defeat the purpose and strength of IGRA. The Act's Declaration of Policy reveals that it is meant first and foremost "to provide a statutory basis for the operation of gaming by Indian tribes as a means of promoting tribal economic development, self-sufficiency, and strong tribal governments." 25 U.S.C. § 2702. Second, IGRA is meant to shield Indian

gaming from corrupting influences on both sides of the table. Third, IGRA establishes "a National Indian Gaming Commission . . . to meet congressional concerns regarding gaming and to protect such gaming as a means of generating tribal revenue." *Id*.

Without the firm enforcement of IGRA, outside entities would have no incentive to create fair and legal contracts with tribes. The review requirements of IGRA provide a necessary check to ensure that tribes are not being taken advantage of by unfair terms which undermine the integrity of the Tribe, its people, and their lands. Without such oversight, sophisticated non-Indian entities could simply skirt the NIGC review and approval process, evade the protections provided to Tribes, and recover on principals of equity should the contract ever be invalidated.

There must be consequences to parties who evade the important safeguards set up by Congress. In *First American Kickapoo Operations*, the Tenth Circuit recognized, "Non-tribal parties who enter into contracts relating to tribal gaming undertake in addition to ordinary business risks, certain regulatory risks as well." 412 F.3d at 1176. The court in that case prevented First American from bringing a tortious interference claim against a third party to recover damages caused by its void management contract. Because it was First American that had "elected to execute a *de facto* management contract without the fuss and bother of NIGC approval," First American had to suffer the consequences. *Id*. Plaintiff should similarly suffer the consequences of its decision to execute a management contract "without the fuss and bother of NIGC approval."

CONCLUSION

For the forgoing reasons, the Court has no jurisdiction over the Defendants in this case, which requires that the entire case be dismissed with prejudice.

Dated this 8th day of February, 2011.

REYNOLDS & ASSOCIATES

s/Wade Max Williams

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STATE OF WISCONSIN CIRCUIT COURT FOREST COUNTY

WELLS FARGO BANK, N.A.,
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SOKAOGON CHIPPEWA COMMUNITY
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Case Code 30303

and

SOKAOGON GAMING ENTERPRISE
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Defendants.

DEFENDANTS' MOTION FOR RECONSIDERATION OF THE JANUARY 24, 2011 ORDER TO DISMISS AMENDED COMPLAINT

Defendants, through their attorneys, Reynolds and Associates, hereby move the Court to reconsider its Order dated January 24, 2011 that dismisses this action without prejudice. Defendants request the Court consider the merits of whether the Indenture is void *ab initio* as an unapproved management contract, thereby making the limited waiver of sovereign immunity also void. The Motion is based on the files, records of this proceeding, the attached brief and the following grounds:

1. Defendants are immune from suit absent a valid waiver of sovereign immunity. *See Kiowa Tribe v. Mfg Techs., Inc.*, 523 U.S. 754 (1998); *see also Local IV-312 Int'l. Woodworkers Union of Am. v. Menominee Tribal Enter.*, 595 F.Supp. 859, 862 (E.D.

Wis. 1984) ("an action against a tribal enterprise is, in essence, an action against the tribe itself").

2. After a Motion Hearing on January 21, 2011, the Court dismissed the Complaint without prejudice, based on a determination that the case should have been brought in federal court due to the following limited waiver of sovereign immunity found in the Bond Documents:

> The Tribe expressly submits to and consents to the jurisdiction of the United States District Court for the Eastern District of Wisconsin, Green Bay Division … and, in the event (but only in the event) the said federal court fails to exercise jurisdiction, the courts of the State of Wisconsin wherein jurisdiction and venue are otherwise proper … with respect to any dispute or controversy arising out of this Indenture, the Tax Exemption Agreement, the Bonds, the Bond Resolution or the Private Placement Agreement, and including any amendment or supplement which may be made thereto, or to any transaction in connection therewith.

(Indenture, Section 13.02.)

3. In reaching its decision, the Court failed to determine if the contract was void *ab initio* before it applied the above clause.

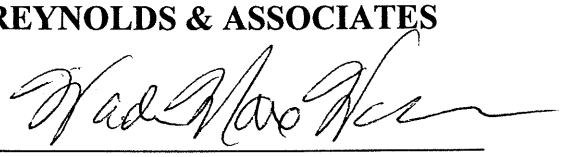
4. However, where jurisdiction or venue is dependent upon a clause in a contract, the court must first determine if the contract exists or if it is void *ab initio*. *Mitchell Health Technologies, Inc. v. Naturewell, Inc.*, No. 02-C-0439-C, Not Reported in F.Supp.2d, 2003 WL 23200260, at *2 (W.D.Wis. Mar. 10, 2003) (the court first has to determine whether a contract exists before it can stay proceedings based on an arbitration clause within the contract); *Latino Food Marketers v. Old Mexican Foods, Inc.*, No. 03-C-0190-C, Not Reported in F.Supp.2d, 2003 WL 23220141, at *2 (W.D.Wis. Nov. 24, 2003) (the

court first has to determine whether a contract exists before it determines whether a forum selection clause applies).

5. The court must first reach the merits of the validity of the contract before determining the validity of the waiver.

Dated this 7th day of February, 2011.

REYNOLDS & ASSOCIATES



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STATE OF WISCONSIN CIRCUIT COURT FOREST COUNTY

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

Plaintiff,

v.

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

Case No. 09 CV 79
Case Code 30303

and

SOKAOGON GAMING ENTERPRISE
CORPORATION,

Defendants.

DEFENDANTS' BRIEF IN SUPPORT OF MOTION FOR RECONSIDERATION

INTRODUCTION

Defendants request the Court decide the merits of the validity of the contract before interpreting the validity of one of its clauses. In August 2009, Wells Fargo filed a lawsuit in this Court based on various contracts claims, naming the Sokaogon Chippewa Community and Sokaogon Gaming Enterprise Corporation as defendants. Over the past year and a half, the validity of the contract has been put squarely at issue by Defendants and by the *Lake of the Torches* case in which Judge Randa ruled that a very similar contract was void *ab initio* as an unapproved management contract. On January 24, 2011, without deciding if the contract is valid, which the Defendants claim it is not, the

Court dismissed the case without prejudice based on a provision within the contract requiring the dispute be first submitted in federal court.

However, before dismissing this case on a provision in the contract, the Court must determine whether the contract is void or valid. While the Court may be hesitant to determine the validity of the contract in this case due to the federal questions presented, these issues are soundly within the Court's province to consider. Both logic and judicial economy call for this Court to come to a decision on the question of contract validity rather than prolonging the dispute by deferring to federal courts.

FACTS

In August 2009, Plaintiff filed a lawsuit in the Forest County Circuit Court alleging various state law contracts claims. This was despite language found in the contract which required that any disputes be brought first in federal court. The limited waiver of sovereign immunity in the Indenture reads:

> The Tribe expressly submits to and consents to the jurisdiction of the United States District Court for the Eastern District of Wisconsin, Green Bay Division … and, in the event (but only in the event) the said federal court fails to exercise jurisdiction, the courts of the State of Wisconsin wherein jurisdiction and venue are otherwise proper … with respect to any dispute or controversy arising out of this Indenture, the Tax Exemption Agreement, the Bonds, the Bond Resolution or the Private Placement Agreement, and including any amendment or supplement which may be made thereto, or to any transaction in connection therewith.

(Section 13.02). Since filing in state court, Plaintiff has also filed in federal court, forcing Defendants to defend against to simultaneous attacks.

In briefing for the Motion to Dismiss in this Court, Defendants alleged that the contract was void *ab initio*. *See e.g.* Defendants' Reply Brief to Defendants' Motion to Dismiss at pg. 14. Based on the various provisions in the Bond Documents that usurp control from the Tribe, Defendants put forth a claim that the documents constitute management contracts that were not approved by the National Indian Gaming Commission, and are therefore void *ab initio* pursuant to 25 U.S.C. § 2711. *Id.*

Following a January 21, 2011 Motion Hearing, this Court dismissed the state court action without prejudice based on its interpretation of Section 13.02 (quoted above) which requires disputes to be brought first in federal court. (A copy of the 1/31/2011 Order is attached.) However, the Court's decision was reached without first determining whether the contract was valid or void *ab initio* as an unapproved management contract.

Defendants requests that this Court reconsider its initial decision to dismiss that did not first determine the validity of the contract, and decide now whether the Bond Documents are void *ab initio*, requiring dismissal with prejudice.

ARGUMENT

I. BEFORE RELYING ON A PROVISION IN A CONTRACT THE COURT MUST DECIDE IF THE CONTRACT IS VOID AB INITIO.

The Court must reach a decision on the validity of the contract before construing provisions within it as private law between the parties. Had the Court examined the validity of the Bond Documents, the Defendants believe it would have found them to be unapproved management contracts and therefore void *ab initio*. *See Wells Fargo v. Lake of the Torches Econ. Dev. Corp.*, 677 F.Supp.2d 1056, 1057 (W.D.Wis. 2010); 25 C.F.R.

533.7. "*Ab initio*" means "from the beginning." Black's Law Dictionary (9th ed. 2009). If a contract is void from the beginning, it is as if it never existed. *Obartuch v. Security Mut. Life Ins. Co.*, 114 F.2d 873, 878 (7th Cir. 1940) (holding that a clause found in a contract deemed void *ab initio* "cannot be used as a vehicle to sanctify that which never existed"); *see also Lake of the Torches Econ. Dev. Corp.*, 677 F.Supp.2d at 1061. In a contract deemed void *ab initio*, no provision within it survives. *Id.* It is as if the contract never existed. The Defendants moved to dismiss the case for lack of jurisdiction based in large part on the fact that the contract at issue is void *ab initio*, nullifying all of the provisions, including the jurisdiction provision. Therefore, it is improper to base a ruling on the provision within the contract without determining first if the contract exists or is void *ab initio*.

Not only does it make logical sense that a contract must exist before a court can rely on any part of it, but this has also been the conclusion of other Wisconsin courts. For instance, in *Latino Food Marketers v. Old Mexican Foods*, the court considered whether the contract dispute should be tried in Georgia instead of Wisconsin due to a forum selection clause in the contract. No. 03-C-0190-C, Not Reported in F.Supp.2d, 2003 WL 2322014, *2 (W.D.Wis. Nov. 24, 2003). While neither party questioned the validity of the clause, there was a dispute as to whether the overall contract ever existed. *Id.* The court noted, "Under the laws of both Wisconsin and Georgia, a party seeking to rely on a contract must prove the existence of the contract." *Id.* The court went on to analyze the facts surrounding the contract formation and determine that the defendant

would be unlikely to prove the existence of a contract.[1] *Id.* at *9. Because there was likely no contract, the court would not even consider sending the case to Georgia pursuant to the forum selection clause. *Id.*

In *Mitchell Health Technologies, Inc. v. Naturewell, Inc.*, the court similarly insisted that a provision within a contract could not be the basis for a ruling until the court determined that the contract itself existed. No. 02-C-0439-C, Not Reported in F.Supp.2d, 2003 WL 23200260, *2 (W.D.Wis. 2003). The court stated:

> As to defendant's alternative motion to stay pending arbitration, its request is premature. The parties contest the existence of the May 1 contract, which contains the arbitration clause at issue. … Although defendant persists in arguing that this court should accept its version of events … such arguments are misplaced at this stage of the proceedings. As is evident, until there has been a determination as to the enforceability of the arbitration clause, the court cannot stay the proceedings on the basis of that clause.

Id. The Tribe similarly asks that there be a determination as to whether the contract exists before the case is dismissed without prejudice based on a provision within the contract.

Only when the existence of the contract itself is not at issue should a court rely on a forum selection clause before ruling on the contract's validity. In *Muzumdar v. Wellness International Network, Ltd.*, appellants alleged that the contract set out a pyramid scheme and was therefore void as against public policy. 438 F.3d 759, 762 (7th Cir. 2006). Because no one argued over whether the contract existed, the court could look at the forum selection clause in isolation to determine if the clause itself was invalid

[1] The judge stopped short of ruling that the contract was invalid and only found that it was likely invalid because the judge did not want to overstep the jury's fact-finding role. *Latino Food Marketers*, 2003 WL 2322014 at *3. Nothing should stop the Court from making final conclusions on the contract's validity.

for reasons of fraud or overreaching. *See id*. Whereas, in a case in which a party alleges the contract is void *ab initio*, the provisions cannot be viewed in isolation before a ruling is made on the existence of the contract.

II. IT IS WITHIN THIS COURT'S PROVINCE AND IN THE INTEREST OF JUDICIAL ECONOMY TO CONSIDER THE FEDERAL ISSUES AT STAKE IN THIS CASE.

Federal courts have limited jurisdiction, but a state court can preside over nearly any dispute that occurs within the state's bounds. This authority stems from the Wisconsin Constitution, article VII § 8, which states in relevant part, "[e]xcept as otherwise provided by law, the circuit court shall have original jurisdiction in all matters civil and criminal within this state." State courts "are presumed competent to resolve federal issues." *Check Kam Choo v. Exxon Corp.*, 486 U.S. 140, 150 (1988) (citations omitted).

Disputes involving federally-recognized Indian tribes regularly implicate federal issues, and they are regularly heard in front of state courts. *See e.g. McNally CPA's & Consultants, S.C. v. DJ Hosts, Inc.*, 2004 WI App 221, 277 Wis.2d 801, 692 N.W.2d 247 (regarding sovereign immunity); *see also Panzer v. Doyle*, 2004 WI 52, 271 Wis.2d 295, 680 N.W.2d 666 (interpreting Indian Gaming Regulatory Act); *see also In re Vaughn R.*, 2009 WI App 109, 320 Wis.2d 652, 770 N.W.2d 795 (interpreting Indian Child Welfare Act).

In addition, given that the case has been pending in front of this Court since August 2009, it would best serve judicial economy to review the contract and come to a decision on whether it constitutes a management contract. This is not only a

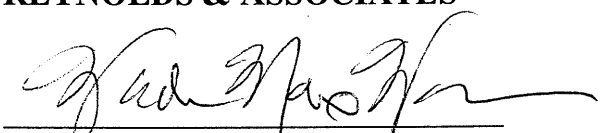
determination necessary before the Court relies on a provision within the contract, but it is also a determination necessary before the Court can decide whether the Tribe has waived its sovereign immunity to be called into *any* court by the Plaintiff. Because such a determination is an essential prerequisite to any action in this case, the Court should reverse its January 24, 2011 Order to Dismiss, and decide whether the contract is valid or void *ab initio*.

CONCLUSION

For the foregoing reasons, the Defendants request that the Court reconsider its decision to dismiss without prejudice and instead determine the existence and validity of the contract.

Dated this 7th day of February, 2011.

REYNOLDS & ASSOCIATES



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STATE OF WISCONSIN | CIRCUIT COURT CIVIL DIVISION | FOREST COUNTY

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

Plaintiff,

v.

SOKAOGON CHIPPEWA COMMUNITY (MOLE LAKE BANK OF LAKE SUPERIOR CHIPPEWA INDIANS) AND SOKAOGON GAMING ENTERPRISE CORPORATION,

Defendants,

ORDER

Case No. 09-CV-79

FILED
JAN 3 1 2011
Circuit Court
Forest County, WI

This matter having come before the Court on January 21, 2011 upon the Defendants' Motion to Dismiss, and the parties appeared by counsel as set forth on the record and the Court having considered the records, files and proceedings had herein and the argument of counsel;

NOW, THEREFORE, IT IS HEREBY ORDERED that, for the reasons set forth on the record, this case is dismissed without prejudice.

Dated this 24th day of January, 2011.

BY THE COURT:

HONORABLE LEON D. STENZ
CIRCUIT COURT JUDGE

STATE OF WISCONSIN, CIRCUIT COURT, FOREST COUNTY

For Official Use

Wells Fargo Bank, N.A.,
As Trustee,

(party designation) Plaintiff

-vs-

Sokaogon Chippewa Community
And Sokaogon Gaming Enterprise Corporation,

(party designation) Defendants

Notice of Appeal

Case No. 09 CV 79

Notice is hereby given that (name of party filing appeal) the Sokaogon Chippewa Community and Sokaogon Gaming Enterprise Corporation appeals to the Court of Appeals, District III, from [choose one] ☒ the whole ☐ a part of the final judgment or order, entered on (date) 1/31/11 in the circuit court for Forest County, the Honorable (name of Judge) Leon D. Stenz, presiding, in favor of (name of party opposing appeal) Wells Fargo Bank, N.A., and against (name of party filing appeal) Sokaogon Chippewa Community and Sokaogon Gaming Enterprise Corporation, wherein the court (describe judgment or order) dismissed the Complaint without prejudice.

NOTE: If this is an appeal under §809.30 or §809.32, also include the following (*see* §809.10(1)):

- If a postconviction motion was not filed, state the date of service of the last transcript or service of a copy of the circuit court case record.

  If a postconviction motion was filed, state the date of the order deciding the postconviction motion(s).

- If the Court of Appeals established any other filing deadline, state it.

If counsel is appointed under ch. 977, a copy of the order appointing counsel should be attached to the notice of appeal.

This [choose one] ☐ is ☒ is not an appeal within Wisconsin Statutes §752.31(2).

This [choose one] ☐ is ☒ is not an appeal to be given preference in the circuit court or court of appeals pursuant to statute.

Date: February 8, 2011

Signature of Filing Attorney or Party	Telephone Number
	608-257-3621
Name Printed or Typed	State Bar Number (if applicable)
Wade Max Williams	1025502
Address	
Reynolds & Associates 407 E. Main St., Madison, WI 53703	

This completed form must be *filed* with the clerk of the circuit court in which the judgment or order appealed from was entered. In addition, copies of this completed form must be served upon the following:

1. the Clerk of the Court of Appeals;
2. opposing counsel; and

3. any other party.

STATE OF WISCONSIN **COURT OF APPEALS DISTRICT III** **COUNTY OF ORIGIN Forest**

Case Caption (Case Name)
Wells Fargo Bank, N.A.,
as Trustee,
Plaintiff,
v.
Sokaogon Chippewa Community
(Mole Lake Band of Lake Superior Chippewa Indians)
and
Sokaogon Gaming Enterprise,
Defendants.

DOCKETING STATEMENT

Circuit Court Case No. 09 CV 79

Case Number Issued by Court of Appeals

Appellant(s) (Cross-Appellant)	Attorney's Name and Address	*(Space for file stamp.)*
Sokaogon Chippewa Community and Sokaogon Gaming Enterprise	Glenn Reynolds and Wade Williams Reynolds & Associates 407 E. Main St. Madison, WI 53703	
	Attorney's Telephone Number 608-257-3621	
Respondent(s) (Cross-Respondent)	Attorney's Name and Address	
Wells Fargo Bank, N.A.	Patrick Hodan and Meredith Wilkerson Reinhart Boerner Van Deuren, S.C. 1000 North Water Street, Suite 1700 Milwaukee, WI 53202	
	Attorney's Telephone Number 414-298-1000	

CRITERIA FOR EXPEDITED APPEALS

- This Docketing Statement is used solely to determine whether an appeal should be placed on the expedited appeal calendar. The respondent is not required to respond to the Docketing Statement. Generally, an appeal is appropriate for the expedited appeal calendar if:
  1. no more than 3 issues are raised;
  2. the parties' briefs will not exceed 15 pages in length; and
  3. the briefs can be filed in a shorter time than normally allowed.

  These requirements can be modified somewhat in appropriate cases.
- Parties should assume that the appeal will proceed under regular appellate procedure unless the court notifies them that the appeal is being considered for placement on the expedited appeals calendar.

JURISDICTION

Has judgment or order appealed from been "entered" (filed with the clerk of circuit court)?
☒ Yes ☐ No If yes, date of entry January 31, 2011.
Is appeal timely? *(See §808.04, Wisconsin Statutes)*
☒ Yes ☐ No
Is judgment or order final (does it dispose of the entire matter in litigation as to one or more of the parties)?
☒ Yes ☐ No *(If "no", explain jurisdiction basis for appeal on separate sheet.)*

NATURE OF ACTION – Briefly describe the nature of action and the result in circuit court:

In August 2009, Plaintiff filed a suit alleging that Defendants defaulted on repayment of bonds Defendants issued to Allstate in 2006. Defendants, a federally-recognized Indian Tribe and its wholly owned corporation, responded with a Motion to Dismiss based on numerous grounds, including that the contract is void ab initio because it constitutes a management contract and was not reviewed by the National Indian Gaming Commission as required by federal law. If true, this would void the waiver of sovereign immunity found in the contract and require dismissal based on lack of personal jurisdiction. The circuit court did not reach the issue of the validity of the contract, but instead dismissed without prejudice based on a clause in the contract requiring that disputes be brought first in federal court.

ISSUES – Specify the issues to be raised on appeal: *(Attach separate sheet if necessary.)*
(Failure to include any matter in the docketing statement does not constitute waiver of that issue on appeal. The court may impose sanctions if it appears available information was withheld. Court of Appeals Internal Operating Procedures, sec. VII(2)(b).)

When a party has alleged that a contract is void ab initio, must the court first reach a decision as to the validity and existence of the contract before basing a ruling on a provision found within the contract?

STANDARD OF REVIEW – Specify the proper standard of review for each issue to be raised, citing relevant authority:
A circuit court's granting of a motion to dismiss is reviewed de novo. 2005 WI App 16, ¶ 9, 278 WIs.2d 388, 692 N.W.2d 304.

Do you wish to have this appeal placed on the expedited appeals calendar? *(See Criteria For Expedited Appeals.)*
☐ Yes ☒ No If "no", explain :

Will a decision in this appeal meet the criteria for publication in Rule 809.23(1)?
☒ Yes ☐ No
Will you request oral argument?
☐ Yes ☒ No

List all parties in trial court action who will not participate in this appeal:

Party	Attorney's Name and Telephone Number	Reason for not Participating

Are you aware of any pending or completed appeal arising out of the same or a companion trial court case that involves the same facts and the same or related issue?
☐ Yes ☒ No Name of Case _____

Appeal Number _____

Rebecca Paulson

Signature of Person Preparing Docketing Statement

Rebecca Paulson

Name Printed or Typed

02-08-2011

Date

Appellant Note:

You MUST attach a copy of the following trial court documents to this form:

1. Trial court's judgment or order and findings of fact.
2. Conclusions of law.
3. Memorandum decision or opinion upon which the judgment or order is based.

You MUST also furnish all opposing counsel with a copy of this completed Docketing Statement and attached trial court documents.

STATE OF WISCONSIN | CIRCUIT COURT CIVIL DIVISION | FOREST COUNTY

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

Plaintiff,

v.

SOKAOGON CHIPPEWA COMMUNITY (MOLE LAKE BANK OF LAKE SUPERIOR CHIPPEWA INDIANS) AND SOKAOGON GAMING ENTERPRISE CORPORATION,

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ORDER

Case No. 09-CV-79

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