SUPREME COURT OF WISCONSIN
APPEAL NO: 2022AP000937

LEGEND LAKE PROPERTY OWNERS ASSOCIATION, INC.,

Petitioner/Plaintiff-Appellant,

v.

GUY KESHENA and
THE MENOMINEE INDIAN TRIBE OF WISCONSIN,

Defendants-Respondents.

Appeal from the Circuit Court for Menominee County,
Case No. 2018-CV-0007
The Honorable Katherine Sloma, Presiding

BRIEF OF DEFENDANTS-RESPONDENTS GUY KESHENA AND THE MENOMINEE INDIAN TRIBE OF WISCONSIN

CARLSON DASH, LLC

Kurt M. Carlson, SBN 1087495
James M. Dash, SBN 1103522
10411 Corporate Drive, Suite 100
Pleasant Prairie, WI 53158
Telephone: (262) 857-1600
kcarlson@carlsondash.com
jdash@carlsondash.com

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STATEMENT OF THE ISSUES

1. Can the so-called "non-transfer provisions" of the Restrictive Covenants be severed from the transfer provisions? The circuit court did not address this issue.

2. If the so-called non-transfer provisions can be severed, are they ripe for a decision? The circuit court did not address this issue.

3. If the so-called non-transfer provisions can be severed, and are ripe for a decision, are they preempted by the Menominee Restoration Act? The circuit court held that the Restrictive Covenants as a whole were preempted. R.163 at 3, A-App.272

4. Does sovereign immunity bar this case? The circuit court answered yes. R.163 at 3, A-App.272.

5. Is the United States an indispensable party to this action? The circuit court ruled that the U.S. would be indispensable party as to one lot it held in trust for the Menominee Indian Tribe of Wisconsin. R.25 at 2, A-App.177. Plaintiff then amended its complaint to remove that lot, and it is no longer a part of this case. After the circuit court decision, the United States acquired all of the properties that are subject to this case in trust for the Tribe.

6. Are the Restrictive Covenants void because they violate the Statute of Frauds? The circuit court did not address this issue.

STATEMENT OF THE CASE

A. Nature of the Case

This case involves an action for a declaratory judgment as to the validity and enforceability of private restrictive covenants on lands within the Menominee Reservation that are owned by the United States in trust for Defendant-Respondent Menominee Indian Tribe of Wisconsin ("Tribe"), a federally-recognized Tribe. *See* 84 Fed. Reg. 1200-01; Compl., R.1 at 2, A-App.006. The case involves the sovereign immunity of the Tribe, as well as that of the United States, and application of the Menominee Restoration Act, Pub. L. No. 93-197, 87 Stat. 770 (1973)

(formerly codified at 25 U.S.C. §§903-903e) ("Restoration Act" or "MRA"), which requires the Secretary of the Interior to accept title to all real property transferred by a tribal member to the United States in trust for the Tribe where the property is in or adjacent to Menominee County. Restoration Act § 6(c), 87 Stat. 772.

Defendant-Respondent Guy Keshena is an enrolled member of the Tribe. R.15 at 1, A-App.096. Mr. Keshena acquired title to lots within the Legend Lake development in Menominee County (the "Properties") as "a single person for and on behalf of the [Tribe]." Compl., R.1 at 7, A-App.011. At the time of the acquisitions, the Properties were within the boundaries of real estate purportedly subject to certain restrictive covenants recorded on June 18, 2009, by Plaintiff-Appellant Legend Lake Property Owners Association, Inc. ("LLPOA"). Compl., R.1 at 7-8, A-App.011-12. Among other restrictions, these covenants purport to preclude any owner of the land subject thereto from "remov[ing] or eliminat[ing] the Subject Real Estate … from the tax rolls of Menominee County, Wisconsin." Compl., R.1 at 5, A-App.009. Under the Restoration Act, a transfer to the United States in trust for the Tribe would remove the Properties from the tax rolls. Restoration Act § 6(c), 87 Stat. 772. Thus, LLPOA filed this suit for a declaratory judgment holding the restrictive covenants are valid and enforceable and preclude any such transfer. Compl. R.1 at 9, A-App.013.

As will be explained below, as it comes to this Court, this case has changed significantly since the circuit court's decision. The properties at issue are now owned by the United States in trust for the Tribe, and not by Mr. Keshena, as a result of the United States District Court's decision in *Legend Lake Prop. Owners Ass'n. Inc. v. United States*, No. 2023CV480, 2024 WL 449287 at *5 (E.D. Wis. 2024) (Supp.App. 5-14), in which the district court held that the Restoration Act preempts the provisions of the covenants insofar as they would prevent the United States from acquiring lands in trust. LLPOA did not appeal that decision, it is now final and has preclusive effect in this case, and it substantially alters the landscape of the case now before this Court.

B. Facts

1. Termination and Restoration of the Menominee Tribe

In 1954, Congress enacted the Menominee Indian Termination Act, Pub. L. No. 83-397, 68 Stat. 250 (1954) ("Termination Act"), "to provide for orderly termination of Federal supervision over the property and members of the Menominee Indian Tribe of Wisconsin." *Id*. §1. The Menominee Reservation became Menominee County. *Menominee Tribe of Indians v. United States*, 391 U.S. 404, 409 (1968). The Termination Act resulted in the loss of tribal self-government, and the loss of thousands of acres of tribal land that were sold by Menominee Enterprises, Incorporated ("MEI"), the tribal entity created to hold tribal lands following termination. R.16 at 3-4.

In 1973, Congress enacted the Restoration Act, which repealed the Termination Act and "reinstated all rights and privileges of the tribe or its members under Federal treaty, statute, or otherwise which may have been diminished or lost pursuant to [the Termination ActRe]." Restoration Act §3(b), 87 Stat. 770. The Restoration Act provided a mechanism to restore Menominee lands. Section 6(b) provided, subject to certain conditions, that the Secretary of the Interior ("Secretary") would accept the transfer of lands held by MEI, to be held in trust for the Tribe and exempt from taxation. Restoration Act §6(b), 87 Stat. 773. Of particular relevance to this case, Section 6(c) provides for the transfer of lands in and adjacent to Menominee County that are owned by tribal members to the United States in trust for the Tribe:

> The Secretary shall accept the real property (excluding any real property not located in or adjacent to the territory constituting, on December 22, 1973, the county of Menominee, Wisconsin) of members of the Menominee Tribe, but only if transferred to him by the Menominee owner or owners. Such property shall be subject to all valid existing rights including, but not limited to, liens, outstanding taxes (local, State, and Federal), mortgages, and any other obligations. The land transferred to the Secretary pursuant to this subsection shall be subject to foreclosure or sale pursuant to the terms of any valid existing obligation in accordance with the laws of the State of

> Wisconsin. Subject to the conditions imposed by this subsection, the land transferred shall be taken in the name of the United States in trust for the Menominee Tribe of Wisconsin and shall be part of their reservation. ***The transfer of assets authorized by this section shall be exempt from all local, State, and Federal taxation. All assets transferred under this section shall, as of the date of transfer, be exempt from all local, State, and Federal taxation***.

Restoration Act §6(c), 87 Stat. 773 (emphasis added).

2. The Restrictive Covenants

In 2009, thirty-six years after enactment of the Restoration Act, LLPOA adopted the Restrictive Covenants. Compl., R.1 Ex. A, A-App.014. The Restrictive Covenants purport to prevent transfers of lands that "could or would" remove the properties from the County tax rolls, or from County zoning authority and general County authority. Compl., R.1 Ex. A, ¶1.B., A-App.015-16. They also provide that "[a]ny purported transfer of any interest in the Subject Real Estate … in violation of these restrictions shall be null and void." Compl., R.1 Ex. A, ¶1.E., A-App.016. The Restrictive Covenants were not signed the then-owners of the Properties. *See* Section VI, *infra*, and text accompanying n.7.

3. Purchase of Lands by Guy Keshena

Mr. Keshena acquired the Properties "for and on behalf of the Menominee Indian Tribe of Wisconsin" for the express purpose of conveying title to the Properties to the United States in trust for the Tribe—Compl., R.1 at 9-10, App.009-010; R.14 at 18-55, A-App.038-71; R.15 at 2, A-App.097—exactly as provided for in the Restoration Act. Mr. Keshena proffered deeds to the Properties to the United States and, on behalf of the Secretary of the Interior, the Bureau of Indian Affairs issued notices of intent to accept the Properties into trust. R.14, Ex. 3, A-App.072-75.

C. Procedural History of the Case and Disposition Below

On October 25, 2018, LLPOA filed the instant suit seeking a declaration that: (1) the Restrictive Covenants are valid and legally enforceable; (2) the Restrictive Covenants apply and are of force and effect concerning the Properties; and (3) any

purported transfer of the Properties in violation of the Restrictive Covenants shall be null and void. Compl., R.1 at 11 ¶ 24, A-App.013. The Tribe moved to dismiss the Complaint on grounds, *inter alia*, of tribal sovereign immunity and preemption. R.10,16. Initially, the circuit court denied the motion. R.25, A-App.176. The parties thereafter filed motions for summary judgment. R.66,67,69,70.

The Tribe also filed a motion for reconsideration on its motion to dismiss, citing new case authority. R.140. The circuit court then dismissed the case, holding that: (1) the Restoration Act preempts the Restrictive Covenants, and so the covenants are not enforceable to prevent transfer of property to the United States in trust for the Tribe under the Restoration Act, and (2) the Tribe, and Mr. Keshena as its agent, are immune from suit. R.163, A-App.270. In its ruling, the court did not decide the merits of the numerous state law defenses raised by the Tribe on summary judgment, finding it unnecessary to do so.[1]

D. Related Proceedings Relevant to this Case

LLPOA filed an administrative appeal with the Interior Board of Indian Appeals ("IBIA") seeking to overturn the BIA decisions. In March 2023, the IBIA held that the Restoration Act mandated acquisition of parcels where, as here, the parcels are located in Menominee County and are owned by a tribal member. *Legend Lake Property Owners Ass'n, Inc. v. Midwest Regional Director, BIA*, 68 IBIA 284, 291-92 (2023), A-App.274. It further held that the Restrictive Covenants were preempted to the extent they would prevent transfers into trust under the Restoration Act. *Id.* at 296. The IBIA rejected the argument that the Restrictive Covenants are "valid existing rights" or "other obligations" under section 6(c) of the Restoration Act. *Id.* at 294.

Subsequent to the IBIA's decision, and the circuit court decision below, the United States accepted transfer of title. The parcels are now held by "the United

[1] Some of the state law defenses are now moot because of LLPOA's express abandonment of its challenge to the "transfer restriction or tax roll provisions" in the Restrictive Covenants, but the Statute of Frauds remains pertinent to this matter (*see* Section V below).

States of America in trust for the Menominee Indian Tribe of Wisconsin." Exhibit B to Motion to Dismiss Appeal, filed 5/2/23, at 23-93, Supp.App.15, 37-107.

LLPOA then filed suit in federal court under the Administrative Procedures Act challenging the IBIA decision. *Legend Lake Prop. Owners Ass'n.,* No. 2023CV480, 2024 WL 449287. The district court upheld the IBIA, stating:

> The BIA could not comply with both the MRA's statutory mandate to place parcels of land transferred to the Secretary by a Menominee tribal member into trust for the Menominee Indian Tribe without the exercise of discretion and the Association's restrictive covenants that prevent the BIA from taking such land into trust. In addition, the MRA's mandate that the Properties be removed from the county tax rolls and exempt from all local, State, and Federal taxation directly conflicts with the restrictive covenants' provisions that the subject real estate cannot be removed from the tax rolls of Menominee County.

Id. at *5. The LLPOA did not appeal this ruling.

ARGUMENT

I. THE TRANSFER AND TAX PROVISIONS OF THE RESTRICTIVE COVENANTS ARE NO LONGER IN CONTROVERSY

We start by noting what LLPOA has expressly waived in its brief on appeal in *this* Court: "This appeal is no longer seeking a ruling on the transfer restriction or tax roll provisions." LLPOA Brief at 13. Accordingly, these issues are not presented for decision in this appeal.

Even if LLPOA had not waived its appeal of each of the "transfer restriction or tax roll provisions," each of these issues was decided in federal district court's decision in *Legend Lake Prop. Owners Ass'n.,* No. 2023CV480, 2024 WL 449287, cited above. LLPOA did not appeal that decision, and it is now final and has preclusive effect in this case, whether by collateral estoppel (issue preclusion) or *res judicata* (claim preclusion). *Michelle T. v. Crozier*, 173 Wis. 2d 681, 687, 694 n.13 (1993) (explaining collateral estoppel v. *res judicata*); *see Moore v. Labor & Indus. Review Comm'n*, 175 Wis. 2d 561, 566-67 (Ct. App. 1993) (federal judgments

entitled to preclusive effect). The federal court's decision substantially alters the landscape of the case now before this Court.

II. THE SO-CALLED "NON-TRANSFER PROVISIONS" CANNOT BE SEVERED FROM THE "TRANSFER PROVISIONS"

A. SOME OF THE SO-CALLED "NON-TRANSFER PROVISIONS" ARE ACTUALLY TRANSFER PROVISIONS

LLPOA did not argue in the circuit court that the transfer and tax roll provisions could be severed from the non-transfer provisions. To the extent LLPOA now seeks an order that the properties are subject to all "municipal" rules and regulations, and LLPOA rules and regulations, the provision it relies on is a transfer provision. Subparagraph D of paragraph 1 of the Restrictive Covenants, entitled "Restriction on Transfer." R.1, Compl., A-App.015-016. LLPOA has not shown that this paragraph survives, given that the transfer provisions as a whole were held preempted by the federal court. *Legend Lake Prop. Owners Ass'n, Inc.*, 2024 WL 449287 at *5 (citing this provision in its holding).

B. THE SO-CALLED "NON-TRANSFER PROVISIONS" CANNOT BE SEVERED FROM THE TRANSFER PROVISIONS

LLPOA's reliance on the severability clause contained in the Restrictive Covenants to save the remaining so-called "non-transfer provisions," LLPOA Br. 31, is misplaced. The mere presence of a severability clause in a contract does not mean that remaining portions of a contract can stand. If a contract contains a provision found to be invalid, the remaining portions of the contract can be enforced only if severing the invalid portions does not defeat the primary purpose of the bargain. *See Simenstad v. Hagen*, 22 Wis. 2d 653, 662 (Sup. Ct. 1964); *Baierl v. McTaggart*, 2001 WI 107, ¶¶15, 18. The Restrictive Covenants were not intended to apply to lands owned by the United States in trust for the Tribe as shown in the Recitals. R.1 at 13, A-App.015 ("These Restrictive Covenants shall not apply to, or be binding upon, any "lot" or "out lot,". . .which, on the date of adoption of the

above referenced Amendment, were owned by any sovereign or dependent sovereign nation. . .").

The primary purpose of the Restrictive Covenants was to defeat Section 6(c) of the Restoration Act. It was to prohibit land from being transferred to the United States in trust for the Tribe, not to regulate land owned by the United States. With that primary purpose defeated, any remaining provisions deemed to be "non-transfer provisions," cannot be severed from the invalid transfer provisions.

C. Even If The So-Called "Non-Transfer Provisions" Can Be Severed, They Are Unenforceable

If the Court were to find that there are non-transfer provisions that are not severable, such provisions would also be unenforceable because they violate the Restoration Act and public policy. Wisconsin courts will not enforce a private agreement that violates statutory law or the public policy expressed therein. *Heyde Companies, Inc. v. Dove Healthcare, LLC*, 2002 WI 131 ¶10, 654 N.W.2d 830, 833-34 (Wis. 2002) *see also Hall v. Church of Open Bible*, 89 N.W.2d 798, 800 (Wis. 1958) ("An owner of real estate has the right to convey it subject to any condition or restriction he deems fit to impose, provided the conditions or restrictions are not against public policy ….") (internal citations omitted).

The Restrictive Covenants by their terms apply to "Any owner of an interest in the Subject Real Estate (or any part thereof)", R.1 at 14, A-App.016, *see also* R.122 at 1, A-App. 179 (By-Laws state that they are binding on Lot Owners and "all other persons occupying or having any legal or equitable interest in the property …."), but the LLPOA has construed its By-Laws so as to exclude trust lands from voting membership, *Legend Lake Prop. Owners Ass'n, Inc. v. Lemay*, 2006 WI App 31, ¶ 5, 289 Wis. 2d 549, 710 N.W.2d 725 ("voting membership was limited to persons or entities owing 'a fee or undivided fee interest....' … Because of their federal trust status, these lots do not have that quality."), thereby discriminating against the Tribe and tribal members residing on land restored to trust status under the Restoration Act. *See Chase v. McMasters*, 573 F.2d 1011, 1018 (8th Cir. 1978)

(City's refusal to provide water and sewer service to trust land "impermissively impaired and burdened a right granted under federal law to a tribal Indian" and so was preempted).

The covenant requiring compliance with municipal laws, R.1 at 14 &1.D, A-App.016, is in direct conflict with the Restoration Act's restoration of tribal rights. The Restoration Act "reinstated all rights and privileges of the tribe … under any Federal treaty, statute, or otherwise," P.L. 93-197, § 3 (b), 87 Stat. 770, and provided for the transfer of lands to the United States in trust for the Tribe, to be part of the Menominee Reservation. *Id*. § 6(b)&(c). The acquisition of lands by the United States in trust for a tribe "reestablish[es] [tribal] sovereign authority" over lands. *City of Sherrill v. Oneida Indian Nation*, 544 U.S. 197, 221 (2005). As this Court has noted, "The state's general jurisdiction [over the Menominee Reservation] took effect in 1961 when title to the property within the Menominee Reservation passed from the United States to the Menominee tribal corporation.

The state's jurisdiction ended, however, when Congress passed the Menominee Restoration Act." *State v. Webster*, 114 Wis. 2d 418, 436 (Sup. Ct. 1983). *See also* 66 Op. Att'y Gen. WI 116 (April 7, 1977) ("Congress intended [in the MRA] to restore to the Tribe the full rights of tribal self government which the Tribe enjoyed prior to the passage of the Menominee Termination Act, including the fundamental right to govern its internal affairs within the same territory that constituted the Reservation prior to termination."); *Upstate Citizens for Equal., Inc. v. United States*, 841 F.3d 556, 561 (2d Cir. 2016) ("Land held by the federal government in trust for Indians is generally not subject to (1) state or local taxation; (2) local zoning and regulatory requirements; or, (3) state criminal and civil jurisdiction [over Indians], unless the tribe consents to such jurisdiction.") (internal quotation omitted). The covenant providing for the application of municipal laws was clearly intended to interfere with the Congressional intent to restore the Menominee Reservation, under the governance of the Tribe, and so would be preempted by the MRA.

LLPOA relies on *Friends of East Willits Valley v. County of Mendocino*, 101 Cal. App. 4th 191, 123 Cal. Rptr. 2d 708, 714 (Cal. Ct. App. 2002) for the proposition that a tribe can voluntarily agree to follow municipal laws, but the Tribe did not agree to these Restrictive Covenants voluntarily. Accordingly, the Restrictive Covenants are not severable and the trial court's judgment should be affirmed *in toto*.

III. IF THE SO-CALLED "NON-TRANSFER PROVISIONS" CAN BE SEVERED FROM THE "TRANSFER PROVISIONS," THE "NON-TRANSFER" PROVISIONS ARE NOT RIPE FOR DECISION

This case is, and has always been, about the transfer restrictions and tax roll provisions, and the circuit court ruled that, on the grounds of federal preemption (the Restoration Act) and tribal sovereign immunity, the entirety of the 2009 Document is unenforceable against the Tribe. R.163, A-App.270, ¶¶1,7,12. With LLPOA now abandoning its claim that the "transfer restriction" and "tax roll provisions" are invalid (as it must in light of the federal court's decision in *Legend Lakes Property Owners Association, Inc. v. United States,* No. 2023CV480, 2024 WL 449287 (E.D. Wis., from which LLPOA took no appeal), and assuming that the circuit court somehow overstepped its authority in ruling that sovereign immunity and preemption render the 2009 Document invalid, what facts remain in this case that create a justiciable controversy?

There is no allegation that anyone occupying any of the lots now owned by the United States in trust are in violation of any of any other so-called "non-transfer restrictions." Properly distilled, this case now boils down to LLPOA's request for an advisory (blanket) opinion that other restrictions are enforceable with no context whatsoever.

To be justiciable, the issue involved must be ripe for judicial determination. *Olson v. Town of Cottage Grove*, 2008 WI 51, ¶29. In a declaratory judgment action, ripeness requires "that the facts be sufficiently developed to allow a conclusive determination." *Id*., at ¶43.

LLPOA's case was devoted, from the beginning, to asserting the enforceability of the transfer provisions so as to prevent the properties from going into trust status. *See e.g.* R.1, Compl. ¶24.C, A-App.013 ("Any purported transfer of the Keshena Properties and the Tribal Property in violation of the Restrictive Covenants shall be null and void."); R.137 at 1 ("Generally speaking, the Restrictive Covenants preclude Legend Lake properties from being removed from the tax rolls of Menominee County, Wisconsin").

In the circuit court, LLPOA did not allege or demonstrate any particular or actual dispute as to "non-transfer" provisions, or otherwise develop the facts as to such provisions. Therefore, there is nothing remaining in this case that is ripe for decision and no remaining justiciable controversy.

IV. THE TRIBE, ITS AGENT (MR. KESHENA), AND THE UNITED STATES ARE IMMUNE FROM THIS SUIT

"Suits against Indian tribes are thus barred by sovereign immunity absent a clear waiver by the tribe or congressional abrogation." *Wisconsin DNR*, 2018 WI App 6, ¶18 (quoting *Oklahoma Tax Comm'n v. Citizen Band Potawatomi Indian Tribe,* 498 U.S. 505, 509 (1991)). In this case, LLPOA shows neither an abrogation by Congress nor a waiver by the Tribe.

A. THE RESTORATION ACT DOES NOT ABROGATE THE TRIBE'S SOVEREIGN IMMUNITY

"[A] congressional decision [to abrogate tribal sovereign immunity] must be clear." *Michigan v. Bay Mills Indian Cmty*, 572 U.S. 782, 790 (2014), *accord*, *C & L Enters., Inc. v. Citizen Band Potawatomi Indian Tribe*, 532 U.S. 411, 418 (2001) ("To abrogate tribal immunity, Congress must unequivocally express that purpose").

As grounds for a supposed abrogation of immunity, LLPOA relies upon the following language from Section 6(c) of the Restoration Act:

> Such property shall be subject to all valid existing rights including, but not limited to, liens, outstanding taxes (local, State, and Federal),

> mortgages, and any other obligations. The land transferred to the Secretary pursuant to this subsection shall be subject to foreclosure or sale pursuant to the terms of any valid existing obligation in accordance with the laws of the State of Wisconsin.

LLPOA Br. at 16.[2] Notably absent from this language is any express or explicit abrogation of sovereign immunity.

LLPOA argues that this language abrogates tribal sovereign immunity because "there has to be some way for the obligation holder to bring suit to enforce the obligations." LLPOA Br. at 16; *see also id*. at 20 ("the MRA must abrogate the tribe's sovereign immunity for the limited purpose of adjudicating the 'valid existing rights' in the property"). In effect, LLPOA argues for an implicit abrogation, contrary to well-accepted legal principles.

But congressional abrogation requires more. Congress must either "say[] in so many words that it is stripping immunity from a sovereign entity," or it must "create[] a cause of action **and** authorize[] suit against a government on that claim." *Financial Oversight & Mgmt. Bd. v. Centro de Periodismo Investigativo, Inc.*, 598 U.S. 339, 347 (2023) (emphasis added). Here, the Restoration Act contains no language either stripping the Tribe's immunity or authorizing a suit against the Tribe.

The only type of enforcement contemplated by the Restoration Act in regard to rights under Section 6(c) is that the land transferred to the Secretary "shall be subject to foreclosure or sale pursuant to the terms of any valid existing obligation in accordance with the laws of the State of Wisconsin." Even if this language could be construed as a waiver of immunity in a proper case, this is not a lawsuit for foreclosure or sale.

[2] LLPOA also cites to similar language in Section 3(d) of the Act, which reads: "Except as specifically provided in this Act, nothing contained in this Act shall alter any property rights or obligations, any contractual rights or obligations, including fishing rights, or any obligations for taxes previously levied." LLPOA Br. at 16.

B. THE TRIBE DID NOT WAIVE ITS SOVEREIGN IMMUNITY BY ACCEPTING A DEED

The other method in which to overcome a tribe's sovereign immunity is via a voluntary waiver by the tribe. "A strong presumption exists against a waiver of tribal sovereign immunity." *Wisconsin DNR*, 2018 WI App 6 ¶19 (citation omitted). "A tribe's waiver of sovereign immunity 'cannot be implied but must be unequivocally expressed.'" *Id.* (quoting *Santa Clara Pueblo v. Martinez,* 436 U.S. 49, 58 (1978)).

LLPOA argues that when Mr. Keshena acquired the Properties in his own name on behalf of the Tribe, the Tribe in effect agreed to waive its sovereign immunity and to abide by the exclusive forum provisions in the Restrictive Covenants. However, LLPOA cannot force a waiver of sovereign immunity on the Tribe by unilaterally recording a document and then claiming that the Tribe "agreed" to it.

At its core, a waiver is the intentional relinquishment or abandonment of a known right. *E.g., Hamer v. Neighborhood Hous. Servs*., 583 U.S. 17, 20 n.1 (2017). The Tribe did not voluntarily agree to the Restrictive Covenants. The Tribe had no say in the Restrictive Covenants, which were not negotiated between LLPOA and the Tribe. *Cf. C&L Enterprises, Inc. v. Citizen Band Potawtomi Indian Tribe*, 532 U.S. 411 (2001) (holding that tribe had waived its immunity by agreeing to an arbitration clause, Court distinguished adhesion contracts: "[n]or did the Tribe find itself on the short end of an adhesion contract …."). LLPOA unilaterally adopted these covenants to undermine the Tribe's rights under the Restoration Act, which is why the federal district court held that provisions of the covenants were preempted. *Legend Lake Prop. Owners Ass'n.*, 2024 WL 449287 at *5.[3] LLPOA's argument that by using Mr. Keshena as an agent it somehow voluntarily agreed to the

[3] Further, the purported sovereign immunity waiver provision in the Restrictive Covenants cannot be severed and is unenforceable, *see supra* at Section I.B., and the Restrictive Covenants were not validly adopted and are not valid and enforceable. *See infra* at Section IV.

covenants, LLPOA Br. at 24, does not change the fact that the covenants were unilaterally imposed on land that was subject to the Restoration Act.

Finally, to be effective, a waiver of tribal sovereign immunity must not only be clear and express, it must also be approved by the tribe's governing body consistent with tribal law. *See Calvello* v. *Yankton Sioux Tribe,* 1998 S.D. 107, ¶12 (1998) ("A waiver … must issue from a tribe's governing body, not from unapproved acts of tribal officials."); *Sharber v. Spirit Mountain Gaming Inc.,* 343 F.3d 974, 976 (9th Cir. 2003) ("Determining whether the tribe has waived immunity ... requires 'a careful study of the application of tribal laws, and tribal court decisions'") (citation omitted). The Court of Appeals, in its Certification, noted that this is the majority rule. *Legend Lake Prop. Owners Ass'n, Inc. v. Keshena*, No. 2022AP937, 2025 WL 262361, at *14 (Wis. Ct. App. Jan. 22, 2025) ("The majority view among other jurisdictions is that a tribe has not waived its immunity where the "tribe's enacted laws, constitutions, ordinances, and codes require specific procedures to waive immunity, and those provisions were not followed").

The Resolution of the Menominee Tribal Legislature authorizing Mr. Keshena to act on behalf of the Tribe neither waives the Tribe's immunity nor authorizes Mr. Keshena to do so. R.15 Ex.1&2, A-App.099-101. Further, the Tribal Legislature could not have authorized Mr. Keshena to waive the Tribe's immunity, through the purchase of land or otherwise, because the Legislature lacks any such authority under the Tribe's Constitution & Bylaws. Menominee Const. & Bylaws, art. XVIII, §§1,2.[4] The Tribe's Constitution preserves its immunity to suit except as expressly authorized by the Constitution, Art. XVIII, §1, and none of the authorizations therein apply to this case. The Constitution authorizes suits by "persons subject to tribal jurisdiction" in Tribal Courts, but expressly declines to extend that waiver to federal or state courts. Menominee Const. & Bylaws art.

[4] Available at https://menominee-nsn.gov/GovernmentPages/Documents/Tribal%20Constitution.pdf (retrieved on June 17, 2025), and in the Supp.App. at 147-203.

XVIII, §2. The Constitution provides no authority for the Legislature to waive the Tribe's immunity to this suit.

LLPOA argues that the Court should not require conformance with tribal law, citing passages in the Court of Appeals' Certification, which state: (1) "at least one jurisdiction has held that the doctrine of 'apparent authority' permitted a tribal member to waive the tribe's immunity despite lacking the authority under the tribe's laws to provide such a waiver," *id*. at *15 (citing *Rush Creek Sols., Inc. v. Ute Mountain Ute Tribe*, 107 P.3d 402, 406-08 (Colo. App. 2004)); and (2) "[o]ther jurisdictions have expressly adopted a similar approach with respect to apparent authority, or they have conducted analyses that tend to support the proposition that a tribe may waive its immunity even without following proper tribal procedure." *Id*.

The Court should not adopt this minority rule, which is not followed by most courts, and in any event should not apply it in this case. First, as to the *Rush Creek* case, both the Court of Appeals and LLPOA acknowledge that in that case—unlike here—the tribes' constitution was silent as to the requisite procedures for waiving immunity. LLPOA Br. at 23; *Rush Creek*, 107 P.3d at 406. As to other cases cited, they all differ from the present situation in a key aspect. In each, the purported waiver was part of a negotiated contract where the Tribe and contracting party were involved in a voluntary mutual exchange. *See StoreVisions, Inc. v. Omaha Tribe of Neb*., 795 N.W.2d 271, 275, *modified on reh'g*, 802 N.W.2d 420 (Neb. 2011) (tribe contracts with general contractor to expand casino); *Granite Valley Hotel Ltd. v. Jackpot Junction Bingo & Casino*, 559 N.W.2d 135, 136 (Minn. Ct. App. 1997) (tribe contracts with construction company); *Bates Assocs., LLC v. 132 Assocs., LLC*, 799 N.W.2d 177, 179 (Mich. Ct. App. 2010) (a settlement agreement); *Smith v. Hopland Band of Pomo Indians*, 95 Cal. App. 4th 1, 2 (Cal. Ct. App. 2002) (tribe contracts for architectural services). Here, there was no such voluntary mutual exchange. Accordingly, there has been no waiver of the Tribe's sovereign immunity.

C. MR. KESHENA CANNOT BE SUED

LLPOA's assertion that this case can go forward against Mr. Keshena because he is not immune from suit fails for two reasons. First, Mr. Keshena no longer owns the Properties, having transferred them to the United States, and LLPOA has expressly waived any challenge to the transfers. LLPOA Br. at 14.

Second, Mr. Keshena was acting as agent for the Tribe in purchasing the Properties to become tribal trust land, and so the Tribe is the real party in interest to the suit. It is undisputed that Mr. Keshena acquired the Properties "for and on behalf of the Menominee Indian Tribe of Wisconsin" for the express purpose of conveying title to the Properties to the United States of America in trust for the Tribe. R.1 at 11-12, A-App.011-12; R.14 at 18-55, A-App.036-71; R.15 at 1-6, A-App.096-101.

LLPOA acknowledges the governing case, *Lewis v. Clarke*, 581 U.S. 155 (2017), but misconstrues it. Under *Lewis*, in determining whether the tribe's immunity applies in a suit against a tribe's agents or employees, the court "must determine in the first instance whether the remedy sought is truly against the sovereign." *Id*. at 162. The circuit court here correctly applied *Lewis,* and the Court of Appeals agreed. *Legend Lake Prop. Owners Ass'n, Inc.*, 2025 WL 262361, at *16 ("Keshena cannot be individually subject to the court's jurisdiction because 'the remedy sought' by the Association—the enforceability of the 2009 restrictive covenants—'is truly against the sovereign'")(quoting *Lewis*, 581 U.S. at 161-63). It is simply irrelevant to the analysis under *Lewis* that the Restoration Act applies to lands owned by tribal members.

D. THE CASE CANNOT PROCEED BASED ON IMMOVABLE PROPERTY OR IN REM EXCEPTIONS TO SOVEREIGN IMMUNITY

Failing to demonstrate either an abrogation of sovereign immunity or a waiver, LLPOA tries a different tack, arguing that a case involving Tribal property may proceed pursuant to a so-called "*in rem*" or "immovable property" exceptions to sovereign immunity. No such exceptions exist, and certainly not here.

1. Immovable Property Exception

LLPOA's argument runs thusly: There is a law that applies to foreign states to the effect that, if one acquires immovable property (*i.e.*, real estate) in the United States, the foreign state is not immune with respect to the property and is subject to suit *in rem*. See 28 U.S.C. §1605(a)(4). ("A foreign state shall not be immune from the jurisdiction of courts of the United States … in any case … in which … rights in immovable property situated in the United States are in issue"). It argues that this should be applied here, because the land is within Wisconsin's jurisdiction (notwithstanding that it is within the Menominee Reservation and so within the Tribe's jurisdiction).

The United States Supreme Court vacated a state court's decision that applied the immovable property exception to tribal land. *Upper Skagit Indian Tribe v. Lundgren,* 138 S. Ct. 1649 (2018) (holding that Washington court erroneously relied on *County of Yakima v. Confederated Tribes & Bands of Yakima Nation,* 502 U.S. 251 (1992), to find an "*in rem*" or "immovable property" exception). Other cases have since declined to apply the provision. *See Self v. Cher-Ae Heights Indian Cmty. of Trinidad Rancheria*, 60 Cal. App. 5th 209, 219 (2021); *Flying T Ranch, Inc v. Stillaguamish Tribe of Indians*, 31 Wash. App. 2d 343, 364, *review granted*, 559 P.3d 1018 (Wash. 2024). The *Self* court stated:

> This history weighs strongly in favor of deferring to Congress to weigh the relevant policy concerns of an immovable property rule in light of the government's solemn obligations to tribes, the importance of tribal land acquisition in federal policy, and Congress's practice of selectively addressing tribal immunity issues in property disputes.

Self at *17. In *Cayuga Indian Nation of New York v. Seneca County*, 978 F.3d 829 (2d Cir. 2020), cited by LLPOA, the court declined to apply the exception, reasoning that it could not be applied to a foreclosure action, but in doing so expressed no views as to whether the exception applied to tribal land. *Id*. at 835-36.

2. In rem *Exception*

LLPOA cannot circumvent Tribal sovereign immunity by characterizing the suit as *in rem*, when, in actuality, it concerns the rights of the Tribe's interest in the Properties. In *Wisconsin DNR v. Timber & Wood Prods. Located in Sawyer Cty*., 2018 WI App 6, ¶32, *rev. den'd.,* 2018 WI 92, the court wrote that "in the context of tribal sovereign immunity there exists no meaningful distinction between *in rem* and *in personam* claims." 2018 WI App 6, ¶34 (citation omitted). LLPOA contends that the *Timber & Wood* court's clear repudiation of an *in rem* exception to sovereign immunity does not apply to this case, because it is not seeking to take the Properties. LLPOA Br. at 29. This is irrelevant to the issue of sovereign immunity. Because Congress has not created an "*in rem*" exception to tribal sovereign immunity, sovereign immunity bars this suit against the Tribe and its agent.

The trial court's dismissal of this case on the merits was correct and should be affirmed.

E. The United States Is Immune to a Suit Concerning the Restrictive Covenants and Its Immunity is Relevant to This Appeal

In addition to Tribal sovereign immunity, the sovereign immunity of the United States, as owner of the Properties, bars this suit.

As discussed in section III below, the United States is a necessary party to this action in its capacity as owner of the Properties. For reasons set forth in section III, its absence is, in itself, grounds for dismissal of this suit. But even if its absence was not grounds for dismissal, the United States' sovereign immunity is directly implicated in this case and requires an affirmation of the judgment below.

The Quiet Title Act, 28 U.S.C. § 2409a ("QTA") "authorizes (and so waives the Government's sovereign immunity from) a particular type of action, known as a quiet title suit: a suit by a plaintiff asserting a 'right, title, or interest' in real property that conflicts with a 'right, title, or interest' the United States claims." *Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians v. Patchak*, 567 U.S.

209, 215 (2012) (hereafter "*Patchak*") (quoting 28 U.S.C. § 2409a(d)). Contrary to LLPOA's argument, the QTA applies where the plaintiff's interest is a property right or interest other than full title. *Id*.; *see also Van Den Heuvel Tr. of 1994 v. U.S. Army Corps of Engineers*, No. 15-CV-275, 2015 WL 4113328, at *2 (E.D. Wis. July 8, 2015) (citing numerous cases to this effect); *Wilkins v. United States*, 143 S. Ct. 870 (2023) (suit against the United States under the QTA over the scope of the easement held by U.S.); *Alaska v. Babbitt*, 38 F.3d 1068, 1074 (9th Cir. 1994) ("[B]oth the QTA's general waiver of sovereign immunity, as well as its exception for Indian lands, apply to cases involving claims for less than fee simple title interests to disputed property").

However, "[t]he QTA's authorization of suit 'does not apply to trust or restricted Indian lands.'" *Patchak*, 567 U.S. at 215 (quoting 28 U.S.C §2409a(a)). A suit that is otherwise within the ambit of the QTA in that it asserts a 'right, title, or interest' in real property that conflicts with a 'right, title, or interest' in property held in trust for Indians is thus barred and must be dismissed. *Alaska v. Babbitt,* 38 F.3d at 1074 *Northern New Mexicans Protecting Land Water & Rights v. United States*, 161 F. Supp. 3d 1020, 1046-50 (D.N.M. 2016), *aff'd on other grounds,* 704 Fed. App'x 723 (10th Cir. 2017).

The United States would be immune to a suit by LLPOA for a declaratory judgment on the Restrictive Covenants. In the federal court action, the United States took the position that although the Administrative Procedures Act authorized the suit challenging the decision to acquire the lands in trust, the QTA barred any other claims. Fed. Defs. Reply in Sup. of Motion to Dismiss, filed on 8/21/23, at p. 12, Supp.App.118, 133. In its appeal to the IBIA, LLPOA acknowledged as much, stating: "Upon conveyance of the parcels at issue into federal trust, the United States would become an indispensable party to the Menominee County Circuit Court [now this] action since the United States would be the title owner of the parcels. The sovereign immunity of the United States would bar its joinder to the State Court proceedings." LLPOA Motion to Stay IBIA App. Proceedings, Legend Lake Prop.

Owners Ass'n v. Midwest Regional Dir., BIA, IBIA No. 19-029, filed 4/16/19, at 4-5, Exhibit C to Motion to Dismiss Appeal, field 5/2/23, at 94, 98-99, Supp.App.112-113.

The sovereign immunity of the United States is also relevant to the so-called immovable property exception and *in rem* exception arguments. In the cases relied upon by LLPOA for adopting either of those exceptions, the properties at issue were not properties held in trust by the United States; rather, they were purchased by the tribe and held by it in fee. *Upper Skagit Indian Tribe*, 584 U.S. at 556; *id*. at 562 (Roberts, CJ, concurring) (noting dispute concerned "non-trust, non-reservation land"); *id*. at 563 ("if it turns out that the [immovable property] rule does not extend to tribal assertions of rights in non-trust, non-reservation property, the applicability of sovereign immunity in such circumstances would, in my view, need to be addressed in a future case"); *Cayuga Indian Nation*, 978 F.3d at 831; *Flying T Ranch*, 549 P.3d at 742; *Self*, 60 Cal. App. 5th at 213. It would be anomalous to extend these novel exceptions to a suit against a tribe concerning trust lands where Congress has enacted the QTA barring the same suit against the United States as the landowner. Parties cannot use other statutes or rules "to end-run the [Quiet Title Act]'s limitations." *Patchak*, 567 U.S. at 216. It would be doubly anomalous to apply the immovable property exception here, because that exception is meant to apply to property owned by a foreign state outside its jurisdiction, *see supra* at Section IV.D.1, whereas here the Properties are owned by the United States within the United States.

V. THE CASE SHOULD BE DISMISSED BECAUSE THE UNITED STATES IS AN INDISPENSABLE PARTY

The United States is a necessary and indispensable party. It made decisions under the Restoration Act to acquire the properties at issue in trust for the Tribe, and it now holds legal title to the properties, in trust for the Tribe. It has an interest in the administration of the Restoration Act, as well as an interest as the title holder of the properties. As noted above in section II.E. at n.6, *supra*, LLPOA previously

acknowledged that the United States would be an indispensable party if it acquired title, which it did after this case was filed. Further, the circuit court held "this Court does find that the United States would be an indispensable party since title to Lot 60 is currently vested in the United States in trust for the Tribe." R.25 at 2, A-App.177.

A. THE UNITED STATES IS A NECESSARY PARTY

The United States meets the requirements of Wis. Stat. §803.03. It "claims an interest relating to the subject of the action and is so situated that the disposition of the action in [its absence] may . . . [a]s a practical matter impair or impede [its] ability to protect that interest[.]" Wis. Stat. §803.03 (1)(b)(1). Legal title to the properties is held by the United States.

The United States also has an interest in the administration of the Restoration Act. The interests of the United States could best be advanced by it, and not by the Tribe or Mr. Keshena. The United States' interest is clearly such that the United States would, if not named as a party, be allowed to intervene as a matter of right under Wis. Stat. §803.09(1) because it "claims an interest relating to the property … which is the subject of the action," *id*., and thus the United States meets the requirements of Wis. Stat. §803.03 (1)(b)(1). *Dairyland Greyhound Park v. McCallum,* 2002 WI App 259, ¶10.

The United States' interest is not, as argued by LLPOA, limited to protecting the land from alienation. *See*, *e.g.*, *State of Minnesota v. United States*, 305 U.S. 382, 388 (1939) (although Congress authorized condemnation of Indian allotments, United States had an interest in amounts paid to allottees, and was therefore an indispensable party). Its interests extend to the use of the properties, including the potential application of the non-transfer provisions of the Restricted Covenants to the United States and the Tribe, such as the payment of LLPOA dues by property owners. *See* LLPOA Br. at 31 (2009 bylaws require dues). The Tribe cannot adequately represent the United States' interest.

Because the United States is a necessary party under section 803.03(1)(b)(1), it is not necessary to show that it meets section 803.03(1)(a), but it meets that section as well. Although LLPOA now seeks a declaratory judgment only as to the validity and enforceability of the Restricted Covenants, the United States is the legal owner of each and every property that is the subject of this case. Further, in arguing for *in rem* jurisdiction, LLPOA asserts that this action is "against all the world." LLPOA Br. at 28. Complete relief cannot be afforded the existing parties in the absence of the United States. For example, if the court were to rule that the Restrictive Covenants require the payment of dues to LLPOA by the landowner, would those dues be due by the United States or the Tribe?

As trustee for the Tribe, the United States does not have less at stake than the Tribe and is a necessary party pursuant to Wis. Stat. §803.03.

B. The Suit Cannot Proceed in Equity and Good Conscience Without the United States

The United States cannot be sued without its consent. *See Block v. North Dakota ex rel. Bd. of Univ. & Sch. Lands*, 461 U.S. 273, 287 (1983). The United States has not consented to this suit. The Restoration Act does not authorize suits against the United States. As noted above, the Quiet Title Act exempts Indian trust lands from the authorization for suits against the United States.

The factors in Wis. Stat. §803.03(3) weigh heavily against proceeding without the United States.

First, a judgment rendered in the absence of the United States "might be prejudicial" to it. Wis. Stat. §803.03(3)(a). A judgment would impact the United States' interest in the properties, its interest in protecting the Tribe's use of the properties, and its interest in the proper administration of the Restoration Act.

Second, the prejudice to the United States could not be avoided through the shaping of relief or protective provisions in the judgment, Wis. Stat. §803.03(3)(b), given its interests that are directly at issue.

Third, a judgment in the absence of the United States would not be adequate. Wis. Stat. §803.03(3)(c). Without the United States as owner of the properties, any judgment of this Court will not fully adjudicate the rights of all parties. For example, if the Court were to rule that the Restrictive Covenants require the payment of dues to LLPOA by the landowner, would those dues be due by the United States or the Tribe?

The fourth factor, whether LLPOA has a remedy if the action is dismissed for nonjoinder of the United States, Wis. Stat. §803.03(3)(d), is not met here, but the absence of that factor is outweighed by the presence of the other factors. *Citizen Potawatomi Nation v. Norton*, 248 F.3d 993, 1001 (10th Cir.), *opinion modified on reh'g*, 257 F.3d 1158 (10th Cir. 2001) (upholding dismissal for failure to name indispensable party even though plaintiff left with no way to challenge the conduct in question).

The four factors are not exclusive of other factors. Wis. Stat. §803.03(3) ("The factors … include…."). Here, the fact that the United States owns the properties in trust for the Tribe, and that Congress has decided to except tribal trust properties from the waiver of sovereign immunity in the QTA, shows a strong federal interest in preserving tribal land rights.

LLPOA asserts that *Lyon v. Gila River Indian River Comm.*, 626 F.3d 1059, 1069 (9th Cir. 2010), creates an "exception that the United States is not an indispensable party in certain real property actions brought by a tribe." LLPOA Br. at 41. But the alleged exception there does not apply here. *Lyon* permits a tribe to bring a suit to adjudicate its rights in property without joining the United States, and is limited to such a case. "Although an action to establish an interest in Indian lands held by the United States in trust generally may not proceed without it, that rule does not apply where the *tribe* has filed the claim to protect its own interest." *Id.* (emphasis in original). To the same effect is another case relief upon by LLPOA, *Choctaw & Chickasaw Nations v. Seitz*, 193 F.3d 456, 459 (10th Cir. 1952).

The United States is therefore an indispensable party who cannot be joined due to its immunity to suit, and the case must be dismissed because in equity and good conscience it cannot proceed in the absence of the United States.

C. WIS. STAT. §806.04 REQUIRES THE JOINDER OF THE UNITED STATES

LLPOA brings this action for a declaratory judgment pursuant to Wis. Stat. §806.04, which provides: "When declaratory relief is sought, all persons shall be made parties who have or claim any interest which would be affected by the declaration, and no declaration may prejudice the right of persons not parties to the proceeding." Wis. Stat. §806.04(11). "Under WIS. STAT. §806.04(11), persons who have any interest that would be affected by the declaratory relief are required to be joined in the action." *Annoye v. Sister Bay Resort Condo. Ass'n, Inc.*, 2002 WI App 218, ¶14. This provision, separate and apart from section 803.03, requires that the United States, as the owner of the properties in trust for the Tribe, be made a party to this suit.

VI. THE 2009 DOCUMENT DOES NOT ENCUMBER THE PROPERTIES AT ISSUE IN THIS LAWSUIT BECAUSE IT VIOLATES THE STATUTE OF FRAUDS

LLPOA seeks to make new law in Wisconsin by proposing that a restriction on land created not by a common grantor, but by a third-party homeowner's association, be enforced despite its clear violation of the statute of frauds.[5] The 2009 Document fails at the most basic level. Wisconsin follows simple, black-letter requirements for title documents, including the common-sense requirement that an owner of real estate must execute any document that will encumber his or her

[5] The only applicable restrictions created by a common grantor are the Plats with use restrictions that were placed on each "addition" as the Legend Lake area was subdivided (together these restrictions are referenced as the "1969 Covenants"). Each 1969 Covenant sets out standard use restrictions (e.g. setbacks, minimum square footage requirements, rules on docks, pets, etc.). The 1969 Covenants permitted the creation of an association for a specific purpose: enforcing the 1969 Covenants' use restrictions and "for the maintenance and use of the wilderness areas, outlots and lodge." *Cobb Aff.,* Ex. A, R.124 at 2, 10.

property. LLPOA's theory that a third-party can encumber the property of another is sharply at odds with Wisconsin law and basic concepts of private property rights.

Wis. Stat. §706.02(1) provides in part that:

> (1) Transactions under s. 706.001(1)[6] shall not be valid unless evidenced by a conveyance that satisfies all of the following:
>
> (a) **Identifies the parties**; and
> (b) Identifies the land; and
> (c) Identifies the interest conveyed, and any material term, condition, reservation, exception or contingency upon which the interest is to arise, continue or be extinguished, limited or encumbered; and
> (d) **Is signed by or on behalf of each of the grantors;** and
> (e) Is signed by or on behalf of all parties, if a lease or contract to convey; and
> (f) **Is signed, or joined in by separate conveyance, by or on behalf of each spouse, if the conveyance alienates any interest of a married person in a homestead under s. 706.01(7)**… and
> (g) **Is delivered**….

Failure to comply with the statute renders the document void. *Zapucklak v. Hucal*, 82 Wis. 2d 184, 191 (1978). The 2009 Document was not signed by any owner of any of the Properties, did not identify those owners, and was not signed by any person with spousal rights in the land. It is thus a nullity as to those Properties.[7] The simple rule that an owner must sign any document impacting his or her title is no technicality – it is a bedrock of property rights. While an owner of property is free to impose a common plan before or at the time of transfers of portions of that property to others, Wisconsin cases provide no exception to the

[6] Wis. Stat. §706.001(1) provides that, subject to exceptions not relevant in this case, "this chapter shall govern every transaction by which any interest in land is created, aliened, mortgaged, assigned or may be otherwise affected in law or in equity."

[7] "[A] document which fails to satisfy the statute of frauds is void. *See Wadsworth v. Moe,* 53 Wis. 2d 620 (1972); *Mann v. Becker*, 171 Wis. 121 (1920). 'Void' means 'of no legal effect; null.' *See* Black's Law Dictionary 1604 (8th ed. 2004). It is the legal equivalent of a mathematical zero - an absolute nullity. *See Williams v. City of Lake Geneva*, 2002 WI App 95 (2002) (quoting Black's Law Dictionary…)." *Seelen v. Couillard (In re Couillard)*, 486 B.R. 481, 485-86 (W.D. Wis. 2012) (citations and parentheticals in original).

statute of frauds to restrict the rights of property owners after conveyance of the land to those owners. *See, e.g., Doherty v. Rice*, 240 Wis. 389, 393 (Wis. 1942) (covenants will be enforced "premising, of course, that the restriction as to such use is a reasonable one and that the grantee takes from a private grantor holding under a chain of title from the original grantor who imposed the restriction").

Neither Guy Keshena on behalf of the Tribe, nor the United States, take the properties under a chain of title from the original grantor who imposed the restriction, because the 2009 restrictions were imposed by LLPOA, not the original grantor. Wisconsin law is vigilant in its protection of property rights. *See AKG Real Estate, LLC v. Kosterman,* 2006 WI 106 (declining to adopt the approach of the *Restatement (Third) of Property: Servitudes* and stating: "Even at the risk of sanctioning unneighborly and economically unproductive behavior, this court must safeguard property rights."). No Wisconsin authority permits an owners' association to impose new restrictions on the property of its owners - only an owner can impose a new restriction.

Calling a new restriction imposed by a third-party homeowner's association a "Bylaw Amendment" is both inaccurate and unavailing. Even jurisdictions that approach property rights more leniently than Wisconsin stop short of allowing associations to make end-runs around the bright line of unanimous consent. In a majority of jurisdictions, *even* where a governing covenant has not expired, and *even* where the covenant explicitly allows for amendment, associations *still* may not impose a new restriction on properties owned by its members (*even* as an amendment to the covenant) except where the new restriction is closely related to the first restriction — such as a clarification or interpretation. *Estates of Desert Ridge Trails Homeowners' Ass'n v. Vasquez,* 300 P.3d 736 (Ct. App. N.M. 2013) (collecting cases holding that, unless otherwise explicitly set out in a covenant, unanimous consent of all owners in subdivision is necessary to amend covenant and holding this requirement cannot be avoided by instead implementing the new restriction as a rule change); *Wilkinson v. Chiwawa Cmtys. Ass'n.,* 327 P.3d 614

(Wash. 2014) (even where covenant provides for amendment by majority, a majority of homeowners could not force a new restriction on a minority where the new restriction is not related to the restrictions of the original covenant); *Dreamland Villa Cmty. Club v. Raimey,* 224 Ariz. 42 (Ct. App. 2010) (regardless of provision stating that restrictions could be amended at any time, amendments to restrictions must be reasonable which is further defined by relation to original covenant); *Armstrong v. Ledges Homeowners Ass'n,* 360 N.C. 547 (2006) (same).

The present case does not involve an attempt to enforce the 1969 Covenants imposed by the common grantor, but to enforce completely unrelated covenants created by LLPOA thirty years later. Not only are the restrictions on transfer found in Section 1 of the 2009 Document unrelated to the 1969 Covenants, but so are the provisions of the 2009 Document found in Section 4.E, 4.F and 4.G regarding expenses, jurisdiction, and waiver of defenses.

As the 2009 Document restrictions were not agreed to by each of the owners themselves, and such restrictions are not related to the purposes of the 1969 Covenant imposed by the common grantor, they are null and void in violation of the statute of frauds.

CONCLUSION

WHEREFORE, the Menominee Tribe respectfully prays the Court to affirm the judgment of the circuit court in favor of the Tribe, to award the Tribe its costs, and for such other relief in the Tribe's favor as is just.

Respectfully submitted this 24th day of June, 2025.

Electronically Signed by Kurt M. Carlson

CARLSON DASH, LLC

Kurt M. Carlson, SBN 1087495
James M. Dash, SBN 1103522
10411 Corporate Drive, Suite 100
Pleasant Prairie, WI 53158

Telephone: (262) 857-1600
kcarlson@carlsondash.com
jdash@carlsondash.com

Attorneys for Guy Keshena and The Menominee Indian Tribe of Wisconsin

CERTIFICATION

I have submitted an electronic copy of this brief, excluding the appendix, if any, which complies with the requirements of Wis. Stat § 809.19 (8) (b), (bm), and (c) for a brief. The length of this brief is 9335 words. I further certify that:

This electronic brief is identical in content and format to the printed form of the brief filed as of this date.

A copy of this certificate has been served with the paper copies of this brief filed with the court and served on all opposing parties.

Electronically Signed by Kurt M. Carlson

CARLSON DASH, LLC

Kurt M. Carlson, SBN 1087495
James M. Dash, SBN 1103522
10411 Corporate Drive, Suite 100
Pleasant Prairie, WI 53158
Telephone: (262) 857-1600
kcarlson@carlsondash.com

Attorneys for
Guy Keshena and
The Menominee Indian Tribe of Wisconsin

CERTIFICATE OF SERVICE

I hereby certify that on June 24, 2025, I personally caused copies of the Brief of Defendants-Respondents Guy Keshena and The Menominee Indian Tribe of Wisconsin, to be served on counsel via the court's e-filing system.

Dated this 24th day of June, 2025.

Electronically Signed by Kurt M. Carlson

CARLSON DASH, LLC

Kurt M. Carlson, SBN 1087495
James M. Dash, SBN 1103522
10411 Corporate Drive, Suite 100
Pleasant Prairie, WI 53158
Telephone: (262) 857-1600
kcarlson@carlsondash.com

Attorneys for
Guy Keshena and
The Menominee Indian Tribe of Wisconsin