

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

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

Plaintiff,

Case No. 10-CV-1039

v.

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

Defendant.

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**RESPONSE TO DEFENDANTS' MOTION TO DISMISS**

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**INTRODUCTION**

This is a case about an Indian tribe, the Sokaogon Chippewa Community (Mole Lake Band of Lake Superior Chippewa Indians) (the "Tribe"), that is seeking to avoid repaying a \$19 million debt. Several years ago, the Tribe issued \$19 million in bonds. At that time, the Tribe assured Plaintiff<sup>1</sup> that the bonds were "enforceable" and that the Tribe could be sued if the Tribe defaulted on the bonds. Now, after defaulting on the bonds, the Tribe claims that its bonds are invalid, that it cannot be sued, and that it gets to keep the \$19 million. Plaintiff has alleged claims for (1) breach of the Indenture, Bonds and the Guaranty; (2) fraudulent transfer; and (3) equitable claims for promissory estoppel, unjust enrichment, restitution and conversion, all of which seek recovery of the \$19 million owed by Defendants.

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<sup>1</sup> Wells Fargo brings this lawsuit in its capacity as Trustee for the bondholders who purchased the tribal bonds.

Presently before this Court is the Tribe's motion to dismiss in which it contends that the Court should either abstain from exercising its jurisdiction or dismiss for lack of jurisdiction.<sup>2</sup> Neither of these arguments has merit. This Court has jurisdiction because both Defendants have expressly waived sovereign immunity and consented to the jurisdiction of this Court in documents that, for the reasons set forth below, are not invalid under IGRA. This Court also may not abstain from exercising its jurisdiction over the case. Defendants contend that this Court should abstain to allow the claims to proceed in the state law action Plaintiff previously filed, alleging some but not all of the claims alleged here. But the Tribe failed to mention in its brief that it had moved to dismiss the state law action, arguing that the claims belong in this Court. On January 21, 2011, the state court granted the motion and dismissed the state court action without prejudice, rendering moot the Tribe's abstention argument. For these reasons, which are described in greater detail below, the Tribe's motion to dismiss should be denied.

## **FACTS**

### **A. The Tribe Issued Over \$19 Million in Bonds Secured By the Casino's Net Revenues.**

On or about January 20, 2006, the Tribe issued bonds with a principal of \$19,165,000 in exchange for capital in the same amount (the "Bonds"). (Slade ¶ 2.)<sup>3</sup> The Tribe issued the Bonds pursuant to a Trust Indenture (the "Indenture"), naming Plaintiff Wells Fargo Bank, N.A., as Trustee for the bondholders (the "Trustee"). (Slade ¶ 4, Ex. B.) As Trustee, Wells

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<sup>2</sup> Curiously, the Tribe presents its two main arguments in this order although a court cannot abstain from exercising jurisdiction it doesn't have. As a practical matter, this Court should first address whether it has jurisdiction before addressing whether it ought to abstain from exercising such jurisdiction. For the sake of simplicity, however, Plaintiff responds to the Tribe's argument using the Tribe's ordering.

<sup>3</sup> All references to and exhibits to the Affidavit of Michael Slade refer to the Affidavit of Michael Slade filed in support of Plaintiff's Motion for Preliminary Injunction, filed with this Court on November 19, 2010, dkt. # 5.

Fargo is authorized to act on behalf of the bondholders. (Slade ¶ 5.) Sokaogon Gaming, a corporation wholly owned by the Tribe, guaranteed the Tribe's obligations by concurrently entering into a Guaranty and Pledge Agreement, dated as of January 1, 2006 (the "Guaranty"). (Slade ¶ 6, Ex. C.)

To secure the bond and guaranty obligations, the Tribe and Sokaogon Gaming granted the Trustee a first priority lien on and pledge of all right, title and interest in and to the gross revenues of Sokaogon Gaming remaining *after* payment of the operating expenses of the casino (the "Pledged Casino Revenues").<sup>4</sup> (Slade ¶¶ 4, 6, 7, 8, Exs. B, C.) The Indenture defines "Operating Expenses" as "the current (and not capitalized) *expenses of operation, maintenance and repair of the Casino Facility.*" (Slade ¶¶ 4, 9, Ex. B) (emphasis added.)<sup>5</sup> For example, the casino generated \$2,008,616 in Pledged Casino Revenues as of August 30, 2010. (Slade ¶ 11, Ex. E, pg. 6.)

**B. Defendants Represented That the Bond Documents Were Enforceable and Waived Sovereign Immunity For Enforcement Actions.**

Before the bond agreements were finalized, Defendants took numerous steps to attract and assure prospective lenders that they would be able to enforce the bond obligations should the Tribe default. On August 1, 2005, the Tribe issued a Tribal Resolution related to the borrowing eventually accomplished through issuance of the Bonds (the "2005 Initial Resolution"). (Slade ¶ 12, Ex. F.) Among other things, the 2005 Initial Resolution included

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<sup>4</sup> The Trustee perfected its security interest in the Pledged Casino Revenues by filing UCC-1 financing statements with the Wisconsin Secretary of State (Document Nos. 060001230107, 060001229923) and the Washington D.C. Recorder of Deeds (Document Nos. 2006010547, 2006010546) (collectively the "UCC Financing Statements") (Slade ¶ 10, Ex. D.)

<sup>5</sup> The Guaranty expressly adopts the definition of Pledged Casino Revenues set forth in the Indenture. (Slade ¶ 6, Ex. C.)

an express waiver of sovereign immunity for all claims regarding the borrowing as well as a jurisdictional consent provision. (Id. at ¶¶ 4.1, 4.2.) These provisions provide as follows:

The Tribe **hereby expressly waives its sovereign immunity from suit** and any requirement for exhaustion of tribal remedies should an action be commenced on this Resolution, or regarding the subject matter of this Resolution. The Tribe expressly consents to the levy of judgment or attachment of the Pledged Casino Revenues wherever located or maintained, including within the boundaries of the Tribe's Reservation, by the appropriate federal or state court.

\* \* \*

(d) shall be enforceable only in a court of competent jurisdiction and only to the extent the Tribe has consented to the jurisdiction of such court as set forth herein,<sup>6</sup>

\* \* \*

The Tribes **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 . . . with respect to any dispute or controversy arising out of the Indebtedness, or any transaction in connection therewith.

(Id.) (emphasis added.)

On January 6, 2006, the Tribe issued a bond resolution (the "2006 Bond Resolution") in which it addressed the proposed bond issuance. (Slade ¶ 13, Ex. G.) The 2006 Bond Resolution again contained provisions waiving sovereign immunity for claims based on or relating to the subject matter of the 2006 Bond Resolution, the Indenture or the Guaranty and consenting to jurisdiction in the federal court and this court under roughly the same terms as set forth in the 2005 Initial Resolution. (Id. at ¶¶ 3.1, 3.3, 4.1.) In the 2006 Bond Resolution,

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<sup>6</sup> The sovereign immunity waiver specifies several additional conditions that must be met in order for the waiver to apply, such as that the suit must be for the enforcement of the obligations of the Tribe in connection with the Indebtedness. (Slade ¶ 12, Ex. F.) None of these additional provisions renders the waiver inapplicable here.

the Tribe also agreed to secure the Bonds with an "absolute and unconditional guaranty of the Casino Enterprise and a pledge of Casino Revenues." (Id. at ¶ 1.6.)

The Indenture also contains an express waiver of sovereign immunity nearly identical to the one set forth in the 2006 Bond Resolution. (Slade ¶ 4, Ex. B, § 13.02.) The Bonds themselves contain additional sovereign immunity waivers and jurisdictional consent provisions nearly identical to those contained in the Indenture. (Slade ¶ 3, Ex. A, pg. 5.)

Finally, the Guaranty contains yet another waiver of sovereign immunity by Sokaogon Gaming with respect to actions "commenced on th[e] Guaranty or the Indenture or the Bond Resolution, or regarding the subject matter of the Guaranty or the Indenture[]" and expressly consents to "the levy of judgment or attachment of the Pledged Casino Revenues wherever located or maintained, including within the boundaries of the Tribe's Reservation, by the appropriate federal or state court."<sup>7</sup> (Slade ¶ 6, Ex. C, ¶ 20.) The Guaranty also includes a jurisdictional consent clause identical to the one found in the 2006 Bond Resolution. (Id.)

In addition to issuing these numerous sovereign immunity waivers, the Tribe retained a local law firm, Michael Best & Friedrich, LLP, to provide the Trustee with a formal opinion confirming that the Indenture and Guaranty "constitute valid and binding obligations" and are "enforceable . . . in accordance with their respective terms." (Slade ¶ 14, Ex. H, pg. 7, III.6.) The opinion assured the Trustee and bondholders that "[e]ach of the Tribe and the Casino Enterprise has duly waived its sovereign immunity in accordance with the terms of each applicable Financing Documents, and such waiver is valid and enforceable

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<sup>7</sup> Additional conditions identical to those found in the Resolutions and the Indenture are also set forth in the Guaranty. (Slade ¶ 6, Ex. C.)

against the Tribe and the Casino Enterprise in accordance with its terms." (Slade ¶ 14, Ex. H, pg. 7, III.10.) The opinion also assures the Trustee that "[a]ll approvals required to be obtained from any Tribal, State of Wisconsin or United States federal agency, body or instrumentality as a condition to the lawful execution, . . . of any of the Financing Documents . . . have been obtained, including all necessary approvals of the . . . National Indian Gaming Commission [("NIGC")]." (Slade ¶ 14, Ex. H, pg. 7, III.8.) Specifically, the opinion states that "[n]one of the Financing Documents constitute a 'management contract' or an agreement that is a 'collateral agreement' to a management contract that relates to a gaming activity regulated by IGRA [and] [n]one of the Financing Documents require approval pursuant to 25 U.S.C. §§ 81 and 84."<sup>8</sup> (Slade ¶ 14, Ex. H, pg. 8, III.12.)

In the Tribe's own words, the purpose for these numerous sovereign immunity waivers and jurisdictional consent provisions was "[t]o assure the successful placement and sale of the Series 2006 Bonds[.]" (Slade ¶ 13, Ex. G, ¶ 1.10.) That is, to encourage investors to loan the Tribe money at favorable interest rates by purchasing their bonds.

### **C. Defendants Have Defaulted on the Bonds, Indenture and Guaranty.**

Pursuant to the Indenture, the Tribe agreed to repay the Bonds by making monthly principal and interest payments of \$148,103.13 to the Trustee. (Slade ¶¶ 4, 15, Ex. B, § 6.01.) The Tribe also agreed to deposit \$41,667 a month into a capital expenditures account to insure that the Tribe could meet its obligations to make at least \$1,000,000 in capital expenditures on the casino over each two fiscal year period. (Slade ¶ 4, 15, Ex. B, § 6.15.) Since November 2008, the Tribe has made only three partial payments to the Trustee and has failed to deposit any money into the capital expenditures account. (Slade

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<sup>8</sup> IGRA is the Indian Gaming Regulation Act. 25 U.S.C. 2701, *et. seq.*

¶ 16.) The Tribe has not paid anything since October 2009. (Id.) These failures constitute defaults under the Bonds and Section 8.01 of the Indenture. (Slade ¶¶ 4, 16, Ex. B, § 8.01.) After the Tribe defaulted, the Trustee accelerated the debt by written notice dated July 29, 2009 to the Tribe pursuant to Section 8.02 of the Indenture. (Slade ¶17, Ex. I.)

Sokaogon Gaming has also defaulted on its Guaranty. (Slade ¶ 18.) Sokaogon Gaming agreed to guaranty the Tribe's performance under the Bonds and Indenture and make all required payments if the Tribe failed to do so. (Slade ¶¶ 6, 18, Ex. C.) Sokaogon Gaming has failed to make the required payments. (Id.) As of the filing of this brief, the Tribe and Sokaogon Gaming owe the Trustee approximately \$19 million on the Bonds and Guaranty. (Slade ¶ 19.)

**D. The State Court Action.**

When negotiations between the Trustee and the Tribe failed, the Trustee filed a collection lawsuit in Forest County Wisconsin (the "State Court Action"). (Slade ¶ 32.) Defendants moved to dismiss this case arguing that: (1) the state court does not have jurisdiction because this Court had not previously failed to exercise jurisdiction over the dispute, (2) the Indenture, including its waiver of sovereign immunity provision, is void and unenforceable as an unapproved "management contract" under IGRA and (3) the Indenture also is void and unenforceable as an unapproved encumbrance on Indian lands. (Slade ¶ 33, Ex. P.)

In light of the Tribe's somewhat surprising litigation position that the Indenture is a "management contract," the Trustee requested a "declination letter" from the NIGC finding

that the Indenture is not a "management contract" under IGRA.<sup>9</sup> (Slade ¶ 35, 36, Ex. Q.) Both the Tribe and Trustee submitted briefing to the NIGC on this issue. (Slade ¶ 36, Exs. Q, R.) On May 27, 2010, the NIGC's General Counsel issued a declination letter. (Slade ¶ 37, Ex. S.) The General Counsel sided with the Trustee and concluded that three of the four provisions that the Tribe contended rendered the Indenture a "management contract"—the pledge of net revenues, receivership and capital expenditure provisions—did not create a "management contract." (Id.) However, she did not offer an opinion on whether the fourth provision—the requirement to retain a consultant triggered by a breach of the debt service provision—created a "management contract," finding the issue to be "ambiguous." (Id.)

#### **E. This Lawsuit.**

Following receipt of the "declination letter" and another failed attempt to negotiate with the Tribe, Plaintiff filed this lawsuit in federal court. (Slade ¶ 38-39.) Based upon the Tribe's claims in the motion to dismiss and its briefing to the NIGC, this lawsuit added two declaratory judgment claims requesting the Court to declare Defendants have waived their sovereign immunity and the Indenture is not a "management contract" under IGRA. These new claims provide the basis for Plaintiff's allegations that the federal court now has jurisdiction.<sup>10</sup> In addition to seeking a declaratory judgment based in federal law, the Trustee has asked the federal court to use its discretion to exercise supplemental jurisdiction over state common law claims for: (1) breach of the Indenture, Bonds and the Guaranty; (2)

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<sup>9</sup> Barry Brandon's declaration filed November 19, 2010, dkt # 6, provides further explanation of the declination letter process. (Brandon ¶¶ 8-17.) Mr. Brandon's declaration is cited throughout this brief as (Brandon ¶ \_\_\_\_.)

<sup>10</sup> Plaintiff could not bring these claims at the time it filed the State Court Action. To file a declaratory judgment action Plaintiff needed an actual case or controversy. 28 U.S.C. § 2201. To satisfy that requirement, the dispute must be definite and concrete, not hypothetical or abstract. *MedImmune, Inc. v. Genentech, Inc.*, 549 U.S. 118, 127 (2007). Before Defendants filed their motion to dismiss, Plaintiff did not know whether Defendants would challenge sovereign immunity or the validity of the Indenture. In other words, the declaratory judgment counts were not ripe when this case was initially filed in state court.



fraudulent transfer; and (3) equitable claims for promissory estoppel, unjust enrichment, restitution and conversion, all of which seek recovery of the \$19 million owed by Defendants. (Compl. ¶¶ 102-197.) In light of this newly ripened basis for federal jurisdiction, Plaintiff asked the State Court to stay the State Court Action until this Court had an opportunity to determine whether it would take jurisdiction of the case. (Wilkerson ¶ 5.)<sup>11</sup> That motion was denied on November 29, 2010. (Id.)

Instead, the state court heard Defendants' motion to dismiss on January 21, 2011, granted the motion and dismissed the State Court Action without prejudice. (Wilkerson ¶ 7.)

## **ARGUMENT**

### **I. ABSTENTION IS NOT APPROPRIATE IN THIS CASE.**

Defendants first assert that this Court should dismiss Plaintiff's claims against them under principles of abstention, arguing that the claims brought in this action are duplicative of those pending in state court and ought to be decided in state court. Defendants complain that Plaintiff brought its state case nearly a year ago and is now unfairly forcing Defendants to defend two simultaneous actions.

What Defendants fail to mention is that their defense to the State Court Action has been that the case should have been brought in federal court. Specifically, Defendants moved to dismiss the State Court Action, arguing that Plaintiff should have brought its claims in federal court. (Slade ¶ 33, Ex. D ("Plaintiff is obliged under the terms of the Trust Indenture and Guarantee to bring its claims in federal court.")) In other words, Defendants asked the state court to dismiss because the claims belonged here and now ask this Court to dismiss because the claims belong in state court.

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<sup>11</sup> All references to and exhibits to the Declaration of Meredith Wilkerson filed in support of this brief are cited as (Wilkerson ¶ \_\_, Ex.\_\_.)

Plaintiff brought the present action in direct response to Defendants' motion to dismiss the State Court Action. (As explained in footnote 9, *supra*, federal question jurisdiction had not yet ripened at the time Plaintiff filed its State Court Action, but has since.) In addition, Plaintiff filed a response brief indicating that it did not object to the dismissal of the State Court Action, provided this Court exercises its jurisdiction over the claims. (Wilkerson ¶ 3, Ex. B.) On January 21, 2011, the state court granted the motion and dismissed the State Court Action without prejudice. (Wilkerson ¶¶ 6-7.)

The state court's dismissal of the State Court Action renders moot Defendants' first argument that this Court abstain from exercising jurisdiction over this case in deference to the state court. A necessary prerequisite to the application of the abstention doctrine is the existence of parallel state and federal court proceedings. *See generally Colorado River Water Conservation Dist. v. United States*, 424 U.S. 800 (1976); *Brillhart v. Excess Ins. Co. of America*, 316 U.S. 491, 494-95 (1942). As that prerequisite is no longer met, abstention is inapplicable.

## **II. DEFENDANTS WAIVED THEIR SOVEREIGN IMMUNITY IN FIVE SEPARATE DOCUMENTS, NONE OF WHICH CONSTITUTE MANAGEMENT CONTRACTS.**

"Suits against Indian tribes are . . . barred by sovereign immunity absent a clear waiver by the tribe or congressional abrogation." *Okla. Tax Comm'n v. Citizen Band Potawatomi Indian Tribe*, 498 U.S. 505, 509 (1991). Defendants argue there is no valid sovereign immunity waiver because the Indenture is unenforceable under IGRA as a management contract not approved by the NIGC. Such a contention must fail; the Indenture does not constitute a "management contract" as that term is defined. But even if it did, Defendants waived sovereign immunity in four other documents. In order to grant Defendants' motion to dismiss, this Court must find that all five of the documents containing

sovereign immunity waivers are invalid and unenforceable. Defendants cannot reasonably argue that the language in those unchallenged documents does not constitute an express waiver of sovereign immunity and in fact, they have made virtually no attempt to do so.

**A. A "Management Contract" is a Contract for the Management and Operation of a Casino.**

IGRA self-defines one of its primary purposes as "shield[ing] [tribes] from organized crime and other corrupting influences." 25 U.S.C. § 2702. In order to prevent corrupt actors from usurping tribal authority over gaming activities, the Act requires that "management contracts" for class II or III gaming be submitted to and approved by the NIGC Chairman. 25 U.S.C. §§ 2705(a)(3)(4), 2710(d)(9), 2711(a). Although the phrase "management contract" is not defined in the Act, the Senate Report accompanying it provides that "the term 'management contract' refers to agreements governing *the overall management and operation* of an Indian gaming facility by an entity other than the tribe or its employees." S. Rep. No. 100-446, at 15 (1988), *reprinted in* 1988 U.S.C.C.A.N. 3071, 3085 (emphasis added). After enactment, to effectuate this purpose, the NIGC adopted various regulations, including a definition of the phrase "management contract" as "any contract, subcontract, or collateral agreement between an Indian tribe and a contractor or between a contractor and a subcontractor *if such contract or agreement provides for the management of all or part of a gaming operation.*" 25 C.F.R. § 502.15 (emphasis added).

IGRA's regulatory structure demonstrates that a "management contract" involves an outside "management contractor" who has operational and management control of an Indian casino, who is being paid to operate and manage an Indian casino, and who is not a tribe employee. *See* 25 C.F.R. § 531.1(b). Although neither the statute nor the regulations define the term "management," the regulations do define a primary management official as any

person "who has authority . . . [t]o set up working policy for the gaming operation . . ." 25 C.F.R. § 502.19. In sum, a "management contract" is an agreement between a tribe and a contractor for outside management and operation of the Tribe's gaming operations. IGRA is not meant to govern lending contracts like the one at issue here. (See Brandon ¶¶ 9-13.)

Consistent with the above analysis, most courts have found an agreement to be a management contract only when a party was contracted to "operate" the gaming facility or when an agreement forces a tribe to follow management advice. *See, e.g., First Am. Kickapoo Operations, L.L.C. v. Multimedia Games, Inc.*, 412 F.3d 1166 (10th Cir. 2005); *United States ex. rel. Bernard v. Casino Magic, Corp.*, 293 F.3d 419 (8th Cir. 2002).

For the reasons specified below, none of the documents at issue—the Indenture, the Resolutions, the Bonds or the Guaranty—constitute a "management contract" under IGRA. Thus, none of the sovereign immunity waivers can be invalidated on that basis.

**B. The Indenture Is Not A Management Contract.**

The Indenture does not meet the definition of a "management contract" as it does not "provide[] for the management of all or part of a gaming operation." 25 C.F.R. § 502.15. It is not a contract "for the operation" of the casino, for the "operation and management" of the casino and it does not "govern[] the overall management and operation of an Indian gaming facility . . ." S. Rep. No. 100-446, *supra*, at 15. Additionally, neither the Trustee nor the bondholders are "management contractors" who are receiving payment to operate the casino. Instead, the Indenture is a contract governing the Tribe's fixed-rate debt to the bondholders. It is undisputed Sokaogon Gaming has been and continues to operate and manage the casino and that under the terms of the Indenture, neither the Trustee nor any other outside party has either the right or opportunity to do so. The Indenture, on its face, is not a management contract.

Like in their submission to the NIGC, Defendants argue in their motion to dismiss that the following provisions in the Indenture make it a management contract: The Capital Expenditures Fund (Sections 5.04 and 6.15), Appointment of Receivers (Section 8.04) and Debt Service Coverage (Section 6.13). (Defs.' Br. 9-17; Slade ¶ 34, Ex. R.) For the reasons discussed below, none of these provisions creates a management contract.

**C. The Trustee's Security Interest in the Pledged Casino Revenues Does Not Create a Management Contract.**

Defendants have previously argued to the NIGC and the state court that the Trustee's security interest in the Pledged Casino Revenues creates a management contract. As Defendants fail to mention it in their motion to dismiss, it appears they have abandoned this argument. However, we address the argument because it is relevant to Defendants' arguments regarding the receivership provision.

The Trustee's security interest in the Pledged Casino Revenues does not give it the ability to influence the management of Sokaogon Gaming. As security for the \$19 million debt, Defendants granted the Trustee a first lien right in Sokaogon Gaming's *net* revenues after the payment of Operating Expenses—the Pledged Casino Revenues. (Slade ¶¶ 4, 6 Exs. B, C.)

As the NIGC's General Counsel pointed out, however, unlike a security interest in *gross* revenues which might allow a secured party to exercise control over a casino's operations by virtue of its control over the casino's revenues, a security interest in *net* operating revenues, like the one here, does not implicate this risk. (Slade ¶ 37, Ex. S.) Any given dollar does not become part of the Pledged Casino Revenues until *after* it is determined to be in excess of the casino's operating expenses. In other words, the Trustee's security interest is strictly limited to those funds *not* implicated in the casino's operation. As the

Trustee has no security interest in the funds needed or used for operating expenses, it accordingly has no control over the gaming operations in the event of a default. The Trustee only receives the money left over after the Tribe uses its discretion to pay operating expenses.

**D. The Capital Expenditures Fund Also Does Not Convert the Indenture Into a Management Contract.**

Under the Indenture, the Tribe agreed to deposit \$41,667 into a capital expenditures account monthly and to spend at least \$1 million on capital expenditures for the casino over each two year fiscal-year period. (Slade ¶ 4, Ex. B.) The Tribe argues this takes away its discretion to decide to spend the money on "other more urgent purposes such as marketing, or even debt service payments" and "constitutes control by the trustee over the casino's ability to buy new equipment which is a Casino Operation." (Slade ¶ 36, Ex. R; Def. Br. at 9-11.)

As the NIGC's General Counsel has aptly observed, "finding management by the Trustee in this would produce absurd results." (Slade ¶ 37, Ex. S, pg. 5.) The Tribe already has made the management decision to make these minimum capital expenditures. (Id.) Moreover, the Trust Indenture does not divest Sokaogon Gaming or the Tribe of its discretion to decide how to spend the money in the capital expenditures account.

The Tribe's argument is tantamount to an assertion that any agreement that requires a payment, or pledges collateral, is a management contract. Although it is true that an agreement to make payments over a period of time removes from the Tribe's discretion the ability to use that money for other purposes, this alone simply cannot bring such a contract within the realm of "management contracts" regulated by IGRA. If this were the rule, the Tribe could not enter into any contracts related to gaming activity or ever receive financing

without having the contract approved by the NIGC. This is not the purpose of the management contract approval process and would be oppressive to Indian tribes, the NIGC and any party that enters into a contract to do business with a tribe.<sup>12</sup> (See Brandon ¶¶ 14-16.)

**E. The Receivership Provision Does Not Convert the Indenture Into a Management Contract.**

The Indenture provides that, in the event of a default, the Trustee has the right to request "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." (Slade ¶ 4, Ex. B, § 8.04.) Defendants argue that this provision "provides a third party with financial control over Casino management upon the event of a default." (Defs.' Br. 12.) Defendants are wrong for several reasons.

A Court's ability to grant a receiver is an inherent equitable power that exists whether or not the parties have previously consented to it in their agreement. Fed. R. Civ. P. 66; *In re*

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<sup>12</sup> Defendants also have taken issue with the requirement that they issue a draw request to withdraw money from the capital expenditures account. The requirement that the Tribe submit a draw request to withdraw money from the capital expenditures account does not provide the Trustee with management discretion or control. As support for its argument that the draw requests create management control, the Tribe has pointed to two draw requests that were denied by the Trustee. (Slade ¶ 36, Ex. R.) As the NIGC recognized, the reason for the denial was the Tribe was already in default under the Indenture and the Indenture prohibits the Trustee from releasing funds to the Tribe from the capital expenditures account when it is in default. (Slade ¶ 37, Ex. S.) Accordingly, nothing in the capital expenditures' provision gives the Trustee or bondholders any right or opportunity to control the operation or maintenance of the casino.

Defendants similarly argued to the NIGC that the Indenture's requirements that some of the loaned funds be deposited into various default repayment accounts created management control because the Tribe lost the ability to spend the money it borrowed in any way it desired. (Slade ¶ 36, Ex. R.) The test is not whether a contractual obligation impairs a tribe's discretion generically but whether it imposes obligations about the management and operation of gaming operations. The Tribe's agreement to set some loaned funds aside in event of default has no effect on Defendants' authority and discretion to make decisions about the management and operation of their gaming activities. Moreover, the bonds were issued with the stated goal of financing numerous tribal projects, most of them unrelated to the Casino such that there is no basis for treating the loaned funds as though they are somehow "Casino funds." According to the Indenture, of the \$19 million, only \$300,000 was to be directed to the Casino for making upgrades to the parking lot; the remainder was for other tribal projects and obligations. (Slade ¶ 4, Ex. B, App. A, pg. 9; Brandon ¶ 20b.)

*McGaughey*, 24 F.3d 904, 907 (7th Cir. 1994) ("Federal courts have an inherent equitable power to appoint a receiver to manage defendant's assets during the pendency of litigation"). The parties' consent to a receiver does not guaranty a party's right to receive one. *See, e.g., Sterling Sav. Bank v. Citadel Dev. Co.*, 656 F. Supp. 2d 1248 (D. Or. 2009). It would be absurd to find that an otherwise available right could, on its own, turn an otherwise unoffending agreement into a management contract.

A receiver, if appointed here, would not manage or operate the casino because the scope of the receivership is limited to protecting a property interest. Courts have recognized that the receivership should be limited to the extent it is necessary to protect, conserve, and administer property pending final disposition of a suit. *In re McGaughey*, 24 F.3d at 907; *Sterling Sav.*, 656 F. Supp. 2d at 1260-61. Because the property interest in this case is limited to the Pledged Casino Revenues, any receiver that would be appointed would only have power over the net revenues. The Tribe would maintain its discretion over how to spend the operating expenses. As the NIGC recognized, such a limited receivership does not create a management contract for the same reason the net revenue pledge does not create a management contract. (Slade ¶ 37, Ex. S.)

**F. The Debt Service Coverage Provision Does Not Convert the Indenture Into a Management Contract.**

There is nothing in the debt service covenant that qualifies the Indenture as a management contract. In short, the debt service provision provides that the Tribe must make available funds in the amount of 150% of its debt service obligation or otherwise hire an independent consultant whose recommendations the Tribe need not follow. (Slade ¶ 4, Ex. B, § 6.14; Brandon ¶¶ 22-23.) The relevant text provides as follows:

[If] Income Available for Debt Service has been less than  
150% of Total Principal and Interest Requirements, the Casino



Enterprise at its expense shall retain an Independent consultant acceptable to the Trustee (which Independent consultant may consist of a consulting firm recognized for its experience in the field of tribal casino gaming or a firm of certified public accountants) to make recommendations. . . . So long as an Independent consultant shall be employed and Casino Enterprise accepts and follows the recommendations of the Independent consultant *or such alternate recommendations of the Tribal Council, the Tribe shall be deemed to be in compliance with the covenants provided in this section.*

(Id.) (emphasis added.)

Defendants argue this provision creates a management contract for three reasons:

(1) the consultant makes recommendations regarding management decisions, (2) the Tribe does not have any freedom to avoid the expense of a management consultant, and (3) the consultant must be "acceptable to the Trustee." (Defs.' Br. 13-14.) None of these arguments is compelling.

First, the debt service provision does not divest the Tribe of its management discretion. By its terms, the Tribe is free to ignore the consultant's suggestions and comply with the debt service provision by developing its own recommendations and following those instead. (Slade ¶ 4, Ex. B, § 6.14; Brandon ¶¶ 22-23.) Making recommendations alone does not create a management contract. *Casino Magic*, 293 F.3d at 425 (consulting agreement would not have been "management contract" but for later contract mandating compliance with consultant recommendations); *Nat'l Indian Gaming Comm'n Bull. No. 94-5, Approved Mgmt. Contrs. v. Consulting Agreements* (Oct. 14, 1994), available at [www.nigc.gov/Reading\\_Room/Bulletins/Bulletin\\_No.\\_1994-5.aspx](http://www.nigc.gov/Reading_Room/Bulletins/Bulletin_No._1994-5.aspx) (distinguishing consulting agreements from management contracts).

Notably, the NIGC refrained from offering an opinion as to whether the debt service provision was a management provision. (Slade ¶ 37, Ex. S.) According to the NIGC, the

provision appeared to require that the Tribe follow some third-party consultant's recommendations, whether they be the recommendations of the initial consultant or the alternate recommendations "presumably from another consultant." (Id. at pg. 8.) However, on this particular detail, the NIGC appears to have either misread or missed the language italicized above indicating that the alternate recommendations were anticipated to be recommendations made by the Tribal Council and not by a third party. (Brandon ¶ 21-23.) Accordingly, the NIGC's uncertainty about mandatory compliance with third party recommendations is misplaced; the Tribe is expressly authorized to substitute its own judgment and discretion in place of that of the consultant. (Id.)

Second, requiring the Tribe to pay for the consultant does not convert the agreement into a management contract for the same reason the capital expenditures provision did not create one—the Tribe has already exercised its discretion and agreed to pay for the consultant. By agreeing to the Indenture, the Tribe decided that if its revenues fall to a certain level, hiring a consultant to advise it on its operations is in its best interests, recalling, of course, that the Tribal Council retains ultimate authority to ignore the consultant and determine the Tribe's best interests.

Finally, the requirement that the consultant be "acceptable to the Trustee" does not convert the Indenture into a management contract either. (Brandon ¶ 23a.) The NIGC found this provision to be ambiguous and thus did not offer an opinion on it. (Slade ¶ 37, Ex. S.) The NIGC stated that the word "acceptable" could vest the Trustee with some kind of veto right over the selection of a consultant. (Id.) In contrast, the NIGC recognized "acceptable to the Trustee" could be read to be limited to the types of firms described in the immediately following parenthetical, which includes firms recognized in the field of casino gaming or a

CPA firm. (Id.) The NIGC concluded that if read as vesting veto power, it conveyed management power, but if the clause merely restricted the Tribe's choice in management consultants to meeting one of the two specified criteria, it would not be a management contract. (Id.) Contractual construction rules dictate that any ambiguity be resolved in favor of a lawful interpretation and, accordingly, the former construction should be adopted. *Variance, Inc. v. Losinske*, 71 Wis. 2d 31, 36-37, 237 N.W.2d 22, 24 (1976) ("interpretation favoring legality and enforceability should be adopted").

However, even if the agreement is read to require Trustee approval in all circumstances, this provision does not constitute a management provision. As noted above, the NIGC acknowledged that consultancy is not an act of management. *Bull. No. 94-5*, *supra*; *see also Casino Magic*, 293 F.3d at 425. If providing non-binding consultation is not management, the one-step-removed act of approving a person to provide non-binding consultation certainly cannot be management. At most, this clause gives the Trustee the right to approve a consultant whose management recommendations the Tribe need not follow. (Brandon ¶ 23.)

The debt service provision in question simply requires that the Tribe make at least 150% of its debt service obligation or hire an independent consultant, whose recommendations the Tribe need not follow. (Brandon ¶ 23.) It does not render the entire agreement a "management contract" as that term is defined in 25 C.F.R. § 502.15.

**G. The Opinion In *Wells Fargo v. Lake of the Torches Economic Development Corporation* Does Not Dictate an Outcome That the Indenture in This Case is a Management Contract.**

The United States District Court for the Western District of Wisconsin earlier this year issued an opinion analyzing whether a particular bond indenture constituted a "management contract" in *Wells Fargo Bank, N.A. v. Lake of the Torches Econ. Dev. Corp.*,

677 F. Supp. 2d 1056 (W.D. Wis. 2010).<sup>13</sup> In that case, the court voided the indenture at issue there, holding the following terms "collectively and individually . . . give unapproved third parties the authority to set up working policy for the Casino Facility's gaming operation:"

- A security interest in the Casino's Gross Revenues.
- A prohibition against incurring capital expenditures in excess of 25% of the prior fiscal year's capital expenditures without receiving the consent of the majority bondholders.
- 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.
- Requiring consent of 51% of the bondholders before replacing or removing the General Manager, Controller, or Chairman or Executive Director of the Gaming Commission.
- The right to a Receiver over the Casino's Gross Revenues in the event of a default.

*Id.* at 1060. The court's opinion in the *Lake of the Torches* case does not dictate whether the Indenture at issue in this case is a management contract because, as noted by the NIGC, there are material differences between the two indentures.

First, while both indentures also contain capital expenditures provisions, the specific terms of the capital expenditures provision in the *Lake of the Torches* case is materially different from the one at issue in this case. In *Lake of the Torches*, the court found that the capital expenditures provision at issue there was a management provision because it required the bondholders to consent in writing if the Tribe wanted to increase its capital expenditures

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<sup>13</sup> The court's holding is currently on appeal with and being reviewed *de novo* by the U.S. Court of Appeals for the Seventh Circuit, Case No. 10-2069. Oral argument was held on October 20, 2010 and can be heard at <http://www.ca7.uscourts.gov/fdocs/docs.fwx?dname=arg>.

by more than 25% over the previous year's spending. 677 F. Supp. 2d at 1059-60. The capital expenditures provision here includes no such requirement. (Slade ¶ 4, Ex. B, § 5.04.)

Second, both indentures include debt service ratio provisions, but the provision in the *Lake of the Torches* indenture mandated that the Tribe use its best efforts to implement the recommendations of a third-party consultant; as noted above, the debt service ratio provision in this case leaves the Tribe with discretion to either adopt or reject a consultant's recommendations. 677 F. Supp. 2d at 1060, n. 1.

Finally, while both indentures provide for the appointment of receivers, a receiver appointed under the *Lake of the Torches* indenture could control all of a casino's gross revenues, but a receiver appointed under the Indenture here could control only net revenues after the payment of operating expenses. Since the appointment of a receiver in this case would not result in third-party control over a casino's operating expenses, it does not provide the Trustee with any control or influence of the management over the casino.

#### **H. The Other Documents Are Not Management Contracts Either.**

Even if the Indenture was a management contract, which it is not, Defendants repeatedly waived their sovereign immunity in other documents; they did so in the 2005 Initial Resolution, the 2006 Bond Resolution, the Guaranty, and the Bonds. None of these waivers are challenged in Defendants' motion, but if they were, these documents are not management contracts either. Thus, the sovereign immunity waivers contained within are enforceable.

##### **1. The 2005 Initial Resolution and 2006 Bond Resolution Are Not Management Contracts.**

As an initial matter, neither the 2005 nor the 2006 Bond Resolution can be regarded as a contract at all, much less a management contract. IGRA is clear that in order to be

subject to mandatory approval by the NIGC, a document must constitute either a "contract" or an "agreement." 25 U.S.C. § 2711; 25 C.F.R. § 502.15. A tribal resolution is a unilateral proclamation of a tribe's governing council. (See Slade ¶¶ 12-13, Exs. F, G.) Neither the Trustee, nor the individual bondholders were parties to either Resolution: they had no say in the terms of the Resolutions, made no promises there under and neither gave, nor received consideration.<sup>14</sup>

Even if the Resolutions constituted some form of agreement or contract, and neither does, neither Resolution "provides for the management of all or part of a gaming operation." The central focus of each of the Resolutions is to provide tribal authorization for the issuance of Bonds. None of the provisions of either Resolution regulates any aspect of management of the casino's operations. As such, neither Resolution comes close to qualifying as a "management contract" under the definition set forth in 25 C.F.R. § 502.15.

Although neither Resolution qualifies as a "collateral agreement,"<sup>15</sup> it would be immaterial even if one or both did. A collateral agreement may be considered a management contract such that it must be approved by the NIGC *only* if it "provides for the management of all or part of a gaming operation." 25 C.F.R. § 502.15. Accordingly "if [an] agreement[] . . . entered into by the parties is a collateral agreement, pursuant to 25 C.F.R. § 502.5, because it is related to a management contract, it still would not be void for lack of NIGC

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<sup>14</sup> Although the 2006 Resolution contains a curious clause stating that the Resolution is to "constitute a contract with the Trustee," statutory language is to be given its plain and ordinary meaning. *Ambrosia Land Invs., LLC v. Peabody Coal Co.*, 521 F.3d 778, 781 (7th Cir. 2008). The plain and ordinary meaning of "contract" and "agreement" implicates more than one party; a single party cannot convert its unilateral proclamation into a contract by simply asserting that it is so. *Ehlinger v. Hauser*, 2010 WI 54, ¶ 57, 325 Wis. 2d 287, 785 N.W.2d 328.

<sup>15</sup> A collateral agreement is defined as "any contract . . . that is related, either directly or indirectly, to a management contract, or to any rights, duties or obligations created between a tribe (or any of its members, entities, or organizations) and a management contractor or subcontractor . . . ." 25 C.F.R. § 502.5.

approval unless it also provides for the management of a gaming operation." *Jena Band of Choctaw Indians v. Tri-Millennium Corp.*, 387 F. Supp. 2d 671, 678 (W.D. La. 2005).

Finally, because the Resolutions do not qualify as "management contracts," Defendants cannot argue that they are somehow null and void under the doctrine of merger. Under the doctrine of merger, "after the parties negotiate the terms of a contract, the negotiations are merged therein when written and signed." *St. Norbert College Found., Inc. v. McCormick*, 81 Wis. 2d 423, 431, 260 N.W.2d 776, 780 (1978) (emphasis added) (citation omitted). First, the Resolutions at issue here are in no way "negotiations" between the parties. In fact, the 2005 Initial Resolution does not even mention the Trustee. Second, there is no possible circumstance under which this doctrine would undo the Tribe's waiver of sovereign immunity. If the Resolutions are merged into the Indenture and the Indenture is found to be valid, the nearly identical waiver of sovereign immunity in the Indenture will apply. On the other hand, if the Indenture is found invalid *ab initio*, there is no contract into which the Resolutions could have merged.

## **2. The Guaranty is Not a Management Contract.**

The sovereign immunity waiver in the Guaranty is also not invalid as that agreement too does not meet the definition of a management contract under 25 C.F.R. § 502.15. Although the Guaranty contains a debt service provision identical to the one found in the Indenture, for the reasons set forth above, that provision does not render a contract a "management contract."

## **3. The Bonds are Not Management Contracts.**

Finally, the sovereign immunity waivers in the Bonds are also valid as they do not constitute management contracts either. 25 C.F.R. § 502.15. The Bonds evidence the debt itself and require bi-annual payments. These requirements do not control management of the

casino in the slightest. The Bonds contain none of the allegedly offending provisions and thus there can be no argument that they are management contracts.

**I. Should the Court Find Any Provision Problematic, the Court Should Sever It and Enforce the Remainder.**

Should this Court find any of the challenged provisions to be problematic, it should enforce the Indenture and Guaranty without them, as failure to do so would result in a \$19 million windfall for Defendants. As the Seventh Circuit has held:

It is not yet the law that if a contractual provision is illegal . . . the contract cannot be enforced, regardless of the nature and consequences of the illegality. . . . [T]he contract defense of illegality is flexible rather than rigid, and will not be applied where it would produce a sanction disproportionate to the wrong, at it might well do here.

*Olson v. Paine, Webber, Jackson & Curtis, Inc.*, 806 F.2d 731, 743 (7th Cir. 1986); *see also Nagel v. ADM Investor Servs., Inc.*, 217 F.3d 436 (7th Cir. 2000); Restatement (Second) of Contracts § 184 (1981).

A court's primary objective when interpreting a contract is to give effect to the parties' intent. *Steinmann v. Steinmann*, 2008 WI 43, ¶ 21, 309 Wis. 2d 29, 749 N.W.2d 145. Both Wisconsin law and Federal law, relying on the Restatement (Second) of Contracts, hold that illegal clauses can be severed from a contract so long as severing such provisions does not defeat "the primary purpose of the bargain." *Dawson v. Goldammer*, 2006 WI App 158, ¶ 16, 295 Wis. 2d 728, 722 N.W.2d 106; *Long Island Sav. Bank, FSB v. United States*, 503 F.3d 1234, 1245 (Fed. Cir. 2007); Restatement (Second) of Contracts § 184(1). Specifically, when "the illegality of the provision arises from a violation of a regulation, the intent behind the regulation drives [the] severability analysis." *Dawson*, 2006 WI App 158, ¶ 17.

Here, none of the parties intended the Indenture to be a management contract. At the time of the bond issuance, Defendants specifically represented that the Indenture was not a



"management contract." (Slade ¶ 14, Ex. H.) Moreover, the contested provisions are for the benefit of the bondholders, who are content to have them stricken if necessary. (Slade ¶ 43.) Had the contested provisions been excluded from the Indenture or Guaranty, the Defendants would have been better off since exclusion of the contested provisions benefit the Defendants. Additionally, severance mimics the process that would have been followed had the Indenture been reviewed by the NIGC prior to execution and found problematic. When, like here, the parties do not intend to create a management contract, the NIGC requests deletion of provisions implicating management, instead of treating an agreement not intended to be a management contract as a management contract. (Brandon ¶ 17.)

The Indenture is not a contract with an illegal purpose or subject matter—the Indenture is facially and functionally a loan agreement and the contested provisions are standard loan terms. Further, there is no allegation that the bondholders or Trustee have engaged in conduct violative of IGRA; on the contrary, the bondholders have performed the undisputedly legal primary purpose of the bond transaction—the loan to the Tribe. *See* Restatement of Contracts § 603 (1932) ("Recovery is more readily allowed where there has been part performance of the legal portion of the bargain.").

The primary purpose of the Indenture—securing repayment of the Bonds—would remain intact even without the contested provisions. That purpose proceeded apace for almost two years without reference to the contested provisions, which account for a miniscule portion of the Indenture. Finally, severance, if necessary, is consistent with IGRA's purpose. The purpose of IGRA is to provide federal oversight of tribal gaming activities; the Act was never intended to provide a statutory framework under which tribes

could walk away from multi-million dollar loans on what can only be described as a technicality.

### **III. THE INDENTURE DOES NOT ENCUMBER TRIBAL LANDS.**

The Tribe also argues that the Indenture should have been approved by the Bureau of Indian Affairs because it encumbers Tribal lands under 25 U.S.C. § 81. It is true that 25 U.S.C. § 81 prohibits encumbrances on "Tribal lands" for more than 7 years without approval from the Secretary of Interior. Surprisingly, in its argument, Defendants never mention the definition "Tribal lands" under 25 U.S.C. § 81. It "means lands the title to which is held by the United States in trust for an Indian tribe or lands the title to which is held by an Indian tribe subject to a restriction by the United States against alienation." 25 U.S.C. § 81(a)(1). In other words, it means what is referred to as "trust land." *See Penobscot Indian Nation v. Key Bank of Main*, 112 F. 3d 538, 550 (1st Cir. 1997); *Oneida Tribe of Indians of Wisconsin v. Village of Hobart*, 542 F. Supp. 2d 908; Pierson, Brian, *Resolving a Perilous Uncertainty: The Right of Tribes to convey Fee Simple Lands*, 57 APR Fed. Law 49 (March/Apr 2010).

None of the land subject to the negative pledge in section 6.14 of the Indenture is trust land. As the NIGC pointed out in its response to this issue, the land subject to the negative pledge is "fee land" which is not subject to regulation under section 81. (Slade ¶ 37, Ex. S.) The Tribe must agree because, in violation of the negative pledge in the Indenture, it encumbered the same land with a mortgage to secure a loan to build a hotel. (Slade ¶¶ 28-31, Ex. N.)

Additionally, unlike the mortgage on the land, the negative pledge in the Indenture is not an "encumbrance" as that term is defined. 25 C.F.R. § 84.002 provides that "[e]ncumbrances 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." (Emphasis added). The negative pledge does not give Wells Fargo "exclusive or nearly exclusive" proprietary control over the subject land and thus, does not constitute an encumbrance for which governmental approval would be necessary.

#### **IV. SHOULD THE COURT INVALIDATE THE INDENTURE, PLAINTIFF'S EQUITABLE CLAIMS SURVIVE.**

Should the Court void the Indenture, the Guaranty and even the Bonds, Plaintiff's equitable claims still survive. Plaintiff has plead claims for unjust enrichment, restitution, negligent misrepresentation and fraudulent inducement. Defendants' motion neglects to mention these claims or why they should be dismissed. For this reason alone, these claims survive. But even if challenged, Defendants are not excused from repaying the \$19 million in equity.

Under both federal and state contract law, when a contract is void for illegality the contract "is ordinarily treated as rescinded, meaning that the parties are to be put back, so far as possible, in the positions they would have occupied had the contract never been made in the first place." *Scheiber v. Dolby Labs., Inc.*, 293 F.3d 1014, 1022 (7th Cir. 2002); *see generally Winton v. Amos*, 255 U.S. 373, 393-94 (1921); Restatement (Third) of Restitution & Unjust Enrichment § 32 (Tentative Draft No. 7, 2010). This is done so that the voiding party is not "unduly enriched by being able to walk away from the contract." *Scheiber*, 293 F. 3d at 1023. There is no question Defendants will be "unduly enriched" if loan documents are deemed void—and therefore, restitution is appropriate. A statutory or regulatory provision voiding non-complying agreements does not preclude restitution. *Olson*, 806 F.2d 731; Restatement (Third) of Restitution & Unjust Enrichment § 32 (Tentative Draft No. 7, 2010.)

Defendants have no reasonable argument that keeping the \$19 million they borrowed is not a windfall, nor do they have any reasonable argument that there is no valid sovereign immunity waiver. The 2005 Initial Resolution contains a waiver of sovereign immunity for any claims "regarding the subject matter of [the] Resolution" and "extend[s] . . . to a suit to enforce the obligations of the Tribe in connection with the Indebtedness." (Slade ¶ 12, Ex. F at § 4.1.) This broad waiver encompasses lawsuits to recover the \$19 million in equity.

### **CONCLUSION**

Because this Court has jurisdiction over this action and no justifiable grounds for abstaining to exercise it exist, Plaintiff requests that the Court deny Defendants' Motion to Dismiss.

Dated this 24th day of January, 2011.

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