



defendant” reasoning that “because the [Trust Indenture] is void, the defendant’s waiver of sovereign immunity [contained in the Trust Indenture] is invalid.”<sup>1</sup> (DRN 46.)

The Court issued its January 6, 2010 Order 16 days after Wells Fargo filed the Complaint in this matter, and four days before the time to amend the Complaint “as a matter of course” under Federal Rule of Civil Procedure 15(a) was to expire. The Court also issued its January 6, 2010 Order less than 24 hours after canceling the January 6, 2010 hearing where, pursuant to Court order, the parties were to “call witnesses” and “introduce other forms of evidence.” (DRN 20 at 1-2.) Wells Fargo respectively submits that the Court’s dismissal was contrary to Seventh Circuit precedent as well as fundamental fairness and basic due process because: (i) Wells Fargo was not granted leave to amend its Complaint to demonstrate that the defendant had waived sovereign immunity; and (ii) Wells Fargo was not permitted to present evidence and argument regarding whether the Trust Indenture was a “management contract” under the Indian Gaming Regulatory Act (“IGRA”) and its related regulations<sup>2</sup> or to respond to defendant’s evidence.

First, the Seventh Circuit has concluded that district courts should, and routinely do, grant plaintiffs leave to amend a complaint before entering judgment, thereby terminating the lawsuit; this is particularly true where, as here, the dismissal was based on a jurisdictional issue. Here, Wells Fargo can demonstrate that, regardless of the validity of the Trust Indenture, the defendant has clearly and definitively waived sovereign immunity regarding the bond financing to which the Trust Indenture relates. Defendant repeatedly and unequivocally waived sovereign immunity

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<sup>1</sup> On January 19, 2010, the Court issued a corrected judgment, signed by the clerk of the Western District of Wisconsin rather than the clerk of the Eastern District of Wisconsin, but which did not alter the substance of the January 11, 2010 Judgment. (DRN 47.)

<sup>2</sup> IGRA provides, subject to approval of the NIGC chairman, that “an Indian tribe may enter into a management contract for the operation and management of a class II gaming activity . . . .” 25 U.S.C. 2711(a). The related regulations define “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.

in numerous documents—including, among other, the Bonds that memorialize the debt and a Bond Resolution passed by the defendant—that are devoid of any language that could even arguably convert them into “management contracts” under federal law. Once given the opportunity to amend the Complaint and demonstrate defendant’s repeated and explicit waiver of sovereign immunity, Wells Fargo can then assert viable causes of action for breach of the Bonds, as well as numerous equitable and other causes of action.

Second, once permitted to present evidence and argument in response to the defendant’s filings, Wells Fargo can demonstrate that: the Trust Indenture is *not* a management contract under 25 U.S.C. § 2711; the Trust Indenture provisions that this Court found to comprise an “indicia of management” are severable from the remainder of the Trust Indenture; or, alternatively, material issues of fact and law prevent the summary adjudication of those issues. Consequently, the Judgment terminating this lawsuit should be vacated, and Wells Fargo should be granted leave to file an amended complaint.

## STATEMENT OF FACTS

### A. Defendant’s \$50 Million Bond Issue.

The defendant is a wholly owed corporation of the Lake Superior Chippewa Indians (the “Tribe”). (DRN 12 at 2.) The defendant “owns and operates the Lake of the Torches Resort Casino (“Casino”).” (*Id.*) In January 2008, the defendant issued \$50 million bonds with Wells Fargo to act as trustee on behalf of the bondholders. (DRN 14 ¶¶ 3-4.) The defendant issued the \$50 million bonds because it wanted “to refinance and consolidate [existing] Bank Debt.” (DRN 6, Ex. 1 at 1.)

Specifically, the defendant had approximately \$28 million in existing bank debt spread across three banks that it wished to refinance and consolidate. (DRN 6, Attach. 1, Ex. 1 at 1, 5, B-1.) The defendant sought the bond proceeds for use both to consolidate the existing bank debt

and to further finance a second, non-Indian, casino project of the Tribe. (DRN 6, Ex. 1 at 1.) In order to secure “the payment of the principal of, premium (if any) and interest on the Bonds,” the defendant pledged the gross revenues of the Casino, subject to terms that allowed the defendant to pay the operating expenses of the Casino, and that allowed the defendant to otherwise use the Casino revenues once the monthly debt obligations were paid. (DRN 6, Ex. 1 at 2-4, 10, 28-29.)

Nowhere in the Trust Indenture does it state that Wells Fargo or Saybrook is to manage the Casino; nowhere in the Trust Indenture does it state that Wells Fargo or Saybrook is to receive any payment to manage the Casino.

**B. The Defendant Breaches The Trust Indenture.**

From January 2008 through October 2009, the defendant complied with the Trust Indenture in all material respects. In October 2009, the Tribe elected a new Tribal Council that took office in November 2009. (DRN 31 at 7.) Thereafter, Tribe Treasurer Barry Lesieur and acting Tribe President Dee Mayo, pursuant to the Trust Indenture, submitted a certification on November 30, 2009, that \$4,750,000 was needed from the Operating Reserve Account—an account created pursuant to the Trust Indenture—to pay defendant operating expenses. (DRN 12 at 2.) After fulfilling the operational funds request pursuant to the Trust Indenture, Wells Fargo subsequently confirmed that the defendant did not, in fact, have an operational need for the \$4,750,00 in funds transferred. (DRN 6 ¶12.) In light of subsequent events, Lesieur and Mayo were intentionally emptying the Operating Reserve Account prior to voiding the Trust Indenture.

Beginning in December 2009—again, after the new Tribal Council took office—the defendant ceased deposits into the deposit account governed by the Trust Indenture. (DRN 6 ¶ 23.) This was in violation of certain provisions of the Trust Indenture requiring that defendant make daily deposits of all gross Casino revenues into a Trust deposit account. (*Id.* ¶ 22.)

**C. Wells Fargo Files Suit And The Defendant Claims The Trust Indenture Is Void And Unenforceable.**

In light of the misrepresentation regarding the transfer of funds and the defendant's cessation of deposits into the deposit account, on December 18, 2009, Wells Fargo accelerated the debt under the Bonds (DRN 1 ¶ 33) and then on December 21, 2009, filed the Complaint (DRN 1). The Complaint asserted four causes of action for breach of the Trust Indenture. (DRN 1 at 8-10.) The Complaint did not assert any claims related to any other document associated with the January 2008 bond financing. (*Id.*) Wells Fargo also sought appointment of a receiver, pursuant to the Trust Indenture and Rule 66 of the Federal Rules of Civil Procedure. (DRN 4.)

In response, on December 28, 2009—and even though the defendant (i) had only 28 days before relied on the Trust Indenture to ensure transfer of funds, (ii) had recently issued a certification pursuant to the Trust Indenture, and (iii) had never, prior to December 28, 2009, disavowed the Trust Indenture—the defendant claimed that the Trust Indenture was “void and unenforceable” as an “unapproved management contract[.]” (DRN 12 at 1.)

**D. The Parties Brief The Motion For Receiver And The Court Provides For The Parties To Present Evidence.**

On December 28, 2009, Judge Crabb issued an Order stating that “it appears that appointment of a temporary receiver is warranted,” but also reserving “final decision” until a phone hearing could be held. (DRN 8 at 1-2.) Also on December 28, 2009, the defendant filed its Response in Opposition to Plaintiff's Motion for Appointment of Receiver (DRN 12), claiming that the Trust Indenture was void and that, therefore, the Court lacked jurisdiction. The defendant did not then, nor at any other time, file a motion to dismiss the Complaint or a motion for summary judgment on any issue.

On December 29, 2009, Judge Crabb held a telephonic hearing regarding the Motion for Receiver. In that hearing, Judge Crabb scheduled a hearing for January 6, 2010. Judge Crabb

was specifically asked whether the Court anticipated an evidentiary hearing and Judge Crabb responded “[w]hatever you think is necessary to resolve it.” (Hr’g Tr., 10, Dec. 29, 2009.) On December 30, 2009, the Court issued an Order giving the parties until January 5, 2010, “in which to submit supplemental briefs in addition to the briefing they have submitted previously.” (DRN 20 at 1.) The Court also stated in that Order that “[c]ounsel may call witnesses at the January 6, 2010 hearing and introduce other forms of evidence.” (*Id.* at 1-2 (emphasis added).)

On January 5, 2010, consistent with the Court’s December 30, 2009 Order, both Wells Fargo and the defendant filed supplemental briefs. (DRN 28 (Wells Fargo), 31 (Defendant).) The Court ordered the parties to file their supplemental materials by noon, and the parties filed their supplemental materials nearly simultaneously. The defendant filed a 37-page Supplemental Response in Opposition to Plaintiff’s Motion for Appointment Of A Receiver (DRN 31), along with five affidavits attaching over 200 pages of additional material (DRNs 32-36) raising numerous factual issues.

Included among defendant’s supplemental affidavits was the “opinion as an expert witness” (DRN 31 at 7) of Kevin Washburn (DRN 32) (“Washburn Affidavit”). Washburn stated that he “was retained on short notice” to evaluate the Trust Indenture and that he had “developed some preliminary opinions.” (*Id.* ¶ 7.) Washburn repeatedly speculates what the NIGC “would very likely” have found, what the NIGC “would have demanded,” what provisions of the Trust Indenture “would give the NIGC” concerns, and what the NIGC “would very likely” wish to do regarding the Trust Indenture. (*Id.* ¶¶ 7-9.) Washburn was not previously disclosed as an expert, Wells Fargo was not given leave to respond to Washburn’s opinion, and Washburn’s report did not, among other things, disclose his fee or hourly rate. (*Id.*)

**E. The Court Cancels The Evidentiary Hearing, Dismisses The Complaint, And Issues Its Opinion.**

On January 5, 2010, the same day the parties filed their supplemental briefs and the day before the scheduled evidentiary hearing, Judge Crabb recused herself from this action and the case was reassigned to Judge Randa. (DRN 26.) On the same day, the Court canceled the “evidentiary hearing” and scheduled a “telephonic status conference” for January 6, 2010, at which time the Court stated that “[t]he parties should be prepared to discuss whether the status quo agreement can be extended for a period of time while the Court reviews the materials and considers the merits of the pending motion.” (DRN 38 at 1.) On January 6, 2010, the Court then canceled the status call scheduled the previous day and, subsequently, also on January 6, 2010, issued an Order stating that “[u]pon consideration of the briefs, affidavits, declarations and exhibits submitted in this matter, the Court finds that the Trust Indenture is a management contract that was executed without prior approval from the [NIGC]” (DRN 43 (citations omitted)), and dismissed the case.

On January 11, 2010, the Court issued its Decision and Order (“Opinion”). (DRN 45.) In the Opinion, the Court held that (1) the Trust Indenture was a management contract that should have been submitted to the NIGC<sup>3</sup>; (2) that because the Trust Indenture was not submitted to the NIGC, it was void *ab initio*; (3) that because the Trust Indenture was void *ab initio*, the waiver of sovereign immunity contained therein was also invalid; (4) that the “management” provisions could not be severed from the Trust Indenture; and (5) that even if the waiver of sovereign immunity could be severed from the Trust Indenture, because the Trust Indenture was otherwise void, “there would be no remaining obligations to enforce under the contract.” (*Id.*) In so ruling, the Court repeatedly relied on Washburn’s Affidavit. (*Id.* at 7-8, 12.) Also on

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<sup>3</sup> The Court did not address any document that was part of the bond financing other than the Trust Indenture.

January 11, 2010, the Court issued a Judgment consistent with the Opinion, dismissing the action because “the Court lacks jurisdiction over the defendant.” (DRN 46.)

### STATEMENT OF ADDITIONAL FACTS

If Wells Fargo had been permitted to either present evidence as originally anticipated at the Court-ordered evidentiary hearing, rebut the Washburn Affidavit, and/or amend its Complaint, Wells Fargo would have presented the following evidence.

**A. The Defendant Made Multiple Waivers Of Sovereign Immunity Beyond That Contained In The Trust Indenture.**

In purchasing defendant’s Bonds, Saybrook relied on multiple waivers of sovereign immunity by the defendant beyond those in the Trust Indenture, as described below.

**1. The Bonds.**

The Bonds evidence the defendant’s obligation to repay the principal amount of \$50,000,000 at an interest rate of 12% semi-annually in 5 years to any bondholder. The Bonds—signed by Victoria Doud, then President of the defendant and the Tribe—each contain a waiver of sovereign immunity nearly identical to that in the Trust Indenture:

The [defendant] hereby expressly waives its sovereign immunity from suit . . . should an action be commenced on this Bond, the Indenture, the Security Agreement, or the Bond Resolution, **or regarding the subject mater of the Indenture.** \* \* \* This waiver:

\* \* \*

(b) is granted solely to the Trustee and [Saybrook],

(c) shall extend only to a suit to enforce the obligations of the [defendant] under the Indenture, the Bond Resolution, the Security Agreement, or the Bond Placement Agreement

(Am. Compl. Ex. B at 5.)

## 2. The Bond Resolution.

To induce Saybrook to loan the defendant \$50 million, the defendant issued the Bond Resolution. The Bond Resolution was certified by the Secretary of the defendant and it, too, waived sovereign immunity:

**Whereas**, the Board of Directors [of the defendant] has been advised that as a condition to the issuance of the Bonds, the Corporation will be required to agree to various legal provisions . . . that will provide for (a) a limited waiver of its sovereign immunity with respect to suits or other legal actions or proceedings arising because of disputes related to the Bonds or the foregoing named documents or other agreements related thereto . . . .

\* \* \*

**Resolved**, that all legal Provisions in the Bond Documents are hereby approved; more specifically and expressly the [defendant] (i) waives immunity from suit . . . with respect to any dispute or controversy arising out of the Indenture, the Security Agreement, the Bond Placement Agreement, the Bonds, this Bond Resolution . . . or to any transaction in connection therewith . . . .

(DRN 29, Attach. 3, Ex. 11 at 3.)

## 3. The Offering Memorandum.

To induce Saybrook's purchase of the Bonds, the defendant authored and issued an offering memorandum. (Am. Compl. Ex. C.) The Offering Memorandum was signed by Doud as President of the defendant. The Offering Memorandum stated as follows:

In the Indenture, the Security Agreement, the Tribal Agreement, the Tribal Resolution, the Bond Resolution, and the Bond Purchase Agreement (the "Bond Documents"), the [EDC] and the Tribe have waived their sovereign immunity and consented to suits against them only in connection with the Bonds and the Bond Documents.

(Am. Compl. Ex. C at 4.) Likewise, defendant's counsel confirmed that "[t]he consents to suit given by the [defendant] in the Indenture and the Bond Purchase Agreement constitute a valid and enforceable waiver of the [defendant's] sovereign immunity from suit, and in a suit for the

enforcement of the Indenture or the Bonds the sovereign immunity of the [defendant] shall not constitute a valid defense to the enforcement thereof.” (Am. Compl. Exs. E, F.)

**B. Wells Fargo's Experts Opine That The Indenture Is Not A Management Contract And Is Consistent With Industry Practice.**

Wells Fargo's expert Michael Cox served as the first General Counsel of the NIGC, from 1990 to 1996, and, among other things, assisted in drafting the regulations implementing the statutory requirements of IGRA, including the management contract provisions. (Declaration of Michael Cox dated February 5, 2010, hereinafter “Cox Decl.,” ¶ 4.) Cox has been retained by Plaintiff to review this transaction generally and the Trust Indenture specifically, as well as Washburn’s affidavit and other materials. Cox has formed the opinion that, based on his knowledge of IGRA’s requirements and his experience at the federal agency charged with implementing IGRA, as well as his industry experience, the Trust Indenture is not a “management contract” under IGRA. (Cox. Decl. ¶13.)

As Cox explains, the Trust Indenture does not contain any of the IGRA-prescribed provisions for management contracts—provisions regarding limits on the term of the management contract, reporting to the tribal body, allowing access to gaming space by tribal officials, allowing tribal officials to verify gross revenues and income, etc. (*Id.* ¶ 10.) There is also no provision for payment to a “manager” for net revenues, with the 30 or 40% statutory limit. (*Id.* ¶ 11.) Cox states,

All of the key IGRA management contract provisions are missing from the Trust Indenture. The reason for this is simple—they have no application or relevance because the Trust Indenture is not a management contract within the meaning of the IGRA.

(*Id.* ¶ 13.) Cox likewise analyzes each of the provisions that Washburn found would give the NIGC concerns and finds that none of them transform the Trust Indenture into a management contract, particularly when considered in light of the unquestioned purpose

of the Trust Indenture, “to ensure the payment of interest on the bonds and the repayment of principal upon maturity to the bondholders.” (*Id.* ¶¶ 14, 15-19.)

Bill Newby has 15 years experience in the Indian gaming finance industry. (Declaration of William N. Newby, dated February 8, 2010, hereinafter “Newby Decl.,” ¶ 6.) He has overseen approximately \$13 billion in Indian gaming financing. (Newby Decl. ¶ 4) and set up and ran the country’s leading gaming industry finance group. (*Id.* ¶ 1.) Based on Newby’s industry experience, the bond financing transaction at issue here is “a standard Indian bond financing transaction.” (*Id.* ¶ 7.) In Newby’s experience, such transactions are not reviewed by the NIGC and, if they were, it would greatly increase the cost of capital to the Indian governments. (*Id.* ¶ 8-9.) Newby also finds that all the provisions in the Trust Indenture are used by lenders to ensure that they have a voice regarding management of the collateral for the loan, without seeking to themselves manage the casino. (*Id.* ¶¶ 11-12.) He also explains that the provisions regarding default in the Trust Indenture must be viewed in context—if, for example, a receiver is not appointed, the lender can accelerate the debt and foreclose on the casino revenues; receivership is a less onerous alternative. (*Id.* ¶¶ 13-15.)

**C. The Proposed Amended Complaint Alleges Additional Causes Of Action As Well As Various Tort And Equitable Causes Of Action Based On The Defendant's Refusal To Repay Its Loan.**

The proposed Amended Complaint, filed herewith, asserts that the defendant has waived sovereign immunity in documents other than the Trust Indenture. (Am. Compl. ¶¶ 14-20.) The Amended Complaint also states causes of action for breach of the Bonds—a separate agreement from the Trust Indenture—reformation of the Trust Indenture, restitution, unjust enrichment, fraud, negligent misrepresentation, conversion, and fraud in the inducement. (*Id.* ¶¶ 89-161.) The Amended Complaint is based on the simple, undisputed fact that the defendant has borrowed

\$50 million and has repudiated the outstanding debt. Regardless of the Trust Indenture's validity, the defendant is not entitled to retain the benefit of the outstanding \$47 million.

### ARGUMENT

A district court can consider a Federal Rule of Civil Procedure 59(e) motion to alter or amend a judgment where there is “newly discovered evidence or a manifest error of law or fact,” *Russell v. Delco Remy Div. of Gen. Motors Corp.*, 51 F.3d 746, 749 (7th Cir. 1995), or to otherwise “correct[] a manifest injustice,” 460 U.S. 605, 644 (1983) (J. Brennan concurring) (“federal courts have traditionally thought that correcting a manifest injustice was reason enough to reconsider a prior ruling”). *See also Mudrovich v. D.C. Everest Area School Dist.*, No. 04-C-398-C, 2005 WL 956988, at \*1 (W.D. Wis. Apr. 25, 2005) (“Motions to alter or amend a judgment pursuant to Rule 59(e) may be granted to (1) take account of an intervening change in controlling law; (2) take account of newly discovered evidence; (3) correct clear legal error; or (4) prevent manifest injustice.”); *Bollig Christian Comm. Homes and Servs.*, No. 02-C-532-C, 2003 WL 23211142, at \*1 (W.D. Wis. Oct. 27, 2003) (same); *McMurray v. Harwood*, 870 F. Supp. 917, 920 (W.D. Wis. 1994) (same).

Here, there are two principal bases on which the Court's judgment dismissing the Complaint for lack of subject matter jurisdiction should be vacated pursuant to Rule 59(e):

- (1) Relief under Rule 59(e) is appropriate to grant a party leave to file an amended complaint where, as effectively occurred here, a court terminates a case while simultaneously granting a motion to dismiss. Likewise where, as here, a case has been dismissed for want of subject matter jurisdiction and a party can cure the jurisdictional defect via an amended complaint, leave to file the amended complaint should be given.
- (2) Wells Fargo should also be granted relief under Rule 59(e) because: (a) the Court effectively granted summary judgment on the management contract issue and on the affirmative defense of sovereign immunity on an incomplete record and without giving Wells Fargo an opportunity to respond to defendant's factual and expert materials; (b) the Court improperly relied on the Washburn affidavit; (c) the purported

management provisions in the Trust Indenture can be severed; (d) the Court's determination that the Trust Indenture was a management contract was clear legal error. Each of these issues involve factual information that Wells Fargo could not have presented prior to the Court's decision—due to the cancellation of the evidentiary hearing and the timing of the opinion—clear legal error, or both.

**I. THE COURT SHOULD VACATE THE JUDGMENT PURSUANT TO RULE 59(E) AND GRANT WELLS FARGO LEAVE TO FILE AN AMENDED COMPLAINT PURSUANT TO RULE 15(A).**

Federal Rule of Civil Procedure 15(a) allows a party to amend its complaint “once as a matter of course” either before being served with a responsive pleading or within 20 days after filing the complaint. Fed. R. Civ. P. 15(a)(1). Here, the Court dismissed this case 16 days after the Complaint was filed, four days before the 20-day time period contemplated by Rule 15(a) had run, and before any responsive pleading had been filed. Judgment was entered on January 11<sup>th</sup>, the same day as the deadline to file an amended complaint “as a matter of course” under Rule 15(a)(1)(B). Fed. R. Civ. P. 15(a)(1)(B). Once judgment has been entered, the judgment must be vacated pursuant to Rule 59(e) before an amended complaint can be filed. *Diersen v. Chicago Car Exch.*, 110 F.3d 481, 488 (7th Cir. 1997). Such relief is warranted here.

Regardless of whether the Court revises its judgment regarding the Trust Indenture, Wells Fargo should be granted leave to file an amended complaint. In exactly this context—a Rule 59(e) motion for relief from judgment to amend an complaint—the Seventh Circuit has held that “an order dismissing the original complaint normally does not eliminate the plaintiff’s right to amend once as a matter of right.” *Foster v. DeLuca*, 545 F.3d 582, 584 (7th Cir. 2008) (quoting *Crestview Vill. Apartments v. United States HUD*, 383 F.3d 552, 557 (7th Cir. 2004)). “District courts routinely do not terminate a case at the same time that they grant a motion to dismiss; rather, they generally dismiss the plaintiff’s complaint without prejudice and give the plaintiff at least one opportunity to amend her complaint.” *Id.* (citations omitted).

This is especially the case where, as here, a complaint is dismissed for lack of subject matter jurisdiction. When a dismissal involves jurisdictional issues, courts are even more likely to vacate prior judgments and allow post-judgment amendments to cure jurisdictional allegations. *See Villa v. Brady Publ'g.*, No. 02 C 570, 2002 WL 1400345, at \*2 (N.D. Ill. June 27, 2002) (vacating prior judgment dismissing case for lack of subject-matter jurisdiction). The Seventh Circuit has made clear that it generally disapproves of dismissing a complaint for lack of subject matter jurisdiction “without first providing the plaintiffs notice and a hearing or an opportunity to amend.” *George v. Islamic Republic of Iran*, 63 Fed. Appx. 917, 918 (7th Cir. 2003); *Frey v. EPA*, 270 F.3d 1129, 1131-32 (7th Cir. 2001). In *Frey*, the Seventh Circuit held that “unless the defect is clearly incurable a district court should grant the plaintiff leave to amend, allow the parties to argue the jurisdictional issue, or provide the plaintiff with the opportunity to discover the facts necessary to establish jurisdiction.” 270 F.3d at 1132.

Here, the Court found there was no waiver of sovereign immunity—and therefore no subject matter jurisdiction—considering only the Trust Indenture.<sup>4</sup> The Court also found that, if “the Trust Indenture is void . . . there would be no remaining obligations to enforce under the contract.” (DRN 45 at 10.) In the proposed Amended Complaint, Wells Fargo pleads both a waiver of sovereign immunity outside the Trust Indenture, and causes of action based on defendant’s undisputed obligation to repay the still outstanding loan amounts, irrespective of the Trust Indenture’s validity.

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<sup>4</sup> While both the defendant argued and the Court held that the issue of waiver of sovereign immunity was jurisdictional, there is Seventh Circuit authority holding that assertion of sovereign immunity is not jurisdictional and concerns “remedy rather than adjudicatory competence” *Blagojevich v. Gates*, 519 F.3d 370, 371 (7th Cir. 2008); *see also Winters v. Taylor*, 333 Fed. Appx. 113, 117 (7th Cir. 2009). If this is the case, then it was an error of law for the Court to grant summary judgment on what amounted to defendant’s affirmative defense of sovereign immunity without the defendant ever having filed a motion, and without a complete factual record, or an opportunity for discovery on the issue. *See infra* at 22.

**A. Even If The Trust Indenture Is Void, The Defendant Has Waived Immunity.**

Whether or not the Trust Indenture is valid, the defendant has explicitly and unconditionally waived immunity to suit as to any dispute arising out of the Bond Transaction.

The Bond Resolution provides:

“Resolved, that all legal Provisions in the Bond Documents are hereby approved; more specifically and expressly the [defendant] (i) waives immunity from suit . . . with respect to any dispute or controversy arising out of the Indenture, the Security Agreement, the Bond Placement Agreement, the Bonds, this Bond Resolution . . . or to any transaction in connection therewith . . . .”

(DRN 29, Attach. 3, Ex. 11, Resolution No. 1(08) at 3.)

The Bond Resolution waiver is broad and unconditional. *See C & L Enterprises, Inc. v. Citizen Band Potawatomi Indian Tribe*, 532 U.S. 411, 418 (2001) (to waive sovereign immunity, language effectuating the waiver must be clear); *Jicarilla Apache Tribe v. Hodel*, 821 F.2d 537, 539 (10th Cir. 1987) (“The terms of [a sovereign’s] consent to be sued in any court define that court’s jurisdiction to entertain the suit.” (quoting *United States v. Testan*, 424 U.S. 392, 399 (1976))). Moreover, the defendant expressly makes the waiver effective regardless of the validity of any individual instrument—the waiver extends to “disputes related to the Bonds *or* the foregoing named documents.” By the explicit terms of the Resolution, the “foregoing named documents” include the Series 2008 Bonds, the Trust Indenture, the Security Agreement, and the Bond Purchase Agreement. The defendant then broadens the waiver, making it effective “with respect to any dispute or controversy *arising out of* the Indenture, the Security Agreement, the Bond Placement Agreement, the Bonds, this Bond Resolution . . . *or* to any transaction in connection therewith.” The Bond Resolution waiver is clear and broad: it waives immunity to “disputes related to the Bonds” or disputes “arising out of . . . any transaction in connection” with the Bonds, whether the right vindicated in such a dispute is one explicitly arising out of the agreements themselves (such as a breach of contract claim), or is another type of claim related to

or arising out of the transaction (such as equitable claims or tort claims). *See, e.g., Alzheimer & Gray v. Sioux Mfg. Corp.*, 983 F.2d 803, 812 (7th Cir. 1993) (letter of intent waiving “all sovereign immunity in regards to all contractual disputes” effective waiver of sovereign immunity).

The defendant has also expressly waived its sovereign immunity in each and every one of the Bonds themselves. Each Bond contains a promise by the defendant to pay the bond holder the stated amount of principal and interest. Additionally, each Bond explicitly waives the defendant’s sovereign immunity to suit on the Bond:

The [defendant] hereby expressly waives its sovereign immunity from suit . . . should an action be commenced on this Bond, the Indenture, the Security Agreement, or the Bond Resolution, or regarding the subject matter of the Indenture. . . . This waiver: [¶] . . . shall extend only to a suit to enforce the obligations of the [defendant] under the Indenture, the Bond Resolution, the Security Agreement, or the Bond Placement Agreement.

(Am. Compl., Ex. B at 2-3.)

Nothing in the Bond conditions the waiver on the validity of the Trust Indenture or any outside documents. Rather, the waiver language applies “to a suit to enforce the obligations of the [defendant] under the Indenture, the Bond Resolution, the Security Agreement, *or* the Bond Placement Agreement.” By listing the agreements disjunctively, the waiver gives the Trustee the right to sue on each of the Bond agreements, distinct from any right to sue on the Trust Indenture. Indeed, it would be truly bizarre for the parties to intend to deny Wells Fargo a forum to bring a claim to recover its principal and interest directly under the Bonds in the case of the invalidity the Trust Indenture—the sole function of which is to secure repayment of the principal and interest of the Bonds. Separate and apart from the broad waiver expressed and effected in

the Bond Resolution, the defendant's waiver of sovereign immunity in the Bond also permits this Court to exercise jurisdiction over Wells Fargo's claims.<sup>5</sup>

**B. Even If The Trust Indenture Is Void, Wells Fargo Has Causes Of Action On The Bonds As Well As Equitable And Tort Remedies.**

While it is correct that, if the Trust Indenture is void, "there would be no remaining obligations to enforce under the contract" (DRN 45 at 10), that does not end the inquiry. It is not contested that the defendant owes Wells Fargo, acting as Trustee for the Bondholders, *at bare minimum*, the outstanding principal on the Bonds, approximately \$47 million. The outstanding debt is a loan, nothing more; is not tied to any "management" of the casino or providing "management services." Because the defendant has otherwise waived sovereign immunity, Wells Fargo can pursue remedies against the defendant outside of the Trust Indenture.

First, there is a cause of action on the Bonds themselves. As the Court has recognized, the Trust Indenture governs "[t]he security provided for the Bonds" (DRN 45 at 6); the Bonds govern the debt itself. Under Wisconsin law—which per the Bonds' choice of law provision governs their construction—a note ("the promise to pay") is separate from the security agreement. *Brest v. Maenat Realty Co.*, 15 N.W.2d 798, 800 (Wis. 1944) ("Thus a note and mortgage relate to the same transaction, but the mortgage cannot be considered to affect the negotiability of the note. The note evidences the debt; the mortgage the security for it.").

The Bonds require biannual payments of interest at 12% per annum, with certain principal payments due annually, and the bulk of the principal due at maturity. As alleged in the

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<sup>5</sup> Defendant confirmed these waivers in the Offering Memorandum, stating that it had "waived their sovereign immunity and consented to suits against [it]" in the Trust Indenture, the Bonds, the Bond Resolution and other documents. (Am. Compl., Ex. C at 4.) Similarly, in Appendix G to the Offering Memorandum, defendant's counsel confirmed that "[t]he consents to suit given by the [defendant] in the Indenture and the Bond Purchase Agreement constitute a valid and enforceable waiver of the [defendant's] sovereign immunity from suit, and in a suit for the enforcement of the Indenture or the Bonds the sovereign immunity of the [defendant] shall not constitute a valid defense to the enforcement thereof." (*Id.*, App. G, at 2.)

proposed Amended Complaint, Defendant breached their promise to pay on the Bonds for two separate and independent reasons. First, wholly apart from the Indenture, the defendant has repudiated the Bonds and taken the position that it is released “from all further obligations.” (Am. Compl., Ex. H.) For this reason alone, the Trustee, on the Bondholders behalf, has a cause of action on the Bonds. Second, regardless of whether the Trust Indenture as a whole was valid, the Bond incorporated the standard for default under the Trust Indenture—not the remedies that the Court found problematic—and the Bonds themselves provide for acceleration when the standard for default has been met. Since the Bonds have been properly accelerated, the entire amount under the Bonds is due and Wells Fargo has a cause of action on the Bonds for this reason as well.

Finally, as detailed in the Amended Complaint, Wells Fargo, on the Bondholder’s behalf, has various equitable remedies, for, among other things, restitution, unjust enrichment, fraud in the inducement, and reformation, all based on the undisputed facts that the defendant made numerous unqualified representations and signed various agreements in order to receive a \$50 million loan. *See Schmidt v. Town of Alvin*, 429 N.W.2d 541, 545 (Wis. Ct. App. 1988) (where loan is void lender is “entitled to restitution under equitable principles in order to prevent unjust enrichment [to the borrower]” and noting “there is ample authority allowing recovery under these circumstances”); *Gen. Split Corp. v. P & V Atlas Corp.*, 280 N.W.2d 765, 769 (Wis. 1979) (party entitled to “restitution of benefits conferred under an illegal contract”). The defendant has unquestionably received the benefit of the loan since January 2008. Even if any bond transaction document is invalid, defendants still owe the Bondholders approximately \$47 million.

**C. The Enforceability Of The Trust Indenture Has No Bearing On The Enforceability Of Other Agreements.**

Defendant will likely argue that if the Trust Indenture is void for want of approval by the NIGC, the same would be true for the Bonds and Bond Resolution, as “collateral agreements” to

the Trust Indenture. *See* 25 C.F.R. § 502.5 (collateral agreements). This argument is wrong. Even viewed as agreements collateral to the Indenture, the Bonds are not forbidden “management contracts.” A “collateral agreement” is subject to the approval of the chairman of the NIGC *only* if it “provides for the management of all or part of a gaming operation.” 25 C.F.R. § 533.7. *Catskill Dev. L.L.C. v. Park Place Entm’t Corp.*, 547 F.3d 115, 130 (2d Cir. 2008) . Here, there is not a single word about management of a gaming operation in the Bonds or the Bond Resolution, and as a matter of law, the Bonds cannot be deemed void *ab initio*. *United States ex rel Yellowtail v. Little Horn State Bank*, 828 F. Supp. 780 (1992) (noting that “even if the Security Agreements were found to be violative of the statute,” the loans themselves did not require government approval). Even defendant’s expert, Mr. Washburn, agrees:

**The NIGC does not approve each document that meets the definition of collateral agreement.** Indeed, it has no standards to use for approval of such documents. The NIGC routinely approves management contracts while failing to approve documents collateral to that management contract. It does not intend that such agreements are void; it simply means that the NIGC seeks to approve only that document that actually involves management of a gaming operation . . . . In short, not all collateral agreements are management agreements. **Those that do not meet the definition of "management contract" are not subject to NIGC review.**

Kevin K. Washburn, *The Mechanics of Indian Gaming Management Contract Approval*, 8 Gaming L. Rev. 333, 345 (2004) [hereinafter *Washburn Article*] (emphasis supplied) .

**II. THE JUDGMENT SHOULD BE VACATED AND THE COURT SHOULD CONVENE A FULL HEARING ON THE ISSUE OF WHETHER THE TRUST INDENTURE IS A MANAGEMENT CONTRACT.**

In this case, the Court cancelled a pre-scheduled evidentiary hearing and then decided the management contract issue on the papers, relying on, among other things, an undisclosed expert who had not been deposed or cross-examined. In doing so, the Court essentially granted defendant’s unfiled summary judgment motion on the management contract issue without

allowing Wells Fargo the opportunity to develop or present evidence in response to the motion.<sup>6</sup> This is clear legal error, resulting in “manifest injustice.” *Russell*, 51 F.3d at 749; *Mudrovich*, 2005 WL 956988 at \*1. Moreover, the Court committed clear legal error in refusing to sever the provisions that allegedly converted the Trust Indenture into a “management contract” before either party had addressed the issue, in contravention of the plain terms of the Indenture and contrary to black letter Wisconsin law. Finally, invalidating the Trust Indenture as an unapproved “management contract” was also clear legal error.

**A. Wells Fargo Should Be Permitted To Present Rebuttal Evidence On Whether The Trust Indenture Is A Management Contract.**

In this matter, the parties submitted extra-Complaint materials regarding the management contract issue. The Court explicitly stated that it would hold an evidentiary hearing on Wells Fargo’s request for a receiver, in response to which defendant raised the management contract issue. Then, on the eve of the evidentiary hearing, the defendant introduced a whole host of new factual material, including an expert affidavit, to which Wells Fargo never had an opportunity to respond because, that same day, the Court canceled the evidentiary hearing and then, effectively, granted summary judgment on the management contract issue. This was legally and procedurally improper.

A district court cannot properly act upon a motion for summary judgment without giving the opposing party a “reasonable opportunity” to submit affidavits that contradict the affidavits submitted in support of the motion. “There must be the opportunity to demonstrate that there is a genuine issue of material fact which precludes granting the defendants’ summary judgment.” *Ross v. Franzen*, 777 F.2d 1216, 1219 (7th Cir. 1985). Moreover, any time the court or a defendant wishes to convert a motion to dismiss into a motion for summary judgment, “the judge

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<sup>6</sup> This same argument is true if the Court finds that the assertion of sovereign immunity is not jurisdictional and was, instead, in the nature of an assertion of an affirmative defense.

would have had to notify [the plaintiff] of his intention and give him an opportunity to present evidence that would create a triable issue.” *Chicago Bd. of Educ. v. Substance, Inc.*, 354 F.3d 624, 627 (7th Cir. 2003). Indeed, these requirements “insure that *both parties* shall be given a reasonable opportunity to submit affidavits and extraneous proofs to avoid taking a party by surprise through the conversion of the motion into a motion for summary judgment.” Fed. R. Civ. P. 12(b) advisory committee’s note (emphasis supplied). This requirement is mandatory and the consideration of outside matter without converting the motion may result in reversible error. *Gen. Elec. Capital Corp. v. Lease Resolution Corp.*, 128 F.3d 1074, 1080 (7th Cir. 1997).

Most significantly to the facts here, “[w]here new evidence is presented in a reply to a motion for summary judgment, the district court should not consider the new evidence without giving the movant an opportunity to respond.” *Black v. TIC Inv. Corp.*, 900 F.2d 112, 116 (7th Cir. 1990); *Dickman v. Astrue*, No. 08-C-898, 2009 WL 1107807, at \*8 n.9 (E.D. Wis. Apr 23, 2009); *Third Wave Techs. v. Stratagene Corp.*, 405 F. Supp. 2d 991, 1002 (W.D. Wis. 2005) (Crabb, J.) (“A party cannot bring up new matters in a reply brief to which its opponent has no opportunity to respond.”).

Here, that is exactly what happened—the defendant submitted factual material relied on by the Court on the eve of the Court’s decision, without Wells Fargo having any opportunity to respond. As reflected in the Amended Complaint and in the Cox declaration, had Wells Fargo been given the opportunity to respond, Wells Fargo could have demonstrated, among other things:

- The defendant is a sophisticated party that initiated and drove the bond deal due to an urgent need to refinance existing debt.
- None of the supposed management contract provisions had ever been evoked or relied on by any party.
- None of the parties intended the Trust Indenture to be a management contract; that is, that none of the parties intended that Wells Fargo or Saybrook be paid for

the provision of management services to the Casino or that Wells Fargo or Saybrook would make any management decisions regarding how the Casino was run.

- The Trust Indenture is not a management contract, but an agreement ancillary to a loan, and the mere appearance of a few provisions that, in a different context might be indicia of management, are not so in this context.

Likewise, in such a proceeding, Wells Fargo could probe the veracity of the defendant's witnesses. For example, while the defendant represented that it had approached the NIGC regarding the Trust Indenture, and the Court relied on that representation in the Opinion, Wells Fargo has been unable to confirm the defendant's representation to that effect.

Indeed, even on the record before the Court there was a clear question of fact regarding the management contract issue. Defendant's counsel Godfrey & Kahn had previously confirmed that the Indenture *was not* a management contract and that, in any event, all federal approvals had been obtained. (Am. Compl., Ex. E at 6, 8-9.) The defendant suggested that other unnamed counsel viewed the issue differently, as does, possibly, Washburn. On those disputed facts alone, Wells Fargo was entitled to call witnesses, or at least develop a factual record, to determine the basis for the various views of the Trust Indenture provisions and to explore what was done at the time of the transaction to confirm that (1) the Trust Indenture was not a management contract and (2) that all federal approvals had been obtained.

**B. It Was Clear Legal Error To Effectively Grant Summary Judgment On Defendant's Affirmative Defense Of Sovereign Immunity.**

Recent Seventh Circuit authority holds that, contrary to defendant's arguments and the Court's Judgment, assertion of sovereign immunity is not jurisdictional and concerns "remedy rather than adjudicatory competence." *Blagojevich v. Gates*, 519 F.3d 370, 371 (7th Cir. 2008); *see also Winters v. Taylor*, 333 Fed. Appx. 113, 117 (7th Cir. 2009).<sup>7</sup> If this is the case,

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<sup>7</sup> A court can address "such a defense" as sovereign immunity "only after it confirms independently that subject-matter jurisdiction exists." *Ninigret Dev. Corp. v. Narragansett*

defendant was obligated in the first instance to establish that it possessed sovereign immunity, which the defendant failed to do. The defendant offered no evidence on the point. The defendant did not argue or demonstrate that its charter or bylaws conferred immunity upon it, and the defendant cited no tribal document or authority demonstrating how and why the Tribe's sovereign immunity has been conferred upon the defendant, an independent, non-stock non-profit corporation. It was clear legal error warranting relief under Rule 59(e) to effectively grant summary judgment on the issue of defendant's sovereign immunity when defendant did not even establish how it possessed sovereign immunity in the first instance.

Even if defendant had established that it possessed sovereign immunity, Wells Fargo is still entitled to relief under Rule 59 because it was clear legal error under the summary judgment case law discussed above, to effectively grant summary judgment on defendant's sovereign immunity affirmative defense without defendant ever having filed a motion and without giving Wells Fargo the opportunity to present all of the evidence on the issue, to respond to defendant's evidence, or to conduct discovery.

**C. The Washburn Affidavit Is Flawed And The Court's Reliance On It Was Procedurally And Substantively Improper.**

The defendant's submission of the Washburn affidavit and the Court's reliance on the Washburn affidavit are both clear errors of law.

First, Washburn's opinion was, by his own admission, "preliminary," as he was retained on "short notice" to "quickly" review the Trust Indenture. (DRN 32 ¶ 7.) Washburn's testimony consists primarily of speculation as to what the NIGC would or might do, or would or might be interested in, regarding the Trust Indenture. Such speculative testimony is never proper, even from an expert. *Ammons v. Aramark Uniform Servs.*, 368 F.3d 809, 816 (7th Cir. 2004) ("A

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*Indian Wetuomuck Housing Auth.*, 207 F.3d 21, 28 (1st Cir. 2000) ("[A]lthough tribal sovereign immunity is jurisdictional in nature, consideration of that issue must await resolution of the antecedent issue of federal subject-matter jurisdiction.") (citations omitted).

court is expected to reject ‘any subjective belief or speculation.’”) (citations omitted); *Goodwin v. MTD Prods., Inc.*, 232 F.3d 600, 609 (7th Cir. 2000) (refusing to allow expert to give opinion when it was “merely based on speculation”). Furthermore, it is unclear as to what, exactly, Washburn’s speculations relate when he says the NIGC would take “jurisdiction over the agreement.” (DRN 32 ¶ 7.) Washburn says that full-blown review of a management contract can take six to eighteen months or more and require a whole host of provisions and procedures—like environmental review—that make no sense in the Trust Indenture. *Washburn Article* at 334, 337-344. Likewise, if Washburn is suggesting that the Trust Indenture would elicit an opinion letter from the current acting general counsel of the NIGC, such letters do not carry the force of law and would be entitled to limited deference from the Court. *See Catskill*, 547 F.3d at 127 (rejecting opinion letter from NIGC deputy general counsel).

Second, Washburn’s affidavit was filed in what is at best described as a reply brief in support of summary judgment. Court’s routinely strike expert affidavits in such circumstances, and certainly do not rely on them, because the opposing party has had no opportunity to depose the expert or cross examine them regarding their views. *Musser v. Gentiva Health Servs.*, 356 F.3d 751, 757 (7th Cir. 2004) (exclusion of affidavit opposing summary judgment from undisclosed expert affirmed because defendant prevented from “disqualify[ing] the expert . . . retaining rebuttal experts, and holding additional depositions . . .”); *see also Mannoia v. Farrow*, 476 F.3d 453, 456 (7th Cir. 2007) (affirming exclusion of expert’s affidavit offered at summary judgment when plaintiff failed to disclose expert before close of discovery); *Bevolo v. Carter*, 447 F.3d 979, 981 n.2 (7th Cir. 2006) (affirming exclusion of expert’s affidavit in summary judgment briefing when plaintiff “sprung the existence of the expert on the defense at the last minute”).

Indeed, while the Court quoted Washburn for the proposition that certain provisions of the Trust Indenture “give the bondholder the opportunity to exert significant control over the management operations of the Casino Facility” (DRN 45 at 7 (*citing* Washburn Aff.)), Cox disagrees, and finds that such provisions do not give Bondholders the type of control addressed by IGRA. Minimally, Wells Fargo was entitled to cross-examine Washburn on his opinion and otherwise present Wells Fargo’s own expert testimony.<sup>8</sup>

Finally, the defendant did not comply with Rule 26 in disclosing Washburn to Wells Fargo. Rule 26 contemplates, minimally, that experts be disclosed either pursuant to a court’s schedule or else “90 days before the date set for trial.” Here, of course, Washburn was disclosed less than 24 hours before a hearing was scheduled and, ultimately, less than 24 hours before the Court dismissed the case in reliance on Washburn’s opinion.

**D. The Management Provisions In the Trust Indenture Can Be Severed.**

Both Wells Fargo and defendant agreed to the following provision in the Trust Indenture:

Section 14.04 Separability of Indenture Provisions. In case any one or more of the provisions contained in this Indenture or in the Bonds shall for any reason be held to be invalid, illegal or unenforceable in any respect, such invalidity, illegality or unenforceability shall not affect any other provisions of this Indenture, but this Indenture shall be construed as if such invalid or illegal or unenforceable provision had never been contained herein.

(DRN 6, Attach. 1, Ex. 1 ¶ 14.04.) The parties clearly contemplated and agreed that where, as here, certain provisions of the Trust Indenture were found “invalid, illegal, or unenforceable” for any reason, they would be severed. Indeed, even Washburn predicts that the NIGC itself would

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<sup>8</sup> Indeed, it is impossible to square the content of Washburn’s article cited by defendant with Washburn’s opinion regarding the Trust Indenture. *Washburn Article* at 337-344. The mandatory management contract provisions and review process Washburn describes in his article have no logical applicability to the Trust Indenture here. While Washburn’s article would provide fertile ground for cross-examination, its content is enough to not only rebut Washburn’s opinion here but to call into question any determination that the Trust Indenture is any kind of management contract under IGRA.

“change” the Trust Indenture “to remove certain provisions that provide indicia of control of the gaming operation to outsiders.” (DRN 32 ¶ 7.)

Here, of course, the provisions that even arguably provide “indicia of control of the gaming operation to outsiders” amount to about two pages, at best, of the 67-page Trust Indenture. No party contends that the primary, or even ancillary purpose, of the Trust Indenture was to allow Wells Fargo or the Bondholders to manage or control the Casino operations. Indeed, though defendant filed reams of information in support of its supplementary opposition to the Wells Fargo receiver motion, *defendant did not file a single piece of evidence, or even make the allegation, that Wells Fargo or Saybrook ever, in the two years the Trust Indenture has been in existence, attempted to exert any kind of control over the management or operations of the Casino*. Given all these facts, it cannot be seriously contested that the provisions that the Court found could provide management control could easily be severed “without defeating the primary purpose of the [parties’] bargain.” (DRN 45 at 10 n.3 (*citing Dawson v. Goldammer*, 722 N.W.2d 106, 110 (Wis. Ct. App. 2006))).

It was legal error for the Court to find, in sole reliance on *First American Kickapoo Operations, L.L.C. v. Multimedia Games, Inc.*, 412 F.3d 1166 (10th Cir. 2005), that these few provisions could not be severed, when the parties had not briefed the issue. The Court did correctly state the rule of severability—illegal clauses can be severed under Wisconsin law so long as doing so does not defeat “the primary purpose of the bargain,” (DRN 45 at 10 n.3 (*citing Dawson v. Goldammer*, 722 N.W.2d 106, 110 (Wis. Ct. App. 2006))); *see also Baierl v. McTaggart*, 629 N.W.2d 277, 281 (Wis. 2001) (same). As noted above, there is no record evidence that “the primary purpose of the bargain” here is contained in any of the provisions discussed by the Court or Washburn—nor could they be, when no party has evoked them in the two years the Trust Indenture has been in existence.

*First American Kickapoo* does not control here—the “indicia of management” at issue are quite unlike the “package deal” in *First American Kickapoo*. Here, there is a fixed interest rate; in *First American Kickapoo*, return on investment was directly tied to the performance of the casino, 412 F.3d at 1168. Wells Fargo is paid the same no matter how well the Casino performs. The *First American Kickapoo* agreement contained provisions authorizing the financiers to develop an employment policy, to supervise employees for the first three months of operations, to create a start up budget, and to develop an operating budget. *Id.* at 1178. No such provisions exist here. Moreover, many of the *First American Kickapoo* agreement’s provisions were drafted to comply with IGRA’s statutory restrictions on management contracts, further confirming that, unlike here, the parties intended the agreement to serve as a management contract. *Id.* at 1173. With management provisions so inextricably woven with the operating lease at issue in *First American Kickapoo*, the court in that case could not compartmentalize the agreement into management and non-management provisions without destroying the bargain agreed upon by the parties. *Id.*; *See also Dawson v. Goldammer*, 722 N.W.2d at 110 (Wis. Ct. App. 2006) (clause may be severed if it does not defeat the primary purpose of the bargain). The opposite is true here—the essence of the bargain was a loan, and the purported management provisions are ancillary to the core purpose of the agreement; there is no evidence here, like there was in *First American Kickapoo*, that the parties intended to enter into a management contract.

**E. The Court’s Determination That The Trust Indenture Was A Management Contract Was Clear Legal Error And Marks The First Time An Agreement Providing A Fixed Payment For A Fixed Time Has Been Deemed A Management Contract Under IGRA.**

Finally, even on the record before it, it was clear error for the Court to find that the Trust Indenture was a management contract under IGRA. The Trust Indenture only provides for a fixed loan with a fixed repayment rate over a fixed time; the Trust Indenture is in no way a contract “for the operation and management of a class II gaming activity,” 25 U.S.C. §

2711(a)(1), or an agreement with a “contractor or subcontractor . . . for the management of all or part of a gaming operation,” 25 C.F.R. § 502.15. Under the plan language of the government statute and regulations, the Trust Indenture is not a “management contract.”<sup>9</sup>

For example, in *First American Kickapoo*, the Tenth Circuit emphasized that, consistent with NIGC policy, “[a] contract that identifies a finite task, specifies a date for its completion, and provides recompense based on an hourly or daily rate or fixed fee” is not a management contract. *First Am. Kickapoo*, 412 F.3d at 1174 (10th Cir. 2005) (citing NIGC Bulletin 94-5).<sup>10</sup> The Tenth Circuit distinguished such a finite, fixed fee arrangement from the agreement before it, where the nontribal entity received 40% of gaming revenue and exercised substantial control over “maintenance, operation, and management” of the gaming facility. *First Am. Kickapoo*, 412 F.3d at 1172.

Unlike every other agreement that a court has found to be a management contract under IGRA, neither the Trust Indenture nor any other agreement in the bond financing provides for any party to share in a percentage of revenues generated by the Casino. For example, every case the Court relied on regarding the management contract issue focused on a manager’s entitlement to a percentage of gaming revenue. *First Am. Kickapoo*, 412 F.3d at 1173 (10th Cir. 2005) (management contract required tribe to pay “**forty percent** of monthly net game revenues from the gaming operation”) (emphasis added); *Machal, Inc. v. Jena Band of Choctaw Indians*, 387 F.

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<sup>9</sup> See also 25 U.S.C. § 2711(b) (describing management contract provisions necessary for approval, such as preparation of monthly financial reports to the tribe, access to gaming activity by the tribe; ceiling for repayment of “development and construction costs,” etc.). None of the provisions described in 25 U.S.C. § 2711(c) can be logically included in the Trust Indenture because it is not, and was not intended to be, a “management contract” under IGRA.

<sup>10</sup> Although the crucial passage of Bulletin 94-5 is discussing characteristics of a “consulting agreement,” which it directly “opposes to management contracts,” that the Trust Indenture does not involve payment for consulting or management services only further reinforces that it is not a management contract under IGRA. *First Am. Kickapoo*, 412 F.3d at 1174. In the eyes of the NIGC, therefore, the Trust Indenture could be characterized as a “consulting agreement” without the consulting. *Id.*

Supp. 2d 659, 668 (W.D. La. 2005) (“Jena Band promises that Machal will be allocated **30%** of the total net gaming revenues.”) (emphasis added); *United States ex rel. Bernard v. Casino Magic Corp.*, 293 F.3d 419, 424 (8th Cir. 2002) (“[T]he Participation Agreement gave Casino Magic **a percentage ownership interest** in the Tribe’s indebtedness.”) (emphasis added). Here, of course, there is no “manager” and no discussion at all of anyone sharing in a percentage of gaming revenues.

Likewise, no court has ever found that a pure financing agreement with a fixed rate of return constitutes a “management contract” under IGRA. *Calumet Gaming Group-Kansas, Inc. v. Kickapoo Tribe*, 987 F. Supp. 1321, 1324 (D. Kan. 1997) (loan agreement and security agreement tribe combined with a contract for gaming consulting services did not constitute a management contract under IGRA); *Iowa Mgmt. & Consultants, Inc. v. Sac & Fox Tribe of the Miss. Of Iowa*, 207 F.3d 488, 489 (8th Cir. 2000) (NIGC approval not required for “routine” gaming-related contracts involving the tribe); *United States ex rel. St. Regis Mohawk Tribe v. President R.C. – St. Regis Mgmt. Co.*, No. 702 CV 845, 2005 WL 1397133, at \*3 (N.D.N.Y. June 13, 2005), *aff’d*, 451 F.3d 44 (2d Cir. 2006) (agreement setting forth terms of tribe’s interim and final payments toward a fixed sum owed for a casino facility was not a management contract under IGRA).

In *Calumet*, an Indian tribe and Calumet, a nontribal entity, entered an agreement by which Calumet would provide advice and recommendations regarding the tribe’s gaming operations. *Calumet Gaming*, 987 F. Supp. at 1324. The tribe also executed a loan agreement, a security agreement, and a note in favor of Calumet. *Id.* When the tribe breached the agreement and defaulted on the note, Calumet sued for damages, foreclosure of the security interest, garnishment, seizure of the collateral, and appointment of a receiver. *Id.* at 1324. The court held that the parties had not entered a management contract subject to NIGC approval. *Id.* at 1325.

The Trust Indenture, like the agreement in *Calumet* and unlike the agreement in *First American Kickapoo*, does not provide for “the management of all or part of a gaming operation.” Rather, it merely secures repayment of the principal and interest on the debt associated with the bonds. As in the case of any ordinary contract for services for the benefit of a gaming operation, the Trust Indenture involves the tribe’s payment of a fixed fee, on a specified timeline, for a particular financial service. *First Am. Kickapoo*, 412 F.3d at 1174; *see also, e.g., Calumet Gaming*, 987 F. Supp. at 1324; *United States ex rel. St. Regis Mohawk Tribe*, 2005 WL 139733, at \*3. This Court should not be the first to hold on an incomplete record that, providing financing at a fixed rate of return for over a fixed period, constitutes a management contract under IGRA. *Iowa Mgmt. & Consultants, Inc.*, 207 F.3d at 489.

### CONCLUSION

For the foregoing reasons, Wells Fargo requests that the Court vacate the January 11, 2010 Judgment (DRN 46), grant Wells Fargo leave to file an Amended Complaint, and allow the parties to engage in discovery on the sovereign immunity and management contract issues and/or present proofs in an evidentiary hearing on the sovereign immunity and management contract issues.

Dated: February 8, 2010

Respectfully submitted,

*Of counsel:*

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